Comments received on Draft Revised Title VI Guidance
Draft 11-15-00

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
AES Corporation			N		
American Association of Airport Executives		t6comm2000_065.pdf	N		
American Road and Transportation Builders Association		t6comm2000_020.pdf	N		merge files 20 and 36
American Petroleum Institute			N		
(b) (6) - Privacy			[redacted]		
Anonymous #3			?		
Anonymous #2			?		
Anonymous #1			?		
(b) (6) - Privacy			?		
Arizona Center for Law in the Public Interest			N		
(b) (6) - Privacy			[redacted]		
Associated Builders and Contractors			N		
Association of State and Territorial Solid Waste Management Officials			N		
Bay Area Air Quality Management District			N		
(b) (6) - Privacy			[redacted]		

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
Bullard, Robert, Ph.D.			N		
Business Network for Environmental Justice			N		
California Environmental Protection Agency			N		
California Council for Environmental and Economic Balance			N		
Center for Equal Opportunity, Defenders of Property Rights, Institute for Justice			N		
Center for Constitutional Rights			N		
Center on Race, Poverty, & the Environment, et. al.			N		
Chemical Weapons Working Group			N		
Chevron Corporation			N		
Chicago, Illinois Listening Session			N		
City of Detroit			N		
Clean Air Council			N		
Coastal Corporation			N		
(b) (6) - Privacy			[redacted]		
Combustion Environmental Justice Committee			N		
Community Coalition for Change			N		

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
County of Bernalillo, State of New Mexico			N		
Dallas, Texas Listening Session			?		
(b) (6) - Privacy					
(b) (6) - Privacy			?		
Environmental Defense			N		
Gauna, Eileen, Professor of Law			N		
(b) (6) - Privacy					
Golden Gate University School of Law's Environmental Law & Justice Clinic			N		
Greater Cincinnati Chamber of Commerce Air Quality Committee, Hispanic Chamber of Commerce of Greater Cincinnati			N		
(b) (6) - Privacy					
Illinois Environmental Protection Agency			N		
Institute for Public Representation, Widener University Environmental and Natural Resources Law Clinic, The Mid-Atlantic Environmental Law Center, Delaware Chapter of the Sierra Club, Wilmington Waterfront Watch			N		
International City/County Management Association			N		

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
(b) (6) - Privacy [redacted]			[redacted]		
(b) (6) - Privacy [redacted]			[redacted]		
Kaswan, Alice, Associate Professor of Law			N		
Lawyers Committee for Civil Rights Under Law, N.A.A.C.P. Legal Defense & Educational Fund, Inc.			N		
Lone Star Chapter of Sierra Club, Galveston-Houston Association for Smog Prevention			N		
Los Angeles County Sanitation Districts			N		
Los Angeles, California Listening Session			?		
Louisiana Department of Environmental Quality			N		
Louisiana Mid-Continent Oil and Gas Association			N		
Maine Department of Environmental Protection, New Hampshire Dept. of Environmental Services, Vermont Agency of Natural Resources, Mass. Executive Office of Environmental Affairs, Rhode Island Dept. of Environmental Management, Connecticut Dept. of Environmental Protection			N		
Michigan Department of Environmental Quality			N		
Mothers Organized to Stop Environmental Sins			N		

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
National Petrochemical and Refiners Association			N		
National Environmental Justice Advisory Council Title VI Task Force			N		
Natural Resources Defense Council			N		
(b) (6) - Privacy					
New York State Environmental Facilities Corporation			N		
New York, New York, Listening Session			N		
New York State Department of Environmental Conservation			N		
New York Lawyers for the Public Interest			N		
New York City Environmental Justice Alliance			N		
New Jersey Department of Environmental Protection			N		
North Baton Rouge Environmental Association			N		
North American Water Office			N		
Nos Quedamos			N		
Nuclear Energy Institute			N		
Oakland, California Listening Session			?		

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
Pacific Gas and Electric Company			N		
Pennsylvania Department of Environmental Protection			N		
People Organized in Defense of Earth and her Resources			N		
Public Interest Law Center of Philadelphia			N		two documents
(b) (6) - Privacy					
(b) (6) - Privacy					
(b) (6) - Privacy					
(b) (6) - Privacy					
(b) (6) - Privacy					
(b) (6) - Privacy					
(b) (6) - Privacy					
Serrano, Jose, Congressman			N		
Shintech Incorporated			N		
Sierra Club			N		
South Dakota Department of Environment and Natural Resources			N		
South Coast Air Quality Management District			N		

Commenter	***File Size*** (KB)	File name	Redact?	QA	Comment
Southwest Network for Environmental and Economic Justice's EPA Accountability Campaign			N		
Spokane Tribal Natural Resources			N		
Texas Natural Resource Conservation Commission			N		
The Environmental Council of States			N		
(b) (6) - Privacy					
U.S. Chamber of Commerce			N		
Washington, D.C. Listening Session			?		
Washington Legal Foundation			N		
Waterhouse, Carlton, Adj. Professor of Law			?		
(b) (6) - Privacy					(b) (6) - Privacy
(b) (6) - Privacy					
(b) (6) - Privacy					
(b) (6) - Privacy					

New York State Department of Environmental Conservation
Office of Environmental Justice, Room 611
50 Wolf Road, Albany, New York 12233-1040
Phone: (518) 457-6558 • **FAX:** (518) 457-6996
Website: www.dec.state.ny.us

John P. Cahill
Commissioner

August 28, 2000

Ann E. Goode, Director
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attn: Title VI Guidance Comments

Dear Ms. Goode:

This letter responds to the EPA's request for comment on the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Programs* (Draft Recipient Guidance) and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Draft Revised Investigation Guidance). In general, both guidance documents provide a basic framework for addressing potentially discriminatory practices within the context of environmental permitting. EPA staff clearly devoted time and resources on the guidance development and should be commended for the attention to comments and concerns raised during guidance development. However, the draft documents still fail to provide sufficient detail to identify, analyze and address potentially significant adverse disparate impacts on protected classes. Furthermore, the documents fail to include key concepts and criteria critical to ensure due process and fair, transparent procedure. The New York State Department of Environmental Conservation (DEC) encourages EPA to again consider the public comments received and revise the documents accordingly.

On May 6, 1998, the DEC submitted comments on the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits*. The DEC recommends that EPA again consider the comments raised therein and submits the following for additional consideration.

The draft guidance fails to lay out a clear process that if followed will satisfy Title VI concerns. The guidance gives EPA very broad discretion with respect to how it will conduct an investigation and make its findings. At a minimum, EPA must define key terms and include an appendix with a detailed discussion of the methodologies it will utilize to conduct investigations and make determinations with respect to, among other things, adverse impacts, discriminatory impacts, significant impacts and Title VI compliance.

The Draft Revised Investigation Guidance should require that a complainant seek remedy in the recipient's administrative process prior to filing a complaint with EPA. The guidance does encourage the complainant to pursue remedy through administrative appeal. However, participation in the administrative review process should be a prerequisite for filing a complaint under Title VI, particularly when a recipient has adopted a policy to implement Title VI compliance. Such a prerequisite would: 1) provide incentive for recipients to adopt Title VI policies; 2) provide recipients with the opportunity to identify and address environmental justice concerns in the course of project review, when there is more flexibility to address Title VI concerns; 3) provide applicants with certainty in the permit outcome;

and 4) encourage applicants to be more responsive to Title VI concerns in the permit process. Requiring that complainants seek remedy in the recipient's administrative process also benefits potentially impacted communities, since Title VI concerns would be identified and addressed within the administrative process, when project modifications are possible, rather than forcing communities to await remedy in the form of assistance withdrawal to the recipient. In connection with this requirement, EPA should devote significant resources to assist recipients in developing and adopting public participation processes which include all stakeholders in the administrative process.

The guidance remains unclear with respect to its affect on state-funded programs which receive no federal funding. Purely state-funded and state run programs should not be subject to the guidance and Title VI challenge. The guidance should clearly state that its applicability and legal authority is limited to Federally delegated state permit programs.

The guidance must clarify the circumstances which warrant permit denial or revocation, if any. Due process dictates that project sponsors possess certainty with respect to process outcome, particularly where a permit has been processed in accordance with all applicable federal and state standards. While the guidance intends to seek resolution through the recipient program, guidance language leaves open the possibility that a permit could be denied as a result of the investigative process. (See IV.B. , "Denial of the permit at issue will not *necessarily* be an appropriate solution." emphasis added). Absent the required clarity, the guidance may subject the state to legal challenges by a project sponsor, should the State be compelled to revoke or deny a permit based on discriminatory effect.

Permit renewals and minor modifications should be exempt from Title VI investigation. New York State's Uniform Procedures regulations require that all renewals and modifications for permits issued under federally delegated permit programs be treated as new applications, with some federally approved or federally cited exceptions for certain modifications. By treating federally delegated permits as new applications, New York State has established a procedure of review for permit actions which potentially relate to Title VI "stressors" and warrant potential scrutiny under Title VI. All other permit renewals and modifications, which do not relate to Title VI stressors, should be exempt from challenge. Applying the guidance to all state programs would have a significant effect on state resources given that on average over 2000 requests for permit renewals are submitted each year.

A list of the minor modifications that will not trigger an investigation should be included in the guidance. While the guidance indicates that OCR will not generally initiate an investigation where the permit that triggered the complaint is a modification, such as a facility name change or a change in mailing address, such an investigation is not precluded. The guidance should clearly state that minor modifications will not form the basis for a complaint and include a list of relevant modifications.

The guidance fails to articulate necessary technical and legal standards for filing a Title VI complaint. The guidance should require explicit documentation of the alleged discriminatory act. Without specific documentary evidence, a recipient, once notified of a complaint filing, will lack the information necessary to respond to the complaint. Moreover, a recipient should have an opportunity to request a more definite statement of the alleged discriminatory act. As previously stated, the guidance should require that the complainant exhaust its administrative relief in the recipient's permit and permit appeals process. The guidance should also require that the complainant document its role in that process and include a statement of Title VI issues raised in that process.

Pursuant to the guidance, a timely complaint is one which is filed within 180 days of the alleged discriminatory act. Therefore, complaints alleging discriminatory effect resulting from the issuance of a permit are timely if filed within 180 days after issuance of the permit. This time frame is too long and creates problems for all stakeholders. The problems are further exacerbated by potential extensions of the 180 day time frame for "good cause." At a minimum, EPA must define "good cause" and establish criteria for waiver of the 180 day clock.

The time frame within which a recipient must submit a response or answer to the complaint is inadequate and must be extended. The policy states that a recipient will have 30 days to respond to a Title VI complaint after being served. This time frame is insufficient to assemble necessary information such as facts, demographic data, and health data, and prepare a response incorporating those facts and relevant points of law. Similarly, the time frame set forth for recipient compliance is inadequate and must be extended.

Adverse Impacts should be defined relative to existing federal and state standards where those standards exist, particularly since environmental standards tend to be health based. Recipients may attempt to incorporate strict pollution reduction standards into the permit process and applicants may voluntarily agree to stricter standards. However, absent firm legal authority, a recipient cannot require permit applicants to adhere to a stricter standard, nor can a recipient impose wide reaching pollution reduction standards on existing sources to attain a standard that has not been promulgated.

The guidance still fails to address the role of local government and zoning laws in the siting of facilities and fails to recognize its relationship to the permitting process. We believe local zoning needs to be specifically addressed in the context of this guidance.

The DEC recognizes the inherent difficulties of developing specific criteria and methodologies for investigating the wide range of potential Title VI complaints. While the current guidelines begin to define such criteria and methodologies, further detail is necessary in order to achieve a workable document. EPA must further develop criteria related to identifying and comparing potentially impacted communities and reference communities and conducting disparity analyses.

While the comments herein focus on the Draft Revised Investigation Guidance, the DEC encourages EPA to further develop the Draft Recipient Guidance. By providing recipients with a variety of *detailed* Title VI activities, recipients may easily adopt such activities into their programs and avoid potentially discriminatory practices and administrative complaints challenging permits.

New York State remains committed to address environmental justice issues and to remedy potentially discriminatory effects. These are DEC's preliminary comments and DEC requests that the comment period remain open an additional 30 days. DEC reserves the right to provide additional comment to EPA.

Environmental Justice is an extremely important issue for Commissioner Cahill and DEC staff. We look forward to discussing this topic further with you and assisting EPA in its efforts to finalize a workable approach for this issue.

Sincerely,
/s/

Monica L. Abreu Conley
Environmental Justice Coordinator

Attachment

cc: J. Fox - Regional Administrator, USEPA Region II
M. Hayden - Environmental Justice Coordinator, USEPA Region II

John P. Cahill
Commissioner

May 6, 1998

Ann E. Goode
Director, Office of Civil Rights
USEPA - Attention: Title VI Guidance
Office of Civil Rights
Mail Code 1201
Washington, D.C. 20460

Re: Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits

Dear Ms. Goode:

This letter responds to the EPA's request for comments on its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits.* While the Department of Environmental Conservation (DEC) supports efforts to ensure environmental programs are carried out in a non-discriminatory manner, EPA's proposed guidance fails to establish a workable vehicle to achieve this worthy and critical objective. The guidance conflicts with New York State's current permit program and would significantly disrupt the State program. For the reasons enumerated below, we urge EPA to withdraw its interim guidance.

The first major concern involves the timeliness of a complaint and its effect on the State permitting scheme. Pursuant to the guidance, a timely complaint is one which is filed within 180 days of the alleged discriminatory act. Therefore, complaints alleging discriminatory effect resulting from the issuance of a permit are timely if filed within 180 days after issuance of the permit. This creates several problems. Since a complainant need not exhaust its administrative remedies, it is possible that the State could first learn of the discriminatory effect claim *after* the permit has been issued and significant project construction has begun. Discriminatory effect claims can and should be properly raised and addressed in the context of New York State's existing administrative permit process, which provides for public notice and comment *prior* to permit issuance. The guidance allows a complainant to bypass the most appropriate forum available for resolving these issues efficiently and effectively. The guidance should require that a complainant first raise the environmental justice claim during the State public comment period to facilitate informal resolution of the complaint.

New York State Department of Environmental Conservation
Office of General Counsel, Room 618
50 Wolf Road, Albany, New York 12233-1500
Phone: (518) 457-4415 FAX: (518) 485-8484

Related activity may be delayed unnecessarily by a complainant who files a complaint well after a permit has been issued. Since the guidance provides for waiver of the 180 day filing limitation, a project which benefits the environment and the affected community may be delayed indefinitely. For example, continued reliance on an aging solid waste facility could result if a permit for a state-of-the-art facility is delayed.

Additionally, complaints initiated after the permit is issued render ineffectual the due process afforded project sponsors and the public during the State permit process. The guidance may subject the state to legal challenges by a project sponsor, should the State be compelled to revoke or deny a permit based on discriminatory effect.

The second major issue concerns notice to the state that a claim has been filed. The complaint process outlined in the guidance fails to provide the state and the project sponsor timely notice of the complaint. Pursuant to the guidance, EPA's Office of Civil Rights ("OCR") will notify the state of the existence of a complaint only after it has determined that the complaint states a valid claim. The state should be made aware of the complaint immediately. Early notification will enable the state to submit comment regarding the claim before OCR makes an initial finding of disparate impact. Such comment would likely assist EPA in evaluating whether the complaint states a valid claim. Furthermore, early notification will facilitate informal resolution with affected stakeholders and, if appropriate and timely, the issues of the claim may be considered in the formal permit review process.

Third, the guidance's objective to determine whether permits "will create a disparate impact, or add to an existing disparate impact on a racial or ethnic population" is not served by subjecting renewals and minor modifications to Title VI review. By definition, minor modifications and renewals will not have a significant adverse environmental impact. Therefore such permits have little or no likelihood of creating a disparate impact or adding to an existing disparate impact. The DEC urges EPA to remove minor permit modifications and renewals from the interim guidance. The guidance states that permit modifications such as facility name change or otherwise beneficial modifications that are neutral in terms of their impact on human health or the environment are likely to be dismissed. This suggests that such claims would be accepted, if properly pleaded, and reviewed by OCR. To allow public comment and challenge on permit renewals would severely tax the limited financial and staff resources of New York State. In 1997, the Department received 2,032 requests for permit renewals.

Next, the requirements for a properly pleaded complaint are not adequate. In addition to the requirements set out in the guidance, the complainant should provide a verified complaint supported by affidavits and statistical evidence documenting disparate impact. The claimant should also demonstrate a good faith basis for the claim. This is particularly important given that a claim filed with OCR may significantly affect the operations of a permitted facility. Since the affect of the claim is considerable, the claimant should provide ample proof substantiating its claim.

The State is also concerned that the scope of the guidance with respect to its affect on State funded programs which receive no federal funding. The guidance should specify EPA's legal authority to issue guidance applicable to wholly state-funded programs. Purely state-funded and state run program should not be subject to the guidance and Title VI challenge. The guidance creates an avenue of legal challenge pursuant to Title VI which may not have previously existed and exposes the State to increased litigation. Moreover, the revocation of federal funds for state-funded and federal-funded programs diminishes the State's overall ability to preserve the environment for the people of the State. Given the significant affects of this guidance on all state programs, comments provided by the states should be given considerable weight.

In general, the guidance lacks necessary detail, fails to define key terms and fails to provide a method of analysis for disparate impact. Without explicit guidance, the State lacks the tools to identify and evaluate disparate impact in order to avoid Title VI challenges. More importantly, the policy completely lacks any standards which DEC can use to ensure it is in compliance with the policy. EPA should not issue this policy unless and until it defines specific criteria and methodologies that are acceptable for identifying disparate impacts and affords states and the public a comment period on the criteria and methodology. This is an essential prerequisite of a workable policy that is totally lacking in EPA's interim guidance. Impacted

communities need such criteria to evaluate whether they are subject to disparate impacts. States need the criteria to avoid or mitigate impacts in minority or disadvantaged communities. EPA needs criteria to carry out its responsibilities to evaluate the legitimacy of complaints. Such standards would allow and encourage states to incorporate disparate impact analysis into current permit review process, thereby avoiding complaints filed under Title VI. Furthermore, the guidance should define the elements of an appropriate supplemental mitigation project, and describe the legitimate interests that justify the decision to proceed with the permit notwithstanding the disparate impact.

Finally, the guidance fails to address the role of local zoning laws in the siting of facilities and recognize its relationship to the permit process. This is a critical issue. Project sponsors select a site based on a host of factors, including local zoning which is pivotal. Once a site has been selected, the project sponsor then applies for environmental permits. The DEC's ability to require a project sponsor to look at alternative sites is limited to situations where an Environmental Impact Statement has been required. Addressing discriminatory effect issues after a siting decision has been made and the permit has been issued, rather than prior to siting, is sure to create delay and confusion. The DEC's ability to require the consideration of alternative sites is totally foreclosed for minor permit modifications and renewals involving existing facilities.

New York State remains committed to address environmental justice issues and to remedy potentially discriminatory effects. These matters are best addressed within the State's current regulatory framework. Therefore, we request EPA to withdraw the interim guidance
and give New York State the opportunity to voluntarily comply with Title VI within its own permitting framework.

These are DEC's preliminary comments and DEC requests that the comment period remain open an additional 30 days. DEC reserves the right to provide additional comment to EPA.

Environmental Justice is an extremely important issue for Commissioner Cahill and DEC staff. We look forward to discussing this topic further with you and assisting EPA in its efforts to finalize a workable approach for this issue.

Sincerely,
/s/

Frank V. Bifera
General Counsel

cc: C. Browner - Administrator, USEPA
J. Fox - Regional Administrator, USEPA Region II
M. Hayden - Environmental Justice Coordinator, USEPA Region II

To: Group Civilrights@EPA
cc: Maresca@abc.org, Spencer@abc.org, Crawford@abc.org, Boucher@abc.org

Subject: ABC Comment: Title VI - Environmental Justice

Our comment is attached below in a Word document. It is also pasted onto the e-mail in case of difficulty opening the document. Two hard copies will be mailed tomorrow morning.

Please confirm receipt of this e-mail electronically.

Thank you,

Jacqueline Lescott
Manager, Federal Regulations
Associated Builders & Contractors
703-812-2036

<<ABCcommentEnviroJustice.doc>>

Yasmin Yorker
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: June 27, 2000 - 65 Federal Register 39650-39701
Draft Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)

Dear Ms. Yorker,

Associated Builders and Contractors (ABC) is a national trade association representing general contractors, subcontractors, material suppliers, and other construction-related firms. On behalf of our 23,000 member firms and 82 chapters, we respectfully submit these comments in response to your notice outlining the proposed Environmental Justice Guidelines.

ABC opposes any attempt by the Environmental Protection Agency to circumvent rulemaking procedures by issuing Guidances instead of Proposals. That is especially unacceptable with an issue as broad and far-reaching as these Environmental Justice Guidelines, which will have the clear effect of a promulgated rule. Our primary concerns are that 1) the EPA does not have the authority to issue such a document, and 2) the document itself lacks clarity, and creates uncertainty and conflicts with existing programs and practices. Because they were issued in a single notice, our comments will refer to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance as a single Guidance.

I. The EPA has no authority to issue this Guidance without following formal rule making procedures. The conditions, requirements, and effects of the Environmental Justice Guidelines will have a significant, widespread impact that has not been properly assessed. Failure to allow the full notice

and comment of what amounts to a proposed rulemaking is a clear violation of the Administrative Procedures Act (5 U.S.C. Section 702 et seq.) Because the Guidelines are more appropriately addressed as a rulemaking - and one which will have a significant impact on a large number of small entities - they should be subject to the following:

* An Advocacy Review Panel pursuant to the Small Business Regulatory Enforcement Fairness Act amendments to the Regulatory Flexibility Act [see 5 U.S.C. 601 et seq.] - analyzes the impact on small businesses
* Regulatory Flexibility Analysis (5 U.S.C. 601) - to assess whether there will be a significant impact on a large number of small entities
* Unfunded Mandates Act (5 U.S.C. 804) - to assess whether it will impose an annual burden of $100 million or more on state and local governments
* Executive Order 12866 - requires that proposed rules be submitted to the Office of Management and Budget (OMB) for evaluation prior to promulgation, and determination of significant rule status

1. EPA may not cite the Executive Order on Environmental Justice [EO 12898] as authority, beyond existing statutes and regulations, to deny or condition a permit where the Order states, "federal agencies must implement this Order consistent with, and to the extent permitted by the law."

2. The choice of issuing guidance rather than regulation means the guidance document is theoretically not binding on the states. This mean that compliance, enforcement, and adherence to the guidelines will vary across states, which provides no certainty for affected stakeholders.

3. EPA must work with Congress to clearly establish the boundaries of federal executive branch authority.

II. The Guidance lacks clarity, creates uncertainty and conflicts with existing programs and practices.

1. States

A. As a co-regulator with EPA, the state should have an opportunity to work with the EPA in developing Title VI policies, rather than an after-the-fact opportunity to comment.

B. The extent of the state agencies' social, scientific, and legal obligation is unclear, as is state authority to carry out those obligations as expressed in the Guidance.

C. The impact of the Guidance on previously adopted state rules and regulations for implementation for addressing Title VI complaints should be assessed.

D. The role of local governments along with their authority is still substantially ignored in the revised guidance. The discussion of Area Specific Agreements implies their participation, yet no reference is made, nor is there any effort to address, limitations on the states' legal authority. The Guidance also does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, HubZones, brownfield redevelopment, greenspace preservation or mitigation initiatives.

E. The high costs associated with the operation of state Environmental Justice programs is recognized, but then dismissed because the guidance is voluntary. The source(s) of necessary funding are not specified or identified. Does U.S EPA plan to furnish federal funding to offset this resource burden, or will these costs be passed on to states and permit

applicants?

2. Existing Programs

A. The Guidance fails to recognize the environmental, social, and health benefits achieved by states' existing permitting programs.

B. The EPA is judging, after the fact, permitting programs that it has already approved. The Guidance states that compliance with environmental laws does not constitute per se compliance with Title VI. In fact, under the Guidance, an affected party cannot be assured of compliance with Title VI.

C. The EPA presently asserts the authorization to consider environmental justice complaints in the context of new permits, permit modification, and permit renewal. Permit modifications that result in environmental improvement are encouraged. Claims based on modifications that are environmentally impact neutral are likely to be dismissed. Generally, permit renewals are treated and analyzed as if they were new permits under the regulations. In order to establish compliance with Title VI, EPA should focus the Office of Civil Right's limited investigative resources on state permitting programs, rather than individual permits. This should be of primary consideration, given EPA's assertion in the Guidance "that individual permit actions are unlikely to create significant adverse disparate impacts."

D. EPA clearly states that a Title VI complaint does not nullify or even stay a permit, and that investigating and resolving Title VI complaints must not create unnecessary delays in the environmental permitting process. It is only logical that the permit process should not be halted by the filing of a complaint, but it is unrealistic to assume that the filing will have no effect on the permit.

3. Permittee

A. The impact of the document on the rights of the permit applicant is unclear. The permittee, whose permit is subject to modification, suspension, or revocation, should be provided with constitutional due process and whatever process is due under the state agencies' regulations.

B. There are no distinctions made between permit applications for temporary vs. fixed-source discharges or emissions.

4. Economic benefit

The potential economic and social benefits that a regulated facility may bring to a community are not properly recognized.

5. Affected Community

Whether the Guidance intends to include low-income, non-minority communities under the protection of Title VI is unclear. "Environmental justice community" and "affected community" is undefined. (However, Title VI is not applicable as a matter of law to groups of people where race is not the predominate factor.)

6. Justifications

A. EPA procedures in the Guidance conflict with existing Title VI law. For example, contrary to present understanding of the law, under the Guidance, opportunity for the recipient to justify its permitting decision occurs late in the process and only if rebuttal and mitigation have failed. Further consideration of justification should occur before an initial finding is made.

B. Economic development is factored into most permitting decisions but is basically ignored in the Guidance.

C. EPA recommends that states identify locations where Area-Specific Agreements might be useful. The negative result of doing so would be the creation of areas which would prove less attractive to new or expanding businesses, often discouraging investment where it is most needed.
D. In describing justification, the Guidance indicates that it is up to the "recipient" - in this case the state or permit issuer - to "show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." But many legitimate and important activities are not integral to the recipient's institutional mission, since the recipient is typically only performing a regulatory function. Rather, it is the reason for the issuance of the permit itself that should be assessed for its importance and legitimacy.

7. Sound Science/Impact Analyses
A. Cumulative impacts of all releases as well as the impact of unregulated factors such as noise and odor will be included in EPA's adverse impact analyses. Many of these factors cannot even be quantified.
B. The scope of impacts considered is overly broad and includes factors outside those which are actually within the legal authority of the permitting agency
C. The Guidance fails to determine whether an adverse impact actually results from the alleged discriminatory act itself.
D. There is a presumption that disproportionate racial distribution represents a disparate impact.
E. There are no standards for data and analytic methods of acceptable quality. Data must be based on sound science, such as that which is based upon on ambient monitoring, actual exposure mechanisms, and known releases of stressors into the environment.
F. The standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, lack specificity and assurance that sound peer-reviewed science will be used.

8. Filing Title VI Complaints
A. Persons without a genuine stake in the community are allowed to file complaints.
B. EPA should give "due weight" in the Title VI process only to complaints which arise from concerns voiced during the permitting process.
C. The thresholds for who can file a complaint and for the acceptance of complaints are too low. The statement that "complainants do not have the burden of proving their allegations are true" invites frivolous complaints.

9. Decision Timelines/Permit Process/Satisfying Title VI Requirements
A. Timelines for investigation and resolution of complaints are not clearly delineated.
B. The Guidance does not provide definite timeframes for state and stakeholder actions, or take into consideration planning and investment requirements for certainty and timeliness.
C. The permitting process itself does not contain well-defined decision points, creating uncertainty for everyone involved, including investors, workers, owners, local development boards, etc.
D. The Guidance fails to lay out a clear process that if followed, will satisfy Title VI concerns. The process described here lacks the clarity and certainty that are fundamental requirements of a sound regulatory process.
E. EPA stresses that the entire process described in the Guidance is completely voluntary, and that "EPA may decide to follow the guidance

provided, or to act at variance with this guidance, based on its analysis of the specific facts presented." There is no certainty for stakeholders to follow.

F. The Guidance does little to help states avoid Title VI complaints, nor does it lay out the requirements which, when followed, would assure compliance and therefore exemptions from Title VI complaints.

G. The Guidance does not allow the states to develop environmental equity programs that would automatically satisfy Title VI requirements.

10. Comparison Populations/Disparate Impact

A. Arbitrarily drawing circles around an installation and assuming that the population within the circles will be negatively impacted lacks any scientific basis as well as common sense.

B. EPA expects to find "similar" levels of risk everywhere in a state, regardless of the location. The Guidance does not take into account zoning, expense, proximity to similar facilities, development history, etc.

C. EPA also makes the assumption that where significant adverse disparate impacts have been found, they are evidence of unlawful discrimination in the permitting process. One is not necessarily a correlate of the other. Land use planning, zoning and socioeconomic considerations are just three of the factors which may contribute to adverse impacts. Just as equality of opportunity does not guarantee equality of outcome, neither should determinations of "environmental injustice" be based on the idea that all areas within a state should be exactly the same. Permitting actions seldom impacts on all segments of the population equally, and a discriminatory effect may be found where there was no discriminatory intent. Risks, impacts, and populations are never equally distributed.

11. Definitions

A. The Guidance lacks clearly defined terms and requirements.

B. There is no single definition of adverse disparate impact. Similarly, terms such as "adequate justification" or "comparison populations" are not specifically defined.

C. The Guidance fails to define clearly how to select a comparison population, which is a key component of determining whether disparate impact exists.

D. Approaches to Title VI compliance will be given "due weight" if a complaint is filed, but just what constitutes "due weight" is undefined. EPA does not specifically define its requirements, which means that permit applicants and issuers do not know what steps need to be taken, or whether or not the proper steps have been taken. EPA allows itself complete discretion, as if trying to "have their cake and eat it, too."

ABC opposes this attempt by the Environmental Protection Agency to circumvent rulemaking procedures by issuing Guidances instead of Proposed Rules. The Environmental Justice Guidelines will have the clear effect of a major rule, and should therefore be subject to the same procedures as any other significant rulemaking.

Jacqueline Lescott
Manager, Federal Regulations
Associated Builders and Contractors
1300 N. 17th Street, Suite 800
Rosslyn, VA 22209
703-812-2036/8202fax

lescott@abc.org <mailto:lescott@abc.org>

- ABCcommentEnviroJustice.doc

(b) (6) - Privacy [redacted] **on 08/28/2000 11:03:48 AM**

To: Group Civilrights@EPA
cc:

Subject: EPA comment on Rule

I urge you to stop the killing of our children and environment. The EPA must do it job and protect the people of this country and not the U.S. dollar. As a citizen of this country I demand that you stop the discrimination and protect us by our God given rights. Follow the law and defend our people's rights!

(b) (6) - Privacy
[redacted]
Goleta CA, 93117

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PRESIDENT
CHARLES M. BARCLAY
Alexandria, Virginia

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
ATTN: Yasmin Yorker

Re: Comments by the American Association of Airport Executives Regarding the U.S. Environmental Protection Agency's *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* 65 Fed. Reg. 39, 649 (June 27, 2000)

Dear Sir or Madam:

The American Association of Airport Executives ("AAAE") respectfully submit the following comments on the U.S. Environmental Protection Agency's D*raft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance*).

I. BACKGROUND

AAAE is a not-for-profit professional individual association of the airport management industry. Founded in 1928, AAAE is the largest professional organization for airport executives in the world. Representing thousands of airport management personnel at over 800 U.S. airports, the Association represents executives of large and medium-size airports, as well as hundreds of managers from smaller airports.

The airport manager's primary duty is to ensure and take responsibility for the safe and efficient operation of the airport. The airport manager must answer both to the airport operator and the tenants. In some cases, the airport operator is an independent authority with a policy board. However, in most cases, the local government owns the airport and leases the facility to airlines, fixed-base operators ("FBOs"), and service businesses.

The airport manager must deal with all tenants and persons who lease or use portions of the airport, including: (1) commercial airlines that schedule flights, maintain and service their own aircraft, and process passengers; (2) all segments of the general aviation community, including FBOs and individual and corporate owners and operators of aircraft; and (3) government-employed staffs, such as air traffic controllers and customs agents.

Tenants share responsibility for compliance with federal regulations with the airport owner/operator. Although the manager works cooperatively with the tenants and airport operator, at most commercial airports, the airport manager does not have direct control over most flying activities. Thus, the manager may not have any control over the types or amounts of chemical deicers that are used, or even how they are used. Nevertheless, the airport manager's overall responsibility for the safe operation of the airport may expose him or her to liability for injuries resulting from "airport" activities.

II. GENERAL AND SPECIFIC COMMENTS

AAAE'S comments apply both to the *Draft Recipient Guidance* and the *Draft Revised Investigation Guidance*. AAAE appreciates the amount of effort expended by the Agency in order to implement President Clinton's Executive Order 12898. Nevertheless, the issue of environmental justice is perhaps one of the toughest moral, economic, administrative, and social issues facing the Agency. There are no simple answers to the many thorny and complex issues. However, EPA must answer many more of the fundamental issues than it has with these proposed guidance documents.

AAAE was represented at one of EPA's Washington, D.C. public listening sessions and the Association was struck by Mr. Christopher Foreman's statement that the original Civil Rights Act of 1964 Title VI was never intended to be applied in environmental permitting situations. A senior fellow and author at the Brookings Institute, Mr. Foreman seemed to advocate a broader national debate regarding the protection of minority and low-income populations regarding disproportional environmental impacts. EPA, the President, and Congress should consider such a debate.

One of the primary reasons AAAE supports a more uniform national policy is because airports and the aviation industry often are forced to confront varying policies and guidance generated by various regulators of numerous and competing programs. Airports have an environmental interest in promoting environmental stewardship at their facility and for the surrounding community while also having to prioritize safety for the general traveling public. Thus, airports must not only answer to EPA but also to the Department of Transportation, its Federal Aviation Administration, and other Federal, state, and local regulatory agencies. Further, some airports are publicly-owned and operated while others are privately controlled. Many larger airports not only are regulated by federal or state permits, but they also are direct recipients of federal funds. This maze of bureaucracy and the independent and unrelated federal actions by competing agencies relating to similar concerns is confusing and inefficient.

At the very least, EPA must create a mechanism for working with other federal agencies regarding environmental justice enforcement, especially when multiple agencies have regulatory authority over a single regulated entity. Therefore, EPA should work with the Department of Transportation to craft a more definitive direction regarding the applicability of Title VI of the Civil Rights Act to aviation activities and how best to achieve the goal of fairness in implementing environmental programs.

AAAE encourages EPA to take the following comments into consideration when revising its two guidance documents.

- The guidance documents fail to lay out a clear process and what roles key stakeholders play in the deliberation process. Facilities that are subject to federal action and are subjected directly to EPA guidance documents and yet EPA envisions no role for them in the process. If the granting or denial of an airport's federal approval hinges on an environmental claim, it ought to have a clearly defined role in resolving any environmental justice claim.

- Specific terms are used throughout the document, such as "adverse disparate impact." However, these terms are not defined. If EPA is unprepared to define such terms, it may be unprepared to finalize guidance that relies upon specific definitions. EPA's guidance should add clarity to the program, not merely mask the confusion surrounding it. The same holds true for the terms "adequate justification" and "comparison populations." Without a clear understanding of what EPA has in mind, the guidance will not prove to be helpful.

- EPA has not provided a rational standard for judging "cumulative impacts" that result in adverse impact. EPA must establish a procedure founded in sound scientific methodology for analyzing "cumulative impacts." We cannot rely on the historic Supreme Court standard of "we know it when we see it."

- EPA must provide some sort of methodological safe harbor. A regulated entity ought to be able to work with local representatives to address environmental justice concerns without the threat of new claims being raised in the waning moments of the permit approval process. An airport ought to be able to predict the effort and expense associated with its actions based upon the initial reaction to, for example, new expansion plans, rather than address issues more likely intended to delay or halt aviation-related expansion unrelated to environmental justice. In other words, the Agency should not create a forum for rectifying all the ills of society through this program. As a related issue, EPA must acknowledge that Title VI was not intended to guaranty all communities with equal environments. Unintended and unequal environmental risks and rewards are created throughout the economy.

- Permit actions that do not increase net emissions levels ought to be categorically excluded from environmental justice claims. Further, permits issued pursuant to EPA health-based determinations also ought to be excluded; EPA should recognize the precedent it set in the *Select Steel* case.

- EPA should establish stringent standards of proof supported by adequate data that must be met prior to the acceptance of an environmental justice claim. This will discourage

entities from filing frivolous claims and wasting resources that could be expended on legitimate claims. The Agency's "so incoherent they cannot be grounded in fact" standard is too lenient.

- EPA shall support whatever interpretation of Title VI it relies upon with a thorough legal analysis. The U.S. Supreme Court has established significant precedent for reviewing Title VI claims, but the Court seems largely ignored by EPA's documents.

- The Agency should not finalize this guidance, but rather initiate a formal notice and comment rulemaking on environmental justice regulations that includes those necessary considerations inherent therein, including the Regulatory Flexibility Act, Office of Management and Budget review, the Unfunded Mandates Act, etc.

AAAE appreciates the opportunity to provide these comments on EPA's draft environmental justice guidance documents. If you have any questions, please call.

Respectfully submitted,

Carter B. Morris
Staff Vice President of Environmental
Affairs and Airport Projects

cc: Jeffrey S. Longsworth
Environmental Counsel

carter.morris@airportnet.org on 08/28/2000 05:50:59 PM

To: Group Civilrights
cc: jlongsworth@kelleydrye.com

Subject: Comments by the American Association of Airport Executives Regard ing the U.S. Environmental Protection Agency's Draft Title VI Guidance fo r EPA Assistance Recipients Administering Environmental Permitting Progra ms (Draft Recipient Guidance) and Draft Revi

<<ej0828final.doc>>
August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
ATTN: Yasmin Yorker
Re: Comments by the American Association of Airport Executives Regarding the U.S. Environmental Protection Agency's Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance) 65 Fed. Reg. 39, 649 (June 27, 2000)

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Respectfully submitted,
<<...>>

Carter B. Morris
Staff Vice President of Environmental
Affairs and Airport Projects

cc: Jeffrey S. Longsworth
Environmental Counsel

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Nancy W. Newkirk
Director
Regulatory and Scientific Affairs

August 28, 2000

Via Courier and E-mail

Yasmin Yorker
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Title VI Guidance Comments

Dear Ms. Yorker:

Enclosed are comments from the American Petroleum Institute (API) on the Environmental Protection Agency's (EPA's) Draft Title VI Guidance. API represents more than 500 companies involved in all aspects of the oil and gas industry.

API recognizes the substantial effort that EPA's Office of Civil Rights (OCR) put forth in gathering input from interested stakeholders, including the states, industry and community groups. The draft guidance documents represent a substantial improvement over the Interim Investigation Guidance that was released by EPA in 1998. We must conclude, however, that these guidance documents do not go far enough to clarify many issues that are involved in determining the existence of discrimination in environmental permitting processes. All parties involved in the permitting process need guidance from EPA that will give greater certainty to the procedures that will be applied to the investigation process and timelines of that process.

Should you have any questions about our comments or would like to discuss them, please contact me or Peter Lidiak, at (202) 682-8325.

Sincerely,

Nancy W. Newkirk
Director, Regulatory & Scientific Affairs

Enclosure

cc: William Harnett
Ann Goode

An equal opportunity employer

Comments from the American Petroleum Institute
To the U.S. Environmental Protection Agency on its
Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and
Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)
8/28/2000

The American Petroleum Institute (API) represents more than 500 companies involved in all aspects of the oil and gas industry, including exploration, production, transportation, refining and marketing. API is pleased to submit the following comments on the U.S. Environmental Protection Agency's (EPA's) Draft Recipient Guidance and Draft Revised Investigation Guidance (65 FR 39650-39701). The bulk of our comments will focus on the Draft Revised Investigation Guidance since most of what is covered in the Draft Recipient Guidance is also covered in the Draft Revised Investigation Guidance.

API also participates in the Business Network for Environmental Justice (BNEJ) and supports the comments filed by that coalition. However, regarding BNEJ's comments in section III, I entitled, "The Investigation Guidance Should Require Fairness in the Remedy", API believes that the resolution of a Title VI complaint on a single permit action should not mandate modification of permits for all other sources in a given area.

I. General Comments

A. EPA has made a significant effort to involve all of the stakeholders.

API commends EPA for the effort it has put forth over the last two years, since the issuance of the Interim Guidance in 1998, to gather input and engage in dialog with all interested parties. We support the concept of early and broad involvement of the parties involved in a civil rights issue to forestall the need for a complaint. Compliance with the law can be promoted by involving all stakeholders, not only in the complaint process, but also in the initial promulgation, and the subsequent implementation of rules, guidance and policies. We hope the Agency will continue to reach out to all of the affected stakeholders, including permittees, as well as complainants and recipients, as it applies the provisions of the Civil Rights Act of 1964 (CRA).

B. The draft guidance documents represent a significant improvement over the 1998 Interim Investigation Guidance.

API congratulates EPA on the marked improvements reflected in the Draft Recipient Guidance and Draft Revised Investigation Guidance, especially in clarifying timelines for action and the complaint process, when compared to the 1998 Interim Investigation Guidance. However, we believe that EPA's approach to compliance with

the CRA could be improved by a change in focus and some additional clarification, as explained below.

C. Civil rights complaints could have a significant adverse impact on timely implementation of national environmental priorities.

API's immediate concern is that permitting actions required for our members to comply with the Tier 2 and Sulfur Regulations may be some of the first actions tested under these guidelines. If complaints are filed, it will be necessary for EPA and recipient agencies to resolve them ahead of the deadlines discussed in the draft guidelines to enable our members to meet the mandatory deadlines of the Tier 2 and Sulfur Rulemaking. While we support the conclusion that "[n]either the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue", it is very difficult for any of our members to justify the very significant financial investment to install equipment at a facility to meet Tier 2 and Sulfur requirements without knowing what the final permit conditions might be or whether these conditions may ultimately be changed.

Further, we are concerned that once a recipient has had a complaint filed against it, further permitting actions at the subject facility[1] or other geographically proximate facilities, might be put "on hold" due to the considerable public interest that is generated when allegations of discrimination and adverse impacts are made. Another scenario we can envision is where a construction permit is issued, a complaint is filed, construction is completed and then the terms of the construction permit are ultimately changed as a result of the complaint. The significant investments (often millions of dollars) for construction could be stranded.

EPA should address this issue in the final investigation guidance by including a more compressed timeline for resolving claims impacting legally mandated permit actions, such as those required to comply with the Tier 2 and Sulfur Rulemaking. Because of the narrow window to begin construction and meet the regulatory deadline for production of low sulfur gasoline, the terms of construction and operating permits must be finalized at the earliest possible moment.

Finally, the Agency should use its resources to actively educate the public about the benefits local communities will reap from the Tier 2 and Sulfur Program. Delays that could occur as a result of civil rights complaints were not addressed in the Tier 2 and Sulfur Rulemaking and could adversely impact our members' ability to meet their legal requirements.

D. EPA's focus should be on addressing state and local permitting processes that result in discrimination rather than individual permitting actions.

Both draft guidance documents focus very heavily on addressing or investigating the effects of a particular permit action. Though it is appropriate to examine a recipient's

[1] In some jurisdictions there is a two-stage process in which a construction permit and then later an operating permit is issued, while others use a one-permit process for construction and operation.

process that results in disparate significant adverse impacts, a single permitting action is not likely to cause such impacts. This is particularly true for permits that do not authorize significant increases in releases of pollutants of concern into the environment. While EPA acknowledges in the guidance that a single permit is rarely the sole cause of a disparate adverse impact, more emphasis needs to be placed on identifying patterns of discrimination in permitting processes and assisting state and local permitting agencies to improve their processes so that, ultimately, these patterns of discrimination do not continue.

The CRA, EPA's implementing regulations and these draft guidance documents do not address other, more direct causes of disproportionate impacts such as land use and planning practices, taxation, spending and other public policies. These public policies often encourage the construction of low-cost residences and schools near older industrial facilities. There is usually nothing that state or local environmental agencies can do or should be expected to do to affect these factors. Thus, we support EPA's position that a complaint's scope can only extend as far as the authority of the permitting agency. Factors that fall outside of the permitting agency's authority must be addressed through other means. EPA should work with other federal, state and local agencies and interested stakeholders to address these factors that can lead to disparate significant adverse environmental impacts rather than trying to solve these problems solely through individual environmental programs.

E. Compliance with the Civil Rights Act should be EPA's goal.

EPA's statement of principles in the Draft Revised Investigation Guidance says, "strong civil rights enforcement is essential". Broad compliance with civil rights laws, as well as enforcement of those laws, should be the driving principle to achieving equity in the application of environmental laws. Individual permitting actions that lead to disparate significant adverse impacts should be investigated. However, investigating individual permitting actions is time and resource intensive. Applying those same resources to assist the state and local agencies to address discriminatory policies, where they exist, would yield broader compliance and ultimately result in fewer complaints.

F. The role of the permittee is not addressed.

The role of the permittee is not adequately addressed in the draft guidance documents. Permittees should receive notice when a complaint is filed, be able to provide input to the decision to investigate such a complaint, and to participate in that investigation. The permittee may not have a direct legal interest in a civil rights complaint under Title VI, but the outcome of an investigation will have real and significant effects on the permittee. We have addressed our concerns about the role of the permittee in the "Detailed Comments" section below.

G. The Civil Rights Act should not be used to force areas to comply beyond the requirements of existing environmental laws.

In making an adverse impact decision, the Draft Investigation Guidance states the "[c]ompliance with environmental laws does not constitute per se compliance with Title VI." (65 FR 39680) It is not appropriate for EPA to use the Title VI complaint process to force recipient's and permit applicants to agree to permit terms that exceed the requirements of applicable environmental standards. If permit terms that meet current environmental standards are not considered "safe and healthful," then the appropriate recourse is to seek changes in the underlying standards.

The draft guidance also states that in identifying voluntary compliance measures the recipient might look at additional controls in the permit at issue or focus on " . . . other permitted entities and other sources . . ." (65 FR 39683). This would mean that facilities that are operating under the terms of their own permits, and which have successfully been through the permitting process, may be affected at any time by any permit action within a given area. Such a process would be fundamentally unfair and without basis in law.

H. It is impossible to provide the same environmental conditions to all people.

The CRA does not require, nor did Congress intended it to require, that all people experience the same exposure to environmental pollutants. We support EPA's paradigm of determining first if the actions of a recipient result in a significant adverse impact on an affected population and then determining if the impact constitutes a disparate significant adverse impact on the affected population before moving forward on a complaint. However, EPA seems to imply in the Draft Revised Investigation Guidance that the occurrence of a disparity may be proof of discrimination. The fact that a disparity exists cannot alone be a measure of discrimination because it is impossible to ensure that all parts of an airshed, for instance, have identical air quality. Such conditions simply do not exist. Likewise, a sparsely settled wilderness will not have the same level of pollutants as a dense urban center.

I. EPA's process could have unintended effects on unprotected populations.

We strongly support the principle that "[a]ll persons regardless of race, color, or national origin are entitled to a safe and healthful environment." EPA's goal should be to ensure reasonable protection of human health and the environment. EPA needs to assure the policies put forth in these guidance documents do not have the unintended effect of shifting adverse impacts from potentially affected minority populations to populations with members not of named classes or that are simply more diverse (i.e., low-income communities with a more even distribution of peoples of race, color, or national origin.)

J. EPA should commit itself to be bound by its own guidance.

EPA should make a firm commitment to follow the Draft Investigation Guidance in conducting investigations. The notice states that, "EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented." As currently drafted, there is no commitment on the part of the Agency to follow these guidelines, which reduces the certainty for all parties about how EPA will handle investigations.

K. API supports the use of Alternative Dispute Resolution and other informal resolution processes.

API supports the use of Alternative Dispute Resolution and other informal resolution processes to avoid complaints and encourage voluntary remedies. Such processes, however, need to have clearly defined timeframes associated with them so that they do not result in unproductive or protracted negotiation. Each party should be able to unilaterally end the informal process and move the action into a more formal process. Parties should also be able to jointly agree to continue the process beyond deadlines if they believe that progress toward a resolution is being made.

II. Detailed Comments

A. Framework for Processing Complaints; Summary of Steps (65 FR 39670)

1. Timing For Acceptance For Investigation

There seems to be a discrepancy in the process laid out in both the draft guidance and EPA's Title VI regulations. The guidance states that "OCR will notify the complainant and the recipient in writing within five calendar days of the receipt of the complaint by EPA." (65 FR 39670) Then the recipient may respond within 30 days of receiving the notification. The guidance goes on to say: "Each allegation that satisfies the jurisdictional criteria will be accepted for investigation within 20 calendar days of acknowledgement of its receipt." We read this to say that EPA will decide on whether to accept a complaint prior to the expiration of the period that has been allowed for the recipient to file a response. EPA should have the benefit of the recipient's response before deciding whether to accept the complaint for investigation.

2. Roles and Opportunities To Participate – Role of the Permittee

The guidance barely mentions one of the most affected parties in the complaint process – the permittee. Although a complaint under EPA's Title VI regulations is brought against the permitting agency, and not the permittee, there are numerous potential impacts on the permittee. The very fact that there is a complaint, in addition to any changes to the permit that might result from a

complaint, can have serious implications for a permittee. There are usually significant financial resources already committed to and expended on a project by the time a permit is issued, in addition to negative impacts of being identified as a facility involved in a civil rights complaint. When a complaint is received, the permittee should be notified at the same time as the complainant and the recipient. The permittee should also have the right to submit supporting documents to assist EPA's investigation of the complaint. EPA should proactively seek input from the permittee at all points in the investigation and communicate to the permittee, on an ongoing basis, the status and results of its actions in processing a complaint.

B. Accepting or Rejecting Complaints

1. Who May File a Complaint

There needs to be better clarification of who is entitled to file a complaint. The guidance and regulations currently allow complaints to be filed by three categories of persons: a person who was allegedly discriminated against in violation of EPA's Title VI regulations; a person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or a party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations.

It should be clarified that simply being a member of a class does not allow a party to file a complaint without some direct interest in the recipient's jurisdiction where the permit is being considered. For example, an Asian American in New York should not be able to file a complaint on a permit being considered in California simply because there are other Asian Americans represented in the affected population in California.

In addition, EPA needs to clarify what it means to be "authorized to represent a person or specific class of people". It should be clarified that this language is not intended to open the door for individuals or groups from outside of the affected population to initiate a complaint on behalf of a person or specific class of people within the affected population, unless representation has been specifically requested from someone within the affected population. Otherwise, groups outside of the area without any stake in the local permitting process may inappropriately intercede and may not represent the best interests of the local affected population.

2. Weighing a Complaint

In deciding to investigate a complaint, EPA should give greater weight to complaints supported by a quorum of adults (i.e., 8 to10) from the affected community to discourage the filing of potential nuisance complaints from a single individual.

3. Complaints Filed By Persons Not Engaged In The State or Local Process

Most state permitting processes include comprehensive notice and comment provisions designed to afford all stakeholders and interested parties an opportunity to participate in the rulemaking process in a meaningful way. When considering whether a complaint should be accepted for investigation, EPA should determine whether the complainant reasonably knew about and participated in the recipient's administrative process. If he/she chose not to participate or participated but chose not to bring forth an issue that could have been reasonably anticipated and addressed, EPA should not accept the complaint or, at the very least, should give additional deference to the results of the recipient's process. It is not fair to accept complaints from individuals who knew a permit was being considered, had a reasonable opportunity to participate, but chose not to be involved or did not surface all relevant issues early in the process.

API agrees that if there was inadequate public notice and insufficient opportunity to participate in public meetings or to comment, then a timely complaint should be accepted by EPA, assuming that it meets all of the other relevant requirements.

4. Timeliness of Complaints – The 180-day "Clock"

One hundred eighty days following the issuance of a permit should be a sufficiently long time to allow for filing a complaint. By that time, the permittee has typically begun construction, and made significant investments based on the permit, which could be jeopardized. The guidance and regulations state that EPA might choose to review the recipient's relevant permit based on an untimely complaint "at some future date" or will determine whether to waive the 180-day limit "for good cause" on a "case-by-case basis". This guidance needs to provide some clarification of when EPA might decide to investigate untimely complaints or extend the time limit. EPA should provide some examples in the guidance of "good cause" and under what circumstances it might decide to investigate a complaint filed after the 180-day limit. EPA should also give some indication of an outside timeframe (in the case of an extension) after which a permittee can proceed with certainty that the permit conditions are final. Finally, EPA should consider a regulatory amendment to set a shorter, binding time limit.

EPA has stated in meetings with our industry that it does not have the manpower to address complaints in 180 days and, in fact, currently has a 7-8 year backlog of civil rights complaints. Should a complaint be filed concerning a refinery's Tier 2 permit and the investigation is delayed that long, a refinery would obviously not be able to supply low sulfur gasoline without considerable risk to its permit status and to the capital investments it made to comply with the Tier 2 and Sulfur Rulemaking. This is an unconscionable position. EPA must prioritize its resources so that facilities, such as refineries, legally obliged to make

changes requiring new permits, can get prompt resolution of permit issues in order to meet other legal requirements.

C. Resolving Complaints

1. Informal versus formal complaint resolution (65 FR 39673 and 39674)

EPA should clarify that both informal and formal (i.e., "voluntary compliance agreements") resolutions need to be reduced to writing and will be enforceable.

2. Voluntary actions to resolve a complaint (65 FR 39674)

As stated previously, the resolution of a Title VI complaint on a single permit action should not mandate modification of permits for all other sources in a given area. Facilities not involved in a complaint may agree to provide voluntary reductions in emissions or other releases as part of the resolution to the complaint. Due process should be afforded to document the voluntary reductions, afford appropriate public notice and comment, and make any resulting agreements binding and enforceable on all parties.

D. Investigative Procedures -- Area Specific Agreements

In the Draft Recipient Guidance, EPA encourages states to consider "area-specific agreements" as mechanisms to avoid civil rights complaints. API is concerned that there is little guidance on how to establish the boundaries of the areas to be included in such agreements. The recipient guidance should recommend the smallest reasonable scope for these areas. It is also unclear how such agreements might affect parties not involved in developing the agreement whose facilities are within the area or are immediately outside of the established boundaries. For instance, could a facility be forced to meet a "voluntary" standard without an opportunity to participate in the agreement?

In the Draft Investigation Guidance, EPA indicates that the existence of an area-specific agreement may be used to accord due weight to the state or local permitting procedure. API supports this position. In investigating a complaint, EPA could resolve the matter by finding that such agreements reduce adverse disparate impacts to the point required by Title VI. In general, subsequent complaints raising allegations covered by such an area-specific agreement should be dismissed. This policy may create a disincentive for potential complainants to enter into such agreements, since the existence of the agreement might close the door to future recourse under EPA's Title VI process. The draft guidance states that a possible exception to this general policy could be where EPA is presented with evidence that the agreement is no longer adequate, due to changed circumstances, or not being implemented properly. API requests that EPA explain the types of evidence that would be required to determine when a change

in circumstances is sufficient to set aside an area-specific agreement. The threshold to setting aside an agreement should be high.

E. Adverse Disparate Impact Analysis

1. Determining the type of permit action at issue

The guidance is too broad on what types of permit actions EPA will investigate. We agree that it is not appropriate for simple permit changes (i.e., change of name or mailing address) to be considered for investigation. Permit renewals also should not be subject to complaint and investigation unless the renewal results in significant increases in emissions or other releases from the permitted facility. The only permitting actions that should be considered are new permits or permit modifications that could result in a significant net increase of actual emissions from the facility.

2. Permit Action Decreases Pollutants of Concern (65 FR 39676)

When a complaint names particular pollutants of concern and the permit at issue has either no net effect on or decreases emissions or other releases of those pollutants, EPA should close the investigation. EPA has proposed to do so when a permit action "significantly decreases overall emissions at the facility." There can be no adverse impact from a permit action if it does not contribute to increases of the specific pollutants at issue.

3. State Actions that Mitigate the Effect of a Permit Action

In considering whether to investigate permit actions that result in a net increase in facility's emissions, EPA should consider whether the state undertakes to offset those impacts. One such instance might be under the recently released Draft Guidance, "Use of Emissions Reductions from Motor Vehicles Operated on Low-Sulfur Gasoline as New Source Review (NSR) Offsets for Tier 2/Gasoline Sulfur Refinery Projects in Nonattainment Areas", which allows a state to identify emissions reductions from the mobile source sector in its State Implementation Plan to specifically offset emissions increases at refineries. In this case, there are projected to be large emissions benefits locally and nationally. EPA should consider whether there actually are any adverse impacts when the state chooses to set aside these offset emissions.

4. Define Scope of Investigation

a. Determine the Nature of Stressors and Impacts Considered

The guidance states "In determining the nature of stressors . . . and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by

applicable laws and regulations." (65 FR 39678) The guidance goes on to say that applicable laws over which the recipient has some "obligation or authority" would be considered as part of the adverse disparate impacts analysis, even if not part of the permitting program. EPA should not consider stressors over which a permitting agency has no control. If the permitting program does not address these stressors, they should not be used as a basis for determining adverse disparate impact in investigating a complaint.

b. Impact Assessment – Source of Data

Impact assessments should determine the level of environmental risk experienced by the affected population based upon some measure of exposure. Sources of data should include exposure data, monitored ambient pollutant levels, emissions data, and known releases of pollutants. It is preferable to use actual or monitored data whenever available, but when it becomes necessary to use modeled data, EPA must ensure that scientifically sound assumptions are used in the modeling. The Agency should also seek relevant data from the permittee (i.e., emissions estimates based on facility specific parameters).

EPA suggests that measures of product production and use, and storage of pollutants, and their potential for release, or activities "associated" with potential exposure might be used to assess impacts, but these data are generally not reliable enough to determine actual exposure and risk. If these are the only sources of data, EPA should consider whether this data is sufficient to demonstrate an impact. API encourages EPA to continue its efforts to develop better environmental data focusing on assessment of risk.

We strongly support EPA's decision to note uncertainties in data where they are known.

5. Adverse Impact Decision

a. Adverse Impact Benchmarks

API agrees with EPA that the application of appropriate benchmarks for risk can be an important tool for determining whether there is an adverse impact. In discussing these benchmarks, EPA indicates it would use measures of cumulative risk to compare to the benchmarks. We strongly urge EPA to clarify that cumulative risk is determined for annual or lifetime risk resulting from exposure to pollutants from the facility at issue.

b. Use of the National Ambient Air Quality Standards (65 FR 39680).

API supports the use of national ambient air quality standards (NAAQS) (and presumably health-based standards for other media and pollutants) to establish a presumption of protectiveness. When complaints include a concern about a specific pollutant for which the area is meeting a health-based standard, EPA will generally find there is no adverse impact. However, we are troubled by the statement that " . . . if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome." The NAAQS set requirements for ambient levels of criteria pollutants that have been determined to protect public health. The Agency's implication that there can be an adverse impact even if standards are being met cannot be supported. Since the Agency sets NAAQS by rulemaking, it cannot disregard them for purposes of assessing the impact of a pollutant (stressor) in the investigation of a civil rights complaint. If a health-based standard is not protective of public health, then the appropriate recourse is to seek changes in the standard.

c. Comparison Population

The guidance does not provide sufficient discussion of how comparison populations should be determined. The draft guidance suggests that comparison populations could be drawn from those who live within a reference area such as the recipient's jurisdiction, political jurisdictions or areas defined by environmental criteria, such as an airshed or watershed. The draft guidance also suggests that a comparison population would usually be larger than the affected population. These seem to be arbitrary measures for determining a comparison population.

The general characteristics of comparison populations should be better defined (i.e., compare urban settings to urban settings and consider similar proximity to key features like transportation infrastructure or industrial facilities.) It would not be appropriate in most cases to compare populations in widely separated geographic areas because geographic features, meteorology, etc. can have large impacts on the formation and movement of pollutants.

F. Definition of terms

We commend EPA for expanding its definitions and including a glossary at the end of each guidance document. However, many of the definitions are still somewhat unclear or incomplete. Further, some terms are used inconsistently throughout the document.

1. Statistical Significance

In the text of the guidance it is suggested that 2 to 3 standard deviations from the mean be a measure of statistical significance (65 FR 39682) in measuring the demographic disparity between the affected and reference populations. The definition in the glossary for statistical significance should include this language.

Clear examples of what the Agency considers "significant" in all instances where the term is used would be useful.

2. Actual vs. Allowable Emissions

Throughout the document when talking about what are the proper measures of emissions of "stressors", reference is made to actual and allowable emissions in a seemingly interchangeable manner. The proper measure of emissions is actual emissions, which should be used consistently throughout the document.

3. Consistency With EPA Permitting Regulations

An effort should be made by EPA to ensure that definitions used in the guidance documents are consistent with definitions used in the underlying permitting provisions.

4. The definition of "adverse impact" is quite open to interpretation and does not clarify how to determine whether there is an adverse impact.

The definition states that EPA's determination would be " . . . based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science." There is very little that falls outside of that definition.

jdeason@artba.org on 08/28/2000 01:15:43 PM

To: Group Civilrights
cc:

Subject: Additional Comments of the American Road and Transportation Builders Association

August 28, 2000

Honorable Carol M. Browner, Administrator
U.S. Environmental Protection Agency
ATTN: Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Browner:

The purpose of this letter is to provide additional comments of the American Road and Transportation Builders Association (ARTBA) on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" proposed by the U.S. Environmental Protection Agency in the Federal Register of June 27, 2000 (Volume 65, Number 124, pages 39649-39701).

Our earlier comments, which the enclosed document supplements, were provided to you by electronic mail over the past weekend.

Sincerely,

T. Peter Ruane

T. Peter Ruane
President and CEO

Enclosure

Additional Comments of the
American Road and Transportation Builders Association
on the "Draft Title VI Guidance for EPA Assistance Recipients
Administering
Environmental Permitting Programs"
and "Draft Revised Guidance for Investigating Title VI
Administrative Complaints Challenging Permits"
proposed by the U.S. Environmental Protection Agency
in the Federal Register of June 27, 2000
(Volume 65, Number 124, pages 39649-39701)

August 28, 2000

Introduction

This document provides additional comments on the subject documents from the American Road and Transportation Builders Association to supplement our earlier comments that were provided by electronic mail.

Additional General Comments

EPA's Title VI regulations address deferring to other federal agencies

with jurisdiction over a Title VI matter. 40 C.F.R. 7.125. We request that EPA's final guidance clarify that EPA will defer to the various Department of Transportation agencies, the Army Corps of Engineers, and the Department of the Interior in matters relating the jurisdiction of those agencies under the transportation statutes, Clean Water Act Section 404, and the Endangered Species Act, respectively.

Because the Clean Air Act does not infringe on local land use authority (42 U.S.C. 7431) and its definition of "conformity" (42 U.S.C. 7506(c)) does not include environmental justice concerns, we request that EPA clarify that a Clean Air Act conformity determination does not provide the occasion for revisiting any environmental justice issues raised by the underlying land use and emission reduction decisions inherent in the underlying State Implementation Plan (SIP) and transportation plan or project. Where the Clean Air Act sets forth the specific criteria required for an affirmative determination, Title VI does not supplement those criteria.

Additional Specific Comments

Page 39654. Under EPA's proposed approach for Title VI, EPA's Office of Civil Rights (OCR) would assess whether an impact is both adverse and borne disproportionately on the basis of race, color, or national origin and, if so, would allow the recipient to show (as an "affirmative defense") that the disparate treatment is justified. This approach falls outside EPA's Title VI authority. Title VI itself prohibits only intentional discrimination, but Supreme Court decisions suggest that agencies may issue regulations that prohibit unjustifiable disparate impact discrimination. E.g., Alexander v. Choate, 469 U.S. 287, 292-93 (1985). To prohibit (by regulation) unjustifiable disparate impact discrimination, however, EPA must point to evidence that such discrimination occurs. Bowen v. American Hospital Association, 476 U.S. 610, 643 (1986). Thus, to expand the scope of Title VI's coverage by regulation, EPA's rulemaking must identify the unjustifiable disparate impacts that its rule will prohibit. For example, in Lau v. Nichols, 414 U.S. 563, 566-67 (1974), the Court found that San Francisco schools violated Title VI by failing to teach Chinese schoolchildren in Chinese, referring to regulations issued by the Department of Health Education and Welfare requiring recipients to rectify students' language deficiencies. EPA's regulated community needs similar specificity in EPA's Title VI regulations. Instead, EPA's proposed guidance provides a blanket statement that the OCR will decide what is or is not unjustifiable disparate impact discrimination in any particular context. Congress did not delegate such ad hoc authority to OCR and neither Congress nor the Administrative Procedure Act allow EPA to delegate such authority to OCR. Moreover, neither EPA's 1973 nor 1984 Title VI rulemakings provide the required express basis for expanding Title VI's race-based intentional discrimination standard to a disparate impact discrimination standard regarding exposure to pollutants caused by environmental permitting programs. Since the underlying rulemakings did not do so, EPA cannot do so by issuing an interpretive rule or guidance statement.

jdeason@artba.org on 08/26/2000 03:20:00 PM

To: Group Civilrights@EPA
cc:

Subject: ARTBA Comments on Title VI Draft Recipient Guidance and Draft Revised Investigation Guidance

August 28, 2000

Honorable Carol M. Browner, Administrator
U.S. Environmental Protection Agency
ATTN: Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Browner:

The purpose of this letter is to provide the comments of the American Road and Transportation Builders Association (ARTBA) on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" proposed by the U.S. Environmental Protection Agency in the Federal Register of June 27, 2000 (Volume 65, Number 124, pages 39649-39701).

As you know, ARTBA represents 5,000 member organizations in the Nation's transportation construction industry, including construction contractors, professional engineering firms, heavy equipment manufacturers, and materials suppliers. Our member companies employ more than 1,000,000 people in the transportation construction industry in the United States.

As an overall general comment, we believe that EPA's revised draft guidance represents a substantial improvement over the 1998 Interim Guidance. Despite these improvements, however, the guidance is still in need of substantial revision because it will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders. For that reason, we urge substantial further revisions, as described in these comments, before EPA issues the draft Guidance in final form.

ARTBA is committed to working with EPA and other stakeholders to address environmental justice concerns. We hope that the enclosed comments will help EPA in this regard.

Sincerely,

T. Peter Ruane

T. Peter Ruane
President and CEO

Enclosure

Comments of the American Road and Transportation Builders Association on the "Draft Title VI Guidance for EPA Assistance Recipients Administering
Environmental Permitting Programs"

and "Draft Revised Guidance for Investigating Title VI
Administrative Complaints Challenging Permits”
proposed by the U.S. Environmental Protection Agency
in the Federal Register of June 27, 2000
(Volume 65, Number 124, pages 39649-39701)

August 28, 2000

Background

The American Road and Transportation Builders Association (ARTBA) represents 5,000 member organizations in the Nation’s transportation construction industry, including construction contractors, professional engineering firms, heavy equipment manufacturers, and materials suppliers. Our member companies employ more than 1,000,000 people in the transportation construction industry in the United States.

ARTBA believes that all people should be treated fairly under all laws, including
environmental laws, without discrimination based on race, color, or national origin.
We support efforts to positively affect human health and the environment and the use of scientifically sound risk assessments in evaluating and prioritizing health and environmental risks.

Introduction

We believe that EPA has coordinated the provisions of the two guidance documents well. Because they contain identical concepts, we intend that our comments apply to both documents. For this reason, we do not repeat a comment made on the draft Recipient Guidance in comments on the draft Investigation Guidance. In some cases, to help EPA clearly identify the concept that we are commenting upon, we refer specifically to a June 27, 2000, Federal Register page number in one or the other document. In such cases, we intend for our comments to apply to both. We expect that EPA will make the ultimate revised documents consistent with each other, as is the case with the drafts.
Other EPA documents, and information occasionally supplied by EPA’s Regional Offices of Civil Rights and of Environmental Justice, also need to be made consistent with these two guidance documents. Specifically, EPA’s April 1998 Guidance for Incorporating Environmental Justice in EPA’s NEPA Compliance Analyses and Clean Air Act Section 309 Guidance contains direction that is at odds with the two draft Guidance documents. To some extent, the older guidance risks causing a finding of disparate impact in a NEPA document that would not be upheld upon investigation under the draft Guidance. It is important to avoid raising the expectations of complainants in a NEPA process if a conclusion will be reversed once a complaint reaches EPA HQ Office of Civil Rights.

General Comments

In some respects, EPA's revised draft guidance represents a substantial improvement over the 1998 Interim Guidance. Despite these improvements, the guidance is still in need of substantial revision because it will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders. For that reason, we urge substantial further revisions, as described in these comments, before EPA issues the draft Guidance in final form.

Because of EPA’s lead role in applying Civil Rights legislation that was never originally envisioned to address environmental conditions, and in implementing related Executive Order 12898 (Environmental Justice),

other Federal agencies, states, counties, cities and districts who are developing their own environmental justice policies naturally will look to EPA for guidance. Although EPA intends that the draft Guidance apply to a narrow set of permitting circumstances, it is nevertheless a model that will be used in ways not conceivable by the drafters of the Guidance. We encourage EPA to take this into account when finalizing the draft documents. To the extent possible, EPA should think about how this draft Guidance will be used by those who are not permit-issuing agencies nor EPA funding recipients. EPA should attempt to ensure that the concepts are generally applicable to broader issues of Title VI compliance.

Specific Comments

Overall Comment. We note that the draft Guidance correctly uses the term minority "population" as opposed to minority "community" or "neighborhood." Many EPA Regions, and EPA's April 1998 Guidance for Incorporating Environmental Justice in EPA’s NEPA Compliance Analyses, use and apply the terms interchangeably. The significance of this is far more than semantics. The interpretation of what constitutes a population influences the outcome of an analysis of disparate effect. For example, it is possible to make a determination that an impact falls disproportionately on minority neighborhoods, when the impact falls predominantly on the non-minority population. This occurs because geographic areas described as minority neighborhoods or communities nevertheless contain non-minority populations. We encourage consistent use of the term “population” and further encourage revision of the Guidance for Incorporating Environmental Justice in EPA’s NEPA Compliance Analyses to be consistent with this comment.

Page 39652. EPA notes that the draft Guidance eliminates the term “complete or properly pleaded complaint.” We appreciate the stated goal of minimizing confusion. And, while we agree that the term “complete or properly pleaded complaint” can be confusing in an administrative process, we suggest that the word “complete” be retained. We believe that the concept of complete is not confusing and that complaints containing incomplete information should be returned to the complainant. It is not reasonable to use EPA or a recipient agency’s time on complaints that are incompletely or incoherently developed.

Page 39657. One approach to broad program-level Title VI involvement by grant recipients mentioned by EPA is the area-specific approach. In this approach, recipient agencies would “identify geographic areas where adverse disparate health impacts or other potential Title VI concerns (e.g., where translation of documents may be necessary) may exist.” While this sounds reasonable, it would have an unintended consequence that should be weighed by permitting agencies before adopting the approach. Using the analogy from the Clean Air Act, this would effectively designate areas as “non-attainment for Title VI.” Just as new industry is loath to locate in areas that are non-attainment of air quality standards, we are aware that, as predicted by Detroit’s mayor, the same is true of areas where the level of environmental justice controversy is high. While this may be a favorable outcome to the extent that it prevents the siting of dirty industry, it has also prevented the siting of comparatively benign industries that are increasingly including environmental justice as a siting criterion. Absent job growth in depressed areas, it will be a very long time before economic and environmental justice is achieved. We are, therefore, very concerned whenever policies inadvertently create economic avoidance zones among the populations that most need economic development.

Page 39674. The principle of informal resolution of a dispute is sound. In addition, the summary of alternative dispute resolution

methods is a helpful reminder. We realize that this suggested approach will be viewed by some recipients, and undoubtedly used by some complainants, as extortion in advance of filing a complaint. This is regrettable. Nevertheless, it offers the potential to reduce the number of complaints and reach locally satisfying solutions. Since, like all parts of the draft Guidance, informal resolution is voluntary, the extent to which it can be used inappropriately can be controlled.

Page 39653. EPA notes that, “denial of the permit at issue will not necessarily be an appropriate solution.” This is an important concept. It is also appropriate, for the reasons explained by EPA. We encourage keeping this type of language, which seeks practical solutions, in the final documents.

Page 39677, VI.B.1.a. The second bullet indicates that, “Permit actions, including…renewals…that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged” could form the basis for initiating a Title VI investigation. While we understand the rationale for this, we strongly disagree with the notion of potentially opening the same argument each time a permit is renewed, even though the emissions have not changed. It is unfair to the permit holder to reexamine the permit on this basis upon each renewal, especially given that changes in circumstances beyond the control of either the permit holder or the issuing agency could cause a finding of disparate impact…even when the emissions have not changed. An example of this would be when the minority population in the impact zone has increased due to normal population growth. Another example would be when unregulated sources, not under the control of the permitee, have increased over time. We think this is unreasonable and should be eliminated from the Guidance.

Page 39683. Clearly, permitting actions can never have equal impacts on all segments of the population and a discriminatory effect may be found where there was no discriminatory intent. We are pleased to see that this weakness in EPA’s regulations, which call for EPA to act upon discriminatory effects which may be unavoidable, is to some extent counterbalanced by the Guidance’s provision for justification of an impact.
The draft Guidance appropriately points out several types of justification. Three additional types of justification should be added:

a. when there is no reasonable or feasible alternative to the proposed action, considering cost and other factors;
b. when the action satisfies an overriding public need; and
c. when other existing permitted facilities under the recipient’s authority are taken into consideration, the recipient’s actions overall do not have discriminatory effect. This acknowledges that risks, impacts, and populations are never equally distributed. In some individual permitting actions, the non-minority fraction of the population is disparately impacted. Consequently, a recipient’s compliance with EPA’s Title VI regulations over its whole program should be sufficient justification for keeping its EPA funding, even though one specific permitting action may be found to have a disparate effect on the minority population.

We see no reason to confine the economic development justification to only those benefits that are delivered directly to the affected population. It seems that the justification for an impact has always been the provision of a benefit, whether direct, indirect, or induced. We note that the concept of justified disparate effect is missing from EPA’s April 1998 Guidance for Incorporating Environmental Justice in EPA’s NEPA Compliance Analyses. We suggest that the 1998 Guidance be revised to include the necessity of considering whether disproportionate

effects are justified. Otherwise, when EPA or grant recipients disclose a disparate effect in a NEPA document, without considering justification, it can stimulate a complaint that would not later be found in violation of EPA's rules or of the Civil Rights Act. This wasteful and painful outcome is avoidable.

Page 39678. The statement, "In determining the nature of stressors (e.g., chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider…" is appropriate. However, it is effectively contradicted by the next statement in this paragraph, which reads, "These could include…laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts." State environmental policy acts encompass such a broad range of human and environmental elements that an air permitting agency would be considered to have authority over practically every element of the built and natural environment. We suggest that EPA leave jurisdiction over plants, animals, housing, etc. with the states through their environmental policy acts, and not attempt to encompass it within the draft Guidance nor to indirectly bring it under EPA's authority through consideration in investigation of Title VI complaints.

Page 39661. We appreciate that EPA has endorsed the use of 1990 Census data in analyses. Although serious analysts discovered long ago that the 1990 Census, with all its imperfections, is the most applicable and practical source of information, the matter continues to be contested. To minimize the continued argument, we recommend that EPA issue a bulletin to its Regions explaining the rationale for using the 1990 Census (until 2000 Census data become available).

Page 39661. The choice of a reference population, to which the affected population will be compared, is perhaps the single most controlling factor in whether a finding of disparate impact will be made or not. EPA had historically advocated using a geopolitical boundary, and retains this as one option in the current draft. Unfortunately, with respect to any particular project, emission, or affected population, a jurisdiction's border is merely an arbitrary line…no more relevant than a 2-mile, 5-mile, or 10-mile radius. Consider this: If a city annexes new territory, the result of a disparate impact analysis will change; although the disparity would not have changed at all. We suggest that EPA acknowledge that a geopolitical or district boundary is rarely relevant and should only be used when a more appropriate area cannot be found.

The draft Guidance comes closer to identifying a relevant boundary in mentioning use of an airshed or watershed. These can be directly related to the proposed action in some cases. So, the concept of using the appropriate bioregion as the reference population is sound. We suggest that this option be mentioned first in the draft Guidance, not minimized by introducing it almost as an afterthought.

A yet more appropriate reference area is one that has a specific relationship to the project/action and to the decision being made. This reference population would be bounded by the line that encompasses those who will be or might have been impacted, both positively and negatively, by the proposal and its alternatives. This captures the area in which choices can be made…which is the classic civil rights issue (i.e., who is getting the benefit and who is suffering the impact). For example, we could choose to impact Population A by implementing Alternative A. Or, we could impact Population B by implementing Alternative B. Using this reference population captures an area that has a direct relationship with the proposed action, defines the area within which choices can be made, and is not an arbitrary line. We acknowledge that

this can't be the only definition of a reference population, since in some cases the benefited area is hard to identify. But, it can be one of the preferred definitions and used when it applies.

Page 39670, II.A.1 & 2. We note that the recipient will have 30 days from receiving Acknowledgment of Complaint in which to respond (II.A.1). However, EPA will decide whether to accept the complaint within 20 days of acknowledgment (II.A.2). We suggest that the timeframes be altered so that EPA makes a determination as to whether it satisfies the jurisdictional criteria before the recipient's 30-day response period begins. This will avoid the potential that a recipient will work for 20 days preparing a response to a complaint that EPA rejects based on jurisdictional criteria.

Page 39670, II.A.3 Investigation. Factually, determining whether a permit at issue adds to an existing adverse disparate impact is a large undertaking by EPA, since it would require conducting a disparate impact analysis of existing conditions, followed by one on the sum of existing and proposed conditions. Furthermore, if a recipient is to attempt to avoid a complaint, they would first have to conduct their own cumulative analysis for each permitting action in order to determine whether they are having an additive disparate effect or not. We question whether this is a reasonable burden to place on recipients. Perhaps a more workable approach is to ascertain whether the proposed action, itself, has a discriminatory effect.

Page 39670, footnote 63. We suggest, for convenience of the reader, that the reference in this footnote be replaced with the actual criteria.

Page 39671, II.A.6 & 7. We note that the recipient will have 10 days within which to come into voluntary compliance before EPA will start the process of terminating funding. However, the recipient has 30 days to file an answer to the determination of non-compliance. This means that EPA may already be 20 days into the process of terminating funding at the time a recipient files a legitimate explanation of why the determination of non-compliance was in error. We suggest that these timeframes be changed to avoid this.

Page 39671, II.A.7. This section states that, "…all parties will be given reasonable opportunity to file written statements." Since there is no definition of how long "reasonable" is, we suggest that the language be changed to read, "…all parties will be given 30 days to file written statements."

Page 39672, III.A.(3). This section specifies that a complaint will be considered timely filed if it is filed within 180 calendar days of the alleged discriminatory act. Because the process of considering and issuing a permit takes a considerable amount of time, complainants have months in which to understand whether they are disparately impacted or not, and to decide whether to file a complaint. It is unreasonable to allow 180 days for this filing, since permittees will have already made substantial commitments under the authority of the permit by this time. We suggest 60 days as a more reasonable timeframe. We realize that this requires changing EPA's regulation 40 CFR 7.120(b)(2). Consequently, we request that the regulation be amended accordingly.

Page 39676, VI.A. Step 1. We recommend changing the language in the third bullet which reads, "…determine whether the permit action that triggered the complaint significantly decreases those pollutants of concern…" to read, "…determine whether the permit action that triggered the complaint significantly decreases emissions of those pollutants from the permitted facility which are of concern …" Otherwise, the sentence,

as written, might be construed to mean that, for example, a small particulate-emitting facility would have to significantly reduce ambient concentrations of particulates in the airshed before EPA would close the investigation. Note that small emitters who make significant reductions in their own emissions would not have the potential to make a significant reduction in pollutant levels in ambient conditions beyond a very localized area. EPA should close the investigation when an emitter makes a significant reduction in its own emissions, irrespective of the magnitude of effect this may have in the ambient environment.

Page 39680, VI.B.4. We suggest changing the title of this subsection from “Adverse Impact Decision” to “Significant Adverse Impact Decision” in order to make it consistent with the text. Additionally, we support the concept that an impact must be significant in order for it to be considered further in an investigation.

Page 39681, VI.B.5.a. Use of mathematical models and other quantitative methods of predicting the “footprint” of the impact zone is sound. We have been dismayed by approaches we have seen in NEPA Environmental Justice analyses that used arbitrarily-drawn circles around a facility to represent impact zones and, sometimes, reference populations. The Guidance inappropriately supports this crude approach as an alternative to the use of quantitative predictors, when better predictors are inapplicable. We agree that there could sometimes be situations when a quantitative model cannot be used and a well-reasoned approximation is the only choice. However, we encourage the Guidance to stress that this alternate approach is very crude and should only be used as a last resort, lest it become a convenient default when quantitative prediction is merely more difficult to perform.

Page 39681, VI.B.5.b. While we are aware that some EPA Regions consider the statewide average minority population percentage to be meaningful in a comparison, and some publish maps that show “minority” areas that are a small multiple of the statewide average, it is exceedingly rare when a state’s population would be an appropriate reference population. It is a statistical fact that, the more unlike the reference population is from the impacted population, the more likely a call of disparity will be [erroneously] made. The percentage minority in an entire state is almost always very different from any particular smaller area (e.g., an impacted population). Consequently, indiscriminate use of such a large area as a reference population introduces bias into an analysis.

Page 39681, VI.B.5.b. The comparison described in the fourth bullet practically assures a finding of disparity in every permit action. By subdividing the minority population “by demographic group” (e.g., disaggregating the population into its component races and ethnic groups) EPA is almost certain to find a disparity involving some race. Except where the impacted population is 100% non-minority, it would be exceedingly rare to find that the percentage of all impacted races is roughly equal to their percent occurrence in the general population. We recommend that the analysis consider the minority population as a whole to avoid this unworkable outcome and because we see no real justification for doing otherwise.

Page 39681, VI.B.6. We fully appreciate the difficulty in defining the point at which a significantly adverse impact has reached the level of “disparate effect” on the minority population. We also acknowledge that there are two frameworks in which disparity can be considered (wide disparity in the level of risk or impact, and wide disparity in the proportion of minorities to non-minorities exposed to the risk or impact) and that any particular analysis may show great disparity by one measure and not by the other. Overarching these dilemmas, however, are two necessities which provide the context within which to begin to solve

the dilemma. First, a threshold of disparity must be set sufficiently high that it does not practically preclude all development, nor development in predominantly minority locations. Secondly, since discrimination is a very serious charge, the degree of disparity that triggers this determination should be equally serious. In general, we agree with EPA that a disparity measured at three standard deviations from the mean is appropriate. Consistent with this, we have some specific comments on the eighth paragraph in VI.B.6.

In making a finding of disparate impact, we believe that the disparity must be wide in both the level of risk or impact and in the proportion of minority-to-nonminority persons exposed. The rationale for this is, it would be inappropriate to adjudge a discriminatory effect on the minority population when, for example, twenty minority individuals out of 100 people are exposed to an intense (i.e., three standard deviations) adverse impact while 80 non-minority individuals are similarly exposed. Conversely, it would be equally inappropriate to determine that the threshold of discrimination has been reached, even if 98 of 100 exposed individuals are minority, when the risk or effect is below a threshold of significance. Consequently, both thresholds need to be exceeded before reaching a conclusion as serious as racial discrimination.

This would also eliminate the need for EPA to “attempt to balance these factors” when one measure indicates disparity and the other does not. We know of no objective method to achieve this balance. Consequently, any attempt would merely lead to unproductive argument.

We are puzzled by the statement in the eighth paragraph that reads, “Similarly, where the disparity of both demographic characteristics and impacts are relatively slight, a finding of disparate impact is somewhat less likely (e.g., in cases where both the disparity of impact and demographics are not statistically significant).” When the disparity in both cases is slight, there should be no finding of disparate impact.

Page 39683 VII.A.1. In describing justification, the draft Guidance indicates that, “Generally, the recipient would attempt to show that the challenged activity is reasonably
necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission.” Note that many legitimate and important activities are not integral to the recipient’s institutional mission, since the recipient is typically only performing a regulatory function. A legitimate and important project like a power plant or temporary installation of an asphalt batch plant (to support needed facility construction) is not integral to any recipient’s mission. Consequently, we suggest that the draft Guidance be revised here and throughout to read, “Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate and important.”

Page 39690. This section says that, “Under the draft Revised Investigation Guidance, OCR expects that any type of permit actions…could form the basis for an investigation if the permit allows existing levels of alleged adverse disparate impacts to continue unchanged or causes an increase (e.g., landfill capacity doubled).” We ask that the clause in parentheses be omitted. The common misconception, that the presence of undesirable facilities rather than actual impacts is sufficient demonstration of discrimination, is the source of many unproductive complaints. We don’t believe that EPA intended to perpetuate this misunderstanding by the example used in the draft Guidance.

Conclusion

As mentioned above, we believe that EPA's revised draft guidance represents a substantial improvement over the 1998 Interim Guidance. Despite these improvements, however, the guidance is still in need of substantial revision because it will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders. For that reason, we urge substantial further revisions, as described in these comments, before EPA issues the draft Guidance in final form.

ARTBA is committed to working with EPA and other stakeholders to address environmental justice concerns. We hope that these comments will help EPA in its efforts in this regard.

- 082800 Final Comments.doc
- 082800 Title VI Transmittal Letter.doc

Association of State and Territorial
ASTSWMO
Solid Waste Management Officials

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August 25, 2000

Title VI Guidance Comments
Director, Office of Civil Rights (1201A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Ms. Goode:

SUBJECT: ASTSWMO Docket Comments on EPA's Revised/Draft Title VI Guidances, as outlined in the *Federal Register* of June 27, 2000, (65 FR 39650).

The purpose of this letter is to provide brief comments regarding the referenced draft EPA guidances for both recipients and federal investigators regarding allegations of CRA Title VI disparate effects related to environmental permitting programs. First, it is appropriate to recognize that the State Environmental Commissioners, organized within their association known as the Environmental Council of the States, have invested countless hours in study and consultation in conjunction with EPA and other stakeholders to help shape the current draft guidances. We are aware of their recent commentary on the guidances, and recognize that as the most extensive and comprehensive review of the guidances by State reviewers. Our comments are entirely consistent with their views, and should be considered by the Agency as supplemental to that more comprehensive review.

ASTSWMO was one of many critical commenters to the 1998 Interim Title VI Guidance, and we commend EPA for its efforts to incorporate many of the earlier criticisms in developing the current guidances. We asked for more detail, definition, clarity, and linkage with EPA's own rules regarding the subject. These revised documents show evidence of considerable effort to apply those criticisms, and result in much more understandable and structured documents. We remain somewhat unconvinced that the degree of clarity is what is necessary to allow optimum interaction among various levels of government in seeking solutions to allegations of disparate effects, but we believe EPA has moved the process forward, and future revisions may yet capture that level of efficient interaction. There are a number of problem areas which require resolution as soon as possible:

- The low threshold of specificity for an acceptable complaint alleging discriminatory effects remains disproportionate to the resources government agencies at all levels, from EPA to States to local governments, will invest in determination and resolution of the allegation. We understand EPA's legal and

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moral obligations to investigate any allegation, especially those of groups or individuals without resources to conduct elaborate analyses and health studies. However, we think that more effort should be made to identify incremental approaches which will rather quickly allow identification of serious situations requiring such extensive analyses, and those more indeterminate and less threatening requiring less complex solutions. There appears to be only one basic investigatory path outlined in the current guidances.

- Despite the Agency's efforts to develop the methods for determining impact and demographic analysis, the resultant descriptions in both guidances only underscore the weaknesses of our current tools in determining cumulative impact and practical ways to assess relief among permitted and non-permitted activities. One is struck by the scope of the task that EPA is building for its own investigators and other levels of government, especially in light of the limited scientific tools presently available. Again, we are concerned with the demands this places on our limited resources and suggest the Agency continue to explore more incremental approaches to accepting complaints and conducting investigations. We should not raise expectations beyond our capabilities.

- Finally, there is one area of concern which we noted in the 1998 Interim Guidance that does not appear to have been resolved or adequately clarified. We continue to be uncertain of EPA's expectations of a State waste permitting program vis-a-vis the program's authority or jurisdiction, or lack thereof, over other permitted or non-permitted activities, especially in dealing with cumulative risk scenarios. The discussion of Investigative Procedures in the Draft Revised EPA Internal Guidance document, and the brief encouragement for intergovernmental involvement in the Draft Recipients Guidance do not resolve this uncertainty for us. We ask EPA to continue to work to bring clarity to this fundamental question of responsibility and accountability of permitting programs and agencies. We want to understand just what the Agency expects from us, and if those expectations are beyond our program jurisdiction, just how EPA believes we are to resolve the matter.

We thank you for the opportunity to comment on these important documents, and for the Agency's obvious efforts in outreach and inclusiveness in the continuing refinement of these guidances. Again, please consider our brief comments as complementary to the extensive analysis of the State Environmental Commissioners, who have already provided the Agency definitive State commentary.

Sincerely,

Michael A. Kelly

Michael A. Kelly
President, ASTSWMO

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VERA S. KORNYLAK
STAFF ATTORNEY
NAPIL FELLOW

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

Dear EPA Office of Civil Rights:

Thank you for the opportunity to submit comments on the above referenced draft guidance documents. We were disappointed to receive the Federal Register Notice in mid-August, barely providing enough time to make comments. Please double check that we are on the appropriate mailing list to receive notices on items available for public comment by EPA's Office of Civil Rights in a timely fashion. Despite the limited time frame, we have the following comments on the Guidance Documents:

I. Comments on Draft Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

1. Enforcement Threat Must Exist

Throughout the Guidance Documents, EPA states several times that "EPA encourages the use of informal resolution to address Title VI complaints whenever possible." 65 Fed. Reg. 124 at 36955, 39669 (and other locations) June 27, 2000 (hereafter "Draft Guidance"). While we agree that informal resolution may in certain circumstances be the preferred method for resolving a Title VI problem, more often, we believe that Title VI violations will only be truly resolved with the threat of EPA enforcement action. The Guidance Documents list several principles, including that "Strong civil rights enforcement is essential." Id. at 39669. The fact of the matter is that if voluntary compliance agreements and informal resolution were an adequate and effective means for enforcing Title VI, Title VI would have no place in American law because companies, agencies, and other entities would conduct themselves in a manner that did not discriminate on the basis of race, color, or national origin. Unfortunately,

such discrimination occurs regularly throughout the United States, particularly in the siting of facilities and issuance of permits.

We believe that the strength and effectiveness of Title VI can be judged in great part by the willingness of EPA and other government entities to enforce the act. Without adequate, regular, and strong enforcement of Title VI, there will never be environmental equality. We suggest that in the Guidance Documents, EPA specifically address different types of enforcement mechanisms EPA may employ to ensure compliance with Title VI. Furthermore, that EPA focus on promising to enforce Title VI as opposed to reassuring recipients of federal funds that informal resolution is the preferred method for solving a dispute.

Finally, we find it inapposite that EPA is charged with enforcing Title VI, yet specifically excludes itself from abiding by Title VI. Draft Guidance at 39669. While the Draft Guidance does state that EPA "is committed to a policy of nondiscrimination in its own permitting programs," we are concerned that such a commitment is not legally enforceable and EPA may, in its discretion, choose not to be so committed in certain circumstances. EPA clearly has authority to govern itself according to the ideals and goals enumerated in Title VI. EPA's self-exclusion from this important federal law weakens the power of Title VI to promote and sustain environmental equality. We urge EPA to make a legal commitment to the principles and guidelines of Title VI, and follow them in administering all the environmental laws and programs that EPA is charged with administering.

2. Adverse Impact Analysis Tools

The Draft Guidance discusses various tools for evaluating adverse impact. Draft Guidance at 39660. While the tools described are important to conducting a proper adverse impact analysis, the fact that such an analysis is not *required* greatly defeats the purpose of Title VI and reduces the chances of achieving environmental equality as soon as possible. EPA should examine the possibility of instituting a required adverse impact analysis so that every permit issued would contain such an analysis. While such a system may delay the issuance of a new permit, it would ensure that permits are not issued in a discriminatory manner.

II. Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

Substantial and Legitimate Justification

We believe that EPA excluded important information from its discussion on the substantial, legitimate justification in the Draft Guidance. Draft Guidance at 39683. The Draft Guidance does not make it absolutely clear that the substantial and legitimate justification must be non-discriminatory.[1] We suggest EPA include further guidance on the

[1] *See e.g. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (under Title VII, any exception to the statute in the form of a legitimate business reasons or interests must be non-discriminatory).

substantial and legitimate justification to avoid needless litigation over a proposed discriminatory "substantial and legitimate justification."

The Draft Guidance also fails to recognize that to the extent state actions are implicated in a Title VI complaint, the legal standards established by EPA for review of the state's action may be inapplicable because the U.S. Constitution establishes a more involved and protective standard to review adverse impact resulting from classifications of people on the basis of race, color, and national origin. For example, this heightened standard would be applicable to a state-run NPDES permit program where the issuance of a permit may be a "state action" that triggers Constitutional standards above and beyond those set by EPA. EPA's clarification of this issue is likely to ensure that everyone understands Title VI and its standards and limitations.

* * * * *

If you have any questions regarding these comments, please feel free to contact me at 520-529-1798. Thank you.

Sincerely,

Vera S. Kornylak

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Title VI Guidance Comments
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VERA S. KORNYLAK
STAFF ATTORNEY
NAPIL FELLOW

August 28, 2000

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US Environmental Protection Agency
Office of Civil Rights (1201A)
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Washington, DC 20460

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* * * * *

If you have any questions regarding these comments, please feel free to contact me at 520-529-1798. Thank you.

Sincerely,

Vera S. Kornylak

MEMORANDUM

SUBJECT: Response to NEJAC Action Item PC242

FROM: Ann Goode, Director
Office of Civil Rights (1201A)

TO: Charles Lee, Associate Director
Office of Environmental Justice

Thank you for your recent memorandum regarding comments received at the recent NEJAC meeting. I am replying directly to you, rather than to the commentor as requested, in order to provide information concerning OCR's activities in this area.

The commentor, Mr. Jerome Balter of the Public Interest Law Center of Philadelphia, provided several suggestions that he believes would be appropriate to consider in the context of enforcing the provisions of Title VI of the Civil Rights Act of 1964. Both prior and subsequent to the NEJAC meeting, OCR staff have met with Mr. Balter to receive more detailed information concerning his suggestions. In addition, the Public Interest Law Center provided written comments on the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*. OCR is in the process of reviewing all the comments received on this document, pursuant to the preparation of a final version.

As background information which may be of interest to your office and the NEJAC, OCR provided a discussion of its perspective and response to many of the issues raised in Mr. Balter's comments in a document published concurrently with the draft revised guidance, entitled, *Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance*. This discussion included:

> [The] primary elements of the proposal include: (1) defining the affected area as a circle of radius one-half to one mile from the facility; (2) assessing the public health status of the affected population based on mortality, cancer, infant mortality and low birth weight rates; and (3) determining the health rate to be substandard when it deviates by 10 to 20 percent from the "standard" (comparison population) rate. Permits to build or operate a new facility in any area with substandard health rates would be prohibited. The commenter asks whether this proposal could be adopted by OCR.

Response:

Both Title VI and EPA's implementing regulations prohibit discrimination on the basis of race, color, or national origin in the programs and activities of EPA financial assistance recipients. As a result, a finding of non-compliance with the statute or regulations requires a finding that the programs or activities of a recipient involved intentional discrimination or caused a discriminatory effect.

The proposal does not appear to require any link between the adverse health effects and the programs or activities of a recipient. In addition, it does not consider any disparity on the basis of race, color, or national origin. While the proposal may warrant consideration as a way of identifying public health "hot spots," it would not be an appropriate basis for OCR to make a finding of non-compliance with Title VI or EPA's implementing regulations.

In addition, the draft revised investigation guidance discusses the potential use of health status information in an adverse disparate impact assessment in Section VI. B. 3.

cc: Marva E. King, NEJAC Program Manager, Office of Environmental Justice

Keith McCoy

Director, Environmental Quality

Resources, Environment and Regulation Policy

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Sir or Madam:

The Business Network for Environmental Justice (BNEJ) is pleased to submit comments regarding the U.S. Environmental Protection Agency's (EPA) "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Investigation Guidance). The BNEJ is a voluntary organization, based at the National Association of Manufacturers, of industry and industry trade associations interested in environmental justice issues. We believe that all people should be treated fairly under the laws, including environmental laws, without discrimination based on race, color or national origin.

In many respects, EPA's Investigation Guidance represents a substantial improvement over EPA's 1998 Interim Guidance. We commend EPA for the outreach, public participation, and stakeholder dialogue effort that has occurred over the last two years, including the intensive work that went into the Title VI Federal Advisory Committee Act ("FACA") process.

The BNEJ is pleased to see that the draft of the revised investigation guidance is based on principles with which we agree: 1) All persons are entitled to a safe and healthful environment; 2) Strong civil rights enforcement is essential; and 3) Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development.

Unfortunately, the draft revised investigation guidance does not provide the predictability and certainty that is crucial to any effective environmental-permitting process. Therefore, the BNEJ concludes that the Investigation Guidance is still in need of substantial revision.

The BNEJ comments focus on three major areas posed by the Investigation Guidance:

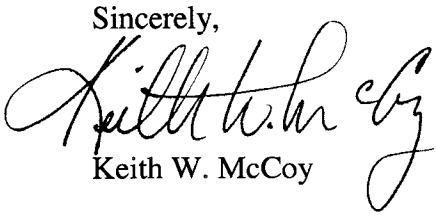
- Title VI was never intended to guarantee equal results or to prohibit all unintentional "disparate impacts" that yield unequal environmental results.

- The proposed process for investigating Title VI complaints does not provide a predictable basis for determining which "disparate impact" situations actually violate the law.

- The proposed process should be made fairer to the community, the recipient and the permittee.

The BNEJ is committed to working with the EPA and other stakeholders, and we believe the BNEJ can bring significant experience and expertise to the table. We appreciate this opportunity to comment, and look forward to significant further dialogue on this very important issue.

Sincerely,



Keith W. McCoy

(b) (6) - Privacy on 08/28/2000 11:12:24 AM

To: Group Civilrights
cc:

Subject: Comments from (b) (6) - Privacy on EPA

>
> Please forward my comments asking that the civil
> rights of communities to
> fight environmental sites in their neighborhoods be
> strengthened, not
> weakened. As a member of the US Civil Rights
> Commission Louisiana Advisory
> Board which years ago found serious environmental
> problems in poor and
> minority neighborhoods, I know that communities have
> few resources to fight
> for their protection. Please improve not weaken
> these protections.
> (b) (6) - Privacy
>
>

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EPA DRAFT TITLE VI GUIDANCE MISSES MARK

Robert D. Bullard

In the real world, all communities are not created equal. Some are more equal than others. If a community happens to be poor, powerless, or inhabited largely by people of color, it receives less protection than the affluent white suburbs. Congress enacted the Civil Rights Act of 1964, Title VI, which prohibits recipients of federal financial assistance from discriminating against persons on account of race, color, or national origin. This law covers the U.S. EPA, established in 1970, and all fifty states. The agency issued Title VI implementing regulations in 1973 and amended them in 1984.

Beginning in 1992, communities began filing Title VI complaints. Presidents Clinton signed the Environmental Justice Executive Order 12898 in 1994. By 1997, over two-dozen Title VI complaints had been filed with the EPA, prompting the agency to begin drafting Title VI guidance. It also established a national advisory committee, under the Federal Advisory Committee Act or FACA, to study the problem. In June 2000, after eight years and 45 complaints (including the original five complaints filed in the early 1990s), EPA issued its Draft (Revised) Title VI Guidance.

The draft guidance can be described in two words—"total disaster." The Interim National Black Economic and Environmental Justice Coordinating Committee (INBEEJCC), a network of over 300 black organizations, says the draft guidance fails to recognize that the concentration of waste sites and toxic facilities in communities of color is a form of racial discrimination that violates the civil rights of people of color who live in these communities, creates a difficult and highly technical standard of "proof" this is biased in favor of state environmental protection agencies and the industries that they

regulate and grant permits, fails to recognize that any justification that can be offered by a state environmental agency must be limited to the substantial, legitimate interest of that agency, excludes communities of color from the appeal process—yet allowing states several appeal avenues, including appealing to an administrative judge.

Lay and legal environmental justice and civil rights advocates alike echo this sentiment. Jerome Balter, an attorney with Public Interest Law Center of Philadelphia and attorney for the plaintiffs in the Chester, Pa. Title VI lawsuit—a case that made its way to the U.S. Supreme Court—says the EPA should withdraw the draft guidance. Balter fears it would be used as an "incorrect legal basis for determining compliance or violation of environmental civil rights and would compound the error by using uncertain data and uncertain science."

By failing to recognize that African American and other people of color communities have be illegally targeted for toxic industries, the EPA has made a fundamental error and abandons established civil rights law—rights that were won in the streets, jails, and in the courts. The federal EPA should be in the business of protecting everyone and enforcing the law without regard to race, color, or national origin—rather than raising the legal bar and making it next to impossible to prove discrimination.

rbullard@cau.edu on 08/28/2000 03:44:32 PM

To: Group Civilrights@EPA
cc:

Subject: Comments on Draft Title VI Guidance

Dear Sir:

Please find my comments on the EPA Draft Title VI Guidance:

EPA DRAFT TITLE VI GUIDANCE MISSES MARK

In the real world, all communities are not created equal. Some are more equal than others. If a community happens to be poor, powerless, or inhabited largely by people of color, it receives less protection than the affluent white suburbs. Congress enacted the Civil Rights Act of 1964, Title VI, which prohibits recipients of federal financial assistance from discriminating against persons on account of race, color, or national origin. This law covers the U.S. EPA, established in 1970, and all fifty states. The agency issued Title VI implementing regulations in 1973 and amended them in 1984.

Beginning in 1992, communities began filing Title VI complaints. Presidents Clinton signed the Environmental Justice Executive Order 12898 in 1994. By 1997, over two-dozen Title VI complaints had been filed with the EPA, prompting the agency to begin drafting Title VI guidance. It also established a national advisory committee, under the Federal Advisory Committee Act or FACA, to study the problem. In June 2000, after eight years and 45 complaints (including the original five complaints filed in the early 1990s), EPA issued its Draft (Revised) Title VI Guidance.
The draft guidance can be described in two words--"total disaster." The Interim National Black Economic and Environmental Justice Coordinating Committee (INBEEJCC), a network of over 300 black organizations, says the draft guidance fails to recognize that the concentration of waste sites and toxic facilities in communities of color is a form of racial discrimination that violates the civil rights of people of color who live in these communities, creates a difficult and highly technical standard of "proof" this is biased in favor of state environmental protection agencies and the industries that they regulate and grant permits, fails to recognize that any justification that can be offered by a state environmental agency must be limited to the substantial, legitimate interest of that agency, excludes communities of color from the appeal process-yet allowing states several appeal avenues, including appealing to an administrative judge.

Lay and legal environmental justice and civil rights advocates alike echo this sentiment. Jerome Balter, an attorney with Public Interest Law Center of Philadelphia and attorney for the plaintiffs in the Chester, Pa. Title VI lawsuit-a case that made its way to the U.S. Supreme Court-says the EPA should withdraw the draft guidance. Balter fears it would be used as an "incorrect legal basis for determining compliance or violation of environmental civil rights and would compound the error by using uncertain data and uncertain science."

By failing to recognize that African American and other people of color communities have be illegally targeted for toxic industries, the EPA has made a fundamental error and abandons established civil rights law-rights that were won in the streets, jails, and in the courts. The federal EPA should be in the business of protecting everyone and enforcing the law without regard to race, color, or national origin-rather than raising the legal bar and making it next to impossible to prove discrimination.

Robert D. Bullard, Ph.D.
Environmental Justice Resource Center
Clark Atlanta University
223 James P. Brawley Drive
Atlanta, Georgia 30314
(404)880-6911(ph) (404)880-6909 (fax)
Website: www.ejrc.cau.edu

- EPA DRAFT TITLE VI GUIDANCE MISSES MARK.doc

August 28, 2000

Via U.S. Mail & Electronic Mail

United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, D.C. 20460
[civilrights@epa.gov]

Re: **CCEEB's Comments on EPA's Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits [65 FR 39650 et seq.]**

To Whom It Concerns:

Following are the comments of the California Council for Environmental and Economic Balance ("CCEEB") regarding the following two draft guidance documents of the U.S. Environmental Protection Agency ("EPA"):

A. the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting; and

B. the Draft Revised Title VI Guidance for Investigating Title VI Administrative Complaints Challenging Permits (the "Draft Revised Investigation Guidance"). [65 FR 39650, et seq.]

CCEEB is a statewide, private, non-profit, non-partisan coalition of business, organized labor, and public leaders who work together to advance collaborative strategies for a sound economy and a healthy environment. Many of CCEEB's members operate industrial facilities pursuant to environmental permits issued by the State of California or its agencies or subdivisions (such as the 35 air districts and the 9 Regional

Water Quality Control Boards). Thereby, the two draft guidance documents are of direct interest to our Members.

CCEEB provided extensive comments in May of 1998 on EPA's Interim Guidance for Investigating Title VI Complaints Challenging Permits (the "Interim Guidance"). Although the Draft Revised Investigation Guidance is significantly improved relative to the Interim Guidance, CCEEB still has serious concerns regarding both the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We appreciate the opportunity to provide comments at this time.

In 1999, CCEEB published its environmental justice principles in the attached document entitled Environmental Justice Principles and Perspectives. Our comments are based on those principles.

CCEEB appreciates EPA's consideration of these comments. If you have any questions, please contact me at (415) 512-7890 or CCEEB's General Counsel Cindy Tuck at (916) 442-4249.

Sincerely,

VICTOR WEISSER
President

VW/CKT
Enclosures

cc: Mr. Jackson Gualco
Mr. Bill Quinn
Mr. Robert Lucas
Ms. Cindy Tuck

COMMENTS OF THE CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE

ON

U.S. ENVIRONMENTAL PROTECTION AGENCY'S

DRAFT TITLE VI GUIDANCE FOR EPA ASSISANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS

AND

DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

[65 FR 39650 et seq.]

August 28, 2000

I. INTRODUCTION

Following are the comments of the California Council for Environmental and Economic Balance ("CCEEB") regarding the following two draft guidance documents of the U.S. Environmental Protection Agency ("EPA"):

A) the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("Draft Recipient Guidance"); and

B) the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigation Guidance"). [65 FR 39650, et seq.]

CCEEB is a statewide, private, non-profit, non-partisan coalition of business, organized labor, and public leaders who work together to advance collaborative strategies for a sound economy and a healthy environment. Many of CCEEB's members operate industrial facilities pursuant to environmental permits issued by the State of California or its agencies or subdivisions (such as the 35 air districts and 9 Regional Water Quality Control Boards). Thereby, the two draft guidance documents are of direct interest to our Members.

CCEEB provided extensive comments in May of 1998 on EPA's Interim Guidance for Investigating Title VI Complaints Challenging Permits (the "Interim Guidance"). Although the Draft Revised Investigation Guidance is significantly improved relative to the Interim Guidance, CCEEB still has serious concerns regarding both the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We appreciate the opportunity to provide comments at this time.

In 1999, CCEEB published its environmental justice principles in the attached document entitled Environmental Justice Principles and Perspectives. Our comments are based on those principles.

II. COMMENTS THAT PERTAIN TO BOTH THE DRAFT RECIPIENT GUIDANCE AND THE DRAFT REVISED INVESTIGATION GUIDANCE

Following are comments that pertain to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance.

A. EPA Should Add a Guiding Principle Related to Providing Certainty.

In the Introduction sections of both sets of draft guidance, EPA states guiding principles that EPA proposes to adhere to in the implementation of Title VI and this draft guidance. CCEEB suggests that EPA add the following principle:

> "The guidance, and implementation of the guidance, should provide the greatest possible clarity and certainty for all stakeholders."

CCEEB believes that environmental justice programs must clearly define terms and establish reasonable goals, objectives and methods to demonstrate compliance. Increased certainty for all stakeholders will both improve EPA's ability to provide fair treatment for all people and help to avoid the counterproductive effect of putting the states' economic growth in jeopardy due to uncertainty in environmental permitting programs. Many of the comments that follow relate to the need to provide more clarity and certainty in the proposed terms, processes and procedures.

B. The Guidance Provides No Clear Standards for Determining if an Adverse Disparate Impact that Violates Title VI Exists.

As EPA is aware, the crux of both draft guidance documents comes down to the definitions of key terms that will be used to judge whether or not there is compliance with Title VI. CCEEB recognizes that EPA has added definitions to the Draft Guidance in response to comments on the Interim Guidance. (Many of the comments noted that the Interim Guidance text was so vague that it was impossible to comprehend how the program would be implemented.) Although the inclusion of definitions is a step in the right direction, the proposed terms and the corresponding text in the two draft guidance documents do not provide clear standards for determining if an adverse disparate impact that violates Title VI exists. Clear standards are needed to provide certainty to stakeholders and to allow EPA to evaluate progress in this program. In reviewing this issue we reviewed the proposed definitions of the following terms:

"impact"
"adverse impact"
"significant"
"statistical significance"
"disparity (disparate impact")

EPA proposes to define "impact" as:

> (…) a negative or harmful effect on a receptor resulting from exposure to a stressor (e.g. a case of diseases). The likelihood of occurrence and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity. [65 FR 39666 and 65 FR 39685]

EPA proposes to define "adverse impact" as:

> a negative "impact" that is determined by EPA to be <u>significant</u>, based on comparison with benchmarks of significance. These benchmarks may be based on law, policy, or science. [65 FR 39665 and 65 FR 39664, emphasis added.]

1. The Proposed Definition of "Significant" is Vague and Ambiguous.

EPA proposes to define "significant" as:

> A determination that an observed value is sufficiently large and meaningful to warrant some action. (See ***statistical significance***.) [65 FR 39667 and 65 FR 39686, emphasis added.]

This definition is vague and ambiguous and should be clarified. On one hand, it defines "significant" as a value that is sufficiently large and meaningful to warrant some action. On the other hand, the reference to "statistical significance" could be read to greatly broaden what is significant by implying that a value is sufficiently large and meaningful to warrant some action if it is statistically significant. Such a definition would be inconsistent with Title VI law. (See below.)

EPA proposes to define "statistical significance" as:

> an inference that there is a low probability that the observed difference in measured or estimated quantities is due to variability in the measurement technique, rather that due to an actual difference in the quantities themselves. [65 FR 39667 and 65 FR 39686]

2. The Draft Guidance Fails to Clarify that the "Significance" of Adverse Disparate Impacts Must be Determined by Application of Legal Standards, Rather than by Statistical Methods Alone.

EPA proposes to define "disparity" or "disparate impact" as:

> A measurement of a degree of difference between population groups for the purpose of making a finding under Title VI. Disparities may be measured in terms of the respective composition (demographics) of the groups, and in terms of the respective potential level of exposure, risk or other measures of adverse impact. [65 FR 39665 and 65 FR 39684]

At Page 39682 of the notice, EPA states that if the "disparity" is not "significant," the complaint will likely be closed. It is a step in the right direction that EPA is proposing that the disparity must be significant. As noted above, however, with the proposed reference to "statistical significance" in the proposed definition of "significant," it appears that EPA could rely on mere statistical significance to determine that there was a "significant" disparity. At Page 39682, EPA proposes that the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved "statistical deviations" to at least 2 to 3 standard deviations. EPA goes on to say that other factors would be considered in the analysis. For example, at Page 39682, EPA states that one such factor would be whether the level of adverse impact is "a little or a lot" above the threshold of "significance." It is difficult for the reader to comprehend how all this will be implemented in practice – there are no clear standards.

Besides the brief definition of "significant" which is made ambiguous with the reference to "statistically significant," EPA fails to explain the meaning of significance under the law of Title VI. The Supreme Court and other courts have wrestled with the legal question of the "significance" of impacts in numerous cases. Those cases find that a statistical difference is not necessarily a "significant" disparate impact for purposes of establishing a Title VI violation. A determination of whether or not a disparate impact is de minimis, insignificant, or minor, is not a question that can be answered through the use of bare statistics. If the Guidance is to correspond with law, and to be of real assistance in future Title VI administrative complaints, it must not sidestep the difficult legal question but instead clarify the meaning of "significant disparity" under Title VI.

C. The Draft Guidance's Confusing View of Adverse Disparate Impact Places State Permitting Agencies in a Legal Dilemma.

If EPA's expansive and confusing view of "disparate impact" is applied to the states, a permitting agency will find itself on the horns of a legal dilemma. If it grants a permit in accordance with its existing permitting requirements, it later may face EPA's correction under the Guidance's broad and indefinite criteria for what is an adverse disparate impact. If it denies the permit or restricts its terms to accommodate the Guidance's uncertain criteria, it quickly may face the permit applicant's legal challenge that the agency has failed to abide by the terms of its environmental statutory obligations and has applied Title VI overbroadly and unlawfully. Obviously the Guidance should not place the states hovering on this high wire above legal liability and the associated expense and delay. If the Guidance could provide a clearer, lawful set of criteria for identifying prohibited discrimination, this dilemma would not exist, for states simultaneously could honor both their environmental and their civil rights obligations under the federal statutes.

III. COMMENTS SPECIFIC TO THE DRAFT REVISED INVESTIGATIVE GUIDANCE

Following are comments that are specific to the Draft Revised Investigation Guidance. (See also comments in Section II. above that pertain to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance.)

A. SUBSTANTIVE COMMENTS AND CONCERNS

1. EPA Should Amend the Guidance so that Permit Decisions that Decrease Emissions or Discharges or Simply Allow the Existing Permit Conditions to Continue Would not be the Basis for a Complaint.

At Page 39677 of the Federal Register Notice EPA proposes that:

> Allegations that concern impacts resulting from a recipient's permitting actions can arise in several different contexts:
> 1) The issuance of new permits;
> 2) the renewal of existing permits; and
> 3) the modification of existing permits.

EPA should amend this section of the Draft Revised Investigation Guidance language to provide that permit decisions that decrease emissions or discharges or simply allow the existing permit conditions to continue would not be the basis for a complaint. (In addition to amending the language quoted above, EPA should delete the bullet on Page 39677 that refers to "permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged.") EPA should also amend Section III.A. regarding the criteria for the acceptance/rejection of a complaint to provide that complaints will be rejected if they pertain to permit decisions that decrease emissions or discharges or simply allow the existing permit conditions to continue.

In the case of permit decisions that simply allow the existing permit conditions to continue (i.e., permit renewals), the permittee has already invested substantial capital in reliance on the permit. Existing facilities are, by definition, not new facilities, and the law demands different treatment of them. Existing facilities--that already have environmental permits which occasionally come up for renewal--present very different types of considerations for regulatory agencies from those presented by permit applications for entirely new facilities. Existing facilities obviously represent commitments of investment, employees' reliance on jobs, customers' reliance on contracts for goods and services, the dependency of suppliers and community businesses on the existing facility, local governments' land use decisions and interests in property tax and other revenues, etc. It should be emphasized, in this regard, that EPA actions that interfere with investment-backed expectations and vested rights, in as broad a fashion as this Guidance suggests, might very well be found to constitute takings of property for which compensation would have to be paid in accordance with the due process requirements of the Constitution.

2. The Most Effective and Equitable Way to Address Environmental Title VI Violations is Through Programmatic Adjustments that Follow Due Process and are Based on Sound Science.

A permit applicant/holder should be able to comply with zoning requirements and environmental requirements and not fear that its permit will be put into jeopardy even though the facility meets those requirements. At Page 39654 of the Federal Register notice, EPA states correctly that:

> it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists;

> therefore, denial of the permit at issue will not necessarily be an appropriate solution.

EPA goes on to state in the Draft Revised Investigation Guidance at Page 39674 that:

> (…) recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing sources, including the permit at issue, using the recipient's existing permitting authorities. Such measures include changes in policies or procedures, additional pollution control, pollution prevention, offsets, and emergency planning and response.

CCEEB suggests that EPA clarify this section by providing that an appropriate means of resolution is for the recipient to go back and adjust that portion of its regulatory program that resulted in the Title VI violation – i.e., a programmatic adjustment. Such adjustments should be: 1) based on sound science and equitable considerations; and 2) provide adequate opportunities for public participation.

As a point of information, the California State Legislature is currently advancing legislation (SB 89, Escutia) that would require the California Environmental Protection Agency to review its programs and address any gaps (deficiencies) that prevent its programs from achieving fair treatment for all people. CCEEB is supporting that legislation.

B. PROCEDURAL COMMENTS AND CONCERNS

1. CCEEB Supports EPA's Position that the Filing or Acceptance of a Title VI Complaint Does Not Invalidate a Permit.

At Page 39676, EPA proposes that "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." CCEEB supports this proposal which provides some certainty to permit applicants.

2. EPA Should Amend the Proposed Complaint Procedure to Set a Deadline for Resolution of a Complaint.

The current Draft Revised Investigative Guidance is unfair because permits could remain under challenge for excessively long periods of time. Consistent with Section 120 to Part 7 of Title 40 to the U.S. Code of Federal Regulations (40 CFR 7.120), EPA proposes that a complaint must be filed within 180 calendar days of issuance of the permit. Also consistent with that regulation, EPA proposes that the Office of Civil Rights ("OCR") may waive that time limit for good cause on a case-by-case basis. CCEEB suggests that EPA specify a deadline for final resolution of a complaint. Such a deadline is needed to provide greater certainty to permit holders that make financial investments based on the issuance of the permit.

3. EPA Should Amend the Draft Guidance to Allow the Permit Applicant/Holder and the Local Government Land Use Authority with Jurisdiction Greater Participation in the Investigation Process.

At Page 39673 of the notice, EPA discusses the process for resolution of complaints. EPA states that OCR "may seek participation from the complainant, the permittee, or others." EPA should amend the draft guidance to give the permit applicant/holder and the local government land use authority a right to participate in the investigative process. As EPA is aware, the permit applicant/holder may be directly affected by the resolution of the complaint (particularly if any violation is not addressed on a programmatic basis). As to the land use authority, these local agencies may be pivotal in making land use planning changes that minimize future disparate impacts. They should be allowed to participate in the investigative process.

IV. CONCLUSIONS

As explained in our comments above, CCEEB has serious concerns regarding the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We urge EPA to work to bring more certainty to this program. Increased certainty will improve EPA's ability to provide fair treatment for all people without creating the counterproductive effect of putting the states' environmental programs into a mode of uncertainty.

V. CONTACT INFORMATION

CCEEB appreciates EPA consideration of our comments. If you have any questions, please call CCEEB's President Victor Weisser at (415) 512-7890 or CCEEB's General Counsel Cindy Tuck at (916) 442-4249.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT

Resolution No. 99-15

A Resolution Adopting Guiding Principles of Environmental Justice for the Bay Area Air Quality Management District's Exercise of its Statutory Authority

WHEREAS, the Bay Area AQMD's Advisory Council's Public Health Committee developed a set of guiding principles for environmental justice for use by the District over a period of several months in 1998 through 1999; and

WHEREAS, the Advisory Council, on May 12, 1999, approved the guiding principles for environmental justice as drafted by its Public Health Committee and voted to recommend its adoption by the Board of Directors; and

WHEREAS, the Advisory Council's Guiding Principles for Environmental Justice state as follows:

> It is the District's intent to achieve clean and healthful air for all who live and work in the Bay Area, so that no segment of the population, regardless of race, national origin or income, bears disproportionately high and adverse health impacts of air pollution. To that end, the District will:
>
> -- Continue to ensure equal access to complaint resolution, rule and permit evaluation, and public resources, and assure equal enforcement activities.
>
> -- Continue outreach and education programs to strengthen the public's ability to participate in the District's Plan and rule development, and in community and individual activities for clean air.
>
> -- Solicit concerns and ideas from communities where there may be disproportionately high and adverse health effects.
>
> -- Work proactively to improve air quality for those disproportionately impacted communities through such actions as appropriate, including implementation of activities pertaining to pollution prevention; implementation of less-polluting alternative technologies; data collection and analysis; technical assistance; CEQA comments on project reviews; and support of state legislation and local ordinances as appropriate.

WHEREAS, the Advisory Council's recommended guiding principles for environmental justice was discussed at length at the Board's Executive Committee meeting of July 1, 1999; and

WHEREAS the Executive committee voted to direct staff to study those guiding principles for environmental justice for the purpose of developing a work plan that would take into consideration ongoing federal, state and local agency efforts in this area and to report back to the Board on an expeditious and periodic schedule; and

WHEREAS the Board of Directors, at their July 7, 1999 meeting, voted instead to have the guiding principles on environmental justice as set forth by the Advisory Council and reviewed by the Executive Committee formally adopted by resolution at their meeting on August 4, 1999.

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors hereby adopts the Guiding Principles for Environmental Justice for use by the District staff in the exercise of its statutory authority and creates an ad hoc committee to be appointed and led by Board Chairperson Nevin for the purpose of studying the issue of environmental justice further and providing policy direction to staff on the implementation of the Guiding Principles for Environmental Justice.

The foregoing resolution was duly and regularly introduced, passed and adopted at a regular meeting of the Board of Directors of the Bay Area Air Quality Management District on the Motion of Director King, seconded by Director Townsend, on the 4th day of August, 1999 by the following vote of the Board:

AYES: ATTAWAY, A. BROWN, H. BROWN, CARROLL, COOPER, HAGGERTY, HARPER, KING, MILLER, MOSSAR, NEVIN, TARVER, TORLIATT, TOWNSEND, UILKEMA, WAGENKNECHT

NOES: NONE

ABSENT: DeSAULNIER, GAGE, SMITH, YAKI

Michael D. Nevin

MICHAEL D. NEVIN
Chairperson of the Board of Directors

ATTEST:

William J. Carroll

WILLIAM CARROLL
Secretary of the Board of Directors

RNK:rk
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rkwong@baaqmd.gov on 08/28/2000 12:20:22 PM

To: Group Civilrights
cc:

Subject: Bay Area AQMD Comments to Draft Title VI Guidance

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TO:  U.S. Environmental Protection Agency
     Office of Civil Rights
     Washington, D.C.

FR:  Bay Area Air Quality Management District
     San Francisco, CA

Attached to this e-mail are the following three documents.
First, a cover letter from Ellen Garvey, Executive Officer,
Bay Area Air Quality Management District regarding the
above-referenced subject matter.  Second, a Bay Area Air
Quality Management District Board of Director Resolution
regarding the adoption of Guiding Principles for
Environmental Justice.  Third, detailed comments from the
Bay Area AQMD staff on the Draft Recipient Guidance and the
Draft Revised Investigation Guidance.

These same documents were sent to you via Federal Express.
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- title6~1.doc
- ejprin1.doc
- titlevi.dot

California Environmental Protection Agency

Air Resources Board ● Department of Pesticide Regulation ● Department of Toxic Substances Control
Integrated Waste Management Board ● Office of Environmental Health Hazard Assessment
State Water Resources Control Board ● Regional Water Quality Control Boards

Winston H. Hickox
Agency Secretary

Gray Davis
Governor

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

SUBJECT: *COMMENTS OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY REGARDING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS (DRAFT RECIPIENT GUIDANCE) AND DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (DRAFT REVISED INVESTIGATION GUIDANCE)*

The California Environmental Protection Agency (CalEPA) is pleased to submit the following comments regarding the United States Environmental Protection Agency's (US EPA) *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* (65 Federal Register Number 124, page 39650, June 27, 2000). CalEPA is the cabinet-level agency responsible for the environmental protection programs for the State of California. It is comprised of the Office of the Secretary and six Boards and Departments (Air Resources Board, California Integrated Waste Management Board, Department of Pesticide Regulation, Department of Toxic Substances Control, State Water Resources Control Board and the Office of Environmental Health Hazard Assessment). In addition to the comments of CalEPA, this documents contains the individual department comments of the Air Resources Board, the California Integrated Waste Management Board, the Department of Toxic Substances Control, the Department of Pesticide Regulation and the State Water Resources Control Board.

CalEPA's Boards and Departments receive assistance from US EPA to support federal environmental protection programs, including permitting, delegated to the State of California and to support other environmental protection activities. The State of California and CalEPA are committed to complying with the Civil Rights Act of 1964. In addition, CalEPA is required under state law to:

a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of

555 Capitol Mall ● Suite 525 ● Sacramento, California 95814 ● (916) 445-3846 ● Fax: (916) 445-6401

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people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.
c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.
d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
e) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency. (Public Resources Code of the State of California, Section 72000).

In implementing Section 72000 and other California statutes that mandate opportunities for public review of and input into permitting decisions, CalEPA's goal is to ensure that all Californians have access to the regulatory process and can feel confident that permitting decisions provide for protection of public health and the environment.

CalEPA would like to commend US EPA for its efforts in developing these new draft guidances. We recognize the improvements of the current draft guidance over the 1998 draft guidance in terms of offering more specific suggestions to state and local permitting agencies and clarifying aspects of the relationship between Title VI of the Civil Rights Act and permitting processes and decisions. CalEPA also appreciates the efforts by US EPA to gather input from a broad set of interested parties, including state and local regulatory agencies. CalEPA believes that the new draft guidances offer more specific suggestions for state and local permitting agencies with respect to public participation activities, disparate impact analysis and other data gathering and evaluation methodologies and opportunities for resolution of complaints.

CalEPA also commends US EPA for recognizing the role of state processes and programs by offering that it will give certain agreements "due weight." We encourage US EPA to consider expanding this concept beyond what is outlined in the draft guidance. We also strongly support US EPA's clarification that the filing or acceptance of a complaint does not suspend or stay a permit.

While CalEPA is encouraged by the direction that the draft guidances take in providing direction to state and local permitting agencies, we offer some suggestions on how they can be improved. We are concerned that US EPA is still only offering general guidance – the guidances are still too broad and vague to give a state any reasonable assurances about how complaints may be avoided, investigated and ultimately resolved, including

the need to offer more specificity about potential mitigation measures short of permit denial or loss of federal funding.

EPA should provide more detail about what kinds of program elements and public participation processes it will look for in giving state and local programs “due weight” in investigating complaints. While we appreciate US EPA’s efforts to give examples, more details are necessary to allow states to develop effective processes or programs that will go a long way towards avoiding complaints or addressing complaints.

We also believe that under Title VI, US EPA has more discretion than to only give “due weight” to effective state programs. US EPA should consider reviewing state programs upfront and creating a rebuttable presumption that a permit granted under a state program US EPA believes is adequate complies with Title VI. In addition, US EPA should clarify that in reviewing state programs and investigating Title VI complaints, US EPA will look at other state statutes that further the goals of Title VI. For example, in California, certain public participation requirements are embodied in the California Environmental Quality Act, the California Administrative Procedures Act, the Bagley-Keene and Brown Acts that govern public meeting and participation requirements for state or local boards that make permitting decisions.

In addition, while we understand US EPA’s criteria for accepting a complaint, US EPA should use its discretion under Title VI to require a threshold of evidence of intentional discrimination or discriminatory effects for complaints to be fully investigated.

Finally we urge US EPA to consider very carefully and clarify which kinds of permit renewals and what aspects of permit renewals are subject to de novo review under Title VI. Some aspects of permit renewals may be largely ministerial and opening all of a permit renewal to potential complaints may create an unnecessary resource drain on the permitting authority, the permitees and US EPA.

We ask US EPA to revise the guidance consistent with the comments of CalEPA and its Boards and Departments. US EPA should finalize the guidances so they can proceed to investigate and resolve complaints. Also, in light of the potentially substantial burdens on states to comply with the guidance, respond to complaints and where appropriate mitigate adverse impacts, US EPA should provide financial, technical assistance and training to the states.

CalEPA fully supports the comments of its Boards and Departments that appear below in this document. We would like to particularly highlight where the Boards and Departments have made specific suggestions on how to improve the guidance.

Comments of the Air Resources Board (ARB)

The Air Resources Board (ARB) prepared and submitted extensive comments to CalEPA in June 1998 on US EPA 's Interim Guidance for Investigating Title VI Complaints Regarding Permits. Some of these comments were incorporated into the CalEPA comments prepared by the Department of Toxic Substances Control and submitted to the US EPA by CalEPA. In the current draft documents, i.e., the Recipient Guidance and the Investigation Guidance, the US EPA has addressed many of our concerns and is to be commended for its continuing efforts to carry out the civil rights mission bestowed upon it by Title VI of the Civil Rights Act of 1964 and its implementing regulations set forth in 40 CFR Section 7.10 et seq.

Title VI of the Civil Rights Act provides, in pertinent part, that "[n]o person in the U.S. shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance". (42 USC Section 2000d).

The US EPA regulations, in turn, prohibit programs having a discriminatory effect, or "disparate impact" as well as those that are intentionally discriminatory. If US EPA finds a recipient agency in violation of the nondiscrimination mandate, it will initiate actions to suspend US EPA funding, and may take other actions as well. The "Investigation Guidance" outlines how US EPA will carry out its responsibility to process complaints to its Office of Civil Rights (OCR). The "Recipient Guidance" is intended to assist US EPA grant recipients take proactive steps to avoid violations and complaints.

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> "…it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists; therefore, denial of the permit will not necessarily be an appropriate solution. Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions."

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Comments of the California Integrated Waste Management Board (CIWMB)

The Integrated Waste Management Board has several active grants with the US EPA, which subject CIWMB to the non-discrimination provisions of Title VI. However, as noted in the comments below, it is not clear whether the CIWMB program for permitting solid waste facilities, because of the regulatory scheme with a state concurrence for a permit actually issued by local government, would be subject to Title VI complaints and therefore this guidance. Local Enforcement Agencies (LEAs) that have active US EPA grants would very likely be subject to the Title VI provisions and the guidance, since these entities actually issue the solid waste facility permit. Because CIWMB is the actual issuer of waste tire facility permits, it is clear that CIWMB would be subject to the Title VI provisions and guidance under the waste tire permitting program.

We have reviewed the draft guidance and submit the following comments:

1. The guidance states that once a discrimination complaint is filed, as part of a preliminary finding of noncompliance, US EPA "expects to assess whether the adverse disparate impact results from factors within the recipient's authority to consider as defined by applicable laws and regulations." In California, the issuance of a solid waste facility permit is a coordinated process between the LEA and CIWMB. The LEA obtains a permit application from the facility and develops a draft permit. CIWMB'S role is to review the draft permit and concur or object to the permit. However, the governing statutes set forth only very limited grounds under which CIWMB may object, i.e., whether the facility will operate in accordance with state minimum operating standards and financial assurance requirements, or whether the project is in compliance with the California Environmental Quality Act (CEQA) from the limited perspective of a "responsible agency." The LEA then issues the permit. Based on the aforementioned assessment process US EPA intends to follow, CIWMB'S limited authority to object to a permit, which does not include authority to either object based on disparate effects of the facility on surrounding population or object based on inadequate public participation activities, suggests its permit decision would necessarily be immune to Title VI complaints.

2. In the response to comments on the previous draft guidance (regarding claims that local zoning/siting decisions are most often the determining factor in where a facility will be located), US EPA states its view that because issuance of a permit is the necessary act that allows the operation of a source in a given location, a state permitting authority has an independent obligation to comply with Title VI, a direct result of its accepting Federal assistance. "[R]ecipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources." In light of comment #1, it is not clear whether US EPA believes this obligation to comply

would override an entity's lack of statutory authority to use Title VI grounds in a permit objection or denial.

3. Where CIWMB's permitting programs are subject to the guidance, both CIWMB and LEA staff will need to obtain extensive training in exposure, risk and demographic analysis techniques, cumulative impact assessments and disparate impact analysis, or some other source for this expertise would need to be obtained.

Comments of the Department of Toxic Substances Control (DTSC)

1. Although the siting of hazardous waste facilities is a local land use decision, the Department of Toxic Substances Control recognizes that it is responsible for ensuring that its permitting decisions not have an adverse disparate impact based on race, color or national origin. DTSC commends US EPA for clarifying that the adverse impacts for which recipients of federal funding will be held accountable are the health and environmental impacts on which DTSC has always focused, and which are cognizable under DTSC's authority. Implicit throughout both guidance documents is a recognition that these impacts are to be evaluated using the analytical tools that the states and the US EPA are constantly refining to measure health and environmental risks, and to determine their significance.

2. The suggestions in the Draft Recipient Guidance for Public Participation and Outreach are sound ideas that reflect the policies that DTSC has long put in practice.

3. The Draft Recipient Guidance has a useful list of resources for obtaining demographic and exposure data and of tools and methodologies for conducting adverse impact analysis. The most useful step that OCR can take to assist the states in ensuring non-discrimination will be to continually update these lists and to provide more specific guidance as to the methodologies for which US EPA will accord "due weight".

Comments of the Department of Pesticide Regulation (DPR)

Instead of submitting detailed substantive comments, the DPR poses the following scenario to highlight a concern regarding Title VI. For example, US EPA provides some funding to a non-permitting program of a certain state agency. A few months later, someone timely files a Title VI complaint with US EPA alleging discrimination in an environmental permitting program of that same state agency. The environmental **permitting** program, which is the subject of the Title VI complaint, did **not** receive any of the US EPA funding.

US EPA should clarify whether the challenged state environmental permitting program is subject to Title VI, and whether it has jurisdiction to investigate and decide if that state environmental permitting program violated Title VI.

Comments of the State Water Resources Control Board (SWRCB)

1. Complainants have 180 days after the subject environmental permit is issued, renewed or modified to file a Title VI complaint with US EPA's Office of Civil Rights (OCR). Complaints must include, among other things, the alleged discriminatory act that violates US EPA's Title VI regulations. In the complaint, the complainant need not show that it raised the issue of the potential Title VI violation during the permitting process conducted by the recipient agency. This is true even if the complainant was aware of or participated in the permitting action.

Even though recipients are generally responsible for anticipating and assessing potentially disparate adverse impacts, the potentially-affected community may be in a better position to alert recipients to specific potential disparate impacts. The guidance should require or encourage complainants to identify potential disparate impacts at the permitting stage. This should only apply if the complainant was aware of the permitting action at the time the permit was under consideration by the recipient. If a recipient is not aware of a specific impact until a complaint is filed - which is after the permit is issued - and the recipient later agrees that an adverse impact can be reduced or mitigated, it will be necessary to open up the permitting process again. It would be much more efficient if the alleged disparate impact was identified earlier so any warranted mitigation measures could be included in the initial permitting action.

2. A recipient's federal funding can be terminated if it is found that any of the recipient's programs or activities violate Title VI. In California, a substantial portion of federal assistance is passed through CalEPA boards, departments and offices to other political entities (e.g., districts, counties, municipalities). At the briefing held on July 24, 2000, US EPA was asked how a Title VI violation by one of the political entities receiving pass through money from the State would impact other federal funding of the state entity.

US EPA indicated that since the money passed through the state entity's program, that a Title VI violation by a recipient of pass through money would be attributed to the state entity and jeopardize all of the federal funding for that state entity. This interpretation has significant ramifications in California, where federal funds are used at various levels for environmental regulation.

SWRCB disagrees with US EPA's conclusion. Section 602 of Title VI provides that compliance with Title VI may be effected by the termination of a program or activity in which discrimination is found, but that such termination shall be limited to the particular political entity, or part thereof, or other recipient (of federal financial assistance) as to whom such a finding has been made. (42 U.S.C. s 2000d-1.) Therefore, if an entity receiving pass through money from the State violated Title VI, it seems that only the federal funding that was passed through could be terminated.

Since Regional Water Quality Control Boards issue water quality control permits, pass through implications do not arise for the State Water Resources Control Board in the context of permitting. It could impact other SWRCB programs where federal funds are passed on to other entities such as the Underground Storage Tank, Local Oversight Program, the State Revolving Fund Loan Program, and the Clean Water Act Sections 319 and 205(j) grant-funded programs. Since this may be a permitting issue for other CalEPA boards, offices and departments, it would be appropriate to seek clarification in this draft guidance.

We appreciate the opportunity to provide these comments. If you have any questions about these comments, please contact either one of us at (916) 445-3846. We look forward to continuing to work with US EPA on this important subject.

Sincerely,

Nancy H. Sutley
Deputy Secretary for Policy and
Intergovernmental Relations

Deborah L. Barnes
Deputy Secretary for Law
Enforcement and Counsel

NSutley@calepa.ca.gov on 08/28/2000 03:02:34 PM

To: Group Civilrights
cc: Enrique Manzanilla/R9/USEPA/US, yoshi.laura@epamail.epa.gov, asami.joanne@epamail.epa.gov

Subject: California Environmental Protection Agency Comments on Title VI d raft guidance

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Text version below in case file cannot be opened.

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

SUBJECT: COMMENTS OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY REGARDING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS (DRAFT RECIPIENT GUIDANCE) AND DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (DRAFT REVISED INVESTIGATION GUIDANCE)

The California Environmental Protection Agency (CalEPA) is pleased to submit the following comments regarding the United States Environmental Protection Agency's (US EPA) Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance) (65 Federal Register Number 124, page 39650,
June 27, 2000). CalEPA is the cabinet-level agency responsible for the environmental protection programs for the State of California. It is comprised of the Office of the Secretary and six Boards and Departments (Air Resources Board, California Integrated Waste Management Board, Department of Pesticide Regulation, Department of Toxic Substances Control, State Water Resources Control Board and the Office of Environmental Health Hazard Assessment). In addition to the comments of CalEPA, this documents contains the individual department comments of the Air Resources Board, the California Integrated Waste Management Board, the Department of Toxic Substances Control, the Department of Pesticide Regulation and the State Water Resources Control Board.

CalEPA's Boards and Departments receive assistance from US EPA to support federal environmental protection programs, including permitting, delegated to the State of California and to support other environmental protection activities. The State of California and CalEPA are committed to complying with the Civil Rights Act of 1964. In addition, CalEPA is required under state law to:

a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment

of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.

c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.

d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

e) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency. (Public Resources Code of the State of California, Section 72000).

In implementing Section 72000 and other California statutes that mandate opportunities for public review of and input into permitting decisions, CalEPA's goal is to ensure that all Californians have access to the regulatory process and can feel confident that permitting decisions provide for protection of public health and the environment.

CalEPA would like to commend US EPA for its efforts in developing these new draft guidances. We recognize the improvements of the current draft guidance over the
1998 draft guidance in terms of offering more specific suggestions to state and local permitting agencies and clarifying aspects of the relationship between Title VI of the Civil Rights Act and permitting processes and decisions. CalEPA also appreciates the efforts by US EPA to gather input from a broad set of interested parties, including state and local regulatory agencies. CalEPA believes that the new draft guidances offer more specific suggestions for state and local permitting agencies with respect to public participation activities, disparate impact analysis and other data gathering and evaluation methodologies and opportunities for resolution of complaints.

CalEPA also commends US EPA for recognizing the role of state processes and programs by offering that it will give certain agreements "due weight." We encourage US EPA to consider expanding this concept beyond what is outlined in the draft guidance. We also strongly support US EPA's clarification that the filing or acceptance of a complaint does not suspend or stay a permit.

While CalEPA is encouraged by the direction that the draft guidances take in providing direction to state and local permitting agencies, we offer some suggestions on how they can be improved. We are concerned that US EPA is still only offering general guidance - the guidances are still too broad and vague to give a state any reasonable assurances about how complaints may be avoided, investigated and ultimately resolved, including the need to offer more specificity about potential mitigation measures short of permit denial or loss of federal funding.

EPA should provide more detail about what kinds of program elements and public participation processes it will look for in giving state and local programs "due weight" in investigating complaints. While we appreciate US EPA's efforts to give examples, more details are necessary to allow states to develop effective processes or programs that will go a long way towards avoiding complaints or addressing complaints.

We also believe that under Title VI, US EPA has more discretion than to only give "due weight" to effective state programs. US EPA should consider reviewing state programs upfront and creating a rebuttable presumption that a permit granted under a state program US EPA believes is adequate complies with Title VI. In addition, US EPA should clarify that in reviewing state programs and investigating Title VI complaints, US EPA will look at other state statutes that further the goals of Title VI. For example, in California, certain public participation requirements are embodied in the

California Environmental Quality Act, the California Administrative Procedures Act, the Bagley-Keene and Brown Acts that govern public meeting and participation requirements for state or local boards that make permitting decisions.

In addition, while we understand US EPA's criteria for accepting a complaint, US EPA should use its discretion under Title VI to require a threshold of evidence of intentional discrimination or discriminatory effects for complaints to be fully investigated.

Finally we urge US EPA to consider very carefully and clarify which kinds of permit renewals and what aspects of permit renewals are subject to de novo review under Title VI. Some aspects of permit renewals may be largely ministerial and opening all of a permit renewal to potential complaints may create an unnecessary resource drain on the permitting authority, the permitees and US EPA.

We ask US EPA to revise the guidance consistent with the comments of CalEPA and its Boards and Departments. US EPA should finalize the guidances so they can proceed to investigate and resolve complaints. Also, in light of the potentially substantial burdens on states to comply with the guidance, respond to complaints and where appropriate mitigate adverse impacts, US EPA should provide financial, technical assistance and training to the states.

CalEPA fully supports the comments of its Boards and Departments that appear below in this document. We would like to particularly highlight where the Boards and Departments have made specific suggestions on how to improve the guidance.

Comments of the Air Resources Board (ARB)

The Air Resources Board (ARB) prepared and submitted extensive comments to CalEPA in June 1998 on US EPA 's Interim Guidance for Investigating Title VI Complaints Regarding Permits. Some of these comments were incorporated into the CalEPA comments prepared by the Department of Toxic Substances Control and submitted to the US EPA by CalEPA. In the current draft documents, i.e., the Recipient Guidance and the Investigation Guidance, the US EPA has addressed many of our concerns and is to be commended for its continuing efforts to carry out the civil rights mission bestowed upon it by Title VI of the Civil Rights Act of 1964 and its implementing regulations set forth in 40 CFR Section 7.10 et seq.

Title VI of the Civil Rights Act provides, in pertinent part, that "[n]o person in the U.S. shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance". (42 USC Section 2000d).

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The Integrated Waste Management Board has several active grants with the US EPA, which subject CIWMB to the non-discrimination provisions of Title VI. However, as noted in the comments below, it is not clear whether the CIWMB program for permitting solid waste facilities, because of the regulatory scheme with a state concurrence for a permit actually issued by local government, would be subject to Title VI complaints and therefore this guidance. Local Enforcement Agencies (LEAs) that have active US EPA grants would very likely be subject to the Title VI provisions and the guidance, since these entities actually issue the solid waste facility permit. Because CIWMB is the actual issuer of waste tire facility permits, it is clear that CIWMB would be subject to the Title VI provisions and guidance under the waste tire permitting program.

We have reviewed the draft guidance and submit the following comments:

1. The guidance states that once a discrimination complaint is filed, as part of a preliminary finding of noncompliance, US EPA "expects to assess whether the adverse disparate impact results from factors within the recipient's authority to consider as defined by applicable laws and regulations." In California, the issuance of a solid waste facility permit is a coordinated process between the LEA and CIWMB. The LEA obtains a permit application from the facility and develops a draft permit. CIWMB'S role is to review the draft permit and concur or object to the permit.

However, the governing statutes set forth only very limited grounds under which CIWMB may object, i.e., whether the facility will operate in accordance with state minimum operating standards and financial assurance requirements, or whether the project is in compliance with the California Environmental Quality Act (CEQA) from the limited perspective of a "responsible agency." The LEA then issues the permit. Based on the aforementioned assessment process US EPA intends to follow, CIWMB'S limited authority to object to a permit, which does not include authority to either object based on disparate effects of the facility on surrounding population or object based on inadequate public participation activities, suggests its permit decision would necessarily be immune to Title VI complaints.

2. In the response to comments on the previous draft guidance (regarding claims that local zoning/siting decisions are most often the determining factor in where a facility will be located), US EPA states its view that because issuance of a permit is the necessary act that allows the operation of a source in a given location, a state permitting authority has an independent obligation to comply with Title VI, a direct result of its accepting Federal assistance. "[R]ecipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources." In light of comment #1, it is not clear whether US EPA believes this obligation to comply would override an entity's lack of statutory authority to use Title VI grounds in a permit objection or denial.

3. Where CIWMB's permitting programs are subject to the guidance, both CIWMB and LEA staff will need to obtain extensive training in exposure, risk and demographic analysis techniques, cumulative impact assessments and disparate impact analysis, or some other source for this expertise would need to be obtained.

Comments of the Department of Toxic Substances Control (DTSC)

1. Although the siting of hazardous waste facilities is a local land use decision, the Department of Toxic Substances Control recognizes that it is responsible for ensuring that its permitting decisions not have an adverse disparate impact based on race, color or national origin. DTSC commends US EPA for clarifying that the adverse impacts for which recipients of federal funding will be held accountable are the health and environmental impacts on which DTSC has always focused, and which are cognizable under DTSC's authority. Implicit throughout both guidance documents is a recognition that these impacts are to be evaluated using the analytical tools that the states and the US EPA are constantly refining to measure health and environmental risks, and to determine their significance.

2. The suggestions in the Draft Recipient Guidance for Public Participation and Outreach are sound ideas that reflect the policies that DTSC has long put in practice.

3. The Draft Recipient Guidance has a useful list of resources for obtaining demographic and exposure data and of tools and methodologies for conducting adverse impact analysis. The most useful step that OCR can take to assist the states in ensuring non-discrimination will be to continually update these lists and to provide more specific guidance as to the methodologies for which US EPA will accord "due weight".

Comments of the Department of Pesticide Regulation (DPR)

Instead of submitting detailed substantive comments, the DPR poses the following scenario to highlight a concern regarding Title VI. For example, US EPA provides some funding to a non-permitting program of a certain state agency. A few months later, someone timely files a Title VI complaint with

US EPA alleging discrimination in an environmental permitting program of that same state agency. The environmental permitting program, which is the subject of the Title VI complaint, did not receive any of the US EPA funding.

US EPA should clarify whether the challenged state environmental permitting program is subject to Title VI, and whether it has jurisdiction to investigate and decide if that state environmental permitting program violated Title VI.

Comments of the State Water Resources Control Board (SWRCB)

1. Complainants have 180 days after the subject environmental permit is issued, renewed or modified to file a Title VI complaint with US EPA's Office of Civil Rights (OCR). Complaints must include, among other things, the alleged discriminatory act that violates US EPA's Title VI regulations. In the complaint, the complainant need not show that it raised the issue of the potential Title VI violation during the permitting process conducted by the recipient agency. This is true even if the complainant was aware of or participated in the permitting action.

Even though recipients are generally responsible for anticipating and assessing potentially disparate adverse impacts, the potentially-affected community may be in a better position to alert recipients to specific potential disparate impacts. The guidance should require or encourage complainants to identify potential disparate impacts at the permitting stage. This should only apply if the complainant was aware of the permitting action at the time the permit was under consideration by the recipient. If a recipient is not aware of a specific impact until a complaint is filed - which is after the permit is issued - and the recipient later agrees that an adverse impact can be reduced or mitigated, it will be necessary to open up the permitting process again. It would be much more efficient if the alleged disparate impact was identified earlier so any warranted mitigation measures could be included in the initial permitting action.

2. A recipient's federal funding can be terminated if it is found that any of the recipient's programs or activities violate Title VI. In California, a substantial portion of federal assistance is passed through CalEPA boards, departments and offices to other political entities (e.g., districts, counties, municipalities). At the briefing held on July 24, 2000, US EPA was asked how a Title VI violation by one of the political entities receiving pass through money from the State would impact other federal funding of the state entity.

US EPA indicated that since the money passed through the state entity's program, that a Title VI violation by a recipient of pass through money would be attributed to the state entity and jeopardize all of the federal funding for that state entity. This interpretation has significant ramifications in California, where federal funds are used at various levels for environmental regulation.

SWRCB disagrees with US EPA's conclusion. Section 602 of Title VI provides that compliance with Title VI may be effected by the termination of a program or activity in which discrimination is found, but that such termination shall be limited to the particular political entity, or part thereof, or other recipient (of federal financial assistance) as to whom such a finding has been made. (42 U.S.C. s 2000d-1.) Therefore, if an entity receiving pass through money from the State violated Title VI, it seems that only the federal funding that was passed through could be terminated.

Since Regional Water Quality Control Boards issue water quality control permits, pass through implications do not arise for the State Water

Resources Control Board in the context of permitting. It could impact other SWRCB programs where federal funds are passed on to other entities such as the Underground Storage Tank, Local Oversight Program, the State Revolving Fund Loan Program, and the Clean Water Act Sections 319 and 205(j) grant-funded programs. Since this may be a permitting issue for other CalEPA boards, offices and departments, it would be appropriate to seek clarification in this draft guidance.

We appreciate the opportunity to provide these comments. If you have any questions about these comments, please contact either one of us at (916) 445-3846. We look forward to continuing to work with US EPA on this important subject.

Sincerely,

Nancy H. Sutley
Deputy Secretary for Policy and Intergovernmental Relations

Deborah L. Barnes
Deputy Secretary for Law Enforcement and Counsel

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Office of the Executive Officer
(909) 396-2100
Fax: (909) 396-3340

August 18, 2000

Via U.S. Mail & Electronic Mail
United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
[civilrights@epa.gov]

RE: *South Coast Air Quality Management District's Comments on Draft Title VI Guidance for EPA Recipients Administering Environmental Permit Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (65 Fed.Reg. 39650 *et seq.* [June 27, 2000])

The South Coast Air Quality Management District (AQMD)[1] appreciates the opportunity to comment on EPA's Draft Recipient Guidance and Draft Revised Investigation Guidance.[2] Environmental Justice is very important to the AQMD. In October 1997, the AQMD Board adopted a series of 10 Environmental Justice Initiatives to assure equitable environmental policymaking and enforcement to protect all AQMD residents from the health effects of air pollution.[3] All of these initiatives have now been implemented, and AQMD continues to implement additional programs to further environmental justice goals. Key accomplishments in implementing environmental justice include:

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[1] The AQMD is the regional air pollution control agency for the Los Angeles area having primary responsibility for control of air pollution from all sources except motor vehicles. (California Health & Safety Code section 39002) It encompasses the Los Angeles metropolitan region, including the non-desert portions of Los Angeles, Riverside and San Bernardino counties, Orange County, and the Palm Springs/Indio area. It includes over 15 million residents. Southern California's economy constitutes about one-half of the California economy, which ranks seventh in the world in terms of goods and services provided. It is classified as an "extreme" nonattainment area for ozone and a "serious" area for PM_{10} and carbon monoxide.

[2] In preparing these comments, AQMD worked closely with the environmental justice subcommittee of its Home Rule Advisory Group. The advisory group consists of representatives from EPA, California Air Resources Board, local government, industry, and environmental groups. The mission of the advisory group is to "seek consolidation of overlapping federal, state, and local regulations to streamline regulatory compliance" while attaining clean air goals. These comments are consistent with that mission.

[3] A copy of the 10 Initiatives and Four Guiding Principles is attached.

1) holding monthly town hall meetings held throughout the District where Board members and executive staff listen to and respond to community concerns, and follow up on these concerns;
2) completing the most comprehensive air toxics exposure study ever performed [Multiple Air Toxics Exposure Study (MATES II) 1998-99] to identify the sources of toxic exposure and relative levels of exposure in different communities;
3) amending the District's air toxics rules to add additional compounds, including non-carcinogenic toxic compounds, establish allowable "cancer burden" for permitted facilities, and reduce the target risk level existing facilities must seek to meet;
4) adopting an Air Toxics Control Plan which describes measures the District plans to take over the next decade to further reduce air toxics; and
5) adopting motor vehicle fleet rules to reduce exposure to diesel emissions, which contribute over 70% of airborne toxic risk throughout the District.

The AQMD appreciates EPA's publication of the draft recipient guidance, which contains numerous helpful suggestions. AQMD agrees with EPA that a "comprehensive approach" to address environmental justice concerns, rather than a case-specific or area-specific approach, offers "the greatest likelihood of adequately addressing Title VI concerns." (p 39657) AQMD is actively implementing such a comprehensive approach, as described in part above.

AQMD also supports EPA's concept of "due weight." EPA states that a program that over a reasonable period of time eliminates or reduces adverse disparate impacts, to the extent required by Title VI, and is supported by sufficient underlying analysis, can form the basis for expedited review of complaints. EPA would dismiss complaints regarding actions taken under such a program, where EPA finds the program adequate. (p. 39675) However, EPA has limited its discussion of such programs to so-called "area-specific agreements." Such agreements would be made between "recipients, affected residents, and stakeholders" respecting a specific geographic area of concern. (*Id.*) AQMD believes EPA should expand this concept to accord "due weight" to recipient programs which meet EPA's criteria, whether or not they are the result of such "agreements."[4] The key point is whether the program adequately addresses adverse impact. In making that decision, it is important that EPA establish practical, objective criteria for a program that should be given due weight. The criteria need to be objective in order to assure consistent treatment between different areas. AQMD would like to work with EPA in developing such criteria. As a starting point AQMD suggests the program include the following elements:

1) public participation in development and implementation of the program;
2) identification of areas of greatest concern for relevant stressors or use of methods to evaluate cumulative impacts;

[4] At EPA's public listening session in Carson, California, on August 2, 2000, speakers expressed concern that recipients would enter agreements with community groups that are not representative and may be funded by polluting industry. By the same token, permitting agencies should be able to have effective programs approved by EPA even if a particular community group does not agree.

3) measures to significantly reduce existing levels of relevant stressors; and
4) measures to ensure that new or modified permits do not cause significant adverse impacts.

AQMD's Environmental Justice Initiatives, together with other existing programs to reduce adverse impacts, go a long way toward achieving an approvable "comprehensive program."[5] AQMD would like to work with EPA to determine what enhancements, if any, are needed to make its program approvable and entitled to "due weight" as discussed in the draft guidance. AQMD would like to volunteer to help develop a model program to implement this concept.

We note that EPA's draft recipient guidance suggests that permitting agencies receiving funds develop their programs with the involvement of all agencies and parties that may contribute to potential problems and solutions. EPA specifically encourages involving other government agencies such as local governments having authority over land use and those agencies controlling decisions that affect traffic patterns. AQMD fully supports this approach. However, EPA has an important role to play in this process. AQMD urges EPA to conduct extensive outreach and training for local government officials so that they may become aware of the potential environmental justice implications of their decisions. AQMD would like to work with EPA in these efforts. Also, EPA should revise its complaint investigation process to give local governments the opportunity to participate. Since local governments may have an important role in developing the most effective remedial measures, they should be included in the process at all stages, including informal resolution.

AQMD is grateful for EPA's efforts to publish recipient guidance, and believes that the draft revised Title VI investigation guidance provides significant clarification as compared to the 1998 Interim Guidance. However, there are still some areas that require clarification, and some areas in which AQMD disagrees with the draft guidance or suggests improvements to it. AQMD's detailed technical comments are attached. They are organized according to whether they support EPA's draft guidance, disagree/suggest improvements, or seek clarification. Each comment identifies whether it refers to the Draft Recipient Guidance or Draft Investigation Guidance. AQMD urges EPA to publish a document summarizing and responding to comments prior to issuing any final guidance documents.

In conclusion, AQMD supports EPA's continuing efforts to effectively and fairly implement Title VI and to provide useful guidance. AQMD especially appreciates the draft recipient guidance provided by EPA. AQMD's comments are intended to help achieve environmental justice goals, which the AQMD fully supports, and to do so in a practical manner with clear, objective criteria that will help all stakeholders understand and implement their respective obligations.

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[5] AQMD's MATES II study demonstrated that cancer risks due to air toxics have declined significantly at all monitoring stations since 1990, ranging from 43% to 63% decreases. (MATES II, p. 2-1)

Please contact me at (909) 396-2100 or Lupe Valdez, Deputy Executive Officer for Public Affairs and Transportation, at (909) 396-3780 to discuss how AQMD can work with EPA to develop and implement an Environmental Justice program which can be accorded due weight and minimize Title VI complaints, and expedite EPA investigation of any complaints that are filed.

Thank you for the opportunity to comment. AQMD looks forward to working with EPA and other interested parties in the future on these important issues.

Sincerely,

Barry R. Wallerstein, D.Env.
Executive Officer

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South Coast Air Quality Management District's Technical Comments on Draft Title VI Guidance for EPA Recipients Administering Environmental Permit Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (65 Fed.Reg. 39650 *et seq.* [June 27, 2000])

A. *Comments Supporting Aspects of EPA's Draft Guidance*

1. AQMD Supports EPA's Position That the Filing of a Complaint Does Not Invalidate a Permit (Investigation Guidance, p. 39676)

EPA's guidance states:

> "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." (p. 39676)

EPA should adhere to this principle. Otherwise, even complaints that are ultimately dismissed as lacking merit could easily derail a valuable project, by imposing unreasonable delays in the process. However, in order to assure that cases of discriminatory impact are promptly addressed, EPA needs to develop a means to process complaints and conduct its investigations more quickly. AQMD believes that establishing practical, objective criteria for recipient programs to reduce or eliminate impact, which programs will be given due weight, will greatly assist in expediting investigations.

2. AQMD Supports EPA's Position that Adverse Impacts Must Be Significant to Support a Finding of Violation (Recipient Guidance, p. 39660; Investigation Guidance, p. 39680)

EPA's draft recipient guidance states that as part of conducting an adverse disparate impact analysis, the recipient should "Determine whether the impact[s] are sufficiently adverse to be considered significant." (p. 39660) The Draft Investigation Guidance, page 39680, states:

> "If the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance . . . ."

AQMD supports EPA's position that an adverse impact must be significant in order to support a finding of violation. This position is consistent with existing Title VI case law holding that disparate impact must be more than insignificant and minor. (*NAACP v. Medical Center, Inc.* (3rd Cir. 1981) 657 F.2d 1322, 1332). The reason it is important to focus on "significant" impact is that virtually every permit allows <u>some</u> pollution and therefore could be argued to have <u>some</u> impact. EPA Investigations Guidance needs to make it clear that the impact must be significant, otherwise EPA may well be inundated with complaints which will inevitably be dismissed, after consuming substantial EPA and recipient resources which would be better spent on addressing significant adverse impacts.

3. AQMD Supports EPA's Position that Both Demographic Disparity and Disparity in Rates of Impact Should Be Statistically Significant (Investigations Guidance, p. 39682; Recipient Guidance, p. 39661)

EPA states in its Draft Revised Investigations Guidance that demographic disparity between an affected population and a comparison population should be evaluated to determine if the differences are statistically significant to 2 to 3 standard deviations. (p. 39682) EPA's Investigation Guidance also states that a finding of disparate impact is "somewhat" less likely where both the disparity of impact and demographics are not statistically significant. (p. 39682) The AQMD believes that disparity needs to be significant to establish disparate impact in the normal case. This is consistent with existing case law concerning employment discrimination. (*Sanchez v. City of Santa Ana* (C.D. Cal. 1995) 928 F.Supp. 1494, 1500) However, there may be an unusual case where disparate impact exists although disparity in one factor is not large (e.g., demographics), if the disparity in the other factor is sufficiently large (e.g., impact).

4. AQMD Supports EPA's Recognition of the Relevance of Regulatory "Benchmarks" of Significance (Recipient Guidance, p. 39661; Investigation Guidance, p. 39680)

EPA states in its Draft Revised Investigation Guidance, page 39680, that in determining whether an impact is adverse, it would "first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy." The AQMD supports this approach but believes that locally adopted levels of significance should also be considered. In the recipient guidance, page 39661, the reference is to all relevant benchmarks, not just those identified in EPA regulations or policies. EPA should explicitly recognize the relevance of locally adopted levels of significance.

5. AQMD Supports EPA's Determination that Remedies Emphasizing All Contributions to Impact, Not Just a Particular Permit, Are Most Appropriate (Recipient Guidance, page 39662; Investigations Guidance, pp. 39674, 39683)

In suggesting ways for recipients to reduce the likelihood of Title VI complaints, EPA states "Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions." (p. 39662) In the Draft Revised Investigation Guidance, EPA states: " . . . denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." (p. 39683) AQMD strongly supports these concepts, at least in areas where the recipient has a program to assure individual permits do not cause significant adverse impacts. AQMD believes its stringent toxics and new source review rules constitute such a program. AQMD, thus, urges EPA to develop criteria for such programs (which recipients can adopt) to avoid or remedy any disparate impact. AQMD believes this approach more fully addresses any actual disparate impact than would an approach focusing on an individual permit. It also avoids an individual permit holder suffering the severe penalty of permit denial as a result of impacts it did not cause. However, recipients should develop programs to assure that individual permits do not themselves cause significant adverse impact, otherwise denial or modification of each individual permit may be considered.

6. AQMD Supports the Concept that EPA Should Give "Due Weight" to Local Agency Analysis and Programs to Avoid or Reduce Disparate Adverse Impact (Recipient Guidance, p. 39663 *et seq.*; Investigations Guidance, p. 39674 *et seq.*)

AQMD understands EPA's position that it cannot delegate its responsibility to enforce Title VI to recipients, page 39674, and appreciates EPA's efforts to provide incentives to recipients to implement proactive programs to reduce the likelihood of Title VI complaints. EPA characterizes this approach as granting "due weight" to information submitted by recipients and to "area-specific agreements." (p. 39675) AQMD believes EPA must always give the appropriate weight that is due to information submitted by recipients. AQMD strongly supports the concept that EPA should also give due weight to programs implemented by recipients which are designed to avoid or reduce disparate adverse impacts.[6] AQMD supports the concept that such programs would allow EPA to promptly evaluate a complaint and to dismiss it if it is covered by a recipient program which "will eliminate or reduce, to the extent required by Title VI, existing adverse disparate impacts." (p. 39675) Such a program should also expedite dismissal of later complaints in the same area. (p. 39675)

7. AQMD Supports EPA's Recognition of Cost and Technical Feasibility in Evaluating Mitigation and Less-Discriminatory Alternatives (Investigation Guidance, p. 39683)

In its Investigation Guidance, page 39683, EPA states that it "will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives [and mitigation measures]." AQMD agrees that these factors need to be considered, and supports EPA's determination to evaluate these factors as part of its assessment.

B. Comments Disagreeing With or Suggesting Improvements to Aspects of EPA's Draft Guidance

1. Permit Renewals or Decisions that Merely "Allow Existing Conditions to Continue" Should Not Be the Basis for Complaint at Least in the Normal Case (Investigations Guidance, p. 39677)

In its Investigations Guidance, page 39677, EPA states that the following types of permit actions could form the basis for initiating a Title VI investigation:

> "Permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged."

AQMD believes that in the normal case, these actions should not serve as the sole basis for a complaint. It also seems questionable whether permit renewals, or other actions that merely allow conditions to "remain unchanged," can constitute an action having an adverse disparate impact such as to support a complaint under EPA's Title VI regulation.[7] In its responses to comments, page 39697, EPA indicates that examining renewals may be proper because the

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[6] However, as discussed in Comment B 2, AQMD believes EPA should not rely on the possibility of agreements with self-identified community representatives, but rather should develop and publish realistic, objective criteria for recipient programs which would be entitled to due weight.

[7] A complaint must allege a "discriminatory act" under EPA's regulation. (40 CFR §7.120(b))

demographics may have changed since the original permit. However, in normal cases it would be unfair to subject the permit renewal to possible jeopardy because the surrounding population may have increased or changed, since this would not have been possible for either the permittee or the recipient to predict. The AQMD will, however, impose corrective conditions if any impact rises to the level of a public nuisance. Moreover, AQMD's rule requirements for existing sources, which require elimination of significant risk, and maximum feasible toxic reductions, will provide additional protection. EPA's response to comments, page 39697, states that "Even if environmental laws mandate different treatment for new permits, permit renewals, and permit modifications, EPA's Title VI regulations do not require different review of these actions." AQMD believes EPA can allow renewals to be treated differently from new permits. Renewals are fundamentally different from new permits. In the case of a renewal, the permittee has already constructed its facility and invested substantial resources in reliance on the permit. Realistic options for mitigation or alternatives (especially alternative siting) are considerably less than in the case of a new permit. Since EPA may seek compliance information from a recipient, independent of a complaint, whenever there is reason to believe discrimination may exist (40 CFR §7.85(b)), EPA has the ability to monitor compliance without making individual permit renewals the subject of an investigation. Thus, there is no need for permit renewals to cause initiation of a Title VI investigation, in the normal case.

2. EPA Should Not Rely on the Concept of Areawide Agreements But Instead Adopt Realistic, Objective Criteria for EPA Approval of Recipient Programs to Avoid or Reduce Disparate Adverse Impact (Recipient Guidance, p. 39657; Investigations Guidance, p. 39675 *et seq*.)

EPA's Draft Recipient Guidance suggests the concept of an areawide agreement as merely one among several Title VI approaches a recipient "may choose to develop." (p. 39657) However, in the Investigations Guidance the areawide agreement turns into something much more significant: if the permit at issue is covered by an area-wide agreement that EPA has approved, EPA will likely close the investigation. (p. 39676) AQMD agrees there is great need for a process which can help EPA focus on complaints in areas where adequate remedial action is not being taken, especially given the large and longstanding backlog in EPA handling of Title VI complaints. AQMD also supports EPA's efforts to encourage recipients, residents, and stakeholders to take action to reduce impacts. However, AQMD does not believe the concept of an areawide agreement is a practical – or even necessarily fair – way to reach these goals. Instead, EPA should issue realistic, objective criteria by which it will judge recipient programs to avoid or reduce disparate adverse impact. Once EPA approves such a program, the EPA would promptly act on complaints regarding permits covered by such a program, and in the normal case would dismiss such complaints. In many cases, it is impractical to accomplish such a result through an "area-wide agreement." How is the recipient to determine which community group or groups with which to form an agreement? Regardless of which group agrees, there is a potential for someone who does not agree to challenge the legitimacy of the "agreement." The agreement will not seem fair to such a person. Moreover, such a process is not fair to the recipient, whose agreement is subject to the veto power of whoever identifies themselves as a community "representative." Finally, EPA would not have adequate assurance that the agreement represented sufficient, but not unnecessary, measures. Instead, EPA should develop and publish realistic, objective criteria for approving a recipient's program. AQMD suggests that such criteria could include:

1) public participation in development and implementation of the program;
2) identification of areas of greatest concern for relevant stressors or use of methods to evaluate cumulative impacts;
3) measures to significantly reduce existing levels of relevant stressors; and
4) measures to ensure that new or modified permits do not cause significant adverse impacts.

The AQMD stands ready to assist EPA in developing such criteria and suggests that EPA work with AQMD to implement a Title VI environmental justice program which would serve as a model for other areas. Programs which meet the criteria EPA develops should be granted "due weight" such that EPA will in normal circumstances dismiss complaints regarding permits covered by such programs.

3. EPA Should Not Defer Investigation Merely Because a Permit is Not Yet Issued, or Because a Lawsuit is Pending (Investigation Guidance, p. 39673)

EPA plans to "dismiss without prejudice" complaints that are the subject of administrative appeals or litigation, or which are premature because the permit is not yet issued (p. 39673). The AQMD urges EPA to reconsider this position. Waiting until after appeals and litigation are complete subjects the complainant and the permit-holder to considerable uncertainty, which may last years beyond the conclusion of litigation. Moreover, while a complaint filed before the permit is issued may be technically "premature," EPA needs to develop a way to provide its expertise and input to the recipient whenever a Title VI issue is raised, even if it is premature. Otherwise, the recipient may proceed in good faith to a decision which might be different had EPA's input been received.

4. The Permit Holder and the Local Government Land Use Authority Having Jurisdiction Should Have the Right to Participate in the Investigation (Investigation Guidance, p. 39673)

EPA states that in exploring informal resolution of a complaint, it "may seek participation from the complainant, the permittee, or others." (p. 39673.) AQMD believes that the permittee, as well as the affected local government having land use jurisdiction, should have the right[8] to participate in investigations. While ultimately any remedy would be directed toward the recipient, the permittee can be directly affected by mitigation measures and proposed less discriminatory alternatives that are considered, and thus has a great stake in the proceedings. The local government having land use authority may play a crucial role both in establishing the justification for a permit, and in developing remedial programs where land-use patterns have contributed to any disparate impact. These parties deserve a right to be heard in the investigation process.

5. The Guidance Fails to Specify a Definitive Timeframe for Resolution of a Complaint (Investigations Guidance, Appendix B)

[8] Since these entities may not have the desire or the resources to fully participate, they should not have the obligation to be involved.

Unfortunately, extended delays in processing complaints have frustrated complainants, recipients, and permittees alike. EPA needs to specify a definitive timeframe for resolving complaints. While we acknowledge that the revised Investigation Guidance has attempted to attach specific deadlines to individual milestone events within the complaint investigation process to a much higher degree than did the Interim Guidance, there is still no overall timeframe by which a complaint must be resolved. Indeed, Appendix B to the Investigations Guidance (flowchart) makes the process seem endless. Even an allegation rejected by EPA may be referred to another federal agency (39670). Most rejections of allegations can be resubmitted at a later time without prejudice (39673). EPA can waive the 180-day limit on filing a complaint after the alleged discriminatory action takes place for "good cause."(39673). Complaints that are subject to ongoing administrative appeals or litigation in federal or state court would be likely candidates for delay depending on the outcome of those decisions (39673). While EPA would likely close such complaints, " EPA expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation" (39673). Furthermore, EPA is requiring little substantiation of claims by complainants, choosing instead to perform the underlying investigations itself which clearly can be a large and time-consuming task. While the April 1998 Shintech-related Draft Revised Demographic Information report might not be indicative of the level of effort that will ultimately go into all investigations, it represents a very considerable effort even if only a few such complaints are processed each year. This level of effort reinforces the need for adopting methods to help EPA focus on the significant and serious complaints.

A corollary concern has to do with allegations of discrimination in the public participation process (39672). Allegations concerning such discrimination should be filed within 180 days of the alleged action. EPA sets forth the example that if a complainant alleges that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing. However, EPA has not included public participation guidelines in the *Investigation Guidance* reserving the right ("as appropriate") to do so in the unspecified future (39669). It seems inconsistent for EPA to steer clear of public participation investigation guidance yet to invite such complaints on the same subject. We urge EPA to commit to draft the public participation guidance quickly since it is our understanding that failure to be heard is one of the biggest catalysts behind the environmental justice movement.

6. EPA Should Clarify that Merely Administrative Changes, or Projects that Reduce Pollution, Without A Collateral Increase, Are Not Normally a Basis for Complaint But Will Be Reviewed in Context Rather Than in Isolation (Investigation Guidance, p. 39677)

EPA states that administrative changes, such as name change or change in mailing address "generally" will not form the basis for a finding of noncompliance. (p. 39677) Similarly, EPA states it will "likely" close an investigation where the recipient demonstrates that the challenged action has a significant benefit in reducing stressors. (*Id.*) If there is uncertainty as to the significance of the benefit, EPA will normally proceed with the investigation. AQMD believes that EPA should clearly state that actions which are administrative will not be the basis of a finding of noncompliance. Moreover, beneficial actions should not normally be the basis of an investigation. A recipient should not have to establish "significant" benefit to justify closing a complaint. However, the benefit of an action needs to be judged in context. As pointed out at the public listening session on August 2, 2000, an action may be technically "beneficial" when reviewed in isolation, yet still part of a pattern of disparate impact if a minority community

receives a very small benefit, while non-minority communities receive significantly more benefit, without sufficient reason. EPA should clarify that beneficial actions will not be the basis of complaint except in such unusual circumstances, but that such actions will be reviewed in context to see if they are part of a pattern of disparate impact.

7. Justification Should Not Be Required to Be "Integral to the Recipient's Mission" (Investigations Guidance, p. 39683)

As stated in EPA's investigations guidance, a recipient may "justify" the issuance of a permit, despite adverse disparate impact, based on a substantial legitimate justification. (p. 39683) Generally, "justification" would be a showing that the challenged activity is reasonably necessary to meet a goal that is "legitimate, important and integral to the recipient's mission." (p. 39683) AQMD believes that the words "integral to the recipient's mission" are subject to potential misinterpretation. AQMD suggests this language be replaced by requiring justification to be based on a reason which "significantly furthers important social goals which the recipient's program is designed to support or allow." The reason for this suggestion is that many recipient permitting agencies have relatively narrow "missions," e.g. air or water quality. Yet they are expected to issue permits to facilities whose primary purpose is to further other social goals. Thus, for example, EPA's statement that a permit for a wastewater treatment plant is "integral to the recipient's mission" (p. 39683) might be interpreted as not true as applied to AQMD. Yet such a permit significantly furthers an important, legitimate social goal which the permit program is designed to support or allow. For the vast majority of permits issued by AQMD, while "they are integral to AQMD's mission" to the extent they control pollution, they arguably are not "integral to the AQMD's mission" to the extent they allow pollution. Few people would consider "economic development," as cited by EPA, p. 39683, to be integral to AQMD's mission. The language used in EPA's guidance regarding justification being integral to the agency's mission is only used in one of the three cases cited by EPA in footnote 149, and there it was actually used to broaden the scope of legitimate justification beyond the narrow focus urged by some. (*Ellston v. Talladega County Bd. of Educ*. (11th Cir. 1993) 997 F.2d 1394, 1412-13) EPA should not incorporate in its guidance such language which has the potential to unduly narrow the scope of legitimate justification. AQMD would like to work with EPA to develop a more relevant test, such as the language suggested above.

8. EPA Should Encourage Programs that Provide Collateral Toxic Benefits While Not Increasing Criteria Pollutants (Recipient Guidance, p. 39663)

EPA's guidance recognizes that recipients want and need incentives to develop proactive Title-VI related approaches. (p. 396637) As noted above, AQMD is volunteering to work with EPA to develop a model environmental justice – Title VI program which would be given "due weight" in any subsequent Title VI investigations. In addition, AQMD has identified mobile sources as the major contributor to air toxics exposure in most of the basin, even when diesel is not considered. (Multiple Air Toxics Exposure Study [MATES II], SCAQMD, March 2000, p. ES-31) When diesel is considered, mobile sources become the overwhelming contributor throughout the basin. (*Id*.) Reducing mobile source air toxics should be a key part of any environmental justice – Title VI strategy. Yet AQMD has relatively little regulatory authority

over such sources.[9] Therefore, AQMD believes it is important to create incentives for the voluntary reduction of such pollution. To that end, AQMD has offered monetary incentives as well as credit trading rules. AQMD believes EPA should encourage such measures, where they decrease toxic emissions, especially diesel, without allowing regional, or significant local, increases in criteria pollutants.

9. EPA Should Establish A Procedure for Promptly Disposing of Meritless Complaints (Investigation Guidance, p. 39672)

EPA's policy is to "investigate all administrative complaints concerning the conduct of recipient of EPA financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." (p. 39672) This means that there is no burden of producing evidence placed on complainant to trigger an investigation. As a result, EPA has accepted nearly 50 complaints for investigation. Only one has been decided. Some investigations have been open since 1994. During the entire investigation process, the recipient, the permittee, and the complainant, undergo enormous uncertainty. For the permittee, the uncertainty alone may be fatal, even if an ultimate decision would have been a finding of no violation. For the complainant, needed relief may be delayed in serious cases while EPA is tied up with meritless cases. Therefore, EPA needs a procedure for promptly disposing of meritless complaints that are accepted for initial investigation because they meet minimum jurisdictional requirements. This procedure need not place a burden on complainant. Instead, EPA could establish something like a summary judgment procedure whereby the burden is placed on the recipient who could obtain early dismissal of a complaint by making specified showings. The procedure could be designed to allow public participation, as well as the participation of complainant. AQMD would welcome the opportunity to assist EPA in developing criteria which would justify early dismissal of a complaint.

10. EPA Should Seek to Minimize Duplicative Court and Administrative Proceedings (Investigations Guidance, p. 39671)

EPA Draft Investigations Guidance, page 39671, states: "Moreover those who believe that they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA."

While a plaintiff may be able to sue without first filing a complaint with EPA, EPA should consider the effect of having two simultaneous proceedings based on similar facts and allegations. The available resources of all parties to process the complaints will be stretched thin, and will inevitably result in an inefficient use of governmental resources. EPA should take the necessary steps to assure the efficient use of agency resources, by seeking resolution of the complaint in one proceeding. These steps could include notifying the court where the Title VI complaint has been filed, that EPA has also received a similar complaint. EPA should notify the court of the steps EPA has taken and EPA's plans to resolve the complaint. Of course each case must be evaluated separately, but the flexibility afforded in an administrative proceeding may be

[9] AQMD is vigorously using the authority it does have, by adopting an unprecedented series of fleet vehicle rules to reduce toxic air pollution, and proposing a low-sulfur diesel rule to reduce SO2 and particulates, and to allow the use of particulate traps to further reduce toxics and particulates.

preferable to judicial determinations. For example, there are more opportunities for all parties to resort to informal resolution procedures in EPA's administrative proceeding. Therefore if the most efficient manner of resolving the complaint is through an administrative proceeding, EPA should request the court to take the necessary steps to allow that proceeding to resolve the issues.

C. Areas in Which AQMD Seeks Clarification

1. What is Meant by the Reference to "Cumulative" Impact in the Discussion of Benchmark Levels? (Investigations Guidance, p. 39680)

EPA's Investigations Guidance states that in determining significance of an impact, it will "evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy." (p. 39680) In giving examples, EPA states that "cumulative risks of less than 1 in 1 million (10^{-6}) . . . would be very unlikely to support a finding of adverse impact . . .", while EPA would be "more likely to issue an adversity finding . . . where the cumulative risk in the affected area was above 1 in 10,000 (10^{-4})." (p. 39680) It is unclear what is meant by "cumulative" in this context. If "cumulative risks" refers to <u>all</u> contributors to air toxics exposure, including mobile sources, area sources, and new and existing permitted sources, then EPA would be likely to issue an adversity finding in virtually every case in an urban area. In a recent comprehensive air toxics exposure study performed for the South Coast Air Basin, monitored levels of toxics at all 10 fixed monitoring sites exceeded 300 in a million (3×10^{-4}) (excluding diesel, which has been declared a toxic air contaminant in California). (Multiple Air Toxics Exposure Study [MATES II], SCAQMD, March 2000, p. 3-12.) Based on modeled estimated risk, virtually the entire basin exceeded 100 in a million, without diesel. (MATES II, p. 5-10)

The AQMD believes that other urban areas would likely show similar, if not higher, results. AQMD is unaware of any EPA regulation or policy setting levels this low as thresholds for overall exposure, including background emissions. Indeed, EPA's draft Residual Risk Report to Congress, pursuant to section 112 of the Clean Air Act, identifies risk levels of 10^{-4} action levels for individual facilities, not overall background exposures. (EPA-453/R-99-001, March 1999) These levels might be more appropriate possible benchmarks for "cumulative" risk if the term refers to overlapping exposure from two or three challenged facilities, not overall exposure levels, including background levels.

2. How Should a Recipient Determine Who Speaks for "The Community" in Establishing Areawide Agreements? (Investigations Guidance, p. 39675)

EPA suggests that permitting agencies that receive federal finding consider entering into "agreements with affected residents and stakeholders" to eliminate or reduce adverse impacts. The agreement is to be developed through collaboration with "communities and other affected stakeholders." (p. 39675) However, EPA's guidance does not explain how the permitting agency or EPA is to determine who represents "the community" or "affected residents," and whose agreement will be needed to constitute an areawide agreement which may be entitled to "due weight." Further clarification is needed on this issue.

3. What is the Effect of Impacts Outside the Recipient's Jurisdiction on a Recipient's Obligations? (Investigations Guidance, p. 39677)

EPA states that it will need to assess background levels of stressors which allegedly contribute to discriminatory effects, but that in determining whether a recipient permitting agency is in violation, EPA will account for those impacts "cognizable under the recipient's authority." (p. 39678) AQMD supports the concept that a permitting agency should only be held responsible for impacts within its authority. It is not clear exactly how other stressors outside the permitting agency's authority will be used to assess whether there are discriminatory impacts. For example, suppose there is an area which has a largely minority population and is located in a harbor area. In such case, a large percentage of emissions are likely from federally regulated sources such as ships, trains, or airplanes. Does EPA's approach mean that a permitting program which would be lawful in an area not affected by these federal sources might be unlawful in an area that does experience such effects?

4. What is Meant by Impacts Regarding Which the Recipient Permitting Agency Has "Some Obligation or Authority?" (Investigations Guidance, p. 39678)

EPA states that it will analyze those impacts regarding which a recipient permitting agency has "some obligation or authority." Thus, if an environmental statute requires an air pollution agency to consider "noise impacts," such impacts would be part of the disparate impact analysis. (p. 39678) It is unclear how such impacts would affect a recipient's obligations under Title VI. For example, in California the California Environmental Quality Act (CEQA) requires all lead agencies in conducting a CEQA analysis to "consider" all significant environmental impacts. But it does not provide new powers authorizing limited purpose agencies to mitigate such impacts. According to CEQA Guidelines section 15040(b): "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." Therefore, in determining liability under Title VI, EPA should only consider impacts the permitting agency has authority to regulate, not those it has authority to analyze or "consider."

5. How Will EPA Select a "Reference Area" For Analysis? (Investigations Guidance, p. 39681)

EPA's guidance states that in order to assess disparity it is necessary to compare the affected population to an appropriate comparison population. The comparison population will be drawn from those who live in a "reference area" which may be the recipient's jurisdiction, a political jurisdiction, or other area. (p. 39681) More guidance is needed as to how EPA will select the appropriate reference area. Also, AQMD believes it may be appropriate, in looking for a "reference area" to seek out areas that are zoned similarly to the affected area by the local government having land use authority over the area. Clean Air Act, section 131, provides that "Nothing in this Act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use." Accordingly, EPA's statement in the summary of comments, page 39691, that "The recipient's operation of its permitting program is independent of the local government zoning activities," is an oversimplification. Local land use patterns are controlled by local government not environmental permitting agencies. Environmental agencies have no authority to allow or require facilities to be located in areas not zoned for such uses. Therefore, only similarly zoned

areas should be comparison areas. This is another reason the affected local government should be involved in the EPA investigation proceedings.

6. Will EPA Conduct Staff Training For Permitting Agencies? (Recipient Guidance, p. 39657)

Among the activities EPA suggests for permitting agencies that receive federal funding is to train staff regarding Title VI issues, including technical issues, communication skills, and dispute resolution methods. (p. 39657-8) AQMD supports such training opportunities. However, EPA is in an excellent position to conduct training on these issues and assist permitting agencies in developing training programs. AQMD urges EPA to assist in training staff in Title VI issues. In addition, EPA should offer outreach and training to local government planning officials to assist them in understanding possible Title VI impacts of local government decisions.

(b) (6) - Privacy [redacted] **on 08/28/2000 05:59:05 PM**

To: Group Civilrights
cc:

Subject: title 6

we wantthe opportun ity to appeal EPA decisions on T itle 6 complaints
we want EPA to stop discrimination by state environmental who issue permits
to
industries that continue to pollute our communities.

(b) (6) - Privacy
[redacted] Mt vernon,N.Y. 10552

Allusio@aol.com on 08/26/2000 02:24:43 PM

To: Group Civilrights
cc:

Subject: Re: Draft Revised Guidance for Investigating Title VI Administrative Complaints

Rahman Shabazz

President

Community Coalition for Change

P. O. Box 59027

Los Angeles, CA 90059

August 26, 2000

Title VI Guidance Comments
Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue
Washington, D.C. 20460

To Whom It May Concern:

According to the EPA's Mission Statement, one of its purposes if to ensure that:

> All Americans are protected from significant risk to human health and the environment where they live, learn and work.

It also states:

> Federal laws protecting human health and the environment are enforced fairly and effectively.

However, the EPA has failed to protect the rights of all Americans and to enforce federal law by instituting guidelines that violate Title VI of the Civil Rights Act of 1964 and the 14th Amendment of the Constitution of the United States.

First, the EPA guidelines do not readily provide for due process and equal protection of the law as required by the 14th Amendment of the Constitution of the United States. Accordilng to EPA guidelines, informal methods will initially be used to solve a compliant prior to an investigation being conducted. This is in sharp contrast to the way that other department and agencies handle Title VI compliants. Yet, EPA guidelines put "the cart before the horse" by initially using informal methods. One can understand the EPA's policy given its budgetary constraints. However, budgetary constraints should never take precedence over the rights of the people. The EPA guidelines in effect prevents evidence from being gathered by stopping an investigation that should take place before it is initiated. This helps to perpetuate discrimination.

Furthermore, the EPA's guidelines place profit ahead of the rights of the people. Title VI is consistent in its message that no entity that receives federal funding can discriminate on the basis of race, color, or national origin. On the other hand, the EPA guidelines state:

> Determining what constitutes an acceptable justification will necessarily be based on the facts of the case. Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission.

In essence, the EPA is saying that discrimination is okay if it benefits the people as a whole. But, this is not what Title VI of the Civil Rights Act of 1964 says. The EPA's guidelines violate both the spirit and the letter of the 14th Amendent of the Constitution of the United States and Title VI.

However, this problem is correctable. The EPA guidelines should be changed to provide for an investigation immediately after receiving a complaint and the EPA should adopt a policy of zero-tolerance toward discrimination.

Cordially,

Rahman Shabazz

President,

Community Coalition for Change

CCChange@AOL.com

August 28, 2000

Via U.S. Mail & Electronic Mail

United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, D.C. 20460
[civilrights@epa.gov]

Re: **CCEEB's Comments on EPA's Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits [65 FR 39650 et seq.]**

To Whom It Concerns:

Following are the comments of the California Council for Environmental and Economic Balance ("CCEEB") regarding the following two draft guidance documents of the U.S. Environmental Protection Agency ("EPA"):

A. the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting; and

B. the Draft Revised Title VI Guidance for Investigating Title VI Administrative Complaints Challenging Permits (the "Draft Revised Investigation Guidance"). [65 FR 39650, et seq.]

CCEEB is a statewide, private, non-profit, non-partisan coalition of business, organized labor, and public leaders who work together to advance collaborative strategies for a sound economy and a healthy environment. Many of CCEEB's members operate industrial facilities pursuant to environmental permits issued by the State of California or its agencies or subdivisions (such as the 35 air districts and the 9 Regional

Water Quality Control Boards). Thereby, the two draft guidance documents are of direct interest to our Members.

CCEEB provided extensive comments in May of 1998 on EPA's Interim Guidance for Investigating Title VI Complaints Challenging Permits (the "Interim Guidance"). Although the Draft Revised Investigation Guidance is significantly improved relative to the Interim Guidance, CCEEB still has serious concerns regarding both the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We appreciate the opportunity to provide comments at this time.

In 1999, CCEEB published its environmental justice principles in the attached document entitled Environmental Justice Principles and Perspectives. Our comments are based on those principles.

CCEEB appreciates EPA's consideration of these comments. If you have any questions, please contact me at (415) 512-7890 or CCEEB's General Counsel Cindy Tuck at (916) 442-4249.

Sincerely,

VICTOR WEISSER
President

VW/CKT
Enclosures

cc: Mr. Jackson Gualco
Mr. Bill Quinn
Mr. Robert Lucas
Ms. Cindy Tuck

COMMENTS OF THE CALIFORNIA COUNCIL FOR ENVIRONMENTAL AND ECONOMIC BALANCE

ON

U.S. ENVIRONMENTAL PROTECTION AGENCY'S

DRAFT TITLE VI GUIDANCE FOR EPA ASSISANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS

AND

DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

[65 FR 39650 et seq.]

August 28, 2000

I. INTRODUCTION

Following are the comments of the California Council for Environmental and Economic Balance ("CCEEB") regarding the following two draft guidance documents of the U.S. Environmental Protection Agency ("EPA"):

A) the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("Draft Recipient Guidance"); and

B) the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigation Guidance"). [65 FR 39650, et seq.]

CCEEB is a statewide, private, non-profit, non-partisan coalition of business, organized labor, and public leaders who work together to advance collaborative strategies for a sound economy and a healthy environment. Many of CCEEB's members operate industrial facilities pursuant to environmental permits issued by the State of California or its agencies or subdivisions (such as the 35 air districts and 9 Regional Water Quality Control Boards). Thereby, the two draft guidance documents are of direct interest to our Members.

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In 1999, CCEEB published its environmental justice principles in the attached document entitled Environmental Justice Principles and Perspectives. Our comments are based on those principles.

II. COMMENTS THAT PERTAIN TO BOTH THE DRAFT RECIPIENT GUIDANCE AND THE DRAFT REVISED INVESTIGATION GUIDANCE

Following are comments that pertain to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance.

A. EPA Should Add a Guiding Principle Related to Providing Certainty.

In the Introduction sections of both sets of draft guidance, EPA states guiding principles that EPA proposes to adhere to in the implementation of Title VI and this draft guidance. CCEEB suggests that EPA add the following principle:

> "The guidance, and implementation of the guidance, should provide the greatest possible clarity and certainty for all stakeholders."

CCEEB believes that environmental justice programs must clearly define terms and establish reasonable goals, objectives and methods to demonstrate compliance. Increased certainty for all stakeholders will both improve EPA's ability to provide fair treatment for all people and help to avoid the counterproductive effect of putting the states' economic growth in jeopardy due to uncertainty in environmental permitting programs. Many of the comments that follow relate to the need to provide more clarity and certainty in the proposed terms, processes and procedures.

B. The Guidance Provides No Clear Standards for Determining if an Adverse Disparate Impact that Violates Title VI Exists.

As EPA is aware, the crux of both draft guidance documents comes down to the definitions of key terms that will be used to judge whether or not there is compliance with Title VI. CCEEB recognizes that EPA has added definitions to the Draft Guidance in response to comments on the Interim Guidance. (Many of the comments noted that the Interim Guidance text was so vague that it was impossible to comprehend how the program would be implemented.) Although the inclusion of definitions is a step in the right direction, the proposed terms and the corresponding text in the two draft guidance documents do not provide clear standards for determining if an adverse disparate impact that violates Title VI exists. Clear standards are needed to provide certainty to stakeholders and to allow EPA to evaluate progress in this program. In reviewing this issue we reviewed the proposed definitions of the following terms:

"impact"
"adverse impact"
"significant"
"statistical significance"
"disparity (disparate impact")

EPA proposes to define "impact" as:

> (…) a negative or harmful effect on a receptor resulting from exposure to a stressor (e.g. a case of diseases). The likelihood of occurrence and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity. [65 FR 39666 and 65 FR 39685]

EPA proposes to define "adverse impact" as:

> a negative "impact" that is determined by EPA to be <u>significant</u>, based on comparison with benchmarks of significance. These benchmarks may be based on law, policy, or science. [65 FR 39665 and 65 FR 39664, emphasis added.]

1. The Proposed Definition of "Significant" is Vague and Ambiguous.

EPA proposes to define "significant" as:

> A determination that an observed value is sufficiently large and meaningful to warrant some action. (See ***statistical significance***.) [65 FR 39667 and 65 FR 39686, emphasis added.]

This definition is vague and ambiguous and should be clarified. On one hand, it defines "significant" as a value that is sufficiently large and meaningful to warrant some action. On the other hand, the reference to "statistical significance" could be read to greatly broaden what is significant by implying that a value is sufficiently large and meaningful to warrant some action if it is statistically significant. Such a definition would be inconsistent with Title VI law. (See below.)

EPA proposes to define "statistical significance" as:

> an inference that there is a low probability that the observed difference in measured or estimated quantities is due to variability in the measurement technique, rather that due to an actual difference in the quantities themselves. [65 FR 39667 and 65 FR 39686]

2. The Draft Guidance Fails to Clarify that the "Significance" of Adverse Disparate Impacts Must be Determined by Application of Legal Standards, Rather than by Statistical Methods Alone.

EPA proposes to define "disparity" or "disparate impact" as:

> A measurement of a degree of difference between population groups for the purpose of making a finding under Title VI. Disparities may be measured in terms of the respective composition (demographics) of the groups, and in terms of the respective potential level of exposure, risk or other measures of adverse impact. [65 FR 39665 and 65 FR 39684]

At Page 39682 of the notice, EPA states that if the "disparity" is not "significant," the complaint will likely be closed. It is a step in the right direction that EPA is proposing that the disparity must be significant. As noted above, however, with the proposed reference to "statistical significance" in the proposed definition of "significant," it appears that EPA could rely on mere statistical significance to determine that there was a "significant" disparity. At Page 39682, EPA proposes that the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved "statistical deviations" to at least 2 to 3 standard deviations. EPA goes on to say that other factors would be considered in the analysis. For example, at Page 39682, EPA states that one such factor would be whether the level of adverse impact is "a little or a lot" above the threshold of "significance." It is difficult for the reader to comprehend how all this will be implemented in practice – there are no clear standards.

Besides the brief definition of "significant" which is made ambiguous with the reference to "statistically significant," EPA fails to explain the meaning of significance under the law of Title VI. The Supreme Court and other courts have wrestled with the legal question of the "significance" of impacts in numerous cases. Those cases find that a statistical difference is not necessarily a "significant" disparate impact for purposes of establishing a Title VI violation. A determination of whether or not a disparate impact is de minimis, insignificant, or minor, is not a question that can be answered through the use of bare statistics. If the Guidance is to correspond with law, and to be of real assistance in future Title VI administrative complaints, it must not sidestep the difficult legal question but instead clarify the meaning of "significant disparity" under Title VI.

C. The Draft Guidance's Confusing View of Adverse Disparate Impact Places State Permitting Agencies in a Legal Dilemma.

If EPA's expansive and confusing view of "disparate impact" is applied to the states, a permitting agency will find itself on the horns of a legal dilemma. If it grants a permit in accordance with its existing permitting requirements, it later may face EPA's correction under the Guidance's broad and indefinite criteria for what is an adverse disparate impact. If it denies the permit or restricts its terms to accommodate the Guidance's uncertain criteria, it quickly may face the permit applicant's legal challenge that the agency has failed to abide by the terms of its environmental statutory obligations and has applied Title VI overbroadly and unlawfully. Obviously the Guidance should not place the states hovering on this high wire above legal liability and the associated expense and delay. If the Guidance could provide a clearer, lawful set of criteria for identifying prohibited discrimination, this dilemma would not exist, for states simultaneously could honor both their environmental and their civil rights obligations under the federal statutes.

III. COMMENTS SPECIFIC TO THE DRAFT REVISED INVESTIGATIVE GUIDANCE

Following are comments that are specific to the Draft Revised Investigation Guidance. (See also comments in Section II. above that pertain to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance.)

A. SUBSTANTIVE COMMENTS AND CONCERNS

1. EPA Should Amend the Guidance so that Permit Decisions that Decrease Emissions or Discharges or Simply Allow the Existing Permit Conditions to Continue Would not be the Basis for a Complaint.

At Page 39677 of the Federal Register Notice EPA proposes that:

> Allegations that concern impacts resulting from a recipient's permitting actions can arise in several different contexts:
> 1) The issuance of new permits;
> 2) the renewal of existing permits; and
> 3) the modification of existing permits.

EPA should amend this section of the Draft Revised Investigation Guidance language to provide that permit decisions that decrease emissions or discharges or simply allow the existing permit conditions to continue would not be the basis for a complaint. (In addition to amending the language quoted above, EPA should delete the bullet on Page 39677 that refers to "permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged.") EPA should also amend Section III.A. regarding the criteria for the acceptance/rejection of a complaint to provide that complaints will be rejected if they pertain to permit decisions that decrease emissions or discharges or simply allow the existing permit conditions to continue.

In the case of permit decisions that simply allow the existing permit conditions to continue (i.e., permit renewals), the permittee has already invested substantial capital in reliance on the permit. Existing facilities are, by definition, not new facilities, and the law demands different treatment of them. Existing facilities--that already have environmental permits which occasionally come up for renewal--present very different types of considerations for regulatory agencies from those presented by permit applications for entirely new facilities. Existing facilities obviously represent commitments of investment, employees' reliance on jobs, customers' reliance on contracts for goods and services, the dependency of suppliers and community businesses on the existing facility, local governments' land use decisions and interests in property tax and other revenues, etc. It should be emphasized, in this regard, that EPA actions that interfere with investment-backed expectations and vested rights, in as broad a fashion as this Guidance suggests, might very well be found to constitute takings of property for which compensation would have to be paid in accordance with the due process requirements of the Constitution.

2. The Most Effective and Equitable Way to Address Environmental Title VI Violations is Through Programmatic Adjustments that Follow Due Process and are Based on Sound Science.

A permit applicant/holder should be able to comply with zoning requirements and environmental requirements and not fear that its permit will be put into jeopardy even though the facility meets those requirements. At Page 39654 of the Federal Register notice, EPA states correctly that:

> it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists;

> therefore, denial of the permit at issue will not necessarily be an appropriate solution.

EPA goes on to state in the Draft Revised Investigation Guidance at Page 39674 that:

> (…) recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing sources, including the permit at issue, using the recipient's existing permitting authorities. Such measures include changes in policies or procedures, additional pollution control, pollution prevention, offsets, and emergency planning and response.

CCEEB suggests that EPA clarify this section by providing that an appropriate means of resolution is for the recipient to go back and adjust that portion of its regulatory program that resulted in the Title VI violation – i.e., a programmatic adjustment. Such adjustments should be: 1) based on sound science and equitable considerations; and 2) provide adequate opportunities for public participation.

As a point of information, the California State Legislature is currently advancing legislation (SB 89, Escutia) that would require the California Environmental Protection Agency to review its programs and address any gaps (deficiencies) that prevent its programs from achieving fair treatment for all people. CCEEB is supporting that legislation.

B. PROCEDURAL COMMENTS AND CONCERNS

1. CCEEB Supports EPA's Position that the Filing or Acceptance of a Title VI Complaint Does Not Invalidate a Permit.

At Page 39676, EPA proposes that "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." CCEEB supports this proposal which provides some certainty to permit applicants.

2. EPA Should Amend the Proposed Complaint Procedure to Set a Deadline for Resolution of a Complaint.

The current Draft Revised Investigative Guidance is unfair because permits could remain under challenge for excessively long periods of time. Consistent with Section 120 to Part 7 of Title 40 to the U.S. Code of Federal Regulations (40 CFR 7.120), EPA proposes that a complaint must be filed within 180 calendar days of issuance of the permit. Also consistent with that regulation, EPA proposes that the Office of Civil Rights ("OCR") may waive that time limit for good cause on a case-by-case basis. CCEEB suggests that EPA specify a deadline for final resolution of a complaint. Such a deadline is needed to provide greater certainty to permit holders that make financial investments based on the issuance of the permit.

3. EPA Should Amend the Draft Guidance to Allow the Permit Applicant/Holder and the Local Government Land Use Authority with Jurisdiction Greater Participation in the Investigation Process.

At Page 39673 of the notice, EPA discusses the process for resolution of complaints. EPA states that OCR "may seek participation from the complainant, the permittee, or others." EPA should amend the draft guidance to give the permit applicant/holder and the local government land use authority a right to participate in the investigative process. As EPA is aware, the permit applicant/holder may be directly affected by the resolution of the complaint (particularly if any violation is not addressed on a programmatic basis). As to the land use authority, these local agencies may be pivotal in making land use planning changes that minimize future disparate impacts. They should be allowed to participate in the investigative process.

IV. CONCLUSIONS

As explained in our comments above, CCEEB has serious concerns regarding the Draft Recipient Guidance and the Draft Revised Investigation Guidance. We urge EPA to work to bring more certainty to this program. Increased certainty will improve EPA's ability to provide fair treatment for all people without creating the counterproductive effect of putting the states' environmental programs into a mode of uncertainty.

V. CONTACT INFORMATION

CCEEB appreciates EPA consideration of our comments. If you have any questions, please call CCEEB's President Victor Weisser at (415) 512-7890 or CCEEB's General Counsel Cindy Tuck at (916) 442-4249.

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August 26, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs***

Dear Administrator Browner and Ms. Goode:

We file these comments on behalf of more than 125 community groups, environmental justice organizations, coalitions, networks, individuals, and an Indian nation, from 33 states and Puerto Rico. The signatories include 63 complainants in 59 of the Title VI complaints filed with EPA since December 1992, 41 of which are under consideration or have been accepted for investigation and 18 of which have been rejected on procedural or other grounds. The signatories include all six environmental justice networks, as well as 16 current or former members of EPA's National Environmental Justice Advisory Council and eight members of EPA's Title VI Implementation Committee. These comments concern both the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (which we will call the "Guidance" throughout these comments) and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (which we will call the "Recipient Guidance" throughout these comments).

Those community groups which have Title VI complaints pending before EPA, and those whose complaints have been rejected by EPA for procedural reasons, have ample experience with EPA's failure to create and enforce a meaningful Title VI policy. Their comments here should carry particular weight, as they have the most expertise in how EPA's complaint processing

procedures work, or don't work.

We are disappointed, in EPA and in the Guidance. The combined Guidance document sets the tone on its very first, prefatory page: "The guidance strikes a fair and reasonable balance between EPA's strong commitment to civil rights enforcement and the practical aspects of operating permitting programs." This balancing act has no place in anti-discrimination law. Civil rights law exists to protect minority interests against just this sort of balancing, not to be part of the balancing itself.

At every opportunity, EPA has ignored the copious, informed input of community groups and environmental justice advocates, based on years of experience working with Title VI and EPA. Many of us who have spent countless hours over many years working to help EPA have a credible civil rights policy feel disillusioned. In almost every policy decision in the Guidance, EPA has chosen to hurt the civil rights complainant, and help the civil rights violator. In many situations EPA's new Guidance is in direct conflict with its own Title VI regulations, and in other cases it simply narrows the regulations' scope in a way which limits the rights of complainants and protects civil rights violators.

Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, we request that EPA scrap the current Guidance and begin again. We offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

Before we address the two Guidances in our general comments and specific, section-by-section observations, we offer the following stories of frustration from communities which have appealed to EPA for help in resolving situations of racial discrimination, to no avail.

STORIES OF FRUSTRATION

A number of signatories of these comments have firsthand experience with EPA's Title VI enforcement record. Their communities – and many others – have been called "EPA's civil rights orphans" – communities facing significant civil rights violations abandoned by EPA. We set forth several examples of communities' experiences with EPA's Title VI enforcement to underscore the complete failure of EPA to have *any* Title VI presence whatsoever. EPA's history both makes its feeble promises in the Guidance simply not credible, and gives a context to EPA's complete abandonment of communities in the Guidance itself.

> *Padres has firsthand experience with the EPA on Title VI issues. Padres filed a Title VI complaint with EPA in December 1994, almost 6 years ago. Padres pointed out that all three of California's Class I toxic dumps are in or near Latino farmworker communities. Padres could be the poster child of EPA's civil rights enforcement orphans – the dozens of communities across the country facing massive civil rights violations that have been abandoned by EPA. In our community, as a direct result of EPA's failure to act, Laidlaw has secured all the permits it needs and is now expanding its toxic waste*

dump to double its former size, which will make it the largest capacity toxic dump in the entire United States.

[redacted], Buttonwillow, CA

Our case has been pending for nearly eight (8) years. This continued lack of resolution is an injustice that our clients, Flint-Genesee United, the St. Francis Prayer Center and the residents of their community, face every day. We have been told repeatedly, for years, that a decision in this matter was imminent. As far back as November 1996, our clients were advised in writing that a decision had even been drafted. Yet, to date, we have no decision from EPA, and the facility in question is up and running, spewing pollutants into the community on a daily basis. Despite the numerous representations to us that an end was in sight, the "end" continues to be postponed. In one telephone conversation, well over a year ago, EPA indicated that it thought there would be a decision 45 days from the last week of March 1999. Again, in August 1999, we contacted EPA to inquire as to when a decision would be handed down and we were told, again, that a decision would be forthcoming within the next 45 days. Those 45 days have long since passed and we have not heard from EPA. As recently as November 1999, EPA indicated, in writing, to Congressman Dale Kildee that it hoped to make a decision within the coming months. Now, in August 2000, we still have no decision.

This facility has been at issue since 1992 and has been under supposedly active investigation by EPA since at least early 1995. We are now entering the new millennium, nearly eight years after the permit for Genesee Power Station was issued, and our clients are still uncertain whether or not EPA will enforce their civil rights. What is certain, however, is that during the pendency of this investigation, the Genesee Power Station has been built, is operating, has assumed a place on EPA's Significant Violators List, has been cited by the Michigan Department of Environmental Quality, has entered into a Consent Judgment based on those violations, and continues to adversely affect the health and welfare of the surrounding community. In fact, the incinerator has been in operation so long that the Title V Air Permit is now up for renewal.

– E. Quita Sullivan, Sugar Law Center, Detroit, MI

We filed a Title VI complaint in 1994, against California Department of Toxic Substances Control. Since that time, we have become one of the many EPA orphans across the United States, communities which EPA has abandoned to environmental racism. In the past 6 years we have had one visit from EPA's civil rights staff, but that is all. The dump continues to operate, and get new permits. The state continues to discriminate, with no sign of EPA.

[redacted], Kettleman City, CA

Mothers Organized to Stop Environmental Sins (MOSES) and thirty representatives of the African-American community in Winona, Texas, traveled to Washington, D.C. in June, 1994 and filed a Title VI complaint against the Texas Natural Resource Conservation Commission. Though accepted for investigation, EPA's Office of Civil Rights has apparently done nothing with this complaint, but let it gather dust. This is not due to a lack of effort on the part of the community to seek justice. Members of MOSES have traveled to Washington, D.C. numerous times to press their environmental justice complaint with the Office of Civil Rights at Federal Advisory Committee meetings, a Congressional Symposium and on one occasion in 1996 when 55 community members traveled from Texas to Washington, D.C. by bus. This past March the community staged a large march for environmental justice aired by CNN on April 16. In a state with an African-American population of around 12% the population surrounding a hazardous waste facility sited in rural Smith County near Winona is 33% both within a 2 mile and 6 mile radius using 1990 US Census data. The African-American population around the facility is also approximately three times the percentage found in other non-urban parts of Smith County, which is primarily a rural county. For fifteen years citizens of this rural community with a disproportionately large African-American population surrounding this facility suffered an ongoing barrage of horrific chemical odors accompanied by burning eyes, nose, and throat, nausea, dizziness, vomiting, shortness of breath and a host of other severe acute health effects. Citizens reported regular problems with harsh chemical odors from the facility at distances even greater than 6 miles. TNRCC failed to enforce basic environmental laws to stop this egregious assault on citizen's health and peace of mind.

Since we filed our complaint in 1994, no one from OCR has ever visited Winona. Whenever MOSES has contacted OCR regarding our complaint over the past several years we have been told that nothing is being done to investigate the complaint and that USEPA OCR does not anticipate doing any investigation of this complaint anytime soon. OCR staff have refused to speculate on a time frame, saying that an investigation of the Winona Title VI complaint is not even "on the horizon." Justice delayed is justice denied. The delay has reached the point of absurdity. OCR has suggested that communities like ours take our complaint to federal court. They must know that our community does not have the resources to do this. Also, our case may be dismissed for a failure to exhaust administrative remedies with OCR. (And they have been exhausting.) It appears the OCR just hopes that our complaint will go away along with those of us bringing the complaint.

We are not confident of USEPA's ability to objectively investigate our complaint, as USEPA itself appears on a list of generators that sent waste to this facility. We believe USEPA should recuse themselves and turn the investigation of this complaint over to the Department of Justice.

– Phyllis Glazer, Mothers Organized to Stop Environmental Sins, Winona, TX

CONTEXT

Before commenting on the Guidances, we feel it necessary to explain how EPA has arrived at this point. It is important to note that Title VI of the Civil Rights Act of 1964 has been the law of the land for almost 36 years; EPA's regulations implementing Title VI are more than 25 years old. Title VI is thus not a new requirement that EPA is imposing on grant recipients; recipients of EPA financial assistance have *always* been required to comply with Title VI.

The first administrative Title VI complaint concerning environmental justice was filed with EPA in December 1992; the agency lost this complaint, and did not begin investigating it until January 1995. The first administrative cases that EPA responded to were filed with EPA in September 1993, and between Fall 1993 and October 1996 about 30 complaints were filed. EPA rejected many of those complaints on procedural grounds, and did not appear to be moving toward resolving any of the complaints it had accepted. Thus, in October 1996, a coalition of community groups involved in 16 of the 20 then-pending cases before EPA sent a letter to Administrator Browner detailing the various violations of federal regulations that had occurred because of EPA's slow processing of their complaints. These groups also demanded that the EPA immediately enact a Title VI policy so that all complaints would be subject to the same standards and potential complainants would have a predictable process to look forward to.

In December 1996, Browner and Assistant EPA Administrator Fred Hansen responded, setting up a Title VI Task Force to develop EPA's policy and begin to resolve cases. The Task Force was to develop the policy and resolve five of the pending cases by February 28, 1997. EPA did not meet this deadline, failing to either issue a policy or resolve any of the cases (six) that the Task Force took on. We note that aside from one complaint which was dismissed by EPA because the complainants grew fed up with EPA and refused to respond to inquiries begun five years after their complaint was filed,[1] none of the other six "expedited" cases has been resolved to date, more than three-and-a-half years after EPA's promised deadline.

In the summer of 1997, a coalition of community groups in Louisiana filed a Title VI complaint with EPA trying to block the siting of a major plastics factory near Convent, the Shintech plant. The Shintech case was added to the six others the EPA's Title VI Task Force was considering; the other pending cases appeared to continue to languish without much attention from EPA.

More Title VI complaints have been filed between October 1996 and the present; EPA's current docket includes 21 complaints under investigation (that is, accepted by EPA) and 30 complaints under consideration (not yet accepted or rejected). This is a dramatic expansion of the docket from even two years ago, when there were just 15 complaints under investigation and six complaints under consideration. Additionally, EPA has dismissed four complaints and rejected 43

[1] *Northwest Civic Association v. Florida Department of Environmental Protection*, No. 09R-94-R4.

others on procedural or jurisdictional grounds.

The EPA finally issued its Interim Guidance in early February 1998. The Interim Guidance was deeply flawed in a number of respects, and many of the signatories of this letter urged EPA at the time to significantly rework it to address their concerns. Additionally, many of the signatories of this letter took part in informal meetings with EPA on the Interim Guidance, and several took part as members of the EPA's Title VI Implementation Subcommittee of the National Advisory Committee on Environmental Policy and Technology.

To come up with this new Guidance, EPA relied heavily on input from "stakeholders" in industry and state and local governments. Inviting such "stakeholders" – the objects of civil rights complaints and the industries accused of poisoning communities of color – to hammer out civil rights policy would be analogous to convening meetings of the KKK and segregationist southern governors to come up with an "acceptable" civil rights policy in 1960. The product in 2000 is no less offensive.

EPA attempts, in its introduction to the two Guidances, to make it appear that it encouraged and received significant community stakeholder input. For example, EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she specifically declined to endorse the Advisory Committee's final report to EPA.

Although we have offered EPA our input on civil rights in general and the Guidance in particular for many years, the Guidance does not reflect any of our input. We thus believe EPA should revoke the Guidance and begin again. Only a fresh approach, unburdened by fealty to "stakeholders" hostile to civil rights, can resuscitate EPA's dormant civil rights enforcement.

GENERAL COMMENTS

A. Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

The Guidance is a significant retreat from even the paltry protections proposed by the 1998 Interim Guidance. At every step, EPA has made the policy decision to hurt the civil rights complainant and help the civil rights violator. Some of these policy decisions are in direct conflict with EPA's own Title VI regulations:

• EPA limits its disparate impact analysis to those impacts which result "from factors within the recipient's authority to consider," a radically narrow reading of EPA's Title VI regulations.

• EPA limits its impact analysis to solely health impacts, and fails to consider economic, social and cultural impacts, another significant narrowing of the scope of Title VI not found in

EPA's regulation.

• EPA limits who may file a Title VI complaint, in a significant change from the language of EPA's Title VI regulations.

• EPA promises to dismiss complaints which meet all jurisdictional requirements simply because complainants raise similar issues in state or federal court, again conflicting with EPA's regulations, which contain no such limitation.

Other policy decisions which hurt the civil rights complainant and help the civil rights violator, which are explained in detail in these comments, include:

• Failing to work to prevent Title VI violations, but instead rejecting complaints filed before a final permit action.

• Using informal resolution techniques in environmental justice disputes.

• Construing the beginning of the 180-day statute of limitations narrowly.

• Never exercising its "good cause" waivers in any case to date.

• Adopting a policy that permit denial is not an appropriate solution to Title VI disputes.

• Making its "due weight" policy effectively a presumption of compliance with Title VI, introducing another hurdle for complainants.

• Implementing a presumption against complainants if an area is in compliance with the NAAQS, although EPA's own studies demonstrate that air quality in NAAQS-attainment areas is still unhealthy.

The Guidance inhabits a fantasy world in which discrimination is rare and hard to find, whereas in the real world, discrimination is quite common and often easy to see. This fantasy has many manifestations, but four of them are particularly important because they undermine the very concept of civil rights enforcement.

First, EPA acts as though benefits and burdens are not *systematically* distributed in unequal fashion. It sets up an extremely laborious process to determine whether, in any particular case, a community of color is being adversely affected by an environmental, social, cultural, or economic insult – when in most cases, one just has to look: at East St. Louis, at Lousiana's Cancer Alley, at East Los Angeles. The concentrations of environmentally questionable and downright harmful projects in those places, and hundreds of communities of color like them around the country, *are not present* in Beverly Hills, Grosse Pointe Farms, the Hamptons, or in hundreds of white communities like them.

Second, EPA acts as if "benefits" can somehow "justify" discrimination. Two examples

are illustrative of EPA's failed approach:

• In §VII.A.1, EPA gives the example of a sewage treatment plant, which it says benefits the community of color in which it is placed by treating that community's sewage. That is true, but not very relevant. The treatment plant also treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.

• Throughout the Guidance, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. § VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

Third, EPA proposes to approve discriminatory effects it finds if recipients come up with plans to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here instead to *institutionalize* discrimination, allowing recipients' actions to be approved of by EPA even when they have demonstrable discriminatory impact.

Finally, EPA also refuses to make the fundamental move of discrimination law: comparison of the impacts among different demographic groups. The Guidance appears to be setting up a super-permitting review process, not a civil rights enforcement process. From the point of view of civil rights law, it simply *does not matter* if the permitting process at issue might have some reasonable basis for the result it produced. If the impact is not felt by white people, or would be different in a white area, or would have been reduced or eliminated in a white area, a discriminatory effect has occurred in violation of the Title VI regulations.

An agency's power manifests itself not only by what it mandates, but by what it tacitly allows. Specifically, despite ample regulatory discretion to address environmental justice concerns under existing environmental laws, in the absence of an explicit legal duty many state agencies have consistently failed to address continuing disparities. This makes the EPA's regulations and administrative proceedings under Title VI a critical legal avenue for residents in environmentally devastated communities. In response to numerous Title VI complaints, EPA committed time and resources to devising the Guidance. However, a reading of the Guidance leads to the inescapable conclusion that – despite the effort expended – the EPA will not deliver on its promise to ensure compliance with civil rights laws, nor will it comply with President Clinton's executive order on environmental justice.

We are troubled by EPA's chosen terminology in its repeated references to "adverse disparate impact analysis." The implication in this choice of phrase is that there can be a "disparate impact" that is not an "adverse disparate impact," a semantic distinction that EPA seems bent on proving but which in the real world does not exist. If there is a disparate impact, it is an adverse impact. We find this odd construction through-out the Guidance, in §§ I.B, I.C, I.E,

II, II.A.3, IV.B, V.B, V.B.2, VI.A, VI.B.1.b, VI.B.4.c, VI.B.6. We discuss why EPA's analysis is actually not an "adverse disparate impacts analysis," but instead a "disparate adverse impact analysis," in our comments on §VI, below.

The Guidance is also written in technical language that is largely inaccessible to community groups which may look to it for an idea on how EPA would handle their complaints.

We urge EPA to scrap the current Guidance and begin again to include the many suggestions provided by community groups and environmental justice advocates on this Guidance and the Interim Guidance.

As noted above, we offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

B. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

A substantial part of the Recipient Guidance is devoted to the EPA imploring and cajoling recipients to do the right thing, to devise strategies to reduce pollutant levels in overburdened communities. Yet, just under the surface of this encouragement is a much stronger message: the regulated community is sure to understand from this guidance that the EPA will go to *extraordinary lengths* to avoid administering a Title VI remedy, either withdrawing funds or requesting the Department of Justice to seek injunctions. The EPA's trepidation is evident in the generous presumptions and ample procedural protections given the recipient in stark contrast to the lack of recourse available to the complainants. Although the Agency may not relish withdrawing funding, without a credible threat by the EPA to use Title VI, many recipients will continue to take actions that cause and contribute to oppressive environmental inequities.

The Recipient Guidance should be strengthened to actually force recipients to admit and address the disparate impact within their jurisdictions. We recommend that EPA require all recipients to:

- Meet with current Title VI complainants to resolve complaints.
- Compile relevant demographic information in the permitting process.
- Conduct a state-wide (or agency-wide) demographic analysis of current permits.
- Place a moratorium on granting permits until the above three recommendations are implemented.

SPECIFIC COMMENTS

Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

In these comments, we use the same numbering system as that used in the Guidance itself.

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964

As we noted above in our General Comments, we are disturbed by EPA's use of the term "adverse disparate impact." It is particularly galling, and misleading, as used in §I.B:

> In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects. This is often referred to as reaching actions that have an unjustified adverse disparate impact.

This construction implies that the Supreme Court endorses the "adverse disparate impact" concept, when in fact, the Supreme Court has never in its history used that tortured construction.

C. Scope of Guidance

The Guidance is very narrow in that it only covers complaints in the permitting context, and even there it does not cover complaints alleging intentional discrimination or complaints alleging discrimination in the public participation processes associated with permitting. Many other activities conducted by recipients of EPA federal financial assistance, both substantive and procedural, may implicate Title VI. For example, substantively, agencies are responsible for enforcement (or non-enforcement) of environmental laws, clean-up of contaminated sites, and awarding of sub-grants, among other duties; procedurally, agencies are also responsible for such things as the size of penalty awards and the length of time for remedial or enforcement action. Many current environmental injustices arise from selective enforcement of environmental laws by state agencies.[2] Additionally, there are at least several pending Title VI complaints outside the permitting context, such as *Chester Street Block Club Association v. Department of Toxic Substances Control*, No. 8R-97-R9 (refusal to require clean-up of toxic substances, including known carcinogens, prior to construction with potential to release toxic substances into community); *Hyde/Aragon Park Improvement Committee v. Georgia Department of Environmental Protection,* No. 8R-94-R4 (failure to investigate, monitor and correct environmental violations in a RCRA clean-up in black community as in white community); and *Mothers Organized to Stop Environmental Sins v. Texas Natural Resource Conservation Commission,* No. 5R-94-R6 (failure to enforce environmental violations which disproportionately affected blacks). The fact that EPA has taken seven years to produce this flawed Guidance, which covers only permitting outcomes, does not make us hopeful that it will ever get around to issuing any future guidances on permit processes, enforcement, clean-up, sub-granting, and other

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[2]*See, e.g., States Neglecting Pollution Rules, White House Says; Sanctions Threatened; Violations Are Underreported, EPA Officials Assert -- Full Review is Sought,* NEW YORK TIMES (December 15, 1996), at 1.

potential complaint areas, as well as a guidance for covering allegations of intentional discrimination.

We note that all of EPA's examples of permits in §I.C are of federal permits, and that since all of the recipients of EPA funding are going to be state and local actors, the vast majority of complaints are going to be about permits granted under state and local permit authority.

We are disappointed that EPA has chosen an avenue for Title VI enforcement – the Guidance – which by its own explicit terms is not "enforceable by any party in litigation." The fact that the Guidance itself is so weak, and EPA is not even committing to follow it, is testament to the lack of commitment to civil rights enforcement at EPA. By giving itself this enormous loophole, EPA is hurting the civil rights complainant and helping the civil rights violator.

Please see our comments in §VI.B.1 on the "sole cause" concept raised by EPA in §I.C.

D. Coordination with Recipient Guidance

We reiterate that without a credible civil rights enforcement threat in this Guidance -- which is wholly lacking in this version – the Recipient Guidance is meaningless.

E. Principles for Implementing Title VI at EPA

For our critique of EPA's misguided principle that "Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved," please see §IV.A. In fact, such informality hurts civil rights complainants and favors civil rights violators, as discussed in §VI.A.1.c.

F. EPA's Nondiscrimination Responsibilities and Commitment

Although EPA professes to be "committed to a policy of nondiscrimination in its own permitting programs," the repeated examples of policy choices made in this document to hurt the civil rights complainant and help the civil rights violator, summarized above in the "General Comments" section, give lie to this representation from the agency. If EPA is unable to have a policy of nondiscrimination in its own civil rights enforcement, it is unlikely to have a credible policy in its permitting programs.

II. FRAMEWORK FOR PROCESSING COMPLAINTS

EPA limits its determination of whether a recipient is in violation of Title VI and EPA's implementing regulations to sources of stressors, stressors, and/or impacts "within the recipient's authority." For a critique of this limitation on the types of impacts considered, please see our comments on §VI.B.2.a. For a critique of this limitation on the range of impacts considered to only those "within the recipient's authority," please see our comments at §VI.B.2.

EPA states here that "informal resolution will often lead to the most expeditious and

effective outcome for all parties." Please see our comments on §VI.A.1 which counter this mistaken assumption.

A. Summary of Steps

Section II.A sets forth a series of deadlines, taken from EPA's Title VI regulations, for EPA to accomplish certain milestones in the complaint processing framework. EPA's intent in establishing definite deadlines for acknowledgment, acceptance and investigation is laudable. By setting a maximum time period of 205 days for a complaint to be received, reviewed and investigated before a decision on the merits is made, EPA is apparently pledging once more to abide by its regulations.[3] There are three concerns with this scheme: that EPA will not follow its own deadlines, that the deadlines will be used as an excuse for substandard investigation of accepted complaints, and, as detailed below in §II.A.3, that EPA has opened a potential loophole with the introduction of informal dispute resolution into the process timeline.

We feel it unlikely that EPA has the self-discipline and resources to comply with the deadlines set forth in the Guidance. EPA has an abysmal history with regard to the deadlines that Congress or EPA itself has set for various environmental controls.[4] In addition, EPA has missed its regulatory deadlines in every single Title VI case accepted for investigation in the history of the agency, with one exception, and missed the regulatory deadlines for acknowledgment of complaints (the 20 days specified in §II.A.2) in almost every case. Given this history, there is reason to suspect that EPA will not always meet the deadlines imposed by the Guidance. EPA has few resources dedicated to investigating Title VI complaints, and it seems likely that OCR will have trouble investigating all of the complaints that will come through its door, in addition to the 51 complaints that are pending.[5]

Because of the lack of resources, there is also a distinct possibility of sub-standard investigation of complaints within the 180-day window. Many of the signatories of this letter have witnessed shoddy investigations of their own complaints, even when the EPA has taken

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[3]The Guidance states that EPA will acknowledge receipt of the complaint within five (5) days, accept the complaint for investigation, rejection or referral within twenty (20) days, and then spend a maximum of 180 days investigating an accepted complaint before making a finding on the merits of the complaint. §§ II.A.1, II.A.2, II.A.3. This makes for a total of 205 days from start to a preliminary finding.

[4]*See Natural Resources Defense Council, Inc., v. Train,* 510 F.2d 692 (D.C. Cir., 1974); *General Motors Corp. v. EPA,* 871 F.2d 495 (5th Cir., 1989); *Conservation Law Foundation of New England, Inc. v. Reilly,* 755 F.Supp. 475 (D.Mass., 1991); *Sierra Club v. Thomas,* 658 F.Supp. 165 (N.D.Cal., 1987).

[5]Indeed, some of these 51 complaints have been pending since 1993. Given that seven (7) years have passed since acceptance for investigation in some cases, and only one complaint has ever been resolved on the merits, there is little reason to believe OCR can turn around all complaints in 180 days.

years to undertake such work. Certainly OCR staff that are under pressure may spend less time than necessary to fully investigate a complaint, if they feel that they must have a decision on the complaint within 180 days. This creates obvious problems for communities at risk from environmental harm. Each complaint deserves a full hearing, and EPA should not tolerate any system that encourages sub-standard investigations of these complaints.

To remedy these problems, we suggest the following recommendations:

• The easiest solution to both of these problems is to ensure that OCR is adequately staffed to investigate all Title VI complaints in a manner that provides for a fair and timely investigation. This may require diverting resources from other parts of EPA, but EPA should recognize the seriousness and importance of civil rights enforcement generally, and specifically a Title VI investigatory program.

• In addition to adequate staffing, EPA should have certain oversight procedures in place to make sure that investigations are being handled properly. This could occur in a number of ways, from an internal annual report outlining the progress and success of complaint investigation to full public disclosure of such progress. At least some public oversight of OCR's process would be valuable to EPA, since there may be occasions where investigations do not include any contact with the community that filed the complaint, immediately raising suspicions that OCR is not conducting a thorough investigation. If there are good reasons for a short investigation that does not appear to fulfill lay expectations of a thorough investigation, then EPA should make those reasons known.

1. Acknowledgment of Complaint

This section allows a recipient to make a written submission to EPA responding to, rebutting or denying the complaint within 30 calendar days. What if the recipient misses the deadline? In our experience with numerous complaints, EPA has generously extended this deadline and often accepted such responses months after the deadline; this stands in marked contrast to EPA's treatment of complainants, whose complaints are rejected if they are even a few days late.

2. Acceptance for Investigation, Rejection, or Referral

We are gratified to see that EPA will request clarification if a complaint is unclear. In several cases to date,[6] EPA has simply denied the complaint rather than request clarification.

3. Investigation

[6] *See, e.g., Gulf Coast Tenants Organization v. Louisiana Department of Environmental Quality,* No. 04R-94-R6.

The timeline of EPA's investigation is not clear in the Guidance, leaving enough loopholes that EPA will not be bound by the times specified in its own Title VI regulations. Section II.A.3, on investigation, lays out the timeline and states that "OCR intends to promptly investigate all Title VI complaints." (Communities with experience with EPA know better, but that is not the point of these comments.) In that section, if a complaint is accepted for investigation, EPA will first try informal resolution. If that fails, only then will EPA conduct an investigation. The guidance next states that within 180 calendar days of the start of the investigation, EPA will make preliminary findings. The question is, when does that 180 day clock start to run? Under the present Guidance, it sounds like EPA can have as much time as it likes to try "informal resolution" before it even *starts* to investigate. This would be a disaster for communities, more of a disaster than EPA's current do-nothing policy.

This section of the Guidance conflicts with EPA's regulations, which say that 180 days after the acceptance of a complaint the EPA has to make a preliminary finding. Otherwise, EPA has an enormous loophole for not complying with the regulatory deadline of 180 days – it can just say it is trying to "informally resolve" the problem. That is our fear, and it is also a concrete way which the new Guidance will have a negative impact on communities of color.

EPA also introduces a subtle but difficult hurdle for complainants in stating, "If based on its investigation, OCR concludes that there is no discriminatory effect (*i.e.*, no unjustified adverse disparate impact), the complaint will be dismissed." By introducing *justification* into the investigation stage, EPA is giving recipients yet another chance to elude civil rights compliance. We urge EPA to remove justification from the investigation stage, and place it at the end of the process – in a post-finding-of-violation stage – where it belongs. This is yet another instance of EPA hurting the civil rights complainant by introducing hurdles into the Guidance not found in Title VI and EPA's regulations.

4. Preliminary Finding of Noncompliance

Please see our comments on §VI.B.2 on EPA's limitation of disparate impact analysis to those which result "from factors within the recipient's authority to consider[.]" This limitation hurts the civil rights complainant and helps the civil rights violator.

7. Hearing/Appeal Process

EPA should define the term "reasonable opportunity" in the context of filing written statements during the Administrator's review of an ALJ's determination.

B. Roles and Opportunities to Participate

1. Recipients

Please see our comments under §II.A.1 on recipients' ability to submit comments.

2. Complainants

In §II.B.2, EPA explains that the proceedings are not "adversarial" between the complainant and recipient and therefore the complainant has no right to appeal. However, EPA employs a different standard to the recipient, affording it substantial procedural protections, including the right of appeal after an adverse decision. As a consequence of this discrepancy, a governmental entity's monetary interest ironically is given far more protection than private citizens' constitutional interests. Here, again, EPA is hurting the civil rights complainant while helping the civil rights violator.

EPA's interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, EPA has effectively made the complainants' civil rights contingent upon the political will of EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court. Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with civil rights laws.

Section II.B.2 states that "complainants do not have the burden of proving that their allegations are true," but given the "due weight" EPA promises to give recipients' data, it is apparent that complainants have the burden of *disproving* recipients' data, which is essentially the same thing as proving their allegations are true.

III. ACCEPTING OR REJECTING COMPLAINTS

A. Criteria

Although EPA relegates it to a footnote, federal financial assistance is a jurisdictional requirement for EPA's Title VI investigations and should be elevated to the text as #5 in the list of jurisdictional criteria. In fact, more complaints are rejected for failing to fulfill this jurisdictional criteria than any other – 18 of 43 complaints thus far rejected, or 42 percent, almost double the percentage of the closest other reasons for rejection. It is irresponsible for EPA not to make this requirement more obvious to the reader of the Guidance.

EPA should accept complaints that do not have a telephone number. The Guidance ambiguously states that it will not investigate complaints that fail to provide a way to contact the complainant, "*e.g.*, no phone number, no address." There are many potential complainants who have no phone, and thus the provision of a phone *or* an address should be sufficient for EPA to reach them.

In a footnote to this section, EPA asserts that it may use information presented by a complainant which it does not accept as a complaint to conduct a compliance review of the complained-of recipient. This statement is of little comfort to complainants and those similarly situated. As a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

1. EPA misleads the public as to when it will accept a complaint.

At the beginning of §III.A, EPA states that it "is the general policy of OCR to investigate *all* administrative complaints concerning the conduct of a recipient of EPA's financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." §III.A (emphasis added). This assertion is repeated at the end of §III.A, as well.[7] This is fundamentally misleading because elsewhere in this very section of the Guidance EPA promises to *dismiss* complaints that "satisfy the jurisdictional criteria in EPA's implementing regulations" if complainants are attempting to exhaust their administrative remedies before the recipient agency (§III.B.3.a) or pursue their rights in court (§III.B.3.b). This contradiction in the Guidance is problematic, and creates situations where EPA can reject complaints based on factors outside the jurisdictional criteria, as outlined more fully at §§ III.B.3.a and III.B.3.b, below.

2. EPA illegally narrows who may file a complaint with it.

The Guidance will have a direct, negative impact on communities because EPA has narrowly limited who may file a Title VI complaint with the agency, in direct conflict with EPA's own regulations. In Section III.A, EPA has decreed new criteria for acceptance or rejecting complaints. That section states that the EPA will accept and investigate a complaint if it is filed by:

> A. A person who was allegedly discriminated against in violation of EPA's Title VI regulations;
>
> B. A person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or
>
> C. An authorized representative of such a person or class of people.

These new criteria conflict with EPA's Title VI implementing regulations. At 40 CFR § 7.120, entitled "complaint investigations," the regulations state:

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

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[7] "OCR's threshold decision to accept a complaint for investigation or reject it is based on the jurisdictional criteria provided in EPA's Title VI regulations[.]"

The regulations do not make the limitation found in the Guidance in point B, that the person filing the complaint be "a member of a specific class of people that was allegedly discriminated against." Instead they state that a "person who believes that he or she *or* a specific class of persons has been discriminated against" may file a complaint -- a much broader standard. Here again EPA has made a policy decision which hurts the civil rights complainant, and helps the civil rights violator, without even noting that the regulations differ.

B. Timeliness of Complaints

EPA ignored comments on its Interim Guidance and continues with a statute of limitations policy which will have a detrimental impact on civil rights complainants. The language used in §III.B is vague and can easily confuse potential complainants regarding the appropriate time for filing a complaint, leading to premature, duplicative, or late complaints. Further, EPA's policy decision to take no action on complaints filed before a permit is issued is an abdication of responsibility for *preventing* civil rights violations.

1. Start of 180-day "Clock"

Although community groups and complainants pointed out in detail the flaws with EPA's approach to the start of the 180-day clock in comments on the Interim Guidance, the same approach is carried forward into the new Guidance in §III.B. Again, EPA narrowly construes the beginning of the statute of limitations in a way which hurts civil rights complainants and aids civil rights violators. Many of the comments in this section will appear familiar to EPA as they were made on the Interim Guidance, but ignored by the agency.

EPA has rejected many complaints on the grounds of timeliness, including a number that complainants have felt were timely, because of differing interpretations of when the statute of limitations begins to run. EPA has generally ruled that the statute begins to run when a permit is issued; many complainants have argued that it should begin to run when all administrative appeals are exhausted. Complainants should be encouraged to try to resolve the issues of disproportionate impact within the permitting process without having to file a civil rights complaint. Thus, they should not be penalized for exhausting their administrative remedies before an agency by having EPA construe the statute of limitations to have run on the complainants' Title VI claim. The Guidance ignores this principle, and forces complainants to file a complaint before exhausting their administrative remedies; as discussed below in §III.B.3, it then will *dismiss* that timely filed complaint, however, because the complainant is exhausting its administrative remedies! This policy of EPA's creates unworkable hurdles for the civil rights complainant, with the Catch-22 of complainants never being able to file a complaint which EPA will investigate.

EPA's Title VI regulations state that a complaint must be filed within 180 days of the action complained about, or allege an ongoing violation of Title VI. 40 C.F.R. § 7.120(b)(2). The Guidance states EPA's position as "Complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit." §III.B.1. This is a subtle change from the Interim Guidance, which required a complaint to be filed within

180 days of the issuance of the *final* permit. The change makes EPA's statute of limitations *more* confusing, not less. The implicit message in the removal of the word "final" is that complaints must be filed after the initial granting of a permit.

The Guidance's policy of requiring a complaint to be filed within 180 days of the *initial* – as opposed to the *final* – permit action is not supported by the law. Not only does the interpretation deviate from EPA's own policy and regulations, but it is contrary to state and federal law, which support the conclusion that the statute of limitations begins to run on the date which a permit became *legally final*. Moreover, EPA's interpretation creates an unworkable legal framework in which complainants must file an administrative Title VI complaint long before the agency action becomes final and is thus subject to judicial review. Federal EPA regulations, state regulations, and federal case law provide an established body of law defining "final agency action." The Guidance's interpretation conflicts with all of these well-settled authorities, and thus should be reversed.

The Guidance flatly contradicts EPA's own regulations defining "final agency action." EPA's regulations, at 40 C.F.R. § 124.19(f)(1), state that "[f]or purposes of judicial review under the Appropriate Act, final agency action occurs when a *final* RCRA, UIC, or PSD permit is issued or denied by EPA *and agency review procedures are exhausted*." (Emphasis added) In the Guidance, EPA makes little provision for the agency review procedures (see §III.B.3, below), even though the filing of an administrative appeal with an agency usually means that the permit in question is not legally enforceable. Further, an appeal might obviate or mitigate (or even exacerbate) the very impacts giving rise to a Title VI complaint; in the course of an appeal, a change in permit conditions could alleviate the impact on the surrounding community. Thus, there may not be a cognizable discriminatory effect until the appeal is resolved.[8] The Guidance's interpretation attempts to begin the statute of limitations before there is a final, reviewable agency action, as defined in EPA's own regulations, 40 C.F.R. § 124.19(f)(1), and, in the case of an administrative appeal, before there is actually even a discriminatory effect of an agency's action.

State law mirrors EPA's regulations concerning final agency action: California state law, to take but one example, establishes that the permit *becoming final* – through the expiration of the administrative review period -- is the final agency action, not the *issuance of the permit* as found in the Guidance. In language almost identical to EPA regulations,[9] the California Code of Regulations state that the agency action is final for judicial review when a final permit is issued *and* agency review procedures and the administrative adjudication procedures are exhausted. 22 Cal. Code Reg. § 66271.8(h).

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[8]The Guidance even recognizes this in §III.B.3, stating "The outcome of such permit appeals... could affect the circumstances surrounding the complaint[.]" Why EPA would resist the logical outcome of its own statements – beginning the statute of limitations *after* the administrative appeal process – eludes us, but is yet another example of EPA working to make the process confusing and difficult for complainants.

[9]40 C.F.R. § 124.19(f)(1).

Federal Court interpretations deciding analogous claims also contradict the Guidance's interpretation of when the statute of limitations should start to run. An agency action is final under the Administrative Procedures Act (APA) when the agency completes its decisionmaking process and the result of that process is one that will directly affect the parties. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992); *Dresser Industries, Inc. v. U.S.*, 596 F.2d 1231 (1979), *rehearing denied* 601 F.2d 586 (1979), *cert. denied* 100 S.Ct. 731 (1979) (finding that the core question in deciding whether the action is final is whether the agency has completed its decisionmaking process, and whether the litigation will expedite rather than delay or impede, effective enforcement by the agency).[10]

EPA's current interpretation would require parties to use a different definition of "final agency action" when seeking judicial review of the agency's action than when seeking EPA administrative review for a Title VI complaint. Federal law, state law, and EPA's own regulations are consistent in stating that the statute of limitations for requesting judicial review of a permit begins to run after issuance of the final permit and after exhaustion of all administrative agency review procedures. 22 Cal. Code Reg. § 66271.18(h); 40 C.F.R. § 124.19(f)(1); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992). The Guidance's different interpretation is an aberration that creates an inconsistent and incoherent legal framework for Title VI complainants. EPA's current interpretation places Title VI complainants in a confusing position: an agency action can simultaneously be "not final" and "final." Under state law and analogous federal authority, it is *not* a final agency action; under EPA's Guidance, it *is* a final agency action. This confusing and arbitrary outcome should be rejected.

The central flaw in EPA's current interpretation is that it begins the running of the statute of limitation before there is a legal "final agency action." A different and more constructive approach, which would allow complainants and federal financial aid recipients the opportunity to fully address disputes before having to file a complaint, would be for EPA to run the 180-day

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[10]Federal Courts have looked to five indicia of the finality of an administrative action: 1) the action is the definitive statement of agency's position; 2) the action has direct and immediate effect on day-to-day business of complaining party; 3) the action has status of law; 4) immediate compliance with the terms is expected; and 5) the question is a legal one. *Mt. Adams Veneer Co. v. U.S.*, 896 F.2d 339, 343 (9th Cir. 1989); *Boise Cascade Corp. v. F.T.C.*, 498 F. Supp 772 (1980), *stay denied*, 498 F.Supp. 782 (1980) (agency action not final until its effect had been felt in a concrete way and the administrative decision had been formalized). This case law directly contradicts the Guidance. For example, when a permit is first issued, but before appeals are exhausted -- the Guidance's starting point for the 180-day statute of limitation -- none of the five criteria set forth by the Federal Court in *Mt. Adams* are applicable: 1) the permit is not the definitive statement of the agency because it could still be altered significantly or even revoked during the consideration of an appeal; 2) the issuance of the permit does not have a direct effect on day-to-day business because it has not become effective; 3) the permit does not have the status of law; 4) immediate compliance with the permit is not expected because the permit is not yet enforceable; and 5) the possibility of administrative review provides a remaining opportunity to decide questions of fact. *Mt. Adams, supra,* 896 F.2d at 343.

statute of limitations from the *latest* of:

• the issuance of an unappealed permit;

• the completion of all agency (non-court) appeals of permit;

• the completion of any agency-mandated dispute resolution procedure; or

• the completion of any voluntary dispute resolution procedure, as long as it has included the complainants, the recipient and the applicant.

Such an approach would allow all stakeholders the opportunity to informally resolve the conditions giving rise to a potential complaint without the necessity of filing a complaint first.

In addition, the Guidance should recognize that complaints alleging continuing violations may be timely even if a particular action occurred more than 180 days before the filing of the complaint, expanding EPA's constricted view of timeliness. Professor Thelma Crivens identifies three categories of continuing violations which apply to actions under Title VI and which could be instructive to the EPA.[11] These categories are:

a. The "date of notification/injury" standard. A violation is considered to be a single act pursuant to a policy which affects a person and requires her to file charges within 180 days of that act.[12] This is the standard thus far used by EPA.

b. The "manifestation/enforcement" standard. A person can bring a civil rights action if she challenges an unlawful practice within 180 days of the enforcement or manifestation of the policy against her or someone in her protected class.[13] Under this theory, the statute of limitations should be interpreted in a manner consistent with eliminating the discriminatory policy. The Supreme Court embraced this standard in *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982):

> where a plaintiff... challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely filed within 180 days of the last asserted occurance of that practice.

c. The "ongoing policy" standard. An aggreived person may bring an action if she challenges an alleged policy, if she remains subject to the policy. "[T]he existence of the formal

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[11]Thelma Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing,* 41 VANDERBILT L. REV. 1171, 1196 (1988).

[12]*Id.* at 1172.

[13]*Id.* at 1192.

policy is proof of the existence of a present alleged violation. Because the policy *is* the present alleged violation, the only remaining issue is whether that policy is in fact discriminatory."[14]

EPA does make one useful clarificaton in §III.B.1, pointing out that complainants should file complaints alleging discriminatory permit processes within 180 days of the event during the process, rather than after the permit has been issued.

In §III.B.1, EPA again states that it may "choose to conduct a compliance review" of a program even if a complaint is rejected on the basis of timeliness. As we noted in §III.A, as a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

2. Good Cause Waiver

Section III.B.2 states that good cause exceptions will be given to certain untimely complaints. Unfortunately, EPA does not specify what the conditions for these exceptions are. Instead, EPA simply states that they may be given. This is confusing. Without guidance from EPA on what "good cause" means, people may think they have a good cause while EPA may not agree. Although EPA has latitude to accept late-filed complaints "for good cause," EPA has thus far narrowly read the statute of limitations on complaints, and has never accepted a complaint which on its face alleged ongoing discrimination if the complaint was filed after what the EPA deemed to be the 180-day statute of limitations. Several signatories of this comment letter are familiar with the effects of EPA's "good cause" policy, which hurts the civil rights complainant while helping the civil rights violator.[15] A list of examples describing situations in which EPA believes "good cause" existed would clarify this seemingly random and arbitrary standard.

3. Ongoing Permit Appeals or Litigation

a. Permit Appeal Processes

EPA states that if a party submits a timely application while administrative proceedings are

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[14]*Id.* at 1200 (emphasis added).

[15]For example, in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6, the complaint was rejected because it was filed 181 days after the action; in *Midway Village Advisory Committee v. California Environmental Protection Agency*, No. 01R-99-R9, the complaint was rejected because it was filed 183 days after the permit issued. In *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9, and *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9, the complaints were rejected as untimely because the complainant groups had diligently appealed the permit to the administrative agency, trying unsuccessfully to resolve the civil rights issue before bringing it to EPA, and had filed within 180 days of the rejection of the permit appeal.

ongoing, then the complaint will be dismissed without prejudice, allowing for the complaint to be refiled later. This places the burden on the complainant to refile the complaint, even if it has been timely filed and meets all EPA's jurisdictional criteria. This is yet another example of EPA's policies hurting the civil rights complainant and aiding the civil rights violator.

EPA is creating a policy which will lead to the dismissing of complaints which meet all its jurisdictional criteria, simply because the complainants are trying to exhaust their administrative remedies. Such complainants could have their future complaints rejected by EPA, as well, as the agency only "expects" – but does not guarantee – to waive the statute of limitations. This is an astonishingly backward policy that penalizes civil rights complainants by imposing on them a new hurdle not found in Title VI or EPA regulations.

If EPA is not willing to alter its policy on when the 180-day clock begins – which would remove this ludicrous situation of dismissal of timely filed complaints – we urge EPA to establish a different policy for complaints filed during permit appeals processes. EPA should accept the complaint, but stay its investigation. If Title VI complaints were accepted and stayed during the pendency of the appeal process, EPA could then alert the recipient that an investigation will take place if the Title VI issues are not resolved during the appeal process. This would provide an incentive to the recipient to avoid the investigation by resolving the issues through changes in the application itself or through additional permit conditions.

The vagueness of the language in §III.B.3 creates further problems for potential complainants, and for EPA. Clarification is required regarding the ability to refile a complaint after appeals and litigation options have been exhausted. The Guidance fails to explain what happens to complaints that are not filed during administrative appeal proceedings but rather wait until such proceedings are exhausted. The Guidance also fails to address whether aggrieved parties must file a timely complaint while pursuing administrative appeals in order to receive the waiver. EPA's language is unclear in referring to complaints submitted and dismissed without prejudice, saying that such complainants will be able "to refile their complaints after the appeal or litigation." §III.B.3. This language appears to make the waiver conditional upon initial timely filing followed by a dismissal without prejudice. If this is indeed the case, then it is unfair. If EPA wishes to encourage potential complainants to exhaust administrative remedies, it should not penalize complainants who pursue remedies without filing a complaint during the appeals process. EPA should grant waivers to all parties who pursue administrative remedies, regardless of whether or not the complaint has been filed and dismissed. If indeed EPA intends to grant waivers to all complainants who go through administrative processes, then it needs to make this clear.

Secondly, EPA conditions the waivers by saying that EPA "may" grant waivers if the complainants go through the appeals process. Clearly this conditional waiver system will not encourage people to use the appeals process. If EPA wants people to try to resolve problems with recipients rather than file Title VI complaints, it should not make the decision to grant a waiver subject to administrative whim. Given the choice between filing a timely complaint within the 180 day window, or taking a chance with an appeals process that "may" result in an untimely complaint, many complainants will choose to file with the EPA before going through the appeals process if only to ensure the legitimacy of the complaint.

In order to reduce the filing of untimely complaints, EPA should make the waiver guaranteed – or, accept the complaint and stay the investigation, or start the 180-day clock at the end of the administrative appeals process, as recommended above. If EPA guarantees the waiver, it should allow complaints to be refiled within 180 days; the use of a 60-day clock in the permit appeals and litigation sections penalizes civil rights complainants, who should have the full 180-day clock guaranteed by EPA's Title VI regulations.

b. Litigation

EPA erects a new hurdle for civil rights complainants – one not found in Title VI itself or in the agency's regulations – when it states, in §III.B.3, that it will generally dismiss complaints if the issues raised in the complaint are the subject of "litigation in Federal or state court." This broad policy has the potential to significantly harm complainants who seek to challenge permit actions on environmental grounds in court, while challenging those same permit actions on civil rights grounds by filing an administrative complaint. Such complainants would have their civil rights complaint dismissed because they sought to force an agency to abide by environmental law – because the "issues raised in the complaint," say, air pollution, would be the same issues raised in the lawsuit. Such a policy once again hurts the civil rights complainant, and helps the civil rights violator. It also has no place in EPA's Title VI Guidance. EPA should investigate Title VI complaints that meet the agency's jurisdictional criteria, rather than erect new hurdles which are not found in Title VI or in EPA regulations.

While the Guidance notes that the complaints will be dismissed "without prejudice," there is also no guarantee that EPA will accept a complaint filed long after the 180-day statute of limitations has run. Based on EPA policy to date, EPA would certainly reject such a complaint, making its dismissal of the earlier "without prejudice" meaningless as a new complaint would never be accepted. If EPA is to retain this policy, it should guarantee a waiver of the statute of limitations to all parties who filed complaints within the original 180-day limitations period.

EPA also states that it will most likely not consider complaints based on permits judged upon by a court. This does not encourage use of the appeals system. By suggesting that all complaints are foreclosed if not heard at EPA first, EPA ensures that some complainants will dispense with those other channels, and go straight to the EPA to have their complaints heard. While barring complaints of this kind may save some resources of EPA, it will not help the agency fulfill its obligations to investigate possible violations of Title VI. Again, EPA should either accept the complaints and then stay investigation during the pendency of the litigation, or guarantee a waiver to encourage the use of non-EPA resources to resolve civil rights violations.

4. Premature Complaints

To ensure that discrimination does not take place, EPA must *prevent* industries from polluting areas where the pollution would result in discriminatory adverse effects. However, the Guidance states that a permit must be issued before a complaint can be considered ripe, otherwise

it will be dismissed as premature.[16] While this creates an easy marker for EPA to judge ripeness by, it hurts the communities that are supposed to be protected by Title VI. Using permit issuance as a ripeness test means that EPA misses its best chance to *prevent* discriminatory impacts – before they happen. If it is clear that a permit will be issued, and if a complaint is sent to EPA that meets the initial acceptance determination, then there seems to be little reason for EPA to delay investigation. Potential EPA investigation may also encourage agencies and polluters to negotiate with communities to revise the siting plans. Without a compelling reason for the delay in investigation, this seems to be a pointless ripeness test for EPA to use. It is irresponsible and a waste of time to put a community's health at risk by delaying investigation until a permit is issued when the investigation – or at least EPA's intervention – may commence as soon as a permit is in the works. EPA is abdicating a low-cost, efficient way of preventing civil rights violations.

IV. RESOLVING COMPLAINTS

A. Reaching Informal Resolution

EPA's Title VI regulations call for the Office of Civil Rights (OCR) to pursue informal resolutions of administrative complaints wherever practicable through alternative dispute resolution (ADR) techniques.[17] The Guidance, at §IV.A, notes that EPA will encourage informal resolution. EPA cites efficiency, time, and costs, among others, as reasons for employing ADR. In addition, EPA claims that ADR is helpful to "design and implement a process leading to an outcome acceptable to all parties."

EPA provides guidance for the use of ADR in two circumstances: in informal resolutions between recipients of federal funding ("recipients") and complainants, and informal resolutions between EPA and the recipients. In either setting, EPA lists dialogue, consensus building, and mediation as approaches to consider when developing an ADR process. For informal resolutions between recipients and complainants, EPA states that the goal is to have the parties resolve the dispute "between themselves." Specifically, EPA advocates the use of a third party acting as a mediator and a structured process through which the parties can participate in ADR approaches useful in resolving Title VI complaints. For informal resolutions between EPA and the recipients, EPA states its willingness to use ADR to reach informal resolutions at any point during the administrative process before a formal finding.

1. Informal Resolution Between Recipient and Complainant

a. EPA's preference for using ADR to reduce complaints deprives communities of the ability to exercise their civil rights.

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[16] "When complaints… are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." Guidance at §III.B.4.

[17] 40 CFR 7.120(d)(2).

EPA's insistence on using ADR techniques may be in the interest of efficiency, cost and time for EPA and the recipients, but does not protect the civil rights or environmental interests of communities of color who actually have to face the environmental hazards. EPA's preference for using ADR is apparently to minimize the overall number of Title VI complaints it has to investigate and decide. Attempting to limit the number of Title VI complaints decided, however, deprives communities of the ability to use Title VI as a tool for achieving equality in civil rights. Furthermore, EPA also states a preference for granting permits, only denying them in "rare situations." As a result, EPA's use of ADR to "reduce" Title VI administrative complaints will not prevent discrimination, but instead may encourage recipients to move forward with potentially discriminatory and environmentally harmful permitting actions and then settle any disputes with a complainant later.

b. EPA's use of ADR creates a pre-ordained outcome unfavorable to complainant communities.

EPA's proposed use of ADR to resolve complaints creates an outcome that all parties are forced to accept, but an outcome that may not necessarily be acceptable to all parties. When a recipient of federal funds decides to issue a permit, the community cannot file a complaint until the permit is granted. In addition, once EPA begins an investigation into the complaint, the complainant has limited rights to participate in EPA's investigation, and no avenue to appeal a dismissal. With EPA's stated goal of using ADR to avoid Title VI complaints, a situation is set up where there is a preference towards granting the permit. As a result, the community, which often times does not want the permit to be granted at all, is forced to enter into an ADR negotiation that is aimed at granting the permit. Although EPA claims this process allows the complainant an opportunity to benefit from the entire permit review process, the reality is that the permit will inevitably be granted except, in EPA's own words, in "rare situations." EPA's ADR scheme does not realistically result in a resolution where a permit is withdrawn or rejected. Instead, EPA has set up a situation where a community is coerced into entering into a potentially binding negotiation that is not aimed at fulfilling its objective of not having a facility at all. This is contrary to EPA's stated reason of using ADR to "implement a process leading to an outcome acceptable to all parties."

c. ADR puts complainants in a position of unequal bargaining power with recipients in the negotiation process.

ADR fails to take into account the inherent inequalities in bargaining powers between the recipient and the complainant in the Title VI process. Unequal bargaining power in issues of negotiation often arise due to differences in education, culture, and training for negotiations. EPA's suggested use of ADR in Title VI complaints, however, does not address the problem of unequal bargaining power. To the contrary, ADR merely institutionalizes this inequality.

ADR places people of color in a disadvantage due to its focus on low cost, speed, and efficiency; it places little weight on creating open communication and an understanding of cultural, racial, and class issues. The formal adjudication process has built-in procedural safeguards and codes of evidence to minimize prejudice in the administrative process and, if

necessary, the courtroom. In the formal process, procedure and rules reinforce the idea that justice is blind to race, ethnicity, nation, and handicap.[18] The ADR process, however, takes the procedural safeguards and puts them aside in favor of informal negotiation between the disagreeing parties. This informal atmosphere may allow weaker parties to be coerced into settlements that they may not necessarily want to enter into.[19] In fact, research has shown that informality only allows for more unfairness and power inequality.[20] For example, if members of a low-income community of color are forced to informally negotiate with attorneys and highly-trained negotiation experts of a recipient without procedural safeguards to curb discriminatory actions, abuse of power, and refusals to cooperate, chances are the community residents will not leave the negotiation getting what they want. In other words, once the procedural safeguards that traditionally protect disadvantaged individuals and groups disappear, there is no guarantee that a negotiation will in fact be fair, inclusive, and non-judgmental.

ADR is also disadvantageous to complainants because they may lack the resources necessary to gather crucial data and facts to prove disparate impact. In any negotiation, knowledge is power. With a voluntary exchange of facts and data in the ADR process, the parties must do their own homework in order to increase their bargaining power and persuasiveness. Low-income communities of color, however, do not have the money or resources to hire legal and technical experts to gather facts and data to bolster their Title VI complaints. State agencies and industry, however, have enormous resources at their disposal, allowing them to use expert research and analysis to support their arguments. With vast resources, facts, and data, the state and industry representatives enter the ADR proceedings in a superior position to disadvantaged communities. The practical effect is that the community is left without much evidence to rebut the facts presented by the recipient, thus further handicapping its bargaining power.

d. Little research and data exists on whether ADR is an

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[18]Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEORGETOWN L.J. 667, 685-686 (1997)(formality in judicial processes remind and ensure everyone of the values of fairness and equal treatment).

[19] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-1550 (1991)(informal methods of dispute resolution can be destructive for participants because it requires them to speak in a setting that they have not chosen and often imposes rigid orthodoxy as to how they should speak, make decisions, and be); *See* Delgado, supra note 3 at 685-686 (informality increases power differentials and formality triggers a better, equal result); Luke W. Cole, *The Theory and Reality of Community-based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY LAW QUARTERLY 751 (1999)(informality of the local advisory committee process led to disenfranchisement of communities of color); Richard Delgado, *et al.*, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISCONSIN LAW REVIEW 1359 (1985).

[20]*See* Delgado, *The Problem of the Shanty*, *supra*, at 681, 685-686 ("Informality increases power differentials").

appropriate method of dispute resolution with low-income communities of color.

Little, if any, research and empirical analysis has been conducted on whether ADR is necessarily the most appropriate or effective method of resolving conflicts with traditionally disempowered groups of people, such as African Americans and the poor.[21] Specifically, there has been a lack of research and analysis on whether ADR is an appropriate method of resolving disputes regarding discrimination and racism.[22]

e. ADR does not address overall patterns and systems of discrimination that constitute significant social problems that may be practiced in the permitting of environmental hazards.

ADR poorly serves the larger goals of EPA's Title VI obligations because it focuses narrowly on the resolution of individual disputes as opposed to addressing larger patterns and systems of discrimination that recipients may practice in the permitting of environmental hazards. First, ADR looks at discrimination on a case-by-case basis. The disadvantage of this approach for communities is that communities can not rely on precedent-setting cases where courts have spoken on issues involving patterns or systems of discrimination, a sometimes-powerful tool for ensuring that the rights of the disadvantaged are not violated. Instead, ADR forces the community to negotiate their position on its own, without the benefit of judicial wisdom and experience. The recipient, on the other hand, has the advantage of negotiating on a case-by-case basis.

f. ADR, often conducted in a closed setting, presents little opportunity, if any, for public scrutiny, political accountability, or accessibility.

The ADR process is inadequate for protecting the civil rights of complainants because it does not result in a written opinion, is generally closed to the public, and is usually exclusive to the parties involved. As a result, none of the proceedings enter into the public record, creating little, if any, opportunity for public scrutiny, accountability, or accessibility. Environmental justice disputes, however, exist in a public arena. Since the disputes affect those in the public arena, the

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[21]Cherise D. Hairston, *African Americans in Mediation Literature: A Neglected Population*, 16 MEDIATION QUARTERLY 360, 370 (1999).

[22]Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L.REV. 1055, 1058-1060 (1996).

agreements reached in the ADR process must withstand public scrutiny.[23] In ADR, however, parties often want "off-the-record" discussions, although the public may have the right to know how the discussions are progressing and what is being said.[24] If discussions are not open to the public, then there is no guarantee that a group may not be taken advantage of in the ADR process.

Unlike ADR, the written decisions and opinions of judges and administrators are part of the public record, and thus create a level of public accountability and scrutiny – as well as precedent. In the 1980s, there was a great deal of public criticism of EPA's "sweetheart deals" between EPA and regulated firms.[25] EPA's use of ADR in the deals created little faith and great public distrust in its ADR process for environmental regulation.[26] As a result, improper deal-making in the ADR process is a real risk the EPA may take by implementing ADR for Title VI complaints. In addition, in certain cases, such as civil rights cases, ADR is inappropriate because of the high level of public interest and concern in the issues involved and its outcome.[27] If formally adjudicated in the administrative process, the public may have full access to all proceedings, decisions, and events of the case.

The reality is that the ADR process is, by nature, private and thus deprives complainants, who may be facing discrimination or racism, from the protection of the decision-making process occurring within the view of the public. Although ADR does have mechanisms to ensure fairness, such as a third-party neutral mediator, the negotiation is only as fair and reasonable to all the parties involved as the individual mediator allows. In addition, traditionally, ADR resolutions are viewed as contractual agreements. Therefore, there is little process or procedure that allows for appeals of agreements or decisions made on substance and procedure in the ADR process.

g. Neutral third-party mediators lack the authority and power of a judge to prevent unfair and discriminatory acts in the ADR process.

There is an assumption in the ADR process that a third-party neutral mediator serves the same equalizing purpose as a judge in a formal adjudicative process. In the ADR process,

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[23]Challenges that Arise for Mediators of Complex Public Policy Disputes, in COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES (Society of Professionals in Dispute Resolution, 1992), pp. 2-5.

[24]*Id.* at 3.

[25]Edward Brunet, *The Cost of Environmental Dispute Resolution*, 18 ENVIRONMENTAL LAW REPORTER, 10515, 10517 (1988).

[26]*See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10517.

[27]Judge Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARVARD LAW REVIEW 668 (1986).

however, mediators are often relied upon to act only as informal "judges."[28] Unlike a judge, however, the neutral third-party mediator may not have the authority to force or demand a fair or voluntary party exchange of facts and data. This lack of authority further accentuates the potential for unfair and discriminatory acts in the ADR process. Formal adjudicative processes, however, have strict rules enforceable by a judge regarding discovery to prevent abuse by parties. The ADR mediator may not have the authority or force to compel actions on one party. In addition, although EPA states that a neutral third-party mediator may be appointed when necessary, there is not any procedure or guidance outlined on how and when a "neutral" third-party mediator is proper, may be selected, or agreed upon by the parties.

h. ADR's lack of formal discovery prevents a fair resolution of a dispute.

Without a formal discovery process, ADR fails to provide a fair resolution of a dispute due to its lack of a high quality and degree of accurately determined facts. Instead, ADR's focus on efficiency, cost, and speed only provides for a voluntary exchange of data that often results in facts that are incomplete, one-sided, and inaccurate. Without substantial and complete "facts" as weapons, communities are at a disadvantage when negotiating with recipients, who usually will have more resources to rely on.

i. ADR has no precedential value.

A unique feature of the common law system is that any legal command or decision becomes a part of the background data that constitutes our legal rules. A foundational principle of our legal system is that like cases should be treated alike, and different cases differently. Consequently, each legal order is of some value as a precedent for similar future situations. Some reasons for this system are the desires for uniformity, equality in treatment, and the ability to learn from lessons in the past.

In contrast, ADR schemes have no such internal structure of precedential value. The lack of precedent destroys the opportunity for the law to be applied uniformly, fairly, and equally. In issues of environmental justice, the lack of any precedential value in ADR not only prevents parties from utilizing past favorable (or adverse) court rulings, but also prevents any long-term growth and learning within the ADR processes. As a result, the ADR process in any specific area does not grow or evolve with any uniformity or equality. Practically, in an environmental justice context, two similar communities facing similar environmentally hazardous threats in similar areas can both enter into an ADR process and leave with completely different results. In addition, in cases where it is clear that the law has yet to address a problem, ADR fails to provide any precedential history or value.

j. Recommendations

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[28] *See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10515.

The current draft guidance is vague on how, when, and in what manner ADR will be used as a method of resolving Title VI complaints. As it is in this guidance, the description of ADR does not address the needs of complainants – which is to prevent discriminatory impact of environmental hazards. ADR, as it is proposed by EPA in this policy, has a preference for granting permits and rejecting Title VI complaints. Therefore, the use of ADR as it appears in this policy is contrary to the purpose and intent of Title VI. The prevention of discrimination does not occur by forcing the discriminated to "settle" their complaint with the recipient for efficiency. ADR creates an outcome that all the parties are forced to accept, but not necessarily acceptable to all parties. Therefore, EPA should abandon efforts to encourage the use of ADR between the complainant and recipient according to the current policy. Instead, EPA should allow the administrative process to decide disputes under Title VI. If, however, ADR is implemented as EPA's primary process of dispute resolution for Title VI complaints, EPA should:

- Consult and conduct investigations, research, and analysis on whether the ADR process is the appropriate method of resolving complaints from people of color who are poor and traditionally disadvantaged and discriminated against.

- Draft a specific guidance on how ADR will be implemented in order to resolve complaints under Title VI and open up the guidance to public comment so that the ADR process includes all the elements that complainants feel will level the playing field. Included in the guidance, for example, should be a detailed procedure on how to identify parties in the convening process, when a third-party neutral mediator is necessary, and the process in which the mediator is selected.

- Examine different approaches to ADR and implement one that takes into account the inherent inequalities in bargaining power between EPA, the recipient, and complainant.

- Recognize that the ADR process for Title VI may deal with parties that are traditionally discriminated against and thus must be sensitive to cultural, social and racial issues.

- Require that the ADR process be more open and accessible to the public eye. The public is skeptical of results and decisions made out of the public eye, and opening the ADR negotiations to public scrutiny may increase its trust in the process, in addition to ensuring that one party does not continue to discriminate and take advantage of another party.

- Practice a heightened standard for employing ADR in cases where one of the party members may be part of a traditionally disadvantaged or discriminated class.

- Practice discretion and not use ADR when there are potentially important precedent-setting legal issues that need resolution.

- Not employ ADR when the conduct of one of the parties is so egregious as to make it in the public interest to subject that party to the most visible trial and punishment available.

- Not employ ADR in instances where it would require one party to compromise moral or

value beliefs (i.e. siting hazardous waste facilities in religiously sacred areas).

• Not employ ADR when the result may have a substantial effect on people who are not at the actual negotiation.

• Complainants should be able to inform EPA that they reject ADR and begin the official 180-day investigation of their complaint.

2. Informal Resolution Between EPA and Recipient

Resolution of complaints solely as a result of negotiations between EPA and a recipient should be avoided, as it may lead to EPA settling for terms that are unacceptable to the complainant or the affected community. Complainants and the affected community should have the opportunity to sign off on any resolution agreed to between EPA and recipients. We also apply this comment to §IV.B, below, in which EPA states that a complainant's "consent is not necessary."

B. Implementing Informal Resolutions

1. EPA should cause permits to be denied or at least stayed during the pendency of its Title VI investigations.

In §IV.B, EPA states that "denial of the permit at issue will not necessarily be an appropriate solution." EPA repeats this language elsewhere in the Guidance, as well (§VII.A.3). This language is deeply troubling. Experience and common sense indicate that affected communities generally raise complaints in response to a single proposed new or expanded facility, discovering or realizing that they are subject to a disparate impact in such instances.[29] The suspension, denial, or revocation of a permit is a powerful tool for communities fighting against disparate impact. EPA, in essence, is robbing complainants of the most effective tool they have to prevent disparate adverse impact. While EPA may believe that encouraging recipients to come into "voluntary compliance" is an acceptable solution to disparate adverse impact, the idea improperly holds complainants' health and safety hostage. EPA here again acts in a way which hurts the civil rights complainant, and helps the civil rights violator.

The EPA Guidance states explicitly that "it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." By this surprising statement, the EPA

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[29] *See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 326 (1994). Of the first 17 Title VI complaints filed with the EPA and examined in this article, almost every single one, whether accepted or rejected, was prompted by individuals or groups challenging the permitting of a single facility.

makes it virtually impossible to successfully challenge the legitimacy of a permit proceeding (or other agency action for that matter) in light of Title VI. Consider the case of a flagrant violation: a hypothetical official advises a permit applicant that the agency will only grant a permit for a major facility if it is sited in an overburdened Latino community. This action is taken because the environmental agency doesn't want to contend with opposition from a white wealthy community situated near a more geographically appropriate site for the facility. Under the logic reflected in the Guidance, denial of the permit in this fictional case would *not* be an appropriate solution simply because the permit is not the "sole" cause of the impacts within the Latino community. No one discrete agency action is likely ever to be solely responsible for an adverse impact, but it does not follow that actions that contribute to disparate impacts should be allowed.

Instead of adopting this baffling position, the EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases. The EPA, in attempting to assuage the regulated community by categorically rejecting permit denial as a potential solution in a Title VI case, while at the same time sending a strong message that withdrawal of funds is unlikely to ever occur, effectively decimates the authority of this Civil Rights law in the permitting context, and probably beyond that.

The "sole cause" idea is contrary to cumulative impacts analysis, which EPA embraces in theory. The whole point is that this project is *adding to* the burden. If "sole cause" is taken to an extreme, the more polluted an area gets, the less likely ti is that a permit will be denied, exactly what Title VI is supposed to combat.

2. EPA's approach to mitigation measures is flawed.

EPA's faith that mitigation measures employed by the recipient agency are sufficient to assure compliance with Title VI is misplaced and will ultimately result in increased violations of Title VI.

EPA sets out the guidelines for its policy regarding mitigation measures in §II.B.6 of the Recipient Guidance and in §IV.B of the Guidance.[30] EPA couches these measures as steps that the recipient agency can take in order to "reduce or eliminate alleged adverse disproportionate impact." Generally speaking, using these measures to compensate for current Title VI violations by creating additional violations of Title VI in other areas is unjust. Granting such measures due weight and considering such measures a "less discriminatory alternative" is ill-advised since it will likely not eliminate adverse disparate impact "to the extent required by Title VI" in the area actually affected by the sited facility. The following mitigating factors and their usage should be carefully reviewed.

a. Mitigation must focus on the site complained about

[30] Those recommendations are short, but generally point out that mitigation is an appropriate way to deal with potential violations of Title VI.

Mitigation measures are sometimes devices used by agencies and polluters to trade certain pollution to other areas or media. This may include promising to reduce water pollution while increasing air pollution, or buying wetlands in another region to compensate for increased air and water pollution. One difficulty with mitigation is that it may not actually cause a reduction in the harmful pollution at the site itself, since mitigation could potentially take the form of positive environmental action in other regions.

Thus, EPA needs to require that any mitigation measure undertaken must solve problems at the actual site, and not deal with an unrelated problem that has no bearing on the community where the facility is to be located.[31] This means keeping mitigation at the site, and concentrating mitigation on the medium specifically claimed to be causing the violation. There is no sense in allowing for reductions in water pollution at a site if the air pollution is the focus of the complaint.[32] This would appear to be the only way to truly address Title VI concerns. Buying wetlands in another region will not help minority communities who are exposed to disproportionate environmental impacts.

b. Offsets

One confusion that EPA needs to clear up is what it means by "offsets." Offsets can be promises by a polluter to reduce pollution at other facilities in exchange for keeping emissions high at the disputed facility. Or offsets can mean allowing the polluter to send pollution to another area in exchange for having to reduce its pollution at the disputed facility. Assuming EPA means reducing pollution at other areas, this is inadequate to address Title VI concerns. Only offsets that apply to the specific neighborhood directly affecting the complaining community would reduce an adverse impact as required by Title VI. Otherwise, a facility's emissions could pollute an area in violation of Title VI, while pollution is reduced in areas where it does not require reductions (perhaps, ironically, in white neighborhoods, the result Title VI is intended to prevent).

Assuming EPA intends to give due weight to offsets, there are significant possible problems. Implementation of pollution offsets (in this case allowing for more pollution in another

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[31] "The significance of the adverse environmental impact of the particular agency action can not be obviated by pointing to the beneficial environmental impact of a different and unrelated action." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982). *See also* Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 831 (1999) ("EPA should amend its supplemental mitigation proposal to require that any mitigation address similar health or environmental risks as those caused by the project").

[32] *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 189-90 (1998) (stating generally that the success cross-media mitigation measures are difficult to establish since a baseline comparison to classic regulation is difficult).

area to compensate for having to reduce emissions at the complained-about site) will necessarily reroute pollution to other areas that may also bear a disproportionate burden of air pollution.[33] As a result, Title VI's core purposes will not be achieved by this sort of scheme. It will be a "rare situation" that the extra pollution created in another area will be placed in an area inhabited by rich, white, property owners. Instead, it would invariably be most economical for a company to deposit its offset pollution in an area that is poor and relatively powerless. Giving companies an incentive to pollute in other poor areas by advocating offsets for Title VI violation areas does not solve the problem of disparate impact, it merely moves it somewhere else.

If EPA wishes to use offsets in a Title VI context, it should limit the recipient of the offset pollution to communities that do not experience adverse disparate impact, and *would* experience no adverse impact as a result of the offset. By limiting the offset destinations, EPA can ensure that the goals of Title VI are not defeated.

c. Abatement procedures should be avoided as they place the burden on the host community.

Abatement procedures are generally those measures that involve reducing chemical exposure by attacking exposure routes that might exist in the homes of the community residents experiencing adverse impact or elsewhere in the community, but not the emitting facility itself. Abatement procedures by their very nature ignore the serious pollution problem that creates the violation in the first place, and as a result, abatement will not in all likelihood solve the root cause of the problem – the emissions that create an adverse impact.

By not addressing the facility actually emitting the pollutant, and rather assigning responsibility for unhealthy conditions to low-income home owners (as in the case of lead), no effective solutions can be truly formed. Given that the data for a source of emissions is much easier to interpret than possible extra-site sources of pollution, the first source targeted for controls should be the sited facility. While data is understandably difficult to ascertain, clearly some polluters are worse than others and no amount of abatement will make up for their emissions.

Until the main source is cleaned up, all abatement measures will likely prove ineffective. It is unlikely that any abatement measure will conclusively eliminate the basis for a Title VI complaint. Allowing abatement as a mitigating factor in rare cases where abatement may be considered will not solve the Title VI problem and should not generally be granted due weight. EPA should restrict the use of abatements as mitigating features to only those circumstances

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[33] *See Communities for a Better Environment v. South Coast Air Quality Management Dist*., EPA File No. 10R-97-R9, filed June 23, 1997 (generally alleging that source pollution, wherever it exists in the SCAQMD, is concentrated in minority communities); Vicki Ferstel, *The Advocate (Baton Rouge, LA)*, June 21, 1998, at 1A (reporting on a 1984 consultative report to the city of Los Angeles that recommended siting facilities in already highly industrialized neighborhoods in low-income neighborhoods).

where abatement is *proven* to be as effective as shutting the facility down completely.

d. The complainants and the affected community must endorse the mitigation measures chosen by EPA and recipients.

By allowing state agencies to submit a mitigation plan to OCR without consulting with the affected community, EPA lacks the input it needs to make a determinative finding. EPA can not adequately find that a mitigation plan will eliminate impact "to the extent required by Title VI" without checking with the community first to make sure they are comfortable with the plan. One of the first assumptions of democracy is that all information is colored by perspective. All perspective and voices are needed to make sound policy decisions. These democratic goals are not met if the decisions regarding solutions to Title VI violations are made without community input, by people who do not live where the violation is occurring. The assumption behind a Title VI administrative complaint is that the regulators and policy makers have failed to adequately assure equality of environmental condition. Moreover, excluding affected community members at a crucial policy making stage is fundamentally unjust, and will ultimately lead to EPA decisions that do not adequately address Title VI violations. It therefore seems illogical to exclude groups which have the crucial perspective needed to evaluate a plan from the process of plan approval.

EPA acknowledges the value of hearing community concerns and ideas when it recommends as most effective mitigation plans those which involve community groups that filed the Title VI complaint.[34] EPA should keep this in mind and strike the language on page 72 that reads "OCR may also consult with complainants, although their consent is not necessary," and replace it with "OCR will consult with complainants."

e. The overall efficacy of mitigation measures must be monitored.

Communities' main suspicion regarding mitigation procedures is that they will not actually work. If a state agency promises to carry out mitigation procedures, and then fails to do so or implements them inadequately, there is very little recourse for the community members affected. Even if the mitigation measures are faithfully put in place, there is no guarantee that they will actually work.[35] Therefore, it is important that EPA do two things to ensure that mitigation

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[34]Recipient Guidance at §II.B.6.

[35]*See* Michael G. LeDesma, Note, *A Sound Of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497, 500-501 (1994) (stating that wetland bank mitigation is generally unmonitored and in fact starts a race to the regulatory bottom among states); Daniel Jack Chasan, *Salmon; Ruling: Agencies Violate Law; So What? It Happens All The Time*, SEATTLE POST-INTELLIGENCER, March 19, 2000, at P-I FOCUS, Pg. G1 (stating again that wetland programs are ineffective and that generally, state environmental agencies do not follow the law with regard to their mitigation plans, at least in Washington state); Michael J. Bean, Testimony Before the Senate Subcommittee on Fisheries, Wildlife and Drinking Water, November 3, 1999 (stating generally that HCP mitigation efforts are underregulated, hard to enforce, and difficult to judge in terms of efficacy); Keith Rogers, *Employees Say Agency*

schemes will actually work.

First, EPA should make sure that third parties that are responsible for conducting mitigation (namely the polluters or state agency) actually do it. The Supreme Court's position in *Robertson v. Methow Valley*[36] is instructive in this regard. The Court there decided that mitigation schemes did not have to be proven sound in order for a project to be legal under NEPA, only that they must be discussed. But the Court insisted that this was because NEPA holds no requirement for substantive environmental protection, so no proof of such protection is required in a mitigation scheme.[37] Since in the Guidance EPA is looking toward mitigation schemes to provide substantive environmental protection, the original reliance standard set out in *Pierce*[38] and the Circuit Court's *Methow* opinion, and not the Supreme Court's *Methow* decision, applies. In short, if EPA wants to rely on third parties to provide mitigation that is supposed to guarantee substantive environmental protection, than those measures must work, and EPA must make sure they do. The easier standard should only be used in NEPA cases, where there is no requirement for substantive environmental protection. Regular EPA monitoring would be required in order to guarantee that mitigation measures were working.

Second, EPA should include administrative recourse for parties who put their faith in mitigation only to see it fail. While EPA grants that an area-specific agreement or other such mitigation scheme may be reviewed if circumstances change (*i.e.*, if it does not work), this review process seems to require a new permitting action in order to make the complaint ripe. And even then, community members must still wait while EPA investigates. Given what is at stake, EPA should allow for a direct review of mitigation measures if the scheme is accused of failure.

V. INVESTIGATIVE PROCEDURES

A. Submission of Additional Information

In §§ V.A and V.B.1, EPA states that recipients may submit evidence to support their position that disparate impacts do not exist "during the course of the investigation." This apparently conflicts with EPA deadline at §II.B.1 of the recipient having 30 days – and just 30 days – to rebut the complaint.

Retaliating, LAS-VEGAS REVIEW JOURNAL, December 9, 1998, at 1B (stating how Clark County Health District (NV) officials were accused of harassing employees who reported violations of mitigation schemes to EPA).

[36]490 U.S. 332 (1989).

[37] "Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Robertson v. Methow Valley*, 490 U.S. 332, 353 (1989).

[38]*Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982).

B. Granting Due Weight to Submitted Information

In general, the idea that EPA can dismiss complaints merely because a state agency claims it is in compliance with Title VI is contrary to EPA's obligations under the Civil Rights Act. EPA grants that these obligations exist, saying that EPA "cannot grant a recipient request that EPA defer to a recipient's own assessment." EPA resolves the contradiction between policy and obligation by saying that it will review state plans to make sure they are adequate. This promise is insufficient to legitimize the prima facie illegality of EPA's due weight policy under Title VI. EPA should be much more specific about its review process for both scientific studies and area-specific plans.

In §V.B, EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

1. Analyses or Studies

Requiring that studies that be granted due weight conform to "accepted scientific approaches" necessarily biases due weight in favor of industry and state agencies. Clearly, a low-income community group fighting for environmental protection is not generally going to have the resources to pay for a comprehensive study that meets EPA's standards. There is also evidence to suggest that EPA ignores studies by community groups, even when submitted in a scientifically acceptable fashion.[39]

Thus, it is likely that most studies of the area mentioned in a particular complaint will be filed by the party adverse to the complainant. This creates an obvious objectivity problem. How can EPA trust a study paid for and conducted by the agency whose funding is riding on the outcome of the study? Does EPA truly expect any result other than one that would lead to a finding of Title VI compliance? While the study itself must meet methodological criteria in order to pass muster with EPA, this seems to be inadequate to truly guarantee the objectivity of any such study. As former EPA Administrator William Ruckelhaus said, "a risk assessment is like a captured spy. Torture it enough and it will tell you whatever you want."

In addition, EPA's promise not to duplicate a study if relevant studies meet the methodological criteria seems foolish. In the unlikely event that a community group can actually afford a study, it is likely that their study and the one submitted by the state agency would reach opposite conclusions. Faced with such contradiction, there seems to be no way for EPA to

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[39] Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

resolve the matter except to make its own survey of the situation. While EPA is likely to argue that it can resolve any such conflict by examining the methodology of the two studies to see which is superior, this is inadequate. EPA itself grants that data and interpretation of data is difficult and it is certainly possible that two different studies can reach opposite conclusions even if conducted properly.

EPA should conduct its own studies, when able, because the standard for dismissing a study is too high. By denying due weight only to studies that have "significant deficiencies," EPA sets a standard for dismissal that allows for “moderately” deficient studies to be accepted. For example, if community residents complain of adverse impact, an agency study suggests that there are no impacts, and the study has "minor" deficiencies, EPA could grant the study due weight under the current Guidance. By making the standard "significant" EPA allows for too much inconsistency in studies that may result in unchecked violations of Title VI.

EPA should also do the following:

• If an agency study contains discrepancies, then EPA should not rely on it, instead of using the current “likely not” language in §V.B.1.

• Be flexible in allowing unscientific studies from community groups to have at least some weight, perhaps enough to trigger an EPA study. Understandably, EPA does not want to grant full weight to a study that does not conform to “accepted scientific principles.” But at the same time, EPA should be sensitive to the fact that many poor communities may not be able to pay for scientific studies, and out of respect for their means, EPA should grant those studies at least some weight.

• If a complainant requests that EPA conduct an independent study, EPA should not grant due weight to a study submitted by a recipient but should evaluate the recipient’s study in light of EPA’s own findings.

• If a recipient’s study is contradicted by external evidence or by studies submitted by complainants, EPA should conduct its own study.

2. Area-specific Agreements

EPA has taken a seriously wrong turn with its promotion of "area-specific agreements." Ostensibly put forward as a way for recipients to be more pro-active in identifying and working to remedy or prevent environmental justice problems (Recipient Guidance § II.A.2), these agreements turn out to be a part of EPA's Title VI enforcement plan (*see, e.g.*, Guidance § V.B.2). EPA encourages recipients to develop area-specific agreements (ASAs) which contain plans to eliminate or reduce existing disparate impacts. As an incentive, EPA will review such plans and if they meet certain criteria, they will be given “due weight” in a Title VI investigation. The precise role the Guidance ascribes to ASAs in the course of a civil rights investigation is both ambiguous and troubling. Despite EPA's assertions in § V.B. ¶ 1 that it "cannot grant a recipient's request that EPA defer to a recipient's own assessment,” the treatment of area-specific agreements

in essence does just that.

The Guidance suggests that unless certain criteria are met, plans “might not be sufficient to constitute an agreement meriting due weight.” This suggests that “due weight” is a threshold rather than a range. This makes “due weight” operate like a presumption rather than a factor warranting typical evidentiary weight. This distinction is not merely academic. If a determination that an ASA merits “due weight” precludes further inquiry into the recipient’s actions, then operationally it is an improper presumption of compliance with Title VI. For example, consider a hypothetical recipient who establishes an agreement that meets the “due weight” criteria because the plan it contains will optimistically result in some pollutant reduction over time. But the plan is mediocre at best and it is not as good as plans developed in other jurisdictions under similar scenarios. Nevertheless, if this plan meets the “due weight” threshold, the Guidance suggests that at that point the EPA will determine without further inquiry that the recipient is adequately responding to the disparate impact and therefore is not violating Title VI. In such a case, a mediocre plan operates just as effectively in a Title VI investigation as a much more comprehensive plan. If interpreted this way, the Guidance promotes the perverse incentive for recipients to do the minimum necessary to trigger the “due weight” determination and insulate the recipient from an adverse Title VI decision. Once again, EPA hurts the civil rights complainant and rewards the civil rights violator.

EPA proposes to rely on its findings about such a *general agreement* to dismiss a *specific complaint* alleging violations of the agency's Title VI regulations. It is difficult to see how this would fulfill EPA's legal responsibilities under Title VI, which require the agency to investigate the complaints that are filed. EPA could not itself legally adopt a policy that said, "We will dismiss all Title VI complaints brought against recipients which have announced that they are trying to address environmental justice issues in some fashion, without determining whether the complaints of actions in violation of the regulations are in fact justified." But by proposing in the Guidance to rely on area-specific agreements, EPA manages to adopt such a policy by the back door.

The construct of area-specific agreements thus has no basis in law, and indeed flies in the face of EPA's legal obligations. Even if one were to assume that the notion of the area-specific agreement were legitimate, it is completely devoid of any features that could assure the recipient's compliance with any goals of pollution reduction, pollution prevention, or environmental justice. There is no requirement that anyone monitor progress, or revise the plan to meet changed circumstances. There is no requirement that the community groups that are parties to such an agreement be able to enforce it in court. The only thing about the area-specific agreement that has *any* enforceable consequences is EPA's proposal to use it to dismiss complaints without deciding whether the complaint, considered on its own, has merit. The agreement is voluntary and informal. There is no requirement that the any of the parties actually represent any people in any affected community, or that any party has the power to deliver what it is promising. There is no provision for any EPA evaluation of these issues. EPA appears to be prepared to take any area-specific agreement at face value, no matter how unrepresentative the process by which it was arrived at, how unrealistic the goals it announces, or unfair the result of its application to preclude particular complaints.

This advocacy of an informal, unenforceable, uncontrolled method to preclude investigation of Title VI complaints is a disgrace. It should be completely eliminated in favor of what this Guidance should have presented, but did not: a program of civil rights enforcement, in which EPA informs recipients of their obligations to obey federal civil rights law, provides examples of what this means, and decides whether recipients who are complained against have failed to live up to their legal responsibilities.

With regard to ASAs and due weight in general, EPA should carefully consider the lessons learned from the experiences with states under the Clean Air Act. The due weight provisions of this part of the Guidance are strikingly similar to the theory if not the practice of certifying state implementation plans under the Clean Air Act. Those plans have not been universally successful, and indeed, in some cases appear to give states a blank check to continue polluting with little or no enforcement threat from EPA. As of December 13, 1999, 119 areas around the country were in nonattainment for one or more listed air pollutant, 29 years after the passage of the Clean Air Act.[40]

EPA must not repeat the mistakes it has made under the Clean Air Act. Some examples of these failures are: 1) constantly granting interim approval to inadequate state permitting schemes resulting in slow action by states to correct them; 2) certifying SIPs only to see them ignored by states (leaving enforcement to citizen groups[41]); and 3) many urban areas of the country still contain unhealthy air that do not meet the NAAQS some thirty years after the passage of the Clean Air Act. The easiest thing that EPA could do is to be less conditional in its enforcement language in the Guidance. Let state agencies know that if they violate EPA regulations, they will indeed be held accountable. For example, by saying that EPA *may* investigate if the ASA is inadequate, EPA is sending a message that it is not serious about making state agencies abide by the law. This is a mistake.

EPA should drop ASAs altogether. The ASA framework completely ignores the reality and the history of the environmental justice movement, and will only end up hurting, not helping the communities in need.

a. EPA penalizes complainants by using ASAs in later-filed complaints.

The practical consequences of a threshold-type "due weight" standard are more disturbing considering EPA's position that if a later-filed complaint raises allegations regarding "other permitting actions" by the recipient, EPA will generally rely on the earlier finding (presumably of due weight) and dismiss the complaint. Not only does the existence of an ASA act as an evidentiary presumption in the current Title VI investigation but, remarkably, it effectively

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[40]<http://www.epa.gov/airs/nonattn.html> checked on July 5, 2000.

[41] *See Coalition for Clean Air, Inc. v. South Coast Air Quality Management District* (C.D. Cal. 1999) 1999 U.S. Dist. LEXIS 16106; *Citizens for a Better Environment v. Bay Area Air Quality Management District* (N.D. Cal. 1990) 746 F.Supp. 976.

operates as *res judicata* or *collateral estoppel* in subsequent Title VI proceedings.

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these exceptions raise further ambiguity. Normally, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency's position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an ASA is no longer is entitled to "due weight."

b. Area Specific Agreements are a majoritarian impulse that has no place in civil rights enforcement.

The lack of any EPA quality control and the potentially preclusive effect of ASAs create an open invitation to fraud. Recipients – and even more, polluters and developers – have every incentive to draft a fine-sounding plan, set up a few front groups of employees, friends, and/or relatives of the industry or developer, and have the front groups sign the plan. Then, after a group whose members are actually residents of the affected community of color files a Title VI complaint with EPA, the recipient triumphantly produces the area-specific agreement for EPA's review, with the expectation that the complaint will be dismissed.

At base, ASAs are a majoritarian impulse: get agencies and community leaders to agree on what is best for a community, and then preclude complaints about that agreement. However, Title VI was passed to protect minority interests from just such majoritarian tyranny – to protect community residents who disagree with their governments and "leaders." As such, ASAs have no place in Title VI enforcement.

C. Submission of Additional or Amended Complaints

EPA should understand that some submissions by complainants with complaints under investigation are not new complaints or amendments, but simply evidence of a pattern of discriminatory impact by a recipient. In these situations, the EPA should not accept or reject the new information as if it were a complaint, but use it during EPA's investigation of the underlying complaint.

D. Discontinued Operations/Mootness

If a complaint alleges a pattern of discriminatory siting, as evidenced by a particular facility, it would be inappropriate to dismiss the complaint if the facility's operations are discontinued. EPA should continue to investigate the pattern of discrimination. This situation arose in *Residents of Sanborn Court v. California Department of Toxic Substances Control*, No. 02R-95-R9, in which the facility was closed but the discriminatory pattern of siting by DTSC continued unabated.

E. Filing/Acceptance of Title VI Complaint Does Not Invalidate Permit

The Guidance states that the OCR will not consider a complaint until the permit has issued, and further that the submission of a complaint will not stay the permit. This means that the most meritorious Title VI complainants will nevertheless experience a substantial lag time and possibly irreversible impairment to their communities before any relief is provided. Considering the current backlog of cases, even the most flagrant violators can expect to continue plainly illegal practices for years, even decades, before any sanctions occur. Yet, in light of this troubling potential situation, the Guidance contains no provision to consider the stay of a new permit (and associated adverse impacts) pending an investigation in cases which would warrant a temporary injunction in an analogous court proceeding. EPA's failure to stop the permit complained about from going into action during the investigation of a Title VI complaint discourages the resolution of Title VI complaints. Because EPA is refusing to stay the permit in question, the agency being complained against has no incentive to either change its practices or resolve the Title VI complaint.

EPA has not ever decided a Title VI complaint against a state or local agency. In fact, of the almost 100 complaints filed in the past 7 years, EPA has only decided one – and in that one, it decided it against the complainant and for the state of Michigan. Some 51 complaints are pending at the time this comment is filed, and there is no hope for resolution of those cases anytime soon. With this record, state agencies have no fear of EPA's Title VI enforcement when the agencies see a new complaint come in, because they know EPA will never do anything about it.

By refusing to stay permits while a complaint is investigated, EPA is guaranteeing that communities' civil rights will be violated. Rather than practicing a precautionary principle – first, do no harm – EPA lets the violation go on, unchecked, for years. If, instead, the permits were stayed, then agencies would move to quickly resolve the complaints, leading to actual civil rights improvements.

VI. DISPARATE ADVERSE IMPACT ANALYSIS

A. Framework for Disparate Adverse Impact Analysis

A troubling aspect of the new EPA civil rights policy is found in §§ VI.A (steps 1 and 4) and VI.B.1.a. In § VI.A, step 4, the Guidance states that "if a permit action clearly leads to a decrease in adverse disparate impacts, it is not expected to form the basis of a finding of a recipient's non-compliance with EPA's Title VI regulations and will be closed." Similarly, section VI.B.1.a notes two situations "where OCR will likely close its investigation into allegations of discriminatory effects":

(1) If the complaint alleges discriminatory effects from emissions and the permit significantly decreases overall emissions; and

(2) If the complaint alleges discriminatory effects from emissions and the permit

significantly decreases the pollutants of concern named in the complaint.

Two examples of how this new policy of EPA's will allowed continued discriminatory effects on communities of color throughout the U.S. illustrate why it is flawed, and should be withdrawn.

First, let's look at the "multiple similar sources of pollution under the control of one jurisdiction" example. In this example, imagine that a particular state has three power plants, each of which emit 100 tons of toxic chemicals per year. Two of the power plants are located in white communities, and one in an African American community; the state is roughly 66 percent white an 33 percent African American, so there is no disproportionate distribution of the plants themselves. Each plant comes up for review of its new permits. The state grants a permit to plants #1 and #2, both in white communities, which impose new pollution control techniques that both require and enable the power plants to emit only 25 tons per year of toxic chemicals. It also grants a permit to plant #3, in the African American community, but there, it imposes permit conditions that only require the plant to reduce its emissions to 75 tons per year of toxic chemicals. Is this discriminatory impact? Clearly – the African American community is forced to bear 50 tons more toxic chemicals than similarly situated white communities. What would EPA do? Well, under this Guidance, EPA would determine that the permit reduced the tons of emissions from power plant #3 by 25 tons – and 25% is certainly a "significant reduction" in emissions in anyone's book – and would thus dismiss the complaint. Thus, EPA, far from enforcing civil rights laws, would, through this new guidance, allow continued discrimination. We pointed out this same flaw in EPA's Interim Guidance, but that input was ignored.

The second example is the "unique source." Let's say there is a pollution source that is unique in a particular jurisdiction, for example a medical waste incinerator. There is only one in the entire state, and it is located squarely in the middle of a Latino and African American community. Now, the hypothetical plant emits 100 tons of toxic chemicals each year, and that pollution clearly has adverse impacts, and those impacts are clearly disparate on the basis of race. The plant has been there 20 years, and now comes in for a permit renewal. The agency gives it a permit, but says to the plant, "you have to reduce your emissions to 75 tons per year." The new permit will still have significant, disparate adverse impact – 75 tons per year of toxic pollutants borne by people of color and not whites – but it is a *reduction* from the old permit. A clear violation of civil rights. What would EPA do? Under this Guidance, EPA would determine that the permit reduced the tons of emissions from the incinerator by 25 tons – again, a "significant reduction" – and would thus dismiss the complaint. Thus, EPA would again avoid enforcing civil rights laws, and would allow continued discrimination.

Even if projects do decrease the total pollution, the emissions, even with the reductions, could still result in disparate impact. Title VI and EPA regulations make it illegal for a federally-funded program or project to discriminate, intentionally or unintentionally, against people of color. The Guidance should not make exceptions for disparate impact by allowing projects that are only *less* discriminatory than an alternative, or than the project originally was.

B. Description of Adverse Disparate Impact Analysis

EPA's Title VI regulations prohibit federally funded programs and projects from having a disparate impact on people on the basis of race, color, or national origin. EPA must revise at least two sections of its impact analysis to comply with that charge. First, the Guidance currently allows recipients to discharge hazardous amounts of pollutants in exchange for reducing overall pollution in a way that has a disparate impact on people of color. Second, it sets forth a dangerously narrow view of impact. We address both of these flaws in their respective sections, below.

1. Assess Applicability

a. Determine Type of Permit

According to the Guidance, EPA will likely dismiss a complaint if the permit action that triggered the complaint significantly decreases overall emissions at the facility. To prevail, the recipient must demonstrate that the decreases occur in the same media and facility. For instance, EPA will not dismiss a complaint alleging adverse disparate impact from air discharges where the recipient demonstrates a decrease in water discharges.

The Guidance should also require the recipient to show that the decrease came from the *same pollutant* within that same media. Trading different pollutants from the same media can adversely affect communities of color in violation of the regulations implementing Title VI. Because different air pollutants have different properties, they interact differently, and affect humans and the environment in different ways. Air pollutants are not interchangeable. Some air pollutant emissions spread out throughout a basin, while others hover, affecting primarily the immediate area. Other air pollutants are highly toxic, while some are relatively benign. For EPA to treat all air pollutants as the same for purposes of "overall emissions" reduction is to ignore the very real health consequences that reductions in relatively non-toxic chemicals – and increases in more toxic chemicals – can have. For instance, if OCR dismisses a Title VI claim because a facility has reduced its emission of SOx, bringing down its overall air emissions, but emits larger quantities of vinyl chloride, persons located in the vicinity of the facility likely will face dire adverse impacts. The Guidance should state that in order to show that the permit action triggering the complaint significantly decreases the overall emissions at the facility, the recipient must demonstrate that the decreases occur within the same media, *pollutant* and facility. Thus, if a facility emits toxic and relatively non-toxic pollutants, it should not be allowed to trade one for the other for the purposes of "significantly reducing" its emissions overall.

In footnote 117 in §VI.B.1.a, the Guidance notes that "if OCR determines that an area-specific agreement meets the criteria described [earlier]... then investigations into future complaints regarding permit actions covered by the area-specific agreements generally will be closed." We refer to our comments on §V.B.2, above, but also point out that this is completely antithetical to civil rights enforcement and goes far beyond EPA's regulations in narrowing EPA's Title VI obligations. Simply because a permit is covered by an area-specific agreement does not mean that it will not have disparate impact on the basis of race, color or national origin. Further, the ASAs do not measure conditions on the ground and thus cannot be dispositive of whether or

not there is disparate impact. Finally, because EPA would apply the ASA dismissal to future complaints, it is effectively telling people in jurisdictions with ASAs that EPA will never enforce civil rights in their communities – a flagrant disregard for Title VI and EPA's obligations to enforce it. This is yet another example of EPA hurting the civil rights complainant, and helping the civil rights violator.

Here again EPA asserts it may conduct compliance reviews even if complaints are dismissed on the basis of a decrease in permitted emissions. As we have noted in §§ III.A, III.B.1 and V.B, the fact that EPA has the authority to undertake such a review is no solace to complainants. As a practical matter, EPA is incapable of timely investigating the 51 complaints currently pending before it, much less undertaking independent *sua sponte* compliance reviews.

Please also see the comments under section VI.A, above.

b. Determine if Permit is Part of an Agreement to Reduce Adverse Disparate Impacts

The EPA should not defer to Area Specific Agreements, because such agreements are conceptually flawed and may also not mirror the reality on the ground. Please also see our comments on §§ V.B.2 and VI.B.1.a, above.

2. Define Scope of Investigation

In §VI.B.2, EPA again illegally limits the scope of its investigation and enforcement to only impacts "cognizable under the recipient's authority." This arbitrary and artificial limitation on which impacts will be examined ignores the fact that the recipient may be the proximate cause of the impacts complained of – that the impacts would not occur but for the recipient's actions, whether or not such impacts are "cognizable under the recipient's authority." This is a radical narrowing of EPA's Title VI enforcement from the mandate found in Title VI itself and EPA's Title VI regulations. A better approach would be to encompass those impacts within a recipient's *control*, so that when a recipient was the proximate cause of an impact, it would be liable under Title VI for that impact.

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving federal financial assistance.[42] Nothing in Title VI limits its application to "discrimination on the basis of race, color or national origin *which manifests itself in ways cognizable under the recipient's authority*," as the Guidance would read it.

EPA's regulations under Title VI explicitly codify the disproportionate impact, or discriminatory impact, standard. Under 40 CFR §7.35(b),

[42] 42 USC §2000d (1988).

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

Nothing in this regulation states that a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *cognizable under the recipient's authority* because of their race, color or national origin." The regulations simply say, a recipient cannot take actions which have a discriminatory effect. Period.

This is yet another example of EPA taking a policy position in clear conflict with its own Title VI regulations. It is also yet another example of EPA taking a policy position which hurts the civil rights complainant and helps the civil rights violator.

We also endorse and join in the comments of the Georgetown Legal Clinic on this section.

a. Determine the Nature of Stressors and Impacts Considered

The Guidance construes "impact" in an unacceptably narrow way. According to the Guidance, impact is "a negative or harmful effect on a receptor resulting from exposure to the stressor," and, "generally, a stressor is any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems." This definition does not take into account the social, cultural or economic impacts of projects, and is a significant narrowing of both Title VI and EPA's Title VI regulations, neither of which limits impacts solely to health impacts. Looking again at 40 CFR §7.35(b), quoted above, nothing in the regulatory language says a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *in terms of health impacts* because of their race, color or national origin." Here again EPA is hurting the civil rights complainant and helping the civil rights violator, in dramatically limiting the scope of its investigation. This narrowing is far more limited than 40 CFR §7.35(b), putting the Guidance once more in conflict with its own regulations.

In Title VII and Title VIII cases, the basic inquiry is whether a policy has a disproportionate impact on people of color "in the total group to which the policy was applied."[43] Here, the corresponding inquiry is whether the program or the stressor has a disproportionate impact based on race, color, or national origin. It is EPA's power and duty to consider all impacts, including health, social, cultural and economic.

Although we feel this is unnecessary, if EPA needs to hang its enforcement of civil rights on environmental statutes, there are ample opportunities for it to do so. The purpose of

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[43] *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4th Cir. 1989).

environmental statutes is often not only to prevent health impacts but also aesthetic injuries. For example, the Clean Water Act states in §101 that a primary purpose of the Act is to make water swimmable and suitable for recreation. The National Environmental Policy Act similarly requires environmental impact statements to consider not only the health impacts but also the social impacts that major projects will have on a community before commencing those projects.

As Tseming Yang has written, the accustomed dependency on hard, quantifiable evidence and its illusory authoritative power has obscured the understanding of discrimination and environmental justice by many involved in environmental regulation. In fact, EPA's heavy reliance on exactly such considerations, such as risk and exposure assessments, toxicity-weighting, pollutant concentrations, ambient air quality standards, and statistical analysis in its disparate adverse impact analysis of administrative complaints under Title VI of the Civil Rights Act of 1964 fall exactly in this way of thinking. It is unlikely that a civil rights complaint process directed at analyzing quantifiable factors will adequately and fairly judge the many intangible concerns, including aesthetic, dignitary, and social impacts, that environmental justice communities complain of. After all, it is all too frequent to think that "[i]f you can't count it, it doesn't exist."[44] Of course, quantitative analysis and especially statistical analysis has been used in other discrimination contexts, such as in employment discrimination. However, unlike the careful consideration that incommensurable values receive in the judicial adjudication context, given the traditional heavy reliance and dependence on quantifiables, it is highly unlikely that EPA will be able to overcome the tendency to undervalue the intangibles without utilizing a process that is significantly different from its traditional decision-making processes or that pays special attention to such intangibles.

i. EPA must consider cultural and social impacts.

To illustrate the cultural impacts a project can have, consider a situation in which a company proposes to build a factory that would have the effect of destroying a piece of land which was culturally significant to a certain protected class – say, for example, a Native American burial mound or a historical African American church. In such a situation, the activity that destroyed the cultural resource would clearly have a disparate impact on the basis of race, but that impact would not be a health-based impact. Under EPA's Guidance, a Title VI claim in this context would be rejected. This is an illegal narrowing of EPA's Title VI enforcement responsibilities.

Federal courts repeatedly have rejected the narrowing of Title VI which EPA proposes here. Instead, the courts have construed disproportionate impact to relate to the impact of the project as a whole. In *Bear Lodge Multiple Use Association v. Babbitt*, a Title VI case, the court construed impact broadly to include cultural, spiritual and religious impacts.[45] Several Native American Nations consider Devil's Tower the place of creation and hold their religious and

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[44]Laurence H. Tribe, Trial by Mathematics: Precision And Ritual in The Legal Process, 84 Harv. L. Rev. 1329, 1358-68 (1971).

[45]*Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (1999), *cert. denied* (2000).

cultural practices there. Devil's Tower is also a recreation spot for avid rock-climbers. The National Park Service considered the impact of the climbing activity on the cultural and spiritual life of Native Americans, to protect the cultural resources of Devil's Tower and to provide visitor enjoyment. The NPS developed a Climbing Management Plan. The plan, among other things, restricted climbing at the Tower during certain times. The Court upheld the NPS's decision and supported the view that preservation of the cultural quality of the site was an appropriate consideration.

In other Federal Civil Rights cases, plaintiffs have raised social and cultural impacts. In *Grimes v. Sobol*,[46] plaintiffs alleged that a public school curriculum discriminated against African American students, and contributed to the low self-esteem and high crime rate, of African Americans. In *Allen v. Wright*,[47] the court acknowledged that stigma was a legally cognizable injury. In *Rozar v. Mullis*,[48] plaintiffs alleged injury to property values and welfare as well as to health. In none of these cases did the court deny or dismiss the claim because cultural injuries were not appropriate.

ii. EPA must consider economic impacts.

The Guidance also fails to consider economic impacts, although one of the central truths of environmental discrimination is that it has profound economic impact on people of color. Even facilities that do not have a demonstrable health impact often have a dramatic impact on housing and land values; where such impact is distributed in a discriminatory pattern, Title VI clearly applies. EPA's failure to consider economic impacts again hurts the civil rights complainant and helps the civil rights violator, and is a marked limitation of its own Title VI regulations. To further this unfairness, ironically, EPA *is* willing to consider the *positive* economic effects of the permit, as "justification" for the facility offered by the recipient.

The Guidance's definitions fail to fully reflect the true impact of facilities that require environmental permits. To choose to limit the definitions construing impact solely as health impact, is artificial, arbitrary and capricious.

iii. EPA must change other sections of the Impact Analysis.

In clarifying that impact extends to injury of cultural and social life, EPA will need to adjust some sections of its impacts analysis. For instance, in step 5 of the impact analysis, (disparate impact), the Guidance explains that if there is a health impact, OCR will consider the complaint regardless of the complainants' proximity to the stressor, so long as there is a pathway.

This recognition is significant because injury does not always correspond with proximity.

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[46]832 F. Supp. 704 (1993).

[47]468 U.S. 737 (1984).

[48]85 F.3d 556 (11th Cir. 1996).

For example, if African Americans attend a Baptist Church in a white section of town, and a large factory is built next door to that church, the white residents might not be adversely affected but the African Americans who attend the church will be. The Guidance should state clearly that OCR is to consider all impacts arising from the permitted facility, including health, cultural, social and economic impacts, regardless of the complainants proximity to the stressor.

The same applies to the impact assessment, step 3 of the impact analysis, in which OCR inquires into whether there is a "direct link" from the stressor to an adverse health or environmental impact. Currently, that approach does not take into account a direct link from the stressor to social, cultural or economic impacts. The Guidance should consider all the discriminatory effects arising from stressors that EPA regulates.

The EPA is required to comply with Title VI which prohibits racial discrimination. In that vein, EPA should revise its subsection that exempts recipients who show a decrease in overall pollution from the Title VI complaint process, and clarify its impacts analysis to include social, cultural and economic impacts.

Please see our comments on §VI.B.2 on EPA's policy of only considering impacts that "are within the recipient's authority to consider." We believe this policy has the perverse outcome of punishing states (like California) that have permitting processes that consider comprehensively a facility's impact, and rewarding states with weak environmental oversight.

b. Determine Universe of Sources

We note that in many situations, additional emissions of a particular substance are by definition adverse – for example, adding more carcinogens to any particular environment will cause adverse impacts.

3. Impact Assessment

EPA's "hierarchy of data types," found in §VI.B.3, should move "known releases of pollutants or stressors into the environment" into the top position on the hierarchy, certainly above modeled exposure concentrations.

EPA calls for a "direct link" between an adverse health or environmental outcome and the "source of the stressor." This, as the EPA well knows, is virtually impossible except in the most egregious cases of toxic poisoning. Further, as EPA notes, it may require data gathered longitudinally over years – far longer than the 180 days which EPA gives complainants to assemble data and file a complaint – to discover such a link. Further, there may be impacts which do not manifest themselves for many years after exposure, such as certain types of cancer. Thus, EPA should focus on exposure to pollution, not only health outcomes.

4. Adverse Impact Decision

The Guidance suggests that where risks or other measures of potential impacts meet or

exceed a relevant "significance level," the impact will be presumed adverse. While this may be a good approach, EPA should not make the converse assumption, *i.e.*, a presumption of no adverse impact if a significance level is not exceeded. It is not unheard of for permit applicants and regulatory officials to manipulate baselines and emission factors to keep from triggering applicable significance levels. This risk is likely to be greater in those very cases that Title VI is designed to address, cases where regulatory agencies have an inappropriate bias in favor of the regulated community to the detriment of residents near the polluting facilities. Thus, even in cases where significance levels are *not* exceeded, EPA should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, EPA should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

EPA should also keep in mind, as discussed below in §VI.B.4.b, that significance thresholds are not set by science but through a political process which is subject to influence by industry and rarely subject to influence by affected communities.

a. Example of Adverse Impact Benchmarks

EPA's use of a significance threshold of 1 in 10,000 to define "adverse impact" is extremely loose, more so than every single EPA regulation establishing significance thresholds, where such thresholds range from 1 in 100,000 to 1 in 1,000,000. EPA should consider a cancer risk of greater than 1 in 1,000,000 an adverse impact.

In its example of using the Hazard Index, it appears that EPA will only use the benchmark to find against complainants, but not to find for them. EPA states that a hazard index score of under 1 would make it "unlikely" for EPA to find the impact adverse, while values over 1 – the significance threshold for many regulations – would not trigger EPA's automatic finding of adversity. This double standard is again a policy decision EPA has made which hurts the civil rights complainant and rewards the civil rights violator.

b. Use of National Ambient Air Quality Standards

The Guidance sets forth EPA's policy position that if the area in question is in compliance with a health based standard ambient air quality standard, there is no "adverse" impact. The Guidance further suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. In the context of the backlog of cases, intense political pressure from industry and some state regulators, budget constraints, this facile presumption is not only a recipe for regulatory inertia, but a convenient escape hatch as well. Moreover, since the complainant does not have standing as an "adverse party," and the recipient will not challenge such a finding, the OCR is in the awkward position of having to rebut its self-imposed presumption. This procedural deformity is a consequence of the EPA's curious attempt to cast the process as non-adversarial with respect to the complainant, while at the same time affording the recipient the protections (and more) of an adjudicative,

adversarial process. Perhaps the better approach would be to recognize that the because the complainants' civil rights may have been violated by the recipient, the process is necessarily adversarial, even though the proceedings are labeled an administrative investigation. Moreover, since the recipient has significantly more resources than the complainant, EPA should be extremely cautious in imposing procedural roadblocks that operate to leave the complainants without recourse. The use of the presumption – which is wholly unsupported, as detailed below – is a burden on complainants, another example of where EPA hurts the civil rights complainant and helps the civil rights violator.

In addition to the procedural burden on complainants, EPA's reliance on the National Ambient Air Quality Standards (NAAQS) is misplaced, because an air basin's attainment status under NAAQS does not mean a polluting facility will not have an adverse impact on the surrounding community.[49] EPA's reasoning is flawed because polluting facilities can still have an impact on a community even when NAAQS are met. EPA's rationale – that attainment under NAAQS equals no adverse impact – is factually incorrect and conceptually flawed on six different grounds: it ignores toxic hotspots, ignores the fact that significant health effects can occur at exposure to air pollution levels below the NAAQS, ignores that "health-based" standards are set through a political process, ignores acute health effects of exposure to VOCs, ignores accidents and upset conditions at plants, and ignores the fact that health based standards are normed on healthy white males. These deficiencies are detailed below.

First, the EPA's rationale ignores toxic hotspots, or localized impacts from air pollution sources that do not cause an area-wide effect. U.S. environmental history is replete with examples of facilities that have had a significant impact on the health of nearby residents, while the air basin remained in compliance with NAAQS. Such local impacts may be diluted or lessened when averaged or spread across an entire air basin. This is particularly true for some VOCs, such as toxic air contaminants, which have their greatest effect when they are most concentrated, and for lead, which tends to "fall out" close to its source of emission. The general determination that an area is in compliance with NAAQS – although perhaps appropriate for SIP planning purposes – may be virtually meaningless at the local level. Air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

Second, EPA's presumption that compliance with ambient air quality standards equals no impact ignores the fact that significant health damage can occur at exposure levels well below the

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[49]EPA's approach also appears to contradict its statement in the Recipient Guidance, at §III.B.3.e, that "risks [which] meet or exceed a significance level as defined by law, policy *or* science... would likely be recognized as adverse in a Title VI approach." (Emphasis added) In relying on the NAAQS, EPA is embracing only law, ignoring the fact that both science and public policy indicate that exposure to pollutants at the NAAQS levels is harmful to human health.

NAAQS levels. Researchers funded by the EPA have found significant health damage to humans exposed to pollution at levels lower than EPA's "health-based" standards. For example, researchers at Loma Linda University studied more than 6,000 non-smoking volunteers over 15 years to determine the impact of ozone and other airborne pollutants on them. The study found that men exposed to ozone levels of 80 parts per billion (ppb) -- EPA's 8-hour "health-based" NAAQ standard – ran three times the risk of lung cancer as men exposed to lower levels. Additionally, both men and women regularly exposed to levels of particulate matter lower than the NAAQS of 50 micrograms per cubic meter ran an increased risk of lung cancer. Both men and women exposed to elevated levels of sulfur dioxide also ran an increased risk of lung cancer.[50] Other studies have demonstrated that long-term exposure to low levels of lead can also have significant impact to kidney function.[51]

One can see how EPA's new policy plays out in practice by examining the recent *Select Steel* decision,[52] in which EPA dismissed a Title VI complaint because the facility complained of, the Select Steel mill in Flint, Michigan, would not have caused the state to violate the NAAQS for ozone. According to Michigan state records, Flint's average 8-hour ozone levels were between .082 and .086 parts per million (ppm) in 1996-1998. Not only does this violate EPA's health-based standard of .080 ppm, but it is also above the 80 ppb (=.080 ppm) level at which EPA-funded researchers found significant health impacts. In the *Select Steel* decision, EPA equated this level of ozone pollution – which caused levels of lung cancer three times normal and was actually *above* the NAAQS – with "no adverse impact."

EPA's rationale also ignores the fact that the setting of "health-based" standards for air pollutants such as ozone is partly a political process, in which the standards are often set based on negotiation with industry. Nor are the "health-based" standards infallible: in case after case, new, more restrictive standards have been promulgated when the existing "health-based" standard has proven inadequate. Examples include the failure of government to set correct or adequate standards for blood lead levels – the Centers for Disease Control has lowered the "safe" blood lead levels from 40μ/dl to 25μ/dl to 20μ/dl to today's current 10μ/dl over the past 15 years -- to the constant readjustment of buffer zones and re-entry intervals for pesticides in agriculture. Further, significant data gaps exist, particularly in the area of volatile organic compounds (VOCs), which make it impossible to state with certainty that exposure to such chemicals -- even at "safe"

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[50]W. Lawrence Beeson, David Abbey and Synnopve Knutsen, *Long-term Concentrations of Ambient Air Pollutants and Incident Lung Cancer in California Adults*, 106 ENVIRONMENTAL HEALTH PERSPECTIVES 813-823 (December 1998).

[51]Ja-Liang Lin, Huei-Huang Ho and Chun-Chen Yu, *Chelation Therapy for Patients with Elevated Body Lead Burden and Progressive Renal Insufficiency,* 130 ANNALS OF INTERNAL MEDICINE 7-13 (January 1999).

[52]*St. Francis Prayer Center v. Michigan Department of Environmental Quality,* EPA File No. 5R-98-R5.

levels -- will not have an impact.

EPA's reasoning does not take into account acute health impacts of exposure to VOCs, and also omits the cumulative physiological and psychological effects of environmental pollution from trucking, odors, noise, vibrations and stigma, which all increase human stress. There is considerable evidence that exposure to air pollutants such as VOCs causes increased stress.[53]

Overlooked in EPA's analysis, but perhaps of greatest consequence of all to communities adjacent to hazardous facilities, are industrial accidents and upset conditions. The fact that a facility's permit meets health-based standards is no guarantee there will not be accidents or upset conditions at that facility. The impact of industrial accidents has been well documented by federal agencies – including the EPA – and watchdog groups. The United States Chemical Safety and Hazard Investigation Board (CSHIB) reports that "[n]o comprehensive, reliable historical records exist" regarding chemical accidents in the United States, and thus the scope of accidents is under-reported. The number of accidents that *is* reported, however, is staggering. CSHIB reports that "[d]uring the years 1988 through 1992, six percent, or 2070 of the 34,500 accidents that occurred resulted in immediate death, injury and or/evacuation; an average of two chemical-related injuries occurred every day during those five years."[54] Further, CSHIB notes that between 1982 and 1986, 464,677 people were evacuated from their homes or jobs due to chemical accidents.[55]

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[53]*See, e.g.*, J. Timmons Roberts, *Stress, Trauma, and Hidden Impacts of Toxic Exposures on Vulnerable Populations*, Testimony presented at the National Environmental Justice Advisory Council, Baton Rouge, Louisiana, December 9, 1998.

[54]United States Chemical Safety and Hazard Investigation Board, "What Human Consequences Result from Chemical Accidents," CSHIB website, http://www.csb.gov/about/why_04.htm (February 2, 1999).

[55]*Id.* The United States Public Interest Research Group (USPIRG), in its recent report *Too Close to Home*, chronicles some of serious impacts on surrounding communities from chemical accidents at facilities. In August and September, 1994, in Rodeo, California, a 16-day release of 125 tons of a caustic catalyst at a Unocal facility sickened and injured 1500 people living near the plant**.** The report elaborates:

> Victims experienced vomiting, headaches, memory loss, brain damage, and other cognitive disorders. Some residents remained sick for well over a year after the Unocal accident.

U.S. Public Interest Research Group, *Too Close to Home: A Report on Chemical Accident Risks in the United States* (1998). The report can be found at http://www.pirg.org/pirg/enviro/toxics/home98/page4.htm (February 2, 1999). USPIRG's *Too Close To Home* found a strong correlation between high disaster potential and actual accident frequency. The report publishes a table titled "Top U.S. Counties ranked by worst-case disaster potential," which found Harris County, Texas (Houston) number one, Los Angeles County, California number two and Cook County, Illinois (Chicago) number three in the nation for disaster potential. These areas already have well documented environmental justice problems.

EPA itself has documented the impact of industrial accidents on communities. A summary by EPA's Chemical Emergency Preparedness and Prevention Office (CEPPO) of Accident Investigations is a sobering look at life in a community where an industrial accident has occurred. One such community is Savannah, Georgia, where an accident happened at Powell Duffryn Terminals, Inc., on April 10, 1995. EPA reports that 2000 residents were evacuated — some for as long as 30 days. The local elementary school was temporarily closed. Water in an adjacent marsh was heavily contaminated.[56] Other reports by EPA's CEPPO chronicle similar evacuations of the surrounding community. One accident at a Shell Chemical facility in Deer Park, Texas on June 22, 1997 mentions "[b]roken window damage reported in area" and an explosion that could be heard ten miles away.[57] Another accident at the Accra Pac facility in Elkhart, Indiana on June 24, 1997 reports a fire and explosion involving ethylene oxide where approximately 2500 residents were evacuated and 59 people were treated at the hospital.[58]

Similarly, EPA's rationale that a facility, once permitted, cannot be considered to have a disparate impact on a community, ignores the reality of compliance violations (sometimes in the form of upset conditions). Communities and the public are well aware, and facts substantiate, that accidents and even the potential for accidents and compliance violations from an industrial facility have a serious impact on community health and well-being.

Finally, the "health-based" standards historically have been set using the norm of a healthy, white male of average weight. The use of such standards may be discriminatory in itself, and certainly does not take into account sensitive receptors and people who are outside the "norm." By omitting any consideration of the critiques of existing regulatory standards and procedures, by the environmental justice movement and others, the EPA's Guidance naturalizes environmental injustice.

There are some among us who are concerned that EPA's new Title VI policy may create a

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In Williamsport, Pennsylvania, on January 4, 1996, a thick cloud of chlorine gas blanketed the city, sending 26 people to the hospital. Victims suffered headaches, eye irritation, and breathing problems. The cloud formed as a result of a chlorine leak from a railroad tanker at the Lonza Chemical Plant. A 1993 accident at General Chemical Corp. in Richmond, California sent 24,000 people to the hospital from inhaled acid mist. The USPIRG report lists several other mass evacuations, including one in Superior, Wisconsin in 1992 where 40,000 people were evacuated. *Id.*

[56]Chemical Emergency Preparedness and Prevention Office, Office of Solid Waste and Emergency Reponse, U.S. Environmental Protection Agency, http://www.epa.gov/awercepp/pubs/accsumma.html (February 2, 1999).

[57]*Id.*

[58]*Id.*

legal hurdle that is impossible to surmount for Title VI complainants in areas that are in attainment under the Clean Air Act. By setting the threshold of "adverse" impact at the level at which a facility will affect the area's compliance with the national ambient air quality standards (NAAQS), EPA has effectively shut the door on any Title VI complaints from areas in attainment under the Clean Air Act, because the EPA's hurdle is legally impossible to meet. It is legally impossible for an agency to grant a permit in an attainment area which would result in the violation of NAAQS. Under the Clean Air Act, an agency may not grant a permit which would violate NAAQS.[59] In other words, if a facility applied for a permit that would violate NAAQS, the agency would be required to turn it down; if a facility is granted a permit, by definition it does not violate NAAQS. Thus, EPA's hurdle – that a permit must cause a violation of NAAQS to have an impact – means that, legally, there can never be a successful Title VI claim filed in an attainment area. EPA has effectively read Title VI out of the equation entirely.

c. Assessing Decreases in Adverse Impacts in a Permit Action

See our comments on this concept in §VI.A

VII. DETERMINING WHETHER A FINDING OF NONCOMPLIANCE IS WARRANTED

A. Justification

EPA proposes to tolerate concededly discriminatory effects if the recipient comes up with a plan to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here to institutionalize discrimination, allowing recipients who are known to be responsible for discriminatory impacts to patch things up and get a clean bill of health.

EPA gives recipients "the opportunity to 'justify' the decision to issue the permit *notwithstanding the adverse disparate impact*, based on a *substantial, legitimate justification*." §VII.A (emphasis added). This position, contrary to EPA's stated goal of complying with Executive Order 12898,[60] opens wide the door to recipients to continue practices that cause

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[59] 42 U.S.C. §7475(a)(3); 40 C.F.R. §52.21(k). The Code of Federal Regulations is clear:

> The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification... would not cause or contribute to air pollution in violation of:
>
> (1) Any national ambient air quality standard in any air quality control region[.]

40 C.F.R. §52.21(k).

[60] Executive Order 12898 "directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based

disparate adverse impacts in violation of Title VI and EPA's regulations. A recipient merely needs to claim "legitimate justification" of the permitting action to avoid a successful Title VI claim. Specifically, the recipient simply shows that "the challenged activity ... meets a goal that is legitimate, important, and integral to the recipient's institutional mission." §VII.A.1. The Guidance uses the permitting of a waste water treatment plant as an example of "acceptable justification." EPA considers the "public health or environmental benefits ... to the affected population" as "generally legitimate, important and integral to the recipient's mission." All of what EPA says about the plant may be true – it may treat the sewage of nearby residents – but not very relevant. The treatment plant *also* treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.[61]

The issue is not whether or not these facilities are legitimate or necessary, but whether the permitting and siting of them causes an disparate adverse impact in violation of Title VI. With the present "justification" model in place, no Title VI complaint is ever likely to be resolved in a complainant's favor. Here again EPA has worked to hurt the civil rights complainant and reward the civil rights violator.

While OCR's choice of the *Elston* standard is to be commended, the Guidance's *application* of the *Elston* standard is more problematic. After stating that the justificatory purpose must be "integral to the recipient's institutional mission," the Guidance nonetheless states that EPA "would likely consider broader interests [than the "provision of public health or environmental benefits"], such as economic development . . . . if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." Economic development (and other government interests not related to protection of human health and the environment) cannot, by definition, be "integral to the recipient's mission." The recipients in Title VI complaints are almost always environmental permitting agencies whose institutional mission – as those recipients have repeatedly sought to remind EPA in the context of the "authority / jurisdiction" issue – does *not* integrally include economic development, or any other similar justificatory purpose (such as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc.). Thus, such "justifications" should be disallowed *per se* as inconsistent with the *Elston* standard.

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on race, color, or national origin." Executive Order 12898, 59 FR 7629 (1994); *see also* Guidance at §I.F.

[61]Further, the justification may fail on a factual level as well as the conceptual level detailed above. In the sewage plant example, the recipient attempts to justify the plant by arguing that nearby residents will benefit by having their water bill reduced, by better overall service, or, perhaps, by being hired at the expanded facility. But if the expanded facility creates a larger and more omnipresent plume of odor and pollution in the area, and threatens to devalue local property, has the project really rendered a benefit at all? One simply cannot calculate the value of good health.

1. Types of Justification

Throughout, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. §VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

The complainant can only challenge a recipient's invocation of justification by showing that the challenged activity is not legitimate, important or integral to the agency's mission. This burden is nearly impossible to carry. Few would deny that most, if not all, challenged activities are legitimate. Everyone agrees that waste water treatment plants and disposal sites are generally necessary, even if not desirable. Likewise, it is hard to imagine that a recipient state agency would authorize, or a private company would wish to build, a polluting facility for no legitimate reason.

EPA also asserts that OCR will consider "broader interests, such as economic development ... to be an acceptable justification, if the benefits are delivered directly to the affected population[.]" §VII.A.1. EPA, however, does not specify what "economic development benefits" are weighed and how much so against the disparate adverse impact?

Finally, EPA took some of its "justification" language from Title VII cases, which cover employment law. Courts often look to Title VII in construing Title VI claims and vice versa. But when considering justification, employment cases are distinguishable. The very premise of employment law is contract. There is an assumption, rightly or wrongly, that the parties, the employer and employee, come to the table with some degree of choice, and consent to enter a relationship with one another. By contrast, Title VI is more akin to nuisance or trespass, where one party unilaterally imposes its will upon another. In those cases, one party might not receive a value that it could rationally choose. Justification is inappropriate for Title VI complaints in which the element of choice is absent. Even where a few members of the community might receive a job, the others cannot be made to get cancer in exchange. A community does not choose to enter the such relationships. If a recipient can choose to justify a project, that agency should bear a heavier burden. For instance, the agency would have to show that they had no reasonable alternative but to site the facility in a particular place notwithstanding reliance that had formed since the permit was issued.

2. Less Discriminatory Alternatives

The description of what EPA considers a "less discriminatory alternative" (LDA) run

contrary to the spirit and letter of EPA's Title VI regulations.[62] While the due weight given to mitigation schemes discussed above in §IV.B requires them to at least reduce emissions "to the extent required by Title VI," there is no such threshold for LDA as represented in §VII.A.2. Rather, LDAs must only cause "less disparate impact." This is of course allows for some, perhaps significant, disparate impact; as long as it is "less" than the impact that occurred when the complaint was filed. Any adverse disparate impact is illegal under Title VI; merely lessening disparate impact is not good enough.

Indeed, while EPA interprets *Georgia State Conference of Branches of NAACP v. Georgia*[63] to allow for any "less discriminatory alternative" to be justified under Title VI, the Supreme Court case that the *Georgia State Conference* court relies on to justify its LDA rationale says that an LDA must eliminate *as many discriminatory effects as possible*.[64] This is a much tougher standard than what EPA is proposing. Basically, the Guidance allows for the diminishment of some, but not all, adverse impacts, while the Supreme Court reasons that an LDA should eliminate all possible effects, and not just some. If EPA wants to rely on *Georgia State Conference* for its LDA standard, than it should follow the Supreme Court's reasoning in *Albermarle*. Discriminatory impact must be statistically eliminated in order for EPA to comply with Title VI. Otherwise, this justification arrangement outlined in the Guidance becomes a rather wide loophole that agencies may use to skirt the spirit of Title VI, allowing them to mandate token mitigation.

Please also see our comments on mitigation measures at §IV.B.

The Guidance's consideration of cost in assessing the practicability of alternatives suggests that such factors as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc., may come into play again here despite their manifest irrelevance, as described above in the discussion of justification. The Guidance should be explicit that costs incurred by the permit applicant will not be a consideration with respect to less discriminatory alternatives analyses.

Indeed, it is difficult to imagine a situation in which cost would be a relevant consideration at all. OCR must recall that it is the recipient permitting agency – not the permit applicant – which is the "defendant" in a Title VI complaint. Thus, it is the recipient agency whose costs would be considered, not those of the permit applicant. It is hard to imagine the case where the

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[62] EPA defines an LDA as "an approach that causes less disparate impact than the challenged practice." §VII.A.2.

[63] 775 F.2d 1403.

[64] "Where racial discrimination is concerned, the (district) court has not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

agency's costs would be raised so excessively by choosing some "less discriminatory alternative" that such alternative would not be practicable.

3. Voluntary Compliance

EPA's plan to encourage recipients to examine all "permitted entities and other sources within their authority to eliminate or reduce ... the disparate adverse impacts of their programs[.]" is a laudable suggestion. However, EPA's general position that it expects "that denial or revocation of a permit is not necessarily an appropriate solution" to complaints is troubling. Please see our comments on this topic at §IV.B.

APPENDIX A: GLOSSARY OF TERMS

Hazardous air pollutant is singular in the term and plural in the definition.

"Informal resolution" would better be defined as "Any settlement of complaint allegations prior to the formal resolution of a complaint." For example, informal resolution may dispose of a complaint before dismissal of the complaint, not just "prior to the issuance of a formal finding of non-compliance by EPA," as suggested in the current definition.

The use of the term "compartments" in the definition of "media" is confusing.

In the definition of "pollution prevention," the word "excessive" should be removed. Pollution prevention refers to the practice of identifying activities that create waste, period, and reducing that waste.

In the definition of "statistical significance," EPA needs to make the following addition to reflect what statistical significance really is about:

> An inference that there is a low probability that the observed difference in measured or estimated quantities is due to *chance or* variability in the measurement technique, rather than to an actual difference in the quantities themselves.

The term "stressor" should not be limited to "chemical, physical and biological" impacts but also include cultural, religious, social and economic impacts.

We note that only the definitions of ECOS and PLAN have the term itself repeated in the definition.

Comments on Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964, as Amended

EPA undercuts its entire Recipient Guidance by stating that "Fund suspension or termination is a means of last resort." EPA's active avoidance of even threatening to use the tools at its disposal to enforce civil rights law sends a clear signal to recipients that they may violate that law with impunity.

D. Stakeholder Involvement

EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she specifically declined to endorse the Advisory Committee's final report to EPA.

We refer EPA to our comments on the Investigatory Guidance, above, for our critique of EPA's statement that the "use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved."

II. TITLE VI APPROACHES AND ACTIVITIES

A. Title VI Approaches

2. Area-Specific Approaches

Please refer to our comments on the Investigatory Guidance, above, on area-specific agreements.

The first sentence in the second paragraph of this section is a sentence fragment. In the third paragraph, EPA refers to "one environmental media" when it should read "one environmental medium."

B. Title VI Activities

The first line of this section contains a typographical error: "you may should consider."

2. Encourage Meaningful Public Participation and Outreach

In the Recipient Guidance, EPA encourages recipients to consider integrating various activities into their permitting programs in order to identify and resolve issues that could lead to

the filing of a Title VI complaint. Specifically, EPA encourages effective public participation and outreach to "provide permitting and public participation processes that occur early, and are inclusive and meaningful." EPA indicates that integrating meaningful public participation and outreach activities will likely reduce the filing of Title VI complaints alleging discrimination in the public participation process for a permit. We define meaningful input to mean substantive input – not merely a fancy process – so that the community's input and desires are reflected in the permit outcome.

When a decision may disproportionately affect people of color, it is imperative to encourage the maximum level of meaningful public participation from the affected people of color. Without a higher level of scrutiny for public participation activities that affect people of color, there is no way to be sure that those who are traditionally disadvantaged and left out of the decision-making process will be included.

a. EPA fails to make recommendations to recipients that will make the public participation process "meaningful."

Public participation is meaningful if community groups not only participate early in the process, but also have a tangible *influence* on a potential project's design and location. The first myth that the proposed public participation activities create is the idea that affected communities have a "meaningful" say in the permitting process. Nowhere in EPA's recommended "meaningful" public participation activities, however, are there any references to activities where the public actually has the opportunity to participate actively in the decision-making process. All the recommended activities focus on education, communication, providing understandable information, and making the process clear and visible. All the activities are one-way processes, from a recipient to a community. The only activity that differs is the activity that recommends that recipients "provide clear explanations for reasons for the decisions made with respect to the issues raised by the community." This activity simply requires that the recipient justify its decision in light of the community's concerns. The activity does not require that the recipient give any "meaningful" weight to the public's comments. As a result, EPA's recommendations for meaningful public participation activities fails to encourage recipients to "meaningfully" include the affected people and stakeholders in the actual decision-making process.

b. Public participation does not guarantee fairness.

The second myth that EPA's proposed "meaningful" public participation activities create is that the availability of public participation eliminates the possibility of discriminatory decision-making in the siting of human health and environmental hazards. EPA assumes that procedures for increased public participation will create fairness or "level-playing field" in the decision-making process. This myth is wrong for two reasons:

1. The disparity in legal and technical expertise and resources between recipients and communities are barriers to meaningful public participation.

It cannot be assumed that procedures for increased public participation will necessarily address the fundamental differences in expertise and resources between communities of color and recipients.[65] For example, the recipients may ignore or overlook the comments and views of community members because they may have a preference for the opinions and advice of industry and state experts with advanced degrees.[66] In addition, environmental issues are commonly extremely technically complex. Even legislators admit that issues are too complex and often delegate their power to administrative agencies with the justification that the issues require the technical expertise of a panel of experts.[67] If legislators, with their vast resources of highly educated staffers and legislative assistants, cannot understand complex technical environmental issues, it is not reasonable to expect that low-income communities of color, without technical experts and university degrees, will understand the technical issues. Therefore, it is difficult, or near impossible, for the community to meaningfully participate in the procedural aspects of permitting if they cannot understand the complexities of the crucial issues that may affect their community.

Although EPA suggests that recipients should provide supplemental technical information and technical assistance to make data more meaningful, neither of EPA's options substitute for a technical expert who works specifically for the community. Technical assistance from the recipient may be helpful, but it would be dangerous to conclude that the recipient's expert knows what is best, and what the needs are, for the community. The community should have the capacity to determine itself what its needs are.

If community residents decide to get their own experts to represent their own needs, the next problem that arises is where they are going to get the money to hire the experts. EPA cannot award damages to complainants under its section 602 regulations or provide attorney fees.[68] As a result, there is no guarantee that a community can actually afford to hire or pay for a technical or legal expert. Many technical and legal experts are hesitant to do work for these communities knowing that there is a chance they might not get paid for their work. Also, as in other areas of

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[65]Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARVARD ENVIRONMENTAL LAW REVIEW 115, 181 (2000).

[66] John C. Duncan, *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J.ENVTL. L. 169, 188-193 (1999).

[67]Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17 (1998).

[68]*See* 40 C.F.R. § 7.130(a) (1997) and *North Carolina Department of Transportation v. Crest Street Council, Inc.*, 479 U.S. 6, 12-16 (1986).

environmental law, without legal or technical assistance, the community may find it difficult to even apply for an EPA technical assistance grant (TAG) in the first place because the application process is often so complex that it requires the help of another expert.[69] For example, in the case of Superfund TAG grants, EPA has admitted that "the agency has made it difficult for local citizens or environmental groups to win [grants] because of unnecessary 'restrictions, complexity, costs, and red tape.'"[70] One of the restrictions in that case was that the community group had to supply funds matching twenty percent of the total grant unless it obtained a waiver.[71]

Some of the other restrictions that may prevent communities from receiving grants and other federal assistance include that the applicant must demonstrate that it has reliable procedures or has plans for establishing reliable procedures for record-keeping and financial accountability related to the management of the TAG, and that the applicant is an incorporated non-profit organization.[72] This precludes assistance to communities that do not have an organization with 501(c)(3) non-profit status.

Such grants and technical assistance are imperative for communities who are filing a Title VI complaint. Although the complaint only requires a written letter, the community may need a technical expert to review pollution and demographic data. In addition, with a number of criteria required for the complainant to file a Title VI complaint that will be accepted by EPA, the community may need a legal expert to evaluate the best approach to take in filing the complaint. Without the grants and assistance it is difficult for a community even to participate in the administrative process of filing a Title VI complaint.

2. Time constraints in public hearings often unfairly prevent disadvantaged people of color from meaningfully participating.

Although EPA does encourage recipients to schedule meeting times and places that are convenient for residents who work and those who use public transportation, EPA fails to take into account the fact that the public hearing process itself does not guarantee meaningful public

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[69]Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TULANE LAW REVIEW 787, 834 (1999)(application process for TAGs in other areas of environmental law are so cumbersome for the average community organization that they often need to hire experts to apply for a grant to hire more experts).

[70]Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: Need for Legislative Authorization*, 25 ECOLOGY LAW QUARTERLY 1, 78 (1998) (quoting 1989 SUPERFUND MANAGEMENT REVIEW at 5-16).

[71]*See* Mank, *Environmental Justice and Title VI*, supra, at 835.

[72]*See* 40 C.F.R. Section 35.4020 (1997).

participation. Disadvantaged people of color may be unfairly left out of the public hearing process due to time constraints imposed by those running the hearing. Such time constraints often control how public hearings are run. It is common that public hearing may address a large array of issues, limiting the amount of time that can be spent on any single issue. The result is that an issue that is important to large numbers of people may only be allotted a small amount of time on the agenda. Often times, an issue will have a significant impact on a large number of people. It, however, may be impossible to allow every single potentially affected person to have an individual time to voice all her comments on the topic within the issue's allotted time. In addition, the social position of an individual may dictate how much time, if any, she will have to wait to testify. Although a moderator must be fair in allotting speaking times to individuals, a person who may be more powerful, influential, or connected may be able to influence the timing of the agenda and manipulate the hearing to disadvantage less influential members of the public. As a result, the time constraints of public hearings may unfairly affect a low-income, person of color's ability to effectively participate in a public hearing, further increasing the individual's feeling of powerlessness and frustration. In addition, the public participation process often ignores the fact that different social and cultural groups have different ways of communicating or participating.[73]

c. EPA fails to address the cultural and social barriers to meaningful public participation.

Nowhere in EPA's recommendations for meaningful public participation is there an emphasis on understanding cultural and social differences in communication, problem solving, and perspectives or world views. When a decision is being made that may disproportionately affect people of color, it is appropriate to encourage the maximum level of participation from the affected people.[74] An understanding of the cultural and social differences between various cultures is vital for a recipient if it is to include different, non-white cultures in an effective public participation process.[75] Among separate cultures there are different methods of communication through non-verbal communication, values and behavioral styles, frames of references, and cultural awareness. Awareness of the differences in communication may be the difference between reaching an agreement and stirring more anger and distrust. For example, how people look at each other and what a particular look or expression means often varies within different cultures within a society. To effectively communicate, one must be aware of these differences, identify them, and make an effort to create an understanding. If recipients and EPA desire effective public participation, they must take the steps necessary to effectively communicate and accept differences, but be aware enough to respect the differences. Otherwise, when attempts that are made to understand each other fail, cultural differences are commonly ignored, causing for a culturally and socially different group of people to not have the opportunity to meaningfully participate in a permitting decision and thus claim discrimination.

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[73] *See* Duncan, *Multicultural Participation in the Public Hearing Process, surpa,* at 188-193.

[74] *Id.* at 188.

[75] *Id.*

d. Recommendations

EPA should include further advice to recipients on achieving the three keys to meaningful public participation in the context of permitting:

1. Maximizing the inclusion of the affected people of color in the permitting process by actively seeking them out and attempting to understand their social and cultural background;

2. Supplying them with the technical and legal knowledge and expertise so they may actively and meaningfully participate in the permitting process; and

3. Giving recognition and weight to the needs and opinions of affected people of color so they may be empowered to participate meaningfully in the decision-making process.

Without inclusion, knowledge, and weight to their opinions and needs, public participation activities will fail to reduce Title VI complaints alleging discrimination. Steps EPA should encourage recipients to take in order to ensure meaningful public participation among low-income communities of color include:

• Recipients should strive to achieve a level playing field for low-income communities of color, not only during the public participation process, but also within political and legal processes.

• Recipients should engage in aggressive outreach to embrace a large spectrum of the public.

• Recipients should run public meetings with affected communities of color that include attempts to understand and respect cultural differences. These meetings should increase respect for differences and allow for a more effective and "meaningful" public participation process.

• Recipients should create Community Advisory Boards (CABs) that include environmental scientist or engineers, health experts, elected representatives, and community representatives. The CAB should also participate early in the planning and permitting process. CABs may potentially provide ideas and suggestions about a broad range of issues, including possible alternatives sites or proposals, community relations, monitoring, mitigation, and economic development. The criteria for selecting community representatives should be focused on including members of low-income communities of color who are not involved in politics and citizens at highest risk from a potential project.

• Recipients should be encouraged to create community advisory groups (CAGs) that participate early in the planning and permitting process. Unlike CABs, who only participate at one or two points of the process, the CAGs would publicly participate throughout the process. In addition, the CAG would have some decision-making authority, as opposed to the purely advisory function of the CAB. Much like the proposed Community Working Groups under 1994 proposed

Superfund legislation, the CAGs should receive "substantial weight" by the EPA on their recommendations achieved by consensus.[76] The formation of a CAG would be, in part, designed to supplement the sometimes limited capacity of an agency or recipient to take into consideration public input under review and comment on procedure. Ideally, the CAG would also negotiate rule-making, as opposed to the traditional role of the public only participating in reviewing and commenting on substantive issues.

• Recipients should include a diverse range of citizens on the CAGs, especially people of color and those at highest risk from the project. The CAG should be a collective voice that speaks for people who do not traditionally have individual voices. It is important to recognize, however, that CAGs still may not effectively, completely, or accurately reflect or account for all public concerns and should not be depended on for the sole source of community outreach.

Additionally, EPA should provide meaningful technical assistance grants (TAGs) to allow complainants to thoroughly investigate a complaint once the EPA concludes after a preliminary investigation that the complaint raises serious health issues. This would allow the complainant to hire its own technical or legal expert who has the flexibility to pursue the complainant's own investigative leads, as opposed to the narrowly tailored assistance of a recipient expert.

3. Conduct Impact and Demographic Analyses

a. Availability of Demographic Data and Exposure Data

In footnote 13, the use of the term "data release" in the last line is confusing in the context of discussing toxic releases.

b. Potential Steps for Conducting Adverse Disparate Impact Analyses

We refer EPA to our comments on the Investigatory Guidance for a critique of the construction "adverse disparate impact."

c. Availability of Tools and Methodologies for Conducting Adverse Impact Analyses
d. Relevant Data

EPA's current and proposed mapping methods do not adequately evaluate existing cumulative toxic burdens in impacted communities. The EPA's mapping methods, as illustrated in the Shintech case in St. James parish, Louisiana, are *facility-based*: existing and proposed polluting facilities are the focal point of the maps produced by the EPA. EPA plotted the existing and proposed facilities on a map and then generated radii of various sizes around the facilities to

[76] H.R. 3800, §§ 117(g)(3); S. 1834, §§ 103 (Version 4, Oct. 3, 1994) (proposing to amend CERCLA §§ 117(1)(3)).

estimate the population count and racial composition within these radii. While this mapping method provides some important demographic information on the population in an area, this facility-based method is insufficient for analyzing and displaying the existing cumulative toxic burden in an area.

Please compare EPA's maps from the Shintech case[77] with the attached maps of two communities in Louisiana (Appendix B, Convent, and Appendix C, Alsen).[78] The attached maps are *community-based*: important community facilities, in this case, elementary schools with Head Start programs, are the focal point of the maps. Radii of various sizes are generated around these community facilities and then, instead of counting the population, TRI emissions and other potential sources of pollution within the radii are summed in order to calculate the existing cumulative toxic burden in these communities. We suggest that EPA incorporate community-based mapping methods in order to complement their facility-based mapping methods such that the existing cumulative toxic burdens on communities can be more accurately analyzed and displayed.

Known emissions should be above modelled data in the data hierarchy.

5. Participate in Alternative Dispute Resolution

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of alternative dispute resolution and EPA's reliance on it.

6. Reduce or Eliminate Alleged Adverse Disparate Impact

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of EPA's odd "sole source" argument, and to §IV.B for our comments on mitigation measures.

C. Due Weight

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of EPA's "due weight" concept.

EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

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[77]Available online at *http://www.epa.gov/civilrights/shinfileapr98.htm*.

[78]The community-based maps were created by Charles A. Flanagan, Louisiana Environmental Action Network.

GLOSSARY OF TERMS

Please see our comments on the identical Glossary of Terms found following the Investigatory Guidance, above.

V. CONCLUSION

Because the Investigatory Guidance is fatally flawed in so many ways, each of which penalizes the communities suffering civil rights violations and benefits the civil rights violators, we request that the Guidance be withdrawn and scrapped. We request that EPA begin again the process of formulating a Guidance, this time with the ambition not of making "stakeholders" satisfied but with enforcing civil rights.

Signed,[79]

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San Francisco, CA
Attorneys for complainants in *African American Environmental Justice Action Network v. Alabama Department of Environmental Management*, No. 28R-99-R4; *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9; *Community United for Political and Individual Development v. Arizona Department of Environmental Quality*, No. 19R-99-R9; *IWU Negotiating Committee v. Arizona Department of Environmental Quality*, No. (filed August 2000); *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9; *Lucha Ambiental de la Comunidad Hispana v. Los Angeles County*, et al., No. 13R-97-R9; *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9; *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9; *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9; *Residents of Sanborn Court v. Department of Toxic Substances Control*, No. 02R-95-R9
Member of EPA's National Environmental Justice Advisory Council and member of EPA's Title VI Implementation Committee*

Complainants

African American Environmental Justice Action Network, Montgomery, AL
Complainant in *African American Environmental Justice Action Network v. Alabama Department of Environmental Management*, No. 28R-99-R4

African Americans for Environmental Justice, Noxubee County, MS

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[79]Please note that Appendix A contains a complete list of all the complaints involving the signatories to this letter.

Complainants in *African Americans for Environmental Justice v. Mississippi Department of Environmental Quality*, No. 01R-93-R4

Alternatives for Community & Environment, Roxbury, MA
Complainants in *Alternatives for Community & Environment v. Massachusetts Department of Environmental Protection*, No. 27R-99-R6

(b) (6) [redacted], Houston, TX
Complainant in *LaNell Anderson v. Texas Natural Resources Conservation Commission*, No. 02R-94-R6

Ascension Parish Residents Against Toxic Waste, Geismar, LA
Complainants in *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality,* No. 04R-97-R6; *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality*, No. 01R-94-R6

(b) (6) [redacted], Daly City, CA
Complainant in *Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control,* No. 01R-99-R9

(b) (6) [redacted], CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Californians for Renewable Energy, Pittsburgh, CA
Complainant in *Californians for Renewable Energy v. California Energy Commission, et al.*, No. 2R-00-R9

Chemical Weapons Working Group, KY
Complainant in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6; *E. Boateng, et al., v. Alabama Department of Environmental Management*, No. 15R-97-R4

Chester Street Block Club Association, Oakland, CA
Complainant in *Chester Street Block Club Association v. Department of Toxic Substances Control*, No. 8R-97-R9

Coalition for a Good Environment, Morgan City, LA
Complainant in *Coalition for a Good Environment v. Louisiana Department of Environmental Quality*, No. 13R-98-R6

(b) (6) [redacted], Louisville, KY
Complainant in *Justice Resource Center, et al., v. Metropolitan Sewer District*, et al., No. 3R-00-R4

Communities for a Better Environment, Oakland and Huntington Park, CA
Complainant in *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9; *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9

Community United for Political and Individual Development, Randolph, AZ
Complainant in *Community United for Political and Individual Development v. Arizona Department of Environmental Quality*, No. 19R-99-R9

Concerned Citizens of Westmorland, Westmorland, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

El Pueblo para el Aire y Agua Limpio, Kettleman City, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

Environmental Health Coalition, San Diego, CA
Complainant in *Environmental Health Coalition, et al., v. San Diego County Air Pollution Control District, et al.*, No. 02R-96-R9

(b) (6) [redacted], Watsonville, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

(b) (6) [redacted], Oxnard, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Garden Valley Neighborhood Association, Austin, TX
Complainant in *Garden Valley Neighborhood Association v. Texas Natural Resources Conservation Commission*, No. 03R-94-R6

Greater Harrisburg Area Branch of the NAACP, Harrisburg, PA
Complainant in *Greater Harrisburg Area Branch of the NAACP v. Pennsylvania Department of Environmental Protection*, No. 01R-98-R3

Hyde Park/Aragon Park Improvement Committee, Augusta, GA
Complainant in *Hyde Park/Aragon Park Improvement Committee v. Georgia Department of Natural Resources, et al.*, No. 08R-94-R4

Improving Kids Environment, Indianapolis, IN
Complainant in *Improving Kids Environment v. City of Indianapolis*, No. 23R-99-R5

Involved Citizens of Helena Community, Inc., Newberry, SC
Complainant in *Involved Citizens of Helena Community, Inc., v. Newberry County*, No. 09R-97-R4

Isleta Pueblo, NM
Complainant in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

IWU Negotiating Committee, Phoenix, AZ
Complainant in *IWU Negotiating Committee v. Arizona Department of Environmental Quality*, No. (filed August 2000)

Jackson/Mahon Neighborhood Association, Lubbock, TX
Complainant in *Jackson/Mahon Neighborhood Association v. Texas Natural Resources Conservation Commission*, No. 02R-96-R6

Justice Resource Center, Louisville, KY
Complainant in *Justice Resource Center, et al., v. Metropolitan Sewer District*, et al., No. 3R-00-R4

(b) (6) [redacted] Pajaro, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Lewisburg Prison Project, Inc., Lewisburg, PA
Complainant in *Lewisburg Prison Project, Inc., et al., v. Pennsylvania Department of Environmental Resources*, No. 02R-94-R3

Lone Star Chapter of the Sierra Club, Austin, TX
Complainant in *Texans United Education Fund, et al. v. Texas Natural Resources Conservation Commission*, No. 16R-98-R6; *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 1R-00-R6

Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente (LA CAUSA), Los Angeles, CA
Complainant in *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9

Louisiana Environmental Action Network, Baton Rouge, LA
Complainant in *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 20R-99-R6; *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 17R-98-R6; *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality,* No. 07R-98-R6; *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality,* No. 04R-97-R6; *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality*, No. 01R-94-R6.

Lucha Ambiental de la Comunidad Hispana, CA
Complainant in *Lucha Ambiental de la Comunidad Hispana v. Los Angeles County*, et al., No. 13R-97-R9

Manzanar Action Committee, Pico Rivera, CA
Complainant in *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9

Midway Village Advisory Committee, Daly City, CA
Complainant in *Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control*, No. 01R-99-R9

Mothers Organized to Stop Environmental Sins, Winona, TX
Complainant in *Mothers Organized to Stop Environmental Sins v. Texas Natural Resources Conservation Commission*, No. 05R-94-R6

(b) (6) [redacted], Birmingham, AL
Complainant in *Jefferson County Black Chamber of Commerce*, No. 02R-98-R4; *George Munchus v. Browning-Ferris Industries, Inc. of Birmingham*, No. 03R-94-R4; *George Munchus v. City of Hueytown*, Alabama, No. 05-94-R4; *George Munchus v. Jefferson County Commission,* No. 06R-94-R4; *George Munchus v. City of Leeds, Alabama, No. 04R*-94-R4

North Baton Rouge Environmental Association, Baker, LA
Complainant in *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality,* No. 07R-98-R6; *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 17R-98-R6

Northwest Civic Association, Jacksonville, FL
Complainant in *Northwest Civic Association v. Florida Department of Environmental Protection, et al.*, No. 09R-94-R4

Oakville Community Action Group, Belle Chasse, LA
Oakville Community Action Group v. Louisiana Department of Environmental Quality, No. 03R-96-R6

Organized North Easterners and Clay Hill and North End, Inc., Hartford, CT
Complainant in *Organized North Easterners and Clay Hill and North End, Inc. v. Connecticut Department of Environmental Protection*, No. 01R-96-R1

(b) (6) [redacted] Salinas, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Padres Hacia una Vida Mejor, Buttonwillow, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

People Against Contaminated Environments, Beaumont, TX
Complainant in *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 02R-95-R6; *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 1R-00-R6

People Organized in Defense of Earth and Her Resources, Austin, TX
Complainant in *People Organized in Defense of Earth and Her Resources, et al. v. Texas Natural Resources Conservation Commission*, No. 01R-96-R6 and *People Organized in Defense of Earth and Her Resources, et al. v. City Council, City of Austin*, No. 05R-99-R6

Pine Bluff for Safe Disposal, Pine Bluff, AR
Complainant in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6

Residents Involved in Saving the Environment, Inc., Richmond, VA
Complainant in *Residents Involved in Saving the Environment, Inc. v. Virginia Department of Environmental Quality*, No. 12R-98-R5

Residents of Sanborn Court, Salinas, CA
Complainant in *Residents of Sanborn Court v. Department of Toxic Substances Control*, No. 02R-95-R9

Residents of the Easton Acres and Feltonsville Communities, Holly Springs, NC
Complainants in *Residents of the Easton Acres and Feltonsville Communities v. Wake County, North Carolina, et al.*, No. 12R-99-R4

Residents Opposed to Pigs and Livestock, College Station, TX
Complainant in *Residents Opposed to Pigs and Livestock v. Texas A&M University*, No. 02R-97-R6

(b) (6) [redacted] Oxnard, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

St. Francis Prayer Center, Flint, MI
Complainant in *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, No. 05R-98-R5 and *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, No. 01R-94-R5

St. James Citizens for Jobs & the Environment, Convent, LA
Complainant in *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality,* No. 04R-97-R6

Save Sierra Blanca, Sierra Blanca, TX
Complainant in *Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al.*, No. 07R-97-R6

Save Sierra Blanca Legal Defense Fund, El Paso, TX
Complainant in *Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al.*, No. 07R-97-R6

South Cook County Environmental Action Coalition, Robbins, IL
Complainant in *South Cook County Environmental Action Coalition v. Illinois Environmental Protection Agency*, No. 14R-97-R5

South Suburban Citizens Opposed to Polluting Our Environment, Bloom Township, IL
Complainant in *South Suburban Citizens Opposed to Polluting Our Environment v. Illinois Environmental Protection Agency*, No. 01R-95-R5

South Valley Coalition of Neighborhood Associations, Albuquerque, NM
Complainant in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

SouthWest Organizing Project, Albuquerque, NM
Complainants in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

Southwest Public Workers Union, San Antonio, TX
Complainant in *Southwest Public Workers Union, et al., v. Texas Natural Resources Conservation Commission*, et al., No. 12R-99-R4

Waimanalo Citizens for a Healthy Future, Waimanalo, HI
Waimanalo Citizens for a Healthy Future v. Hawaii Department of Health, No. 02R-99-R9

(b) (6) [redacted] Tahlequa, OK
Complainant in *William C. Whitehead, et al. v. Hardage Site Remedy Corp., et al.*, No. 06R-97-R6

Environmental Justice Networks

Asian Pacific Environmental Network
Oakland, CA

Farmworker Network for Economic and Environmental Justice
Lake Alfred, FL

Indigenous Environmental Network
Bemidji, MN

Northeast Environmental Justice Network
New York, NY and Boston, MA

Southern Organizing Committee for Economic and Social Justice
Atlanta, GA

Southwest Network for Environmental and Economic Justice
Albuquerque, NM

Organizations & Individuals

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Save Sierra Blanca
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White Castle, LA

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Portland, OR

Savi Horne
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Environmental Quality, No. 01R-94-R5

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Oakland, CA

Chavel Lopez/Ruben Solis
Southwest Public Workers Union
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Louisiana ACORN
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Louisiana Communities United
Gonzales, LA

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People Against Contaminated Environment
Beaumont, TX

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Alpaugh, CA

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Attorney for complainants Isleta Pueblo in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

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North Lake Charles Environmental Action Network
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Sara Piesch
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Hato Rey, PR

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Melissa Scanlan
Midwest Environmental Advocates
Madison, WI

Rahman Shabazz
Community Coalition for Change
Los Angeles, CA

Peggy Shepard
West Harlem Environmental Action
New York, NY
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Attorney for complainants in *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality,* No. 01R-94-R6; *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality,* No. 07R-98-R6; *Oakville Community Action Group v. Louisiana Department of Environmental Quality,* No. 03R-96-R6; *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality,* No. 04R-97-R6

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Kansas City, MO

Donele Wilkens
Michigan Environmental Justice Coalition
Detroit, MI

Jane Williams
California Communities Against Toxics
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Member of EPA's National Environmental Justice Advisory Council*

Evelyn Yates
Pine Bluff for Safe Disposal
Pine Bluff, AR

*For identification purposes only.

APPENDIX A:
CASES OF SIGNATORIES:

African American Environmental Justice Action Network v. Alabama Department of Environmental Management, No. 28R-99-R4

African Americans for Environmental Justice v. Mississippi Department of Environmental Quality, No. 01R-93-R4

Alternatives for Community & Environment v. Massachusetts Department of Environmental Protection, No. 27R-99-R6

LaNell Anderson v. Texas Natural Resources Conservation Commission, No. 02R-94-R6

E. Boateng, et al., v. Alabama Department of Environmental Management, No. 15R-97-R4

Angelita C., et al., v. California Department of Pesticide Regulation, No. 16R-99-R9

Californians for Renewable Energy v. California Energy Commission, et al., No. 2R-00-R9

Coalition for a Good Environment v. Louisiana Department of Environmental Quality, No. 13R-98-R6

Chester Street Block Club Association v. Department of Toxic Substances Control, No. 8R-97-R9

Community United for Political and Individual Development v. Arizona Department of Environmental Quality, No. 19R-99-R9

Environmental Health Coalition, et al., v. San Diego County Air Pollution Control District, et al., No. 02R-96-R9

Garden Valley Neighborhood Association v. Texas Natural Resources Conservation Commission, No. 03R-94-R6

Greater Harrisburg Area Branch of the NAACP v. Pennsylvania Department of Environmental Protection, No. 01R-98-R3

Hyde Park/Aragon Park Improvement Committee v. Georgia Department of Natural Resources, et al., No. 08R-94-R4

Improving Kids Environment v. City of Indianapolis, No. 23R-99-R5

Involved Citizens of Helena Community, Inc., v. Newberry County, No. 09R-97-R4

IWU Negotiating Committee v. Arizona Department of Environmental Quality, No. (filed August 2000)

Leonard Jackson, et al., v. Louisiana Department of Environmental Quality, No. 01R-94-R6

Jackson/Mahon Neighborhood Association v. Texas Natural Resources Conservation Commission, No. 02R-96-R6

Jefferson County Black Chamber of Commerce, No. 02R-98-R4

Justice Resource Center, et al., v. Metropolitan Sewer District, et al., No. 3R-00-R4

Lewisburg Prison Project, Inc., et al., v. Pennsylvania Department of Environmental Resources, No. 02R-94-R3

Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District, No. 10R-97-R9

Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality, No. 20R-99-R6

Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality, No. 17R-98-R6

Lucha Ambiental de la Comunidad Hispana v. Los Angeles County, et al., No. 13R-97-R9

Manzanar Action Committee v. Department of Toxic Substances Control, No. 11R-97-R9

Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control, No. 01R-99-R9

Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control, No. 03R-97-R9

Mothers Organized to Stop Environmental Sins v. Texas Natural Resources Conservation Commission, No. 05R-94-R6

George Munchus v. Browning-Ferris Industries, Inc. of Birmingham, No. 03R-94-R4

George Munchus v. City of Hueytown, Alabama, No. 05-94-R4

George Munchus v. Jefferson County Commission, No. 06R-94-R4

George Munchus v. City of Leeds, Alabama, No. 04R-94-R4

North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality, No. 07R-98-R6

Northwest Civic Association v. Florida Department of Environmental Protection, et al., No. 09R-94-R4

Oakville Community Action Group v. Louisiana Department of Environmental Quality, No. 03R-96-R6

Organized North Easterners and Clay Hill and North End, Inc. v. Connecticut Department of Environmental Protection, No. 01R-96-R1

Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control, No. 01R-95-R9

People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission, No. 02R-95-R6

People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission, No. 1R-00-R6

People Organized in Defense of Earth and Her Resources, et al. v. Texas Natural Resources Conservation Commission, No. 01R-96-R6

People Organized in Defense of Earth and Her Resources, et al. v. City Council, City of Austin, No. 05R-99-R6

Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality, No. 15R-99-R6

Residents Involved in Saving the Environment, Inc. v. Virginia Department of Environmental Quality, No. 12R-98-R5

Residents of Sanborn Court v. Department of Toxic Substances Control, No. 02R-95-R9

Residents of the Easton Acres and Feltonsville Communities v. Wake County, North Carolina, et al., No. 12R-99-R4

Residents Opposed to Pigs and Livestock v. Texas A&M University, No. 02R-97-R6

St. Francis Prayer Center v. Michigan Department of Environmental Quality, No. 05R-98-R5

St. Francis Prayer Center v. Michigan Department of Environmental Quality, No. 01R-94-R5

St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality, No. 04R-97-R6

Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al., No. 07R-97-R6

South Cook County Environmental Action Coalition v. Illinois Environmental Protection Agency, No. 14R-97-R5

South Suburban Citizens Opposed to Polluting Our Environment v. Illinois Environmental Protection Agency, No. 01R-95-R5

South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department, No. 13R-99-R6

Southwest Public Workers Union, et al., v. Texas Natural Resources Conservation Commission, et al., No. 12R-99-R4

Texans United Education Fund, et al. v. Texas Natural Resources Conservation Commission, No. 16R-98-R6

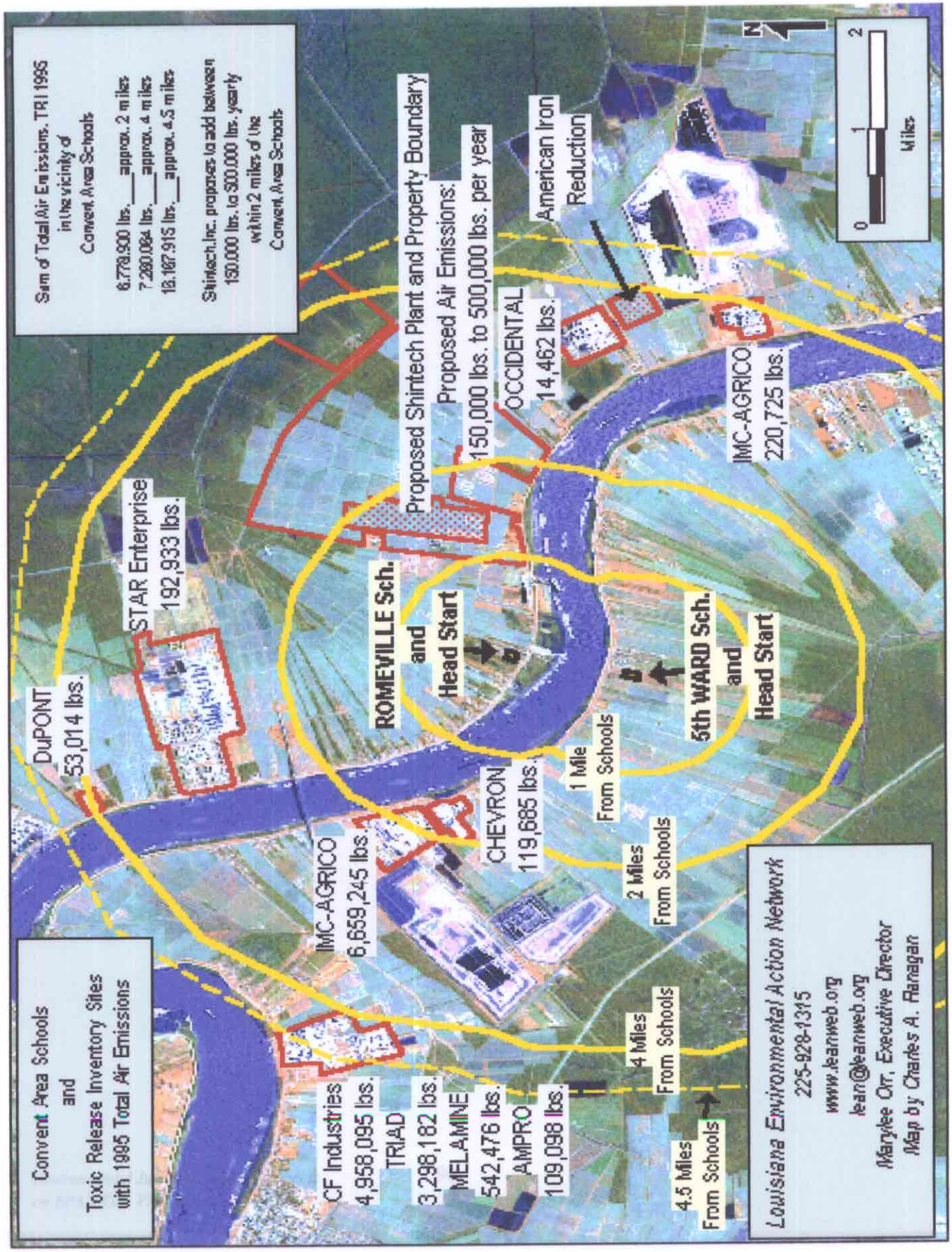
Waimanalo Citizens for a Healthy Future v. Hawaii Department of Health, No. 02R-99-R9

William C. Whitehead, et al. v. Hardage Site Remedy Corp., et al., No. 06R-97-R6

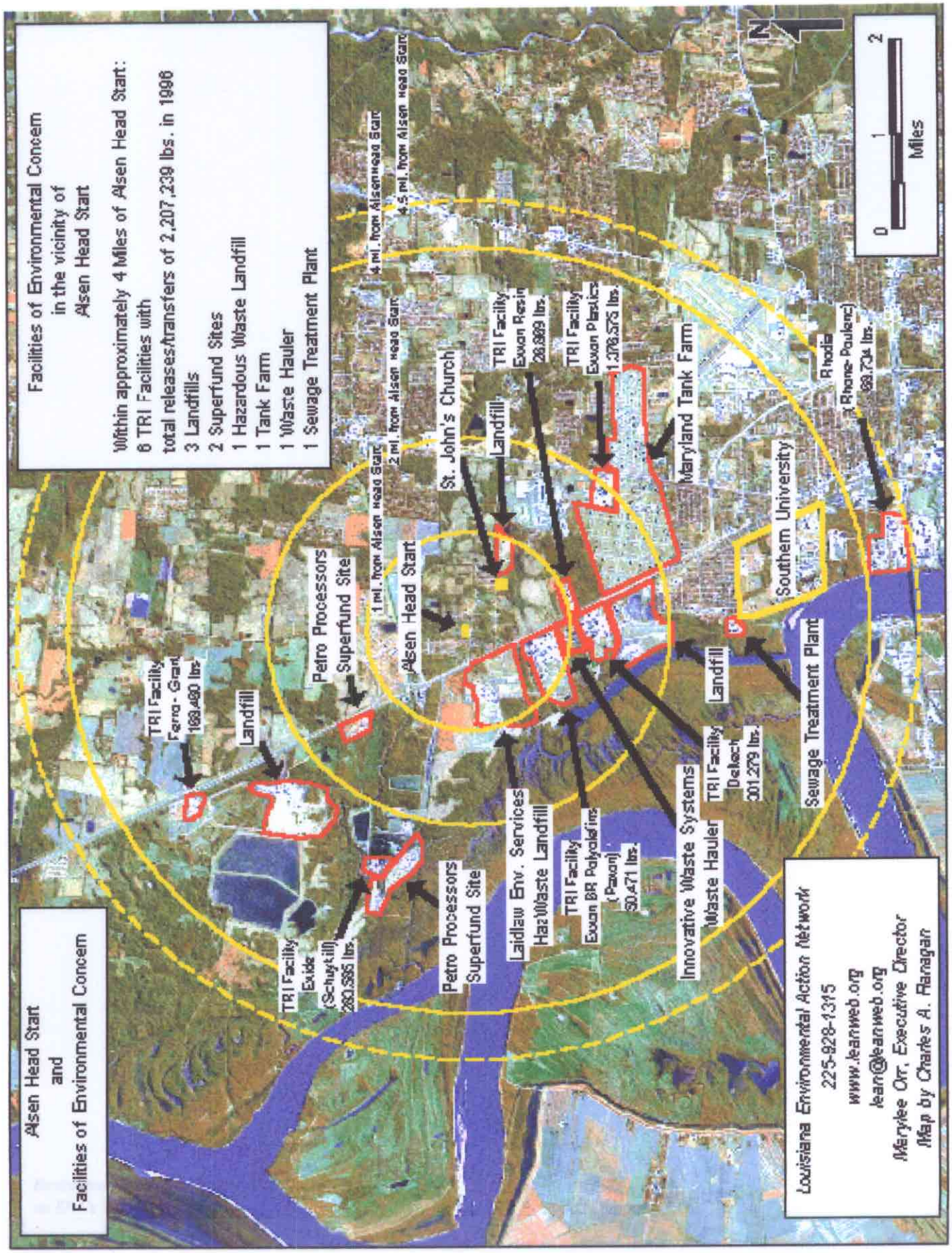
Appendix B: Convent, Louisiana Community Map

Appendix C: Alsen, Louisiana Community Map

Appendix B: Convent, Louisiana Community Map



Appendix C: Alsen, Louisiana Community Map



GREATER CINCINNATI
CHAMBER OF COMMERCE

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Also sent to e-mail: civilrights@epa.gov

Dear Madam or Sir:

Re: Request for Comments on: *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance*).

The Greater Cincinnati Chamber of Commerce has over 6500 business members in the Ohio, Kentucky, and Indiana tristate area. USEPA's draft Title VI Guidance includes many issues important to Chamber businesses.

The Chamber's Air Quality Committee has reviewed the Title VI Guidance. The Committee has developed the following comments. In addition, these comments were reviewed by the Hispanic Chamber of Commerce of Greater Cincinnati. The officials of that Chamber concur with the views expressed herein.

We trust you will give our comments thorough consideration, and work to resolve our concerns, before finalizing the Guidance.

The spirit of the proposed Guidance is commendable but our Committee concludes that the implementation of the Guidance will be difficult, always open to challenge, and potentially accusatory.

Summary of Comments:

- Permits and the Permitting Process: Despite EPA's claim that the Guidance will not impact individual operating permits, or – just as critically -- the permitting process, we conclude the opposite: The Guidance will in fact open new and emotionally charged avenues for challenging and delaying permit applications and permit changes.

- Population Survey Difficulties: The Guidance presents, and then builds upon a notion that "disparately affected" subgroups can be identified and compared. In reality, the science and art of epidemiology and public health cannot provide the definitive answers implied by a Title VI review.

- Brownfields and Urban Development: EPA claims that the Guidance will not thwart brownfield redevelopment and efforts by cities like Cincinnati to retain and expand manufacturing and industrial bases. But that claim is not documented in the Guidance. We conclude the opposite: We think that if a business has to face *new* hurdles regarding permit applications then business managers will readily choose to relocate or expand in localities far from cities such as Cincinnati. More likely, new activity will move to another county, another state, or another country.

Detailed Comments on Specific Sections of the Proposed Guidance:

Part C, Section V. "Investigative Procedures"

To acquire or revise an environmental permit, regulated facilities direct significant resources to ensure compliance with applicable laws, rules, and regulations. All available tools are used to accomplish this goal, including modeling, emissions testing, research and development, predictive exercises, testing, material balance and other calculations.

A common thread links the permitting process. The applicant wants to document that a facility's operations, when compared against a standard, or benchmark, will comply with that standard. Predicted compliance allows the project to proceed, with relative assurance it will finally be judged acceptable.

This established practice serves to illustrate a basic flaw with EPA's draft Guidance. The Guidance does not present a methodology for a permit holder, or permit applicant, to determine whether a project will result in "disparate impacts" *that actually violate Title VI.* Without such a methodology, a permit applicant cannot know whether a project should continue, whether it is a viable project, or if it should be abandoned.

Public regulatory agencies (the "recipients" under the draft Guidance) also direct significant resources to review permit applications in order to *ensure environmental compliance*. These public agencies will face the same challenges: an inability to predict which facility impacts might violate Title VI.

In our opinion, the Guidance creates a new social-activist role for state environmental agencies, which we do not support. Environmental regulators need to ensure that environmental statutes are implemented and that facility permits have appropriate limits and controls for public health and safety. EPA's draft investigative approach does not account for relevant social, economic, historical and development issues impacting an area or group. The Guidance does not clearly recognize and emphasize that an environmental operating permit can be but one minor player within a geographic area and the people living nearby.

Furthermore, the policy relegates the role of the permittee to that of a lonely right fielder. Consider Section V.B.1:

> "In response to allegations, or during the course of an investigation, *recipients* as well as *complainants* may submit evidence such as data and analysis to support their position that an adverse disparate impact does or does not exist" (emphasis added).

However, In EPA's response-to-comments, at page 39693, the Guidance states:

> "The permittee may also be asked to provide information to assist in the investigation of the complaint. The recipient may wish to notify the permittee about the investigation, if potential mitigation measures involve the permittee."

That allowance is after-the-fact. It's unfair that the Guidance does not require equal participation among recipient, complainant, and permittee. The Guidance should require notice to the permittee, who, after all, may be responsible for "mitigation measures."

The resources of USEPA's Office of Civil Rights should be directed at state permitting programs in order to identify and correct <u>institutional</u> <u>problems</u> with these programs that result in patterns of environmental injustice. In reaching any conclusions on the validity of a complaint, the scope of the impact should be limited to those that are actually within the legal authority of the recipient. Due recognition and consideration should be given to causes other than environmental permitting, such as the historical location of industry and workforces. The focus on individual permits is flawed both as reactive and as piecemeal.

While EPA writes that the Title VI investigative procedures are not intended to be reflective of a judicial process, the Guidance still presents an amorphous investigatory process with no clear guidelines. We would <u>not</u> recommend a process analogous to a judicial one. However, we still seek a clearer document regarding the parameters and appropriate factors in a Title VI investigation.

<u>Part C, Section V.B.2 "Area-specific Agreements"</u>

The Area-specific Agreement is built upon vague concepts, incompletely developed and defined.

For example, EPA does not define "Area", nor does it tell recipients how to identify Areas. Apparently, an Area could include a 20 foot radius, or expand to include a neighborhood, a metropolitan region, a state, or entire parts of the US (in the case of a utility plant, for example).

The Guidance does not address potential conflicts along Area boundaries. For example, consider if one locale agrees to be included, or chooses inclusion, within an Area-specific Agreement. Across the street, however, a separate locality may not want to be part of the Agreement. After a Title VI review, a recipient could propose changes to

its permitting program. However, the Guidance raises the possibility that a recipient could undertake different policies in an Area-specific Agreement compared to policies undertaken beyond the Area. The Guidance needs to detail how the recipient's approach to permitting, enforcement, emission limits, public involvement, inspections, and related issues might differ between an Agreement locality vis-à-vis the non-Agreement locality.

The Guidance needs to detail and emphasize that if public or private facilities join an Agreement, or choose not to, either decision in no way shifts or changes the legal standing of those facilities, nor the terms and conditions of any environmental permits or obligations or program.

The Guidance is naïve to imply that joining an Area-wide Agreement would be anything but a difficult decision for a regulated facility. For example, the Guidance does not address liabilities, and related charges that could be developed by trial attorneys who galvanize class action defendants. The Guidance does not address enforcement, and fallback plans, and possible reassessments, if participants change or drop out. One wonders whether "joint and several liability" could apply to participants.

More fundamentally, though, the Agreement idea is built on two concepts of particular concern for an urban chamber of commerce.

<u>First concern</u>:

At the start of the "Area-specific Agreement" text in part C, EPA refers the reader to related text in part B, the part of the Guidance for recipients. Tellingly, the first example within that part B text is an example of how and where an Agreement might apply. EPA makes first reference to "a *section of a city* as an area where permitted emissions are contributing to discriminatory health effects on African Americans" (emphasis added).

Note the reference to *city*. As written, we think the Guidance leaves cities vulnerable, especially older manufacturing cities with mixed residential and manufacturing and transportation zones that have been active for more than a century.

At the Greater Cincinnati Chamber of Commerce, one strategic goal is to strengthen and maintain Cincinnati's critical manufacturing and industrial economy. That goal becomes more difficult to reach because of the lure of easy-to-develop greenfield sites that companies can so readily find. At those sites, companies face few concerns about confrontations with *city* sectors.

A Title VI review, and the notion of establishing Area-specific Agreements, is implicitly challenging for cities since suburban and exurban areas are far less diverse regarding population and density and history.

Therefore, depending on location in a region, a Title VI review unfairly carries different meanings and different consequences. Ironically, the Guidance is inequitable.

Second Concern:

In the *city* reference above, EPA's example refers to "discriminatory health effects on African Americans." In other parts of the Guidance, EPA refers to similar burdens for Asian-Americans and Hispanics.

The Guidance contains a lengthy "Adverse Disparate Impact Analysis" in which a protocol is proposed for elucidating ambient exposures and supposed health effects. As proposed, this is an investigative effort that could go on forever. Even if the Guidance were followed to the letter, epidemiologists and public health specialists cannot identify and separate every risk and toxic burden and environmental "stressor" and then assume qualities about those risks, that they are constant or stationary, for example.

Even more far reaching is the Guidance's implication that ambient environmental impacts can be singularly parsed among a population, leading to claims that African-Americans are affected one way, and Hispanic-Americans are affected a second way and Asian-Americans are affected another way while some -Americans are not affected at all.

EPA misleads the general public by implying (1) an ability to identify "discriminatory health impacts", and (2) that such "impacts" can be fairly and satisfactorily redressed via environmental operating permits. There is weakness in both of these assumptions. Consequently, subsequent policy changes will not be built on sound science, but on charges and counter-charges that are always open to debate.

Part C, Section VI.B.1 "Assess Applicability"

In Section I.E, "Principles for Implementing Title VI at EPA", EPA writes that one foundation for the Title VI complaint investigation process will be assessing the potential adverse disparate cumulative impacts from environmental stressors.

However, the investigative framework outlined in Section VI.B.1 of the Guidance, "Assessing the Applicability of Title VI Allegations", does not build on this foundation. Rather, the investigative procedures focus on individual permitting activity in a community, not on the health impacts that its citizens are experiencing.

We suggest it would be more consistent with Title VI principles if an investigation first quantified the cumulative levels of the environmental stressor in question. Next, determine if adverse health impacts could occur based on established exposure standards. Then, if safe exposure levels are exceeded, the investigation should shift, including an assessment of the Recipient's permitting program. If safe exposure standards are not being exceeded, the investigation should end.

The above changes would directly address community health concerns. However, they would impact a recipient's permitting programs only if true environmental risks exist.

For urban facilities, this section of the Guidance poses serious challenges. It will be extremely difficult to stay competitive in a regulatory environment where every process modification, plant expansion, or permit revision is ripe for a Title VI challenge. Facilities need to make operational changes that are often covered by environmental

permits. It's our opinion that the proposed Title VI investigation procedure yields redundant oversight, further encumbering business operations.

The Guidance raises the possibility that permit compliance would no longer preserve a facility's right to operate in the face of a Title VI allegation. A facility would be forced to conduct business under the constant threat that additional emission control measures could be required in response to a Title VI complaint.

When approached with such uncertainty, business managers will be prone to curtail operations in urban areas and invest in locations where environmental justice issues are less likely. The end result is that urban communities will suffer a loss of jobs, a decreased tax base, and a poorer economy, outcomes that the original Title VI legislation was designed to prevent.

We make the following suggestions, for instances in which a disparate cumulative impact from environmental stressors has been identified:

- OCR should focus investigations on needed improvements to Recipient's permitting and emission management programs, *not* on individual permits.
- If OCR maintains a need to focus upon individual permits, it should significantly limit the types of permit actions that can support a Title VI investigation. Investigations of individual permit actions should be pursued in cases where there is a significant increase in emissions of concern.
- As stated in the Guidance, minor permit modifications should be excluded as well as permits with significant emissions decreases.
- We disagree with the Guidance directive which subjects sites to environmental justice investigations (and risk their continued ability to operate) based on routine permit renewal activities. Permit renewals that maintain or decrease the current level of permitted emissions should NOT trigger environmental justice investigations.
- Minor modifications that do not significantly increase permitted emissions of a pollutant of concern should be excluded.
- Where area wide emission reductions are needed to address disparate cumulative impacts from identified stressors, area emission management programs should be established as part of SIPs to reduce these emissions.

<u>Part C, Section VI.B.3 "Impact Assessment"</u>

In this section, the Guidance challenges an investigation team to assess the following:

> That a particular "permitted entity at issue, either alone or in combination with other relevant sources, may result in an adverse impact."

The U.S. EPA has been performing monitoring, modeling, and related risk and toxicity studies for over 30 years.

Where specific effects and adverse impacts have been noted (and notable), these observations have usually occurred in remote areas, focused on large singular facilities, with emissions not mixed with other sources, pathways, environmental stresses, or geographical setting.

The Guidance implies that similar impact assessments can be made in a far different environment: urban metropolitan regions with multiple sources, large populations, and vast transportation networks. This implication is misleading. We contend that the Guidance methodologies will not yield the answers that describe a cause and effect relationship. Rather, those answers will be "best estimates" but not best science. This weakness in the Guidance needs to be corrected.

In addition, we offer the following specific comments:

1. The proposed impact analysis includes the determination of risk. However, it does not define *acceptable risk*, nor a standard methodology to assess risk. The Guidance implies that no level of risk is acceptable, only a reduction in risk. Without a more complete presentation on risk, it is impossible to answer the question: how much risk reduction would be acceptable? Before the Guidance is finalized we urge development of a uniform risk assessment methodology, and a presentation on acceptable level of risk, in order to make the Guidance more equitable.

2. The Guidance proposes that an agency's permit action signals when a complaint can be filed. The permitted facility would be investigated for its possible impact on an affected group. This process singles out one facility, despite possible contributions from many sources, either private or public facilities or area sources or transportation impacts.

3. The complaint can allege the effects of a single pollutant (stressor) or include the cumulative effects of multiple pollutants. The Guidance here is vague and this opens the procedure to possible abuse, possibly becoming a witch-hunt. We suggest that in order to reduce the time and cost of an investigation, the scope of a complaint should be specific to a single pollutant or group of pollutants.

4. The Guidance process is unfair to the permit holder. It adds another layer of uncertainty to the permitting process. The permit holder may be investigated and required to make additional emission reductions at some point after the permit has been issued. A *de minimus* or acceptable emission level should be set for all pollutants. In this manner, the permit holder could include an evaluation of off site pollutant impacts in order to minimize the possibility of a civil rights complaint.

In one sense the Guidance gives the investigation team a basic set of quantitative tools to determine adverse impact. However, the Guidance is cautionary regarding public

health assessment. The Guidance notes that it takes years of exposure, on large groups of people, to detect and possibly measure adverse health effects. This means that some of the "approaches" recommended in the Guidance just infer risk and health effects based on monitoring or modeling. The Guidance needs to describe how an investigation team should proceed if health effects are not really "measured" health effects, but just based on models. We also seek an enhanced presentation in the Guidance regarding uncertainties in data types, and how those uncertainties will be factored into the investigation team's final discernment of disparate adverse impact.

Part C, Section VI.B.5 "Characterize Populations and Conduct Comparisons"

In this section, the Guidance proposes several methods to identify "affected populations." Unfortunately, the guidance does not rank those methods.

We believe the methodologies in the Guidance are imprecise and theoretical, relying on "proximity" and mathematical models. Nowhere does the Guidance describe the benefits of one method over another.

Furthermore, it appears that any method would be acceptable as long as it identifies an affected population. A reviewer does not know how EPA will determine the reliability of one study method over another. In addition, the Guidance fails to address *actual* effects, only the *potential* to effect. This leaves the door open for extreme interpretations.

The next element is to determine the race, color, or national origin of the affected population. The guidance does not explain the reason for this determination. If *proximity* is the primary factor regarding an environmental exposure, then how are race, color, or national origin relevant ?

Further in this section, the guidance proposes to compare:

> "The demographic characteristics of an affected population to demographic characteristics of a non-affected population or general population."

What if the affected and non-affected populations are neighbors, each equally proximate to a permitted source?

The draft proposes to use census data. Our concern is that census data could be ten years old when it is used. To assure accuracy, we think the guidance should describe how EPA plans to address demographic changes.

The authors of the Clean Air Act believed that national primary pollutant standards mimimized and controlled the impact of local emissions. This approach recognized that economic benefits outweighed limited adverse impacts. Thus, acceptable pollution levels were established, levels that were not to be exceeded.

Critically, though, nowhere in the Act did Congress write that there would not *be* an impact. We read the Guidance to propose that if a facility could impact an area, and thus a population, then it cannot have a permit, <u>even if it does *not* have an impact</u>. Thus, the *potential to impact* becomes the deciding factor.

The second major element is to compare the affected population to an appropriate comparison population to determine whether disparity exists that may violate EPA's Title VI regulations. The Guidance methodology is not statistically relevant. The phrases used indicate that the comparison population would "usually" be larger than the affected population. Thus the door is left open to choose a smaller population. That choice could bend an analysis toward a preconceived objective. The Guidance needs to utilize statistically accurate population comparison methodologies. No two different populations can be statistically identical

There is tremendous normal variability of population mix from area to area within a city and throughout the country. Without more meaningful assessment methodologies, the population mix screening criteria outlined in EPA's Guidance is meaningless - it does not exclude anything. The questions then are how much and which types of differences are statistically significant between two areas in a city or two regions in a country.

Beyond the issue described above, the entire process does not take into account the practical needs of society. Certain industries and services will be located near or next to specific geographic features. Public officials make these siting decisions within zoning and other land use debates. These decisions may result in an impact on the value of adjacent property, such that the economic value declines. This decline could make the property more attractive to buyers who cannot afford other property. The result is that a demographic characteristic is created by the source itself because of the economic impact on the surrounding area. Because of geography, other economically equivalent areas may not be locally available for this population. Does this constitute unintended discrimination?

As written, the guidance implies that any source could be determined to present a potential impact on an affected population. The monetary cost to argue this determination will only benefit the legal profession and further burden the court system with litigation that is not beneficial to society. On its surface, this Guidance appears to serve a noble cause. In practice, though, we believe it misdirected, diverting the attention of society and resources from the root causes of injustice and, at the same time, increasing the pace of urban sprawl.

A more serious outcome might be the use of the Guidance to prevent any permitting of sources. For example, suppose a source wishes to move to a rural, greenfield area. Residents can allege social injustice. After all, they are currently not exposed to any emissions. By contrast, their environmental impact model shows that the proposed source would indeed impact them. By comparison, a similar population exists in adjacent counties. They are also not currently affected and will not be affected by the proposed source. The affected population and the comparison population are of the same race, color and national origin. Thus the potentially affected population and a comparison population are available and show a disparity.

Part D. Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance: Follow-up Comments.

In Part D, EPA responds to comments regarding the 1998 Interim Guidance for Title VI review.

We think further debate would be productive on at least two topics within Part D. Those topics are under the headings "Consistency With State Permitting Procedures" and "Brownfields and Clean-Ups." Our first comments pertain to "Consistency."

In EPA's *Response* in the "Consistency" section, the Agency notes that a recipient may grant an operating permit, but local officials have closer authority on where a facility is located, or zoned. EPA writes further that recipients,

> "to comply with Title VI…are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources."

Actually, it seems unlikely that a state environmental agency would select a site for a permitted facility. Usually, public and private developers choose sites, and then analyze those sites for environmental suitability.

This brings up an added concern. It is very likely that a site for a permitted facility is planned and chosen with full participation among public and private and neighborhood representatives. In fact, that is the kind of up-front, coordinated effort for which project managers strive. It's an achievement to reach such consensus.

What is the benefit, then, if the recipient is asked to undertake a Title VI review? At best, the project's schedule becomes highly uncertain, even if EPA decides that such a review is not necessary. At worst, the private parties, eager to get to work, may pull out, responding to a competing offer at a site where a Title VI challenge is unlikely. There's nothing to stop these challenges because the Guidance allows a request for a Title VI review to come from a complainant anywhere; he or she does not even have to live near a project. Similarly, the Guidance sets no *de minimis* limits, meaning any allegations about any "disparate impacts" all carry the same impact.

Please note: This is not written to deny public review and comment on projects, including those portions or entities requiring an operating permit. But once that process has concluded, and permits are issued, permit holders should not have to face new uncertainties regarding terms and conditions or emission limits, absent significant environmental changes, e.g., a NAAQS violation, or new public health data, or persistent and severe drought. Importantly, these kinds of changes, though, would not target "city sectors."

The meaning of a permit is to build or operate. If that changes, the permit loses its meaning.

More fundamentally, the type of new development mentioned above, developed cooperatively, implies a project starting in a locale with little or no ongoing, related activity – a "blank slate" kind of site.

In fact, in most older cities and metro regions, economic development and economic projects proceed within a dynamic just the opposite from a "blank slate." In

cities like Cincinnati, many industrial and manufacturing areas have been operating for over a century.

Sometimes, mostly historically, a facility and nearby neighborhoods marched in step. During the last 50 years, though, those links have weakened. People living near a facility may have nothing to do with it, at least regarding employment or providing services. These social shifts include not just individuals, of course, but entire population groups.

Residential change does not occur solely because of business operations. However, a Title VI review implies that permitted facilities will somehow have to keep their operations in tune with social dynamics, which are constant and driven by forces separate from business plans.

For example, one Cincinnati neighborhood has long been home to many people from Appalachia. In the past five years, the same neighborhood drew many new Hispanic residents. For the permitted facilities in or near that neighborhood (proximity is not defined in the Guidance) this population shift, according to the Guidance, seems to present new and different permit conditions. Such revision would be based on the presumption that "disparate impacts" can be detected among human beings from Appalachia or Spanish speaking countries. If the population alters again, would permits again have to change?

The Guidance implies that facility managers need to keep their operations within environmental limits, *plus* keep one eye on social forces. This just does not seem feasible. Granted, EPA writes that it does not foresee a Title VI review focusing on just one permit. Nevertheless, one entire section of the Guidance deals with "challenging permits." Undoubtedly, permits, the permitting process, and individual facilities and projects will be pulled into an open-ended and adversarial process.

Finally, we have to call attention to new public housing initiatives. In many cities, including Cincinnati, there are initiatives to rebuild inner city neighborhoods. In Cincinnati, some of these new residential areas are close to industrial facilities, and industrial areas, that have operated as such for over a century.

Today, there may be relatively few people near an industrially zoned sector. In 10 years, hopefully those redeveloped neighborhoods will built out, and full. As permits need to change, though, it doesn't make sense to level a criticism that more people are now proximate to industrial facilities, and therefore operating permits have to fit into "Area-specific Agreements", or face reviews that other, more distant permit holders do not have to face. Those new residents arrived because of public policy. The Guidance needs to recognize and separate the very different dynamics of industrial development and urban development.

<u>"Brownfields and Clean-Ups"</u>

In the Part D *Response*, EPA writes that it does not "believe" that the Guidance discourages brownfield development. That belief needs to be described and documented.

This belief might apply for brownfield projects at a site without any current economic activity – a true "dead zone." There, people would certainly welcome, and could more easily attempt to control, new development.

But it's just as likely that brownfield redevelopment can occur at sites that are part of a vibrant economy. For example, a facility may want to move into an adjacent, but abandoned, parcel characterized as a brownfield. Assuming that related issues can be resolved, the facility may need a permit change – an air permit, perhaps, or a treatment, storage, disposal permit, or a wastewater discharge permit.

If a company takes this step, there are benefits: the company prospers, the local economy expands, land is reused, municipal and school tax bases grow, jobs and related spending may increase. However, if this expansion faces delay because of Title VI reviews, chances are that project managers will think twice about a brownfield site and think again about a far more accessible greenfield site.

These plans, expansions, and private reviews are constant business activities. They need to be energized and encouraged, especially in older industrial sectors where private and public officials struggle to assemble land, make it usable, deal with old and abandoned buildings, and try to correct past practices. The Title VI Guidance will cast a chill over this activity because <u>permits and the permitting process will become a strike point for charges about social inequities and problems</u>.

In its focus on permit challenges, the Guidance raises the popular notion that industrial permits can be reshaped to resolve social problems over which businesses have no direct or indirect control.

Again, consider a business seeking to expand, a business that may have been operating at the same site for 50 years. Whatever the changes off-site, a business still needs a permit and a permitting process that keeps it competitive and that allows it to get products to worldwide customers and markets. Most businesses don't want to ignore the communities in which they operate. Nevertheless, if operating permits are expected to be integrated with unrelated social and community problems, business operations will wither, shut down and move. That's an outcome we think everyone wants to avoid.

Within the *Response* to brownfield concerns, the Guidance raises the possibility of future guidance relating to Title VI and cleanup activities. That guidance should be developed before the Title VI Guidance is finalized.

Thank you for the opportunity to comment on this important issue.

For the Air Quality Committee,

Thomas F. Ewing
Legislative & Policy Analyst
Greater Cincinnati Chamber of Commerce

Greater Cincinnati Chamber of Commerce Air Quality Committee:

George Schewe, Committee Chair, Environmental Quality Management
William Burkhart, Procter & Gamble Company
Neal Frink, Dinsmore & Shohl
Terry Harris, Bayer, Inc.
William Hayes, Vorys, Sater, Seymour and Pease
Eugene Langschwager, Greater Cincinnati Chamber of Commerce
Bob Schmidt, Senco
Randy Welker, Greater Cincinnati Chamber of Commerce

Hispanic Chamber of Commerce of Greater Cincinnati

Robert Peraza, President

rbullard@cau.edu on 08/28/2000 03:44:32 PM

To: Group Civilrights@EPA
cc:

Subject: Comments on Draft Title VI Guidance

Dear Sir:

Please find my comments on the EPA Draft Title VI Guidance:

EPA DRAFT TITLE VI GUIDANCE MISSES MARK

In the real world, all communities are not created equal. Some are more equal than others. If a community happens to be poor, powerless, or inhabited largely by people of color, it receives less protection than the affluent white suburbs. Congress enacted the Civil Rights Act of 1964, Title VI, which prohibits recipients of federal financial assistance from discriminating against persons on account of race, color, or national origin. This law covers the U.S. EPA, established in 1970, and all fifty states. The agency issued Title VI implementing regulations in 1973 and amended them in 1984.

Beginning in 1992, communities began filing Title VI complaints. Presidents Clinton signed the Environmental Justice Executive Order 12898 in 1994. By 1997, over two-dozen Title VI complaints had been filed with the EPA, prompting the agency to begin drafting Title VI guidance. It also established a national advisory committee, under the Federal Advisory Committee Act or FACA, to study the problem. In June 2000, after eight years and 45 complaints (including the original five complaints filed in the early 1990s), EPA issued its Draft (Revised) Title VI Guidance.
The draft guidance can be described in two words--"total disaster." The Interim National Black Economic and Environmental Justice Coordinating Committee (INBEEJCC), a network of over 300 black organizations, says the draft guidance fails to recognize that the concentration of waste sites and toxic facilities in communities of color is a form of racial discrimination that violates the civil rights of people of color who live in these communities, creates a difficult and highly technical standard of "proof" this is biased in favor of state environmental protection agencies and the industries that they regulate and grant permits, fails to recognize that any justification that can be offered by a state environmental agency must be limited to the substantial, legitimate interest of that agency, excludes communities of color from the appeal process-yet allowing states several appeal avenues, including appealing to an administrative judge.

Lay and legal environmental justice and civil rights advocates alike echo this sentiment. Jerome Balter, an attorney with Public Interest Law Center of Philadelphia and attorney for the plaintiffs in the Chester, Pa. Title VI lawsuit-a case that made its way to the U.S. Supreme Court-says the EPA should withdraw the draft guidance. Balter fears it would be used as an "incorrect legal basis for determining compliance or violation of environmental civil rights and would compound the error by using uncertain data and uncertain science."

By failing to recognize that African American and other people of color communities have be illegally targeted for toxic industries, the EPA has made a fundamental error and abandons established civil rights law-rights that were won in the streets, jails, and in the courts. The federal EPA should be in the business of protecting everyone and enforcing the law without regard to race, color, or national origin-rather than raising the legal bar and making it next to impossible to prove discrimination.

Robert D. Bullard, Ph.D.
Environmental Justice Resource Center
Clark Atlanta University
223 James P. Brawley Drive
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- EPA DRAFT TITLE VI GUIDANCE MISSES MARK.doc

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August 15, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave, NW
Washington, DC 20460

To the US Environmental Protection Agency:

The purpose of this letter is to provide our comments on your *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* and your *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.

Our comments are limited to the issue of your agency employing a disparate-impact approach in determining compliance with Title VI of the Civil Rights Act of 1964. For the reasons discussed in the May 5, 1998, letter to you Re: Interim Guidance on Title VI and Environmental Permitting from the Center for Equal Opportunity, Institute for Justice, and Defenders of Property Rights, this approach is mistaken as a matter of both law and policy. *See also* Roger Clegg, "The Bad Law of 'Disparate Impact,'" *The Public Interest* (Winter 2000), at pp. 79-90; Thomas A. Lambert, *EPA's "Revised Guidance" for Implementing Title VI: Environmental Justice on Faulty Legal Footing* (July 2000) (Policy Brief for the Center for the Study of American Business). For your convenience, we will send you copies of the cited materials under separate cover.

Accordingly, we recommend that you limit your enforcement efforts to ensuring that there has been no disparate treatment because of race, color, or national origin, which is the intended scope of Title VI.

Sincerely,

Roger Clegg
Center for Equal Opportunity

Nancie G. Marzulla
Defenders of Property Rights

Clint Bolick
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Center on Race, Poverty, & the Environment
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August 26, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs***

Dear Administrator Browner and Ms. Goode:

We file these comments on behalf of more than 125 community groups, environmental justice organizations, coalitions, networks, individuals, and an Indian nation, from 33 states and Puerto Rico. The signatories include 63 complainants in 59 of the Title VI complaints filed with EPA since December 1992, 41 of which are under consideration or have been accepted for investigation and 18 of which have been rejected on procedural or other grounds. The signatories include all six environmental justice networks, as well as 16 current or former members of EPA's National Environmental Justice Advisory Council and eight members of EPA's Title VI Implementation Committee. These comments concern both the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (which we will call the "Guidance" throughout these comments) and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (which we will call the "Recipient Guidance" throughout these comments).

Those community groups which have Title VI complaints pending before EPA, and those whose complaints have been rejected by EPA for procedural reasons, have ample experience with EPA's failure to create and enforce a meaningful Title VI policy. Their comments here should carry particular weight, as they have the most expertise in how EPA's complaint processing procedures work, or don't work.

We are disappointed, in EPA and in the Guidance. The combined Guidance document sets the tone on its very first, prefatory page: "The guidance strikes a fair and reasonable balance between EPA's strong commitment to civil rights enforcement and the practical aspects of operating permitting programs." This balancing act has no place in anti-discrimination law. Civil rights law exists to protect minority interests against just this sort of balancing, not to be part of the balancing itself.

At every opportunity, EPA has ignored the copious, informed input of community groups and environmental justice advocates, based on years of experience working with Title VI and EPA. Many of us who have spent countless hours over many years working to help EPA have a credible civil rights policy feel disillusioned. In almost every policy decision in the Guidance, EPA has chosen to hurt the civil rights complainant, and help the civil rights violator. In many situations EPA's new Guidance is in direct conflict with its own Title VI regulations, and in other cases it simply narrows the regulations' scope in a way which limits the rights of complainants and protects civil rights violators.

Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, we request that EPA scrap the current Guidance and begin again. We offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

Before we address the two Guidances in our general comments and specific, section-by-section observations, we offer the following stories of frustration from communities which have appealed to EPA for help in resolving situations of racial discrimination, to no avail.

STORIES OF FRUSTRATION

A number of signatories of these comments have firsthand experience with EPA's Title VI enforcement record. Their communities – and many others – have been called "EPA's civil rights orphans" – communities facing significant civil rights violations abandoned by EPA. We set forth several examples of communities' experiences with EPA's Title VI enforcement to underscore the complete failure of EPA to have *any* Title VI presence whatsoever. EPA's history both makes its feeble promises in the Guidance simply not credible, and gives a context to EPA's complete abandonment of communities in the Guidance itself.

> *Padres has firsthand experience with the EPA on Title VI issues. Padres filed a Title VI complaint with EPA in December 1994, almost 6 years ago. Padres pointed out that all three of California's Class I toxic dumps are in or near Latino farmworker communities. Padres could be the poster child of EPA's civil rights enforcement orphans – the dozens of communities across the country facing massive civil rights violations that have been abandoned by EPA. In our community, as a direct result of EPA's failure to act, Laidlaw has secured all the permits it needs and is now expanding its toxic waste dump to double its former size, which will make it the largest capacity toxic dump in the entire United States.*
>
> [redacted] *Buttonwillow, CA*

Our case has been pending for nearly eight (8) years. This continued lack of resolution is an injustice that our clients, Flint-Genesee United, the St. Francis Prayer Center and the residents of their community, face every day. We have been told repeatedly, for years, that a decision in this matter was imminent. As far back as November 1996, our clients were advised in writing that a decision had even been drafted. Yet, to date, we have no decision from EPA, and the facility in question is up and running, spewing pollutants into the community on a daily basis. Despite the numerous representations to us that an end was in sight, the "end" continues to be postponed. In one telephone conversation, well over a year ago, EPA indicated that it thought there would be a decision 45 days from the last week of March 1999. Again, in August 1999, we contacted EPA to inquire as to when a decision would be handed down and we were told, again, that a decision would be forthcoming within the next 45 days. Those 45 days have long since passed and we have not heard from EPA. As recently as November 1999, EPA indicated, in writing, to Congressman Dale Kildee that it hoped to make a decision within the coming months. Now, in August 2000, we still have no decision.

This facility has been at issue since 1992 and has been under supposedly active investigation by EPA since at least early 1995. We are now entering the new millennium, nearly eight years after the permit for Genesee Power Station was issued, and our clients are still uncertain whether or not EPA will enforce their civil rights. What is certain, however, is that during the pendency of this investigation, the Genesee Power Station has been built, is operating, has assumed a place on EPA's Significant Violators List, has been cited by the Michigan Department of Environmental Quality, has entered into a Consent Judgment based on those violations, and continues to adversely affect the health and welfare of the surrounding community. In fact, the incinerator has been in operation so long that the Title V Air Permit is now up for renewal.

— E. Quita Sullivan, Sugar Law Center, Detroit, MI

We filed a Title VI complaint in 1994, against California Department of Toxic Substances Control. Since that time, we have become one of the many EPA orphans across the United States, communities which EPA has abandoned to environmental racism. In the past 6 years we have had one visit from EPA's civil rights staff, but that is all. The dump continues to operate, and get new permits. The state continues to discriminate, with no sign of EPA.

[redacted] *Kettleman City, CA*

Mothers Organized to Stop Environmental Sins (MOSES) and thirty representatives of the African-American community in Winona, Texas, traveled to Washington, D.C. in June, 1994 and filed a Title VI complaint against the Texas Natural Resource Conservation Commission. Though accepted for investigation, EPA's Office of Civil Rights has apparently done nothing with this complaint, but let it gather dust. This is not due to a lack of effort on the part of the community to seek justice. Members of MOSES have traveled to Washington, D.C. numerous times to press their environmental justice complaint with the Office of Civil Rights at Federal Advisory Committee meetings, a Congressional Symposium and on one occasion in 1996 when 55 community members traveled from Texas to

Washington, D.C. by bus. This past March the community staged a large march for environmental justice aired by CNN on April 16. In a state with an African-American population of around 12% the population surrounding a hazardous waste facility sited in rural Smith County near Winona is 33% both within a 2 mile and 6 mile radius using 1990 US Census data. The African-American population around the facility is also approximately three times the percentage found in other non-urban parts of Smith County, which is primarily a rural county. For fifteen years citizens of this rural community with a disproportionately large African-American population surrounding this facility suffered an ongoing barrage of horrific chemical odors accompanied by burning eyes, nose, and throat, nausea, dizziness, vomiting, shortness of breath and a host of other severe acute health effects. Citizens reported regular problems with harsh chemical odors from the facility at distances even greater than 6 miles. TNRCC failed to enforce basic environmental laws to stop this egregious assault on citizen's health and peace of mind.

Since we filed our complaint in 1994, no one from OCR has ever visited Winona. Whenever MOSES has contacted OCR regarding our complaint over the past several years we have been told that nothing is being done to investigate the complaint and that USEPA OCR does not anticipate doing any investigation of this complaint anytime soon. OCR staff have refused to speculate on a time frame, saying that an investigation of the Winona Title VI complaint is not even "on the horizon." Justice delayed is justice denied. The delay has reached the point of absurdity. OCR has suggested that communities like ours take our complaint to federal court. They must know that our community does not have the resources to do this. Also, our case may be dismissed for a failure to exhaust administrative remedies with OCR. (And they have been exhausting.) It appears the OCR just hopes that our complaint will go away along with those of us bringing the complaint.

We are not confident of USEPA's ability to objectively investigate our complaint, as USEPA itself appears on a list of generators that sent waste to this facility. We believe USEPA should recuse themselves and turn the investigation of this complaint over to the Department of Justice.

– *Phyllis Glazer, Mothers Organized to Stop Environmental Sins, Winona, TX*

CONTEXT

Before commenting on the Guidances, we feel it necessary to explain how EPA has arrived at this point. It is important to note that Title VI of the Civil Rights Act of 1964 has been the law of the land for almost 36 years; EPA's regulations implementing Title VI are more than 25 years old. Title VI is thus not a new requirement that EPA is imposing on grant recipients; recipients of EPA financial assistance have *always* been required to comply with Title VI.

The first administrative Title VI complaint concerning environmental justice was filed with EPA in December 1992; the agency lost this complaint, and did not begin investigating it until January 1995. The first administrative cases that EPA responded to were filed with EPA in September 1993, and between Fall 1993 and October 1996 about 30 complaints were filed. EPA rejected many of those complaints on procedural grounds, and did not appear to be moving toward resolving any of the complaints it had accepted. Thus, in October 1996, a coalition of community groups involved in 16 of the 20 then-pending cases before EPA sent a letter to Administrator Browner detailing the various violations of federal regulations that had occurred because of EPA's slow processing of their complaints. These groups also demanded that the EPA immediately enact a Title VI policy so that all complaints would be subject to the same standards and potential complainants would have a

predictable process to look forward to.

In December 1996, Browner and Assistant EPA Administrator Fred Hansen responded, setting up a Title VI Task Force to develop EPA's policy and begin to resolve cases. The Task Force was to develop the policy and resolve five of the pending cases by February 28, 1997. EPA did not meet this deadline, failing to either issue a policy or resolve any of the cases (six) that the Task Force took on. We note that aside from one complaint which was dismissed by EPA because the complainants grew fed up with EPA and refused to respond to inquiries begun five years after their complaint was filed,[1] none of the other six "expedited" cases has been resolved to date, more than three-and-a-half years after EPA's promised deadline.

In the summer of 1997, a coalition of community groups in Louisiana filed a Title VI complaint with EPA trying to block the siting of a major plastics factory near Convent, the Shintech plant. The Shintech case was added to the six others the EPA's Title VI Task Force was considering; the other pending cases appeared to continue to languish without much attention from EPA.

More Title VI complaints have been filed between October 1996 and the present; EPA's current docket includes 21 complaints under investigation (that is, accepted by EPA) and 30 complaints under consideration (not yet accepted or rejected). This is a dramatic expansion of the docket from even two years ago, when there were just 15 complaints under investigation and six complaints under consideration. Additionally, EPA has dismissed four complaints and rejected 43 others on procedural or jurisdictional grounds.

The EPA finally issued its Interim Guidance in early February 1998. The Interim Guidance was deeply flawed in a number of respects, and many of the signatories of this letter urged EPA at the time to significantly rework it to address their concerns. Additionally, many of the signatories of this letter took part in informal meetings with EPA on the Interim Guidance, and several took part as members of the EPA's Title VI Implementation Subcommittee of the National Advisory Committee on Environmental Policy and Technology.

To come up with this new Guidance, EPA relied heavily on input from "stakeholders" in industry and state and local governments. Inviting such "stakeholders" – the objects of civil rights complaints and the industries accused of poisoning communities of color – to hammer out civil rights policy would be analogous to convening meetings of the KKK and segregationist southern governors to come up with an "acceptable" civil rights policy in 1960. The product in 2000 is no less offensive.

EPA attempts, in its introduction to the two Guidances, to make it appear that it encouraged and received significant community stakeholder input. For example, EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she

[1] *Northwest Civic Association v. Florida Department of Environmental Protection*, No. 09R-94-R4.

specifically declined to endorse the Advisory Committee's final report to EPA.

Although we have offered EPA our input on civil rights in general and the Guidance in particular for many years, the Guidance does not reflect any of our input. We thus believe EPA should revoke the Guidance and begin again. Only a fresh approach, unburdened by fealty to "stakeholders" hostile to civil rights, can resuscitate EPA's dormant civil rights enforcement.

GENERAL COMMENTS

A. Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

The Guidance is a significant retreat from even the paltry protections proposed by the 1998 Interim Guidance. At every step, EPA has made the policy decision to hurt the civil rights complainant and help the civil rights violator. Some of these policy decisions are in direct conflict with EPA's own Title VI regulations:

· EPA limits its disparate impact analysis to those impacts which result "from factors within the recipient's authority to consider," a radically narrow reading of EPA's Title VI regulations.

· EPA limits its impact analysis to solely health impacts, and fails to consider economic, social and cultural impacts, another significant narrowing of the scope of Title VI not found in EPA's regulation.

· EPA limits who may file a Title VI complaint, in a significant change from the language of EPA's Title VI regulations.

· EPA promises to dismiss complaints which meet all jurisdictional requirements simply because complainants raise similar issues in state or federal court, again conflicting with EPA's regulations, which contain no such limitation.

Other policy decisions which hurt the civil rights complainant and help the civil rights violator, which are explained in detail in these comments, include:

· Failing to work to prevent Title VI violations, but instead rejecting complaints filed before a final permit action.

· Using informal resolution techniques in environmental justice disputes.

· Construing the beginning of the 180-day statute of limitations narrowly.

· Never exercising its "good cause" waivers in any case to date.

· Adopting a policy that permit denial is not an appropriate solution to Title VI disputes.

· Making its "due weight" policy effectively a presumption of compliance with Title VI, introducing another hurdle for complainants.

· Implementing a presumption against complainants if an area is in compliance with the NAAQS, although EPA's own studies demonstrate that air quality in NAAQS-attainment areas is still unhealthy.

The Guidance inhabits a fantasy world in which discrimination is rare and hard to find, whereas in the real world, discrimination is quite common and often easy to see. This fantasy has many manifestations, but four of them are particularly important because they undermine the very concept of civil rights enforcement.

First, EPA acts as though benefits and burdens are not *systematically* distributed in unequal fashion. It sets up an extremely laborious process to determine whether, in any particular case, a community of color is being adversely affected by an environmental, social, cultural, or economic insult – when in most cases, one just has to look: at East St. Louis, at Lousiana's Cancer Alley, at East Los Angeles. The concentrations of environmentally questionable and downright harmful projects in those places, and hundreds of communities of color like them around the country, *are not present* in Beverly Hills, Grosse Pointe Farms, the Hamptons, or in hundreds of white communities like them.

Second, EPA acts as if "benefits" can somehow "justify" discrimination. Two examples are illustrative of EPA's failed approach:

· In §VII.A.1, EPA gives the example of a sewage treatment plant, which it says benefits the community of color in which it is placed by treating that community's sewage. That is true, but not very relevant. The treatment plant also treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.

· Throughout the Guidance, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. § VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

Third, EPA proposes to approve discriminatory effects it finds if recipients come up with plans to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here instead to *institutionalize* discrimination, allowing recipients' actions to be approved of by EPA even when they have demonstrable discriminatory impact.

Finally, EPA also refuses to make the fundamental move of discrimination law: comparison of the impacts among different demographic groups. The Guidance appears to be setting up a super-permitting review process, not a civil rights enforcement process. From the point of view of civil rights law, it simply *does not matter* if the permitting process at issue might have some reasonable basis for the result it produced. If the impact is not felt by white people, or would be different in

a white area, or would have been reduced or eliminated in a white area, a discriminatory effect has occurred in violation of the Title VI regulations.

An agency's power manifests itself not only by what it mandates, but by what it tacitly allows. Specifically, despite ample regulatory discretion to address environmental justice concerns under existing environmental laws, in the absence of an explicit legal duty many state agencies have consistently failed to address continuing disparities. This makes the EPA's regulations and administrative proceedings under Title VI a critical legal avenue for residents in environmentally devastated communities. In response to numerous Title VI complaints, EPA committed time and resources to devising the Guidance. However, a reading of the Guidance leads to the inescapable conclusion that – despite the effort expended – the EPA will not deliver on its promise to ensure compliance with civil rights laws, nor will it comply with President Clinton's executive order on environmental justice.

We are troubled by EPA's chosen terminology in its repeated references to "adverse disparate impact analysis." The implication in this choice of phrase is that there can be a "disparate impact" that is not an "adverse disparate impact," a semantic distinction that EPA seems bent on proving but which in the real world does not exist. If there is a disparate impact, it is an adverse impact. We find this odd construction through-out the Guidance, in §§ I.B, I.C, I.E, II, II.A.3, IV.B, V.B, V.B.2, VI.A, VI.B.1.b, VI.B.4.c, VI.B.6. We discuss why EPA's analysis is actually not an "adverse disparate impacts analysis," but instead a "disparate adverse impact analysis," in our comments on §VI, below.

The Guidance is also written in technical language that is largely inaccessible to community groups which may look to it for an idea on how EPA would handle their complaints.

We urge EPA to scrap the current Guidance and begin again to include the many suggestions provided by community groups and environmental justice advocates on this Guidance and the Interim Guidance.

As noted above, we offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

B. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

A substantial part of the Recipient Guidance is devoted to the EPA imploring and cajoling recipients to do the right thing, to devise strategies to reduce pollutant levels in overburdened communities. Yet, just under the surface of this encouragement is a much stronger message: the regulated community is sure to understand from this guidance that the EPA will go to *extraordinary lengths* to avoid administering a Title VI remedy, either withdrawing funds or requesting the Department of Justice to seek injunctions. The EPA's trepidation is evident in the generous presumptions and ample procedural protections given the recipient in stark contrast to the lack of recourse available to the complainants. Although the Agency may not relish withdrawing funding, without a credible threat by the EPA to use Title VI, many recipients will continue to take actions that cause and contribute to oppressive environmental inequities.

The Recipient Guidance should be strengthened to actually force recipients to admit and

address the disparate impact within their jurisdictions. We recommend that EPA require all recipients to:

- Meet with current Title VI complainants to resolve complaints.

- Compile relevant demographic information in the permitting process.

- Conduct a state-wide (or agency-wide) demographic analysis of current permits.

- Place a moratorium on granting permits until the above three recommendations are implemented.

SPECIFIC COMMENTS

Draft Revised Guidance for Investigating
Title VI Administrative Complaints Challenging Permits

In these comments, we use the same numbering system as that used in the Guidance itself.

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964

As we noted above in our General Comments, we are disturbed by EPA's use of the term "adverse disparate impact." It is particularly galling, and misleading, as used in §I.B:

> In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects. This is often referred to as reaching actions that have an unjustified adverse disparate impact.

This construction implies that the Supreme Court endorses the "adverse disparate impact" concept, when in fact, the Supreme Court has never in its history used that tortured construction.

C. Scope of Guidance

The Guidance is very narrow in that it only covers complaints in the permitting context, and even there it does not cover complaints alleging intentional discrimination or complaints alleging discrimination in the public participation processes associated with permitting. Many other activities conducted by recipients of EPA federal financial assistance, both substantive and procedural, may implicate Title VI. For example, substantively, agencies are responsible for enforcement (or non-enforcement) of environmental laws, clean-up of contaminated sites, and awarding of sub-grants, among other duties; procedurally, agencies are also responsible for such things as the size of penalty awards and the length of time for remedial or enforcement action. Many current environmental injustices arise from selective enforcement of environmental laws by state agencies.[2] Additionally, there are at least several pending Title VI complaints outside the permitting context, such as *Chester*

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[2]*See, e.g., States Neglecting Pollution Rules, White House Says; Sanctions Threatened; Violations Are Underreported, EPA Officials Assert -- Full Review is Sought,* NEW YORK TIMES

Street Block Club Association v. Department of Toxic Substances Control, No. 8R-97-R9 (refusal to require clean-up of toxic substances, including known carcinogens, prior to construction with potential to release toxic substances into community); *Hyde/Aragon Park Improvement Committee v. Georgia Department of Environmental Protection,* No. 8R-94-R4 (failure to investigate, monitor and correct environmental violations in a RCRA clean-up in black community as in white community); and *Mothers Organized to Stop Environmental Sins v. Texas Natural Resource Conservation Commission,* No. 5R-94-R6 (failure to enforce environmental violations which disproportionately affected blacks). The fact that EPA has taken seven years to produce this flawed Guidance, which covers only permitting outcomes, does not make us hopeful that it will ever get around to issuing any future guidances on permit processes, enforcement, clean-up, sub-granting, and other potential complaint areas, as well as a guidance for covering allegations of intentional discrimination.

We note that all of EPA's examples of permits in §I.C are of federal permits, and that since all of the recipients of EPA funding are going to be state and local actors, the vast majority of complaints are going to be about permits granted under state and local permit authority.

We are disappointed that EPA has chosen an avenue for Title VI enforcement – the Guidance – which by its own explicit terms is not "enforceable by any party in litigation." The fact that the Guidance itself is so weak, and EPA is not even committing to follow it, is testament to the lack of commitment to civil rights enforcement at EPA. By giving itself this enormous loophole, EPA is hurting the civil rights complainant and helping the civil rights violator.

Please see our comments in §VI.B.1 on the "sole cause" concept raised by EPA in §I.C.

D. Coordination with Recipient Guidance

We reiterate that without a credible civil rights enforcement threat in this Guidance -- which is wholly lacking in this version – the Recipient Guidance is meaningless.

E. Principles for Implementing Title VI at EPA

For our critique of EPA's misguided principle that "Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved," please see §IV.A. In fact, such informality hurts civil rights complainants and favors civil rights violators, as discussed in §VI.A.1.c.

F. EPA's Nondiscrimination Responsibilities and Commitment

Although EPA professes to be "committed to a policy of nondiscrimination in its own permitting programs," the repeated examples of policy choices made in this document to hurt the civil rights complainant and help the civil rights violator, summarized above in the "General Comments" section, give lie to this representation from the agency. If EPA is unable to have a policy of nondiscrimination in its own civil rights enforcement, it is unlikely to have a credible policy in its permitting programs.

(December 15, 1996), at 1.

II. FRAMEWORK FOR PROCESSING COMPLAINTS

EPA limits its determination of whether a recipient is in violation of Title VI and EPA's implementing regulations to sources of stressors, stressors, and/or impacts "within the recipient's authority." For a critique of this limitation on the types of impacts considered, please see our comments on §VI.B.2.a. For a critique of this limitation on the range of impacts considered to only those "within the recipient's authority," please see our comments at §VI.B.2.

EPA states here that "informal resolution will often lead to the most expeditious and effective outcome for all parties." Please see our comments on §VI.A.1 which counter this mistaken assumption.

A. Summary of Steps

Section II.A sets forth a series of deadlines, taken from EPA's Title VI regulations, for EPA to accomplish certain milestones in the complaint processing framework. EPA's intent in establishing definite deadlines for acknowledgment, acceptance and investigation is laudable. By setting a maximum time period of 205 days for a complaint to be received, reviewed and investigated before a decision on the merits is made, EPA is apparently pledging once more to abide by its regulations.[3] There are three concerns with this scheme: that EPA will not follow its own deadlines, that the deadlines will be used as an excuse for substandard investigation of accepted complaints, and, as detailed below in §II.A.3, that EPA has opened a potential loophole with the introduction of informal dispute resolution into the process timeline.

[3] The Guidance states that EPA will acknowledge receipt of the complaint within five (5) days, accept the complaint for investigation, rejection or referral within twenty (20) days, and then spend a maximum of 180 days investigating an accepted complaint before making a finding on the merits of the complaint. §§ II.A.1, II.A.2, II.A.3. This makes for a total of 205 days from start to a preliminary finding.

We feel it unlikely that EPA has the self-discipline and resources to comply with the deadlines set forth in the Guidance. EPA has an abysmal history with regard to the deadlines that Congress or EPA itself has set for various environmental controls.[4] In addition, EPA has missed its regulatory deadlines in every single Title VI case accepted for investigation in the history of the agency, with one exception, and missed the regulatory deadlines for acknowledgment of complaints (the 20 days specified in §II.A.2) in almost every case. Given this history, there is reason to suspect that EPA will not always meet the deadlines imposed by the Guidance. EPA has few resources dedicated to investigating Title VI complaints, and it seems likely that OCR will have trouble investigating all of the complaints that will come through its door, in addition to the 51 complaints that are pending.[5]

Because of the lack of resources, there is also a distinct possibility of sub-standard investigation of complaints within the 180-day window. Many of the signatories of this letter have witnessed shoddy investigations of their own complaints, even when the EPA has taken years to undertake such work. Certainly OCR staff that are under pressure may spend less time than necessary to fully investigate a complaint, if they feel that they must have a decision on the complaint within 180 days. This creates obvious problems for communities at risk from environmental harm. Each complaint deserves a full hearing, and EPA should not tolerate any system that encourages sub-standard investigations of these complaints.

To remedy these problems, we suggest the following recommendations:

· The easiest solution to both of these problems is to ensure that OCR is adequately staffed to investigate all Title VI complaints in a manner that provides for a fair and timely investigation. This may require diverting resources from other parts of EPA, but EPA should recognize the seriousness and importance of civil rights enforcement generally, and specifically a Title VI investigatory program.

· In addition to adequate staffing, EPA should have certain oversight procedures in place to make sure that investigations are being handled properly. This could occur in a number of ways, from an internal annual report outlining the progress and success of complaint investigation to full public disclosure of such progress. At least some public oversight of OCR's process would be valuable to EPA, since there may be occasions where investigations do not include any contact with the community that filed the complaint, immediately raising suspicions that OCR is not conducting a thorough investigation. If there are good reasons for a short investigation that does not appear to fulfill lay expectations of a thorough investigation, then

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[4] *See Natural Resources Defense Council, Inc., v. Train,* 510 F.2d 692 (D.C. Cir., 1974); *General Motors Corp. v. EPA,* 871 F.2d 495 (5th Cir., 1989); *Conservation Law Foundation of New England, Inc. v. Reilly,* 755 F.Supp. 475 (D.Mass., 1991); *Sierra Club v. Thomas,* 658 F.Supp. 165 (N.D.Cal., 1987).

[5] Indeed, some of these 51 complaints have been pending since 1993. Given that seven (7) years have passed since acceptance for investigation in some cases, and only one complaint has ever been resolved on the merits, there is little reason to believe OCR can turn around all complaints in 180 days.

EPA should make those reasons known.

1. Acknowledgment of Complaint

This section allows a recipient to make a written submission to EPA responding to, rebutting or denying the complaint within 30 calendar days. What if the recipient misses the deadline? In our experience with numerous complaints, EPA has generously extended this deadline and often accepted such responses months after the deadline; this stands in marked contrast to EPA's treatment of complainants, whose complaints are rejected if they are even a few days late.

2. Acceptance for Investigation, Rejection, or Referral

We are gratified to see that EPA will request clarification if a complaint is unclear. In several cases to date,[6] EPA has simply denied the complaint rather than request clarification.

3. Investigation

The timeline of EPA's investigation is not clear in the Guidance, leaving enough loopholes that EPA will not be bound by the times specified in its own Title VI regulations. Section II.A.3, on investigation, lays out the timeline and states that "OCR intends to promptly investigate all Title VI complaints." (Communities with experience with EPA know better, but that is not the point of these comments.) In that section, if a complaint is accepted for investigation, EPA will first try informal resolution. If that fails, only then will EPA conduct an investigation. The guidance next states that within 180 calendar days of the start of the investigation, EPA will make preliminary findings. The question is, when does that 180 day clock start to run? Under the present Guidance, it sounds like EPA can have as much time as it likes to try "informal resolution" before it even *starts* to investigate. This would be a disaster for communities, more of a disaster than EPA's current do-nothing policy.

This section of the Guidance conflicts with EPA's regulations, which say that 180 days after the acceptance of a complaint the EPA has to make a preliminary finding. Otherwise, EPA has an enormous loophole for not complying with the regulatory deadline of 180 days – it can just say it is trying to "informally resolve" the problem. That is our fear, and it is also a concrete way which the new Guidance will have a negative impact on communities of color.

EPA also introduces a subtle but difficult hurdle for complainants in stating, "If based on its investigation, OCR concludes that there is no discriminatory effect (*i.e.*, no unjustified adverse disparate impact), the complaint will be dismissed." By introducing *justification* into the investigation stage, EPA is giving recipients yet another chance to elude civil rights compliance. We urge EPA to remove justification from the investigation stage, and place it at the end of the

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[6]*See, e.g., Gulf Coast Tenants Organization v. Louisiana Department of Environmental Quality,* No. 04R-94-R6.

process – in a post-finding-of-violation stage – where it belongs. This is yet another instance of EPA hurting the civil rights complainant by introducing hurdles into the Guidance not found in Title VI and EPA's regulations.

4. Preliminary Finding of Noncompliance

Please see our comments on §VI.B.2 on EPA's limitation of disparate impact analysis to those which result "from factors within the recipient's authority to consider[.]" This limitation hurts the civil rights complainant and helps the civil rights violator.

7. Hearing/Appeal Process

EPA should define the term "reasonable opportunity" in the context of filing written statements during the Administrator's review of an ALJ's determination.

B. Roles and Opportunities to Participate

1. Recipients

Please see our comments under §II.A.1 on recipients' ability to submit comments.

2. Complainants

In §II.B.2, EPA explains that the proceedings are not "adversarial" between the complainant and recipient and therefore the complainant has no right to appeal. However, EPA employs a different standard to the recipient, affording it substantial procedural protections, including the right of appeal after an adverse decision. As a consequence of this discrepancy, a governmental entity's monetary interest ironically is given far more protection than private citizens' constitutional interests. Here, again, EPA is hurting the civil rights complainant while helping the civil rights violator.

EPA's interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, EPA has effectively made the complainants' civil rights contingent upon the political will of EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court. Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with civil rights laws.

Section II.B.2 states that "complainants do not have the burden of proving that their allegations are true," but given the "due weight" EPA promises to give recipients' data, it is apparent that complainants have the burden of *disproving* recipients' data, which is essentially the same thing as proving their allegations are true.

III. ACCEPTING OR REJECTING COMPLAINTS

A. Criteria

Although EPA relegates it to a footnote, federal financial assistance is a jurisdictional requirement for EPA's Title VI investigations and should be elevated to the text as #5 in the list of jurisdictional criteria. In fact, more complaints are rejected for failing to fulfill this jurisdictional criteria than any other – 18 of 43 complaints thus far rejected, or 42 percent, almost double the percentage of the closest other reasons for rejection. It is irresponsible for EPA not to make this requirement more obvious to the reader of the Guidance.

EPA should accept complaints that do not have a telephone number. The Guidance ambiguously states that it will not investigate complaints that fail to provide a way to contact the complainant, "*e.g.*, no phone number, no address." There are many potential complainants who have no phone, and thus the provision of a phone *or* an address should be sufficient for EPA to reach them.

In a footnote to this section, EPA asserts that it may use information presented by a complainant which it does not accept as a complaint to conduct a compliance review of the complained-of recipient. This statement is of little comfort to complainants and those similarly situated. As a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

1. EPA misleads the public as to when it will accept a complaint.

At the beginning of §III.A, EPA states that it "is the general policy of OCR to investigate *all* administrative complaints concerning the conduct of a recipient of EPA's financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." §III.A (emphasis added). This assertion is repeated at the end of §III.A, as well.[7] This is fundamentally misleading because elsewhere in this very section of the Guidance EPA promises to *dismiss* complaints that "satisfy the jurisdictional criteria in EPA's implementing regulations" if complainants are attempting to exhaust their administrative remedies before the recipient agency (§III.B.3.a) or pursue their rights in court (§III.B.3.b). This contradiction in the Guidance is problematic, and creates situations where EPA can reject complaints based on factors outside the jurisdictional criteria, as outlined more fully at §§ III.B.3.a and III.B.3.b, below.

[7]"OCR's threshold decision to accept a complaint for investigation or reject it is based on the jurisdictional criteria provided in EPA's Title VI regulations[.]"

2. EPA illegally narrows who may file a complaint with it.

The Guidance will have a direct, negative impact on communities because EPA has narrowly limited who may file a Title VI complaint with the agency, in direct conflict with EPA's own regulations. In Section III.A, EPA has decreed new criteria for acceptance or rejecting complaints. That section states that the EPA will accept and investigate a complaint if it is filed by:

> A. A person who was allegedly discriminated against in violation of EPA's Title VI regulations;
>
> B. A person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or
>
> C. An authorized representative of such a person or class of people.

These new criteria conflict with EPA's Title VI implementing regulations. At 40 CFR § 7.120, entitled "complaint investigations," the regulations state:

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

The regulations do not make the limitation found in the Guidance in point B, that the person filing the complaint be "a member of a specific class of people that was allegedly discriminated against." Instead they state that a "person who believes that he or she *or* a specific class of persons has been discriminated against" may file a complaint -- a much broader standard. Here again EPA has made a policy decision which hurts the civil rights complainant, and helps the civil rights violator, without even noting that the regulations differ.

B. Timeliness of Complaints

EPA ignored comments on its Interim Guidance and continues with a statute of limitations policy which will have a detrimental impact on civil rights complainants. The language used in §III.B is vague and can easily confuse potential complainants regarding the appropriate time for filing a complaint, leading to premature, duplicative, or late complaints. Further, EPA's policy decision to take no action on complaints filed before a permit is issued is an abdication of responsibility for *preventing* civil rights violations.

1. Start of 180-day "Clock"

Although community groups and complainants pointed out in detail the flaws with EPA's approach to the start of the 180-day clock in comments on the Interim Guidance, the same approach is carried forward into the new Guidance in §III.B. Again, EPA narrowly construes the beginning of the statute of limitations in a way which hurts civil rights complainants and aids

civil rights violators. Many of the comments in this section will appear familiar to EPA as they were made on the Interim Guidance, but ignored by the agency.

EPA has rejected many complaints on the grounds of timeliness, including a number that complainants have felt were timely, because of differing interpretations of when the statute of limitations begins to run. EPA has generally ruled that the statute begins to run when a permit is issued; many complainants have argued that it should begin to run when all administrative appeals are exhausted. Complainants should be encouraged to try to resolve the issues of disproportionate impact within the permitting process without having to file a civil rights complaint. Thus, they should not be penalized for exhausting their administrative remedies before an agency by having EPA construe the statute of limitations to have run on the complainants' Title VI claim. The Guidance ignores this principle, and forces complainants to file a complaint before exhausting their administrative remedies; as discussed below in §III.B.3, it then will *dismiss* that timely filed complaint, however, because the complainant is exhausting its administrative remedies! This policy of EPA's creates unworkable hurdles for the civil rights complainant, with the Catch-22 of complainants never being able to file a complaint which EPA will investigate.

EPA's Title VI regulations state that a complaint must be filed within 180 days of the action complained about, or allege an ongoing violation of Title VI. 40 C.F.R. § 7.120(b)(2). The Guidance states EPA's position as "Complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit." §III.B.1. This is a subtle change from the Interim Guidance, which required a complaint to be filed within 180 days of the issuance of the *final* permit. The change makes EPA's statute of limitations *more* confusing, not less. The implicit message in the removal of the word "final" is that complaints must be filed after the initial granting of a permit.

The Guidance's policy of requiring a complaint to be filed within 180 days of the *initial* – as opposed to the *final* – permit action is not supported by the law. Not only does the interpretation deviate from EPA's own policy and regulations, but it is contrary to state and federal law, which support the conclusion that the statute of limitations begins to run on the date which a permit became *legally final*. Moreover, EPA's interpretation creates an unworkable legal framework in which complainants must file an administrative Title VI complaint long before the agency action becomes final and is thus subject to judicial review. Federal EPA regulations, state regulations, and federal case law provide an established body of law defining "final agency action." The Guidance's interpretation conflicts with all of these well-settled authorities, and thus should be reversed.

The Guidance flatly contradicts EPA's own regulations defining "final agency action." EPA's regulations, at 40 C.F.R. § 124.19(f)(1), state that "[f]or purposes of judicial review under the Appropriate Act, final agency action occurs when a *final* RCRA, UIC, or PSD permit is issued or denied by EPA *and agency review procedures are exhausted*." (Emphasis added) In the Guidance, EPA makes little provision for the agency review procedures (see §III.B.3, below), even though the filing of an administrative appeal with an agency usually means that the permit in question is not legally enforceable. Further, an appeal might obviate or mitigate (or even

exacerbate) the very impacts giving rise to a Title VI complaint; in the course of an appeal, a change in permit conditions could alleviate the impact on the surrounding community. Thus, there may not be a cognizable discriminatory effect until the appeal is resolved.[8] The Guidance's interpretation attempts to begin the statute of limitations before there is a final, reviewable agency action, as defined in EPA's own regulations, 40 C.F.R. § 124.19(f)(1), and, in the case of an administrative appeal, before there is actually even a discriminatory effect of an agency's action.

State law mirrors EPA's regulations concerning final agency action: California state law, to take but one example, establishes that the permit *becoming final* – through the expiration of the administrative review period -- is the final agency action, not the *issuance of the permit* as found in the Guidance. In language almost identical to EPA regulations,[9] the California Code of Regulations state that the agency action is final for judicial review when a final permit is issued *and* agency review procedures and the administrative adjudication procedures are exhausted. 22 Cal. Code Reg. § 66271.8(h).

Federal Court interpretations deciding analogous claims also contradict the Guidance's interpretation of when the statute of limitations should start to run. An agency action is final under the Administrative Procedures Act (APA) when the agency completes its decisionmaking process and the result of that process is one that will directly affect the parties. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992); *Dresser Industries, Inc. v. U.S.*, 596 F.2d 1231 (1979), *rehearing denied* 601 F.2d 586 (1979), *cert. denied* 100 S.Ct. 731 (1979) (finding that the core question in deciding whether the action is final is whether the agency has completed its decisionmaking process, and whether the litigation will expedite rather than delay or impede, effective enforcement by the agency).[10]

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[8]The Guidance even recognizes this in §III.B.3, stating "The outcome of such permit appeals... could affect the circumstances surrounding the complaint[.]" Why EPA would resist the logical outcome of its own statements – beginning the statute of limitations *after* the administrative appeal process – eludes us, but is yet another example of EPA working to make the process confusing and difficult for complainants.

[9]40 C.F.R. § 124.19(f)(1).

[10]Federal Courts have looked to five indicia of the finality of an administrative action: 1) the action is the definitive statement of agency's position; 2) the action has direct and immediate effect on day-to-day business of complaining party; 3) the action has status of law; 4) immediate compliance with the terms is expected; and 5) the question is a legal one. *Mt. Adams Veneer Co. v. U.S.*, 896 F.2d 339, 343 (9th Cir. 1989); *Boise Cascade Corp. v. F.T.C.*, 498 F. Supp 772 (1980), *stay denied*, 498 F.Supp. 782 (1980) (agency action not final until its effect had been felt in a concrete way and the administrative decision had been formalized). This case law directly contradicts the Guidance. For example, when a permit is first issued, but before appeals are exhausted -- the Guidance's starting point for the 180-day statute of limitation -- none of the five criteria set forth by the Federal Court in *Mt. Adams* are applicable: 1) the permit is not the definitive statement of the agency because it could still be altered significantly or even revoked during the consideration of an appeal; 2) the issuance of the permit does not have a direct effect

EPA's current interpretation would require parties to use a different definition of "final agency action" when seeking judicial review of the agency's action than when seeking EPA administrative review for a Title VI complaint. Federal law, state law, and EPA's own regulations are consistent in stating that the statute of limitations for requesting judicial review of a permit begins to run after issuance of the final permit and after exhaustion of all administrative agency review procedures. 22 Cal. Code Reg. § 66271.18(h); 40 C.F.R. § 124.19(f)(1); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992). The Guidance's different interpretation is an aberration that creates an inconsistent and incoherent legal framework for Title VI complainants. EPA's current interpretation places Title VI complainants in a confusing position: an agency action can simultaneously be "not final" and "final." Under state law and analogous federal authority, it is *not* a final agency action; under EPA's Guidance, it *is* a final agency action. This confusing and arbitrary outcome should be rejected.

The central flaw in EPA's current interpretation is that it begins the running of the statute of limitation before there is a legal "final agency action." A different and more constructive approach, which would allow complainants and federal financial aid recipients the opportunity to fully address disputes before having to file a complaint, would be for EPA to run the 180-day statute of limitations from the *latest* of:

· the issuance of an unappealed permit;

· the completion of all agency (non-court) appeals of permit;

· the completion of any agency-mandated dispute resolution procedure; or

· the completion of any voluntary dispute resolution procedure, as long as it has included the complainants, the recipient and the applicant.

Such an approach would allow all stakeholders the opportunity to informally resolve the conditions giving rise to a potential complaint without the necessity of filing a complaint first.

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on day-to-day business because it has not become effective; 3) the permit does not have the status of law; 4) immediate compliance with the permit is not expected because the permit is not yet enforceable; and 5) the possibility of administrative review provides a remaining opportunity to decide questions of fact. *Mt. Adams, supra*, 896 F.2d at 343.

In addition, the Guidance should recognize that complaints alleging continuing violations may be timely even if a particular action occurred more than 180 days before the filing of the complaint, expanding EPA's constricted view of timeliness. Professor Thelma Crivens identifies three categories of continuing violations which apply to actions under Title VI and which could be instructive to the EPA.[11] These categories are:

a. The "date of notification/injury" standard. A violation is considered to be a single act pursuant to a policy which affects a person and requires her to file charges within 180 days of that act.[12] This is the standard thus far used by EPA.

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[11]Thelma Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing,* 41 VANDERBILT L. REV. 1171, 1196 (1988).

[12]*Id.* at 1172.

b. The "manifestation/enforcement" standard. A person can bring a civil rights action if she challenges an unlawful practice within 180 days of the enforcement or manifestation of the policy against her or someone in her protected class.[13] Under this theory, the statute of limitations should be interpreted in a manner consistent with eliminating the discriminatory policy. The Supreme Court embraced this standard in *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982):

> where a plaintiff... challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely filed within 180 days of the last asserted occurance of that practice.

c. The "ongoing policy" standard. An aggreived person may bring an action if she challenges an alleged policy, if she remains subject to the policy. "[T]he existence of the formal policy is proof of the existence of a present alleged violation. Because the policy *is* the present alleged violation, the only remaining issue is whether that policy is in fact discriminatory."[14]

EPA does make one useful clarificaton in §III.B.1, pointing out that complainants should file complaints alleging discriminatory permit processes within 180 days of the event during the process, rather than after the permit has been issued.

In §III.B.1, EPA again states that it may “choose to conduct a compliance review” of a program even if a complaint is rejected on the basis of timeliness. As we noted in §III.A, as a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

2. Good Cause Waiver

[13] *Id.* at 1192.

[14] *Id.* at 1200 (emphasis added).

Section III.B.2 states that good cause exceptions will be given to certain untimely complaints. Unfortunately, EPA does not specify what the conditions for these exceptions are. Instead, EPA simply states that they may be given. This is confusing. Without guidance from EPA on what "good cause" means, people may think they have a good cause while EPA may not agree. Although EPA has latitude to accept late-filed complaints "for good cause," EPA has thus far narrowly read the statute of limitations on complaints, and has never accepted a complaint which on its face alleged ongoing discrimination if the complaint was filed after what the EPA deemed to be the 180-day statute of limitations. Several signatories of this comment letter are familiar with the effects of EPA's "good cause" policy, which hurts the civil rights complainant while helping the civil rights violator.[15] A list of examples describing situations in which EPA believes "good cause" existed would clarify this seemingly random and arbitrary standard.

3. Ongoing Permit Appeals or Litigation

a. Permit Appeal Processes

EPA states that if a party submits a timely application while administrative proceedings are ongoing, then the complaint will be dismissed without prejudice, allowing for the complaint to be refiled later. This places the burden on the complainant to refile the complaint, even if it has been timely filed and meets all EPA's jurisdictional criteria. This is yet another example of EPA's policies hurting the civil rights complainant and aiding the civil rights violator.

EPA is creating a policy which will lead to the dismissing of complaints which meet all its jurisdictional criteria, simply because the complainants are trying to exhaust their administrative remedies. Such complainants could have their future complaints rejected by EPA, as well, as the agency only "expects" – but does not guarantee – to waive the statute of limitations. This is an astonishingly backward policy that penalizes civil rights complainants by imposing on them a new hurdle not found in Title VI or EPA regulations.

If EPA is not willing to alter its policy on when the 180-day clock begins – which would remove this ludicrous situation of dismissal of timely filed complaints – we urge EPA to

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[15]For example, in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6, the complaint was rejected because it was filed 181 days after the action; in *Midway Village Advisory Committee v. California Environmental Protection Agency*, No. 01R-99-R9, the complaint was rejected because it was filed 183 days after the permit issued. In *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9, and *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9, the complaints were rejected as untimely because the complainant groups had diligently appealed the permit to the administrative agency, trying unsuccessfully to resolve the civil rights issue before bringing it to EPA, and had filed within 180 days of the rejection of the permit appeal.

establish a different policy for complaints filed during permit appeals processes. EPA should accept the complaint, but stay its investigation. If Title VI complaints were accepted and stayed during the pendency of the appeal process, EPA could then alert the recipient that an investigation will take place if the Title VI issues are not resolved during the appeal process. This would provide an incentive to the recipient to avoid the investigation by resolving the issues through changes in the application itself or through additional permit conditions.

The vagueness of the language in §III.B.3 creates further problems for potential complainants, and for EPA. Clarification is required regarding the ability to refile a complaint after appeals and litigation options have been exhausted. The Guidance fails to explain what happens to complaints that are not filed during administrative appeal proceedings but rather wait until such proceedings are exhausted. The Guidance also fails to address whether aggrieved parties must file a timely complaint while pursuing administrative appeals in order to receive the waiver. EPA's language is unclear in referring to complaints submitted and dismissed without prejudice, saying that such complainants will be able "to refile their complaints after the appeal or litigation." §III.B.3. This language appears to make the waiver conditional upon initial timely filing followed by a dismissal without prejudice. If this is indeed the case, then it is unfair. If EPA wishes to encourage potential complainants to exhaust administrative remedies, it should not penalize complainants who pursue remedies without filing a complaint during the appeals process. EPA should grant waivers to all parties who pursue administrative remedies, regardless of whether or not the complaint has been filed and dismissed. If indeed EPA intends to grant waivers to all complainants who go through administrative processes, then it needs to make this clear.

Secondly, EPA conditions the waivers by saying that EPA "may" grant waivers if the complainants go through the appeals process. Clearly this conditional waiver system will not encourage people to use the appeals process. If EPA wants people to try to resolve problems with recipients rather than file Title VI complaints, it should not make the decision to grant a waiver subject to administrative whim. Given the choice between filing a timely complaint within the 180 day window, or taking a chance with an appeals process that "may" result in an untimely complaint, many complainants will choose to file with the EPA before going through the appeals process if only to ensure the legitimacy of the complaint.

In order to reduce the filing of untimely complaints, EPA should make the waiver guaranteed – or, accept the complaint and stay the investigation, or start the 180-day clock at the end of the administrative appeals process, as recommended above. If EPA guarantees the waiver, it should allow complaints to be refiled within 180 days; the use of a 60-day clock in the permit appeals and litigation sections penalizes civil rights complainants, who should have the full 180-day clock guaranteed by EPA's Title VI regulations.

b. Litigation

EPA erects a new hurdle for civil rights complainants – one not found in Title VI itself or in the agency's regulations – when it states, in §III.B.3, that it will generally dismiss complaints if the issues raised in the complaint are the subject of "litigation in Federal or state court." This broad policy has the potential to significantly harm complainants who seek to challenge permit

actions on environmental grounds in court, while challenging those same permit actions on civil rights grounds by filing an administrative complaint. Such complainants would have their civil rights complaint dismissed because they sought to force an agency to abide by environmental law – because the "issues raised in the complaint," say, air pollution, would be the same issues raised in the lawsuit. Such a policy once again hurts the civil rights complainant, and helps the civil rights violator. It also has no place in EPA's Title VI Guidance. EPA should investigate Title VI complaints that meet the agency's jurisdictional criteria, rather than erect new hurdles which are not found in Title VI or in EPA regulations.

While the Guidance notes that the complaints will be dismissed "without prejudice," there is also no guarantee that EPA will accept a complaint filed long after the 180-day statute of limitations has run. Based on EPA policy to date, EPA would certainly reject such a complaint, making its dismissal of the earlier "without prejudice" meaningless as a new complaint would never be accepted. If EPA is to retain this policy, it should guarantee a waiver of the statute of limitations to all parties who filed complaints within the original 180-day limitations period.

EPA also states that it will most likely not consider complaints based on permits judged upon by a court. This does not encourage use of the appeals system. By suggesting that all complaints are foreclosed if not heard at EPA first, EPA ensures that some complainants will dispense with those other channels, and go straight to the EPA to have their complaints heard. While barring complaints of this kind may save some resources of EPA, it will not help the agency fulfill its obligations to investigate possible violations of Title VI. Again, EPA should either accept the complaints and then stay investigation during the pendency of the litigation, or guarantee a waiver to encourage the use of non-EPA resources to resolve civil rights violations.

4. Premature Complaints

To ensure that discrimination does not take place, EPA must *prevent* industries from polluting areas where the pollution would result in discriminatory adverse effects. However, the Guidance states that a permit must be issued before a complaint can be considered ripe, otherwise it will be dismissed as premature.[16] While this creates an easy marker for EPA to judge ripeness by, it hurts the communities that are supposed to be protected by Title VI. Using permit issuance as a ripeness test means that EPA misses its best chance to *prevent* discriminatory impacts – before they happen. If it is clear that a permit will be issued, and if a complaint is sent to EPA that meets the initial acceptance determination, then there seems to be little reason for EPA to delay investigation. Potential EPA investigation may also encourage agencies and polluters to negotiate with communities to revise the siting plans. Without a compelling reason for the delay in investigation, this seems to be a pointless ripeness test for EPA to use. It is irresponsible and a waste of time to put a community's health at risk by delaying investigation until a permit is issued when the investigation – or at least EPA's intervention – may commence as soon as a permit is in the works. EPA is abdicating a low-cost, efficient way of preventing civil rights violations.

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[16] "When complaints… are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." Guidance at §III.B.4.

IV. RESOLVING COMPLAINTS

A. Reaching Informal Resolution

EPA's Title VI regulations call for the Office of Civil Rights (OCR) to pursue informal resolutions of administrative complaints wherever practicable through alternative dispute resolution (ADR) techniques.[17] The Guidance, at §IV.A, notes that EPA will encourage informal resolution. EPA cites efficiency, time, and costs, among others, as reasons for employing ADR. In addition, EPA claims that ADR is helpful to "design and implement a process leading to an outcome acceptable to all parties."

EPA provides guidance for the use of ADR in two circumstances: in informal resolutions between recipients of federal funding ("recipients") and complainants, and informal resolutions between EPA and the recipients. In either setting, EPA lists dialogue, consensus building, and mediation as approaches to consider when developing an ADR process. For informal resolutions between recipients and complainants, EPA states that the goal is to have the parties resolve the dispute "between themselves." Specifically, EPA advocates the use of a third party acting as a mediator and a structured process through which the parties can participate in ADR approaches useful in resolving Title VI complaints. For informal resolutions between EPA and the recipients, EPA states its willingness to use ADR to reach informal resolutions at any point during the administrative process before a formal finding.

1. Informal Resolution Between Recipient and Complainant

a. EPA's preference for using ADR to reduce complaints deprives communities of the ability to exercise their civil rights.

EPA's insistence on using ADR techniques may be in the interest of efficiency, cost and time for EPA and the recipients, but does not protect the civil rights or environmental interests of communities of color who actually have to face the environmental hazards. EPA's preference for using ADR is apparently to minimize the overall number of Title VI complaints it has to investigate and decide. Attempting to limit the number of Title VI complaints decided, however, deprives communities of the ability to use Title VI as a tool for achieving equality in civil rights. Furthermore, EPA also states a preference for granting permits, only denying them in "rare situations." As a result, EPA's use of ADR to "reduce" Title VI administrative complaints will not prevent discrimination, but instead may encourage recipients to move forward with potentially discriminatory and environmentally harmful permitting actions and then settle any disputes with a complainant later.

b. EPA's use of ADR creates a pre-ordained outcome unfavorable to complainant communities.

[17] 40 CFR 7.120(d)(2).

EPA's proposed use of ADR to resolve complaints creates an outcome that all parties are forced to accept, but an outcome that may not necessarily be acceptable to all parties. When a recipient of federal funds decides to issue a permit, the community cannot file a complaint until the permit is granted. In addition, once EPA begins an investigation into the complaint, the complainant has limited rights to participate in EPA's investigation, and no avenue to appeal a dismissal. With EPA's stated goal of using ADR to avoid Title VI complaints, a situation is set up where there is a preference towards granting the permit. As a result, the community, which often times does not want the permit to be granted at all, is forced to enter into an ADR negotiation that is aimed at granting the permit. Although EPA claims this process allows the complainant an opportunity to benefit from the entire permit review process, the reality is that the permit will inevitably be granted except, in EPA's own words, in "rare situations." EPA's ADR scheme does not realistically result in a resolution where a permit is withdrawn or rejected. Instead, EPA has set up a situation where a community is coerced into entering into a potentially binding negotiation that is not aimed at fulfilling its objective of not having a facility at all. This is contrary to EPA's stated reason of using ADR to "implement a process leading to an outcome acceptable to all parties."

c. ADR puts complainants in a position of unequal bargaining power with recipients in the negotiation process.

ADR fails to take into account the inherent inequalities in bargaining powers between the recipient and the complainant in the Title VI process. Unequal bargaining power in issues of negotiation often arise due to differences in education, culture, and training for negotiations. EPA's suggested use of ADR in Title VI complaints, however, does not address the problem of unequal bargaining power. To the contrary, ADR merely institutionalizes this inequality.

ADR places people of color in a disadvantage due to its focus on low cost, speed, and efficiency; it places little weight on creating open communication and an understanding of cultural, racial, and class issues. The formal adjudication process has built-in procedural safeguards and codes of evidence to minimize prejudice in the administrative process and, if necessary, the courtroom. In the formal process, procedure and rules reinforce the idea that justice is blind to race, ethnicity, nation, and handicap.[18] The ADR process, however, takes the procedural safeguards and puts them aside in favor of informal negotiation between the disagreeing parties. This informal atmosphere may allow weaker parties to be coerced into settlements that they may not necessarily want to enter into.[19] In fact, research has shown that

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[18]Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEORGETOWN L.J. 667, 685-686 (1997)(formality in judicial processes remind and ensure everyone of the values of fairness and equal treatment).

[19] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-1550 (1991)(informal methods of dispute resolution can be destructive for participants because it requires them to speak in a setting that they have not chosen and often imposes rigid orthodoxy as to how they should speak, make decisions, and be); *See* Delgado,

informality only allows for more unfairness and power inequality.[20] For example, if members of a low-income community of color are forced to informally negotiate with attorneys and highly-trained negotiation experts of a recipient without procedural safeguards to curb discriminatory actions, abuse of power, and refusals to cooperate, chances are the community residents will not leave the negotiation getting what they want. In other words, once the procedural safeguards that traditionally protect disadvantaged individuals and groups disappear, there is no guarantee that a negotiation will in fact be fair, inclusive, and non-judgmental.

ADR is also disadvantageous to complainants because they may lack the resources necessary to gather crucial data and facts to prove disparate impact. In any negotiation, knowledge is power. With a voluntary exchange of facts and data in the ADR process, the parties must do their own homework in order to increase their bargaining power and persuasiveness. Low-income communities of color, however, do not have the money or resources to hire legal and technical experts to gather facts and data to bolster their Title VI complaints. State agencies and industry, however, have enormous resources at their disposal, allowing them to use expert research and analysis to support their arguments. With vast resources, facts, and data, the state and industry representatives enter the ADR proceedings in a superior position to disadvantaged communities. The practical effect is that the community is left without much evidence to rebut the facts presented by the recipient, thus further handicapping its bargaining power.

d. Little research and data exists on whether ADR is an appropriate method of dispute resolution with low-income communities of color.

Little, if any, research and empirical analysis has been conducted on whether ADR is necessarily the most appropriate or effective method of resolving conflicts with traditionally disempowered groups of people, such as African Americans and the poor.[21] Specifically, there has been a lack of research and analysis on whether ADR is an appropriate method of resolving disputes regarding discrimination and racism.[22]

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supra note 3 at 685-686 (informality increases power differentials and formality triggers a better, equal result); Luke W. Cole, *The Theory and Reality of Community-based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY LAW QUARTERLY 751 (1999)(informality of the local advisory committee process led to disenfranchisement of communities of color); Richard Delgado, *et al.*, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISCONSIN LAW REVIEW 1359 (1985).

[20]*See* Delgado, *The Problem of the Shanty*, *supra*, at 681, 685-686 ("Informality increases power differentials").

[21]Cherise D. Hairston, *African Americans in Mediation Literature: A Neglected Population*, 16 MEDIATION QUARTERLY 360, 370 (1999).

[22]Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L.REV. 1055, 1058-1060 (1996).

e. ADR does not address overall patterns and systems of discrimination that constitute significant social problems that may be practiced in the permitting of environmental hazards.

ADR poorly serves the larger goals of EPA's Title VI obligations because it focuses narrowly on the resolution of individual disputes as opposed to addressing larger patterns and systems of discrimination that recipients may practice in the permitting of environmental hazards. First, ADR looks at discrimination on a case-by-case basis. The disadvantage of this approach for communities is that communities can not rely on precedent-setting cases where courts have spoken on issues involving patterns or systems of discrimination, a sometimes-powerful tool for ensuring that the rights of the disadvantaged are not violated. Instead, ADR forces the community to negotiate their position on its own, without the benefit of judicial wisdom and experience. The recipient, on the other hand, has the advantage of negotiating on a case-by-case basis.

f. ADR, often conducted in a closed setting, presents little opportunity, if any, for public scrutiny, political accountability, or accessibility.

The ADR process is inadequate for protecting the civil rights of complainants because it does not result in a written opinion, is generally closed to the public, and is usually exclusive to the parties involved. As a result, none of the proceedings enter into the public record, creating little, if any, opportunity for public scrutiny, accountability, or accessibility. Environmental justice disputes, however, exist in a public arena. Since the disputes affect those in the public arena, the agreements reached in the ADR process must withstand public scrutiny.[23] In ADR, however, parties often want "off-the-record" discussions, although the public may have the right to know how the discussions are progressing and what is being said.[24] If discussions are not open to the public, then there is no guarantee that a group may not be taken advantage of in the ADR process.

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[23]Challenges that Arise for Mediators of Complex Public Policy Disputes, in COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES (Society of Professionals in Dispute Resolution, 1992), pp. 2-5.

[24]*Id.* at 3.

Unlike ADR, the written decisions and opinions of judges and administrators are part of the public record, and thus create a level of public accountability and scrutiny – as well as precedent. In the 1980s, there was a great deal of public criticism of EPA's "sweetheart deals" between EPA and regulated firms.[25] EPA's use of ADR in the deals created little faith and great public distrust in its ADR process for environmental regulation.[26] As a result, improper deal-making in the ADR process is a real risk the EPA may take by implementing ADR for Title VI complaints. In addition, in certain cases, such as civil rights cases, ADR is inappropriate because of the high level of public interest and concern in the issues involved and its outcome.[27] If formally adjudicated in the administrative process, the public may have full access to all proceedings, decisions, and events of the case.

The reality is that the ADR process is, by nature, private and thus deprives complainants, who may be facing discrimination or racism, from the protection of the decision-making process occurring within the view of the public. Although ADR does have mechanisms to ensure fairness, such as a third-party neutral mediator, the negotiation is only as fair and reasonable to all the parties involved as the individual mediator allows. In addition, traditionally, ADR resolutions are viewed as contractual agreements. Therefore, there is little process or procedure that allows for appeals of agreements or decisions made on substance and procedure in the ADR process.

g. Neutral third-party mediators lack the authority and power of a judge to prevent unfair and discriminatory acts in the ADR process.

There is an assumption in the ADR process that a third-party neutral mediator serves the same equalizing purpose as a judge in a formal adjudicative process. In the ADR process, however, mediators are often relied upon to act only as informal "judges."[28] Unlike a judge, however, the neutral third-party mediator may not have the authority to force or demand a fair or voluntary party exchange of facts and data. This lack of authority further accentuates the potential for unfair and discriminatory acts in the ADR process. Formal adjudicative processes, however, have strict rules enforceable by a judge regarding discovery to prevent abuse by parties. The ADR mediator may not have the authority or force to compel actions on one party. In addition, although EPA states that a neutral third-party mediator may be appointed when necessary, there is not any procedure or guidance outlined on how and when a "neutral" third-party mediator is proper, may be selected, or agreed upon by the parties.

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[25]Edward Brunet, *The Cost of Environmental Dispute Resolution*, 18 ENVIRONMENTAL LAW REPORTER, 10515, 10517 (1988).

[26]*See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10517.

[27]Judge Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARVARD LAW REVIEW 668 (1986).

[28]*See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10515.

h. ADR's lack of formal discovery prevents a fair resolution of a dispute.

Without a formal discovery process, ADR fails to provide a fair resolution of a dispute due to its lack of a high quality and degree of accurately determined facts. Instead, ADR's focus on efficiency, cost, and speed only provides for a voluntary exchange of data that often results in facts that are incomplete, one-sided, and inaccurate. Without substantial and complete "facts" as weapons, communities are at a disadvantage when negotiating with recipients, who usually will have more resources to rely on.

i. ADR has no precedential value.

A unique feature of the common law system is that any legal command or decision becomes a part of the background data that constitutes our legal rules. A foundational principle of our legal system is that like cases should be treated alike, and different cases differently. Consequently, each legal order is of some value as a precedent for similar future situations. Some reasons for this system are the desires for uniformity, equality in treatment, and the ability to learn from lessons in the past.

In contrast, ADR schemes have no such internal structure of precedential value. The lack of precedent destroys the opportunity for the law to be applied uniformly, fairly, and equally. In issues of environmental justice, the lack of any precedential value in ADR not only prevents parties from utilizing past favorable (or adverse) court rulings, but also prevents any long-term growth and learning within the ADR processes. As a result, the ADR process in any specific area does not grow or evolve with any uniformity or equality. Practically, in an environmental justice context, two similar communities facing similar environmentally hazardous threats in similar areas can both enter into an ADR process and leave with completely different results. In addition, in cases where it is clear that the law has yet to address a problem, ADR fails to provide any precedential history or value.

j. Recommendations

The current draft guidance is vague on how, when, and in what manner ADR will be used as a method of resolving Title VI complaints. As it is in this guidance, the description of ADR does not address the needs of complainants – which is to prevent discriminatory impact of environmental hazards. ADR, as it is proposed by EPA in this policy, has a preference for granting permits and rejecting Title VI complaints. Therefore, the use of ADR as it appears in this policy is contrary to the purpose and intent of Title VI. The prevention of discrimination does not occur by forcing the discriminated to "settle" their complaint with the recipient for efficiency. ADR creates an outcome that all the parties are forced to accept, but not necessarily acceptable to all parties. Therefore, EPA should abandon efforts to encourage the use of ADR between the complainant and recipient according to the current policy. Instead, EPA should allow the administrative process to decide disputes under Title VI. If, however, ADR is implemented as EPA's primary process of dispute resolution for Title VI complaints, EPA

should:

· Consult and conduct investigations, research, and analysis on whether the ADR process is the appropriate method of resolving complaints from people of color who are poor and traditionally disadvantaged and discriminated against.

· Draft a specific guidance on how ADR will be implemented in order to resolve complaints under Title VI and open up the guidance to public comment so that the ADR process includes all the elements that complainants feel will level the playing field. Included in the guidance, for example, should be a detailed procedure on how to identify parties in the convening process, when a third-party neutral mediator is necessary, and the process in which the mediator is selected.

· Examine different approaches to ADR and implement one that takes into account the inherent inequalities in bargaining power between EPA, the recipient, and complainant.

· Recognize that the ADR process for Title VI may deal with parties that are traditionally discriminated against and thus must be sensitive to cultural, social and racial issues.

· Require that the ADR process be more open and accessible to the public eye. The public is skeptical of results and decisions made out of the public eye, and opening the ADR negotiations to public scrutiny may increase its trust in the process, in addition to ensuring that one party does not continue to discriminate and take advantage of another party.

· Practice a heightened standard for employing ADR in cases where one of the party members may be part of a traditionally disadvantaged or discriminated class.

· Practice discretion and not use ADR when there are potentially important precedent-setting legal issues that need resolution.

· Not employ ADR when the conduct of one of the parties is so egregious as to make it in the public interest to subject that party to the most visible trial and punishment available.

· Not employ ADR in instances where it would require one party to compromise moral or value beliefs (i.e. siting hazardous waste facilities in religiously sacred areas).

· Not employ ADR when the result may have a substantial effect on people who are not at the actual negotiation.

· Complainants should be able to inform EPA that they reject ADR and begin the official 180-day investigation of their complaint.

2. Informal Resolution Between EPA and Recipient

Resolution of complaints solely as a result of negotiations between EPA and a recipient

should be avoided, as it may lead to EPA settling for terms that are unacceptable to the complainant or the affected community. Complainants and the affected community should have the opportunity to sign off on any resolution agreed to between EPA and recipients. We also apply this comment to §IV.B, below, in which EPA states that a complainant's "consent is not necessary."

B. Implementing Informal Resolutions

1. EPA should cause permits to be denied or at least stayed during the pendency of its Title VI investigations.

In §IV.B, EPA states that "denial of the permit at issue will not necessarily be an appropriate solution." EPA repeats this language elsewhere in the Guidance, as well (§VII.A.3). This language is deeply troubling. Experience and common sense indicate that affected communities generally raise complaints in response to a single proposed new or expanded facility, discovering or realizing that they are subject to a disparate impact in such instances.[29] The suspension, denial, or revocation of a permit is a powerful tool for communities fighting against disparate impact. EPA, in essence, is robbing complainants of the most effective tool they have to prevent disparate adverse impact. While EPA may believe that encouraging recipients to come into "voluntary compliance" is an acceptable solution to disparate adverse impact, the idea improperly holds complainants' health and safety hostage. EPA here again acts in a way which hurts the civil rights complainant, and helps the civil rights violator.

The EPA Guidance states explicitly that "it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." By this surprising statement, the EPA makes it virtually impossible to successfully challenge the legitimacy of a permit proceeding (or other agency action for that matter) in light of Title VI. Consider the case of a flagrant violation: a hypothetical official advises a permit applicant that the agency will only grant a permit for a major facility if it is sited in an overburdened Latino community. This action is taken because the environmental agency doesn't want to contend with opposition from a white wealthy community situated near a more geographically appropriate site for the facility. Under the logic reflected in the Guidance, denial of the permit in this fictional case would *not* be an appropriate solution simply because the permit is not the "sole" cause of the impacts within the Latino community. No one discrete agency action is likely ever to be solely responsible for an adverse impact, but it does not follow that actions that contribute to disparate impacts should be allowed.

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[29] *See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 326 (1994). Of the first 17 Title VI complaints filed with the EPA and examined in this article, almost every single one, whether accepted or rejected, was prompted by individuals or groups challenging the permitting of a single facility.

Instead of adopting this baffling position, the EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases. The EPA, in attempting to assuage the regulated community by categorically rejecting permit denial as a potential solution in a Title VI case, while at the same time sending a strong message that withdrawal of funds is unlikely to ever occur, effectively decimates the authority of this Civil Rights law in the permitting context, and probably beyond that.

The "sole cause" idea is contrary to cumulative impacts analysis, which EPA embraces in theory. The whole point is that this project is *adding to* the burden. If "sole cause" is taken to an extreme, the more polluted an area gets, the less likely ti is that a permit will be denied, exactly what Title VI is supposed to combat.

2. EPA's approach to mitigation measures is flawed.

EPA's faith that mitigation measures employed by the recipient agency are sufficient to assure compliance with Title VI is misplaced and will ultimately result in increased violations of Title VI.

EPA sets out the guidelines for its policy regarding mitigation measures in §II.B.6 of the Recipient Guidance and in §IV.B of the Guidance.[30] EPA couches these measures as steps that the recipient agency can take in order to "reduce or eliminate alleged adverse disproportionate impact." Generally speaking, using these measures to compensate for current Title VI violations by creating additional violations of Title VI in other areas is unjust. Granting such measures due weight and considering such measures a "less discriminatory alternative" is ill-advised since it will likely not eliminate adverse disparate impact "to the extent required by Title VI" in the area actually affected by the sited facility. The following mitigating factors and their usage should be carefully reviewed.

a. Mitigation must focus on the site complained about

Mitigation measures are sometimes devices used by agencies and polluters to trade certain pollution to other areas or media. This may include promising to reduce water pollution while increasing air pollution, or buying wetlands in another region to compensate for increased air and water pollution. One difficulty with mitigation is that it may not actually cause a reduction in the harmful pollution at the site itself, since mitigation could potentially take the form of positive environmental action in other regions.

[30] Those recommendations are short, but generally point out that mitigation is an appropriate way to deal with potential violations of Title VI.

Thus, EPA needs to require that any mitigation measure undertaken must solve problems at the actual site, and not deal with an unrelated problem that has no bearing on the community where the facility is to be located.[31] This means keeping mitigation at the site, and concentrating mitigation on the medium specifically claimed to be causing the violation. There is no sense in allowing for reductions in water pollution at a site if the air pollution is the focus of the complaint.[32] This would appear to be the only way to truly address Title VI concerns. Buying wetlands in another region will not help minority communities who are exposed to disproportionate environmental impacts.

b. Offsets

One confusion that EPA needs to clear up is what it means by "offsets." Offsets can be promises by a polluter to reduce pollution at other facilities in exchange for keeping emissions high at the disputed facility. Or offsets can mean allowing the polluter to send pollution to another area in exchange for having to reduce its pollution at the disputed facility. Assuming EPA means reducing pollution at other areas, this is inadequate to address Title VI concerns. Only offsets that apply to the specific neighborhood directly affecting the complaining community would reduce an adverse impact as required by Title VI. Otherwise, a facility's emissions could pollute an area in violation of Title VI, while pollution is reduced in areas where it does not require reductions (perhaps, ironically, in white neighborhoods, the result Title VI is intended to prevent).

Assuming EPA intends to give due weight to offsets, there are significant possible problems. Implementation of pollution offsets (in this case allowing for more pollution in another area to compensate for having to reduce emissions at the complained-about site) will necessarily reroute pollution to other areas that may also bear a disproportionate burden of air pollution.[33] As a result, Title VI's core purposes will not be achieved by this sort of scheme. It will be a "rare

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[31] "The significance of the adverse environmental impact of the particular agency action can not be obviated by pointing to the beneficial environmental impact of a different and unrelated action." *Preservation Coalition, Inc. v. Pierce,* 667 F.2d 851, 860 (9th Cir. 1982). *See also* Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,* 73 TUL. L. REV. 787, 831 (1999) ("EPA should amend its supplemental mitigation proposal to require that any mitigation address similar health or environmental risks as those caused by the project").

[32] *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 189-90 (1998) (stating generally that the success cross-media mitigation measures are difficult to establish since a baseline comparison to classic regulation is difficult).

[33] *See Communities for a Better Environment v. South Coast Air Quality Management Dist.*, EPA File No. 10R-97-R9, filed June 23, 1997 (generally alleging that source pollution, wherever it exists in the SCAQMD, is concentrated in minority communities); Vicki Ferstel, *The Advocate (Baton Rouge, LA)*, June 21, 1998, at 1A (reporting on a 1984 consultative report to the city of Los Angeles that recommended siting facilities in already highly industrialized neighborhoods in low-income neighborhoods).

situation" that the extra pollution created in another area will be placed in an area inhabited by rich, white, property owners. Instead, it would invariably be most economical for a company to deposit its offset pollution in an area that is poor and relatively powerless. Giving companies an incentive to pollute in other poor areas by advocating offsets for Title VI violation areas does not solve the problem of disparate impact, it merely moves it somewhere else.

If EPA wishes to use offsets in a Title VI context, it should limit the recipient of the offset pollution to communities that do not experience adverse disparate impact, and *would* experience no adverse impact as a result of the offset. By limiting the offset destinations, EPA can ensure that the goals of Title VI are not defeated.

c. Abatement procedures should be avoided as they place the burden on the host community.

Abatement procedures are generally those measures that involve reducing chemical exposure by attacking exposure routes that might exist in the homes of the community residents experiencing adverse impact or elsewhere in the community, but not the emitting facility itself. Abatement procedures by their very nature ignore the serious pollution problem that creates the violation in the first place, and as a result, abatement will not in all likelihood solve the root cause of the problem – the emissions that create an adverse impact.

By not addressing the facility actually emitting the pollutant, and rather assigning responsibility for unhealthy conditions to low-income home owners (as in the case of lead), no effective solutions can be truly formed. Given that the data for a source of emissions is much easier to interpret than possible extra-site sources of pollution, the first source targeted for controls should be the sited facility. While data is understandably difficult to ascertain, clearly some polluters are worse than others and no amount of abatement will make up for their emissions.

Until the main source is cleaned up, all abatement measures will likely prove ineffective. It is unlikely that any abatement measure will conclusively eliminate the basis for a Title VI complaint. Allowing abatement as a mitigating factor in rare cases where abatement may be considered will not solve the Title VI problem and should not generally be granted due weight. EPA should restrict the use of abatements as mitigating features to only those circumstances where abatement is *proven* to be as effective as shutting the facility down completely.

d. The complainants and the affected community must endorse the mitigation measures chosen by EPA and recipients.

By allowing state agencies to submit a mitigation plan to OCR without consulting with the affected community, EPA lacks the input it needs to make a determinative finding. EPA can not adequately find that a mitigation plan will eliminate impact "to the extent required by Title VI" without checking with the community first to make sure they are comfortable with the plan. One of the first assumptions of democracy is that all information is colored by perspective. All perspective and voices are needed to make sound policy decisions. These democratic goals are

not met if the decisions regarding solutions to Title VI violations are made without community input, by people who do not live where the violation is occurring. The assumption behind a Title VI administrative complaint is that the regulators and policy makers have failed to adequately assure equality of environmental condition. Moreover, excluding affected community members at a crucial policy making stage is fundamentally unjust, and will ultimately lead to EPA decisions that do not adequately address Title VI violations. It therefore seems illogical to exclude groups which have the crucial perspective needed to evaluate a plan from the process of plan approval.

EPA acknowledges the value of hearing community concerns and ideas when it recommends as most effective mitigation plans those which involve community groups that filed the Title VI complaint.[34] EPA should keep this in mind and strike the language on page 72 that reads "OCR may also consult with complainants, although their consent is not necessary," and replace it with "OCR will consult with complainants."

e. The overall efficacy of mitigation measures must be monitored.

Communities' main suspicion regarding mitigation procedures is that they will not actually work. If a state agency promises to carry out mitigation procedures, and then fails to do so or implements them inadequately, there is very little recourse for the community members affected. Even if the mitigation measures are faithfully put in place, there is no guarantee that they will actually work.[35] Therefore, it is important that EPA do two things to ensure that mitigation schemes will actually work.

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[34] Recipient Guidance at §II.B.6.

[35] *See* Michael G. LeDesma, Note, *A Sound Of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497, 500-501 (1994) (stating that wetland bank mitigation is generally unmonitored and in fact starts a race to the regulatory bottom among states); Daniel Jack Chasan, *Salmon; Ruling: Agencies Violate Law; So What? It Happens All The Time*, SEATTLE POST-INTELLIGENCER, March 19, 2000, at P-I FOCUS, Pg. G1 (stating again that wetland programs are ineffective and that generally, state environmental agencies do not follow the law with regard to their mitigation plans, at least in Washington state); Michael J. Bean, Testimony Before the Senate Subcommittee on Fisheries, Wildlife and Drinking Water, November 3, 1999 (stating generally that HCP mitigation efforts are underregulated, hard to enforce, and difficult to judge in terms of efficacy); Keith Rogers, *Employees Say Agency Retaliating*, LAS-VEGAS REVIEW JOURNAL, December 9, 1998, at 1B (stating how Clark County Health District (NV) officials were accused of harassing employees who reported violations of mitigation schemes to EPA).

First, EPA should make sure that third parties that are responsible for conducting mitigation (namely the polluters or state agency) actually do it. The Supreme Court's position in *Robertson v. Methow Valley*[36] is instructive in this regard. The Court there decided that mitigation schemes did not have to be proven sound in order for a project to be legal under NEPA, only that they must be discussed. But the Court insisted that this was because NEPA holds no requirement for substantive environmental protection, so no proof of such protection is required in a mitigation scheme.[37] Since in the Guidance EPA is looking toward mitigation schemes to provide substantive environmental protection, the original reliance standard set out in *Pierce*[38] and the Circuit Court's *Methow* opinion, and not the Supreme Court's *Methow* decision, applies. In short, if EPA wants to rely on third parties to provide mitigation that is supposed to guarantee substantive environmental protection, than those measures must work, and EPA must make sure they do. The easier standard should only be used in NEPA cases, where there is no requirement for substantive environmental protection. Regular EPA monitoring would be required in order to guarantee that mitigation measures were working.

Second, EPA should include administrative recourse for parties who put their faith in mitigation only to see it fail. While EPA grants that an area-specific agreement or other such mitigation scheme may be reviewed if circumstances change (*i.e.*, if it does not work), this review process seems to require a new permitting action in order to make the complaint ripe. And even then, community members must still wait while EPA investigates. Given what is at stake, EPA should allow for a direct review of mitigation measures if the scheme is accused of failure.

V. INVESTIGATIVE PROCEDURES

A. Submission of Additional Information

In §§ V.A and V.B.1, EPA states that recipients may submit evidence to support their position that disparate impacts do not exist "during the course of the investigation." This apparently conflicts with EPA deadline at §II.B.1 of the recipient having 30 days – and just 30 days – to rebut the complaint.

B. Granting Due Weight to Submitted Information

In general, the idea that EPA can dismiss complaints merely because a state agency claims it is in compliance with Title VI is contrary to EPA's obligations under the Civil Rights Act. EPA grants that these obligations exist, saying that EPA "cannot grant a recipient request

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[36] 490 U.S. 332 (1989).

[37] "Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Robertson v. Methow Valley*, 490 U.S. 332, 353 (1989).

[38] *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982).

that EPA defer to a recipient's own assessment." EPA resolves the contradiction between policy and obligation by saying that it will review state plans to make sure they are adequate. This promise is insufficient to legitimize the prima facie illegality of EPA's due weight policy under Title VI. EPA should be much more specific about its review process for both scientific studies and area-specific plans.

In §V.B, EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

1. Analyses or Studies

Requiring that studies that be granted due weight conform to "accepted scientific approaches" necessarily biases due weight in favor of industry and state agencies. Clearly, a low-income community group fighting for environmental protection is not generally going to have the resources to pay for a comprehensive study that meets EPA's standards. There is also evidence to suggest that EPA ignores studies by community groups, even when submitted in a scientifically acceptable fashion.[39]

Thus, it is likely that most studies of the area mentioned in a particular complaint will be filed by the party adverse to the complainant. This creates an obvious objectivity problem. How can EPA trust a study paid for and conducted by the agency whose funding is riding on the outcome of the study? Does EPA truly expect any result other than one that would lead to a finding of Title VI compliance? While the study itself must meet methodological criteria in order to pass muster with EPA, this seems to be inadequate to truly guarantee the objectivity of any such study. As former EPA Administrator William Ruckelhaus said, "a risk assessment is like a captured spy. Torture it enough and it will tell you whatever you want."

In addition, EPA's promise not to duplicate a study if relevant studies meet the methodological criteria seems foolish. In the unlikely event that a community group can actually afford a study, it is likely that their study and the one submitted by the state agency would reach opposite conclusions. Faced with such contradiction, there seems to be no way for EPA to resolve the matter except to make its own survey of the situation. While EPA is likely to argue that it can resolve any such conflict by examining the methodology of the two studies to see which is superior, this is inadequate. EPA itself grants that data and interpretation of data is difficult and it is certainly possible that two different studies can reach opposite conclusions even if conducted properly.

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[39] Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

EPA should conduct its own studies, when able, because the standard for dismissing a study is too high. By denying due weight only to studies that have "significant deficiencies," EPA sets a standard for dismissal that allows for "moderately" deficient studies to be accepted. For example, if community residents complain of adverse impact, an agency study suggests that there are no impacts, and the study has "minor" deficiencies, EPA could grant the study due weight under the current Guidance. By making the standard "significant" EPA allows for too much inconsistency in studies that may result in unchecked violations of Title VI.

EPA should also do the following:

· If an agency study contains discrepancies, then EPA should not rely on it, instead of using the current "likely not" language in §V.B.1.

· Be flexible in allowing unscientific studies from community groups to have at least some weight, perhaps enough to trigger an EPA study. Understandably, EPA does not want to grant full weight to a study that does not conform to "accepted scientific principles." But at the same time, EPA should be sensitive to the fact that many poor communities may not be able to pay for scientific studies, and out of respect for their means, EPA should grant those studies at least some weight.

· If a complainant requests that EPA conduct an independent study, EPA should not grant due weight to a study submitted by a recipient but should evaluate the recipient's study in light of EPA's own findings.

· If a recipient's study is contradicted by external evidence or by studies submitted by complainants, EPA should conduct its own study.

2. Area-specific Agreements

EPA has taken a seriously wrong turn with its promotion of "area-specific agreements." Ostensibly put forward as a way for recipients to be more pro-active in identifying and working to remedy or prevent environmental justice problems (Recipient Guidance § II.A.2), these agreements turn out to be a part of EPA's Title VI enforcement plan (*see, e.g.,* Guidance § V.B.2). EPA encourages recipients to develop area-specific agreements (ASAs) which contain plans to eliminate or reduce existing disparate impacts. As an incentive, EPA will review such plans and if they meet certain criteria, they will be given "due weight" in a Title VI investigation. The precise role the Guidance ascribes to ASAs in the course of a civil rights investigation is both ambiguous and troubling. Despite EPA's assertions in § V.B. ¶ 1 that it "cannot grant a recipient's request that EPA defer to a recipient's own assessment," the treatment of area-specific agreements in essence does just that.

The Guidance suggests that unless certain criteria are met, plans "might not be sufficient to constitute an agreement meriting due weight." This suggests that "due weight" is a threshold rather than a range. This makes "due weight" operate like a presumption rather than a factor warranting typical evidentiary weight. This distinction is not merely academic. If a determination that an ASA merits "due weight" precludes further inquiry into the recipient's

actions, then operationally it is an improper presumption of compliance with Title VI. For example, consider a hypothetical recipient who establishes an agreement that meets the "due weight" criteria because the plan it contains will optimistically result in some pollutant reduction over time. But the plan is mediocre at best and it is not as good as plans developed in other jurisdictions under similar scenarios. Nevertheless, if this plan meets the "due weight" threshold, the Guidance suggests that at that point the EPA will determine without further inquiry that the recipient is adequately responding to the disparate impact and therefore is not violating Title VI. In such a case, a mediocre plan operates just as effectively in a Title VI investigation as a much more comprehensive plan. If interpreted this way, the Guidance promotes the perverse incentive for recipients to do the minimum necessary to trigger the "due weight" determination and insulate the recipient from an adverse Title VI decision. Once again, EPA hurts the civil rights complainant and rewards the civil rights violator.

EPA proposes to rely on its findings about such a *general agreement* to dismiss a *specific complaint* alleging violations of the agency's Title VI regulations. It is difficult to see how this would fulfill EPA's legal responsibilities under Title VI, which require the agency to investigate the complaints that are filed. EPA could not itself legally adopt a policy that said, "We will dismiss all Title VI complaints brought against recipients which have announced that they are trying to address environmental justice issues in some fashion, without determining whether the complaints of actions in violation of the regulations are in fact justified." But by proposing in the Guidance to rely on area-specific agreements, EPA manages to adopt such a policy by the back door.

The construct of area-specific agreements thus has no basis in law, and indeed flies in the face of EPA's legal obligations. Even if one were to assume that the notion of the area-specific agreement were legitimate, it is completely devoid of any features that could assure the recipient's compliance with any goals of pollution reduction, pollution prevention, or environmental justice. There is no requirement that anyone monitor progress, or revise the plan to meet changed circumstances. There is no requirement that the community groups that are parties to such an agreement be able to enforce it in court. The only thing about the area-specific agreement that has *any* enforceable consequences is EPA's proposal to use it to dismiss complaints without deciding whether the complaint, considered on its own, has merit. The agreement is voluntary and informal. There is no requirement that the any of the parties actually represent any people in any affected community, or that any party has the power to deliver what it is promising. There is no provision for any EPA evaluation of these issues. EPA appears to be prepared to take any area-specific agreement at face value, no matter how unrepresentative the process by which it was arrived at, how unrealistic the goals it announces, or unfair the result of its application to preclude particular complaints.

This advocacy of an informal, unenforceable, uncontrolled method to preclude investigation of Title VI complaints is a disgrace. It should be completely eliminated in favor of what this Guidance should have presented, but did not: a program of civil rights enforcement, in which EPA informs recipients of their obligations to obey federal civil rights law, provides examples of what this means, and decides whether recipients who are complained against have failed to live up to their legal responsibilities.

With regard to ASAs and due weight in general, EPA should carefully consider the lessons learned from the experiences with states under the Clean Air Act. The due weight provisions of this part of the Guidance are strikingly similar to the theory if not the practice of certifying state implementation plans under the Clean Air Act. Those plans have not been

universally successful, and indeed, in some cases appear to give states a blank check to continue polluting with little or no enforcement threat from EPA. As of December 13, 1999, 119 areas around the country were in nonattainment for one or more listed air pollutant, 29 years after the passage of the Clean Air Act.[40]

[40]<http://www.epa.gov/airs/nonattn.html> checked on July 5, 2000.

EPA must not repeat the mistakes it has made under the Clean Air Act. Some examples of these failures are: 1) constantly granting interim approval to inadequate state permitting schemes resulting in slow action by states to correct them; 2) certifying SIPs only to see them ignored by states (leaving enforcement to citizen groups[41]); and 3) many urban areas of the country still contain unhealthy air that do not meet the NAAQS some thirty years after the passage of the Clean Air Act. The easiest thing that EPA could do is to be less conditional in its enforcement language in the Guidance. Let state agencies know that if they violate EPA regulations, they will indeed be held accountable. For example, by saying that EPA *may* investigate if the ASA is inadequate, EPA is sending a message that it is not serious about making state agencies abide by the law. This is a mistake.

EPA should drop ASAs altogether. The ASA framework completely ignores the reality and the history of the environmental justice movement, and will only end up hurting, not helping the communities in need.

a. EPA penalizes complainants by using ASAs in later-filed complaints.

The practical consequences of a threshold-type "due weight" standard are more disturbing considering EPA's position that if a later-filed complaint raises allegations regarding "other permitting actions" by the recipient, EPA will generally rely on the earlier finding (presumably of due weight) and dismiss the complaint. Not only does the existence of an ASA act as an evidentiary presumption in the current Title VI investigation but, remarkably, it effectively operates as *res judicata* or *collateral estoppel* in subsequent Title VI proceedings.

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these exceptions raise further ambiguity. Normally, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency's position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an ASA is no longer is entitled to "due weight."

b. Area Specific Agreements are a majoritarian impulse that has no place in civil rights enforcement.

The lack of any EPA quality control and the potentially preclusive effect of ASAs create an open invitation to fraud. Recipients – and even more, polluters and developers – have every incentive to draft a fine-sounding plan, set up a few front groups of employees, friends, and/or relatives of the industry or developer, and have the front groups sign the plan. Then,

[41] *See Coalition for Clean Air, Inc. v. South Coast Air Quality Management District* (C.D. Cal. 1999) 1999 U.S. Dist. LEXIS 16106; *Citizens for a Better Environment v. Bay Area Air Quality Management District* (N.D. Cal. 1990) 746 F.Supp. 976.

after a group whose members are actually residents of the affected community of color files a Title VI complaint with EPA, the recipient triumphantly produces the area-specific agreement for EPA's review, with the expectation that the complaint will be dismissed.

At base, ASAs are a majoritarian impulse: get agencies and community leaders to agree on what is best for a community, and then preclude complaints about that agreement. However, Title VI was passed to protect minority interests from just such majoritarian tyranny – to protect community residents who disagree with their governments and "leaders." As such, ASAs have no place in Title VI enforcement.

C. Submission of Additional or Amended Complaints

EPA should understand that some submissions by complainants with complaints under investigation are not new complaints or amendments, but simply evidence of a pattern of discriminatory impact by a recipient. In these situations, the EPA should not accept or reject the new information as if it were a complaint, but use it during EPA's investigation of the underlying complaint.

D. Discontinued Operations/Mootness

If a complaint alleges a pattern of discriminatory siting, as evidenced by a particular facility, it would be inappropriate to dismiss the complaint if the facility's operations are discontinued. EPA should continue to investigate the pattern of discrimination. This situation arose in *Residents of Sanborn Court v. California Department of Toxic Substances Control*, No. 02R-95-R9, in which the facility was closed but the discriminatory pattern of siting by DTSC continued unabated.

E. Filing/Acceptance of Title VI Complaint Does Not Invalidate Permit

The Guidance states that the OCR will not consider a complaint until the permit has issued, and further that the submission of a complaint will not stay the permit. This means that the most meritorious Title VI complainants will nevertheless experience a substantial lag time and possibly irreversible impairment to their communities before any relief is provided. Considering the current backlog of cases, even the most flagrant violators can expect to continue plainly illegal practices for years, even decades, before any sanctions occur. Yet, in light of this troubling potential situation, the Guidance contains no provision to consider the stay of a new permit (and associated adverse impacts) pending an investigation in cases which would warrant a temporary injunction in an analogous court proceeding. EPA's failure to stop the permit complained about from going into action during the investigation of a Title VI complaint discourages the resolution of Title VI complaints. Because EPA is refusing to stay the permit in question, the agency being complained against has no incentive to either change its practices or resolve the Title VI complaint.

EPA has not ever decided a Title VI complaint against a state or local agency. In fact, of the almost 100 complaints filed in the past 7 years, EPA has only decided one – and in that one, it decided it against the complainant and for the state of Michigan. Some 51 complaints are pending at the time this comment is filed, and there is no hope for resolution of those cases

anytime soon. With this record, state agencies have no fear of EPA's Title VI enforcement when the agencies see a new complaint come in, because they know EPA will never do anything about it.

By refusing to stay permits while a complaint is investigated, EPA is guaranteeing that communities' civil rights will be violated. Rather than practicing a precautionary principle – first, do no harm – EPA lets the violation go on, unchecked, for years. If, instead, the permits were stayed, then agencies would move to quickly resolve the complaints, leading to actual civil rights improvements.

VI. DISPARATE ADVERSE IMPACT ANALYSIS

A. Framework for Disparate Adverse Impact Analysis

A troubling aspect of the new EPA civil rights policy is found in §§ VI.A (steps 1 and 4) and VI.B.1.a. In § VI.A, step 4, the Guidance states that "if a permit action clearly leads to a decrease in adverse disparate impacts, it is not expected to form the basis of a finding of a recipient's non-compliance with EPA's Title VI regulations and will be closed." Similarly, section VI.B.1.a notes two situations "where OCR will likely close its investigation into allegations of discriminatory effects":

(1) If the complaint alleges discriminatory effects from emissions and the permit significantly decreases overall emissions; and

(2) If the complaint alleges discriminatory effects from emissions and the permit significantly decreases the pollutants of concern named in the complaint.

Two examples of how this new policy of EPA's will allowed continued discriminatory effects on communities of color throughout the U.S. illustrate why it is flawed, and should be withdrawn.

First, let's look at the "multiple similar sources of pollution under the control of one jurisdiction" example. In this example, imagine that a particular state has three power plants, each of which emit 100 tons of toxic chemicals per year. Two of the power plants are located in white communities, and one in an African American community; the state is roughly 66 percent white an 33 percent African American, so there is no disproportionate distribution of the plants themselves. Each plant comes up for review of its new permits. The state grants a permit to plants #1 and #2, both in white communities, which impose new pollution control techniques that both require and enable the power plants to emit only 25 tons per year of toxic chemicals. It also grants a permit to plant #3, in the African American community, but there, it imposes permit conditions that only require the plant to reduce its emissions to 75 tons per year of toxic chemicals. Is this discriminatory impact? Clearly – the African American community is forced to bear 50 tons more toxic chemicals than similarly situated white communities. What would EPA do? Well, under this Guidance, EPA would determine that the permit reduced the tons of

emissions from power plant #3 by 25 tons – and 25% is certainly a "significant reduction" in emissions in anyone's book – and would thus dismiss the complaint. Thus, EPA, far from enforcing civil rights laws, would, through this new guidance, allow continued discrimination. We pointed out this same flaw in EPA's Interim Guidance, but that input was ignored.

The second example is the "unique source." Let's say there is a pollution source that is unique in a particular jurisdiction, for example a medical waste incinerator. There is only one in the entire state, and it is located squarely in the middle of a Latino and African American community. Now, the hypothetical plant emits 100 tons of toxic chemicals each year, and that pollution clearly has adverse impacts, and those impacts are clearly disparate on the basis of race. The plant has been there 20 years, and now comes in for a permit renewal. The agency gives it a permit, but says to the plant, "you have to reduce your emissions to 75 tons per year." The new permit will still have significant, disparate adverse impact – 75 tons per year of toxic pollutants borne by people of color and not whites – but it is a *reduction* from the old permit. A clear violation of civil rights. What would EPA do? Under this Guidance, EPA would determine that the permit reduced the tons of emissions from the incinerator by 25 tons – again, a "significant reduction" – and would thus dismiss the complaint. Thus, EPA would again avoid enforcing civil rights laws, and would allow continued discrimination.

Even if projects do decrease the total pollution, the emissions, even with the reductions, could still result in disparate impact. Title VI and EPA regulations make it illegal for a federally-funded program or project to discriminate, intentionally or unintentionally, against people of color. The Guidance should not make exceptions for disparate impact by allowing projects that are only *less* discriminatory than an alternative, or than the project originally was.

B. Description of Adverse Disparate Impact Analysis

EPA's Title VI regulations prohibit federally funded programs and projects from having a disparate impact on people on the basis of race, color, or national origin. EPA must revise at least two sections of its impact analysis to comply with that charge. First, the Guidance currently allows recipients to discharge hazardous amounts of pollutants in exchange for reducing overall pollution in a way that has a disparate impact on people of color. Second, it sets forth a dangerously narrow view of impact. We address both of these flaws in their respective sections, below.

1. Assess Applicability

a. Determine Type of Permit

According to the Guidance, EPA will likely dismiss a complaint if the permit action that triggered the complaint significantly decreases overall emissions at the facility. To prevail, the recipient must demonstrate that the decreases occur in the same media and facility. For instance, EPA will not dismiss a complaint alleging adverse disparate impact from air discharges where the recipient demonstrates a decrease in water discharges.

The Guidance should also require the recipient to show that the decrease came from the

same pollutant within that same media. Trading different pollutants from the same media can adversely affect communities of color in violation of the regulations implementing Title VI. Because different air pollutants have different properties, they interact differently, and affect humans and the environment in different ways. Air pollutants are not interchangeable. Some air pollutant emissions spread out throughout a basin, while others hover, affecting primarily the immediate area. Other air pollutants are highly toxic, while some are relatively benign. For EPA to treat all air pollutants as the same for purposes of "overall emissions" reduction is to ignore the very real health consequences that reductions in relatively non-toxic chemicals – and increases in more toxic chemicals – can have. For instance, if OCR dismisses a Title VI claim because a facility has reduced its emission of SOx, bringing down its overall air emissions, but emits larger quantities of vinyl chloride, persons located in the vicinity of the facility likely will face dire adverse impacts. The Guidance should state that in order to show that the permit action triggering the complaint significantly decreases the overall emissions at the facility, the recipient must demonstrate that the decreases occur within the same media, *pollutant* and facility. Thus, if a facility emits toxic and relatively non-toxic pollutants, it should not be allowed to trade one for the other for the purposes of "significantly reducing" its emissions overall.

In footnote 117 in §VI.B.1.a, the Guidance notes that "if OCR determines that an area-specific agreement meets the criteria described [earlier]... then investigations into future complaints regarding permit actions covered by the area-specific agreements generally will be closed." We refer to our comments on §V.B.2, above, but also point out that this is completely antithetical to civil rights enforcement and goes far beyond EPA's regulations in narrowing EPA's Title VI obligations. Simply because a permit is covered by an area-specific agreement does not mean that it will not have disparate impact on the basis of race, color or national origin. Further, the ASAs do not measure conditions on the ground and thus cannot be dispositive of whether or not there is disparate impact. Finally, because EPA would apply the ASA dismissal to future complaints, it is effectively telling people in jurisdictions with ASAs that EPA will never enforce civil rights in their communities – a flagrant disregard for Title VI and EPA's obligations to enforce it. This is yet another example of EPA hurting the civil rights complainant, and helping the civil rights violator.

Here again EPA asserts it may conduct compliance reviews even if complaints are dismissed on the basis of a decrease in permitted emissions. As we have noted in §§ III.A, III.B.1 and V.B, the fact that EPA has the authority to undertake such a review is no solace to complainants. As a practical matter, EPA is incapable of timely investigating the 51 complaints currently pending before it, much less undertaking independent *sua sponte* compliance reviews.

Please also see the comments under section VI.A, above.

b. Determine if Permit is Part of an Agreement to Reduce Adverse Disparate Impacts

The EPA should not defer to Area Specific Agreements, because such agreements are conceptually flawed and may also not mirror the reality on the ground. Please also see our

comments on §§ V.B.2 and VI.B.1.a, above.

2. Define Scope of Investigation

In §VI.B.2, EPA again illegally limits the scope of its investigation and enforcement to only impacts "cognizable under the recipient's authority." This arbitrary and artificial limitation on which impacts will be examined ignores the fact that the recipient may be the proximate cause of the impacts complained of – that the impacts would not occur but for the recipient's actions, whether or not such impacts are "cognizable under the recipient's authority." This is a radical narrowing of EPA's Title VI enforcement from the mandate found in Title VI itself and EPA's Title VI regulations. A better approach would be to encompass those impacts within a recipient's *control*, so that when a recipient was the proximate cause of an impact, it would be liable under Title VI for that impact.

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving federal financial assistance.[42] Nothing in Title VI limits its application to "discrimination on the basis of race, color or national origin *which manifests itself in ways cognizable under the recipient's authority*," as the Guidance would read it.

EPA's regulations under Title VI explicitly codify the disproportionate impact, or discriminatory impact, standard. Under 40 CFR §7.35(b),

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

Nothing in this regulation states that a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *cognizable under the recipient's authority* because of their race, color or national origin." The regulations simply say, a recipient cannot take actions which have a discriminatory effect. Period.

This is yet another example of EPA taking a policy position in clear conflict with its own Title VI regulations. It is also yet another example of EPA taking a policy position which hurts the civil rights complainant and helps the civil rights violator.

We also endorse and join in the comments of the Georgetown Legal Clinic on this section.

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[42] 42 USC §2000d (1988).

a. Determine the Nature of Stressors and Impacts Considered

The Guidance construes "impact" in an unacceptably narrow way. According to the Guidance, impact is "a negative or harmful effect on a receptor resulting from exposure to the stressor," and, "generally, a stressor is any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems." This definition does not take into account the social, cultural or economic impacts of projects, and is a significant narrowing of both Title VI and EPA's Title VI regulations, neither of which limits impacts solely to health impacts. Looking again at 40 CFR §7.35(b), quoted above, nothing in the regulatory language says a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *in terms of health impacts* because of their race, color or national origin." Here again EPA is hurting the civil rights complainant and helping the civil rights violator, in dramatically limiting the scope of its investigation. This narrowing is far more limited than 40 CFR §7.35(b), putting the Guidance once more in conflict with its own regulations.

In Title VII and Title VIII cases, the basic inquiry is whether a policy has a disproportionate impact on people of color "in the total group to which the policy was applied."[43] Here, the corresponding inquiry is whether the program or the stressor has a disproportionate impact based on race, color, or national origin. It is EPA's power and duty to consider all impacts, including health, social, cultural and economic.

Although we feel this is unnecessary, if EPA needs to hang its enforcement of civil rights on environmental statutes, there are ample opportunities for it to do so. The purpose of environmental statutes is often not only to prevent health impacts but also aesthetic injuries. For example, the Clean Water Act states in §101 that a primary purpose of the Act is to make water swimmable and suitable for recreation. The National Environmental Policy Act similarly requires environmental impact statements to consider not only the health impacts but also the social impacts that major projects will have on a community before commencing those projects.

[43] *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4th Cir. 1989).

As Tseming Yang has written, the accustomed dependency on hard, quantifiable evidence and its illusory authoritative power has obscured the understanding of discrimination and environmental justice by many involved in environmental regulation. In fact, EPA's heavy reliance on exactly such considerations, such as risk and exposure assessments, toxicity-weighting, pollutant concentrations, ambient air quality standards, and statistical analysis in its disparate adverse impact analysis of administrative complaints under Title VI of the Civil Rights Act of 1964 fall exactly in this way of thinking. It is unlikely that a civil rights complaint process directed at analyzing quantifiable factors will adequately and fairly judge the many intangible concerns, including aesthetic, dignitary, and social impacts, that environmental justice communities complain of. After all, it is all too frequent to think that "[i]f you can't count it, it doesn't exist."[44] Of course, quantitative analysis and especially statistical analysis has been used in other discrimination contexts, such as in employment discrimination. However, unlike the careful consideration that incommensurable values receive in the judicial adjudication context, given the traditional heavy reliance and dependence on quantifiables, it is highly unlikely that EPA will be able to overcome the tendency to undervalue the intangibles without utilizing a process that is significantly different from its traditional decision-making processes or that pays special attention to such intangibles.

i. EPA must consider cultural and social impacts.

To illustrate the cultural impacts a project can have, consider a situation in which a company proposes to build a factory that would have the effect of destroying a piece of land which was culturally significant to a certain protected class – say, for example, a Native American burial mound or a historical African American church. In such a situation, the activity that destroyed the cultural resource would clearly have a disparate impact on the basis of race, but that impact would not be a health-based impact. Under EPA's Guidance, a Title VI claim in this context would be rejected. This is an illegal narrowing of EPA's Title VI enforcement responsibilities.

Federal courts repeatedly have rejected the narrowing of Title VI which EPA proposes here. Instead, the courts have construed disproportionate impact to relate to the impact of the project as a whole. In *Bear Lodge Multiple Use Association v. Babbitt*, a Title VI case, the court construed impact broadly to include cultural, spiritual and religious impacts.[45] Several Native American Nations consider Devil's Tower the place of creation and hold their religious and cultural practices there. Devil's Tower is also a recreation spot for avid rock-climbers. The National Park Service considered the impact of the climbing activity on the cultural and spiritual life of Native Americans, to protect the cultural resources of Devil's Tower and to provide visitor enjoyment. The NPS developed a Climbing Management Plan. The plan, among other things, restricted climbing at the Tower during certain times. The Court upheld the NPS's decision and supported the view that preservation of the cultural quality of the site was an appropriate

[44]Laurence H. Tribe, Trial by Mathematics: Precision And Ritual in The Legal Process, 84 Harv. L. Rev. 1329, 1358-68 (1971).

[45]*Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (1999), *cert. denied* (2000).

consideration.

In other Federal Civil Rights cases, plaintiffs have raised social and cultural impacts. In *Grimes v. Sobol*,[46] plaintiffs alleged that a public school curriculum discriminated against African American students, and contributed to the low self-esteem and high crime rate, of African Americans. In *Allen v. Wright*,[47] the court acknowledged that stigma was a legally cognizable injury. In *Rozar v. Mullis*,[48] plaintiffs alleged injury to property values and welfare as well as to health. In none of these cases did the court deny or dismiss the claim because cultural injuries were not appropriate.

ii. EPA must consider economic impacts.

The Guidance also fails to consider economic impacts, although one of the central truths of environmental discrimination is that it has profound economic impact on people of color. Even facilities that do not have a demonstrable health impact often have a dramatic impact on housing and land values; where such impact is distributed in a discriminatory pattern, Title VI clearly applies. EPA's failure to consider economic impacts again hurts the civil rights complainant and helps the civil rights violator, and is a marked limitation of its own Title VI regulations. To further this unfairness, ironically, EPA *is* willing to consider the *positive* economic effects of the permit, as "justification" for the facility offered by the recipient.

The Guidance's definitions fail to fully reflect the true impact of facilities that require environmental permits. To choose to limit the definitions construing impact solely as health impact, is artificial, arbitrary and capricious.

iii. EPA must change other sections of the Impact Analysis.

In clarifying that impact extends to injury of cultural and social life, EPA will need to adjust some sections of its impacts analysis. For instance, in step 5 of the impact analysis, (disparate impact), the Guidance explains that if there is a health impact, OCR will consider the complaint regardless of the complainants' proximity to the stressor, so long as there is a pathway.

This recognition is significant because injury does not always correspond with proximity. For example, if African Americans attend a Baptist Church in a white section of town, and a large factory is built next door to that church, the white residents might not be adversely affected but the African Americans who attend the church will be. The Guidance should state clearly that OCR is to consider all impacts arising from the permitted facility, including health, cultural, social and economic impacts, regardless of the complainants proximity to the stressor.

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[46] 832 F. Supp. 704 (1993).

[47] 468 U.S. 737 (1984).

[48] 85 F.3d 556 (11th Cir. 1996).

The same applies to the impact assessment, step 3 of the impact analysis, in which OCR inquires into whether there is a "direct link" from the stressor to an adverse health or environmental impact. Currently, that approach does not take into account a direct link from the stressor to social, cultural or economic impacts. The Guidance should consider all the discriminatory effects arising from stressors that EPA regulates.

The EPA is required to comply with Title VI which prohibits racial discrimination. In that vein, EPA should revise its subsection that exempts recipients who show a decrease in overall pollution from the Title VI complaint process, and clarify its impacts analysis to include social, cultural and economic impacts.

Please see our comments on §VI.B.2 on EPA's policy of only considering impacts that "are within the recipient's authority to consider." We believe this policy has the perverse outcome of punishing states (like California) that have permitting processes that consider comprehensively a facility's impact, and rewarding states with weak environmental oversight.

b. Determine Universe of Sources

We note that in many situations, additional emissions of a particular substance are by definition adverse – for example, adding more carcinogens to any particular environment will cause adverse impacts.

3. Impact Assessment

EPA's "hierarchy of data types," found in §VI.B.3, should move "known releases of pollutants or stressors into the environment" into the top position on the hierarchy, certainly above modeled exposure concentrations.

EPA calls for a "direct link" between an adverse health or environmental outcome and the "source of the stressor." This, as the EPA well knows, is virtually impossible except in the most egregious cases of toxic poisoning. Further, as EPA notes, it may require data gathered longitudinally over years – far longer than the 180 days which EPA gives complainants to assemble data and file a complaint – to discover such a link. Further, there may be impacts which do not manifest themselves for many years after exposure, such as certain types of cancer. Thus, EPA should focus on exposure to pollution, not only health outcomes.

4. Adverse Impact Decision

The Guidance suggests that where risks or other measures of potential impacts meet or exceed a relevant "significance level," the impact will be presumed adverse. While this may be a good approach, EPA should not make the converse assumption, *i.e.*, a presumption of no adverse impact if a significance level is not exceeded. It is not unheard of for permit applicants and regulatory officials to manipulate baselines and emission factors to keep from triggering applicable significance levels. This risk is likely to be greater in those very cases that Title VI is designed to address, cases where regulatory agencies have an inappropriate bias in favor of the

regulated community to the detriment of residents near the polluting facilities. Thus, even in cases where significance levels are *not* exceeded, EPA should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, EPA should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

EPA should also keep in mind, as discussed below in §VI.B.4.b, that significance thresholds are not set by science but through a political process which is subject to influence by industry and rarely subject to influence by affected communities.

a. Example of Adverse Impact Benchmarks

EPA's use of a significance threshold of 1 in 10,000 to define "adverse impact" is extremely loose, more so than every single EPA regulation establishing significance thresholds, where such thresholds range from 1 in 100,000 to 1 in 1,000,000. EPA should consider a cancer risk of greater than 1 in 1,000,000 an adverse impact.

In its example of using the Hazard Index, it appears that EPA will only use the benchmark to find against complainants, but not to find for them. EPA states that a hazard index score of under 1 would make it "unlikely" for EPA to find the impact adverse, while values over 1 – the significance threshold for many regulations – would not trigger EPA's automatic finding of adversity. This double standard is again a policy decision EPA has made which hurts the civil rights complainant and rewards the civil rights violator.

b. Use of National Ambient Air Quality Standards

The Guidance sets forth EPA's policy position that if the area in question is in compliance with a health based standard ambient air quality standard, there is no "adverse" impact. The Guidance further suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. In the context of the backlog of cases, intense political pressure from industry and some state regulators, budget constraints, this facile presumption is not only a recipe for regulatory inertia, but a convenient escape hatch as well. Moreover, since the complainant does not have standing as an "adverse party," and the recipient will not challenge such a finding, the OCR is in the awkward position of having to rebut its self-imposed presumption. This procedural deformity is a consequence of the EPA's curious attempt to cast the process as non-adversarial with respect to the complainant, while at the same time affording the recipient the protections (and more) of an adjudicative, adversarial process. Perhaps the better approach would be to recognize that the because the complainants' civil rights may have been violated by the recipient, the process is necessarily adversarial, even though the proceedings are labeled an administrative investigation. Moreover, since the recipient has significantly more resources than the complainant, EPA should be extremely cautious in imposing procedural roadblocks that operate to leave the complainants without recourse. The use of the presumption – which is wholly unsupported, as detailed below

– is a burden on complainants, another example of where EPA hurts the civil rights complainant and helps the civil rights violator.

In addition to the procedural burden on complainants, EPA's reliance on the National Ambient Air Quality Standards (NAAQS) is misplaced, because an air basin's attainment status under NAAQS does not mean a polluting facility will not have an adverse impact on the surrounding community.[49] EPA's reasoning is flawed because polluting facilities can still have an impact on a community even when NAAQS are met. EPA's rationale – that attainment under NAAQS equals no adverse impact – is factually incorrect and conceptually flawed on six different grounds: it ignores toxic hotspots, ignores the fact that significant health effects can occur at exposure to air pollution levels below the NAAQS, ignores that "health-based" standards are set through a political process, ignores acute health effects of exposure to VOCs, ignores accidents and upset conditions at plants, and ignores the fact that health based standards are normed on healthy white males. These deficiencies are detailed below.

First, the EPA's rationale ignores toxic hotspots, or localized impacts from air pollution sources that do not cause an area-wide effect. U.S. environmental history is replete with examples of facilities that have had a significant impact on the health of nearby residents, while the air basin remained in compliance with NAAQS. Such local impacts may be diluted or lessened when averaged or spread across an entire air basin. This is particularly true for some VOCs, such as toxic air contaminants, which have their greatest effect when they are most concentrated, and for lead, which tends to "fall out" close to its source of emission. The general determination that an area is in compliance with NAAQS – although perhaps appropriate for SIP planning purposes – may be virtually meaningless at the local level. Air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

[49]EPA's approach also appears to contradict its statement in the Recipient Guidance, at §III.B.3.e, that "risks [which] meet or exceed a significance level as defined by law, policy *or* science... would likely be recognized as adverse in a Title VI approach." (Emphasis added) In relying on the NAAQS, EPA is embracing only law, ignoring the fact that both science and public policy indicate that exposure to pollutants at the NAAQS levels is harmful to human health.

Second, EPA's presumption that compliance with ambient air quality standards equals no impact ignores the fact that significant health damage can occur at exposure levels well below the NAAQS levels. Researchers funded by the EPA have found significant health damage to humans exposed to pollution at levels lower than EPA's "health-based" standards. For example, researchers at Loma Linda University studied more than 6,000 non-smoking volunteers over 15 years to determine the impact of ozone and other airborne pollutants on them. The study found that men exposed to ozone levels of 80 parts per billion (ppb) -- EPA's 8-hour "health-based" NAAQ standard – ran three times the risk of lung cancer as men exposed to lower levels. Additionally, both men and women regularly exposed to levels of particulate matter lower than the NAAQS of 50 micrograms per cubic meter ran an increased risk of lung cancer. Both men and women exposed to elevated levels of sulfur dioxide also ran an increased risk of lung cancer.[50] Other studies have demonstrated that long-term exposure to low levels of lead can also have significant impact to kidney function.[51]

One can see how EPA's new policy plays out in practice by examining the recent *Select Steel* decision,[52] in which EPA dismissed a Title VI complaint because the facility complained of, the Select Steel mill in Flint, Michigan, would not have caused the state to violate the NAAQS for ozone. According to Michigan state records, Flint's average 8-hour ozone levels were between .082 and .086 parts per million (ppm) in 1996-1998. Not only does this violate EPA's health-based standard of .080 ppm, but it is also above the 80 ppb (=.080 ppm) level at which EPA-funded researchers found significant health impacts. In the *Select Steel* decision, EPA equated this level of ozone pollution – which caused levels of lung cancer three times normal and was actually *above* the NAAQS – with "no adverse impact."

EPA's rationale also ignores the fact that the setting of "health-based" standards for air pollutants such as ozone is partly a political process, in which the standards are often set based on negotiation with industry. Nor are the "health-based" standards infallible: in case after case, new, more restrictive standards have been promulgated when the existing "health-based" standard has proven inadequate. Examples include the failure of government to set correct or adequate standards for blood lead levels – the Centers for Disease Control has lowered the "safe" blood lead levels from 40μ/dl to 25μ/dl to 20μ/dl to today's current 10μ/dl over the past 15 years -- to the constant readjustment of buffer zones and re-entry intervals for pesticides in agriculture. Further, significant data gaps exist, particularly in the area of volatile organic compounds

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[50]W. Lawrence Beeson, David Abbey and Synnopve Knutsen, *Long-term Concentrations of Ambient Air Pollutants and Incident Lung Cancer in California Adults*, 106 ENVIRONMENTAL HEALTH PERSPECTIVES 813-823 (December 1998).

[51]Ja-Liang Lin, Huei-Huang Ho and Chun-Chen Yu, *Chelation Therapy for Patients with Elevated Body Lead Burden and Progressive Renal Insufficiency*, 130 ANNALS OF INTERNAL MEDICINE 7-13 (January 1999).

[52]*St. Francis Prayer Center v. Michigan Department of Environmental Quality*, EPA File No. 5R-98-R5.

(VOCs), which make it impossible to state with certainty that exposure to such chemicals -- even at "safe" levels -- will not have an impact.

EPA's reasoning does not take into account acute health impacts of exposure to VOCs, and also omits the cumulative physiological and psychological effects of environmental pollution from trucking, odors, noise, vibrations and stigma, which all increase human stress. There is considerable evidence that exposure to air pollutants such as VOCs causes increased stress.[53]

Overlooked in EPA's analysis, but perhaps of greatest consequence of all to communities adjacent to hazardous facilities, are industrial accidents and upset conditions. The fact that a facility's permit meets health-based standards is no guarantee there will not be accidents or upset conditions at that facility. The impact of industrial accidents has been well documented by federal agencies – including the EPA – and watchdog groups. The United States Chemical Safety and Hazard Investigation Board (CSHIB) reports that "[n]o comprehensive, reliable historical records exist" regarding chemical accidents in the United States, and thus the scope of accidents is under-reported. The number of accidents that *is* reported, however, is staggering. CSHIB reports that "[d]uring the years 1988 through 1992, six percent, or 2070 of the 34,500 accidents that occurred resulted in immediate death, injury and or/evacuation; an average of two chemical-related injuries occurred every day during those five years."[54] Further, CSHIB notes that between 1982 and 1986, 464,677 people were evacuated from their homes or jobs due to chemical accidents.[55]

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[53]*See, e.g.*, J. Timmons Roberts, *Stress, Trauma, and Hidden Impacts of Toxic Exposures on Vulnerable Populations*, Testimony presented at the National Environmental Justice Advisory Council, Baton Rouge, Louisiana, December 9, 1998.

[54]United States Chemical Safety and Hazard Investigation Board, "What Human Consequences Result from Chemical Accidents," CSHIB website, http://www.csb.gov/about/why_04.htm (February 2, 1999).

[55]*Id.* The United States Public Interest Research Group (USPIRG), in its recent report *Too Close to Home,* chronicles some of serious impacts on surrounding communities from chemical accidents at facilities. In August and September, 1994, in Rodeo, California, a 16-day release of 125 tons of a caustic catalyst at a Unocal facility sickened and injured 1500 people living near the plant. The report elaborates:

> Victims experienced vomiting, headaches, memory loss, brain damage, and other cognitive disorders. Some residents remained sick for well over a year after the Unocal accident.

U.S. Public Interest Research Group, *Too Close to Home: A Report on Chemical Accident Risks in the United States* (1998). The report can be found at http://www.pirg.org/pirg/enviro/toxics/home98/page4.htm (February 2, 1999). USPIRG's *Too Close To Home* found a strong correlation between high disaster potential and actual accident frequency. The report publishes a table titled "Top U.S. Counties ranked by worst-case disaster potential," which found Harris County, Texas (Houston) number one, Los Angeles County, California number two and Cook County, Illinois (Chicago) number three in the nation for disaster potential. These areas already have well documented environmental justice problems.

In Williamsport, Pennsylvania, on January 4, 1996, a thick cloud of chlorine gas blanketed the city, sending 26 people to the hospital. Victims suffered headaches, eye irritation, and breathing problems. The cloud formed as a result of a chlorine leak from a railroad tanker at the Lonza Chemical Plant. A 1993 accident at General Chemical Corp. in Richmond, California sent 24,000 people to the hospital from inhaled acid mist. The USPIRG report lists several other mass evacuations, including one in Superior, Wisconsin in 1992 where 40,000 people were evacuated. *Id.*

EPA itself has documented the impact of industrial accidents on communities. A summary by EPA's Chemical Emergency Preparedness and Prevention Office (CEPPO) of Accident Investigations is a sobering look at life in a community where an industrial accident has occurred. One such community is Savannah, Georgia, where an accident happened at Powell Duffryn Terminals, Inc., on April 10, 1995. EPA reports that 2000 residents were evacuated — some for as long as 30 days. The local elementary school was temporarily closed. Water in an adjacent marsh was heavily contaminated.[56] Other reports by EPA's CEPPO chronicle similar evacuations of the surrounding community. One accident at a Shell Chemical facility in Deer Park, Texas on June 22, 1997 mentions "[b]roken window damage reported in area" and an explosion that could be heard ten miles away.[57] Another accident at the Accra Pac facility in Elkhart, Indiana on June 24, 1997 reports a fire and explosion involving ethylene oxide where approximately 2500 residents were evacuated and 59 people were treated at the hospital.[58]

Similarly, EPA's rationale that a facility, once permitted, cannot be considered to have a disparate impact on a community, ignores the reality of compliance violations (sometimes in the form of upset conditions). Communities and the public are well aware, and facts substantiate, that accidents and even the potential for accidents and compliance violations from an industrial facility have a serious impact on community health and well-being.

Finally, the "health-based" standards historically have been set using the norm of a healthy, white male of average weight. The use of such standards may be discriminatory in itself, and certainly does not take into account sensitive receptors and people who are outside the "norm." By omitting any consideration of the critiques of existing regulatory standards and procedures, by the environmental justice movement and others, the EPA's Guidance naturalizes environmental injustice.

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[56]Chemical Emergency Preparedness and Prevention Office, Office of Solid Waste and Emergency Reponse, U.S. Environmental Protection Agency, http://www.epa.gov/awercepp/pubs/accsumma.html (February 2, 1999).

[57]*Id.*

[58]*Id.*

There are some among us who are concerned that EPA's new Title VI policy may create a legal hurdle that is impossible to surmount for Title VI complainants in areas that are in attainment under the Clean Air Act. By setting the threshold of "adverse" impact at the level at which a facility will affect the area's compliance with the national ambient air quality standards (NAAQS), EPA has effectively shut the door on any Title VI complaints from areas in attainment under the Clean Air Act, because the EPA's hurdle is legally impossible to meet. It is legally impossible for an agency to grant a permit in an attainment area which would result in the violation of NAAQS. Under the Clean Air Act, an agency may not grant a permit which would violate NAAQS.[59] In other words, if a facility applied for a permit that would violate NAAQS, the agency would be required to turn it down; if a facility is granted a permit, by definition it does not violate NAAQS. Thus, EPA's hurdle – that a permit must cause a violation of NAAQS to have an impact – means that, legally, there can never be a successful Title VI claim filed in an attainment area. EPA has effectively read Title VI out of the equation entirely.

c. Assessing Decreases in Adverse Impacts in a Permit Action

See our comments on this concept in §VI.A

VII. DETERMINING WHETHER A FINDING OF NONCOMPLIANCE IS WARRANTED

A. Justification

EPA proposes to tolerate concededly discriminatory effects if the recipient comes up with a plan to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here to institutionalize discrimination, allowing recipients who are known to be responsible for discriminatory impacts to patch things up and get a clean bill of health.

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[59] 42 U.S.C. §7475(a)(3); 40 C.F.R. §52.21(k). The Code of Federal Regulations is clear:

> The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification... would not cause or contribute to air pollution in violation of:
>
> (1) Any national ambient air quality standard in any air quality control region[.]

40 C.F.R. §52.21(k).

EPA gives recipients "the opportunity to 'justify' the decision to issue the permit *notwithstanding the adverse disparate impact*, based on a *substantial*, *legitimate justification*." §VII.A (emphasis added). This position, contrary to EPA's stated goal of complying with Executive Order 12898,[60] opens wide the door to recipients to continue practices that cause disparate adverse impacts in violation of Title VI and EPA's regulations. A recipient merely needs to claim "legitimate justification" of the permitting action to avoid a successful Title VI claim. Specifically, the recipient simply shows that "the challenged activity ... meets a goal that is legitimate, important, and integral to the recipient's institutional mission." §VII.A.1. The Guidance uses the permitting of a waste water treatment plant as an example of "acceptable justification." EPA considers the "public health or environmental benefits ... to the affected population" as "generally legitimate, important and integral to the recipient's mission." All of what EPA says about the plant may be true – it may treat the sewage of nearby residents – but not very relevant. The treatment plant *also* treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.[61]

The issue is not whether or not these facilities are legitimate or necessary, but whether the permitting and siting of them causes an disparate adverse impact in violation of Title VI. With the present "justification" model in place, no Title VI complaint is ever likely to be resolved in a complainant's favor. Here again EPA has worked to hurt the civil rights complainant and reward the civil rights violator.

While OCR's choice of the *Elston* standard is to be commended, the Guidance's *application* of the *Elston* standard is more problematic. After stating that the justificatory purpose must be "integral to the recipient's institutional mission," the Guidance nonetheless states that EPA "would likely consider broader interests [than the "provision of public health or environmental benefits"], such as economic development . . . . if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." Economic development (and other government interests not related to protection of human health and the environment) cannot, by definition, be "integral to the recipient's mission." The recipients in Title VI complaints are almost always environmental permitting agencies whose institutional mission – as those recipients have repeatedly sought to remind EPA in the context of the "authority / jurisdiction" issue – does *not* integrally include economic development, or any other similar justificatory purpose (such as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to

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[60]Executive Order 12898 "directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin." Executive Order 12898, 59 FR 7629 (1994); *see also* Guidance at §I.F.

[61]Further, the justification may fail on a factual level as well as the conceptual level detailed above. In the sewage plant example, the recipient attempts to justify the plant by arguing that nearby residents will benefit by having their water bill reduced, by better overall service, or, perhaps, by being hired at the expanded facility. But if the expanded facility creates a larger and more omnipresent plume of odor and pollution in the area, and threatens to devalue local property, has the project really rendered a benefit at all? One simply cannot calculate the value of good health.

transportation arteries, availability of pre-existing infrastructure, etc.). Thus, such "justifications" should be disallowed *per se* as inconsistent with the *Elston* standard.

1. Types of Justification

Throughout, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. §VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

The complainant can only challenge a recipient's invocation of justification by showing that the challenged activity is not legitimate, important or integral to the agency's mission. This burden is nearly impossible to carry. Few would deny that most, if not all, challenged activities are legitimate. Everyone agrees that waste water treatment plants and disposal sites are generally necessary, even if not desirable. Likewise, it is hard to imagine that a recipient state agency would authorize, or a private company would wish to build, a polluting facility for no legitimate reason.

EPA also asserts that OCR will consider "broader interests, such as economic development ... to be an acceptable justification, if the benefits are delivered directly to the affected population[.]" §VII.A.1. EPA, however, does not specify what "economic development benefits" are weighed and how much so against the disparate adverse impact?

Finally, EPA took some of its "justification" language from Title VII cases, which cover employment law. Courts often look to Title VII in construing Title VI claims and vice versa. But when considering justification, employment cases are distinguishable. The very premise of employment law is contract. There is an assumption, rightly or wrongly, that the parties, the employer and employee, come to the table with some degree of choice, and consent to enter a relationship with one another. By contrast, Title VI is more akin to nuisance or trespass, where one party unilaterally imposes its will upon another. In those cases, one party might not receive a value that it could rationally choose. Justification is inappropriate for Title VI complaints in which the element of choice is absent. Even where a few members of the community might receive a job, the others cannot be made to get cancer in exchange. A community does not choose to enter the such relationships. If a recipient can choose to justify a project, that agency should bear a heavier burden. For instance, the agency would have to show that they had no reasonable alternative but to site the facility in a particular place notwithstanding reliance that had formed since the permit was issued.

2. Less Discriminatory Alternatives

The description of what EPA considers a "less discriminatory alternative" (LDA) run contrary to the spirit and letter of EPA's Title VI regulations.[62] While the due weight given to mitigation schemes discussed above in §IV.B requires them to at least reduce emissions "to the extent required by Title VI," there is no such threshold for LDA as represented in §VII.A.2. Rather, LDAs must only cause "less disparate impact." This is of course allows for some, perhaps significant, disparate impact;

[62] EPA defines an LDA as "an approach that causes less disparate impact than the challenged practice." §VII.A.2.

as long as it is "less" than the impact that occurred when the complaint was filed. Any adverse disparate impact is illegal under Title VI; merely lessening disparate impact is not good enough.

Indeed, while EPA interprets *Georgia State Conference of Branches of NAACP v. Georgia*[63] to allow for any "less discriminatory alternative" to be justified under Title VI, the Supreme Court case that the *Georgia State Conference* court relies on to justify its LDA rationale says that an LDA must eliminate *as many discriminatory effects as possible.*[64] This is a much tougher standard than what EPA is proposing. Basically, the Guidance allows for the diminishment of some, but not all, adverse impacts, while the Supreme Court reasons that an LDA should eliminate all possible effects, and not just some. If EPA wants to rely on *Georgia State Conference* for its LDA standard, than it should follow the Supreme Court's reasoning in *Albermarle*. Discriminatory impact must be statistically eliminated in order for EPA to comply with Title VI. Otherwise, this justification arrangement outlined in the Guidance becomes a rather wide loophole that agencies may use to skirt the spirit of Title VI, allowing them to mandate token mitigation.

Please also see our comments on mitigation measures at §IV.B.

The Guidance's consideration of cost in assessing the practicability of alternatives suggests that such factors as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc., may come into play again here despite their manifest irrelevance, as described above in the discussion of justification. The Guidance should be explicit that costs incurred by the permit applicant will not be a consideration with respect to less discriminatory alternatives analyses.

Indeed, it is difficult to imagine a situation in which cost would be a relevant consideration at all. OCR must recall that it is the recipient permitting agency – not the permit applicant – which is the "defendant" in a Title VI complaint. Thus, it is the recipient agency whose costs would be considered, not those of the permit applicant. It is hard to imagine the case where the agency's costs would be raised so excessively by choosing some "less discriminatory alternative" that such alternative would not be practicable.

3. Voluntary Compliance

EPA's plan to encourage recipients to examine all "permitted entities and other sources within their authority to eliminate or reduce ... the disparate adverse impacts of their programs[.]" is a laudable suggestion. However, EPA's general position that it expects "that denial or revocation of a permit is not necessarily an appropriate solution" to complaints is troubling. Please see our comments on this topic at §IV.B.

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[63] 775 F.2d 1403.

[64] "Where racial discrimination is concerned, the (district) court has not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975).

APPENDIX A: GLOSSARY OF TERMS

Hazardous air pollutant is singular in the term and plural in the definition.

"Informal resolution" would better be defined as "Any settlement of complaint allegations prior to the formal resolution of a complaint." For example, informal resolution may dispose of a complaint before dismissal of the complaint, not just "prior to the issuance of a formal finding of non-compliance by EPA," as suggested in the current definition.

The use of the term "compartments" in the definition of "media" is confusing.

In the definition of "pollution prevention," the word "excessive" should be removed. Pollution prevention refers to the practice of identifying activities that create waste, period, and reducing that waste.

In the definition of "statistical significance," EPA needs to make the following addition to reflect what statistical significance really is about:

> An inference that there is a low probability that the observed difference in measured or estimated quantities is due to *chance or* variability in the measurement technique, rather than to an actual difference in the quantities themselves.

The term "stressor" should not be limited to "chemical, physical and biological" impacts but also include cultural, religious, social and economic impacts.

We note that only the definitions of ECOS and PLAN have the term itself repeated in the definition.

Comments on Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964, as Amended

EPA undercuts its entire Recipient Guidance by stating that "Fund suspension or termination is a means of last resort." EPA's active avoidance of even threatening to use the tools at its disposal to enforce civil rights law sends a clear signal to recipients that they may violate that law with impunity.

D. Stakeholder Involvement

EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she specifically declined to endorse the Advisory Committee's final report to EPA.

We refer EPA to our comments on the Investigatory Guidance, above, for our critique of EPA's statement that the "use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved."

II. TITLE VI APPROACHES AND ACTIVITIES

A. Title VI Approaches

2. Area-Specific Approaches

Please refer to our comments on the Investigatory Guidance, above, on area-specific agreements.

The first sentence in the second paragraph of this section is a sentence fragment. In the third paragraph, EPA refers to "one environmental media" when it should read "one environmental medium."

B. Title VI Activities

The first line of this section contains a typographical error: "you may should consider."

2. Encourage Meaningful Public Participation and Outreach

In the Recipient Guidance, EPA encourages recipients to consider integrating various activities into their permitting programs in order to identify and resolve issues that could lead to

the filing of a Title VI complaint. Specifically, EPA encourages effective public participation and outreach to "provide permitting and public participation processes that occur early, and are inclusive and meaningful." EPA indicates that integrating meaningful public participation and outreach activities will likely reduce the filing of Title VI complaints alleging discrimination in the public participation process for a permit. We define meaningful input to mean substantive input – not merely a fancy process – so that the community's input and desires are reflected in the permit outcome.

When a decision may disproportionately affect people of color, it is imperative to encourage the maximum level of meaningful public participation from the affected people of color. Without a higher level of scrutiny for public participation activities that affect people of color, there is no way to be sure that those who are traditionally disadvantaged and left out of the decision-making process will be included.

a. EPA fails to make recommendations to recipients that will make the public participation process "meaningful."

Public participation is meaningful if community groups not only participate early in the process, but also have a tangible *influence* on a potential project's design and location. The first myth that the proposed public participation activities create is the idea that affected communities have a "meaningful" say in the permitting process. Nowhere in EPA's recommended "meaningful" public participation activities, however, are there any references to activities where the public actually has the opportunity to participate actively in the decision-making process. All the recommended activities focus on education, communication, providing understandable information, and making the process clear and visible. All the activities are one-way processes, from a recipient to a community. The only activity that differs is the activity that recommends that recipients "provide clear explanations for reasons for the decisions made with respect to the issues raised by the community." This activity simply requires that the recipient justify its decision in light of the community's concerns. The activity does not require that the recipient give any "meaningful" weight to the public's comments. As a result, EPA's recommendations for meaningful public participation activities fails to encourage recipients to "meaningfully" include the affected people and stakeholders in the actual decision-making process.

b. Public participation does not guarantee fairness.

The second myth that EPA's proposed "meaningful" public participation activities create is that the availability of public participation eliminates the possibility of discriminatory decision-making in the siting of human health and environmental hazards. EPA assumes that procedures for increased public participation will create fairness or "level-playing field" in the decision-making process. This myth is wrong for two reasons:

1. The disparity in legal and technical expertise and resources between recipients and communities are barriers to meaningful public participation.

It cannot be assumed that procedures for increased public participation will necessarily address the fundamental differences in expertise and resources between communities of color and recipients.[65] For example, the recipients may ignore or overlook the comments and views of community members because they may have a preference for the opinions and advice of industry and state experts with advanced degrees.[66] In addition, environmental issues are commonly extremely technically complex. Even legislators admit that issues are too complex and often delegate their power to administrative agencies with the justification that the issues require the technical expertise of a panel of experts.[67] If legislators, with their vast resources of highly educated staffers and legislative assistants, cannot understand complex technical environmental issues, it is not reasonable to expect that low-income communities of color, without technical experts and university degrees, will understand the technical issues. Therefore, it is difficult, or near impossible, for the community to meaningfully participate in the procedural aspects of permitting if they cannot understand the complexities of the crucial issues that may affect their community.

Although EPA suggests that recipients should provide supplemental technical information and technical assistance to make data more meaningful, neither of EPA's options substitute for a technical expert who works specifically for the community. Technical assistance from the recipient may be helpful, but it would be dangerous to conclude that the recipient's expert knows what is best, and what the needs are, for the community. The community should have the capacity to determine itself what its needs are.

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[65] Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARVARD ENVIRONMENTAL LAW REVIEW 115, 181 (2000).

[66] John C. Duncan, *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J.ENVTL. L. 169, 188-193 (1999).

[67] Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox,* 17 STAN. ENVTL. L.J. 3, 17 (1998).

If community residents decide to get their own experts to represent their own needs, the next problem that arises is where they are going to get the money to hire the experts. EPA cannot award damages to complainants under its section 602 regulations or provide attorney fees.[68] As a result, there is no guarantee that a community can actually afford to hire or pay for a technical or legal expert. Many technical and legal experts are hesitant to do work for these communities knowing that there is a chance they might not get paid for their work. Also, as in other areas of environmental law, without legal or technical assistance, the community may find it difficult to even apply for an EPA technical assistance grant (TAG) in the first place because the application process is often so complex that it requires the help of another expert.[69] For example, in the case of Superfund TAG grants, EPA has admitted that "the agency has made it difficult for local citizens or environmental groups to win [grants] because of unnecessary 'restrictions, complexity, costs, and red tape.'"[70] One of the restrictions in that case was that the community group had to supply funds matching twenty percent of the total grant unless it obtained a waiver.[71]

Some of the other restrictions that may prevent communities from receiving grants and other federal assistance include that the applicant must demonstrate that it has reliable procedures or has plans for establishing reliable procedures for record-keeping and financial accountability related to the management of the TAG, and that the applicant is an incorporated non-profit organization.[72] This precludes assistance to communities that do not have an organization with 501(c)(3) non-profit status.

Such grants and technical assistance are imperative for communities who are filing a Title VI complaint. Although the complaint only requires a written letter, the community may need a technical expert to review pollution and demographic data. In addition, with a number of criteria required for the complainant to file a Title VI complaint that will be accepted by EPA, the community may need a legal expert to evaluate the best approach to take in filing the complaint. Without the grants and assistance it is difficult for a community even to participate in the administrative process of filing a Title VI complaint.

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[68] *See* 40 C.F.R. § 7.130(a) (1997) and *North Carolina Department of Transportation v. Crest Street Council, Inc.*, 479 U.S. 6, 12-16 (1986).

[69] Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TULANE LAW REVIEW 787, 834 (1999)(application process for TAGs in other areas of environmental law are so cumbersome for the average community organization that they often need to hire experts to apply for a grant to hire more experts).

[70] Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: Need for Legislative Authorization*, 25 ECOLOGY LAW QUARTERLY 1, 78 (1998) (quoting 1989 SUPERFUND MANAGEMENT REVIEW at 5-16).

[71] *See* Mank, *Environmental Justice and Title VI*, supra, at 835.

[72] *See* 40 C.F.R. Section 35.4020 (1997).

2. Time constraints in public hearings often unfairly prevent disadvantaged people of color from meaningfully participating.

Although EPA does encourage recipients to schedule meeting times and places that are convenient for residents who work and those who use public transportation, EPA fails to take into account the fact that the public hearing process itself does not guarantee meaningful public participation. Disadvantaged people of color may be unfairly left out of the public hearing process due to time constraints imposed by those running the hearing. Such time constraints often control how public hearings are run. It is common that public hearing may address a large array of issues, limiting the amount of time that can be spent on any single issue. The result is that an issue that is important to large numbers of people may only be allotted a small amount of time on the agenda. Often times, an issue will have a significant impact on a large number of people. It, however, may be impossible to allow every single potentially affected person to have an individual time to voice all her comments on the topic within the issue's allotted time. In addition, the social position of an individual may dictate how much time, if any, she will have to wait to testify. Although a moderator must be fair in allotting speaking times to individuals, a person who may be more powerful, influential, or connected may be able to influence the timing of the agenda and manipulate the hearing to disadvantage less influential members of the public. As a result, the time constraints of public hearings may unfairly affect a low-income, person of color's ability to effectively participate in a public hearing, further increasing the individual's feeling of powerlessness and frustration. In addition, the public participation process often ignores the fact that different social and cultural groups have different ways of communicating or participating.[73]

c. EPA fails to address the cultural and social barriers to meaningful public participation.

[73] *See* Duncan, *Multicultural Participation in the Public Hearing Process, surpa,* at 188-193.

Nowhere in EPA's recommendations for meaningful public participation is there an emphasis on understanding cultural and social differences in communication, problem solving, and perspectives or world views. When a decision is being made that may disproportionately affect people of color, it is appropriate to encourage the maximum level of participation from the affected people.[74] An understanding of the cultural and social differences between various cultures is vital for a recipient if it is to include different, non-white cultures in an effective public participation process.[75] Among separate cultures there are different methods of communication through non-verbal communication, values and behavioral styles, frames of references, and cultural awareness. Awareness of the differences in communication may be the difference between reaching an agreement and stirring more anger and distrust. For example, how people look at each other and what a particular look or expression means often varies within different cultures within a society. To effectively communicate, one must be aware of these differences, identify them, and make an effort to create an understanding. If recipients and EPA desire effective public participation, they must take the steps necessary to effectively communicate and accept differences, but be aware enough to respect the differences. Otherwise, when attempts that are made to understand each other fail, cultural differences are commonly ignored, causing for a culturally and socially different group of people to not have the opportunity to meaningfully participate in a permitting decision and thus claim discrimination.

d. Recommendations

EPA should include further advice to recipients on achieving the three keys to meaningful public participation in the context of permitting:

1. Maximizing the inclusion of the affected people of color in the permitting process by actively seeking them out and attempting to understand their social and cultural background;

2. Supplying them with the technical and legal knowledge and expertise so they may actively and meaningfully participate in the permitting process; and

3. Giving recognition and weight to the needs and opinions of affected people of color so they may be empowered to participate meaningfully in the decision-making process.

Without inclusion, knowledge, and weight to their opinions and needs, public participation activities will fail to reduce Title VI complaints alleging discrimination. Steps EPA should encourage recipients to take in order to ensure meaningful public participation among low-income communities of color include:

· Recipients should strive to achieve a level playing field for low-income communities of color, not only during the public participation process, but also within political and legal processes.

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[74] *Id.* at 188.

[75] *Id.*

· Recipients should engage in aggressive outreach to embrace a large spectrum of the public.

· Recipients should run public meetings with affected communities of color that include attempts to understand and respect cultural differences. These meetings should increase respect for differences and allow for a more effective and "meaningful" public participation process.

· Recipients should create Community Advisory Boards (CABs) that include environmental scientist or engineers, health experts, elected representatives, and community representatives. The CAB should also participate early in the planning and permitting process. CABs may potentially provide ideas and suggestions about a broad range of issues, including possible alternatives sites or proposals, community relations, monitoring, mitigation, and economic development. The criteria for selecting community representatives should be focused on including members of low-income communities of color who are not involved in politics and citizens at highest risk from a potential project.

· Recipients should be encouraged to create community advisory groups (CAGs) that participate early in the planning and permitting process. Unlike CABs, who only participate at one or two points of the process, the CAGs would publicly participate throughout the process. In addition, the CAG would have some decision-making authority, as opposed to the purely advisory function of the CAB. Much like the proposed Community Working Groups under 1994 proposed Superfund legislation, the CAGs should receive "substantial weight" by the EPA on their recommendations achieved by consensus.[76] The formation of a CAG would be, in part, designed to supplement the sometimes limited capacity of an agency or recipient to take into consideration public input under review and comment on procedure. Ideally, the CAG would also negotiate rule-making, as opposed to the traditional role of the public only participating in reviewing and commenting on substantive issues.

· Recipients should include a diverse range of citizens on the CAGs, especially people of color and those at highest risk from the project. The CAG should be a collective voice that speaks for people who do not traditionally have individual voices. It is important to recognize, however, that CAGs still may not effectively, completely, or accurately reflect or account for all public concerns and should not be depended on for the sole source of community outreach.

Additionally, EPA should provide meaningful technical assistance grants (TAGs) to allow complainants to thoroughly investigate a complaint once the EPA concludes after a preliminary investigation that the complaint raises serious health issues. This would allow the complainant to hire its own technical or legal expert who has the flexibility to pursue the complainant's own investigative leads, as opposed to the narrowly tailored assistance of a recipient expert.

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[76] H.R. 3800, §§ 117(g)(3); S. 1834, §§ 103 (Version 4, Oct. 3, 1994) (proposing to amend CERCLA §§ 117(1)(3)).

3. Conduct Impact and Demographic Analyses

a. Availability of Demographic Data and Exposure Data

In footnote 13, the use of the term "data release" in the last line is confusing in the context of discussing toxic releases.

b. Potential Steps for Conducting Adverse Disparate Impact Analyses

We refer EPA to our comments on the Investigatory Guidance for a critique of the construction "adverse disparate impact."

c. Availability of Tools and Methodologies for Conducting Adverse Impact Analyses
d. Relevant Data

EPA's current and proposed mapping methods do not adequately evaluate existing cumulative toxic burdens in impacted communities. The EPA's mapping methods, as illustrated in the Shintech case in St. James parish, Louisiana, are *facility-based*: existing and proposed polluting facilities are the focal point of the maps produced by the EPA. EPA plotted the existing and proposed facilities on a map and then generated radii of various sizes around the facilities to estimate the population count and racial composition within these radii. While this mapping method provides some important demographic information on the population in an area, this facility-based method is insufficient for analyzing and displaying the existing cumulative toxic burden in an area.

Please compare EPA's maps from the Shintech case[77] with the attached maps of two communities in Louisiana (Appendix B, Convent, and Appendix C, Alsen).[78] The attached maps are *community-based*: important community facilities, in this case, elementary schools with Head Start programs, are the focal point of the maps. Radii of various sizes are generated around these community facilities and then, instead of counting the population, TRI emissions and other potential sources of pollution within the radii are summed in order to calculate the existing cumulative toxic burden in these communities. We suggest that EPA incorporate community-based mapping methods in order to complement their facility-based mapping methods such that the existing cumulative toxic burdens on communities can be more accurately analyzed and displayed.

Known emissions should be above modelled data in the data hierarchy.

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[77] Available online at *http://www.epa.gov/civilrights/shinfileapr98.htm*.

[78] The community-based maps were created by Charles A. Flanagan, Louisiana Environmental Action Network.

5. Participate in Alternative Dispute Resolution

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of alternative dispute resolution and EPA's reliance on it.

6. Reduce or Eliminate Alleged Adverse Disparate Impact

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of EPA's odd "sole source" argument, and to §IV.B for our comments on mitigation measures.

C. Due Weight

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of EPA's "due weight" concept.

EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

GLOSSARY OF TERMS

Please see our comments on the identical Glossary of Terms found following the Investigatory Guidance, above.

V. CONCLUSION

Because the Investigatory Guidance is fatally flawed in so many ways, each of which penalizes the communities suffering civil rights violations and benefits the civil rights violators, we request that the Guidance be withdrawn and scrapped. We request that EPA begin again the process of formulating a Guidance, this time with the ambition not of making "stakeholders" satisfied but with enforcing civil rights.

Signed,[79]

Luke Cole
Center on Race, Poverty & the Environment
San Francisco, CA
Attorneys for complainants in *African American Environmental Justice Action Network v. Alabama Department of Environmental Management*, No. 28R-99-R4; *Angelita C., et al., v.*

[79]Please note that Appendix A contains a complete list of all the complaints involving the signatories to this letter.

California Department of Pesticide Regulation, No. 16R-99-R9; *Community United for Political and Individual Development v. Arizona Department of Environmental Quality*, No. 19R-99-R9; *IWU Negotiating Committee v. Arizona Department of Environmental Quality*, No. (filed August 2000); *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9; *Lucha Ambiental de la Comunidad Hispana v. Los Angeles County*, et al., No. 13R-97-R9; *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9; *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9; *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9; *Residents of Sanborn Court v. Department of Toxic Substances Control*, No. 02R-95-R9
Member of EPA's National Environmental Justice Advisory Council and member of EPA's Title VI Implementation Committee*

Complainants

African American Environmental Justice Action Network, Montgomery, AL
Complainant in *African American Environmental Justice Action Network v. Alabama Department of Environmental Management*, No. 28R-99-R4
African Americans for Environmental Justice, Noxubee County, MS
Complainants in *African Americans for Environmental Justice v. Mississippi Department of Environmental Quality*, No. 01R-93-R4

Alternatives for Community & Environment, Roxbury, MA
Complainants in *Alternatives for Community & Environment v. Massachusetts Department of Environmental Protection*, No. 27R-99-R6

[redacted], Houston, TX
Complainant in [redacted] *v. Texas Natural Resources Conservation Commission*, No. 02R-94-R6

Ascension Parish Residents Against Toxic Waste, Geismar, LA
Complainants in *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality*, No. 04R-97-R6; [redacted], *et al., v. Louisiana Department of Environmental Quality*, No. 01R-94-R6

[redacted], Daly City, CA
Complainant in *Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control*, No. 01R-99-R9

Angelita C., Pajaro, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Californians for Renewable Energy, Pittsburgh, CA
Complainant in *Californians for Renewable Energy v. California Energy Commission, et al.*, No. 2R-00-R9

Chemical Weapons Working Group, KY
Complainant in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6; *E. Boateng, et al., v. Alabama Department of Environmental Management*, No. 15R-97-R4

Chester Street Block Club Association, Oakland, CA
Complainant in *Chester Street Block Club Association v. Department of Toxic Substances Control*, No. 8R-97-R9

Coalition for a Good Environment, Morgan City, LA
Complainant in *Coalition for a Good Environment v. Louisiana Department of Environmental Quality*, No. 13R-98-R6

[redacted], Louisville, KY
Complainant in *Justice Resource Center, et al., v. Metropolitan Sewer District*, et al., No. 3R-00-R4
Communities for a Better Environment, Oakland and Huntington Park, CA
Complainant in *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9; *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9

Community United for Political and Individual Development, Randolph, AZ
Complainant in *Community United for Political and Individual Development v. Arizona Department of Environmental Quality*, No. 19R-99-R9

Concerned Citizens of Westmorland, Westmorland, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

El Pueblo para el Aire y Agua Limpio, Kettleman City, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

Environmental Health Coalition, San Diego, CA
Complainant in *Environmental Health Coalition, et al., v. San Diego County Air Pollution Control District, et al.*, No. 02R-96-R9

[redacted] Watsonville, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

[redacted] Oxnard, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Garden Valley Neighborhood Association, Austin, TX
Complainant in *Garden Valley Neighborhood Association v. Texas Natural Resources Conservation Commission*, No. 03R-94-R6

Greater Harrisburg Area Branch of the NAACP, Harrisburg, PA
Complainant in *Greater Harrisburg Area Branch of the NAACP v. Pennsylvania Department of Environmental Protection*, No. 01R-98-R3

Hyde Park/Aragon Park Improvement Committee, Augusta, GA
Complainant in *Hyde Park/Aragon Park Improvement Committee v. Georgia Department of Natural Resources, et al.*, No. 08R-94-R4

Improving Kids Environment, Indianapolis, IN
Complainant in *Improving Kids Environment v. City of Indianapolis*, No. 23R-99-R5

Involved Citizens of Helena Community, Inc., Newberry, SC
Complainant in *Involved Citizens of Helena Community, Inc., v. Newberry County*, No. 09R-97-R4

[redacted] Pueblo, NM
Complainant in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

IWU Negotiating Committee, Phoenix, AZ
Complainant in *IWU Negotiating Committee v. Arizona Department of Environmental Quality*, No. (filed August 2000)

Jackson/Mahon Neighborhood Association, Lubbock, TX
Complainant in *Jackson/Mahon Neighborhood Association v. Texas Natural Resources Conservation Commission*, No. 02R-96-R6

Justice Resource Center, Louisville, KY
Complainant in *Justice Resource Center, et al., v. Metropolitan Sewer District*, et al., No. 3R-00-R4

[redacted] Pajaro, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Lewisburg Prison Project, Inc., Lewisburg, PA
Complainant in *Lewisburg Prison Project, Inc., et al., v. Pennsylvania Department of Environmental Resources*, No. 02R-94-R3

Lone Star Chapter of the Sierra Club, Austin, TX

Complainant in *Texans United Education Fund, et al. v. Texas Natural Resources Conservation Commission*, No. 16R-98-R6; *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 1R-00-R6

Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente (LA CAUSA), Los Angeles, CA
Complainant in *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9

Louisiana Environmental Action Network, Baton Rouge, LA
Complainant in *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 20R-99-R6; *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 17R-98-R6; *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality*, No. 07R-98-R6; *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality*, No. 04R-97-R6; *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality*, No. 01R-94-R6.

Lucha Ambiental de la Comunidad Hispana, CA
Complainant in *Lucha Ambiental de la Comunidad Hispana v. Los Angeles County*, et al., No. 13R-97-R9

Manzanar Action Committee, Pico Rivera, CA
Complainant in *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9

Midway Village Advisory Committee, Daly City, CA
Complainant in *Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control*, No. 01R-99-R9

Mothers Organized to Stop Environmental Sins, Winona, TX
Complainant in *Mothers Organized to Stop Environmental Sins v. Texas Natural Resources Conservation Commission*, No. 05R-94-R6

[redacted], Birmingham, AL
Complainant in *Jefferson County Black Chamber of Commerce*, No. 02R-98-R4; [redacted] *v. Browning-Ferris Industries, Inc. of Birmingham*, No. 03R-94-R4; [redacted] *v. City of Hueytown*, Alabama, No. 05-94-R4; *George Munchus v. Jefferson County Commission,*

No. 06R-94-R4; [redacted] *v. City of Leeds, Alabama, No. 04R*-94-R4

North Baton Rouge Environmental Association, Baker, LA
Complainant in *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality*, No. 07R-98-R6; *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 17R-98-R6

Northwest Civic Association, Jacksonville, FL
Complainant in *Northwest Civic Association v. Florida Department of Environmental Protection, et al.*, No. 09R-94-R4

Oakville Community Action Group, Belle Chasse, LA
Oakville Community Action Group v. Louisiana Department of Environmental Quality, No. 03R-96-R6

Organized North Easterners and Clay Hill and North End, Inc., Hartford, CT
Complainant in *Organized North Easterners and Clay Hill and North End, Inc. v. Connecticut Department of Environmental Protection*, No. 01R-96-R1

[redacted] Salinas, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Padres Hacia una Vida Mejor, Buttonwillow, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

People Against Contaminated Environments, Beaumont, TX
Complainant in *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 02R-95-R6; *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 1R-00-R6

People Organized in Defense of Earth and Her Resources, Austin, TX
Complainant in *People Organized in Defense of Earth and Her Resources, et al. v. Texas Natural Resources Conservation Commission*, No. 01R-96-R6 and *People Organized in Defense of Earth and Her Resources, et al. v. City Council, City of Austin*, No. 05R-99-R6

Pine Bluff for Safe Disposal, Pine Bluff, AR
Complainant in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6

Residents Involved in Saving the Environment, Inc., Richmond, VA
Complainant in *Residents Involved in Saving the Environment, Inc. v. Virginia Department of Environmental Quality*, No. 12R-98-R5

Residents of Sanborn Court, Salinas, CA
Complainant in *Residents of Sanborn Court v. Department of Toxic Substances Control*, No. 02R-95-R9

Residents of the Easton Acres and Feltonsville Communities, Holly Springs, NC
Complainants in *Residents of the Easton Acres and Feltonsville Communities v. Wake County, North Carolina, et al.*, No. 12R-99-R4

Residents Opposed to Pigs and Livestock, College Station, TX
Complainant in *Residents Opposed to Pigs and Livestock v. Texas A&M University*, No. 02R-97-R6

[redacted] Oxnard, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9
St. Francis Prayer Center, Flint, MI
Complainant in *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, No. 05R-98-R5 and *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, No. 01R-94-R5

St. James Citizens for Jobs & the Environment, Convent, LA
Complainant in *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality*, No. 04R-97-R6

Save Sierra Blanca, Sierra Blanca, TX
Complainant in *Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al.*, No. 07R-97-R6

Save Sierra Blanca Legal Defense Fund, El Paso, TX
Complainant in *Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al.*, No. 07R-97-R6

South Cook County Environmental Action Coalition, Robbins, IL
Complainant in *South Cook County Environmental Action Coalition v. Illinois Environmental Protection Agency*, No. 14R-97-R5

South Suburban Citizens Opposed to Polluting Our Environment, Bloom Township, IL
Complainant in *South Suburban Citizens Opposed to Polluting Our Environment v. Illinois Environmental Protection Agency*, No. 01R-95-R5

South Valley Coalition of Neighborhood Associations, Albuquerque, NM
Complainant in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

SouthWest Organizing Project, Albuquerque, NM
Complainants in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

Southwest Public Workers Union, San Antonio, TX
Complainant in *Southwest Public Workers Union, et al., v. Texas Natural Resources Conservation Commission*, et al., No. 12R-99-R4

Waimanalo Citizens for a Healthy Future, Waimanalo, HI
Waimanalo Citizens for a Healthy Future v. Hawaii Department of Health, No. 02R-99-R9

[redacted], Tahlequa, OK
Complainant in [redacted], *et al. v. Hardage Site Remedy Corp., et al.*, No. 06R-97-R6

Environmental Justice Networks

Asian Pacific Environmental Network
Oakland, CA

Farmworker Network for Economic and Environmental Justice
Lake Alfred, FL

Indigenous Environmental Network
Bemidji, MN

Northeast Environmental Justice Network
New York, NY and Boston, MA

Southern Organizing Committee for Economic and Social Justice
Atlanta, GA

Southwest Network for Environmental and Economic Justice
Albuquerque, NM

Organizations & Individuals

Bill Addington
Save Sierra Blanca
Sierra Blanca, TX

Alliance Against Waste and Action to Restore the Environment (AWARE)
New Orleans, LA

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*For identification purposes only.

APPENDIX A:
CASES OF SIGNATORIES:

African American Environmental Justice Action Network v. Alabama Department of Environmental Management, No. 28R-99-R4

African Americans for Environmental Justice v. Mississippi Department of Environmental Quality, No. 01R-93-R4

Alternatives for Community & Environment v. Massachusetts Department of Environmental Protection, No. 27R-99-R6

[redacted] *v. Texas Natural Resources Conservation Commission*, No. 02R-94-R6

[redacted], *et al., v. Alabama Department of Environmental Management*, No. 15R-97-R4

Angelita C., et al., v. California Department of Pesticide Regulation, No. 16R-99-R9

Californians for Renewable Energy v. California Energy Commission, et al., No. 2R-00-R9

Coalition for a Good Environment v. Louisiana Department of Environmental Quality, No. 13R-98-R6

Chester Street Block Club Association v. Department of Toxic Substances Control, No. 8R-97-R9

Community United for Political and Individual Development v. Arizona Department of Environmental Quality, No. 19R-99-R9

Environmental Health Coalition, et al., v. San Diego County Air Pollution Control District, et al., No. 02R-96-R9

Garden Valley Neighborhood Association v. Texas Natural Resources Conservation Commission, No. 03R-94-R6

Greater Harrisburg Area Branch of the NAACP v. Pennsylvania Department of Environmental Protection, No. 01R-98-R3

Hyde Park/Aragon Park Improvement Committee v. Georgia Department of Natural Resources, et al., No. 08R-94-R4

Improving Kids Environment v. City of Indianapolis, No. 23R-99-R5

Involved Citizens of Helena Community, Inc., v. Newberry County, No. 09R-97-R4

IWU Negotiating Committee v. Arizona Department of Environmental Quality, No. (filed August

2000)

[redacted], *et al., v. Louisiana Department of Environmental Quality*, No. 01R-94-R6

Jackson/Mahon Neighborhood Association v. Texas Natural Resources Conservation Commission, No. 02R-96-R6

Jefferson County Black Chamber of Commerce, No. 02R-98-R4

Justice Resource Center, et al., v. Metropolitan Sewer District, et al., No. 3R-00-R4

Lewisburg Prison Project, Inc., et al., v. Pennsylvania Department of Environmental Resources, No. 02R-94-R3

Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District, No. 10R-97-R9

Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality, No. 20R-99-R6

Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality, No. 17R-98-R6

Lucha Ambiental de la Comunidad Hispana v. Los Angeles County, et al., No. 13R-97-R9

Manzanar Action Committee v. Department of Toxic Substances Control, No. 11R-97-R9

Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control, No. 01R-99-R9

Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control, No. 03R-97-R9

Mothers Organized to Stop Environmental Sins v. Texas Natural Resources Conservation Commission, No. 05R-94-R6

[redacted] *v. Browning-Ferris Industries, Inc. of Birmingham*, No. 03R-94-R4

[redacted] *v. City of Hueytown*, Alabama, No. 05-94-R4

[redacted] *v. Jefferson County Commission*, No. 06R-94-R4

[redacted] *v. City of Leeds, Alabama, No. 04R*-94-R4

North Baton Rouge Environmental Association, et al., v. Louisiana Department of

Environmental Quality, No. 07R-98-R6

Northwest Civic Association v. Florida Department of Environmental Protection, et al., No. 09R-94-R4

Oakville Community Action Group v. Louisiana Department of Environmental Quality, No. 03R-96-R6

Organized North Easterners and Clay Hill and North End, Inc. v. Connecticut Department of Environmental Protection, No. 01R-96-R1

Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control, No. 01R-95-R9

People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission, No. 02R-95-R6

People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission, No. 1R-00-R6

People Organized in Defense of Earth and Her Resources, et al. v. Texas Natural Resources Conservation Commission, No. 01R-96-R6

People Organized in Defense of Earth and Her Resources, et al. v. City Council, City of Austin, No. 05R-99-R6

Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality, No. 15R-99-R6

Residents Involved in Saving the Environment, Inc. v. Virginia Department of Environmental Quality, No. 12R-98-R5

Residents of Sanborn Court v. Department of Toxic Substances Control, No. 02R-95-R9

Residents of the Easton Acres and Feltonsville Communities v. Wake County, North Carolina, et al., No. 12R-99-R4

Residents Opposed to Pigs and Livestock v. Texas A&M University, No. 02R-97-R6

St. Francis Prayer Center v. Michigan Department of Environmental Quality, No. 05R-98-R5

St. Francis Prayer Center v. Michigan Department of Environmental Quality, No. 01R-94-R5

St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental

Quality, No. 04R-97-R6

Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al., No. 07R-97-R6

South Cook County Environmental Action Coalition v. Illinois Environmental Protection Agency, No. 14R-97-R5

South Suburban Citizens Opposed to Polluting Our Environment v. Illinois Environmental Protection Agency, No. 01R-95-R5

South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department, No. 13R-99-R6

Southwest Public Workers Union, et al., v. Texas Natural Resources Conservation Commission, et al., No. 12R-99-R4

Texans United Education Fund, et al. v. Texas Natural Resources Conservation Commission, No. 16R-98-R6

Waimanalo Citizens for a Healthy Future v. Hawaii Department of Health, No. 02R-99-R9

[redacted], *et al. v. Hardage Site Remedy Corp., et al.*, No. 06R-97-R6

Appendix B: Convent, Louisiana Community Map

Appendix C: Alsen, Louisiana Community Map

August 28, 2000

Ms. Ann Goode
Director
Office of Civil Rights
United States Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Ms. Goode:

In February, 1998, the United States Environmental Protection Agency (USEPA) issued its Draft Interim Guidance for Investigating Title VI Administrative Complaints (Interim Guidance). The document set forth proposed policies and procedures for investigating and resolving Environmental Justice complaints filed with USEPA regarding environmental permits issued by the states pursuant to delegated authority from the agency. While Title VI does not directly address the actions or activities of local governments, the City of Detroit recognized as did other local governments that implementation of USEPA's Interim Guidance would have a substantial, if not, significant impact on land use planning and economic development initiatives at the local level.

The level of concern was such that in June, 1998, we, in cooperation with the U.S. Conference of Mayors, hosted an open forum in Detroit to discuss these local government issues and to suggest revisions to the Interim Guidance to alleviate any adverse impact that implementation of the Guidance would have on land use planning and economic development. Subsequent to the forum, representatives of the City of Detroit presented these views to the USEPA Title VI Advisory Group at a meeting in Philadelphia.

On June 27, 2000, USEPA issued its Draft Agency Guidance for Investigating Title VI Administrative Complaints in two documents — "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" (External Guidance) and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits"(Internal Guidance). These documents reflect a substantial improvement in clarity and specificity of the Agency's proposed processes and procedures. While we appreciate the opportunity the USEPA has given to the City of Detroit, other municipalities, and stakeholders to exchange views and provide input into the process, our review of the Draft Guidance discloses suggested resolution of several of the issues of greatest concern to the City are not reflected in this document. Consequently, the City of Detroit makes the following comments and observations regarding specific provisions in one or both Guidances:

The process does not provide adequate certainty that following the guidance will result in a positive outcome or prevent an Title VI investigation. The External Guidance sets forth numerous suggestions for addressing Title VI issues early in the process. Although these suggestions are quite specific in nature, there is no commitment on the Agency's part that following these guidelines will be viewed favorably in the evaluation of a Title VI complaint. While we recognize this is Guidance and not a promulgated rule, those states (and municipalities) who undertake, in good faith, extended outreach, community input, and enhanced scrutiny of permit applications should be given some assurance that complainants, at least, will be required to make a greater showing that a violation has occurred than would be the case in the absence of such efforts.

Traditional notions of standing are absent from the Guidance. The complainant need not reside in the target area or be among the "affected population." The Guidance appears to allow anyone to file a complaint and allege a violation of a permit action regardless of any possible or theoretical harm to the complainant or the population of which he/she is a member. This policy invites those outside of the community to "make mischief" without consideration for the concerns or expressed support of those within the community that hosts the permitted facility.

The Guidance extends the bounds of "notice pleading." Complainants are simply allowed to allege that a violation has occurred without more. Complainants should at least be encouraged to state the nature of the violation, why he/she believes the permit action violates Title VI and briefly describe the nature of the harm. Without these basic allegations, USEPA and the states will expend unnecessary resources and time and possibly delay the permittees activities during this investigation period.

Almost any permit action can trigger an investigation, regardless of purpose. Mere permit renewals can trigger a Title VI investigation even if the permittee is in compliance with all permit conditions. As the Draft Guidance states compliance with the environmental laws does not constitute per se compliance with Title VI. Additionally, even a permit for a new facility that requires state of the art controls not present in existing facilities can be the subject of a Title VI complaint and investigation. Our discussion with community groups discloses their concerns are with older facilities or those which do not fall within the permitting requirements of the state or federal government. Title VI does not address these concerns or the inequities that might be visited upon new or modernized facilities.

The Draft Guidance provides no clear definition of "affected population" and no clear standards for the selection of comparison populations. Again, the Draft Guidance attempts to infuse traditional civil rights standards into the environmental permitting process, it goes far beyond those standards. The states, permittees, and local governments are left to guess whether a particular area will be considered an Environmental Justice area and the geographic boundaries of such an area. Because there are no discernible standards for selecting a comparison population, cities like Detroit may be inappropriately compared to bedroom communities. From a process standpoint, it would appear that every permit must be subjected to area wide modeling to reach any discernible threshold that the permit decision will withstand Title VI scrutiny. Such modeling is time consuming, requires enhanced resources and may yet fail to yield a scientifically valid result.

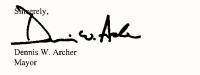
The Draft Guidance allows a finding of adverse impact without concrete standards and can be based on a purely hypothetical basis. USEPA is free to use any assessment tool or observation it deems relevant to make this determination. At present, the conclusions drawn from risk assessment tools are, at best, debatable. The present state of USEPA rulemaking has yet to address standards for air toxics and other pollutants making enforcement of a finding of an adverse impact subject to legal challenges and rulemaking on a case by case basis. There should be some threshold on which states, local governments and permittees can rely.

The economic benefit of the proposed facility must remain a justification. Whether or not the subject permitted facility provides direct employment to the affected population is nonetheless an important component to the health and safety of the affected community and to the local community at large. As stated above, new or modernized facilities often contain state of the art environmental controls that enhance environmental quality overall. Lack of economic development relegates the most disaffected communities to co-exist with less desirable uses that have fewer overall benefits and often lower standards of environmental accountability. Moreover, clean air is not quite so clean if bought at the expense of abandonment. There must be a balancing of the overall benefits of a facility and the environmental goals.

Finally, it remains troubling that the Title VI process is appended to, rather than integrated into the permitting process. Complainants are granted 180 days after the issuance of the permit to file an administrative action. By USEPA's own timetable, resolution of a complaint can take a year or more. We recognize that the Title VI remedies are primarily addressed to the actions of the state and suspension or revocation of a permit may be rare. As a practical matter, companies faced with going through an extended review process will think twice about implementing their projects out of fear that the permit may be subsequently revised or that third parties will use the administrative complaint process as a linchpin for court actions that could disrupt construction or renovation. We urge USEPA to revisit this issue now and in the future to explore ways that Title VI concerns can be fully examined during the permit process.

Again, we applaud the agency's efforts to clarify the process and to more fully define the substance of its Environmental Justice policies. We appreciate this opportunity and earlier opportunities to discuss these issues with you. We look forward to working with you in the future on this issue and other issues of concern to Detroit and our sister local governments.

Sincerely,



Dennis W. Archer
Mayor, City of Detroit

August 28, 2000

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August 24, 2000

Ms. Ann Goode
Director, Office of Civil Rights
United States Environmental Protection Agency
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Washington, DC 20460

Dear Ms. Goode:

Attached herewith are the comments regarding the Revised Title VI Guidance from the Environmental Council of the States. These comments were adopted by the membership at the ECOS Annual Meeting, August 13-16, in Girwood, Alaska.

ECOS is the national, non-partisan, non-profit association of state environmental commissioners. Our mission is to improve the environment by providing for the exchange of ideas, views and experiences among the States, by fostering cooperation and coordination in environmental management, and by articulating state positions to Congress and EPA on environmental issues.

We appreciate your willingness to work with the states to address this important issue, and look forward to continued efforts to improve the Guidance.

Regards,

Robert E. Roberts
Executive Director

Attachments
cc: George Meyer of Wisconsin, ECOS President
Ron Hammerschmidt of Kansas, ECOS Vice-President
Dennis Hemmer of Wyoming, ECOS Secretary-Treasurer
R. Lewis Shaw of South Carolina, ECOS Past-President

received
8/25/00

ECOS Comments on Revised Title VI Guidance

(As approved by the Cross Media Committee on August 14, 2000

When U.S. EPA issued its "Draft Interim Guidance for Investigating Title VI Administrative Complaints" in February 1998, the Environmental Council of the States ("ECOS") responded quickly in March 1998 with Resolution Number 98-2 ("Resolution"), declaring the Interim Guidance was unworkable and should be withdrawn. In addition, the Resolution set out principles that should be embraced in any policy or guidance addressing Title VI complaints. The Resolution is included as Attachment #1 to this document.

U.S. EPA issued revised guidance in two documents published in the Federal Register on June 27, 2000. Those are entitled "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" ("External Guidance") and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" ("Internal Guidance").

After U.S. EPA issued the two guidance documents in June 2000, ECOS members discussed during conference calls how the External and Internal Guidances compared to the seven fundamental principles set out in its Resolution. Further, all ECOS members were invited to submit comments on the guidance. These comments were developed as a result of those efforts and finalized at the ECOS annual meeting in August 2000. They are divided into comments pertaining to both Guidances, then to the Internal Guidance, then to the External Guidance.

Comments Pertinent to Both Guidances Published June 27, 2000

- Nothing is more important to the regulatory process than clearly defined terms and requirements, so that a person subject to a particular law can take specified actions with the knowledge and certainty that if properly implemented or undertaken, compliance is achieved. This is true of a permit applicant seeking to comply with environmental laws and it is true of a federal grant recipient seeking to comply with Title VI. We cannot hit a moving target, which is what these guidances represent. The guidances fail to lay out a clear process that if followed, will satisfy Title VI concerns. There are so many judgments left to U.S. EPA to be made, that the process described therein is completely devoid of the clarity and certainty that are fundamental requirements of a sound regulatory process.

- Notwithstanding U.S. EPA's attempt to describe a process that might be undertaken, it stresses in the External Guidance that such a process is completely voluntary and then comments in the Internal Guidance that "EPA may decide to follow the guidance provided, or to act at variance with this guidance, based on its analysis of the specific facts presented." Further, if a state voluntarily implements approaches to Title VI compliance, the External Guidance states those efforts will only be afforded "due weight" in gauging whether Title VI concerns have been satisfied, which is another judgment by U.S. EPA. Therefore, both guidances provide virtually no certainty.

- In its Resolution, ECOS stated that terms needed to be defined. Key terms are still not adequately defined in the two guidances. There is no single definition of adverse disparate impact. Similarly, terms such as "adequate justification" or "comparison populations" are not specifically defined.

- The standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, still lack specificity and assurance that sound peer-reviewed science will be used as called for in the ECOS Resolution.

- The guidances fail to define clearly how to select a comparison population, which is a key component of determining whether disparate impact exists.

- Neither guidance does much to help states avoid Title VI complaints as called for in the ECOS Resolution. Even if the state has an Environmental Justice (EJ) program, a complaint could be filed by someone whether or not he or she participated in the EJ program or public participation activities of the state.

- To fully implement the objectives of the Title VI Guidance, EPA must engage in an open debate with the Congress to clearly establish the boundaries of federal executive branch authority and provide an avenue for all levels of government to obtain adequate resources to implement agreed upon objectives.

- The choice of issuing guidance rather than regulation means that neither guidance document is binding on the states.

Comments on External Guidance

- There are aspects of the External Guidance that appear to respond to the Resolution. The variety of options provided in the External Guidance clearly address the need for states to have flexibility in designing their EJ programs. In addition, the External Guidance clearly represents an attempt to educate states on what types of factors are to be considered in evaluating whether a violation of Title VI has occurred.

- The resource intensity of operating state EJ programs is recognized in the External Guidance, but then dismissed because the guidance is voluntary. This misses the

mark. ECOS members question whether U.S. EPA has plans to furnish federal funding to offset this resource burden, or at a minimum, to identify where those resources can be obtained. Can state EJ programs be funded for existing federal grants with a related reduction in other activities under those grants? As written, the External Guidance does not adequately address the concern expressed in ECOS' resolution to avoid unfunded mandates and unnecessary burdens.

- The External Guidance does not allow the states to develop environmental equity programs that if implemented properly, automatically satisfy Title VI requirements, as called for in the Resolution. U.S. EPA wants the states to do so, but it won't tell us how much is enough. No matter what a state does in implementing an environmental equity program, U.S. EPA reserves the right to perform a *de novo* investigation and determine whether the state effort is good enough.

- The External Guidance declares states' approaches to Title VI compliance will be given "due weight" if a complaint is filed. The refusal by U.S. EPA to define its requirements specifically enough for a recipient or a permit applicant to be able to rely on the results of those approaches contributes further to the uncertainty. U.S. EPA claims it cannot delegate its responsibility to assure compliance with Title VI. That does not preclude U.S. EPA from defining a process that either provides greater assurance that robust state approaches will be given greater weight or heightens the threshold for a Title VI complaint to be accepted. U.S. EPA prefers to leave itself complete discretion, which only further contributes to the uncertainty and potential arbitrariness of its review. In the end, such uncertainty raises doubt that the External Guidance will actually assist the states in complying with Title VI.

Comments on the Internal Guidance

- The Internal Guidance makes it clear that permit decision making is not shifted from the states to the federal government as called for in the Resolution. The revised guidance clearly states that a Title VI complaint does not nullify or even stay a permit and elaborates that the interest of the Federal Government is in ensuring nondiscrimination by its recipients.

- The guidance also addresses the concern in the Resolution that investigating and resolving Title VI complaints must not create unnecessary delays in the environmental permitting process. The guidance clearly states that acceptance of a complaint does not stay the permit at issue.

- Another change that appears positive is that the Internal Guidance states that U.S. EPA "generally expects to consider only those types of impacts affected by factors within the recipient's authority under applicable law," which is consistent with U.S. EPA's ruling in the Select Steel case, and an important acknowledgment of a recipient's limitations in achieving resolution of the issues raised. References to state constitutional authorities and other general laws that allow U. S. EPA to broadly define the recipient's authorities should be deleted.

- The revised guidance does not specifically recognize the precedential value of the Select Steel ruling, which is the only Title VI complaint that U.S. EPA has adjudicated. The guidance seems to be stating that fundamental concepts in the Select Steel ruling may at times apply and at other times they may be overcome. This appears to be inappropriate treatment of an administrative ruling. U.S. EPA should clarify how this guidance will be implemented to ensure consistency with Select Steel, as legal principles require.

- The Internal Guidance does not provide adequate and definite timeframes as requested by the Resolution. The timeframes for various state actions in the revised guidance is unreasonably short. Fourteen (14) calendar days are allowed to submit additional information the state would like U.S. EPA to consider. Only 10 calendar days are allowed for a recipient to voluntarily comply after a formal determination of noncompliance. At the same time, in discussing the viability of Title VI complaints received, the guidance states that certain timeframes may be waived for good cause or that some steps should "generally" be done within a certain time period. Untimely complaints may be rejected, but U.S. EPA retains the right to waive the timeframe. No certainty or enforceability is provided for any of the timeframes. Experience to date suggests U.S. EPA cannot meet these timeframes. The process should contain incentives for timeframes to be met and consequences if they are not.

- The thresholds for who can file a complaint and for the acceptance of complaints are too low. The person filing the complaint does not have to be directly impacted by the issue but rather simply a member of the class of people, or a representative of a person or class of people. Further, there is no minimum level of support that must be provided with the complaint for U.S. EPA to accept it. In fact the guidance only states that complaints will be rejected if they are "so incoherent they can not be considered grounded in fact or those that fail to provide an avenue for contacting the complainant." Further, the statement in the guidance that "Complainants do not have the burden of proving their allegations are true" only invites frivolous complaints. Before accepting a complaint, U. S. EPA needs to determine the veracity of the complaint and that the complaint broadly reflects the concerns of the impacted community. Acceptance determinations should be made within 20 days of receiving the complaint. Better defined threshold requirements will avoid wasting resources of U.S. EPA and the recipient.

- U.S. EPA attempts to reduce the number of permit decisions on which a Title VI complaint will be continued through the investigation process. The guidance states that where the complaint was triggered by a permit that significantly decreases overall emission or emissions of pollutants of concern, U.S. EPA will likely close its investigation. Unfortunately, the guidance goes on to say that while a specific complaint may be dismissed on the basis of decreased emissions, U.S. EPA may choose to conduct a compliance review of the recipient's relevant permit program either at that point in time or at some future date. Once more, the guidance fails to provide certainty. Similarly, the guidance states that complaints involving permit

modifications other than emissions will "generally" not be investigated, but provides no assurance.

- The role of local governments along with their authority is still substantially ignored in the revised guidance. The discussion of Area Specific Agreements implies their participation, yet no reference is made nor is there any effort to address limitations on legal authority. The Internal Guidance also does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, brownfield redevelopment, or greenspace preservation initiatives as called for in the Resolution.

- The emphasis placed on the informal resolution process is likely to be resource intensive and place unnecessary burdens on states without a clear picture of what will constitute success. The ability of the recipient to justify a disparate impact is a positive element of the revised guidance. However, U.S. EPA claims the right to rebut a justification if it determines that a less discriminatory alternative exists. Once again, standards for this determination are lacking, which causes uncertainty.

Conclusion

The draft guidances published on June 27, 2000 did address some of the concerns identified in the previous ECOS resolution; however, the preceding specific comments also identify fundamental flaws in these draft documents. Accordingly, ECOS calls for U.S. EPA to revise the documents substantially prior to issuing either guidance in final form. Any final guidance must provide certainty, set out explicit steps that can be taken, use the tools and science available to us today, and avoid unnecessary burdens/unfunded mandates. The current guidances fall short on each of these issues. Further revision to the current draft guidances must also focus on providing certainty - in terms of process and outcome - to the parties involved, by clarifying legal authority, by defining all terms, and by assuring U.S. EPA's commitment to be bound by it. ECOS strongly urges U.S. EPA to address the aforementioned issues in finalizing the guidance documents.

ENVIRONMENTAL DEFENSE

August 28, 2000

BY EMAIL AND FACSIMILE TRANSMISSION;
HARD COPY TO FOLLOW
Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
Attn: Ann E. Goode, Director
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Transmitted by email to: civilrights@epa.gov

Re: EPA's *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*

Dear Ms. Goode:

These comments cover both of the following draft documents:

a) EPA's *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs,* and
b) EPA's *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits,*

because the two documents reference each other and address the same substantive information. For convenience, both documents collectively are referred to below as "draft Guidance." These comments are submitted on behalf of Environmental Defense, a national, not-for-profit organization dedicated to protecting the environmental rights of all people, including the right to clean air, clean water, healthy food, and flourishing ecosystems. Over 300,000 Environmental Defense members live in the United States.

Environmental Defense strongly supports the issuance of EPA Guidance on Title VI compliance. The public has a right to know the potential civil rights impacts of agency actions on communities of color and low-income communities. Affected communities and agencies also benefit from predictability in the process that is used to assess pollution control permits. EPA Title VI Guidance can help to provide such predictability. For example, the glossary of defined terms in the draft Guidance provides common ground for community members, recipients and other interested parties to initiate a dialogue regarding compliance with EPA's Title VI regulations.

Specific areas of the draft Guidance could be improved and in present form raise concerns about clarity and effectiveness which are described below. Our comments include recommendations for specific improvements.

1. The Draft Guidance fails to provide a set timeline to complete Title VI Investigations. Regarding EPA's response to administrative complaints, the draft Guidance states that the Office of Civil Rights "*intends* to promptly investigate all Title VI complaints that satisfy the jurisdictional criteria." (Emphasis added.) It is not clear from the draft Guidance how long EPA will take, or expects to take, to investigate a new Title VI administrative complaint. In addition, no provision is made for the administrative complaints already pending in EPA's Office of Civil Rights, many of which have been pending for years.[1] In light of the approximately 50 complaints still awaiting EPA investigation, the final Guidance should provide complainants and recipients with a more concrete time commitment from EPA, *i.e.*, six to eight months, so that the public can rely upon timely and responsive Title VI investigation.

2. No administrative appeal process is provided for complainants. Should EPA make a finding of recipient noncompliance with EPA's Title VI regulations, the draft Guidance includes an administrative appeal process for recipients. However, in the event of a dismissal of a Title VI complaint, there is no such appeal procedure for complainants. While we recognize that a Title VI investigation is not an adversarial proceeding between recipient and complainant, it seems unfair to allow an appeal and further EPA review process for recipients and not allow the same access to complainants. Complainants should be allowed the same review and appeal process as recipients, and the final Guidance should include an administrative appeal process for complainants.

3. The alternative dispute resolution process is too vague to be useful. Throughout the draft Guidance, EPA references its preference for complainants and recipients to engage in alternative dispute resolution ("ADR") before and after filing an administrative complaint. Yet, aside from references to a selection of ADR procedures, the draft Guidance fails to articulate any further guidelines for ADR. There is no discussion of who should bear the costs of pursuing ADR and what the timeline should be for ADR before EPA Title VI investigation begins. This particular recommendation is also problematic because if ADR was a successful, local problem-solving strategy, complainants would not have had to file Title VI complaints in the first place. Without more discussion about the alternative dispute resolution process, a general recommendation for ADR might not be reasonable.

[1] According to the EPA website, as of June 29, 2000, fifty Title VI administrative complaints were pending in the EPA Office of Civil Rights, including one accepted for investigation in 1993 - still awaiting resolution.

Without question, the draft Guidance expands and improves upon the Interim Guidance issued by EPA in 1998. We recognize the difficulty of drafting these proposed regulations and appreciate the time spent by EPA staff to complete the draft Guidance. We also urge EPA to consider our comments in preparing the final Title VI Guidance, as well as the comments of other environmental and civil rights advocates, to ensure the Guidance provides the clearest and most useful regulations for the public to follow.

Thank you for your consideration of our views.

Respectfully submitted,

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(b) (6) - Privacy on 08/28/2000 04:30:53 PM

To: Group Civilrights (b) (6) - Privacy
cc:

Subject: Re: URGENT !! THE DEADLINE TO SEND IN YOUR COMMENTS IS AUGUGUST 28,2000!! PLEASE HIT REPLY AND COMMENT!

I would like to take the time to complain not only about the status of my neighborhood but also the neighborhoods that I commute through. There are many unused lots, waste sites, sites that emit radiation, and sewage problems in many low-income areas. This is a mockery of human rights, in which promotes class and capitalism. If repair or production is made in these communities it is VERY slow to occur. I will personally join any forces and organizations in order to rise and commit to action to ensure that families, communities, and its children are protected. Something needs to be done NOW!

SOUTHWESTERN
UNIVERSITY
SCHOOL OF LAW

July 27, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: **Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits.**

Dear Administrator Browner and Ms. Goode:

In devising a comprehensive guidance to investigate Title VI complaints in the permitting area, the Environmental Protection Agency is metaphorically at the crossroads. The Agency has the extraordinary opportunity to set aside the ceaseless debate on the cause of environmental inequities and take remedial action which will have the direct effect of promoting effective strategies to reduce pollutants in impacted communities. It is no exaggeration to say that real lives depend upon the Agency's courage during this politically sensitive time.

An Agency's power manifests itself not only by what it mandates, but by what it tacitly allows. Specifically, despite ample regulatory discretion to address environmental justice concerns under existing environmental laws, in the absence of an explicit legal duty many state agencies have consistently failed to address continuing disparities. This makes the EPA's regulations and administrative proceedings under Title VI a critical legal avenue for residents in

675 SOUTH WESTMORELAND AVENUE • LOS ANGELES, CALIFORNIA 90005-3992

environmentally devastated communities. In response to numerous Title VI complaints, the Agency committed time and resources into devising a guidance for states in this politically difficult and technically complex area. However, a reading of the new Guidance leads to the inescapable conclusion that–despite the effort expended--the EPA will not deliver on its promise to ensure compliance with civil rights laws, nor will it comply with President Clinton's executive order on environmental justice.

A substantial part of the Guidance is devoted to the EPA imploring and cajoling recipients to do the right thing, to devise strategies to reduce pollutant levels in overburdened communities. Yet, just under the surface of this encouragement is a much stronger message: the regulated community is sure to understand from this guidance that the EPA will go to *extraordinary lengths* to avoid administering a Title VI remedy, either withdrawing funds or requesting the Department of Justice to seek injunctions. The EPA's trepidation is evident in the generous presumptions and ample procedural protections given the recipient in stark contrast to the lack of recourse available to the complainants. One can understand why the Agency would be hesitant to withdraw funds, with the potential consequences of reacquiring previously delegated permitting programs. Although this is a step the Agency may not relish taking, the fact remains that without a credible threat by the EPA to use Title VI, many recipients will continue to take actions that cause and contribute to oppressive environmental inequities.

Hopefully the EPA is willing to reconsider its position. With that in mind, I respectfully offer the following comments.

1. **"Adversarial" and the Double Standard**. In the Guidance, the EPA explains that the proceedings are not "adversarial" between the complainant and recipient and therefore the complainant has no right to appeal. However, the Agency employs a different standard to the recipient, affording it substantial procedural protections, including the right of appeal after an adverse decision. As a consequence of this discrepancy, a governmental entity's monetary interest ironically is given far more protection than private citizens' constitutional interests.

   The EPA's interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, the Agency has effectively made the complainants' civil rights contingent upon the political will of the EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is frankly disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court. Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated

analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with Civil Rights laws.

2. **Independent Compliance Reviews**. In the Guidance, the EPA repeatedly asserts that it has a right to conduct a compliance review even if the complaint does not state a claim or the complaint is untimely filed. Pointing out the Agency's unquestioned authority to undertake compliance reviews is of little comfort to complainants and those similarly situated. As a practical matter, the EPA's Office of Civil Rights (OCR) is unable to timely investigate pending complaints, much less undertake independent *sua sponte* compliance reviews.

3. **No Permit Stay**. The Guidance states that the OCR will not consider a complaint until the permit has issued, and further that the submission of a complaint will not stay the permit. This means that the most meritorious Title VI complainants will nevertheless experience a substantial lag time and possibly irreversible impairment to their communities before any relief is provided. Considering the current backlog of cases, even the most flagrant violators can expect to continue plainly illegal practices for years, even decades, before any sanctions occur. Yet, in light of this troubling potential situation, the Guidance contains no provision to consider the stay of a new permit (and associated emissions increases) pending an investigation in cases which would warrant a temporary injunction in an analogous court proceeding.

4. **Area Specific Agreements**. The EPA encourages recipients to develop area-specific agreements which contain plans to eliminate or reduce existing disparate impacts. As an incentive, the EPA has indicated it will review such plans and if they meet certain criteria, they will be given "due weight" in a Title VI investigation. These types of recovery plans–with multiple stakeholder participation--are possibly the best means to accomplish real progress in impacted communities. The EPA should be commended in its continual encouragement of these voluntary arrangements. That said, however, the precise role the Guidance ascribes to such an agreement in the course of a civil rights investigation is both ambiguous and troubling.

What is "Due Weight"?

The Guidance suggests that unless certain criteria are met, plans "might not be sufficient to constitute an agreement meriting due weight." This suggests that "due weight" is a threshold rather than a range. This makes "due weight" operate like a presumption rather than a factor warranting typical evidentiary weight. This distinction is not merely academic. If a determination that an area specific agreement merits "due weight" precludes further inquiry into the recipient's actions, then operationally it is an

improper presumption of compliance with Title VI. For example, consider a hypothetical recipient who establishes an agreement that meets the "due weight" criteria because the plan it contains will optimistically result in some pollutant reduction over time. But the plan is mediocre at best and it is not as good as plans developed in other jurisdictions under similar scenarios. Nevertheless, if this plan meets the "due weight" threshold, the Guidance suggests that at that point the OCR will determine without further inquiry that the recipient is adequately responding to the disparate impact and therefore is not violating Title VI. In such a case, a mediocre plan operates just as effectively in a Title VI investigation as a much more comprehensive plan. If interpreted this way, the Guidance promotes the perverse incentive for recipients to do the minimum necessary to trigger the "due weight" determination and insulate the recipient from an adverse Title VI decision.

Subsequent Complaints.

The practical consequences of a threshold-type "due weight" standard are more disturbing considering the EPA's position that if a later-filed complaint raises allegations regarding "other permitting actions" by the recipient, the OCR will generally rely on the earlier finding (presumably of due weight) and dismiss the complaint. Not only does the existence of an area-specific agreement act as an evidentiary presumption in the current Title VI investigation but, remarkably, it effectively operates as *res judicata* or *collateral estoppel* in subsequent Title VI proceedings.

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these exceptions raise further ambiguity. Normally, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency's position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an area-specific agreement no longer is entitled to "due weight."

However, if--as the Guidance suggests--newly issued permits with associated emission increases do *not* constitute significantly changed circumstances *per se*, this forces another important unaddressed question: to what extent will the Agency allow new emissions to consume any gains made by the reduction strategies in the area-specific agreement? The Guidance suggests that the agreement, overall, should operate to reduce/eliminate the disparity within a reasonable time. But if subsequent permitting activities allow additional pollutants into the overburdened area without constraint, then any promise of real world progress is illusory.

To remedy this problem, the EPA should require that subsequent permits may issue only if the new emissions (or impacts) from the facility are offset or mitigated *within the same impacted area* in a ratio greater than 1:1. This would allow newer cleaner facilities without compromising a recovery plan for the affected community. Project sponsors who participated in the area specific agreement and contributed to pollutant reductions should be given priority in subsequent permit proceedings to the extent allowable by law.

Complainant's participation in the Agreement.

The EPA Guidance specifies that such plans may be developed without consulting the complainant. However, often it is the complainants–typically organizations comprised of community residents--who better understand the scope and nature of the impacts. Thus, substantially greater weight should be given to agreements that are designed with the full participation of the complainant and those similarly situated. The Agency should make it clear that plans lacking input by the complainant will be viewed skeptically by the EPA, as this evidences a lack of engagement between the recipient agency and its constituents.

Criteria for assessing adequacy of an Area Specific Agreement.

Key terms of adequate plan criteria, such as reductions over a "reasonable time" and "significantly reducing impacts" are not defined. To be sure, these terms are difficult to define in the abstract because they are context-specific, e.g., "reasonable time" might depend on the severity of the problem. However, additional guidance can and should be given on this critical point. A useful benchmark would be to consider the extent to which the recipient is exercising its discretionary authority to minimize or eliminate adverse impacts the course of issuing permits. For example, if the recipient agency is expediting permits, or allowing favorable baseline determinations and emission factors (from the permit applicant's perspective), then the extent to which the recipient can be presumed to be attempting to reduce emissions is questionable. Accordingly, such actions suggest that recovery is not likely to occur within a "reasonable time" and any associated plan or agreement should not be given due weight. Conversely, a comprehensive plan that contains a detailed commitment by a recipient agency to use its authority to require an alternative site analysis, control emissions, and/or minimize facility-related impacts as much as possible might be considered to "significantly reduce impacts" and eliminate the disparity within a "reasonable time."

A technical problem left unaddressed by the Guidance is the method of measuring a plan's expected pollutant reductions to determine if the area specific agreement should be given due weight. Some strategies are likely to be inherently hard to measure. For

example, instead of involving pollution control equipment with continuous monitoring equipment, the reduction strategies might attempt to control fugitive emissions or non-point runoff by using better land management practices, buffer zones or even institutional controls under some circumstances. The EPA should make it clear that while such strategies are encouraged, the Agency will be conservative in estimating expected reductions because there is little or no margin for error in highly impacted communities.

Theoretically at least, recovery plans have the potential to protect communities if they are carefully designed and implemented. As a practical matter, however, given the EPA's apparent aversion to actually imposing a Title VI remedy, coupled with its position that permit denial is not an appropriate solution (see discussion below), all that remains is a very weak incentive for state agencies to develop token agreements that have no realistic prospect of significantly reducing or eliminating disparities.

5. **Standard Deviation:** There is a problem measuring the degree of disparity using a consistently applied standard deviation to all cases, even assuming a generous one from the complainants' perspective. Instead of imposing a rigid population-oriented statistical methodology, a standard should take into account the distinct vulnerabilities of any particular impacted community. For example, a less "extreme" disparity (statistically measured) should be sufficient to support a case of disparate impact when the pollutants of concern exacerbate asthma and there is an abnormally high rate of asthma in the affected community. This approach is more responsive to the context-specific nature of diverse environmental justice scenarios that exist throughout the EPA's jurisdiction.

6. **Considering only sources, stressors and impacts within the recipient's authority to determine a violation.** The EPA has noted that it will consider a wide range of background factors to determine if an adverse impact exists, but will consider the more limited factors "within the recipient's authority" to consider whether there is a Title VI violation. Although appearing logical on its face, this distinction might be too simplistic in practice. There is ample support for the position that there is extensive authority under existing environmental statutes (omnibus clauses, for example) to address a wide range of impacts, even matters that may appear to be outside the explicit jurisdiction of the regulatory agency. Thus, the EPA's Guidance should make it clear that if the recipient has discretion under the applicable statutes and regulations to require measures that would ultimately result in mitigation of an undesired impact, failure to use that discretion could support a finding of a Title VI violation.

7. **Using "significance levels" under applicable regulations to establish a benchmark for an "adverse impact".** The EPA Guidance suggests that where risks or other measures of potential impacts meet or exceed a relevant "significance level," the impact will be presumed adverse. While this is a good approach, the Agency should be careful that the converse assumption is not made, i.e., a presumption of no adverse impact if a

significance level is not exceeded. It is not unheard of for permit applicants and regulatory officials to manipulate baselines and emission factors to keep from triggering applicable significance levels. This risk is likely to be greater in those very cases that Title VI is designed to address, cases where regulatory agencies have an inappropriate bias in favor of the regulated community to the detriment of residents near the polluting facilities. Thus, even in cases where significance levels are *not* exceeded, the OCR should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, the OCR should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

8. **Using compliance with NAAQS and other health-based ambient standards as presumptively protective.** Consistent with the approach taken in the *Select Steel* case, the EPA Guidance reiterates the position that if the area in question is in compliance with a health based standard, there is no "adverse" impact. The Guidance further suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. In the context of the backlog of cases, intense political pressure from industry and some state regulators, budget constraints, this facile presumption is not only a recipe for regulatory inertia, but a convenient escape hatch as well. Moreover, since the complainant does not have standing as an "adverse party," and the recipient will not challenge such a finding, the OCR is in the awkward position of having to rebut its self- imposed presumption. This procedural deformity is a consequence of the Agency's curious attempt to cast the process as non-adversarial with respect to the complainant, while at the same time affording the recipient the protections (and more) of an adjudicative, adversarial process. Perhaps the better approach would be to recognize that the because the complainants' civil rights may have been violated by the recipient, the process is necessarily adversarial, even though the proceedings are labeled an administrative investigation. Moreover, since the recipient has significantly more resources than the complainant, the EPA should be extremely cautious in imposing procedural roadblocks that operate to leave the complainants without recourse.

If the agency is committed to using health-based standards to raise presumptions, it should avoid doing so when the standard applies to a large geographical area, such as an air shed. These general determinations–although perhaps appropriate for SIP planning purposes--may be virtually meaningless at the local level. Air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

9. **The Role of Economic Development in Justifying Disparate Impact.** The Guidance suggests that broader interests such as economic development may be an acceptable justification for the disparate impact if the benefits are delivered directly to the affected population and if the broader interest is "legitimate, important *and* integral" to the recipient's mission (emphasis supplied). It is difficult to imagine that economic development would be an interest that is "integral" to the mission of an environmental protection agency, whether it is federal, state, local or tribal. If so, then the statement in the Guidance is a *non sequitur*. However, it is more likely that the Guidance specifically lists economic development as a type of justifying "broader interest" because the EPA anticipates justifying disparate impact on economic grounds. Therefore, it is important that the EPA provide better detail as to the precise role of economic development in order to allow adequate opportunity for public comment. The Guidance as proposed does not provide sufficient notice on this major point because the ambiguity generates additional unaddressed questions. For example, if an economic interest that is "legitimate" or merely "important" to the recipient's mission can support a justification if there are corresponding benefits, what kinds of benefits are sufficient and to what extent should benefits be delivered to the affected population? Hopefully, the Agency will make it clear that the promise of jobs to some community residents, alone, does not constitute a justification for imposing a disparate impact.

9. **Denial of a Permit is not an Appropriate Solution.** The EPA Guidance states explicitly that "it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." By this surprising statement, the EPA makes it virtually impossible to successfully challenge the legitimacy of a permit proceeding (or other agency action for that matter) in light of Title VI. Consider the case of a flagrant violation: a hypothetical official advises a permit applicant that the agency will only grant a permit for a major facility if it is sited in an overburdened Latino community. This action is taken because the environmental agency doesn't want to contend with opposition from a White wealthy community situated near a more geographically appropriate site for the facility. Under the logic reflected in the Guidance, denial of the permit in this fictional case would *not* be an appropriate solution simply because the permit is not the "sole" cause of the impacts within the Latino community. No one discrete agency action is likely ever to be solely responsible for an adverse impact, but it does not follow that actions that contribute to disparate impacts should be allowed.

Instead of adopting this baffling position, the EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases. The EPA, in attempting to assuage the regulated community by categorically rejecting permit denial as a potential solution in a Title VI case, while at the same time sending a strong message that withdrawal of funds is unlikely to ever occur,

effectively decimates the authority of this Civil Rights law in the permitting context, and probably beyond that.

10. **Limited Role of an alternatives analysis**. The Guidance appears to limit the role of an alternatives analysis to rebutting a proffered justification. After (1) the EPA has made a finding of an adverse disparate impact (which is extremely unlikely given the interplay of presumptions created by the Guidance), and (2) the recipient offers a justification, only then is an alternatives analysis explicitly made relevant under the Guidance. First, familiar procedural complexities arise–who is going to step forward with a less discriminatory alternative if the complainant is not an adverse party? Equally important, however, is that the Agency has relegated an analysis of alternatives to a stage in the proceedings that the OCR is unlikely to ever reach. Consequently, if it continues to adhere to this Guidance, the Agency has squandered the opportunity to encourage recipients to use their considerable authority under existing environmental laws to engage in an analysis of alternative processes or sites in appropriate circumstances.

In my frequent dealings with the Environmental Protection Agency, I have been fortunate to encounter personnel who are sincerely committed to the principles of environmental justice. The Agency–as it should--has made an effort to communicate with all affected stakeholders in order to better understand the scope and significance of environmental inequities. More importantly, citizens from impacted communities generously gave their time and limited resources to this effort in the hope that Title VI could be developed into a viable, workable remedy for long standing disparities. Regrettably, the Guidance as proposed insidiously undermines the design and potential of Title VI. Although replete with precatory language giving lip service to the goal of reducing disparity, the Guidance in reality is a procedural stealth attack on environmental justice. Fortunately, countless remarkable individuals in impacted communities will continue to respond to actual conditions in spite of regulatory machinations, either at the state or federal level. Unfortunately, the EPA under the Draft Guidance is not only doing a disservice to its most important constituents, it is impairing its own legitimacy in the process.

Respectfully submitted,

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August 28, 2000

Honorable Carol Browner, Administrator
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Anne Goode, Director
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1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigations Guidance")

Dear Administrator Browner and Ms. Goode,

The Institute for Public Representation (IPR), the Widener University Environmental and Natural Resources Law Clinic, and the Mid-Atlantic Environmental Law Center, each on its own behalf, and on behalf of the Delaware Chapter of the Sierra Club and the Wilmington Waterfront Watch, submit the following comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Guidance"), noticed for public comment on June 27, 2000 (65 F.R. 39649) by the Environmental Protection Agency (EPA).

IPR is a nonprofit, public interest law firm located at Georgetown University Law Center. IPR has been working on issues of broad public concern for over twenty years. Since 1991, IPR has represented individuals and groups concerned about environmental threats to public health, safety and natural resources, often dealing with issues of

"environmental justice." On June 16, 1998, IPR filed a Title VI administrative complaint with EPA on behalf of the Mattaponi Indian Tribe of Virginia.[1]

The Widener Environmental and Natural Resources Law Clinic has provided legal services to local, state and national not-for-profit environmental organizations since 1989. Since 1994, the Clinic and its students have focused on ascertaining and monitoring disparate impacts of enforcement and implementation of environmental laws in Delaware.

The Mid-Atlantic Environmental Law Center is a regional not-for-profit public interest law firm with offices located on the campus of Widener University School of Law in Wilmington, DE. The Center's Environmental Justice Initiative provides legal representation to individuals, and grassroots and national organizations in environmental justice matters throughout the mid-Atlantic region.

The Sierra Club is a not-for-profit corporation that works on behalf of the public interest. The Delaware Chapter of the Sierra Club is dedicated to the equal enforcement and implementation of environmental laws for all citizens in Delaware. The Club has 1,550 members in the State. The Chapter presently serves on the State's only Environmental Justice committee, styled the "Community Involvement Advisory Committee," and its members have published several scholarly articles on environmental racism.

Wilmington Waterfront Watch provides information to the people of Wilmington, DE, and aims to strengthen ties within the City's economically disadvantaged and minority communities. The group focuses on a variety of associated issues affecting urban residents, including water quality, combined sewer overflows, and leaking underground storage tanks.

While there are some encouraging signs in the Guidance, such as the strong verbal formulation of the justification standard, many provisions of the Guidance fall well short of the mark. First, the Guidance often misconstrues EPA's own Title VI regulations and ignores established Title VI precedent, resulting in policies unduly favoring recipients of federal funding ("recipients"). Second, the Guidance fails to uphold core legal values of due process and procedural fairness. Third, the Guidance fails to take prudent measures to ensure the enforceability of consensual compliance agreements. Fourth, the Guidance erects arbitrary barriers to the acceptance of complaints. Fifth, the Guidance is, in several places, so vague as to be of little use to either recipients or prospective complainants.

This letter discusses all of these shortcomings (as well as several bright spots in the Guidance) in detail in the section-by-section comments below and makes numeous recommendations for improving the Guidance. Please note that the following citations to the Guidance refer first to the internal section number of the Guidance, followed by the page number in the Federal Register, Volume 65, in parentheses.

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[1] EPA File No. 8R-98-R3.

Scope of Guidance: *§ I.C. (39668-69)*

The Guidance sketches out a typology of three types of allegations that might be made in a complaint: (1) allegations focused narrowly on the impacts from a single permitted activity or facility; (2) allegations focused on groups of similar facilities or the combined impacts of facilities and other sources in a particular area; and (3) allegations of a discriminatory pattern of decision-making for certain types of facilities. In all cases, it appears that the Guidance treats the granting (or renewal or modification)[2] of the challenged permit (or its terms and conditions) as the "criteri[on] or method[] of administration"[3] that is alleged to cause a disparate impact.

The Guidance should also reflect the possibility that complainants may allege that a recipient's permitting ***regulations*** and/or governing state and local ***statutes and ordinances***[4] are the "criteria or methods of administration" that cause unjustified disparate impacts, *e.g.*, the granting of the challenged permit.[5] In particular, a permit challenge focused on the permitting regulations could be made in at least three different ways: (1) a facial challenge to the regulations, arising from a single permit that causes or contributes to a disparate impact; (2) an as applied challenge to the regulations, arising from a single permit that causes or contributes to a disparate impact; or (3) an as-applied challenge to the regulations arising from a pattern of granting permits, each of which causes or contributes to a disparate impact. The exact focus of the inquiry at the justification and less discriminatory alternative stages may differ slightly depending on the nature of the claim.

In the first scenario, the complainant would allege that the regulations (i.e., the *criteria* of administration) are written in such a way that their application *inevitably* resulted in[6] or will result in[7] the approval of the challenged permit. In such a "facial

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[2] Hereinafter, the words "grant" or "approval" (of a permit) will be used to refer not only to granting a new permit, but also to renewal or modification of a pre-existing permit.

[3] 40 C.F.R. § 7.35(b) (West 2000).

[4] Hereinafter, in this section, "regulations" will be used to refer to all state and local regulations, statutes, and ordinances governing the recipient's permitting process.

[5] We applaud EPA for also recognizing that "it is possible to have a violation of Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the permitting process (*e.g.*, public hearings, translation of documents) . . . ." Guidance at § II, introductory para. (39670). Although this section of our comments is written in terms of disparate impacts in the substantive outcome of the permitting process, the same concept of filing a complaint focused on a recipients' regulations applies equally to claims of disparate impact in the permitting *procedure*. In such cases, the complainant would allege that the recipient's procedural regulations are the root cause of a procedural disparate impact. The complaint would be analyzed as discussed in the text, *mutates mutandis.*

[6] *Cf. El Cortez Height Residents and Property Owners Ass' v. Tuscon Housing Authority*, 457 P.2d 294, 296 (1969) (holding that use of site selection criteria that had effect of discriminatory siting of public housing facility constituted Title VI violation).

challenge," the recipient would have to justify *the regulations themselves* under the appropriate legal standard (see discussion of justification, below), and, if justified, the inquiry would be whether there are any comparably effective, less discriminatory alternative regulations (e.g., regulations that take into account cumulative and synergistic impacts, vulnerable subpopulations, etc.).

In the second scenario, a complainant would allege that the *application of the regulations* to this particular permit application (i.e., the *method* of administration), with all of the discretionary decisions by the agency inherent in considering the permit application, resulted in the approval of the challenged permit. In this case, the complainant might challenge specific agency findings or conditions (or lack of conditions) placed on the permit, which resulted in the approval of a permit that causes or contributes to a disparate impact. In such an "as applied challenge," the recipient would have to justify its *findings and/or failure to impose additional conditions*, and, if justified, the inquiry would be whether there are any alternative, and legally supportable, alternative findings and/or permit conditions that are comparably effective and less discriminatory in effect.

In the third scenario, the complainant would allege that the standards are written or applied in such a way that they have a *systematic tendency to result in the approval of permits for facilities (plural)* that, individually or cumulatively, cause or contribute to a disparate impact,[8] and that the standards themselves are therefore a Title VI violation. In such a scenario, as in the first scenario, the recipient would have to justify its *regulations*, under the appropriate legal standard, and, if justified, the inquiry would be whether there are any comparably effective, less discriminatory alternative regulations (e.g., regulations that take into account of cumulative and synergistic impacts, vulnerable subpopulations, etc.).[9]

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[7] For example, an administrative complaint regarding the potential siting of two hazardous waste facilities in Noxubee County, MS, made such an allegation. *See* Letter from Robert Wiygul, Sierra Club Legal Defense Fund, to U.S. Comm'n on Civil Rights (Sept. 2, 1993) (alleging that agency's siting criteria "guarantee[d]" t hat permits would be approved) (*cited in* Vicki Been, *Environmental Justice and Equity Issues*, in 4 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS at § 25D.04[2]).

[8] *See, e.g.*, Plaintiff's Complaint, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960, ¶¶ 46 (E.D. Pa., 1996) (alleging State's regulatory regime resulted in pattern of approving waste facilities disproportionately located in communities of color); EPA Title VI Complaint # 10R-97-R9 (July 1997) (alleging air emission trading regime of South Coast air Quality District in Southern Califirnia imposes disparate impact on protected groups; Richard Toshiyuki Drury, *et al.*, *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 Duke Envtl. L. & Pol'y F. 231 (1999) (discussing in detail the distributional effects of Los Angeles' air emissions trading regime underlying aforementioned complaint). *Cf. Scesla v. City Univ. of New York*, 806 F.Supp. 1126, 1141 (1992) (holding that overall "employment regime," which over nearly two decades has failed to hire Italian-Americans proportionately, is proper object of a Title VI disparate impact challenge).

[9] The cognizability of all three types of allegations is linked to the fact, elaborated below, that the proper scope of impacts cognizable under Title VI includes those *not* currently "within the recipient's authority to consider." Thus, a recipient can, and should, be found in violation of Title VI if its regulations bar it from considering types or combinations of impacts that may result in an adverse disparate impact. Moreover,

When a complainant's allegations focus on the permitting regulations as the cause of discriminatory permit approvals, EPA should accept a complaint for Title VI compliance review even before a pending permit is actually granted if the complainant alleges that the faulty regulations will inevitably lead to the permit approval. Such might be the case, for example, if it is undisputed that a permit application meets all of the applicable regulatory criteria (or at least undisputed that the recipient agency will make such a finding), but that such regulations fail to account for, *inter alia*, cumulative impacts, and will therefore result in a Title VI violation when the permit is inevitably granted. In such a case, the regulations, not the as-yet-unapproved permit, are the object of the challenge, so there would be no ripeness issue to preclude EPA review.

This proposal for review of recipient agencies' regulations would not expand EPA's Title VI review into a boundless inquiry. Indeed, review of state and local regulations for compliance with the requirements of federal (environmental) law is a common practice for EPA; the Agency reviews the regulations of states with delegated authority to enforce federal statutes such as the Clean Air Act and Clean Water Act for conformity with those statutes. Similarly, in the case of Title VI, EPA has both the institutional expertise and the obligation to review recipients' permitting regulations for conformity with the federal statutory requirements of Title VI. Review of recipients' actions at the policy level of permitting-regulations may, in fact, be a more efficient way for EPA to achieve programmatic change in recipients' practices to ensure compliance with Title VI, both with regards to the challenged permit and into the future.

Preliminary Finding of Noncompliance / Defining Scope of Investigation / Determining Nature of Stressors and Impacts Considered : *§ II.A.4. (39671); § VI.A. step(2) (39676); § VI.B.2.a. (39678)*

The Guidance takes a far too narrow view of the scope of cognizable impacts due to its mistaken insistence that the scope of Title VI is limited by the pre-existing jurisdiction of recipient permitting-agencies (*i.e.*, EPA will only consider "stressors and impacts . . . within the recipient's authority to consider, as defined by applicable laws and regulations."). EPA's position on this matter is directly at odds with its position elsewhere in the Guidance that "[a] recipient's Title VI obligation exists ***in addition to*** the Federal or state environmental laws governing its environmental permitting program." § VI.B.4.a. (39680) (emphasis added). We applaud EPA for recognizing, in the preceding passage at least, that recipients' Title VI obligations are independent of – and are not limited by -- their authority under Federal or state environmental laws. The Guidance, however, fails to abide by this core principle in the areas where it is most crucial.

The Guidance view that only stressors and impacts within the pre-existing jurisdiction of the recipient are cognizable under Title VI is incorrect as a matter of Title

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this is the case even if state statutes currently prevent the recipient agency from broadening the scope of its regulations to encompass such impacts.

VI case law and under EPA's Title VI regulations. That Title VI may force a state or local agency, as a pre-condition of receiving federal funds, to act beyond its pre-existing authority should not be controversial. For example, in the context of school desegregation, the primary context to which Title VI was intended to apply,[10] a local school district receiving federal funds could not have claimed an exemption from Title VI compliance on the basis that state law mandated segregated public schools. If state law required segregation, then the local school district would have been ineligible for funds until such time as it acquired the authority to desegregate schools and exercised that authority.[11]

Thus, as a legal matter, Title VI may force a state or local agency, as a condition of receipt of federal funds, to take action on a permit that would be otherwise beyond the agency's authority as established by state law. State environmental agencies often claim that disparate impacts arising from the location of a facility are beyond their authority to address, since the siting decision is made by the facility owner and local land use officials, and/or because state law does not allow the agency to consider disparate impacts. But these recipient state agencies can no more wash their hands of Title VI obligations by claiming "the zoning board made me do it" or "the state Legislature made me do it" than local school districts were able to wash their hands of Title VI obligations by claiming "the state Legislature made me do it."

Accepting or Rejecting Complaints: Timeliness: *§ III.B. (39672-73)*

Without restating the arguments made by numerous other commenters, IPR concurs in the extensive comments on this section submitted by the Center on Race, Poverty and the Environment, along with a coalition of scores of other community groups, environmental justice organizations, and individuals from across the country and incorporates those comments by reference. In short, the process should be as simple, transparent, and predictable as possible for prospective complainants. Unnecessary hurdles and burdens should not be placed upon complainants. For example, rather than dismissing a jurisdictionally proper complaint if there are other pending administrative or judicial appeals -- as EPA did in the case of our client, the Mattaponi Indian Tribe[12] --

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[10] *See* Stephen C. Halpern, ON THE LIMITS OF THE LAW 5 (1995).

[11] *Cf. Bd. of Ed. of the City of New York v. Califano*, 584 F.2d 576 (2d Cir 1978), *aff'd by Bd. of Ed. of the City of New York v. Harris*, 444 U.S. 130 (1979). In this case, the school board sued to enjoin a finding by the Dept. of Health, Education and Welfare (HEW) that it had violated disparate impact regulations that made it ineligible for funding under the Emergency School Act. One of the justifications for racially disparate teacher assignments proffered by the school board was that the disparate assignments "resulted from the state education law." *Id.* at 587. The Court apparently held that this justification was one of several that were not "supported by adduced facts appearing on the record" and did not pass on the legal sufficiency of this justification. *Id.* at 589. (The district court opinion is unpublished, so the ruling below regarding this particular justification is unavailable.)

[12] Letter from Anne E. Goode, Director, USEPA Office of Civil Rights to Hope M. Babcock, Attorney, Institute for Public Representation (July 18, 1999) (EPA File No. 8R-98-R3).

and then requiring a complainant to re-file after the conclusion of the pending appeals and hope for EPA's indulgence in waiving the 180-day time limit, EPA should simply stay any enforcement action pending the resolution of the other appeals and then resume its enforcement process should those appeals fail to conclusively resolve the issue.

Furthermore, EPA should replace the rule that "OCR [EPA's Office of Civil Rights] generally considers a complaint to be 'filed' on the date that it arrives at EPA" with a "mailbox rule," *i.e.*, that complaints should be deemed filed on the date on which they are mailed by the complainant. Such a rule would provide certainty for complainants that they have satisfied the statute of limitations without having to worry about when postal or other delivery actually occurs or is accepted.

Implementing Informal Resolutions: *§ IV.B. (39674)*

The Guidance states that a satisfactory informal resolution would "eliminate or reduce [adverse disparate impacts] *to the extent required by Title VI"* (emphasis added), but fails to elaborate on the meaning of this standard. The Guidance should make explicit that any informal resolution must, at a minimum, reduce any disparate impacts to the level at which they are no longer "significant" enough to be considered "adverse" or "disparate" under Title VI, i.e., to the extent that, after implementation of the informal agreement, the complainant's allegations would no longer constitute a violation of Title VI. This same requirement should also be made explicit in § VII.A.3, with regard to standards for voluntary compliance after EPA has made a finding of non-compliance.

The Guidance should make clear that a legally sufficient informal resolution (or voluntary compliance) must include adequate enforcement provisions, including, but not limited to, a schedule of compliance and automatic penalties for noncompliance. A settlement agreement is only as good as its enforcement provisions. The Guidance should require that informal resolutions between EPA and the recipient or between the recipient and the complainant, as well as voluntary compliance agreements, grant authority to EPA to enforce their provisions. Absent EPA enforcement authority, EPA has no adequate assurance that the violation will, in fact, be remedied. Thus, EPA should not close any investigation on the basis of an informal resolution or voluntary compliance agreement that lacks an EPA-enforcement mechanism.

Due Weight: Analyses or Studies *§ V.B.1. (39674-75)*

This section is too vague to be of any use to prospective complainants, recipients, or OCR investigators. How much weight does EPA intend to give to recipients' analyses or studies? *Chevron*-like deference would be clearly insufficient to ensure Title VI compliance.[13] The recipient agencies are comparable to a regulated entity and should not be trusted to guard the proverbial "hen-house." The Guidance should state clearly that EPA will engage in a searching review of any analysis or studies submitted by recipients,

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[13] *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

and grant no "due weight" when these analyses or studies are not commensurate with EPA's own analytic work. In the case in which the state agency analysis is based on industry-supplied data and analyses, it should be discounted heavily, or given no weight at all. The Guidance should also provide that complainants will be given free and open access to any analyses or studies submitted by the recipient, and the opportunity to critique such submissions and offer counter-analyses.

Due Weight: Area Specific Agreements: *§ V.B.2. (39675-76)*

The Guidance gives claim-preclusive effect to "area-specific agreements" reached between community stakeholders and recipients, such that future complaints by *any party* addressing the same issues covered by the agreement may be dismissed. If EPA intends to apply this form of claim preclusion, there must be some independent investigation by EPA to ensure that the parties that entered into the agreement were similarly situated to and fairly and adequately representative of the affected community; and such parties had competent legal representation (and access to scientific experts) to enter into an agreement with adequate knowledge of their rights and remedies and of the salient scientific data and facts. (*Cf.* Federal Rules of Civil Procedure R. 23(a)(4) requiring fair and adequate representation of the class by the class representative and competent representation by the class representative's counsel.) Furthermore, If EPA proposes to make a finding that the parties are fairly and adequately representative and competently represented, and that an area-specific agreement will therefore be deemed to satisfy the requirements of Title VI, EPA should first provide notice and an opportunity for comment by all interested persons to challenge the proposed finding. (*Cf.* F.R.C.P. R. 23(e), providing for opportunity for interested parties to be heard pending court approval of proposed class action settlement.)

The above proposals are a matter of basic due process and procedural fairness, principles that are both inherently valued by our legal system and necessary to maintain the legitimacy of the process. Applying procedural due process requirements in this context is also especially appropriate, since the Guidance treats the complaint process in some respects as quasi-litigative, by imposing standing requirements (i.e., complainant himself or herself must suffer an injury-in-fact), limited pleading requirements, and filing deadlines. If the universe of possible complainants is limited to those who are actual members of the affected community and therefore suffer an injury-in-fact, the Guidance should also ensure that the rights of such complainants to submit a complaint are not compromised by the agreements of third parties that do not satisfy basic due process.

If the parties to the area-wide agreement were not adequately representative (or adequately represented) – especially as indicated by the presence of other community organizations opposing the area-wide agreement, whether or not such groups have filed a Title VI complaint – then EPA should not use the area-wide agreement as grounds to dismiss any pending or future complaint on the same or related issues. Similarly, if a complainant is not adequately representative (or adequately represented), an informal resolution between the complainant and the recipient should not be given any preclusive effect as to future Title VI complaints. Moreover, EPA should not dismiss the pending

complaint, but rather should continue its investigation, despite complainant's attempt to withdraw the complaint. (*Cf.* F.R.C.P. R. 23(e), requiring court approval of settlements in class actions to ensure that the interests of absent class members are adequately protected.)

Additionally, in reviewing an area-wide agreement on its merits, EPA should consider the adequacy of the enforcement mechanisms provided for by the agreement. Absent adequate guarantees of implementation of the agreement, it should be given no "due weight." In fact, the Guidance might recommend that proponents of area-wide agreements seeking "due weight" include enforcement provisions allowing for enforcement by EPA directly. As an incentive, the Guidance might provide that, in the "due weight" analysis, provisions for enforcement by EPA will create a presumption of adequate enforceability.

Adverse Disparate Impact Analysis: Assess Applicability: Determine Type of Permit: *§ VI.B.1.a. ¶ 4 (39667)*

Again, without restating the arguments made by numerous other commenters, IPR wholeheartedly concurs in the extensive comments on this section submitted by the Center on Race, Poverty and the Environment, *et al.*, and incorporates them by reference. EPA's proposal to dismiss complaints when a challenged permit "significantly decreases overall emissions at a facility" is inherently flawed and should be deleted for the following reasons.

By aggregating pollutants into "overall emissions," the Guidance ignores the fact that there can be an increase in emissions of a particular pollutant despite a decrease in overall emissions.[14] Thus, a significant decrease in overall emissions is no guarantee of a decrease in adverse impacts upon environmental justice communities.

More fundamentally, the touchstone of a Title VI violation is *disparity*, not simply impact. Even if emissions of all pollutants are reduced, they might not be reduced to the same extent they are reduced in other, non-minority communities whose permits become due for renewal or modification. As the line of Title VI cases dealing with unequal provision of municipal services demonstrates, failure to improve the status quo at an equal rate in neighborhoods of color can be a cognizable injury under Title VI, just as can the imposition of new burdens that worsen the status quo.[15] The Guidance should recognize that failure of recipients to reduce emission in communities of color by an amount equal to that of other communities may constitute a Title VI violation, even if the challenged permit results in a net decrease in emissions.

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[14] *Cf.* 40 C.F.R. § 1508.27 (West 2000) ("A significant effect may exist even if the [ ] Agency believes that on balance the effect will be beneficial.") (National Environmental Policy Act (NEPA) regulations promulgated by Council on Environmental Quality).

[15] *See, e.g,, Johnson v. City of Arcadia, Fla.*, 450 F.Supp. 1363, (M.D.Fla. 1978). *See also, Hawkins v. Town of Shaw*, 303 F.Supp. 1162 (N.D.Miss. 1969), *rev'd*, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) (14th Amendment claim).

Finally, in cases where a disputed facility is solely responsible for the alleged disparate impact, the EPA's "net decrease" approach is especially inappropriate. Where a single "unique" facility – perhaps the only one of its kind in a jurisdiction – imposes disparate impacts on environmental justice communities, a permit renewal or modification that results in a net decrease in emissions should be a proper subject of a Title VI complaint. Even if emission are reduced, unless they are reduced to the point at that no adverse impact is imposed on the affected community, a disparate impact in violation of Title VI will remain. Especially given EPA's failure to enforce Title VI in the past thirty-six years, "unique" facilities should not, by implication, be grandfathered-in and immunized from future Title VI enforcement, if otherwise warranted, simply because all future permit renewals and modifications may result in a net decrease in emissions. Thus, the "net decrease" rule proposed by the Guidance – though, perhaps, superficially appealing – is entirely inappropriate and should be deleted.

Adverse Disparate Impact Analysis: Define Scope of Investigation: Determine Universe of Sources: *§ VI.B.2.b. (39678)*

Following the model of regulations and case law developed under the National Environmental Policy Act (NEPA),[16] the Guidance should make clear that "cumulative" impacts to be considered include "reasonably foreseeable" future impacts, [17] such as those from soon-to-be permitted facilities that are not yet in operation.

Also following the NEPA model, whenever the Guidance refers to cumulative impacts, "indirect impacts" (e.g., impacts from related developments foreseeably spawned by the newly permitted facility) should also be included.[18]

Furthermore, in this section especially, and wherever the Guidance refers to cumulative effects, synergistic effects (i.e., multiple pollutants combining to have a different or heightened health impact) should also be included. Although scientific knowledge about such effects remains limited, the appropriate response is not, therefore, to ignore such effects. Rather, EPA should pledge to apply the available science, where relevant, and to take steps to expand the knowledge base regarding synergistic impacts so that such impacts can be more fully considered in the future. Moreover, the Guidance should apply the "precautionary principle," and treat suspected synergistic impacts as cognizable impacts, even if they have not been conclusively scientifically established. Although the exact nature of many synergistic impacts is unknown, the basic phenomenon is well-enough established, and the risk sufficiently great, that EPA should err on the side of caution and provided protection against suspected as well as established synergistic impacts.

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[16] 42 U.S.C. § 4321, *et. seq.* (West 2000).

[17] *See* 40 C.F.R. § 1508.7 (West 2000).

[18] *See* 40 C.F.R. § 1508.8 (West 2000).

Adverse Disparate Impact Analysis: Impact Assessment: *§ VI.B.3. (39670)*

This section of the Guidance could be read to suggest that where the "ideal" form of evidence about impacts is not available, a finding of disparate adverse impacts may be less likely. The Guidance should make explicit that the unavailability of perfect data on "direct links to impacts" will not in any way prejudice a Title VI complaint. It should clearly state that the best *available* form of evidence is adequate, and will be given no less weight by EPA than any other more "ideal" type evidence would have received.

The Guidance hints at our suggested approach (§ VI. B.5., (39681)) where it states that "simpler approaches based primarily on proximity may also be used where more detailed (e.g., modeled) estimated cannot be developed. . . ." EPA should expand this language to make clear that a proximity analysis is *always* appropriate where other forms of analysis are unavailable due to lack of data, methodological difficulties, or other reasons.

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Adverse Disparate Impact Analysis: Adverse Impact Decision: Examples of Adverse Impact Benchmarks: *§ VI.B.4.a. (39680)*

The Guidance properly recognizes that "[c]ompliance with environmental laws does not constitute per se compliance with Title VI. . . . A recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program." We commend EPA for taking this position and, because of its importance, suggest that it should be emphasized in the Introduction to the Guidance.

The examples given by the Guidance of situations where pre-existing environmental standards may be insufficient are good ones. However, this list should be expanded to include, for example, not only cumulative impacts, but also synergistic as well as indirect impacts.

Furthermore, the Guidance should state that, as a rule, no consideration at all will be given to compliance with "technology-based standards" (such as the BAT standard under NPDES), as opposed to "health- or environmental quality-based standards" (such as National Ambient Air Quality Standards (NAAQS) or Water Quality Standards (WQS)). Even in the case of health-based standards, such as NAAQS, these standards do not typically account for "hot spots," cumulative or synergistic impacts, or sensitive subpopulations. Thus, compliance with such health-based standards should not be deemed sufficient as a defense to a Title VI complaint. The "rebuttable presumption" formulation used in the Guidance suggests a degree of deference to the recipient when NAAQS are satisfied, which is unacceptable given the inability of NAAQS compliance determinations to account for adverse disparate impacts in environmental justice communities.[19]

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[19] Moreover, many federal environmental statutes have some sort of "omnibus clause" requiring protection of human health and the environment, above and beyond any specifically promulgated standards.[19] Thus,

Adverse Disparate Impact Analysis: Characterizing Populations and Conducting Comparisons: *§ VI.B.5 (39681)*

The section on determining the "disparity" of the impact is confusing, and perhaps confused. This section, along with the prior section on determining the existence of "adverse" impacts (see comments on adverse impact benchmarks, above), deals with the most important – and one of the most methodologically difficult and controversial – element required to make a finding of "disparate impact." Yet, the Guidance does little to clarify the meaning of "disparity." The Guidance takes no position as to whether the appropriate comparison is between the "affected population" and the "general population" (i.e., including the "affected population"); or the "affected population" and the "non-affected population" (i.e., the "general population" excluding the "affected population"). This is an important methodological choice that could determine the outcome of a complaint investigation by altering the statistical degree of significance of the disparity. Second, the Guidance is also silent as to whether disparity should be assessed by comparisons of the different prevalence of race, color, or national origin of the two populations; the level of risk of adverse impacts experienced by each population; or both. Again, this is a highly important, and potentially outcome-determinative methodological choices since each of these comparisons may yield different degrees of statistical significance of the dispratity. Third, the Guidance expresses no preference as to which of five potential "comparisons of demographic characteristics" will be conducted. What happens, for example, when some of these measures show a disparity while others do not?

The Guidance allows EPA to choose the "appropriate comparisons . . . depending on the facts and circumstances of the complaint." This is insufficient. While case-specific methodological decisions may be necessary to some extent, this degree of vagueness in the Guidance amounts to a dodge by EPA of some of the most critical methodological issues in this entire field of law. EPA should invite all stakeholders to engage in further discussion, with the aid of experts in statistical methodology, to clarify these issues.

Adverse Disparate Impact Analysis: Adverse Disparate Impact Decision: *§ VI.B.6. (39682)*

The Guidance states that in determining whether there is an adverse disparate impact in a given case, EPA will consider whether the adverse impact is "a little or a lot above a threshold of significance." This approach should be abandoned. If an impact is

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compliance with pre-existing health-based standards (such as NAAQS) does not necessarily even constitute compliance with federal environmental law mandates, and should, therefore, be given only minimal weight, if any weight at all, in the analysis of a Title VI claim. *See* Richard J. Lazarus and Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999).

above a threshold of significance, it constitutes an adverse disparate impact, regardless of the degree by which it exceeds the threshold. That is the meaning of a *threshold* of significance.

Determining Whether a Finding of Noncompliance is Warranted: *§ VII (39683)*

The Guidance states that if the recipient does not voluntarily comply after the receipt of a formal determination of noncompliance, EPA *must* start proceedings to deny, annul, suspend, or terminate EPA assistance. This is very positive and strong language and should be retained. The certain threat of funding termination proceedings is the hammer necessary to get state and local agencies to comply with Title VI, hopefully in a pro-active manner.

However, the Guidance also vaguely states that OCR, after starting such funding termination proceedings, "may postpone" them. This language should be deleted. By this point in the process, OCR review will have been ongoing for many months, providing the recipient with more than sufficient notice to develop methods to achieve compliance in the event of a finding of noncompliance. Further delay at this point only invites indefinite postponement, which threatens the efficacy of the entire enforcement scheme.

Justification: *§ VII.A.1. (39683)*

The issue of "justification" receives almost no attention in the Guidance, despite the length of the overall document. What little there is on the topic deserves some praise, but also much criticism. EPA is to be commended for choosing the strongest – and the most doctrinally supported – standard of justification from among many enunciations of the justification test in Title VI case law and Title VII statutory and case law. The Guidance adopts the very well-reasoned and strong standard of *Elston v. Talladega County Bd. of Education*,[20] which requires that the recipient's challenged practice be "necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." Inexplicably, however, the Draft Guidance also cites *NAACP v. Med. Ctr.*[21] in support of the same standard. The *Med. Ctr.* case, however, adopted a much weaker standard of justification that has been largely superseded by the Civil Rights Act of 1991 and should not under any circumstances be adopted by EPA. This citation should be removed to avoid any confusion.

While EPA's choice of the *Elston* standard is to be commended, the Guidance's *application* of the *Elston* standard is more problematic. After stating that the justificatory purpose must be "integral to the recipient's institutional mission," the Guidance nonetheless states that EPA "would likely consider broader interests [than the 'provision of public health or environmental benefits'], such as economic development . . . if the

[20] 997 F.2d 1394, 1412-13 (11th Cir, 1993).

[21] 657 F.2d 1322 (3d Cir. 1981).

benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." The Guidance seems to be written as though the justification is made with respect to the *permittee's* institutional mission, which would, naturally, include economic justifications. Clearly, however, it is not the permittee, but rather the recipient permitting agency that is charged with justifying the challenged action, *vis-à-vis* the recipient's institutional mission. Thus, in the vast majority of environmental permitting challenges, *economic development* (and other government interests not related to protection of human health and the environment) cannot, by definition, be "integral to the recipient's mission." The institutional missions of recipient environmental permitting agencies – as those recipients have repeatedly sought to remind EPA in the context of the "authority/jurisdiction" issue – does *not* integrally include economic development, or any other similar justificatory purpose (such as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc.). [22] Such "justifications" should generally be disallowed because they are inconsistent with the *Elston* standard.

Additionally, the Guidance, at times, suggests that the recipient faces a burden of production regarding the issue of justification once a preliminary finding of noncompliance has been made by OCR.[23] Other passages, however, suggest that EPA will inquire on its own into justifications, even prior to a preliminary finding of non-compliance.[24] The Guidance should be consistent in placing a burden of production on the recipient regarding the issue of justification, and this burden should attach after a preliminary finding of noncompliance. As in a private right of action, a finding of disparate adverse impact should create a presumption of a Title VI violation. This presumption should come in the form of a preliminary finding of noncompliance. The presumption can be rebutted – and a formal finding of noncompliance forestalled -- by the existence of a legally sufficient justification. If the recipient cannot produce evidence of a plausible justification worthy of EPA's further investigation, then there is no reason for EPA to seek out and consider justifications on the recipient's behalf.[25]

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[22] For cases not within the vast majority, such as permits for public works facilities, and permits for siting of – as opposed to emissions from – privately-owned facilities, it may well be that the permitting agency's core institutional mission is multifold. Even in such cases, however, economic justifications should be given a weight commensurate only with the degree of importance of economic goals in the permitting agency's governing regulations, statutes, and/or ordinances.

[23] *See* § VII.A., introductory paragraph.

[24] *See* § II.A.3., importing the justification analysis into the initial investigation stage. ("If, based on its investigation, OCR concludes that there is no discriminatory effect (i.e., no *unjustified* adverse disparate impact), the complaint will be dismissed.) (Emphasis added.)

[25] Similarly, in the Title VI and Title VII statutory and case law, once a prima facie case of disparate impact has been established, both the burdens of production and persuasion shift to the defendant on the issue of justification. *See, e.g., New York Urban League Inc. v. State of New York,* 71 F.3d 1031 (2d Cir., 1995) (Title VI); *Elston v. Talladega,* 997 F.2d 1394 (11th Cir, 1993) (Title VI); *Georgia State Conf. of Branches of NAACP v. State of Georgia,* 775 F.2d 1403 (11th Cir. 1985) (Title VI); 42 U.S.C. § 2000e2(k)(1)(A)(i) (Civil Rights Act of 1991 (Title VII)); *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1117, n. 5 (11th Cir. 1993) (Title VII). While we recognize that OCR investigations are not adversarial in the same sense as a

The section on justification should include illustrative examples -- such as those discussed under § I.C. -- addressing complaints focused on recipients' *regulations*.

Less Discriminatory Alternatives: *§ VII.A.2. (39683)*

The discussion of "less discriminatory alternatives" (LDAs) is even more cursory than that of "justification." EPA should be commended for using the *Elston* standard of "comparably effective" alternatives as opposed to "equally effective" alternatives that has been used in some of the older case law,[26] as this standard allows for consideration of a broader range of potential LDAs. The Guidance's consideration of cost in assessing the practicability of alternatives suggests, however, that such factors as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, and availability of pre-existing infrastructure, may come into play here despite their manifest irrelevance, as described above in the discussion of justification.[27] The Guidance should be explicit that costs incurred by the permit applicant will generally not be a consideration with respect to less discriminatory alternatives analyses.

The section on LDAs should include illustrative examples -- such as those discussed under § I.C. -- addressing complaints focused on recipients' *regulations*.

Glossary: Appendix A

The word "significant" or "significantly" appears several times in the Guidance but is not defined in the Glossary. The meaning of this word may be vitally important in many circumstances; it should be defined. EPA should consider looking to NEPA regulations for an operational definition of "significant."[28]

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judicial complaint, the basic principle of burden-shifting still should apply in this limited circumstance. As stated above, for EPA to imagine possible justifications that the recipient has not even advanced would be both a waste of EPA's time and undermine EPA's mission of strong enforcement of Title VI.

[26] *See, e.g., Georgia State Conf. of Branches of NAACP v. State of Georgia,* 775 F.2d 1403 (11th Cir. 1985). Note that *Ga. State Conf.*, like *Elston,* is from the 11th Circuit. Thus, the "equally effective" standard is no longer good law, even in the Circuit of its origin.

[27] Again, with the exception of those limited cases mentioned, *supra,* at note 22.

[28] *See* 40 C.F.R. § 1508.27 (West 2000).

Thank you for your consideration of these comments. Please address any questions about them to Lawrence Levine at 202-662-9549.

Sincerely,

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August 28, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, NW
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Anne Goode, Director
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US Environmental Protection Agency
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Re: **Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs***

Dear Administrator Browner and Ms. Goode:

These comments are submitted by Golden Gate University School of Law's Environmental Law and Justice Clinic ("ELJC"). Since its inception in 1994, the ELJC has provided free legal services and education on environmental health and justice issues to San Francisco Bay Area residents, community groups and public-interest organizations. The Clinic assists communities bearing disproportionate environmental burdens, particularly communities of color and low-income neighborhoods. ELJC addresses a range of environmental issues by offering a combination of services: legal counseling and representation; community education workshops and community guidebooks; and policy and legislative analysis.

Our clients are assaulted by hazardous chemicals on a daily basis and disproportionately bear the burden of facilities that create, emit, and dispose of these hazardous substances. Such ongoing exposures to multiple toxins from a variety of sources places our clients at greater risk for developing serious health problems than the general population. Many of our clients bear the direct burdens of environmental harms from facilities that provide citywide or regional benefits. For example, our clients in the Bayview Hunters Point neighborhood in San Francisco, a community which is close to ninety percent persons of color live amidst several hundred polluting or potentially polluting sources, far more than any other neighborhood in San Francisco. Many of these facilities, such as the City's sewage treatment plant, a large power plant, and others, benefit residents throughout San Francisco. Surveys have shown that in Bayview Hunters Point, rates of cervical and breast cancer are double that of San Francisco and the Bay Area, and that hospitalization rates for asthma, cognitive heart failure, hypertension, diabetes, and emphysema are three times the statewide average.

The ELJC represents several clients that have filed Title VI complaints with EPA, or alleged Title VI violations in judicial actions. For instance in 1997, the Chester Street Block Club Association ("CSBCA") filed a complaint after Cal-EPA's Department of Toxic Substances Control (DTSC) approved inadequate remediation plans relating to the reconstruction of the Cypress Freeway in Oakland, California.[1] For several decades, residents living at the Cypress site have been burdened with the improper treatment and disposal of hazardous substances released from multiple sources. DTSC failed to properly identify these sources and the extent of contamination and allowed the freeway and an adjacent neighborhood park to be constructed without proper investigation and long-term remediation. DTSC's disregard of the community residents' concerns, and denial of a meaningful process for public participation, resulted in hazardous contaminants being left in place under the freeway, and inadequate protection from ongoing risks of exposure to hazardous contaminants. After being accepted for investigation by the Office of Civil Rights in September, 1997, the CSBCA's complaint has languished at EPA for the past three years.

The ELJC also represents Midway Village Advisory Committee, a group of low-income residents living in a public housing complex in Daly City, California that was constructed over a toxic waste site. DTSC has allowed Midway Village residents to be continuously exposed to hazardous chemicals by failing to properly remediate the toxics at the Midway Village site and by recently approving inadequate cleanup plans for an adjacent park area.

Our clients have looked to Title VI of the Civil Rights Act of 1964 in an attempt to redress harms from the disproportionate environmental burdens they suffer. Unfortunately, existing environmental laws have failed to adequately deal with these environmental inequities. With few exceptions, environmental regulation focuses on improving overall ambient environmental conditions, and does not consider the distributional consequences of where pollution is occurring. Virtually all environmental permitting decisions evaluate only the incremental impacts of a proposed facility's activities, and not the effects of cumulative or multiple exposures from other sources. Moreover, most environmental regulation places controls on, rather than eliminates, pollution. So called "grandfather" clauses included in many environmental laws – clauses that exempt or create more lenient standards for existing facilities – exacerbate inequities by encouraging older, dirtier facilities in low-income communities or communities of color to continue operating. Moreover, often the laws governing the siting of a facility are procedural in nature, and offer no remedy to siting decisions that reflect the relative political power of white and wealthier communities, and their desire not to host environmentally undesirable facilities.

By holding agencies accountable for their mandate to protect people and the environment without discriminating against people of color—particularly those who bear our society's disproportionate industrial burdens—Title VI holds great promise for our clients to obtain relief where other laws and regulations have failed them.

Unfortunately, however, the current *Draft Revised Investigation Guidance* documents fail to properly implement Title VI and will not safeguard the very groups that it was intended to

[1] EPA File No. 8R-97-R9.

protect. According to the Guidance, in order to find a recipient agency in violation of this Title VI, EPA's Office of Civil Rights ("OCR") would have to determine that the recipient's programs or activities resulted in an "unjustified adverse disparate impact," meaning that "the impact is both adverse and borne disproportionately by group of persons based on race, color, or national origin," and that it is unjustified. Section II. Even if adverse disparate impacts are found, the Guidance documents include an opportunity for the recipient agency to justify its actions. Yet Title VI makes no allowance for such a justification. There is simply no room for this type of "balancing" in civil rights laws, which are intended to protect against racial discrimination. Moreover, the Guidance inappropriately relies on compliance with existing environmental standards to show the absence of adverse impacts and discriminatory effects (such as where an air permit will not cause an area to violate the relevant National Ambient Air Quality Standard) despite the demonstrated *failure* of such laws to prevent disproportionate environmental harms from occurring in the first place.

The Guidance leaves unanswered many additional concerns about implementation. While the *Draft Revised Investigation Guidance* explains the various steps of an investigation in more detail than the *Interim Guidance*, and includes definitions in a Glossary of Terms, it is still unclear how the Guidance will be utilized in practice to achieve just results for impacted communities. Many policy decisions in the Guidance appear to help the recipient while hurting the complainant in administrative proceedings.

Our specific comments below focus on various elements of the *Draft Revised Investigation Guidance* ("Guidance").

Public Participation

One of the most serious defects in the Guidance is that it provides very limited opportunity for public participation in the administrative process, while providing multiple opportunities and procedural rights for recipient agencies. See, e.g., Sections II.B.1, 2 . For example, while recipients are given an opportunity for a hearing with an EPA ALJ regarding a formal finding of noncompliance, complainants have no opportunity within the administrative process to challenge EPA's findings. Sections II.A.7, II B.2. Moreover, the Guidance limits the role of complainants by allowing it to be determined by the nature of the circumstances and of the claims. Aside from submission of information relevant to the complaint, the complainant's role is limited at best, to non-existent, throughout the process

Even accepting for the moment EPA's characterization of the complaint process as not adversarial between the complainant and recipient – one, we submit, that elevates form over substance-- there nonetheless is considerable room for EPA to fashion procedures that allow the complaints to participate in the administrative and decision-making process. For example, where OCR seeks an informal resolution directly with the recipient, the complainant may have no opportunity to participate in the decision-making process. In fact, the complainant's consent to the resolution is not even required. Section IV.B. To safeguard their rights, complainants should be kept informed throughout the proceedings and given an opportunity to comment on proposed informal resolutions. (See also comments below).

Moreover, since the Guidance authorizes EPA to give significant weight to analyses submitted by recipients when EPA conducts its adverse impact determination, complainants should have access to evidence submitted by recipients and the opportunity to rebut it. Likewise, since the recipient has 50 days to respond to a preliminary finding of noncompliance by EPA —including an opportunity to demonstrate that OCR's findings are incorrect or that compliance may be achieved some other way—the complainant should be given a comparable opportunity, such as a period of 50 days, to respond to a preliminary finding that a recipient agency has not violated Title VI.

Finally, OCR should be required to regularly report to the complainant on the status of pending complaints, at a minimum at least once every six months. This would help ameliorate some of the frustration that has been engendered by EPA's lengthy delays in processing administrative complaints.

Complainants' role should not be determined or limited by the nature of their claims. Instead, the opportunity for public participation should be guaranteed at every possible stage of the administrative process.

Informal Resolution

While OCR will encourage informal resolution of administrative complaints wherever practicable—meaning settlement of a complaint prior to a formal finding of non-compliance—the complainant's rights are not adequately protected. As noted, the Guidance provides the affected community no role or opportunity for input where OCR seeks to informally resolve the complaint directly with the recipient. In those cases, the complainant's consent to the resolution is not required if OCR determines that there are "sufficient assurances" regarding implementation of a plan to "eliminate or reduce, to the extent required by Title VI, adverse disparate impacts." Section IV.B. This means that once a complaint is filed, complainants are completely shut out of the resolution process and will be reliant on the permit applicant and recipient to safeguard their interests and ensure adequate protection against adverse health impacts.

The Guidance allows EPA to determine—with the recipient but without the complainant—what mitigation measures are appropriate to settle the complaint. However, *an independent investigation by EPA to determine the necessary relief or action is not even required* before reaching a resolution. Section IV.A.2. It is virtually impossible for EPA to make a determination about the measures necessary to eliminate or reduce adverse disparate impacts without an investigation of the specific allegations. It is unclear how, absent an investigation into the facts of the complaint, EPA intends to determine the significance of the potential effects and risks of a given permitting action. This is particularly true where there are claims that a permit would adversely affect cumulative risks or impacts.

Complainants must be able to provide input regarding any informal resolution reached between OCR and the recipient. Complainants should have access to a tentative resolution and be given

opportunity to comment. Complainants' consent should be required for all informal resolutions. While the current Guidance does not require the complainants' consent to such an agreement, even the *Interim Guidance* encouraged the recipient to negotiate a settlement directly with the complainant.

Finally, the Guidance must include stronger provisions to ensure that "informal resolutions" are properly implemented, monitored and enforced. While Section IV.B. covers these issues, OCR should be required to ensure that mitigation measures have been implemented and have been successful. In addition, there should be a limit on the length of time EPA may devote to trying to informally resolve a complaint before it begins an investigation. Experience shows that the word "prompt" does not mean to EPA what it means to complainants.

No Stay Provision

The Guidance presumes that the disputed permit will be issued—indeed there is no stay provision at all. This puts complainant groups at risk from ongoing project impacts and greatly undermines their ability to effectively negotiate with recipient agencies. Complainants must bear the burdens stemming from implementation of permits while their complaints are pending, and indeed languishing for years, at EPA (often while simultaneously fighting to ensure that the permits are complied with).

Thus, for example, in the Chester Street case, three years after the complaint was filed, complainants have had no redress for the impacts of the permits granted by DTSC. They have had to suffer through an almost continuous stream of projects impacting their neighborhood, including the construction of the Cypress Freeway on a highly toxic site without proper cleanup, the remediation of the highly toxic buffer zone between the neighborhood and the Cypress Freeway (the proposed South Prescott Park) which was mitigation for building the freeway on a contaminated site, and various other construction, remediation and cleanup projects. The complainants continue to suffer through the impacts of permitted projects while their complaint languishes at EPA. The complainants are left with no bargaining power in dealing with the permitting agencies they are complaining about in the first place.

Alternative Dispute Resolution

The Guidance evinces a strong preference for resolving complaints through Alternative Dispute Resolution (ADR). Section IV.A.1. This is problematic in theory and practice.

First, structurally ADR favors educated negotiators with resources and experience—basically industry and agencies. ADR does not take into account the inherent unequal bargaining power between parties. Community residents will certainly lose out in negotiations with high priced corporate lawyers with years of training in negotiating strategies.

Second, in practice the use of ADR, in combination with EPA's lengthy delays in resolving complaints and the lack of any stay provisions, may exacerbate community tensions, rather than calm them. For example, in the Chester Street case, two years after the community filed its

complaint, EPA approached the neighborhood residents with an attempt at mediation. At the time, the State was forcing the cleanup of the contaminated South Prescott Park site with very little, if any, protection for neighborhood residents during cleanup. Residents had to endure meetings where the recipient agency, DTSC, as well as the California Department of Transportation (Caltrans), which was implementing the cleanup plan, completely dismissed the neighborhood's concerns, treated residents with open contempt, and told residents that either they would have to submit to the park cleanup now, or there would be no park. The neighborhood residents were meeting one night with Caltrans and DTSC in a very adversarial environment and then expected to spend another night trying to "mediate" with the very agencies who previously were insulting them and completely disregarding their concerns.

In this situation, where the agencies refused to deal with residents and dismissed their concerns, sitting down with the opposing side to attempt to mediate was a losing proposition and in fact angered and insulted the community even further.

While EPA's intent in utilizing ADR may be valid, as a practical matter, our experience shows it doesn't work with great success in these situations. The use of ADR is inappropriate in many Title VI complaint scenarios. EPA should reconsider the reliance the Guidance places on ADR.

Area Specific Agreements

The Guidance promotes the laudable goal of encouraging recipients to reduce adverse disparate impacts where they have been identified through an approach referred to as an area-specific agreement (ASA). Section V.B.2. The ASA would, in theory, function as a collaborative effort where a recipient would work together with stakeholders and affected communities to create a plan that would reduce or eliminate any disparate impact. However, the old saying "the devil is in the details" surely applies to this proposal. Despite its positive goal, the proposed plan for ASAs contains fatal flaws that would allow adverse disparate impacts to continue where they exist, and effectively cuts off not only remedies, but also infringes the rights of potential complainants by foreclosing future complaints by affected communities. Some immediately apparent flaws in this proposal include:

- *No mechanism for monitoring and enforcing an ASA*
  The Guidance is silent on who or what agency would be responsible for monitoring adherence to an ASA and what, if any, powers communities would have in enforcing them.
- *No recourse or redress for violations of an ASA by recipients or facilities*
  The Guidance is also silent on what penalties or remedies would be available to communities who are victims of ASA violations. Presumably, the EPA would accept complaints in such instances, however language in the Guidance contradicts this. The Guidance states that "later-filed complaints rais[ing] allegations regarding other permitting actions … covered by the same area-specific agreement" would be dismissed based upon an "earlier finding." Section V.B.2. Under no circumstances should the EPA fail to investigate a complaint merely because an ASA is in place. If anything, the EPA should be prompted by complaints to revisit and reexamine ASAs to make sure they are working. The burden should not be on past complainants to monitor and enforce ASAs.

- *No mandatory provision to revisit and revamp an ASA when standards change*
  Many standards relating to emission levels and health vary over time with new data and discoveries. Standards that may have been acceptable at the time an ASA was formed could subsequently change as more stringent laws or regulations are adopted, rendering the ASA insufficient in protecting health. The Guidance makes no provision for this likely scenario.

- *Formation of ASA*

Noticeably absent from the Guidance is any discussion about important details involved in the formation of an ASA. Obviously each ASA would be specific and tailored to a particular set of facts and circumstances. The cast of facility operators, recipients and affected communities would be different for each case. However, what would be consistent and predictable in nearly every instance is the bargaining power of the parties involved. Affected communities generally have little, if any, bargaining power in dealing with recipients and facility operators. Without any power, such as the ability to stay or deny a permit, or influence the size and scope of a project, affected communities will have little, if any, ability to frame the outcome of an ASA.

The Guidance seems to assume a situation where adverse or potentially adverse parties of relatively equal bargaining strength come together and at arms length form an agreement that roughly results in a compromise where each side has made approximately exact concessions for approximately exact gains. Reality, however, does not reflect this. Recipients are generally government agencies with substantial budgets and resources. They would come to the bargaining table armed with reports conducted by scientists they employ or have hired. They have legal counsel at their disposal to buttress and justify whatever decision and outcome they wish. Facility operators would be similarly situated, and further, are motivated by business need and potential profit to get as much as they can out of the ASA. What strength do affected communities have against this array of power, where the permit has already been granted and construction begun on the project?

Another absent element is what constitutes adequate representation of an affected community. The Guidance gives no assurances that all who may be affected by the ASA would have a voice in its formation. In other words, a recipient could create an ASA with a particular community that would be binding on that community. Future complaints from community members or area residents would be dismissed or rejected. Yet the Guidance makes no provision for complainants who are community members or area residents whose input was not solicited for the agreement, or whose needs were not met by the agreement. Under the Guidance, those persons' complaints would be dismissed or rejected.

Given this circumscribed arena in which these ASAs would likely be formed, the Guidance's silence on the crucial issue of formation is deeply troubling. If the EPA has not considered this aspect carefully, it certainly should. If it has considered it but chose to ignore it, EPA should reconsider its position to ensure that complainants' interests are protected.

Adverse Disparate Impact Analysis

EPA may not delegate its Title VI enforcement responsibility to its recipients. But the Guidance gives significant weight to the recipient's assessment regarding the existence of adverse disparate impacts. OCR should not delegate this important task to the recipient; instead of reviewing and possibly relying on the recipient's analysis, OCR should conduct its own independent analysis. The Guidance provides that EPA's review will evaluate whether the methodology used is appropriate and valid, and assess the "overall reasonableness of the outcome or conclusions." Section V.B.1. If EPA's review reveals "significant deficiencies," OCR would not likely rely upon the analysis, but it is unclear how OCR would proceed and whether the complaint would then be dismissed or pursued.

Due to the considerable weight the Guidance and OCR place on the recipient's assessment—looking for "overall reasonableness" or "significant deficiencies"—complainants should have access to all documents submitted by recipients, and be provided an opportunity to provide comment on them. In addition, if there are *any* noticeable deficiencies in the recipient's analysis, OCR should not rely on the analysis. Further, as already stated, OCR should conduct its own analysis.

OCR may, but is not required to, consider other relevant or nearby "sources of similar stressors" for inclusion in its analysis. Section VI.B.2.b. This determination is likely dependent on allegations in the complaint. If a complaint refers generally to "cumulative impacts" or "overburdened" communities, EPA will determine, based on the specific permit at issue, which stressors are of concern. It is unclear whether this would necessarily include consideration of exposures to all sources within the recipient's jurisdiction, or only stressors related to the specific allegations at issue. While a complainant may allege cumulative impacts or a pattern of discrimination, those who lack technical and scientific expertise may be unable to make such allegations with specificity, and will instead be forced to rely on EPA's assessment, and/or be unable to challenge or rebut the recipient's analysis.

Finally, OCR should not dismiss a complaint as the result of a recipient's showing of a significant decrease in overall emissions or of pollutants named in the complaint, as stated in Section VI.B.1.a., unless OCR conducts an assessment establishing the reductions will not result in continued adverse disparate impact on the affected community. Reduced emissions can still result in continued discrimination, and complainants will be left with no administrative remedies.

Conducting the Impact Assessment

In conducting the impact assessment, EPA expects to use data "to attempt to quantify potential impacts," despite the fact that quantitative data is not always available, relevant, sufficient or conclusive. Section VI.B.3. EPA acknowledges that direct, causal links to impacts are rarely available, and that it will be forced to rely on predictions or "potentially significant exposures and risks." Section VI.B.3. Uncertainties are to be discussed and weighed. However, given the inability of current risk assessment methods to deal with populations already burdened by significant environmental and health impacts—and the inherent uncertainties and data insufficiencies involved—reliance on these methods to determine potential impacts and cumulative impacts is particularly troubling.

Specifically, given the numerous uncertainties regarding risk assessment, the hierarchy of data types listed in Section VI.B.3. should not be viewed as comprehensive. Often it is difficult to quantify effects of various exposures. There should be some measure of value given to qualitative factors that are not quantifiable, such as proximity to the source. Regarding the list of hierarchy of data types, "Known releases of pollutants or stressors in the environment" should be moved to the top, and "The existence of sources or activities associated with potential exposures to stressors" should be moved further up the list.

Finally, the Guidance defines "impact" too narrowly; social, cultural and economic impacts also should be considered as adverse project impacts. Title VI does not only prohibit discrimination regarding health impacts. Communities adjacent to industrial facilities are also affected by disruptions to their every day lives, their cultural traditions and social resources. They are harmed by reduced property values and changes in the character of their community. They must live with the threat of accidental releases or spills, as well as the stress and anxiety about harm to their families from exposure to pollutants. They must regularly deal with the noise, industrial traffic, unsightliness and other disruptions that shake the fabric of their neighborhoods.

Making the Adverse Impact Decision

First, see discussion above regarding "Adverse Disparate Impact Analysis."

Despite OCR's intent to use "all relevant information," it is still unclear how OCR will determine whether the estimated risk or measure of impact is "significantly adverse," when significant is defined as "sufficiently large and meaningful to warrant some action" (Glossary of Terms). OCR will compare this estimated risk or measure of impact with "benchmarks for significance" provided by environmental law, EPA policy or regulation. Section VI.B.4. But while this evaluation would consider policies developed for single sources, it does not include consideration of either cumulative exposures or uncertainties in estimates of risks. It will be particularly challenging to assess cumulative non-cancer health effects, where such "benchmarks" may not exist. In those cases, it will be extremely difficult for complainants to meet this criterion in order to proceed further.

There is no method provided in the Guidance to deal with the inherent uncertainty at this stage—especially regarding cumulative risks or synergistic effects of the multitude of stressors to which affected communities are exposed. When determining whether potential or actual impacts are "significantly adverse" and there is evidence of potential or likely adversity, uncertainties should be resolved in favor of complainants as human health is at stake.

Further, most "benchmarks" for health standards are set for an average-sized, adult, white male. Reliance on these benchmarks to determine whether impacts are "adverse" to predominantly minority communities is inappropriate. These figures do not account for sensitive receptors, such as children or women of childbearing age, persons with reduced lung capacity who are especially sensitive to asthma or other respiratory illnesses, the elderly, or communities that are already burdened by existing environmental and health harms.

Use of National Ambient Air Quality Standards

Section VI.B.4.b of the Guidance addresses the use of the National Ambient Air Quality Standards ("NAAQS") in assessing whether the EPA will find adverse health impacts in its investigation of a Title VI complaint. In any complaint that alleges adverse health impacts relating to air quality, there is a presumption that if the area in question meets NAAQS for a pollutant at issue, "the air quality in the surrounding community will generally be considered presumptively protective and … not viewed as 'adverse' within the meaning of Title VI." Section VI.B.4.b. This presumption is unwise and unwarranted.

NAAQS in theory are health-based standards, but in fact adverse impacts can and do occur at levels below NAAQS. Lead is an excellent example. While the current NAAQS for lead is 1.5 $\mu g/m^3$, the consensus in the medical community is that there is no safe level of exposure to lead. EPA itself has adopted this position.[2] Moreover, since the NAAQS for lead is a maximum quarterly average, compliance with it may not adequately protect maximally exposed individuals from lead's adverse health impacts. This is particularly true since some of lead's adverse endpoints, such as reproductive toxicity, can result from very short term exposures. Equally fundamental, NAAQS change in response to new scientific information. EPA's recent tightening of the NAAQS for ozone and particulate matter illustrates this point; evolving scientific information demonstrates that tens of thousands of persons are significantly affected by particulate emissions at levels previously believed safe. *See also* David Fairley *Daily Mortality and Air Pollution in Santa Clara County, California: 1989-1996*. ENVIRONMENTAL HEALTH PERSPECTIVES, Vol. 107, No. 8, August 1999. (finding a statistically significant correlation between mortality in the San Francisco Bay Area and particulate matter emissions (PM_{10} and $PM_{2.5.}$) and concluding that "current national air quality standards … may not be protective of public health for the Bay Area.")

As an example of why the presumption proposed in the Guidance is ill-advised, consider the experience of the predominantly minority community in the Bayview Hunters Point section of San Francisco. In 1994, an energy company proposed constructing a new power plant in the community that was authorized to emit over 49 tons per year of PM_{10} emissions (the community was already host to two existing power plants). The Bay Area at the time was in compliance with the NAAQS for particulate emissions, and the project was not projected to cause a violation of this NAAQS. Nonetheless, the PM_{10} emissions would have increased exposures in the community surrounding the new plant, which was already suffering higher levels of asthma, respiratory ailments, and other health problems than other Bay Area communities. Moreover, in 1996, despite the existing NAAQS for particulates, an estimated 1,270 annual deaths in the San Francisco-Oakland are were attributable to PM_{10} emissions.[3] Clearly, an additional 50 tons per year of particulate emissions would have had seriously harmful health impacts both locally and regionally, yet the Guidance would presume that the emissions were not adverse.

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[2] *See, e.g,* 40 C.F.R. @ 141.51(b) (1998) (setting maximum contaminant level goal for lead of zero).

[3] *See* Philip Hilts, *Fine Pollutants In Air Cause Many Deaths*, NY TIMES, May 9, 1996 at A8.

The Guidance's presumption, moreover, ignores the fact that in real life, facilities regularly violate their permit limits. EPA estimated that in fiscal year 1998, the rates of *significant* noncompliance for major facilities (by definition those subject to the most regulatory attention) were 20 percent under the Clean Water Act, 21 to 28 percent under RCRA and at least 7 percent (and probably higher) under the Clean Air Act. [4] EPA also noted evidence suggesting widespread violations of its New Source Review requirements under the Clean Air Act.[5] Likewise, a 1999 study shows that more than 39 percent of all major facilities in five large industrial sectors violated the CAA in the two year period starting in January, 1997, and on average were out of compliance half the time during this period.[6] Again, the consequences of these violations are experienced most directly by adjacent community residents.

In theory, the Guidance permits the presumption of "no adverse impact" to be rebutted, but in practice this will rarely if ever occur. It seems unlikely, for example, that EPA staff will both mount the inherently resource intensive investigation necessary to do this, and then reach the conclusion that the agency's *own standards* do not adequately protect the public.

EPA's deference to facilities that do not result in compliance with NAAQS as a practical matter will preclude any complaints from going forward in areas that are in attainment, since EPA is barred from granting permits that will cause a violation of NAAQS. Under the Clean Air Act, an agency may not grant a permit that would violate NAAQS. [7] This would carve out a huge exemption to Title VI, which is supposed to redress discriminatory impacts that occur *notwithstanding* compliance with other laws.

In light of these considerations, EPA's presumption of no adverse impact where there is compliance with NAAQS is another hurdle for complainants and another tool for EPA to dismiss or reject complaints. The EPA should remove this presumption and accept any sound medical or scientific evidence that would tend to show an adverse effect.

Characterize Populations and Conduct Comparisons for Disparity

There is no clear method for identifying and characterizing an "affected population" for means of comparison to the "general population" to determine whether a disparity exists. It is simply

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[4] Sylvia Lowrance, *Innovations in EPA's Compliance and Enforcement Program*, Presentation to U.S. E.P.A. Office of Enforcement and Compliance Assurance (Feb. 3, 1999).

[5] Office of Enforcement and Compliance Assurance, U.S. Envtl. Protection Agency; *Compliance with Permitting Critical to Clean Air Act Goals: EPA Concerned About Noncompliance with New Source Review Requirements*, 2 ENFORCEMENT ALERT 1, 1 (Jan. 1999).

[6] JOHN COEQUYT ET AL., ENVIRONMENTAL WORKING GROUP, ABOVE THE LAW: HOW THE GOVERNMENT LETS MAJOR POLLUTERS OFF THE HOOK 9 (1999).

[7] 42 U.S.C. §7475(a)(3); 40 C.F.R. §52.21(k).

defined as "a population that is determined to bear an adverse impact from the source(s) at issue" (Glossary of Terms), or as "that which suffers the adverse impacts of the stressors from assessed sources" Section VI.B.5.a. Yet it is still unclear how this determination will actually be made.

OCR acknowledges that impacts may not always relate to close proximity and that it intends to use models and census GIS data to facilitate its determination of affected population. By themselves, these tools do not take into account other cultural, economic and social factors that may influence which persons will suffer adverse impacts from a project. Likewise, it is important that the "affected population" be broadly interpreted to include persons who work in an area, eat from area sources, or are otherwise impacted even if they do not live in the area surrounding a facility.

In addition, sole reliance on U.S. census data and demographics analysis that historically have been faulty is a particular problem, especially with regard to identifying and characterizing affected minority residents and those who do not speak English. EPA itself, in its Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, has raised concerns about use of such data in demographic analysis, noting that "[t]he fact that census data can only be disaggregated to certain prescribed levels (e.g. census tracts, census blocks) suggests that pockets of minority or low-income communities, including those that may be experiencing disproportionately high and adverse effects, may be missed in a traditional census-based analysis."

Making the Adverse Disparate Impact Decision: Statistical Significance

Perhaps one of the most disturbing components of the Guidance concerns the determination of disparity. The Guidance states that a finding of adverse disparate impact is most likely to be found where "significant disparity is clearly evident" but "in some instances results might not be clear." Section VI.6. Given the difficulties of identifying and characterizing the "affected population" and conducting a reliable assessment of disparity, a finding of "significance" will depend on the facts and circumstances of each complaint, but is open to wide discretion by OCR. This is exacerbated by the problem of statistical interpretation, for which there simply is no clear guidance. If EPA intended to elucidate this section of the Guidance, it clearly failed to do so. Further, it has erected an unreasonably stringent and unjustified standard that will pose a barrier to complainants when there is evidence of adverse disparate impacts.

To determine whether a disparity is "significant," OCR expects to review several possible measures. While the Guidance states that OCR intends to apply "some basic rules" in its assessment, these "rules" are not clearly defined. The statistical evaluation is particularly troubling. OCR states that "measures of demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved *statistical significance to at least 2 to 3 standard deviations*." Section VI.6. (emphasis added). This is a rather arbitrary and vague rule, the application of which may or may not result in any practical significance. The Guidance does not explain how it selected this "rule" nor does it justify the use of a 2 or 3 standard deviations as a measure of significance to show disparity. Certainly, there can be evidence of disparate impacts that do not meet this standard.

By requiring a level of certainty beyond that which is generally required in science or law, OCR has posed an unreasonable barrier to complainants.

There are several important flaws with the rule established by the Guidance. First, it can not be applied abstractly; there is a question as to what will be measured. OCR expects to use one or more measures listed in Section VI.5. But it is unclear which ones will be utilized, or how they will be selected. The results, of course, will vary greatly depending on which measures are used. The guidelines are so vague that they are open to wide disparities in application and interpretation. It also is not clear that each case will fit into this proposed framework. For example, there may be no easily identified standard error in a measure of discrepancy, and thus no way to determine the standard deviation.

Second, as stated above, the distinction of "at least 2 to 3 standard deviations" is an arbitrary one. It is not clear in the abstract whether the percentage to be used will be reasonable for statistical purposes. The "statistical significance" might not have what statisticians refer to as "practical significance," or relevance when applied to real-life situations. The "significance" will depend heavily on how much data is available, rather than on the size of the potential discrepancy. For example, where there is scant data, a certain percentage might seem statistically insignificant, but it is actually significant due to the small amount of data available. Further, it appears that there is a presumption that there is no deviation unless it is proven to 2-3 standards.

In addition, this statistical analysis will not be effective when dealing with *risks* as opposed to strict health standards. Due to the acknowledged difficulty of proving causal links and EPA's reliance on risk data, this analysis can easily result in flawed findings.

Finally, and perhaps most importantly, this arbitrary and vague yet stringent "standard" for assessing the significance of the disparity presents a huge burden for complainants to overcome. This is true not only with regard to the data that will be required, but also due to the lack of technical support available to complainants. Clearly, only a statistician could assess whether the demographic disparity achieved "statistical significance to at least 2 to 3 standard deviations."

Where there is evidence of adverse impact, OCR should err on the side of safety and protection of complainants regarding statistical deviations, rather than requiring more stringent measures. This tough burden will result in OCR's dismissal of the complaint due to lack of "significantly" conclusive evidence, where there is in fact evidence that a disparity exists. EPA should rework this section and clearly identify more specific, workable guidelines that will not result in the dismissal of a complaint except in the most extreme cases.

Justification

Title VI clearly prohibits discriminatory effects. Nonetheless, the Guidance allows a recipient to use economic justification to continue activities that have adverse disparate impacts. While under the Guidance benefits to the community will be considered, in reality, most economic benefits from industrial facilities are realized outside the burdened community. The Guidance provides that OCR will consider the "views of the affected community" in determining whether

the facility will provide direct, economic benefits to the community. But there are fundamental problems with this approach.

When EPA seeks to obtain input about benefits to the community, whose voice will count? Communities are often divided by proposals for environmentally harmful facilities that may generate new jobs. How will EPA decide who are the legitimate representatives of the community? Consider, for example, the power plant proposed for the Bayview Hunters Point community in 1994, discussed above. When state officials approved the plant, they accepted a community benefits package proposed by the developer as an important part of mitigation for the project. This benefits package was negotiated with only a small section of the Hunters Point community, and bitterly opposed by many other residents.

What if, as has so often happened in the past, the promise of economic benefits for *local* residents does not materialize? Are the disproportionate impacts still "justified"? What if the environmental impacts of the project are worse than projected? Consider, again, the Bayview Hunters Point neighborhood. When the City of San Francisco built a major sewage treatment plant in the area, it justified the burdens imposed on residents in part by constructing a community education center. But for decades following, the treatment facility has experienced sewage overflows, released noxious odors, and created a long-term community nuisance.

Why should community residents be forced to choose between jobs or their health and other adverse impacts? How can residents who may be desperate for employment make a voluntary choice about whether to expose themselves to disproportionate environmental harms? Why should economic benefits be able to justify burdens on health, particularly when they are distributed in an uneven manner? All permitting actions have some economic benefit that can be used to justify almost anything. There should be no economic justification for racism.

The Guidance provides that a justification may be rebutted if EPA determines that a less discriminatory alternative exists, including mitigation measures. OCR will consider "cost and technical feasibility" in assessing the practicability of potential alternatives. Section VII.A.2. As Professor Bradford Mank has pointed out, since minority groups often live in areas with significantly lower land prices, allowing recipients and developers to use lower land costs as a justification for rejecting an alternative may place many minorities at risk. Bradford Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999). At the least, therefore, EPA should not allow cost to be a factor unless there are extraordinary cost differentials involved.

Finally, if a mitigation measure is approved as a less discriminatory alternative, the Guidance provides for no real monitoring or enforcement methods to guarantee that the measure(s) will actually be implemented or accomplish the necessary reductions. While EPA may threaten to condition future funding on compliance, it will not likely investigate unless the complainants monitor results, which typically they are ill-equipped to do. More importantly, there is no guarantee that reductions will result in the relief required. Reductions can still result in continued discrimination.

Conclusion

There are many serious defects in the proposed Guidance that will drastically limit Title VI's usefulness for communities already overwhelmed by environmental hazards. We urge EPA to redraft the Guidance to address the concerns raised in these comments.

We appreciate the opportunity to submit these comments, and look forward to EPA's response.

Sincerely,

Amy Cohen, Law Student Clinician
James Browne, Law Student Clinician
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August 17, 2000

Anne Goode
EPA Office of Civil Rights
(MC1201A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Dear Ms. Goode:

I am an employee of the Michigan Education Association/NEA, but this letter is not being written to you as such. In fact, I am an American citizen who has always believed that fairness and equality are rights which all of our citizens should be allowed to enjoy. I was raised with a social conscience, and when I hear or read of an injustice to one segment of our society, I find that I can not sit idly by and not express my outrage.

Recently, I read about a situation which is being labeled as "environmental discrimination." This involves the placing of industrial incinerators in neighborhoods which are inhabited mainly by people of color. These neighborhoods are also being inhabited by people who can least afford to fight these encroachments upon their health and safety. This in direct violation of Title 6 of the Civil Rights Act, and these encroachments must stop now.

I am a father, have been an educator for thirty-three years and now am hired to defend the rights of individuals. I would not want my children living in contaminated neighborhoods. I would not have wanted to teach in contaminated neighborhoods. I do not want schools which house our most precious natural resource, our children, built or near these incineration sites. For these reasons I would urge you and the EPA to change its Title 6 Guidance. It is right to do so to insure that all of our citizens share in the health and well-being of this great country.

Received 8/21/00

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I thank you for your time and urge your strong consideration of this matter.

Sincerely,

(b) (6) - Privacy

[redacted]

COMMENTS

OF THE

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

ON

"Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance); Notice

65 Federal Register 39650

(June 27, 2000)

Submitted Electronically
to
U.S. EPA's Office of Civil Rights

August 28, 2000

INTRODUCTION

The Illinois Environmental Protection Agency respectfully submits the comments below in response to the request of the U.S. EPA for comments on its draft guidance on Title VI published in the Federal Register on June 27, 2000 (65 FR 39650).

The Illinois Environmental Protection Agency is designated by Section 4 of the Illinois Environmental Protection Act, 415 ILC 5/1 et seq., as the agency responsible for the administration of the federal environmental statutes in the State of Illinois, including specific responsibility for the Clean Air Act, the Water Pollution Control Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Resource Recovery Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Together these laws embody the environmental pollution control program of this nation. These comments express the views of the Illinois EPA on the administration of these federal laws in Illinois and how the proposed guidance documents would affect this important work.

The Illinois EPA conducts its business on behalf of the citizens of Illinois in a manner consistent with the principle of equal rights for all, which is embodied in both the U.S. and the Illinois constitutions. The Illinois EPA carries out its important responsibilities to protect the health, welfare and environment on behalf of all of the citizens of Illinois. These citizens are a diverse and varied group, including some of the largest groups of minority populations in the nation, including not only racial minorities, but a large and diverse population of citizens of different national origins.

Some of the comments that follow are critical of the proposed guidance that U.S. EPA has offered as a means of implementing Title VI of the federal Civil Rights Act. These criticisms do not stem from a disagreement with the principles and purposes of the Civil Rights Act and do not imply a lack of belief in, or commitment to, those principles and purposes. The comments are intended to lead to a more effective program to assess and protect those rights.

The Illinois EPA provided extensive comments on "U.S. EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" issued by U.S. EPA in 1998. When finalized, one of the proposed draft guidance documents which is the subject of these comments is intended to replace the Interim Guidance. The Illinois EPA is pleased that the U.S. EPA has addressed some of the issues raised in these and the many other comments submitted in response to the Interim Guidance. However, many important issues and concerns raised by the Illinois EPA have either not been addressed or, in the view of the Illinois EPA, have not been adequately addressed. In the comments that follow, Illinois EPA will reiterate its issues and concerns regarding those areas in the draft guidance and comment on some significant changes that have been made to, and address some of the new areas contained in, the draft guidance.

The Illinois EPA has participated in discussions and development of separate comments being submitted by the Environmental Council of States (ECOS), the national organization of state environmental agency directors. The Illinois EPA expresses support for those comments made by ECOS and also reiterates and adopts them as its own. This will help prevent unnecessary repetition of the same comments.

COMMENT 1:

The program to implement Title VI recommended in U.S. EPA's draft guidance simply cannot be made to work within the context of an environmental permitting program. There are at least three reasons for this. First, the draft Title VI guidance is so devoid of effective administrative standards and parameters that no permitting authority can know how to meet the requirements of Title VI under this guidance. Second, it requires the use of scientific tools that have not been developed, the application of complex integrative methodologies that have either not been developed or do not enjoy general acceptance within the scientific community, and the use of comprehensive and accurate data that are not available. Third, the guidance requires decisions that are beyond the expertise, scope and authority of permitting authorities to make. This conclusion is convincingly demonstrated by the fact that U.S. EPA itself has been unable or unwilling to incorporate any of this draft guidance into its own federal permitting programs, the same programs in which the States would have to apply the guidance.

This is a general summarizing comment, intended to provide an overall assessment of the effect of the draft guidance. Some of the individual reasons mentioned for why the guidance is unworkable will be discussed separately below. However, it is important that U.S. EPA understand that the State permitting authorities that would be called upon to carry out these efforts do not believe that the program can work. It is, at this time, too undefined, too complex and simply infeasible. For example, the ozone control program that the Clean Air Act has addressed over the last 30 years through three major Congressional revisions, while itself a complex, expensive and technically challenging endeavor, is less difficult in each of these areas than the Title VI program proposed by U.S. EPA in its guidance. Yet, the draft guidance would require immediate implementation of a comprehensive Title VI program that goes beyond all federal environmental statutes in its environmental objectives and policies. This is not a statement of objection to the goals of Title VI, but a simple statement of fact that U.S. EPA itself knows to be true.

COMMENT 2:

The draft guidance does not enable a state to conduct an acceptable adverse disparate impact analysis. In fact, for nearly every step of the disparate impact

analysis, the guidance does not provide an adequate basis to understand how to perform that step of the analysis.

The adverse disparate impact analysis is the critical element in the draft guidance. For every instance where a Title VI issue must be evaluated, there must ultimately be an analysis that indicates whether there is any reason to be concerned about a significant disparate impact. The elements or steps of this process are each complex and important. The result of the uncertainty that permeates the guidance is that a permitting authority has no incentive to conduct a disparate impact analysis since the inputs to any study, no matter how thorough or complete, could be selected on a different, and no less acceptable basis, which inputs could produce a different result.

A step-by-step review of the elements of an analysis, together with what the guidance provides or fails to provide for each step, is necessary to appreciate the full extent of the uncertainty that the guidance creates for permitting authorities attempting to comply with Title VI.

1) Identify the affected population: Based on the discussion in the guidance, this step "depend[s] on the allegations and facts in the case". According to the draft guidance, "[v]arious affected populations may be identified". The affected population can be categorized, according to the guidance, in a number of different ways, by likely risk, by measure of impact above a threshold of adversity, by sources or by pathways. The guidance also states that the area for the affected population can be "irregularly shaped due to environmental factors or other conditions" and that "the affected population may or may not include those people with residences in closest proximity to a source." (65 FR 39681) These statements provide no criteria for a permitting authority to identify the affected population. Indeed, the identification of an affected population is little more than a random choice among many competing sets of criteria.

2) Identify the comparison population: The draft guidance states that OCR "would generally expect to draw relevant comparison populations from those who live within a reference area," giving as possible reference areas the recipient's jurisdiction, a political jurisdiction or an area defined by environmental criteria. (Obviously, only one of these has an environmental basis, though this is presumably an environmental analysis.) The guidance also indicates that an entire State could be the reference area, and that the comparison population could be either the general population for the reference area or the non-affected population for the reference area. The guidance also states that the assessment is expected to include one of six different comparisons of demographic characteristics. (65 FR 39681- 39662) Again, the statements provide no discernible basis for choosing among various and competing sets of criteria. The guidance would not even allow the permitting authority any measure of certainty if it elected to use all three of these different possible reference areas and create three separate sets of comparison populations since, within each listed category, there are numerous undefined choices that could be made which would result in different comparison populations.

3) Determining the pollutants to evaluate: For a single pollutant, this may be a simple matter. However, where a source or group of sources have multiple pollutants, a recipient does not know from the guidance which pollutants to evaluate, whether to look

at each pollutant separately, whether to add risks from separate analyses, or whether to look at synergistic effects. As U.S. EPA knows, the scientific tools to analyze synergistic effects are not well developed, nor are they generally accepted.

4) Pathways of the pollutants of concern: The expectations for this step are not defined and the complexities are ignored. For example, if an air permit is the subject of a complaint, should other non-air pathways of exposure be considered, even if the permit has no other relation to such pathways? If the permit is solely for a source of particulate matter, should other pollutants be examined? Should the toxic properties of the particulate matter be considered? If so, which toxics should be considered? No answers are provided in the guidance for these questions or for the analogous questions that arise for land or water permits.

5) Disparate impact analysis methodology: The draft guidance does not provide a list of acceptable methodologies or even a single acceptable methodology to use to perform a disparate impact analysis. This is one of the areas where the ECOS Comments make the point that there is no assurance in the draft guidance that there will be "sound peer-reviewed science." The Illinois EPA shares this concern.

The draft guidance acknowledges this problem, stating "[t]hese analytical tools have limitations given the state of the sciences in assessing risks from multiple stressors and exposure pathways." (65 FR 39660) However, the guidance attempts to assert that some tools are available. "Although there is no single place to obtain access to data sources and tools needed to address these concerns, and some are incomplete or still being developed, major assessment tools and data are available." (65 FR 39659) However, as this statement itself indicates, U.S. EPA cannot conclude that these ("major") tools are sufficient to do the job.

> 6) Determination of whether an impact is significant: The guidance does provide some help on this issue. However, as seemingly happens at every important point in the guidance, U.S. EPA concludes that this determination would be decided on a case-by-case basis.

In summary, U.S. EPA is unable or unwilling to provide criteria that would enable a recipient to know how to conduct a disparate impact analysis or how to make decisions on which elements are needed for an analysis to be accepted. This is a major issue for recipients, particularly in light of the cost of conducting these studies. (U.S. EPA's own study in Shintech cost several hundred thousand dollars and ultimately was not accepted by either the complainant or the permitting authority as adequate.) It is this unwillingness to provide criteria -- even on an interim basis -- that forces U.S. EPA to develop the concept of "Due Weight" that will be given to a recipient's analysis instead of looking to the application of set criteria known prior to analysis.

COMMENT 3:

The U.S. EPA should provide funding for the Title VI activities that this guidance would ask of state permitting programs

In a very real sense, the importance attributed to any program can be judged by the size of its budget. From this perspective, one would be forced to conclude that U.S. EPA is not serious about establishing an effective Title VI program.

U.S. EPA is recommending that recipients undertake programs and perform Title VI analyses of great breadth and unprecedented complexity. U.S. EPA knows that its recommendations for Title VI are beyond its own expertise as well as that of State permitting authorities; in certain aspects they are also beyond the available science as well. If recipients are forced to proceed by this guidance, it would require an enormous amount of resources. At the same time, for its own Office of Civil Rights (OCR), U.S. EPA expects complete *de novo* investigations of virtually every complaint put to paper, including the performance of complex analyses that are well beyond available budget and staffing levels of OCR. This same office has only been able to complete one investigation carried through to decision in the last five years.

U.S. EPA has provided no additional funding for Title VI activities by recipients of its program funds, although the cost of a comprehensive program of the type it recommends is substantial. U.S. EPA also knows that the cost of a single, thorough Title VI analysis, if one could be done in a manner consistent with its draft guidance, would greatly exceed – probably by several orders of magnitude - the cost to a state permitting authority to act on that permit consistent with past practice over the last decade on U.S. EPA's behalf.

It is also important to realize that U.S. EPA's guidance would require the use of methodologies that are currently not available and that must be developed by U.S. EPA. There is no scientific consensus on the cumulative risk and assessment tools that would be required. Individual states cannot effectively develop these tools nor would it be prudent to try. Providing these tools will require a substantial budgetary commitment by U.S. EPA. In the absence of a corresponding fiscal commitment, proceeding with this draft guidance will prove hollow and ineffective.

COMMENT 4:

The Illinois EPA agrees with ECOS that the draft guidance effectively creates requirements for state permitting authorities that will be extremely costly to implement.

The draft guidance represents yet another unfunded federal mandate to state and local governments. One of the characteristics of an unfunded mandate is that they represent the federal government efforts to impose its policy decisions onto lower levels of government without considering all of the implications their policy dictates, especially the fiscal implications. This guidance will force state and local permitting authorities to

investigate whether or not the issuance of a new permit, or the renewal of an existing permit, will result in an added burden to a minority or low-income community. In order to do this, the draft guidance will require state and local permitting authorities to expend substantial amounts of money and administrative resources in order to meet this new federal mandate.

Furthermore, such an unfunded mandate represents U.S. EPA's attempt to impose its regulatory and policy objectives on state and local authorities without ever assuming either the risks or the responsibilities of these objectives. The draft guidance fails to acknowledge or address the disruption it will visit upon permitting programs.

There is the very real possibility that even if a permitting authority did seek to incorporate environmental justice principles into its permit review process, a complainant could still bring a Title VI administrative complaint which challenged the issuance of a permit on environmental justice or Title VI grounds. Due to the vagaries of the complaint process, a permitting authority is likely to have to expend additional resources trying to defend issuance of a permit, even after having incorporated such principles into its permitting process.

The draft guidance is also an unfunded mandate to state and local governments because it imposes potentially expensive disparate impact review of all permits. There is no indication in the draft guidance that U.S. EPA has engaged in any meaningful consideration of these additional costs.

COMMENT 5:

It is improper for U.S. EPA to impose requirements on state and local governments that it cannot and has not carried out in its own permit programs.

As a matter of law and policy, it is improper for U.S. EPA to require states to both determine and impose requirements upon the federal permit programs administered by state agencies where U.S. EPA has not addressed these requirements in its own programs. It is especially inappropriate to do this through an after-the-fact review of a state's efforts. All of these federal permit programs operate under U.S. EPA promulgated rules delineating permit standards and requirements; however, U.S. EPA has not amended its own rules to incorporate Title VI requirements. At the same time, U.S. EPA claims a rulemaking is not required for the Title VI elements of the programs contained in this draft guidance.

Such a result would be patently unfair to the state and local authorities who are partners with U.S. EPA in the administration and enforcement of this nation's body of federal environmental statutes. If U.S. EPA is intent upon implementing this guidance, it should make clear how it intends to hold itself accountable to the same standards of investigation review that it now proposes for review of state and local permitting decisions.

<u>COMMENT 6</u>:

The guidance would impose on state, regional or local environmental agencies a level of social and economic planning that they do not have the authority or ability to determine or implement.

The environmental permitting systems of the states should be "loaded" with the task of resolving a myriad of economic development and social issues of which the environmental impact issues are often only a small part. It would also be especially short-sighted to resolve these issues based solely on environmental considerations.

The business and economic development disparate impacts that may result from the implementation of this guidance may have far greater aggregate negative impacts on the health and welfare of a minority community than the environmental impacts. Failure to consider the negative economic and social impacts in making discrimination decisions, or effectively excluding such considerations from the decision making process, is likely to result in unintended consequences that will adversely redound on minority communities in this and other states.

<u>COMMENT 7</u>:

A serious and complex policy matter such as Environmental Justice Policy should be established through a comprehensive set of regulations and should not be developed through a complaint-resolution process.

Developing a policy through a complaint-resolution process creates a policy only by defining what cannot be done, rather than by what should be done. In effect, it constitutes a decision NOT to have a policy. The applicability of any given decision is unclear, as it is not necessarily applicable to the next set of facts.

More importantly, no one can in good faith attempt to comply with an undefined and unwritten policy, particularly one with such broad and far-reaching implications or one with such tremendous social forces at issue; including business development, economic growth, etc.

<u>COMMENT 8</u>:

As a policy matter, U.S. EPA's guidance could have the likely result of creating economic development *injustice* for minority communities.

The guidance could have the unfortunate result of prohibiting economic growth in order to prohibit disparate impacts that may be insignificant to the health of the minority citizens in a community. U.S. EPA's policy could operate to prohibit economic development in a minority community.

The guidance also fails to recognize that some economically disadvantaged or minority communities may, in fact, actually want to have industry, even locally undesirable land uses (LULUS), sited within their communities because they represent prospects for economic development. U.S. EPA implementation of the Title VI policy should not expend its resources in a way that may potentially deny such communities a viable alternative for economic development. Rather, U.S. EPA's efforts to promote environmental justice would be better advanced if it provided economically disadvantaged or minority communities with the resources required to negotiate the best possible deal for itself when considering the siting of LULUs within their communities.

The guidance apparently seeks to create a degree of equity in the siting of industry that, given our economic and political system, can never be realized through the permitting process. Even assuming that there is, at present, an unequal distribution of LULUs in either poorer or minority communities, government cannot mandate a equitable pattern of distribution of these types of facilities. The simple reason for this is that larger economic and social forces will prevent it. Thus, as a consequence of market forces, the people who live in communities which host LULUs will tend to be those who are financially less well off and have less mobility.

COMMENT 9:

There is no "state action," the effect of which is to create discriminatory effects, in the context of the consistent application of a nondiscriminatory permitting program. Therefore, there is no legally valid Title VI challenge.

The discriminatory "action" from which alleged discriminatory effects flow is the location of polluting activities by private parties (excluding an insignificant number of sources owned or operated by a governmental entity or sited through a state or regional siting process). Neither the State of Illinois nor the Illinois EPA (or, for that matter, most other states and their environmental agencies) select the site for any polluting activity. The location of these activities is the result of multiple, complex factors. The guidance, in practical application, ignores these basic elements in the political and economic structure:

- absent land use planning and zoning regulations justified under a state's police powers, market forces (including land costs, taxing structure, infrastructure, and environmental regulations) determine the location of industry;

- industry, especially heavy industry, tend to locate together in urban areas to ensure a sufficient workforce and to achieve economies in infrastructure necessary to serve these operations;

- cities, counties and other units of local government evince a desire to keep industry together through land use planning and zoning, including the formation of industrial parks and enterprise zones; and

- current *Brownfields* public policy initiatives support keeping industrial sources together.

The guidance, by assuming that the correlation of minority communities near heavily industrialized areas implies causation; i.e., polluting facilities locate in minority areas rather than minorities locate in industrialized areas, is faulty. If other factors such as zoning laws, market forces or the longstanding policy and practice of grouping industrial sources together have created areas of high air emissions (as they have throughout the nation), individual sources should not suddenly be denied their ability to conduct their business simply because their permit is the next one up for issuance or renewal, particularly when no action would be required in the absence of a new permit application. This is not policy, but an abdication of policy-making.

Conclusion

The Illinois EPA shares the conclusion of ECOS that U.S. EPA should substantially revise the substance of the guidance documents prior to issuing either document in final form. The Illinois EPA also believes that any final action on these should be done through a formal rulemaking in accordance with federal law. The reasons for these conclusions are stated above or in ECOS Comments referenced above.

Respectfully submitted,

Illinois Environmental Protection Agency

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Springfield, Illinois 62794-9276

Date: August 28, 2000

(b) (6) - Privacy [redacted] on 08/28/2000 11:37:28 AM

To: Group Civilrights@EPA
cc:

Subject: my letter to the EPA

Ann Goode Reducing our Civil Rights and allowing more pollutants into the environment in not acceptable It is not acceptable to allow the racial make-up of a place to influence the decision of what is an acceptable ammount of pollutants to release into the air, water or any part of the environment.Pollutants are injurious to the health and well-being of every life. Do Not allow the EPA to become the agency known for promoting environmental injustice and racism . Do Not allow the EPA to become the agency known for promoting bad health, debilitating illness, and the destruction of ourselves and our neighborhoods. Change Title 6 to reflect our great need for protection from those that would take advantage of any weakness or loop hole to make money regardless of the destruction inflicted on others. (b) (6) - Privacy

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Alice Kaswan, Associate Professor
University of San Francisco School of Law

August 28, 2000

Honorable Carol Browner, Administrator
U.S. Environmental Protection Agency
401 M Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Comments on:

Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance) and

Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Investigation Guidance).

Dear Administrator Browner and Ms. Goode:

In recognizing the implications of Title VI for recipient environmental permitting agencies, EPA has courageously recognized the potential of our civil rights laws to protect communities of color from some of the most important threats to their well-being. My comments therefore begin by emphasizing the importance and the potential inherent in the path EPA has taken. The question, then, is whether EPA's guidance documents will, in reality, fully implement what Title VI requires. While EPA's guidance documents reflect a recognition of the importance of disparate effects on the communities impacted by recipient agencies' permitting decisions, some aspects of the guidance documents risk seriously undermining the goal of eliminating such disparate consequences. The comments therefore proceed to identify some of the most important ways in which the draft guidances may fail to redress the inequities proscribed by Title VI.

I. General Comments in Support of the Draft Guidance Documents

Comment #1: EPA's Interpretation of Title VI Helps Address the Shortcomings in the Existing Implementation of Environmental Laws. My first general comment is to emphasize that EPA's interpretation of Title VI, and its applicability to environmental

permitting, presents a major step forward in responsibly addressing the distributional implications of environmental laws. As anyone familiar with environmental laws is aware, our environmental laws have not been implemented in a way that systematically considers the distribution – and concentration – of polluting facilities. Pollution controls imposed by regulations and then incorporated into environmental permits generally focus on single sources, they focus on technological feasibility, they focus on economic feasibility. Even where health considerations factor into the regulatory structure, the analysis rarely considers the actual impact of a given facility in a particular location. The environmental permitting process has thus failed to consider the fairness of the distribution of multiple facilities. Nor has the environmental permitting process been effective at dealing with the cumulative impacts of multiple facilities or their impacts in combination with other types of sources. Through EPA's interpretation of Title VI, the federal government has had the courage to address the deficiencies in our environmental permitting programs and to confront the real-life implications of the permits issued by the state and local agencies wielding EPA funding and authority.

Comment #2: The Title VI Regulations' and the Guidances' Focus on Disparate Impacts Rather than Discriminatory Intent Appropriately Focuses Attention on the Harm Suffered Rather than the Motives of the Permitting Agencies. Some might imply that little "harm" is done if an agency does not act with discriminatory intent. That approach ignores the real-life experience of those on whom polluting facilities are concentrated. The fact that EPA's Title VI regulations, like the implementing regulations of most federal agencies, address the disparate effects of recipient agency decisions means that regulatory attention is properly focused on the extent to which communities are protected by the permitting process. Were Title VI to apply only where discriminatory motives could be demonstrated, it would fail to address the many circumstances in which environmental pollution might be concentrated in minority neighborhoods for non-discriminatory reasons. Industries and local governments might concentrate – and have concentrated – in particular areas for any number of reasons, such as cheaper land prices and the presence of available infrastructure. Existing inequities may be traceable, in part, to a legacy of historic segregation and discrimination. Because of the myriad factors that cause existing inequities, environmental permitting agencies may very well make decisions that adversely and disparately impact minority neighborhoods even if environmental permitting agencies themselves do not intentionally discriminate. If the law were to apply only to decisions tainted by direct discrimination, the law would "miss" the distributional inequities minority communities confront.

Comment #3: It Is Appropriate for Recipient Agencies To Be Accountable for the Disparate Effects of Their Permitting Decisions Even if They Were Not Responsible for Preexisting Inequities. As suggested by Comment #2, environmental permitting agencies may not be the direct or even the indirect cause of many of the disparate impacts communities experience. However, environmental permitting agencies do have the power, the opportunity, and the obligation to keep from exacerbating existing inequities. Undesirable land uses may have been concentrated in certain neighborhoods for a whole host of reasons, many beyond the control of a particular permitting agency. EPA's Title VI regulations indicate that, when a

polluting facility applies for a permit for that neighborhood, the agency should deny the permit if it will exacerbate the existing inequity, regardless of the agency's role, or lack of a role, in creating the underlying inequity. While the agency might not be the cause of the disparities, it could provide one of the few mechanisms for improving them.

Comment #4: EPA's Draft Recipient Guidance Appropriately Directs Our Focus to the Permitting Process Itself. EPA's guidance on Title VI is most important for what it tells us about how the permitting process should work. State and local agencies must come to terms with the fact that, under Title VI, they must consider the distributional implications of the permits they issue. The message is positive, not negative. While the original 1998 draft investigation guidance might have seemed negative given its sole focus on the processing of complaints against recipient agencies, the Recipient Guidance explains how an agency might be expected to execute the responsibilities EPA has identified. The primary issue is that permitting agencies must now consider distributional issues. They now have the opportunity to address issues that were previously considered outside of their expertise. The opportunity is an exciting one. In time, the mission of protecting communities equally will hopefully become as important as the basic underlying mission of protecting the environment. Ideally, changes in the permitting process will preclude the need for subsequent complaints.

Comment #5: The Proposal for Area-Specific Approaches and Agreements Could Allow the Recipient Agencies to Serve as Catalysts for a More Comprehensive and Far-Reaching Resolution to Distributional Inequities than the Agencies Could Accomplish Pursuant to Their Own Jurisdictional Powers. To the extent the Recipient Guidance encourages agencies to assess the disparate impacts within their geographical jurisdiction, regardless of pending permit applications, the Guidance will promote a much-needed assessment of distributional equity. More importantly, to the extent that Title VI, and the Guidance, prompt recipient agencies to begin working with other entities that play a role in existing disparities, one increases the potential for a more comprehensive and far-reaching resolution than a single agency, such as an air permitting agency, could accomplish on its own. In that case, the recipient agencies could be serving as a catalyst that will remedy distributional inequities, even in the absence of a specific permitting application and/or a particular complaint.

In addition, the area-specific approach suggests that existing sources might have to assume greater responsibility for existing inequities than would be the case if Title VI were to apply only to prospective permit applicants. If Title VI were to apply only to new facilities, the new facilities might argue that they should not bear the burden of the existing cumulative burdens created by other sources and facilities. The area-specific approach would allow for an assessment of existing sources as well as new sources, and could lead to measures that would reduce existing inequities. Arguably, Title VI could be read to *require* that such an approach be taken, whether or not a recipient agency is considering proposals for new facilities. The area-specific approach is not just a "good idea." It is one that deserves development and amplification in its own right.

As discussed below, however, the area-specific approach, and the potential for effective and meaningful area-specific agreements, may be undermined by a number of the guidances' provisions. The approach thus has an enormous potential, but one that may not be realized under the guidances.

Comment #6: **The Flexibility to Consider a Wide Range of Solutions in Informally Resolving Complaints Has the Potential to Facilitate Broad Improvements in Disparate Impacts.** Like area-specific approaches and agreements, the voluntary compliance process provides recipient agencies with an incentive to take a wide variety of actions to reduce disparate impacts. One permit application might trigger a resolution process that would expand the universe of activities subject to regulation or to more rigorous regulation. As with the area-specific approaches, existing sources, as well as new sources, might find themselves subject to more stringent regulation. While existing sources might not greet this prospect with anticipation, the burden of reducing a legacy of unequal impacts might, through such settlements, distribute the burden of reducing impacts to existing contributors as well as proposed new contributors. As is discussed below, however, it is not clear how willing agencies would be to re-open existing permits. The draft guidances may be insufficient to promote their own suggestions.

II. Comments Critical of the Draft Guidance Documents

A. Consideration of Disparate Impacts

Comment #7: The definition of disparate impact fails to account for social, economic, and cultural impacts. According to the glossary, an impact is an effect resulting from exposure to a stressor. A stressor is defined as a factor that could adversely affect receptors, such as chemicals, physical effects (like noise), and biological effects, or as any substance "that adversely affects the health of humans, animals, or ecosystems." Thus, the guidances seem to recognize only physical and health-related impacts. Facilities seeking permits from recipient agencies may, however, result in a host of negative impacts not covered by the guidances, such as negative impacts on the social, cultural, or economic life of a community. These impacts are considered relevant under other laws considering environmental effects, such as NEPA. The Title VI regulations should cover impacts at least as broadly as other statutes. If anything, the term "impacts" should have an even broader interpretation under Title VI than under environmental statutes, since Title VI was passed to guarantee "civil" rights, not just "environmental" rights. Finally, the placement of environmentally significant facilities can have stigmatic impacts in addition to tangible impacts. For example, the placement of a sewage facility is not a neutral. Taking serious account of stigmatic and symbolic impacts is an important part of addressing the racial disparities that are the target of EPA's Title VI regulations.

Comment #8: The frequently-repeated assertion that the OCR, in determining compliance, will consider only disparate impacts resulting from stressors "cognizable

under the recipient's authority" is ambiguous and, under at least one reading, could undermine the guidances' commitment to recognizing and redressing cumulative impacts. The guidances' strength is in requiring consideration of the real cumulative impacts faced by real people in a particular location. To the extent a permitting or other decision could create a disparity or exacerbate an existing disparity, it violates the Title VI regulations. This understanding of the regulations is reflected in the Recipient Guidance's reference to President Kennedy's statement that "[s]imple justice requires that public funds ... not be spent in any fashion which ... entrenches ... racial discrimination." The agency does not have to be the sole cause of the discrimination; it is enough if the agency makes a decision that "entrenches" or exacerbates disparities caused by other sources.

The guidances' oblique comment that, when it comes to the critical question of compliance or violation it will consider only those impacts associated with the agency, seems to cut directly against the tenor of the guidances and the regulations they implement. Does this mean that OCR will consider only the impacts associated with the agency in determining whether a decision having a disparate impact violates the regulations? Does this mean that OCR will ignore existing disparities that the agency's decision might exacerbate? What, then, is the purpose of considering the cumulative impact in the first place?

If the interpretation I critique is, in fact, the interpretation OCR has adopted, then it fails to prevent recipient agencies from exacerbating and/or "entrenching" existing disparities. That significantly undercuts Title VI. The virtue of the Title VI regulations is that they look to effects, not just intent, as discussed above in Comment #2. The regulations focus on what people experience, not on the state of mind of decisionmakers. If the purpose of the Title VI regulations were to punish a bad agency for treating people badly, then, at least for argument's sake, it might be appropriate to evaluate only that agency's actions to determine if it behaved wrongly. But the Title VI regulations are not about punishing agencies for having a "bad" state of mind. They are about requiring agencies to make sure that their actions do not have bad consequences. Agencies' actions could have bad consequences even if the agencies' decisions were not the sole cause of those consequences. If the focus is on the impact of agencies' decisions, not on their state of mind, then an agency's decision to exacerbate an existing disparity, even if it did not cause the underlying disparity, would violate the Title VI regulations.

As discussed in Comment #3, above, the Title VI regulations present an opportunity. They provide agencies with a mission: to factor distributional consequences into permitting decisions. Title VI is not about fault, it is about the opportunity to improve conditions for those who have suffered inequities. Agencies should be required to improve, not worsen, conditions. Agencies who do not do so, and who exacerbate existing inequities, should be found in violation of the law, even if they are not the sole cause of the disparities of concern.

If the foregoing interpretation of the Guidance is mistaken, then the Guidance needs to be clarified. Perhaps the proper interpretation is that an agency will not be found to have violated Title VI if there is nothing it can do about an identified disparate impact. But it is unclear what

would have prompted the complaint if the impact is something entirely outside of an agency's control. Presumably, a complaint is filed against an agency because it has made a decision having an impact on a community. If its action will not have a particular impact on a community, then there would not be an adverse impact at issue and this stage of the analysis would not have been reached.

Comment #9: Permit modifications should receive the same disparity analysis as other permit applications. The Investigation Guidance states that allegations addressing permit modifications would analyze only the modification and its effects, suggesting that OCR would not consider cumulative impacts from a variety of sources in determining whether to grant a request for a modification. With all due respect to the political difficulties raised by modifications, OCR appears to be creating an unjustified loophole for modifications. For the community experiencing the disparate impact, an increase in impacts is equally detrimental whether it is caused by a modification or by a new source. An existing source does not have a vested right to a modification that impacts the surrounding community. The guidances' important focus on cumulative impacts, from all stressors, should be applied to modifications as well as applications for new permits.

Comment #10: In assessing the "adversity" of a disparate impact, the Guidances place too much weight on the "benchmarks" provided by environmental laws, including the NAAQS. One of the virtues of the guidances is their emphasis on collecting area-specific information. Many of the benchmarks established by environmental laws, in contrast, are considered in isolation, without full consideration of cumulative and symbiotic impacts. Existing benchmarks, including the NAAQS, provide a tempting but potentially misleading picture of the cumulative impacts a community may face. If the problem of cumulative impacts resulting from the inequitable distribution of facilities is to be taken seriously, each setting should be evaluated on its own terms. The data that has gone into the creation of various benchmarks will, of course, be relevant to determining the degree of adversity presented by a particular confluence of facilities. But the potential for variation presented by unique circumstances suggests that presumptions based upon the benchmarks would be flawed. In addition, given the scientific uncertainties that are frequently present, and the limited resources of many complainants, presumptions could be inappropriately difficult to overcome. Presumptions, or overreliance on benchmarks, could create a false sense of certainty and impede the full exploration of site-specific cumulative impacts.

B. <u>Complaint Investigation and Consideration</u>

Comment 11#: OCR should accept complaints filed prior to the issuance of a final permit and assist recipient agencies in avoiding disparate impacts. One of the critical benefits provided by the guidances is that they encourage incorporation of consideration of disparate impacts in the permitting process. If a complainant files a complaint prior to the issuance of the permit, the OCR is on notice that a permitting process may not be proceeding in an appropriate fashion. Intervention early, to prevent the disparate impact, would be highly preferable to waiting until the permit is actually issued. Early intervention is appropriate for all

parties: for the recipient agencies, who could thereby avoid subsequent litigation; for the permittee, who could avoid the uncertainty associated with having its permit challenged; and for the complainant, who would be spared the period of impact that could occur between issuance of the permit and a subsequent finding of its disparate impact. As a matter of institutional structure, OCR could develop a "compliance counselling" function in addition to its enforcement functions. If a complaint is filed prior to the issuance of a permit, it could be referred to the compliance staff who could begin to intervene in the permitting process to assure that disparate impacts are not created.

Comment 12 #: OCR should investigate, not dismiss, complaints that require additional clarification. The Investigation Guidance suggests that, if a complaint lacks sufficient information to determine whether its allegations should be accepted for investigation, it will send a letter requesting clarification to the complainant and that a complainant's failure to respond within 20 days could result in a rejection of the complaint. As OCR suggests throughout the guidances, it is OCR's duty to investigate and resolve potential violations of the Title VI regulations. OCR should be grateful when a complainant comes forward to alert it to a potential violation of Title VI. Once alerted, the burden should be on OCR, not the complainant, to determine whether the allegation is worth investigating.

Comment 13#: The OCR should maintain a strong role in investigating complaints; the "due weight" provisions of the Guidances suggest that OCR might be tempted to rely too heavily on recipient agencies' own studies. It is understandable that OCR would want to encourage agencies to conduct disparate impact analyses, and that one mechanism for encouraging such studies is to indicate that the results of proper studies will be respected by OCR. However, in providing this inducement to recipient agencies, OCR risks abdicating its own responsibilities.

Recipient agencies essentially have a duty, under Title VI, to conduct whatever studies may be necessary to ensure that their decisions do not have disparate impacts. No additional inducement should be expected; no *quid pro quo* for performing a function that is already required should be provided. Furthermore, the methodology for conducting disparate impact analyses varies, and there is a strong likelihood that the outcome of an analysis could depend significantly upon how the study was conducted. OCR might have one view of how it should be conducted; the recipient agencies might have another view. The recipient agencies are likely to follow whatever approach is least likely to show a violation. While the agency's study might conform to accepted scientific approaches, it might not conform to what OCR, the agency responsible for enforcing Title VI, would find. OCR, the agency responsible for enforcing Title VI, should have the last word, not the recipient agency. Deference to the recipient agency is likely to encourage reliance on methodologies that are least likely to show a violation, and that undermines OCR's authority to determine the methodology and approach that best meets the requirements of Title VI.

Comment #14: The OCR should not base its findings upon a proposed activity's

conformance to an area-specific agreement. As discussed in Comment #5, the area-specific agreement process appears to present a very positive opportunity to address distributional inequities. The Guidance's "due weight" provisions suggest that an agency action contemplated by an area-specific agreement will be considered in compliance with Title VI (presumably notwithstanding the action's individual disparate impact). As with the "due weight" accorded an agency's own studies, OCR appears to be attempting to create an inducement, this time for the area-wide approach.

In this case, the need for an inducement is particularly understandable. Unlike the disparate impact studies, discussed above, most recipient agencies would not be considered required to take an area-wide approach. Here, there may be little to incline an agency to undertake the approach without some sort of inducement. However, the inducement may simply generate poor area-wide agreements that do not provide a sufficient level of protection. OCR may be under considerable pressure to accept area-wide agreements, even if they do not go as far as OCR might like. Future complainants might be unlikely to become involved in the creation of an area-wide agreement since the stakes, at that point in time, may be relatively low. If an agency can come up with an agreement that allows for new facilities or modifications, and can get the agreement accepted by OCR, then the Guidance suggests that any subsequent complaints challenging facilities contemplated by the agreement would be dismissed.

Each complaint should receive more attention than that; the area-wide agreement should not have such preclusive effect. When an individual application is under consideration, its effects, and the concerns of the complainants challenging the application, should receive full attention. The area-wide agreement may still be of value to the recipient agency if it can show how the agreement is being implemented and how, in the individual case, it is working to decrease impacts. If it turns out that the application is connected to other activities that will decrease impacts, then that can be determined on the merits, after full consideration. To simply dismiss the complaint, without considering the individual case and without giving a full hearing to the individual complainants, who might not have participated in the area-wide agreement, would be to cut short the analysis Title VI requires and to give too much deference to the area-wide agreements.

Comment #15: The absence of appeal rights for complainants undercuts their ability to seek the protection Title VI requires. The Title VI regulations are intended to protect complainants from disparate impacts. By denying complainants the right to appeal, OCR is undercutting the ability of affected communities to enforce the rights the regulations are designed to serve. The Guidance documents should be facilitating the enforcement of complainant rights, not cutting off their ability to pursue them.

Furthermore, as a pragmatic matter, EPA and recipient agencies have a long history of working together in administering environmental programs. The Title VI Guidances create new responsibilities that will undoubtedly be challenging for both EPA and recipient agencies to undertake. Complainants will thus be requesting relief that runs counter to the status quo and

counter to what the agencies – federal and state – are accustomed to providing. In recognition of the possible reluctance recipient agencies and EPA may feel, the complainants' ability to challenge agency action should not be hampered.

C. Remedy

Comment #16: The Guidance fails to establish an effective remedy, thus undermining the likelihood of recipient agency compliance. The Guidances frequently states that permit denial is an unlikely consequence of a Title VI dispute since, in many instances, the permit application at issue is not the sole cause of the disparate impact at issue. As the Guidance also notes, however, many communities experience disparate impacts from a multitude of sources. The only way in which a recipient agency may be able to avoid "entrenching" or exacerbating that disparate impact is by denying a permit application. As noted in Comment #3, above, the recipient agency should be required to take measures, such as permit denial, that are necessary to protect the impacted community, regardless of whether the permit is the sole cause of the identified disparity.

The alternatives to permit denial, such as area-wide agreements and informal voluntary compliance measures, are all well and good. But they may not present a feasible alternative to permit denial. A recipient agency may have difficulty convincing other sources, outside of their control, to reduce impacts. Additional legislative measures may be necessary before there is a sufficient incentive for local, state, and federal agencies to enter into such agreements and approach reductions in disparate impacts in the comprehensive way envisioned.

And a recipient agency might prefer to deny a new permit if the alternative is re-opening an existing permit to require additional controls that would enable the new applicant to start up. Informal compliance might be achieved if the permit applicant agrees to finance reductions of the stressor of concern by other entities, but such agreements would likely be complex to negotiate. Similarly, it is unlikely that OCR would take the drastic step of terminating a recipient agency's funding. Without a credible threat that an agency's funding could be terminated or that a new permit could be denied if the requisite reductions in impact are not achieved, it appears unlikely that the significant efforts necessary to reduce impacts from other sources would be undertaken.

D. Justifications

Comment #17: Arguably, economic benefits should not justify a disparate impact. By indicating that a disparate impact could be justified if the activity in question provides economic benefits to the affected community, the Investigation Guidance creates the possibility that community residents could be subject to "environmental blackmail." A community could be convinced that it must accept environmental degradation, and risks to health and happiness, as a necessary tradeoff to accomplish economic development. Especially given the high threshold

for establishing an adverse disparate impact established by the Guidance, it is morally questionable whether the law should allow a community to trade its environmental and physical well-being for economic growth.

Such an approach also suggests that industries will have little incentive to minimize their impacts. An entity seeking a permit might look for the most economically desperate community on the expectation that economic need will allow it to pollute without having to consider its adverse disparate impact. The Guidance contains much promise as a mechanism for ameliorating the legacy of disparate impacts that some communities have endured. OCR should be highly reluctant to accept justifications that could undermine the progress that is possible.

Comment #18: Even if OCR retains the "economic benefits" justification, the confirmed existence of economic benefits to a community should not be sufficient to justify a disparate impact unless there is clear evidence that the community not only recognizes the benefits, but chooses to accept them notwithstanding the permitted activity's adverse consequences. The Investigation Guidance appropriately states that it will consider the community's, not just the recipient's, view as to the likelihood that a permitted activity would provide direct economic benefits to the affected community. However, a community may recognize the possibility of direct economic benefits but choose to reject those benefits in light of the disparate impact associated with the activity. The community may be seeking environmentally benign forms of economic development. From a community's perspective, the presence of economic benefits does not necessarily justify the activity in question. To the extent the Guidance permits economic benefits to be a justification for a disparate impact, it should require an assessment not only of the community's recognition of the benefits, but its desire for them as well.

E. Less Discriminatory Alternatives

Comment #19: OCR's consideration of "cost" in determining the feasibility of alternatives is likely to perpetuate concentrations of disparate impacts in minority communities. Property owned by minorities is typically valued less than comparable property that is not owned by minorities. Thus, land in minority neighborhoods tends, overall, to be cheaper than land elsewhere. Sites in white neighborhoods will generally be more expensive than sites in minority neighborhoods. Under the Guidance's approach, a comparable site in a white neighborhood that cost more than the site in a minority neighborhood would not be considered a viable alternative, even if it was less discriminatory, because of the additional cost. As long as "cost" is considered a variable, it will, overall, tend to limit the number of alternatives that do not result in disparate impacts.

Comment #20: A permit applicant's economic gain should not be valued more than protecting a community from disparate impacts. A disparate impact should be permitted simply because it is more costly for a company to locate in an area where it will not cause a disparate impact. This variable suggests that it is more important for a company to be able to

meet its cost projections than it is for a community to be spared inequitable impacts.

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In sum, the Draft Recipient and Investigation Guidances present a major step forward in recognizing the problem of disparate impacts and the necessity of addressing them. However, many aspects of the Guidance may dilute EPA's capacity to accomplish real change. Notwithstanding the political pressure associated with the significant requirements Title VI imposes, I hope that EPA will have the courage to turn the Guidance into a roadmap for improving the quality of life of communities who have suffered disparate impacts for too long.

Respectfully Submitted,

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Alice Kaswan

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Comments on the Title VI
Recipient Guidance and the
Draft Revised Investigation Guidance

The Louisiana Mid-Continent Oil and Gas Association appreciates the opportunity to submit the following comments on the Title VI Draft Recipient Guidance and the Draft Revised Investigation Guidance Documents which appeared in the June 27,2000 Federal Register (Page 39650). Louisiana Mid-Continent is an industry trade association representing individuals and companies who together produce, transport, refine and market over 90% of the crude oil and natural gas in Louisiana. These individuals and companies must obtain multiple permits from the Louisiana Department of Environmental Quality to operate and therefore could be affected by complaints investigated under this guidance. It is in this context that we offer the following comments for EPA's consideration.

Mid-Continent is affiliated with the American Petroleum Institute (API) and participated in the review of the draft guidance with API and National Petrochemical and Refining Association (NPRA) representatives. As such, Mid-Continent endorses the comments being submitted by API and NPRA. Mid-Continent has also reviewed the comments being submitted by the Business Network for Environmental Justice (BNEJ), and Mid-Continent endorses the BNEJ comments.

>> General Comments

Mid-Continent supports EPA's efforts to improve the clarity of the guidance documents on how EPA will investigate Title VI complaints. It is in everyone's best interest to have the recipients expectations described and the complaint process outlined. Mid-Continent believes the guidance is greatly improved over that presented in the 1998 Interim Investigation Guidance. Mid-Continent, however, believes the guidance needs to further clarify several provisions to ensure complete understanding by all affected parties.

Mid-Continent also commends EPA for its effort to hear the concerns of stakeholders after the publication of the 1998 Interim Guidance. Mid-Continent was afforded the opportunity to participate in some of these forums, and we appreciate the opportunity to express our views during this period.

>> The Affect of a Complaint on a Permit

The EPA states throughout the Federal Register notice that "the filing or acceptance for investigation of a Title VI complaint does not suspend an issued permit." While this may be true from a strict legal standpoint, Mid-Continent believes that a complaint often will have the practical effect of suspending a project covered by the permit. While the complaint is filed against the "recipient", the press often reports the filing as a complaint against the permittee. It is anticipated that very few permittees will undertake the activities authorized by the permit in question while the complaint is unresolved. This concern is evidenced by one of the resolutions EPA offers in the guidance.

On page 39683, Column 2, EPA offers that the "justification" a recipient offers for a permit can be "rebutted" by EPA if a "less discriminatory alternative exists". (Section VII.A.1.). Mid-Continent believes that a permittee is unlikely to construct a facility using one technology if there is the possibility that a different technology will be identified as the possible remedy for this complaint.

Secondly, a permittee must often receive multiple permits (air, water, etc.) before a facility can be constructed. The air construction permit is usually the first permit issued since it must be obtained prior to start of construction. If the complaint is filed on this initial permit action, a permittee is not likely to aggressively pursue the remaining permit actions until the complaint is resolved. The recipient is also more likely to slow the processing of these additional permits since a complaint has already been filed against the recipient. The EPA, which has oversight of these permitting actions, is also expected to take a long look at these permits which causes additional potential delays.

Mid-Continent believes that the filing of a complaint does have the "equivalent" effect, if not the legal effect, of suspending the activity authorized by the permit. This being the case, Mid-Continent believes the EPA should make every attempt to resolve complaints quickly. Several of Mid-Continent's comments will address issues that will facilitate the speedy resolution of a complaint.

>> Procedural Steps for Processing Complaints

In Section II.A. (Page 39670), EPA outlines the procedure for acknowledging and accepting complaints. This procedure is taken from 40 CFR 7.120. It appears that EPA misses an excellent opportunity to reject a complaint (if warranted) at this early stage due to the timing of the steps.

The steps require that EPA "notify" the complainant and the recipient within five days of the receipt of the complaint. The EPA is required to accept for investigation a complaint satisfying the jurisdictional criteria within 20 days. EPA, however, allows the recipient 30 days to respond to the complaint. EPA is therefore required to make a decision before the recipient is required to respond.

A permit complaint can be something as simple as the recipient failed to hold a public hearing on the permit. This allegation could easily be rebutted by the recipient in short order. The procedural steps, however, require EPA to accept the complaint before the 30 day deadline the recipient is allowed to make its initial response to the complaint. Mid-Continent believes that the EPA misses an excellent opportunity to resolve a complaint early in the process by not waiting for the initial response of the recipient.

>> Role of the Complainant in the Permit Process

The EPA Recipient's Guidance does an excellent job of identifying potential activities recipients can undertake to minimize the potential for a complaint. Louisiana has undertaken many changes to its public participation procedures in the last few years. Mid-Continent has supported many of the legislative and regulatory actions that implemented these changes. Mid-Continent believes that the most appropriate place for disparate impacts to be addressed is before the permit is issued, not afterwards, as is often the case. EPA will have the opportunity to review the comments on the permit and the recipient's response before the permit is ultimately issued. Resolution of any issues at this point allows a valid permit to be issued and should lead to quick resolution of any future complaint.

EPA, however, places no burden on the complainant to participate in the permit process. The guidance as proposed appears to allow EPA to fully investigate a complaint and to apply a remedy even if the complainant fails to take advantage of the opportunity to offer their comments in the permit process. What incentive does a complainant have to participate in the permit process when they can wait to file a complaint after the permit is issued?

Mid-Continent believes the guidance should include strong language that EPA will be more likely to dismiss a complaint if the complainant fails to participate in the permit process. Mid-Continent acknowledges that this predisposition is only appropriate in those instances where the recipient has provided the complainant the opportunity to participate as outlined in the examples in the Recipient's Guidance. The EPA hopes issues can be resolved before the permit issuance. This is EPA's reason for the Recipient's Guidance. For this to occur, EPA must place some onus on the complainant to participate in this process which does not currently exist in the guidance.

>> Role of the Permittee

While Mid-Continent acknowledges that a complaint can only be filed against a recipient, Mid-Continent believes that there is a role for the permittee. Once again, Mid-Continent believes that it is in everyone's best interest to resolve a complaint quickly. The permittee can often quickly provide the information to accomplish this resolution. While Mid-Continent assumes that EPA fully expects the permittee will take part in any resolution, as proposed in the guidance this occurs only through a third party request for information. Mid-Continent believes the guidance should include a specific role for the permittee to participate.

>> Clarifying the "Affected Population" and "Who may file a complaint"

Mid-Continent believes that EPA should add more clarity to its interpretation of "affected populations". Mid-Continent members individually and through support of legislative and regulatory changes have already implemented some of the public outreach concepts presented in the Recipient's Guidance. However, there remains much doubt about the geographic limits of the community the facilities should target for outreach.

This confusion is caused by the implementation of several federal programs in the 1990s that purport that pollutants travel hundreds of miles and cause significant impacts far from their source. These programs include the acid rain program, the regional haze program and the northeast states ozone transport (OTAG) initiative. The guidance appears to allow a community several hundreds miles away from the source to allege an adverse impact that EPA would be required to review and potentially investigate. The EPA has often used an area of 50 square miles to analyze demographic information. Mid-Continent believes this smaller concept of affected population is more appropriate for considering the validity of a complaint.

Mid-Continent is also concerned about the provisions of allowing a party "authorized to represent" a person or class to file a complaint. Mid-Continent believes EPA should outline criteria to be met to be considered "authorized to represent".

Mid-Continent members have made great strides to improve the relationship and communications with the communities immediately surrounding the facilities. A potential detriment to this improved relationship is the opportunity for groups outside of the community to use the Title VI program to pursue an agenda that is different than the community's concerns. The community should make the overture to a group to represent them and not the other way around. The guidance should include some form of "test" to ensure that an outside group is truly authorized to represent the community and is expressing the community's actual concerns.

>> Complaints Based on Issues Outside EPA or Recipient's Jurisdiction

Mid-Continent is concerned that the Title VI complaint process will be used to foster issues that are outside the scope of the environmental laws under the EPA's or recipient's jurisdiction. Many of the concerns of communities surrounding facilities have their roots in activities that are not environmental in nature. The failure for local and state governments to institute zoning requirements or to allocate tax revenues to upgrade schools or infrastructure in poor and/or minority areas around facilities is not the responsibility of the permitting agency and is not appropriate for EPA to review in complaints on environmental permit actions. Complaints seeking resolution on issues not associated with direct impacts associated with environmental programs under EPA's jurisdiction should be quickly dismissed.

>> Area Specific Agreements

While Mid-Continent understands the potential benefits of engaging in area specific agreements, Mid-Continent believes these agreements may actually have an unintended negative impact on the community. The communities of concern often need businesses of many types to move into these neighborhoods. These area specific agreements could place a stigma on these areas discouraging these new businesses. Louisiana has lost many new plants or businesses because an area was designated ozone non attainment. This in spite of the fact that the business was of a nature that it could easily be sited in the location under the environmental rules. The simple designation of non attainment was enough to halt these opportunities.

>> Dismissal of Complaints Using "Banked" Emission Credits.

EPA states that it would not dismiss a complaint if the permit relied on "banked emission" to achieve the reductions. (Section VI.B.1a-Page 39677, Column 2). Mid-Continent requests that EPA reconsider this position.

Many states have some form of emissions banking program for use in permitting activities. The banking program for Baton Rouge has led to significant emissions reductions well in advance of any rule requiring such reductions. The communities surrounding these facilities have benefited from these early reductions. Admittedly, a permit using banked emission credits increases emissions. However, the increase is still significantly less than the amount originally reduced due to the offset ratio provisions (e.g. 1.3 to 1 offset). In fact, many credits in the bank are never used, and the early reductions become permanent.

Disallowing early reductions will actually hurt nearby communities since facilities will wait several months if not years to perform the emissions reduction project to be contemporaneous with the increase. Instead of encouraging early reductions which is in the community's best interest, the guidance discourages this activity. Once again, banking programs 1) result in significant reductions, therefore benefiting the community, 2) result in reductions sooner versus later, and 3) result in reductions that eventually become permanent if the credits are not used. EPA should encourage early reductions. The guidance, however, discourages this practice to the community's detriment.

>> Multiple Complaints on the Same Activity

Mid-Continent believes that EPA should dismiss follow-up complaints on actions that have already been resolved by the parties involved. For example: a new facility received an air construction permit and a complaint is filed. This complaint is eventually resolved (either changes made or dismissed). The facility is constructed in compliance with the permit and the facility requests a Title V operating permit, which is granted. The guidance would allow a new complaint to be filed on the same issue as previously resolved at this point in the permit process. Unless significant new issues are raised, Mid-Continent believes EPA should immediately reject this complaint. This case also can occur when a facility applies to renew a Title V permit. If no new substantive issues are raised, EPA should immediately dismiss the complaint.

>> Compliance with Existing Environmental Laws

Mid-Continent has serious concerns with EPA's blanket position that "compliance with environmental laws does not constitute per se compliance with Title V." It is one thing if "compliance" is achieved because there is no regulation addressing a specific pollutant. It is quite another when the permit action involves facilities required to be modified to meet a specific rule.

Louisiana (as is many other states) is in the process of issuing Title V permits to facilities. These permits are required by statute and were not intended to add/change requirements at a facility. Mid-Continent believes complaints against Title V permits that simply document existing requirements should be dismissed.

Mid-Continent is also concerned that the guidance can be used to require compliance with a more stringent level of control. Many permits are issued to install facilities needed to meet EPA regulatory requirements. These requirements are justified based on cost impact figures developed by EPA in the rule promulgation process. Mid-Continent is concerned that the Title VI process could be used by EPA to mandate control requirements that it could not initially justify in the rulemaking process. Mid-Continent is also concerned that the Title VI process could lead to control technologies that raise the BACT/LAER threshold in PSD or NSR permitting that could not otherwise be justified based on the permit process alone. States may also not have the legal authority to mandate "compliance" beyond that stated in the rules.

>> Acknowledgement of Agency's Need to Issue Permits for the Public Good

Mid-Continent concurs with EPA's position that agencies must at times issue permits to meet an overreaching goal to improve the environment and/or spur economic development and that EPA could dismiss complaints based on these

grounds. Mid-Continent believes the upcoming permit actions to manufacture Tier 2 low-sulfur gasoline falls into this category and EPA should acknowledge this fact. Refiners have no choice but to construct new process units at existing plant sites to manufacture this fuel. State agencies must issue permits to allow this construction. The overall benefits to society will far outweigh any increased impact to communities around the plant sites. Mid-Continent requests that EPA take a strong public stance that they will dismiss claims for these permits unless there is overwhelming evidence to the contrary.

>> Improvements in the Guidance Supported by Mid-Continent

As stated in the opening General Comments, Mid-Continent believes the new guidance is significantly improved in several areas. Mid-Continent requests the following concepts be retained in the final guidance:

1) The use of risk-based procedures to determine adverse impact - Section VI.B.4.a.

2) The affirmation that compliance with a NAAQS standard is presumed protective of public health - Section VI.B.4.b.

3) The acknowledgement that permit actions that significantly reduce emissions and/or that reduce the pollutant(s) of concern in the complaint will likely be dismissed - Section VI.B.1.a.

4) The requirement that an adverse impact be "significant" to qualify as a valid complaint - Section VI.A.Step 6.

5) The addition of the definitions are quite helpful and should be retained and clarified where appropriate.

6) The position that EPA will not process complaints that are also part of ongoing legal action.

Once again, the Mid-Continent Oil and Gas Association appreciates the opportunity afforded us to participate in the discussions that led up to the new guidance and we appreciate the opportunity to submit these comments.

Sincerely,

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August 25, 2000

File No: 31-380.10B

United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Ladies and Gentlemen:

Comments on Draft Title VI *Recipient* and *Investigations Guidance*

Thank you once again for the opportunity to comment on this important guidance now under final consideration. We also thank the Director herself for listening to our comments on August 2, 2000 at the Carson Community Center.

The Los Angeles County Sanitation Districts (LACSD) are involved in municipal wastewater treatment and non-hazardous municipal solid waste disposal for over five million persons living within all or a portion of 78 cities and unincorporated areas of the County of Los Angeles. The siting and permitting and operation of the above essential public services are often extremely controversial, exacerbated by dynamic and dense demographics.

LACSD is both a direct and indirect recipient of EPA funding as well as a permittee of other local governments that receive EPA funding in some form. The theme of the comments that follow is simple: EPA should provide a timely, objective criteria-based approach to resolving alleged Title VI complaints recognizing the extensiveness and validity of some existing state programs.

An Acknowledgment of the Positive

We recognize the formidable task EPA faced addressing the reactions from the release of the *Interim Guidance* in February 1998. We believe EPA has done a good job:

a) by providing *Recipient Guidance* that should allow recipients to be more proactive in designing their environmental justice programs to hopefully minimize Title VI challenges, and

b) by providing more definitive timelines in some (but not all) of the *Investigation Guidance*, and

c) by recognizing that an issued permit is just that and is not stayed by any Title VI challenge under investigation, and

d) by recognizing that recipients should only be liable for those matters under their jurisdiction.

AREAS WHERE ADDITIONAL CONSIDERATION IS NEEDED

We believe that both Title VI Recipient and Investigations Guidance documents need to give additional consideration to the following areas to greatly improve the timeliness and efficiency of the process:

1. Further Recognition of Existing Comprehensive Local Environmental Justice Programs In Exchange for Expedited Processing

LACSD understands that EPA cannot delegate the administration of the Title VI program in its entirety to local recipients. However, in consideration of those states with highly developed cumulative toxics and EJ programs, a pre-review and approval by EPA should at least result in a presumption that the underlying analyses have been properly performed, are of adequate depth and breadth and that, as a consequence, a complaint can be dispatched within a period not to exceed 60 days.

The South Coast Air Quality Management District (SCAQMD) in conjunction with California state-mandated programs and legislation have the most rigorous environmental justice program in the United States. Many of these programs already put into practice what EPA suggests or hopes to accomplish with their guidance, including all of the technical analyses. We urge OCR to utilize the “due weight provisions” (39663) * and recognize the SCAQMD’s “comprehensive” Title VI approach (39657), both contained in the *Recipient Guidance* (39657), by examining the high degree of effectiveness of the local program here such that a guarantee of a greatly expedited review of complaints by OCR can ensue.

Some components of the local program are as follows:

* = Federal Register page numbers

State of California

AB 1807 – Tanner Toxics Act

This act established a process for identifying air toxics and establishing air toxics control measures (ATCMs) to be adopted and implemented by local air districts. The 1990 Clean Air Act Amendments re-created the federal NESHAPs program based upon this "technology based" control model.

AB 2728 – Toxic Air Contaminants: General Identification and Control Measures

This act incorporated all 188 Title III hazardous air pollutants into the AB 1807 process.

AB 2588 – Air Toxics "Hot Spots" Assessment and Information Act and SB 1731

AB1731 – Air Toxics "Hot Spots" Risk Reduction Audits and Plans

These acts require stationary sources to inventory emissions of air toxics and prepare risk assessments based upon the toxics emissions to identify potential air toxics "hot spots." If a facility's risk exceeds notification thresholds, it is required to notify the affected community of the risks. If the facility's risk exceeds acceptable risk levels, it must prepare and implement a "risk reduction plan."

Other California programs that directly or indirectly regulate emissions of air toxics are:

PROPOSITION 65 – California Safe Drinking Water and Toxic Enforcement Act

AB 3205 – Notification and Analysis Requirements for Air Contaminant Emissions Near Schools

AB 3374 – Air Monitoring of Disposal Sites

AB 3777 – Risk Management and Prevention Plans

South Coast Air Quality Management District Rules and Regulations

Rule 1401 – New Source Review of Carcinogenic Air Contaminants

This rule specifies limits for maximum individual cancer risk and excess cancer cases from new, modified, or relocated permit units, which emit carcinogenic air pollutants. The rule also places limits on many chemicals for which acute or chronic exposure thresholds have been established.

Rule 1402 – Control of TACs from Existing Sources

This rule specifies limits for maximum allowable carcinogenic and acute and chronic non-carcinogenic health risk from existing sources. The maximum carcinogenic risk that can be imposed by a *facility* on the maximally exposed individual is 25 chances in a million chances.

Rule 1403 – Asbestos Emissions from Demolition/Renovation Activities

This rule specifies requirements for demolition/renovation involving asbestos-containing materials.

Rule 1404 – Cr^{+6} Emissions from Cooling Towers

This rule bans the use of additives containing Cr^{+6} in industrial and HVAC cooling processes.

Rule 1405 – Control of Ethylene Oxide/CFC Emissions from Sterilization or Fumigation Processes

This rule limits ethylene oxide emissions from commercial and medical sterilization equipment, and from quarantine equipment and areas.

Rule 1406 – Control of Dioxin Emissions from Medical Waste Incinerators

This rule specifies a high degree of control of dioxin emissions from medical waste incinerators.

Rule 1407 – Control of Emissions of Arsenic Cadmium and Nickel from Non-Ferrous Metal Melting Operations

This rule requires reduction of arsenic, cadmium, and nickel emissions from non-ferrous metal melting operations.

Rule 1414 – Asbestos-Containing Serpentine Material in Surfacing Applications

This rule eliminates any future use of asbestos-containing serpentine material for the surfacing of unpaved areas.

Rule 1420 – Emissions Standard for Lead

This rule reduces lead emissions from stationary sources that process ambient lead.

Rule 1421 – Control of Perchloroethylene Emissions from Dry Cleaning Systems

This rule establishes perchloroethylene emission control requirements for dry cleaners.

Rule 212 – Standard for Approving Permits

This rule establishes requirements for public notification, among other things, before issuing permits.

Rule 461 – Gasoline Transfer and Dispensing

This rule reduces benzene emissions from the retail sale of gasoline.

Rule 1169 – Hexavalent Chromium (Cr^{+6}) – Chrome Plating and Cr Acid Anodizing

This rule establishes stringent emission control requirements for chrome plating and chromic anodizing facilities.

Regulation XIII – New Source Review

Under this rule, emission controls equivalent to federal LAER, is required on all new and modified sources proposing to increase emissions by as little as one pound per day. In the process of controlling criteria pollutants to very low levels, the strict application of LAER, done without cost considerations, has greatly reduced corollary pollutants such as toxics.

California Environmental Quality Act (CEQA)

Furthermore, California agencies making permitting and land-use decisions must comply with the California Environmental Quality Act (CEQA). This statue, while modeled after NEPA, contains much more stringent substantive requirements to avoid or mitigate adverse environmental impacts than NEPA. CEQA requires that the potential environmental impacts of proposed projects be evaluated and that feasible methods to reduce or avoid significant adverse environmental impacts of these projects be identified. There is full public disclosure and discussion of projects under CEQA that go a long way to explain projects to the public. CEQA also requires a discussion of cumulative impacts, which are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Generally the agency must consider aggregate individual effects resulting from both single projects and separate projects, giving consideration to "closely related past, present, and reasonably foreseeable future projects."

2. The *Investigations Guidance* Must Incorporate a Definitive Timeframe for Resolution of a Complaint

While we acknowledge that the revised *Investigation Guidance* has attempted to attach specific deadlines to individual milestone events within the complaint investigation process to a much higher degree than did the *Interim Guidance*, there is still no overall *definitive* timeframe by which a complaint must be resolved. Indeed, Appendix B to the Investigations Guidance (flowchart) makes the process seem endless. EPA can enter into informal resolution discussions with recipients that do not appear to have a specific deadline. Even an allegation rejected by OCR may be referred to another federal agency (39670). Most rejections of allegations can be resubmitted at a later time without prejudice (39673). EPA can waive the 180-day limit on filing a complaint after the alleged discriminatory action takes place for "good cause" (39673). Complaints that are subject to ongoing administrative appeals or litigation in federal or state court would be likely candidates for delay depending on the outcome of those decisions (39673). While EPA would likely close such complaints, "OCR expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation" (39673). LACSD urges OCR to adopt a procedure such that a complaint from start to finish can be completely dispatched within 180 days.

OCR may be galvanizing delay potential by requiring almost no substantiation of claims by complainants. EPA chooses instead to perform the underlying investigations itself which clearly can be a large and time-consuming task. If the April 1998 Shintech-

related Draft Revised Demographic Information report is any indication of the level of effort that will ultimately go into most investigations, it represents a very considerable effort that will overburden OCR.

3. *Investigations Methodology* Needs a Checklist Approach for More Certainty

While the *Investigations Guidance* represents a substantial elaboration over the *Interim Guidance* there are still large areas where uncertainty exists. Even in the situation where the subject permit represents a decrease in overall emissions or pollutants of concern at a facility, a seemingly sure-fire justification by EPA to reject a complaint (39677), much uncertainty can exist as to the significance of the overall decrease or whether the decrease will actually occur. In this situation, which we believe will be fairly common; EPA will resolve the uncertainty in favor of proceeding to investigate for potential discriminatory effects (39677). The disparate impact analysis and the determination of the significance of the disparity offer no certainty to either recipients or permittees. What is needed is a checklist approach of defined, specific analyses, that embodies bands or ranges of acceptability, and which, when performed, results in a definitive determination of discrimination or a dismissal of the complaint. A PSD-type approach might serve as an example for this more prescriptive approach or a no-net increase new source review program, with ground level impact analyses, for both criteria and toxics pollutants, such as those that exist at the SCAQMD.

4. The *Investigations Guidance* Should Include A Discussion of Discrimination in the Public Process

While EPA provides guidance on enhancing public participation in the *Recipient Guidance* no similar text is provided in the *Investigations Guidance (39672).* The guidance stipulates that allegations of discrimination in the public participation process should be filed within 180 days of the alleged action (39672). EPA sets forth the example that if a complainant alleges that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing. Two issues arise within this context. First, EPA has steered clear of including public participation guidelines in the *Investigation Guidance* reserving the right ("as appropriate") to do so in the unspecified future (39669). It seems inconsistent for EPA to steer clear of public participation investigation guidance yet to invite such complaints on the same subject. We urge EPA to commit to draft the public participation guidance quickly since it is our understanding that failure to be heard is one of the biggest catalysts behind the EJ movement.

Second, this clause has the potential of negating EPA's claim that an investigation of a complaint does not stay the permit at issue. If the hearing in question is part of a lengthy permitting process (the permit has not been issued within 180 days after the hearing), these provisions have the practical effect of staying the permit issuance until the allegations are addressed. Further, in support of this last point, in the process of dismissing premature complaints (complaints filed prior to the issuance of a

permit by the recipient), EPA intends to forward to the recipient a copy of the complaint so that the issues can be addressed during the permitting process (39673). In practical effect, both of these provisions act to stay the issuance of the permit.

5. Raising the Complaint Acceptance Bar

In EPA's commendable zeal to do justice to allegations and determine recipient compliance, there are no requirements being placed on complainants to prove that their allegations are true (39672) Complainants do not have the burden of presenting evidence to support their allegations or proving that their allegations are true (39693). Furthermore, complainants are not obligated to offer less discriminatory alternatives (39696). Complainants essentially simply need only complain. Absence of substantive criteria for acceptance of complaints could be an invitation for frivolous filings. From a practical implementation viewpoint, EPA could be swamped doing many underlying investigations of complaints filed as the result of people unhappy with a myriad of undesirable land use decisions by local governments, improperly taking advantage of the Title VI complaint process and OCR's largesse. EPA should specify criteria for complaints that contain more than just basic information, including as a minimum, previous or current emissions data and projected unmitigated emissions that is the source of the concern and that the recipient is overlooking.

6. Permit Renewals

The *Investigations Guidance* states that permit renewals that allow existing levels of stressors or predicted risks to continue unchanged, could be the basis of OCR initiating a Title VI investigation of a recipient's permitting program (39677). Furthermore, decreases in emissions at a facility that could be the basis of dismissing a challenge, should be in the same media, at the same facility and shall be contemporaneous (39677). Furthermore, banking over time is not a basis for a decrease dismissal (39677).

We again wish to reiterate that the Clean Air Act as well as state and local regulators have for years recognized the difference between the opportunities available for pollution control when constructing a new facility versus the reduced opportunities for facilities undergoing retrofits. Facilities undergoing modifications may have severe size, land, matching existing process and cost restrictions considerations that new construction never deals with to the same degree. Permit renewals are akin to the modifications subcategory. In the specific case where the facility is seeking a renewal and is emitting the status quo, they should not be held hostage for increased cleanup simply because a "betterment" must occur or because the neighborhood demographics (beyond their control) has changed.

Also, the contemporaneous emissions decreases at the *same* facility also seem to contradict the thrust of area wide agreements where multiple facilities may be involved. It may be cheaper for another lead smelter in the area to reduce emissions

rather than the target lead smelter that is the cause of the filing and this flexibility should not be discouraged.

7. Enhancement of the Permittee Role

The role of the permittee needs to be addressed. It is completely inappropriate for the recipient to discuss mitigation measures including the possible imposition of control technology or the exacting of emissions offsets without the input and concurrence of the permittee. It is not sufficient to leave communications between the recipients and their
permittees up to the goodwill of the recipients. At the very minimum, the permittees should receive copies of all correspondence passing between OCR and the recipient.

8. Overlooking Land Use Planning Concerns

LACSD does not believe that Title VI complaints can be investigated and resolved among complainants and recipients and OCR irrespective of the land use planning agencies that permitted the siting of the facility in the first place. All three parties must be involved in any dispute resolution. Both guidance documents continue to overlook the role of local governments and their land use planning authority. Training of local government land use planners to be more perceptive to and aware of environmental justice concerns should be undertaken by EPA and might be one prophylactic measure to minimize the possibility of Title VI complaints materializing in the future.

Again, we thank you for this opportunity to comment. Questions can be addressed to the undersigned below at 562.699.7411 x 2113.

Yours very truly,

James F. Stahl

Gregory M. Adams
Assistant Departmental Engineer
Office Engineering Department

GMA:tk

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August 28, 2000

Ann E. Goode, Director
Office of Civil Rights
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1201A)
Washington, DC 20460

Dear Ms. Goode:

The City of Los Angeles appreciates the opportunity to review and comment on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" (Recipient Guidance) and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Complaint Investigation Guidance) printed in the Federal Register June 27, 2000 (65 FR 39650). The City supports Title VI and programs to ensure that disparate impacts to low-income and minority groups are avoided and/or addressed. The City continues to develop policies and strategies to address environmental justice issues on a local level.

The draft Recipient Guidance and Complaint Investigation Guidance are substantial improvements over the previously released "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits." However, the proposed guidance must be further clarified and modified to ensure timely resolution of complaints to avoid unintended consequences. Detailed comments and recommended changes to the proposed Recipient Guidance and Complaint Investigation Guidance are attached. The key issues of concerns that remain to be addressed in the guidance include:

- Development of a more detailed methodology to assist recipient agencies in avoiding and addressing potential disparate impacts through integration of civil rights concerns into existing environmental and regulatory programs; and

- Development of a more efficient, predictable, consistent, and timely Title VI Complaint resolution process; and

- Ensuring full and open participation of all key stakeholders throughout the Title VI complaint evaluation and resolution process; and

- Placing greater emphasis on a recipient agency's underlying permitting processes and on cumulative impacts rather than on the issuance of individual permits and on impacts from individual facilities; and

- Addressing potential effects on local land use planning and decision-making authority.

The City of Los Angeles looks forward to working with the U.S. Environmental Protection Agency (EPA) to resolve these issues so that the communities, recipient agencies, and the permitted facilities can proactively avoid and/or address potential disparate impacts. The City appreciates EPA's attention to our concerns and staff is available to meet with EPA to further discuss our comments as appropriate.

Very truly yours,

Ronald F. Deaton
Chief Legislative Analyst

Attachment

City of Los Angeles Comments on the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

I. Development of a more detailed methodology to assist recipient agencies in avoiding and addressing potential disparate impacts through integration of civil rights concerns into existing environmental and regulatory programs

Public Education to Encourage Early Participation in the Decision-Making Process

The Title VI complaint process should encourage individuals and groups to participate as early as possible in the local planning processes to identify and resolve issues and concerns that have the potential to create disparate impacts. Early stakeholder involvement in the development of policies and/or projects could serve to alleviate any potential disparate impacts.

Because of the complexities of Title VI requirements, the Office of Civil Rights (OCR) should provide Title VI technical assistance and financial incentives to recipient agencies, local governments, and community members. This assistance could take the form of training for recipient agency staff members in Title VI compliance or providing a regional EPA contact or ombudsman familiar with a local area (e.g., southern California) who is available to offer guidance and advice to recipient agencies, local governments and community members. Assistance and other incentives to recipients in designing a comprehensive Title VI program that could help agencies avoid disparate impacts in the planning stages would be particularly helpful.

Avoiding Complaints Through EPA's Proactive Review of Recipient Programs

The EPA proposes to review recipient programs and "area-specific agreements"and provide due weight to such programs as part of the Title VI complaint investigation process (*Federal Register* p. 39675). However, such review is afforded only once a Title VI complaint has been submitted to EPA. In areas such as southern California where thousands of environmental regulatory program permits are issued, a more appropriate method of assuring consistent consideration of civil rights issues in all permit actions, not just those appealed to EPA, would be to evaluate the permitting programs as a whole. Recipient program evaluation would assure a more consistent implementation of methodologies designed to identify and address disparate impacts associated with permits as they are reviewed and approved. Consistent application of permitting criteria and enforcement is essential to ensuring non-discrimination in the conduct of recipient agency permitting programs.

Finally, development of "area-specific agreements" would be very time consuming and resource intensive. In the absence of some provision for EPA's review and agreement that such area-specific agreements appropriately consider and address potential disparate impacts, it is unlikely that such agreements would be utilized.

The City therefore recommends that EPA modify the Recipient Guidance to encourage and provide for recipient agencies to voluntarily submit programs and proposed area-specific agreements for EPA review for compliance with Title VI. Such a process would ensure regulatory programs appropriately and consistently address potential disparate impacts and would assist in streamlining the Title VI Complaint evaluation process. EPA could integrate such proactive reviews into its existing oversight and approval responsibilities over various aspects of recipient agency activities (i.e. State Implementation Plans, rules and regulations, monitoring programs, etc.). Areas where a large number of permits are issued by recipient agencies should be given priority for proactive reviews by EPA.

Due Weight for Existing Programs

The southern California region has several unique regulatory programs which should be provided "due weight" in the Title VI complaint processes. In addition, several agencies may have oversight over a particular project, each of which have independent responsibilities for review of a project's appropriateness. Such programs have been developed with significant public participation and are designed to balance several important social factors including costs of compliance, implementation time lines, and environmental and public health benefits. Each program in and of itself should address disparate impacts, but taken as a whole these programs should integrate to further provide the checks and balances appropriate to ensure the identification of disparate impacts and appropriate project justification in light of disparate impacts which cannot be fully mitigated. The City therefore requests that as EPA reviews recipient agency programs for "due weight," programs administered by other agencies which are considered by the recipient agency, such as the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), in its project review and decision making process also be considered and provide due weight by EPA.

Integration of Recipient Guidance requirements for public participation into the federal NEPA process would minimize costs and/or duplication of effort. However, the integration of civil rights concerns into existing programs may require modification to those programs. For example, public noticing for NEPA documents is generally confined to the *Federal Register* which is not readily available to low-income and minority populations. EPA's recipient Title VI Guidance appears to require more accessible public noticing requirement to ensure that affected communities are aware of their opportunities to participate in the process. Federal programs such as NEPA should be expanded to include such public outreach consistent with the Recipient Guidance.

Consideration of Low-Income Communities

Although Title VI focuses on "race, color, or national origin," Executive Order 12898 requires review for "minority and low-income populations." The City supports this type of comprehensive approach to environmental justice. The integration of disparate impact considerations and assessment methodologies into existing regulatory programs, as recommended by the City, would address low-income population concerns. The modification of the Recipient Guidance to provide for EPA's proactive review of Recipient Agency programs for Title VI compliance would address low-income communities and therefore better reflect the requirements of Executive Order 12898.

Benchmarks

The City supports EPA's proposal to utilize regulatory standards as benchmarks for evaluating the significance of potential disparate impacts. The overall purpose of local regulatory and permitting programs are to reduce pollution to achieve health based standards for water quality and air quality (both regional and site specific as through CAA Title III), and to reduce risks

associated with hazardous materials. Therefore, if permits are consistently issued based upon the adopted regulatory programs and consistently enforced, disparate impacts should be minimized. Benchmarks must then be inclusive of plans to achieve health based standards within the time frame allowed by law, not just the standard itself. If local environmental regulatory programs are not designed to reduce pollutants to healthful levels, then we urge the EPA to review the federal laws and standards upon which those programs are based.

Cumulative Impact Benchmarks

While the City supports EPA's use of existing health based regulatory standards for benchmarks, we caution EPA's use of benchmarks developed for individual permits, facilities, or pollutants in evaluating cumulative impacts. For example the *Federal Register* at page 39680 indicates that a cumulative risk of 1 in 10,000 would be likely to support a finding of adverse impact. However, this benchmark is not reflective of regulatory standards for cumulative risk, but rather is reflective of standards established for individual pollutants. Recent air quality studies in the South Coast Air Basin have indicated that the cumulative health risk associated with ambient concentrations of air toxics are approximately 1 in 1,000 (1,400 in 1,000,000). The use of EPA's urban air toxic program, which is cumulative in nature, would be a more appropriate benchmark than the 1 in 10,000 discussed by EPA in the guidance. Similar caution must be employed when selecting cumulative impact benchmarks for other environmental media.

II. Development of a More Predictable, Consistent, and Timely Title VI Complaint Resolution Process

Complaint Processing Timeline

The City supports the complaint processing timelines presented in the draft guidance, but is concerned that EPA may have inadvertently created some opportunities for delays that should be rectified. In particular, the informal resolution process should occur in parallel with the formal investigative process, rather than delay commencement of the investigation. OCR must ensure that the established timelines, including completing the investigative process within 180 days, are consistently met. In this way, OCR can ensure that the Title VI complaint processing procedures are clear, certain, and predictable. To that end, the City would further recommend that OCR be provided with sufficient staff and resources to ensure that investigations are completed within the established timelines.

Better Integration of the Title VI Complaint Processes

In the draft guidance EPA proposes to process complaints on a single project for different environmental media separately. The draft guidance further indicates that EPA will forward complaints as appropriate to other federal agencies with jurisdiction. As commented on the Interim Guidance, it is essential that a single Title VI administrative process be established to prevent repeated complaints through subsequent permit actions administered by different regulatory programs receiving federal funds or administered by different federal agencies.

In many cases, projects may require several permits directly from several federal agencies, or agencies receiving federal funds. One such example would be port expansion activities which often require approvals/entitlements by the Army Corps of Engineers, the metropolitan planning organization (which receive federal transportation funds), the Coastal Commission, permits from the local air quality management district, the state or regional water control board, and the State Department of

Toxic Substances (DTSC) (which receive EPA funding), fire department clearances, sewer connection permits, (most local government recieve federal funds for one program or another), etc. Rather than allow subsequent permit appeals for an individual project with independent review of each complaint, as is currently proposed by EPA, a process which comprehensively addresses the project should be established. A prolonged and repetitive Title VI complaint evaluation and resolution process creates enormous uncertainty for complainants and project proponents. Therefore, EPA must develop a Title VI complaint investigation and resolution process that integrates consideration of other environmental media and other federal agency permitting programs. The draft guidance should be modified to include an integrated project review process to address Title VI complaints against a single project with regard to all environmental permits and non-permitted sources.

Consideration of the project as a whole is also essential to evaluating the justification for the project in light of potential disparate impacts. As indicated by EPA in the proposed guidance, construction of wastewater treatment plants is imperative to public health and safety and has an overall benefit to society. However, EPA goes on to limit project justification to the media over which an agency has jurisdiction (*Federal Register* p. 39677). Therefore, if the air quality permits for a wastewater treatment plant were the subject of a Title VI complaint, the air quality regulatory agency would have no justification for issuing a permit, since air quality is its sole purview and responsibility. Therefore, both project review and project justification should consider the project as a whole.

More Detailed Methodology on Appropriately Assessing Potential Disparate Impacts

Consistent, peer reviewed methodologies and evaluation criteria should be established to assist agencies in evaluating potential disparate impacts and their significance early in the process to avoid Title VI complaints. The EPA should develop methodologies that are circulated for public and peer review and comment, for use by local agencies and integration into existing programs.

III. Ensuring full and open participation of all key stakeholders throughout the Title VI complaint evaluation and resolution process

Inclusion of All Stakeholders Throughout the Process

The Title VI guidance should clearly outline the responsibilities and participation opportunities for each of the various parties involved in a Title VI complaint, including the complainant, recipient, permittee, other federal and state agencies, the local municipal government, potentially affected communities (including low-income communities), geographically proximate and/or similar facilities, the general public, and other interested stakeholders. In conducting a Title VI complaint investigation it is important that all agencies involved in project approval be included. Local governments have project oversight through land-use decisions and therefore would be integral in the complaint evaluation process and would have information and documentation essential to the complaint evaluation process.

In developing voluntary compliance agreements, it is particularly important that there be comprehensive stakeholder involvement. Such voluntary agreements may affect other similar or nearby facilities who are not part of the complaint and could affect the local government, other permitting agencies, and other communities (including low-income communities). Therefore, all potentially impacted parties should be included in the development of such voluntary compliance agreements.

Inclusion of All Sources

As indicated by EPA, sources that contribute to cumulative impacts, including non-permitted sources, may also need to be addressed. Therefore, if mobile sources of air toxic sources are contributing to a disparate impact, agencies responsible for controlling mobile sources, such as EPA and the California Air Resources Board, must be included in the Title VI process so that control options for addressing the cumulative impact of all sources can be considered. The need for expanded stakeholder participation to develop comprehensive approaches that address cumulative impacts raises the importance of focusing the Title VI complaint resolution process from individual permits to an agency's underlying permitting program as discussed in greater detail below.

Public Outreach

Public education and outreach activities are essential to identifying issues of concern to communities and ensuring that potential disparate impacts are assessed and addressed as appropriate. Low-income and minority populations must be informed not only of projects that may impact their community, but of their opportunities to participate in the entire decision-making process, including Title VI complaints. It is important that all stakeholders be encouraged to participate in project evaluation and environmental permitting processes as early as possible to help identify potential disparate impacts and to develop strategies to avoid those impacts. Such public participation is encouraged through several existing programs, such as NEPA and CEQA. As discussed above, such existing programs should be considered in EPA's "due weight" analyses during Title VI complaint evaluation.

Deadline for Filing a Complaint Concerning Public Participation

In the Complaint Investigation Guidance EPA indicates that Title VI complaints regarding the public participation process must occur within 180 days of the alleged discriminatory act in that process (e.g., exclusion from a hearing) (*Federal Register* p. 39670). Such an interpretation does not recognize that, within local governments, public participation is an ongoing open process that is not completed until a final decision has been rendered in a public hearing before the decision making body. Therefore, failures to comprehensively outreach to or otherwise include an individual or community at any single event in the public participation process could be addressed at subsequent public workshops or hearings. Because the ability to participate in the public process does not end until a final decision is rendered, it is this final public hearing that should signal the opening of the 180-day filing of a complaint, not an individual event which may have occurred and could be corrected through the public participation process as a whole. The City therefore requests that the Complaint Evaluation Guidance be clarified to indicate that the 180-day complaint filing period for public process Title VI complaints commences at the end of the public participation process. Such a process would be consistent with EPA's proposed policy of not addressing complaints until the administrative permit appeal process has been completed (i.e. the action is final).

IV. Placing Greater Emphasis On An Agency's Underlying Permitting Processes And On Cumulative Impacts Rather Than On The Issuance Of Individual Permits And On Impacts From Individual Facilities

Contributors to Cumulative Disparate Impacts

Disparate impacts associated with existing facilities could be the result of the lack of authority of any agency to address a specific pollutant or source, the operation/location of regional facilities, the result of decisions made by other agencies and/or higher levels of government, etc. Furthermore, the baseline conditions, such as demographic and information changes over time, may be the reasons for the newly identified disparate impact. Such situations create complex problems

which may require more programmatic solutions, as opposed to the imposition of control strategies at an individual facility. Neither a single facility nor a recipient agency should be held solely responsible for disparate impacts which are cumulative in nature and which are the result of actions and circumstances beyond their control. When investigating disparate impacts, EPA must consider the full range of complex interactions and sources that may contribute to a disparate impact or effect, and the various agencies with oversight over such cumulative sources. Furthermore, EPA must provide "due weight" for programs being undertaken by agencies other than the recipient agency in response to a Title VI complaint involving a cumulative impact.

Comprehensive Programmatic Approach

A more programmatic regulatory program review approach, as opposed to a permit-by-permit review/complaint driven process, would be more appropriate. By working to comprehensively address impacts within an area, pollutants from all contributing sources could be comprehensively addressed based upon cost-effectiveness, technical feasibility, specific agency authorities, and reasonable compliance time frames. Such a program is essential to addressing sources which are not permitted, but which substantially contribute to cumulative disparate impacts. In addition, future permits could then be evaluated within the context of contribution to cumulative impacts.

Potential for Creating Inequities Between Facilities and Industries

In evaluating cumulative impacts for existing permit renewals, a potential for creating significant competitive differences between facilities exist. For example, where several similar facilities are located in the same geographic area, a complaint against the renewal of one facility's permit could result in that facility being be held responsible to undertake facility modifications at substantial costs, while the other like facilities could potentially continue to operate unaffected, simply because their permit was not challenged or has not yet come up for renewal. Such an individual permit complaint driven Title VI resolution scheme could easily result in inequities between facilities and industries.

V. Local Land Use Planning and Decision-Making Authority Impacts and Issues

Local government has traditionally held jurisdiction over land use planning and zoning, and the Title VI complaint review process must ensure that such local control is maintained. The concept of local control over planning is based upon the desire of residents to organize and plan their own communities. In addition, unlike single purpose agencies, such as environmental, transportation, and housing agencies, local governments are responsible for, and must balance, a wide variety of issues. Local government provides essential public services, such as solid resources collection, processing, and disposal, wastewater collection and treatment, electric utility services, potable water delivery, and emergency services at a reasonable cost to the public. In addition, local governments are responsible for balancing economic growth and job needs with open space, recreation, housing, and quality of life needs. Local elected officials must consider and accommodate all of these issues in making land use decisions.

Therefore, it is imperative that the review of any land use decisions, such as that contemplated by the EPA Title VI complaint review process, consider the full range of factors that go into the actions and decision-making processes of local government. We strongly request that the local

jurisdiction primarily responsible for approving a project be included in the Title VI complaint review, evaluation, and resolution process.

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August 28, 2000

VIA EMAIL TRANSMISSION
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Re: Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*

Dear Administrator Browner and Ms. Goode:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the N.A.A.C.P. Legal Defense & Educational Fund, Inc. ("LDF") submit the following comments on the Environmental Protection Agency's ("EPA") *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* for your review and consideration.

The Lawyers' Committee is a national civil rights organization formed in 1963 to involve the private bar in assuring the rights of all Americans. For thirty seven years, the Lawyers' Committee has represented victims of discrimination in virtually all aspects of life. In 1992, the Lawyers' Committee formed its Environmental Justice Project to represent communities of color in environmental and civil rights matters. Our comments are drawn from the Lawyers' Committee's long and varied experience with the administration and application of the nation's civil rights laws, including within the environmental context.

LDF was incorporated in 1939 under the laws of New York State for the purpose of rendering legal aid free of charge to indigent "Negroes suffering injustices by reason of race or color." Its first Director-Counsel was Thurgood Marshall. The Supreme Court has recognized LDF's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *N.A.A.C.P. v. Button*, 371 U.S. 415, 422 (1963). LDF has participated as counsel in numerous environmental justice cases in state and federal courts and before administrative agencies, including cases involving siting of waste incinerators, highway construction and lead poisoning cases.

OVERVIEW OF COMMENTS

These comments briefly discuss the background of EPA's Title VI regulations and enforcement efforts, and of the development of the Proposed Guidance. The substance of the various aspects of the rather lengthy Guidance is then summarized. Finally, the comments discuss the substantive standards set forth in the Guidance, as well as important remedial and procedural standards and provisions.

The comments primarily are concerned with the question whether the Guidance conforms to established precedent, interpretations and applications of Title VI and analogous civil rights statutes. As well, the comments address concerns that are presented regarding the accessability of EPA's OCR and its investigative process to those most familiar with and affected by potential violations — communities of color across the nation — and the effectiveness of that process in accomplishing the Title VI compliance and enforcement function.

The Proposed Guidance departs substantially from the purpose, intent and meaning of Title VI. Specifically, the Guidance would impose limits on the application of Title VI that are not only contrary to the language and established interpretation of the statute, but that would sharply limit enforcement of civil rights protections by both EPA and, by extension, the recipients of EPA assistance. This is most notably the case in those portions of the Guidance that limit the "impacts" to be considered to those "within the authority of the recipients to consider" and the related limitations, both express and implied, on the universe of sources of impacts to be considered and the determination of those impacts that are "adverse". The Guidance, in its present form, seeks to limit Title VI essentially to a sub-species of environmental regulation. The Guidance would erroneously and substantially retrench on the civil rights protections Title VI was designed to afford and purposefully blind EPA to categories of discriminatory practices by recipients of federal funds. We strongly urge EPA OCR to correct these errors and issue Guidance that accurately reflects the scope and reach of Title VI.

I. BACKGROUND

On July 2, 1964, Congress enacted the Civil Rights Act of 1964, the most comprehensive civil rights legislation since Reconstruction.[1] Congress charged federal agencies with the duty to "demolish ... segregation and discrimination" which "experience has shown, can be dismantled only with the leadership and assistance of the Federal Government."[2] Title VI is specifically directed at eliminating the financial participation of the federal government in any programs involving racial or ethnic discrimination.[3] Title VI also requires federal agencies to promulgate regulations for its enforcement.

EPA promulgated implementing regulations under Title VI in 1973,[4] and revised its regulations in 1984. EPA nonetheless effectively avoided enforcement of Title VI until 1993 when the Clinton Administration increased attention on the issue of environmental justice.[5] Enforcement efforts thus far have been slow. Since 1993, EPA OCR has received 97 Title VI administrative complaints.[6] Of those 97 complaints, EPA Disparate has dismissed or rejected 47, leaving 50 currently pending. No complaint has resulted in a Title VI violation.

On February 11, 1994, President Clinton issued Executive Order No. 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. It orders that "each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." In the Presidential memorandum accompanying the Order, President Clinton specifically emphasized that Title VI of the Civil Rights Act of 1964 provided opportunities for federal agencies to address environmental hazards in communities of color.

EPA responded to the Order by developing an Environmental Justice Strategy.[7] The Strategy states that "EPA will improve its implementation of requirements of Title VI of the Civil Rights Act

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[1]42 U.S.C. § 2000 et seq. (1993).

[2]U.S. Commission on Civil Rights, Federal Civil Rights Commitments: *An Assessment of Enforcement Resources and Performance* (Nov. 1983); U.S. Commission on Civil Rights, Civil Rights Under Federal Programs: *An Analysis of Title VI of the Civil Rights Act of 1964* (1968).

[3]42 U.S.C. § 2000-d (1992).

[4]40 C.F.R. Part 7.

[5]U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996, p. 429 ("EPA's recent focus on environmental justice activities has increased the Agency's attention to Title VI issues.")

[6]EPA OCR, *Title VI Complaints Filed with EPA*, June 29, 2000.

[7]EPA OEJ, *Environmental Justice Strategy: Executive Order* 12898, EPA/200-R-95-002, April 1995.

of 1964 by issuing *guidance* and conducting oversight for state and local recipients of EPA funding."[8] Specifically, it states that "EPA will develop *guidance* on the requirements of Title VI for carrying out federally-authorized State permitting programs under the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act.[9] Pursuant to that commitment, EPA OCR developed the Guidance now proposed.

Immediately before issuing the Interim Guidance that preceded this Guidance, EPA made its first notable attempt at enforcing Title VI. That investigation was in response to a Title VI Administrative Complaint regarding the Louisiana Department of Environmental Quality's permitting of the proposed Shintech facility in St. James Parish, Louisiana. In August 1997, EPA OCR began an investigation at the site which was prematurely terminated by Shintech's withdrawal from the community. However, this investigation, which followed the Executive Order and EPA's Environmental Strategy and immediately preceded the Interim Guidance, lends some insight regarding EPA's original approach to Title VI.

During the investigation, EPA emphasized an important issue that is now absent from the Guidance. That is, the independent significance of Title VI compliance and enforcement in the environmental permitting context. Specifically, environmental laws generally treat many of the potentially harmful effects of pollution sources as "acceptable" when such sources are regulated under individual, facility-specific permits.[10] "Importantly, the presumption of the acceptability of residual pollution contemplated by permits did not consider that it would be distributed in such a way that it becomes concentrated in racial or ethnic communities.[11] Title VI and EPA's implementing regulations speak to that issue, by setting out an independent requirement that all recipients of EPA financial assistance ensure that they implement their environmental programs in a manner that does not have a discriminatory effect based on race, color, or national origin."[12]

While conducing the Shintech investigation, EPA issued its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*. Strong opposition, from both sides of the issue, immediately followed. But opposition from the states carried the most weight, leading to federal legislation prohibiting EPA from using any "funds 'to implement or administer the

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[8]EPA OEJ, *Environmental Justice Strategy: Executive Order* 12898, EPA/200-R-95-002, April 1995, p.17.

[9]Id.(emphasis added)

[10]EPA OCR, Title VI Administrative Complaint re: *Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, Draft Revised Demographic Information*, April 1998, p.1.

[11]EPA OCR, *Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, Draft Revised Demographic Information*, April 1998, p.1-2.

[12]Id.

interim guidance'" for complaints submitted after October 21, 1998.[13] It was under this political climate, which extended from February 1998 until June 2000, that the current Guidance was revised and issued.

In June 1998, both before the Revised Guidance was issued and during this heightened political pressure, EPA decided its first case under the Interim Guidance. The case arose out the Michigan Department of Environmental Quality's issuance of a permit to the Select Steel Corporation of America for a steel recycling mill in Genesee County, Michigan. Only four months after the complaint was filed, EPA dismissed the claim. EPA's decision in Select Steel was controversial both because of its political underpinnings and questionable reasoning.[14]

In the context of this Guidance, the political pressure and EPA's response to that pressure is concerning. Yet, in the context of Title VI, it could be irreparable. What EPA adopts in the forthcoming Final Guidance could greatly influence Title VI enforcement. Courts will defer to the agency's interpretation of its own regulation. *See, e.g., Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994); *Lyng v. Payne*, 476 U.S. 926, 929 (1986) (granting high degree of deference to agency's interpretations of their own regulations). This is troubling given the Guidance's limitations on Title VI. Limiting standards regarding the range of impacts, adversity, and less discriminatory alternatives could be devastating to Title VI enforcement. Recognition that the Guidance is not "enforceable by any party in litigation" does little to ease this concern.

II SUMMARY OF GUIDANCE

A. Recipient Guidance

This Guidance provides "a framework designed to improve ... existing programs or activities and reduce the likelihood or necessity for persons to file Title VI administrative complaints."[15] Although focusing primarily on this "framework," the Guidance discusses Title VI and EPA's implementing regulations as the source of authority prohibiting a recipient from "issu[ing] permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin."[16] It reminds recipients that "when EPA approves an application for EPA assistance and you

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[13] *Appropriations Act for Departments of Veteran Affairs and Housing and Urban Development and Independent Agencies for Fiscal Year Ending September 30, 1999*, Pub.L.No. 105-276 (H.R.4194, 112 Stat. 2461, 105th Cong. Tit. III (1998).

[14] Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice*, 27 B.C.Env.Aff.L.Rev 631, 660-666 (2000)(discussing *Select Steel* decision and responses to that decision).

[15] Recipient Guidance p. 2.

[16] Recipient Guidance p. 3.

receive the EPA funds, you accept the obligation of your assurance to comply with EPA's Title VI implementing regulations."[17] Also, "EPA's Title VI implementing regulations require that recipients "submit an assurance with [an] application that [they] will comply with the requirements of EPA's Title VI implementing regulations."[18] Instead of further defining these obligations, the Guidance is dedicated to discussing "recommendations ... designed to identify and resolve circumstances that may lead to complaints being filed with EPA under Title VI."[19]

In discussing recommendations, the Guidance covers several areas, including staff training, public participation, adverse disparate impact analysis, demographic analyses, intergovernmental involvement, ADR, mitigation measures, and self-evaluation of Title VI activities.[20] The Guidance provides such recommendations only as suggestions, however, while making clear that recipients "are not required to adopt such activities or approaches."[21]

B. Investigation Guidance

This Guidance governs investigations of Title VI administrative complaints challenging environmental permits. It is "directed at the processing of discriminatory effects allegations"[22] resulting from the issuance of pollution control permits by recipients of EPA financial assistance.[23] The Guidance does not create any rights nor enforceable obligations, and is clearly described as "discretionary."[24] In fact, EPA explicitly reserves the right "to follow the guidance, or to act at variance with the guidance, based on its analysis of the specific facts presented."[25]

The Guidance explicitly states that "Title VI is inapplicable to EPA actions, including EPA's issuance of permits, because it only applies to the programs and activities of recipients of Federal

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[17]Recipient Guidance p. 3.

[18]Recipient Guidance p. 3.

[19]Recipient Guidance p. 3.

[20]Recipient Guidance p. 8.

[21]Recipient Guidance p. 6.

[22]Investigation Guidance p. 52.

[23]Investigation Guidance p. 51.

[24]Investigation Guidance p. 54.

[25]Investigation Guidance p. 54.

financial assistance."[26] It characterizes an investigation of Title VI complaints as one that "should be viewed as OCR following up on information that alleges that EPA funds are being used inappropriately."[27] It also emphasizes that "the Title VI administrative process is not an adversarial one," and that "[i]t is important to note that EPA does not represent the complainants, but rather the interests of the Federal government, in ensuring nondiscrimination by its recipients."[28]

C. Resolving Complaints

The Guidance emphasizes informal resolution of Title VI complaints. Specifically, it states that "OCR is committed to pursuing informal resolution"[29] and explicitly "encourages pursuit of informal resolution from the beginning of the administrative process."[30] EPA also states that it may "provide support for efforts at informal resolution" at least "to the extent resources are available."[31]

OCR agrees to facilitate these resolutions. "OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before the formal finding."[32] In fact, "during the informal resolution process, the recipient may independently submit a plan to OCR ... without consulting with complainants or others."[33] In evaluating plans, "OCR may consult with complainants, although their consent is not necessary."[34]

Although OCR also encourages "recipients and complainants to try to resolve the issues between themselves,"[35] it takes the position that "denial of the permit at issue will not necessarily be an appropriate solution."[36] OCR states that a denial is inappropriate because "it will likely be a rare

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[26]Investigation Guidance p. 56.

[27]Investigation Guidance p. 62.

[28]Investigation Guidance p. 62.

[29]Investigation Guidance p. 57.

[30]Investigation Guidance p. 67.

[31]Investigation Guidance p. 67.

[32]Investigation Guidance p. 67.

[33]Investigation Guidance p. 69.

[34]Investigation Guidance p. 69.

[35]Investigation Guidance p. 67.

[36]Investigation Guidance p. 68.

situation where the permit that triggered the complaint is the sole reason for the discriminatory effects."[37]

2. Investigative Procedures

"EPA, like other federal agencies, is responsible for investigating formal complaints concerning the administration of programs by recipients of financial assistance."[38] "However, EPA expects that [its investigation process] will often be substantially improved and expedited by information submitted by complainants and recipients."[39]

II Submitted Information

II Analyses/Studies

While encouraging submitted information to resolve investigations, OCR also states it "cannot defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations or that EPA rely on an assertion that a Title VI program has been followed" due to its "responsibility to enforce Title VI."[40] Later, however, OCR describes its willingness to rely on a recipient's submitted analysis concluding that "no adverse disparate analysis exists ... in a finding that the recipient is in compliance with Title VI and EPA's regulations."[41] OCR does state that such reliance is conditioned upon the relevancy, completeness, accuracy and sufficient scope of the analyses, which will dictate the amount of "weight" it is due.[42] Yet, only if the analysis contains "significant deficiencies" will OCR refrain from relying on it.[43]

ii. Area Specific Agreements

The Guidance also encourages recipients to develop area-specific agreements through which recipients can identify geographic areas where adverse disparate impacts may exist and enter into agreements with affected residents and stakeholders to eliminate or reduce, to the extent required by

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[37]Investigation Guidance p. 68.

[38]Investigation Guidance p. 70.

[39]Investigation Guidance p. 70.

[40]Investigation Guidance, p. 70-71.

[41]Investigation Guidance, p. 72.

[42]Investigation Guidance p. 72.

[43]Investigation Guidance, p. 72.

Title VI, adverse disparate impacts.[44] The agreement, if supported by underlying analyses and a pollution reduction plan, will foreclose present and future investigations into allegations related to any of the permitting actions covered by the agreement.[45]

Once an agreement is properly made, OCR will rely upon it instead of conducting a first-hand investigation into allegations. Specifically, when OCR receives the first complaint with allegations related to the agreement, it will rely on the agreement and "close its investigation into the allegation."[46] With respect to any subsequent complaints that "raise allegations regarding other permitting actions by the recipient that are covered by the same area-specific agreement," OCR will generally rely upon its earlier finding and dismiss the complaint.[47] Only if "circumstances had changed substantially" such that the agreement is no longer adequate or properly implemented will OCR "be likely to conduct a first-hand investigation into the allegations."[48]

3. Adverse Disparate Impact Analysis

a. Define Scope of Investigation

In defining the scope of an investigation, OCR expects to rely on (1) the complaint's allegations, (2) an understanding of the recipient's authorities, (3) the results of an evaluation of scientific information, and (4) relevant available data.[49] The complaint will generally define the scope of the investigation.[50] Specifically, a complaint's allegations will define the investigation's

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[44]Investigation Guidance, p. 72 (the Guidance does not define what the standard "to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts" means.)

[45]Investigation Guidance, p. 73 ("If OCR accepts a complaint for investigation involving allegations of adverse disparate impacts related to any of the permitting actions covered by an area-specific agreement, OCR expects, under certain circumstances, to review and give due weight to the agreement if it: is supported by underlying analyses that [are] sufficient; and will result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA's Title VI regulations.").

[46]Investigation Guidance, p. 73.

[47]Investigation Guidance, p. 73.

[48]Investigation Guidance p. 73.

[49]Investigation Guidance p. 79.

[50]Investigation Guidance p. 53.

"geographic scope, sources of concern, pollutants or other stressors, and potentially affected populations."[51] OCR may supplement this information with "available data."[52]

i. Recipient's Authority

OCR will limit its investigations to include only those pollutants ("stressors") and impacts which are "*within the recipient's authority to consider*, as defined by applicable laws and regulations."[53] "Applicable laws and regulations" include "permit programs" or "broader, cross-cutting matters, such as state environmental policy acts."[54] What is appropriate to consider as part of the adverse disparate impact analysis is determined by whether the recipient has "some obligation or authority" regarding it.[55] "A recipient need not have exercised this authority for it to be deemed within the recipient's authority to consider." However, a recipient will not be found to be in violation of Title VI or EPA's implementing regulations unless the adverse disparate impacts that form the basis of the violation "result from sources of stressors, the stressors themselves, and/or impacts cognizable under the recipient's authority."[56]

ii. Universe of Sources

In considering the impacts relevant to an investigation, EPA will consider the "*relevant* universe of sources"[57] which may include "other relevant and/or nearby sources of *similar* stressors."[58] In addition, "the relevant universe of sources contributing to the potential adverse impacts could include, if appropriate, *background sources*."[59] Including background sources allows cumulative impacts of both regulated and unregulated sources to be considered in determining the cumulative level of potential adverse impacts.[60] Specifically, "assessing background sources of

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[51]Investigation Guidance p. 80.

[52]Investigation Guidance p. 80.

[53]Investigation Guidance p. 79 (emphasis added).

[54]Investigation Guidance p. 79.

[55]Investigation Guidance p. 79.

[56]Investigation Guidance p. 79.

[57]Investigation Guidance p. 80 (emphasis added).

[58]Investigation Guidance p. 80 (emphasis added).

[59]Investigation Guidance p. 80 (emphasis added).

[60]Investigation Guidance p. 80.

stressors allegedly contributing to discriminatory effects may be required to understand whether an adverse impact exists."[61] Background sources, therefore, are only included in determining adversity. In determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the agency will not include background sources. Instead, determinations about violations will only "account for the adverse disparate impacts resulting from sources of stressors, stressors, and/or impacts *cognizable under the recipient's authority*."[62]

b. Impact Assessment

An impact assessment determines whether a causal link exists between the alleged discriminatory act and the alleged adverse impacts.[63] This will consider whether the permitted facility is the source of the stressor linked to an exacerbation of alleged impacts, and whether a plausible mechanism and exposure route exists. In conducting this assessment, EPA expects to quantify potential impacts, using data on sources, stressors, and associated potential impacts. EPA admits, however, that data may not be available for many types of impacts.

Available data will be considered in a hierarchical fashion. The list of data, in descending order, is monitoring, modeling, known releases, potential releases, and existence of sources. The most reliable will be given the most weight.[64] OCR will consider data using several approaches to determine causation, including "direct links to impacts," "risk," "toxicity weighted emissions," and "concentration levels."[65] "Direct links to impacts" is evidence of causation between an adverse health or environmental effect and the source of a stressor. "Risk" is the "prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities."[66] Toxicity-weighted emissions "sums the releases of multiple stressors that may be associated with significant risks, weighted by a relative measure of each's toxicity or potential to cause impacts."[67] Concentration levels considers chemical concentration estimates which are "compared to benchmarks of concern for each chemical separately."[68]

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[61]Investigation Guidance p. 57.

[62]Investigation Guidance p. 79 (emphasis added).

[63]Investigation Guidance p. 82.

[64]Investigation Guidance p. 82.

[65]Investigation Guidance p. 82.

[66]Investigation Guidance p. 82.

[67]Investigation Guidance p. 84.

[68]Investigation Guidance p. 84.

c. Adverse Impact Decision

In determining whether a predicted impact is "significantly adverse" under Title VI, "OCR would first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy."[69] Environmental benchmarks, therefore, are the primary standards OCR will use to measure adversity. OCR does state, however, that "compliance with environmental law does not constitute *per se* compliance with Title VI."[70] That is, "in some cases, the relevant environmental laws may not identify regulatory levels for the risks of the alleged human health impact or may not address them for Title VI purposes."[71] "In such cases, OCR could consider whether any *scientific or technical* information indicates that those impacts should be recognized as adverse under Title VI."[72]

According to the Guidance, health based standards based on environmental laws are "presumptively protective" within the meaning of Title VI.[73] "EPA and the states have promulgated a wide series of regulations to implement public health protections" such as the National Ambient Air Quality Standards (NAAQS).[74] "By establishing an ambient, public health threshold, the primary NAAQS contemplate multiple source contributions and establish a protective limit on cumulative pollution levels that should ordinarily prevent an adverse air quality impact on public health."[75] Therefore, "if an investigation alleges air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will be considered *presumptively protective* and emissions of that pollutant should not be viewed as 'adverse' within the meaning of Title VI."[76] It may be possible to overcome

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[69]Investigation Guidance p. 84.

[70]Investigation Guidance p. 85.

[71]Investigation Guidance p. 84; It is important to note that when an environmental benchmark was not available to measure adversity in a Title VI investigation, OCR assumed there was no adversity. *Select Steel Complaint*, EPA File No. 5R-98-R5, at 5 (Oct. 30, 1998)("No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect.")

[72]Investigation Guidance p. 85 (emphasis added).

[73]Investigation Guidance p. 86.

[74]Investigation Guidance p. 86.

[75]Investigation Guidance p. 86. It is important to note that the "primary" NAAQS that OCR interprets as "presumptively protective" for Title VI purposes are designed to protect only "public health," while the "secondary" NAAQS are designed to protect "public welfare." 42 U.S.C. § 7409(b)(1)-(2).

[76]Investigation Guidance p. 86 (emphasis added).

the presumption if contributions of the criteria pollutant "not subject to the standard" under NAAQS (i.e. from non-air pathways) exceed a standard under another environmental law.[77]

d. Comparison Populations

In identifying an affected population, OCR will determine which population "suffers the adverse impacts of the stressors from assessed sources."[78] Affected populations may be identified "depending on the allegations and the facts in the case," the population's "likely risk or measure of impact above a threshold of adversity," or "the sources or pathways of the adverse impacts"affecting the population.[79]

OCR plans to use several approaches to identify affected populations. "Environmental factors or other conditions like wind direction, stream direction, or topography," the "location of a plume or pathway," and "proximity" may be used.[80] "OCR expects to use mathematical models, when possible, to estimate the location and size of the affected populations."[81] It is important to recognize that, depending upon these approaches, "the affected population may or may not include those people with residences in closest proximity to a source."[82]

In determining the race, color, or national origin of the affected population, "OCR intends to use available data and demographic analysis methods, such as currently available U.S. census information," using "the smallest geographic resolution feasible for the demographic data."[83] "In conducting a typical analysis to determine an affected population, OCR would likely generate data estimating the race, color, or national origin and density of populations within a certain proximity from a facility or within a geographic distribution pattern predicted by scientific models."[84]

In determining the comparison population, "OCR would consider the allegations and factors of each case, and would generally expect to draw relevant comparison populations from those who live within a reference area such as the recipient's jurisdiction, a political jurisdiction, or an area

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[77]Investigation Guidance p. 86.

[78]Investigation Guidance p. 87.

[79]Investigation Guidance p. 87.

[80]Investigation Guidance p. 87.

[81]Investigation Guidance p. 87.

[82]Investigation Guidance p. 86.

[83]Investigation Guidance p. 88.

[84]Investigation Guidance p. 88.

defined by environmental criteria, such as an airshed or watershed."[85] Comparison populations may include the "general population" or the "non-affected population" for the reference area.[86]

A disparity analysis will use "comparisons both of the different prevalence of race, color, or national origin of the two populations, and of the level of adverse impacts experienced by each population."[87] Each disparity must be "significant" for a finding of disparate impact.

"Measures of demographic disparity ... would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations."[88] Measures of disparity in adverse impacts may include such factors as whether "the level of adverse impact [is] a little or a lot above a threshold of significance."[89] "A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear."[90] "For example, where credible measures are at least a factor of 2 times higher in the affected population, OCR would generally expect to find a disparate impact under Title VI."[91]

4. Determining Whether a Finding of Noncompliance is Warranted

In determining whether a recipient is in violation of the discriminatory effects standard in EPA's Title VI implementing regulations, "OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin, and, if so, whether the impact is justified."[92] OCR reiterates here again that "while assessing background sources of stressors contributing to alleged discriminatory effects may be required to understand whether an adverse impact is created or exacerbated, in determining whether a recipient is in violation of Title VI or EPA's implementing regulations and the extent of any voluntary compliance measures, the

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[85]Investigation Guidance p. 88.

[86]Investigation Guidance p. 88.

[87]Investigation Guidance p. 88.

[88]Investigation Guidance p. 90.

[89]Investigation Guidance p. 90.

[90]Investigation Guidance p. 90.

[91]Investigation Guidance p. 91.

[92]Investigation Guidance p. 91.

Agency expects to account for the adverse disparate impacts resulting from sources of stressors, the stressors themselves, and/or impacts *cognizable under the recipient's authority*."[93]

a. Justification

If noncompliance is found, "a recipient will have the opportunity to 'justify' the decision to issue the permit ... based on a substantial, legitimate justification."[94] That requires a showing that "the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission."[95] Acceptable justifications include "provision of public health or environmental benefits to the affected population" and "broader interests, such as economic development, if the benefits are delivered directly to the affected population."[96] Benefits of economic development will be evaluated based on "not only the recipient's perspective, but the views of the affected community."[97]

b. Less Discriminatory Alternatives

A justification can be rebutted if EPA determines a less discriminatory alternative exists. Alternatives will be considered that are "practicable and comparably effective." "Cost and technical feasibility" will be considered in its practicability assessment of alternatives.[98] "Practical mitigation measures associated with the permitting action could be considered as less discriminatory alternatives."[99]

c. Voluntary Compliance

If OCR makes a preliminary finding of a Title VI violation, it will attempt to negotiate "voluntary compliance" by the recipient. OCR again reiterates here that "denial or revocation of a permit is not necessarily an appropriate solution."[100] "OCR will likely recommend that the recipient

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[93]Investigation Guidance p. 92 (emphasis added).

[94]Investigation Guidance p. 92.

[95]Investigation Guidance p. 92.

[96]Investigation Guidance p. 92.

[97]Investigation Guidance p. 93.

[98]Investigation Guidance p. 93.

[99]Investigation Guidance p. 94.

[100]Investigation Guidance p. 94.

focus on other permitted entities and other sources within their authority to eliminate or reduce, to the extent required by Title VI, the adverse disparate impacts of their programs or activities."[101]

5. Hearing/Appeal Process

"If compliance with EPA's Title VI regulations cannot be achieved by informal resolution or voluntary compliance, OCR must make a finding of noncompliance."[102] The recipient then would receive two opportunities to appeal. First, the recipient may appeal an adverse finding to an EPA administrative law judge and, if that appeal fails, then the recipient may appeal to the EPA Administrator. EPA enforcement consists of terminating funding, which requires that a written report must first be submitted to Congress.

COMMENTS

The following comments cover several important issues raised in the Guidance. These issues are discussed below in order of priority. Although we refer to "the Guidance" throughout our comments, our references apply to both the Investigation Guidance and the Recipient Guidance. As a result, we encourage EPA to consider and review our comments when revising both Guidance documents.

A. FEDERAL AID RECIPIENT'S OBLIGATIONS UNDER TITLE VI

Title VI of the Civil Rights Act of 1964 has governed the programs and activities of all federal aid recipients for nearly four decades. EPA promulgated Title VI implementing regulations in 1973 and revised them in 1984. All federal agencies' Title VI obligations were clarified and strengthened in 1976 when DOJ promulgated inter-agency coordinating regulations for Title VI enforcement.[103] Congress itself reinforced the broad and strong language of Title VI in 1987, when enacting the Civil Rights Restoration Act of 1987.[104]

A recipients' Title VI obligations are extensive. Title VI itself prohibits intentional discrimination based on race, color or national origin under any program or activity of a federal financial assistance recipient. EPA's Title VI regulations prohibit a federal financial assistance

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[101]Investigation Guidance p. 94.

[102]Investigation Guidance p. 94.

[103]28 CFR § 42.405 (1993)(requiring each agency to draft compliance regulations for recipients, maintain fully staffed national and local civil rights offices, collect and distribute public information about its Title VI program, and develop a Title VI enforcement plan.)

[104] Pub.L.No. 100-259, § 2(2), 102 Stat. 28 (1988).

recipient from administering any program or activity that has a discriminatory effect on a population based on race, color or national origin. Under its regulations, EPA specifically requires recipients to follow certain procedures when applying for EPA loans and grants,[105] and reserves the right to conduct compliance reviews of any program receiving assistance at any time.[106]

While recipients' Title VI obligations are extensive, the Guidance fails to mention them with any specificity. EPA is required to provide recipients with guidelines for proper compliance with Title VI, including Title VI's application to specific programs, methods of enforcement, prohibited program practices, and suggested remedial actions.[107] Instead of fulfilling this requirement, the Guidance sets up a framework designed only to react to potential complaints, rather than to promote overall compliance. Therefore, the Guidance should be amended to provide recipients with clear requirements for compliance under Title VI. At a minimum, the Guidance should require that recipients consider and document the demographic characteristics of affected populations as part of the permitting process.[108]

B. ADVERSE DISPARATE IMPACT ANALYSIS

We agree that the first step in assessing the validity of a Title VI complaint should be to analyze whether, in fact, an adverse disparate impact has occurred. In several ways, the Guidance's approach to this analysis is commendable. In particular, we are pleased that EPA intends to give attention to the cumulative impacts of multiple exposures, including a range of "background" sources, in its determination of adverse impact. Consideration of cumulative impacts, however, must also be included in determining whether a recipient violated Title VI, because determinations based simply on single exposures to single pollutants would be grossly inadequate. We are also encouraged that OCR has clearly stated that its task, in handling Title VI complaints, is to enforce civil rights law, not environmental law. This distinction is imperative to the proper execution of Title VI investigations.

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[105]40 C.F.R. 7.80(a)-(c)(Applications for federal funding from EPA must include: (1) an assurance that the applicant will comply with EPA's Title VI regulations; (2) notice of any lawsuit against the applicant alleging discrimination; (3) a description of pending applications for loans or grants from other agencies; (4) a list of all federal aid currently received by the applicant; (5) a description of any civil rights compliance reviews of the applicant conducted during the previous two years.)

[106]40 C.F.R. 7.85(a)-(b)(Recipients must maintain records for the purpose of compliance reviews, including (1) records of pending lawsuits alleging discrimination; (2) records of racial, ethnic, national origin, sex, and handicap data; (3) a list of filed discrimination complaints and the investigation of these complaints; (4) reports of compliance reviews conducted by other agencies; and (5) any additional information required by EPA.)

[107]28 C.F.R. 42.404(a).

[108]See *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970)(Title VI discriminatory effects standard requires consideration of the racial and socio-economic composition of the surrounding area); See *Caulfield v. Board of Education of New York City*, 583 F.2d 605, 610-612 (2d Cir. 1978)(collecting racial and ethnic data to evaluate compliance with civil rights does not violate Title VI).

Therefore, we urge EPA to continue to honor the distinction that mere compliance with applicable environmental regulations is not sufficient to demonstrate compliance with Title VI.

Despite these strengths, several issues concerning the adverse disparate impact analysis set forth in the Guidance are problematic. Most importantly, the standard limiting impacts to those "within a recipient's authority to consider" lacks any support in law. In fact, this is a dangerous limitation on Title VI enforcement generally and a recipient's civil rights obligations in particular, which is mirrored no where in Title VI precedent. Additionally, the methodology for assessing whether an adverse impact has occurred and whether that impact is discriminatory is also flawed. EPA's policy choices in these areas whether in the ways in which adversity and disparity are measured, or in the narrow range of impacts considered, disregard the important civil rights concerns of affected communities of color.

Therefore, we propose several changes to the Guidance that build on its strengths and address its weaknesses. Our proposed changes are not just as a matter of policy, but a matter of civil rights law. Under Title VI, EPA has an obligation to ensure that none of its aid recipients discriminate on the basis of race, color, or national origin. This obligation is absolute. It cannot legally be subordinated to the types of concerns–convenience, limitations of expertise or data, concern for industry or other regulated entities–that influence the development and implementation of environmental law.

1. IMPACT ASSESSMENT

a. Title VI is not Limited to Impacts Within a Recipient Authority

OCR should abandon the rule that only those impacts that fall within the recipient's "authority to consider" are relevant to a Title VI investigation.

The Guidance strictly narrows the impacts cognizable under Title VI to only those impacts which are "*within the recipient's authority to consider*, as defined by applicable laws and regulations."[109] When describing which "applicable laws and regulations" will grant this authority, it points to "permit programs" or "broader, cross-cutting matters, such as state environmental policy acts."[110] This limitation is too narrow for proper Title VI enforcement.

The scope of impacts that OCR is willing to consider should not depend on whether the aid recipient has "authority to consider" such impacts under relevant environmental law and regulation.[111]

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[109]Investigation Guidance p. 79 (emphasis added).

[110]Investigation Guidance p. 79.

[111]Investigation Guidance at 79.

The authority, and the obligation, to consider a full range of potentially adverse disparate impacts derives from Title VI, which binds federal aid recipients independent of their other responsibilities under state and federal environmental law.[112]

Title VI's mandate is not only independent, it is broad.[113] It may be true that the law allows a permitting agency's exclusive consideration of environmental factors under environmental law, but under Title VI such limited consideration is prohibited.[114] Thus, Title VI provides recipient environmental agencies with both the authority and obligation to consider all the impacts of their decisions that are adverse, not just environmental.

Furthermore, an agency's lack of a specific statutory mandate to consider certain types of impacts should not be confused with a lack of authority to do so. As the EPA Administrative Board has held with respect to EPA regional permitting, "to hold that a Region must abstain from a particular type of inquiry simply because a procedure is not mandated by rule would attack the core of the permitting process."[115]

Some state representatives have commented that it is unfair to recipients to hold them responsible for actions that fall outside their regulatory authority. This response is properly understood as bearing only on the issue of which sources of pollution (regulated and unregulated) may be included in a cumulative impact analysis, and not on the issue of which *impacts* of permit issuance are relevant.[116] Any state agency that has the authority to issue permits, and has accepted federal funds

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[112]The applicable federal environmental laws may, nevertheless, demonstrate that social and economic impacts are within state permitting agencies' authority to consider; state agencies that assume permitting responsibility under Section 502 of the Clean Air Act, 42 U.S.C. 7661(a)(d), assume also the CAA-imposed responsibility to consider such types of impacts. *See infra* notes 145 and 146.

[113] U.S. Commission on Civil Rights, p.12("Title VI is, thus, the broadest instrument available for the nationwide elimination of invidious discrimination and the effects of discrimination on the basis of race or national origin.")

[114]*Shannon v. HUD*, 436 F.2d 809, 819 (3rd. Cir. 1970)(holding that HUD violated Title VI in approving a decision that concentrated on land use factors and made no investigation or determination of the social factors involved in the choice; stating that even if "exclusive concentration on land use factors may originally be permitted under the Housing Act of 1949, since 1964 such limited consideration has been prohibited").

[115]*In re Ash Grove Cement Co.*, 1997 WL 732000 at *11. *See also* Richard Lazarus and Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617, 672 (1999) (discussing Ash Grove).

[116]The former question, about which sources of pollution are relevant, is not the focus of these Comments. We believe that OCR has properly resolved this issue by stating that it will consider the contributions of unregulated sources to cumulative risk. This approach does not hold recipients responsible for impacts beyond their control; rather, it simply recognizes that the activities they do control (i.e., the issuance of the contested permit) do not take place in a vacuum, but against a backdrop of pre-existing exposures that must be taken into

conditioned on Title VI compliance, has the authority, and in fact the obligation, to consider all the discriminatory impacts that may result from such issuance. Any limitation on that obligation has neither a basis in statute nor precedent, and is contrary to the agency's constitutional obligations under the Fourteenth Amendment, the Supremacy Clause, and its obligations to comply with federal law without state imposed limits.

i. Statutory Language Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Title VI's statutory language is not limited to impacts cognizable under a recipient's authority. Contrary to Title VII, which explicitly limits the scope of inquiries to discrimination in hiring, promotion, or terms and conditions of employment, Title VI contains no analogous limitation–simply prohibiting all racial discrimination by recipients of federal funds. If Congress had intended to limit the scope of Title VI to certain types of actions or impacts, it would have explicitly done so as it did in Title VII. Furthermore, even Title VII's much more limiting language as to the range of cognizable impacts has been given an expansive interpretation by the courts.[117]

Title VI's broad statutory language has also been reinforced since its enactment. Congress resolved any doubts about Title VI's scope during its first two decades, when in 1988, it issued a clear statutory mandate for a broad interpretation of the types of discrimination and discriminatory impacts covered by Title VI. The Civil Rights Restoration Act of 1988[118] legislatively overruled a Supreme Court case that had held that Title VI only covered discrimination in the particular activities for which federal funding was earmarked.[119] The CRRA redefined the term "program or activity" in Title VI to include "all of the operations" of departments, agencies, or other institutions "any part of which" receives federal funds. The sole statutory exception was employment discrimination (except in cases where federal funds are earmarked for employment), to avoid overlap with Title VII. Given this, it is clear that EPA is obligated to terminate federal funding of any institution that discriminates in any of its activities except employment.

Although the issue the CRRA addressed most directly was the range of activities covered by Title VI, not the range of impacts, one consequence of the law is that Title VI reaches *types* of discrimination whose *impacts* may be removed from the institutional mission of the federal agency.

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account before such activities can be considered safe or nondiscriminatory. After all, an adverse impact will not be found unless the permit in question would exacerbate the pre-existing risks.

[117] *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied 406 U.S. 95 (1972) (interpreting employer's racial discrimination in providing services to its customers as being part of the terms or conditions of employment, because it contributes to a hostile environment for minority employees).

[118] 42 U.S.C. § 2000d-4a.

[119] *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that covered "program or activity" of a university meant only the federally funded financial aid program).

Where the range of activities covered is so broad, it is impossible to sharply, and arbitrarily, limit the types of impacts considered. It is clear that to do so would functionally moot the CRRA. In fact, expanding the range of impacts considered in investigations of discrimination in environmental permitting would actually be a much less expansive interpretation of Title VI than the CRRA requires. The CRRA does not mandate a strong nexus between a recipients institutional mission and the alleged discrimination. It is surprising, then, and legally untenable, that even in cases where the discrimination is essentially environmental in nature based on environmental laws (a nexus not required by law), the Guidance requires an even closer nexus by including only environmental impacts based on environmental benchmarks.

ii. Judicial Precedent Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Under civil rights law, all potentially adverse impacts on populations of color are relevant to the issue of whether disparate impact exists. A wide range of cases demonstrate this principle. In *R.I.S.E. v. Kay*, for example, an environmental justice case under the Equal Protection Clause, the court held that the state landfill siting process had a disparate impact on a community of color on the basis of noise, dust, odor, property values, interference with worship, need for road improvements, and damage to a historic church and community.[120] The court held that this was insufficient to prove a constitutional violation because there was no proof of discriminatory intent, but since EPA's Title VI regulations have no intent requirement, this ultimate holding is irrelevant for our purposes. Similarly, in *Laramore v. Illinois Sports Facilities Authority*, the court held that increased noise and light, higher rent and taxes, reduced employment base, and isolation from neighboring communities were legally cognizable impacts of the construction of a facility.[121] The court dismissed the Title VI portion of the claim because the defendants were not recipients of federal funds, but refused to dismiss the plaintiffs' Equal Protection claim.[122]

In the Title VI context, the types of impacts considered by courts have not been limited to those impacts that are the subject of the general regulatory or institutional mission of either the federal agency or the recipient.[123] For example, in *Allen v. Wright*, a case challenging the IRS's granting of

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[120]768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992).

[121]722 F.Supp. 443 (N.D. Ill. 1989).

[122]Disparate impacts were relevant to the Equal Protection claim in this case, as in many, because they had the potential to provide indirect evidence of discriminatory intent. In Title VI cases, of course, disparate impacts are relevant regardless of whether there are allegations of discriminatory intent.

[123]In *Allen v. Wright*, 468 U.S. 737 (1984), a case challenging the IRS's granting of tax-exempt status to racially discriminatory schools, the Supreme Court held that the psychological stigma experienced by victims of racial discrimination was an injury cognizable under Title VI. Preventing stigma is not, presumably, a core institutional mission of either the IRS or the beneficiaries of the tax exemption. It is–like the social and economic impacts of a permit issuance–simply an adverse impact that results from the challenged activity.

tax-exempt status to racially discriminatory schools, the Supreme Court held that the psychological stigma experienced by victims of racial discrimination was an injury cognizable under Title VI.[124] Preventing stigma is not, presumably, a defined potentially adverse impact within the core institutional mission of either the IRS or the beneficiaries of the tax exemption. It is–like the social and economic impacts of a permit issuance–simply an adverse impact that results from the challenged activity. Furthermore, EPA's implementing regulations do not limit the applicable scope of an inquiry to environmental or health impacts; there is no reason the Guidance should do so.[125]

iii. The Supremacy Clause and Federal Civil Rights Policy Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

The "authority to consider" standard not only lacks any legal foundation, it also promotes several indefensible consequences. This standard creates a situation wherein the states themselves can define, through means of their own laws, the limits of their own obligations under federal civil rights law. That is, states could narrow their own Title VI duties by passing laws or regulations that limit the authority of the state permitting agencies to consider certain types of impacts. From a legal perspective, this is indefensible.

Title VI and EPA's implementing regulations impose an absolute obligation on all federal aid recipients, which cannot be subordinated to state law. Federal law, of course, enjoys supremacy over state law under the U.S. Constitution.[126] The U.S. Supreme Court has upheld this principle in numerous cases. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 594-96 (1979), *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816 (1979); *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1974); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45 (1971). Most recently, the Court reinforced this principle when holding that the application of the Supremacy Clause "does not depend on express congressional recognition that federal and state law may conflict."[127] It is therefore unlawful for EPA to decline from enforcing federal law because "state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[128]

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[124]468 U.S. 737 (1984).

[125]See 40 C.F.R. Ch. I § 7.35(b) and (c) (1992) (prohibiting actions that have the effect of "subjecting individuals to discrimination," without specifying types of effects).

[126]U.S. Const. Art. 6, cl.2.

[127]*Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2302 (2000)(holding that a federal law will override a state law if the purpose of the federal law cannot be accomplished due to the state law)

[128]Id. at 2293-4.

When a state agency specifically argued that it did not have power under state law to carry out a federal obligation to effectuate federal law, the Supreme Court held:

> State-law prohibition against compliance with [federal obligation] cannot survive the command of the Supremacy Clause of the United States Constitution. [citations omitted]. It is also clear that [the state agency], as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. [citations omitted];. . . . The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court. [citations omitted].

Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 594-96.

Additionally, in *North Carolina State Board of Education v. Swann*, the Court held that states could not shield themselves, or those agencies under their authority, from the obligation to comply with federal civil rights obligations by passing laws that take away those agencies' authority to take the steps necessary for compliance.[129]

There is a strong policy justification, in addition to legal justification, why the Court has so firmly enforced this principle. In the years after *Brown v. Board of Education* and, later, the Civil Rights Act of 1964, many states openly or covertly resisted the enforcement of federal civil rights laws. Often, they did this by changing their own laws to limit the authority of subordinate agencies–like school boards, zoning boards, or housing authorities–to implement federal civil rights guarantees. The Supreme Court's unequivocal rejection of these tactics is not only binding law for EPA today; it is also good policy. Without strong civil rights enforcement, it is not unlikely that some states may attempt to take advantage of the legal loophole created by the "authority to consider" standard in carrying out Title VI compliance. Nonetheless, it seems ironic to allow a recipient to avoid federal law while operating a program funded by federal assistance for the purpose of upholding a state imposed limitation such as the "authority to consider" rule.

Thus, the "authority to consider" rule creates a perverse incentive for states that is directly at odds with one of OCR's major stated goals in issuing the Guidance. OCR has, commendably, endeavored to encourage states to address civil rights concerns in the permitting process before Title VI violations arise. But the "authority to consider" rule creates a direct and large disincentive to

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[129] 402 U.S. 43, 45 (1971) (in school desegregation case, striking down state anti-busing statute). The Court stated that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." Title VI was adopted as an enforcement mechanism of these same constitutional guarantees and, in any event, the Court's holding in *Swann* is equally applicable to state policies conflicting with federal civil rights statutes.

recipients to undertake their own, proactive disparate impact inquiries. That is, the more narrowly circumscribed the range of factors that the state agency is allowed to consider in issuing permits, the less exposed the agency is to Title VI investigations. So, in an effort to avoid federal oversight, state agencies or legislatures have an incentive to pass laws or regulations preventing the agency from considering factors such as socioeconomic impacts or even some types of environmental impacts when issuing permits. The rule thus punishes states that pass laws that require permitting agencies to consider a wide range of relevant civil rights concerns, and rewards those that deliberately hamstring their permitting agencies' Title VI compliance efforts.

iv. Uniform Civil Rights Policy Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Another legal obstacle undermining the "authority to consider" rule is its inconsistent application of civil rights law. That inconsistency stems from the significant variation in the range of legal authority possessed by different recipients. At least 15 states have laws mandating, or at least allowing, permitting agencies to take socioeconomic impacts into account.[130] Many others limit consideration to those socioeconomic effects that stem directly from already-cognizable physical effects.[131] Others limit their consideration to environmental or health effects.[132] Thus, the degree of

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[130]*See, e.g.*, ALA. CODE. ANN. § 22-30-5.1(d) (1997) (requiring consideration of "social and economic impacts . . . including changes in property values, community perception and other costs); CONN. GEN. STAT. ANN. § 22a-122(b) (1998) (requiring consideration of "public health, safety, and welfare," including economic impacts, for issuance of hazardous waste permits); IND. CODE ANN. § 13-22-10-18(a) (1998) (requiring consideration of social impacts including population density and scenic, historic, cultural, and recreational concerns); IOWA CODE § 455B.448(1) (1997) (requiring consideration of social and economic risks); KY. REV. STAT. ANN. § 224.46-830(2)(a) (1996) (same, including "property values, community perception and other psychic costs); MICH. COMP. LAWS ANN. §324.11120 (requiring consideration of scenic, historical, cultural, and recreational concerns); MISS. CODE ANN. § 17-18-15 (1997) (requiring consideration of socioeconomic factors including impact on land use, property values, and government services); MINN. STAT. ANN. § 115A.20 (same); NEV. ADMIN. CODE §444.8458 (1998) (requiring consideration of public welfare); N.J. ADMIN. CODE § 7:26G-12.2(g)(3)(ii)(4) (1998) (requiring permit applicant to submit detailed analysis of economic effects); N.Y. ENVTL. CONSERV. LAW (interpreting "environment," for purpose of triggering an EIS, to include, e.g., noise, historic and aesthetic values, and neighborhood character); S.D. CODIFIED LAWS § 34A-9-1 (same); TENN. ENVTL. HEALTH & SAFETY REGS. § 1200-1-14-.03(3)(q) (1997) (requiring permit applicant to submit detailed analysis of economic effects). *See also* Sheila Foster, *Impact Assessment*, in THE LAW OF ENVIRONMENTAL JUSTICE 256, 285-289 (Michael B. Gerrard, ed.) (ABA publication) (1999) (discussing these and other state laws).

[131]*See, e.g.*, CAL. PUB. RES. CODE § 21100(d), § 15064(f) (deeming socioeconomic impacts relevant to the significance of an environmental impact, although not enough standing alone to trigger an EIS); MONT. ENVTL. & HEALTH SAFETY REGS. § 17.4.603(12) (same).

[132]For example, Mississippi limits the regulatory authority of its environmental department to "scientific," environmental impacts and also requires deference to the interests of industry. See Miss. Laws ch. 598, § 1 (1994) (stating that "environmental rules and regulations should have an identifiable scientific basis and should be adopted after consideration of the costs to the regulated community"). *See also Save Downtown Committee, Inc. v. Wisconsin Dep't of Natural Resources*, 340 N.W.2d 722 (Wisc. 1983) (socioeconomic impacts need not be considered). Consideration of socioeconomic impacts may occur pursuant to state "mini-

civil rights protection offered by Title VI would, under this rule, vary from state to state, creating a unequal pattern of federal civil rights enforcement. Actions that are illegal in one state would, as a matter of federal law, be legal in another. Federal civil rights laws, however, impose uniform obligations that must be enforced uniformly.[133]

v. OCR's Role Does Not Support Limiting Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Another drawback of the "authority to consider" rule is that it forces OCR into making legal determinations about the meaning and scope of state laws. This is something that even federal judges generally avoid doing, since America's system of federalism charges state courts as the ultimate arbiters of the interpretation of state laws. Thus, if there are open questions of state law, a federal court–even the U.S. Supreme Court–will generally refer the case to a state supreme court to resolve the legal issues. OCR, as a division of a federal agency, is certainly not trained, nor does it have the authority, to handle these interpretive questions. Furthermore, unlike federal courts, it cannot refer questions of state law to a state court for resolution. Therefore, OCR should simply avoid the business of interpreting state law, and instead enforce federal civil rights laws as intended: uniformly.

b. Universe of Sources

The relevant "universe of sources" should include the full range of sources resulting in potential adverse disparate impacts on communities of color.

The "universe of sources" of adverse disparate impacts must include all potential sources. What is a potential source should be a case-specific determination, including the proper assessment of cumulative impacts. In describing the universe, the Guidance first lists three options, which we read as illustrative rather than exhaustive. It is important nevertheless that OCR recognizes these illustrations, which demonstrate that both a "single permitted entity alone" and "regulated and unregulated sources together" can cause an adverse disparate impact. Despite these examples, the Guidance describes the universe to include only "other relevant and/or nearby sources of similar stressors."[134] With this description, the universe, although first described in broad and flexible terms, may ultimately be interpreted as only including "similar" and "relevant" sources. This section

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NEPAs," which require environmental impact statements but do not necessarily impose substantive siting requirements, or to the laws directly governing the siting process. Thirty-four states have not passed mini-NEPAs, and some mini-NEPAs address only environmental impacts. *See, e.g.*, D.C. Code Ann. § 6-982(3); Ga. Code Ann. § 12-16-3; Mass. Gen. Laws Ann. § 61. Most of the other states not listed above in footnote 130 do not have siting laws that specifically address socioeconomic impacts. *See* Foster, *supra* note 130.

[134]Investigation Guidance p. 80.

therefore could be improved with further clarification of terms used to describe the sources within a universe.

B. ADVERSITY ASSESSMENT

1. Health Based Standards in the Adversity Assessment

OCR's adversity assessment should not be limited to consideration of health impacts, but should incorporate the full range of impacts, socioeconomic and otherwise, that result from environmental decision-making.

The Guidance focuses entirely on assessing the harms to human health–as measured in terms of increased disease risk, or in terms of health-based regulatory benchmarks–of exposure to various toxins. Although these risks relate to civil rights concerns in the environmental context, they are far from being the whole story. The siting of a polluting facility, or of any locally undesirable land use, has a range of potentially adverse impacts on the surrounding community beyond scientifically provable health risks. Property values almost invariably decline. Quality of life is severely affected by nuisance impacts such as odor, noise, or aesthetic harms. Life in the community may be physically disrupted by displacement of homes, new roads, or excess traffic. Local culture may be affected, particularly in the case of Native American communities whose religious practices or traditional hunting and fishing locations may be disturbed.[135]

All of these impacts are potentially adverse, cognizable under Title VI and EPA's implementing regulations, and therefore within OCR's legal duty to consider. OCR's obligations in this regard can be distinguished from the responsibilities of other EPA offices in implementing environmental laws. For example, the EPA Administrative Board has held that because EPA's primary mission is to protect environmental and human health, not to address socioeconomic concerns, EPA should grant permits complying with environmental standards.[136] However, EPA's implementation of environmental laws with respect to its own permitting authority is distinguishable from OCR's implementation of Title VI with respect to the permitting activities and civil rights responsibilities of federal aid recipients. As the Guidance aptly states, Title VI concerns are not commensurable with those of environmental laws.

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[135] *See* Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 5-6, 9 (2000).

[136] *See In re Chemical Waste Management*, 1995 WL 395962 (EPA June 19, 1995) (holding that RCRA permit must be granted if statutory and regulatory risk and exposure thresholds are complied with); *In re Envotech, L.P.*, 1996 WL 66307 (EPA Feb. 15, 1996) (holding that Safe Drinking Water Act permits may not be denied on the basis that too many undesirable land uses already existed in an area). Note that these cases concerned EPA's authority to consider race when granting permits itself, an activity which EPA contends are not covered by Title VI on the basis of its assertion that Title VI applies only to recipients of federal assistance, not federal agencies themselves.

a. Environmental Laws Permit Consideration of Potentially Adverse Impacts beyond Environmental Health Based Standards in an Adversity Assessment

The Guidance sets up a false dichotomy between environmental and other impacts. Environmental laws often explicitly encompass a wide variety of impacts relevant to the lives of citizens. In fact, a number of environmental statutes and regulations require EPA and state permitting agencies to take social impacts into account in some way. For example, the Clean Air Act (CAA) states that prior to the redesignation of a nonattainment area, an impact assessment must be prepared that encompasses "health, environmental, economic, social, and energy effects."[137] Similarly, in order for a permit to be issued under the CAA, an analysis of alternatives must demonstrate that the benefits of the chosen site "significantly outweigh the environmental and social costs."[138] Additionally, the CAA provides two types of national ambient air quality standards: the primary NAAQS, which "protect the public health" and the secondary NAAQS, which "protect the *public welfare*."[139]

Under the Toxic Substances Control Act (TSCA), Congress instructed the EPA administrator to take into account the "environmental, economic, and social impact" of her decisions.[140] The National Environmental Policy Act (NEPA) requires that socioeconomic, aesthetic, and cultural impacts be included in environmental impact statements. Other agencies have held that, under President Clinton's Executive Order 12,898, NEPA must be interpreted to require disparate socioeconomic impact assessments. Finally, although EPA has traditionally weighed only quantifiable types of harm, President Clinton's Executive Order 12,866, which covers all risk assessments conducted by federal agencies for regulatory purposes, requires that in addition to quantifiable measures, risk assessments must incorporate "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."[141]

EPA nevertheless refrained from using federal environmental laws to reach beyond health based standards in its Title VI investigations. For example, EPA states it will use the primary NAAQS as a presumption of no adversity in the Guidance. The primary NAAQS, however, are designed to protect only the public health, not the public welfare. Conversely, the secondary NAAQS were

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[137] 42 U.S.C. 7474(b)(1)(A) (1994).

[138] 42 U.S.C. 7503(a)(5).

[139] 42 U.S.C. 7408(b)(1)-(2).

[140] 15 U.S.C. 2601(c) (1994).

[141] 3 C.F.R. 638-39 (1994), *reprinted in* 5 U.S.C.A. 601 (West Supp. 1995). *See also* Robert Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment,* U. ILL. L. REV. 103, 111 (discussing application of E.O. 12, 866 to EPA risk assessment).

intended to protect the public welfare and therefore clearly provide a more appropriate standard for adversity in the civil rights context. Such standard, even if not promulgated, demonstrates that protecting the public welfare goes beyond health benchmarks to include factors more relevant to civil rights enforcement. Furthermore, given this presumption, EPA's statement that compliance with environmental law is not *per se* compliance with Title VI is essentially untrue. EPA's presumption has, in fact, essentially made compliance with environmental law *per se* compliance with Title VI, so long as the complaint involves air quality. Strictly under environmental law, a permit would not be granted if it did not comply with the primary NAAQS. Therefore, when a permit is issued and then challenged under Title VI that permit is, by its issuance alone, already presumptively protective. Overcoming this presumption would be hard to accomplish. Thus, when taken to its extreme, EPA's presumption illustrates how EPA has made compliance with environmental law equal to compliance with Title VI.

b. EPA Precedent Demonstrates The Inadequacy of Solely Considering Potentially Adverse Impacts Based Upon Environmental Health Based Standards in an Adversity Assessment

EPA cannot rely solely on health based standards to measure adversity. This problem was explicitly illustrated in *Select Steel*. In that case, EPA stated it would measure diversity strictly against environmental benchmarks, however, benchmarks were not available for all of the pollutants considered in the Title VI investigation. Instead of considering alternative standards, EPA simply assumed there was no adversity.[142] Health based standards, therefore, cannot be the sole basis for measuring adversity, particularly when that means an absence of a standard would mean an absence of adversity. Adversity must be considered against proper measurements to ensure adequate Title VI enforcement.

c. Health Based Standards Should Accurately Measure the Full Range of Potentially Adverse Heath Impacts in an Adversity Assessment

i. Cumulative Exposures

The assessment of cumulative exposures should explicitly incorporate synergies between multiple chemicals, not merely additive impacts of exposures to one or many chemicals from multiple sources.

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[142]*Select Steel Complaint*, EPA File No. 5R-98-R5, at 5 (Oct. 30, 1998)("No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect.")

The Guidance's focus on cumulative impacts is commendable, as disparate impact cannot meaningfully be addressed through a focus on single chemicals or single exposures. We believe that the Guidance should, however, be more clear about what sorts of cumulative impacts will be addressed. At its most simple level, a cumulative impact assessment might simply mean adding the different exposures to a single chemical faced by a population rather than analyzing only one pollution source. Such an approach would not take into account even the additive health risks of exposure to multiple chemicals, and thus would be thoroughly incapable of addressing the real level of health risk faced by communities who are overburdened with a variety of toxins. We do not believe that OCR intends to limit itself to this interpretation of "cumulative impact," as evidenced by its discussion of the "toxicity-weighted emissions" approach and its references to "multiple chemicals" in, for example, the definition of "hazard index," but it would be useful if the Guidance clarified that cumulative impact assessments should *always* include the effects of multiple chemicals.

A second approach–which we read the Guidance as endorsing–would calculate the impacts of multiple chemicals by adding the individual risks posed by multiple chemicals and/or multiple sources. This approach is encapsulated by the Guidance's definition of "hazard index." While an improvement over the single-chemical approach, the additive approach nevertheless does not adequately protect against the true risks posed by combinations of multiple chemicals. This is because chemicals in the environment, or in the human body, sometimes react synergistically with one another, such that their combined effect is far more severe than the sum of the two individual impacts.[143] For example, some combinations of pesticides may cause endocrine disruption at rates up to 1,600 times that caused by the individual pesticides alone.[144] Similarly, the potency of the carcinogens benzo(a)pyrene and benzo(a)anthrocene increases "one-thousand-fold in the presence of n-dodecane, a noncarcinogen."[145] Scientists estimate that the additive theory may be accurate for approximately 95% of pollutants. The 5% that it fails to describe accurately may seem like a small percentage, but "because there are so many chemicals, the synergistic possibilities are huge."[146] Individuals may be exposed to hundreds of pollutants at once, making the chance of synergy among some of them enormous.

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[143]It is also possible for chemicals to react negatively to one another; that is, the presence of one may negate the effect of the other. In such cases, the additive approach would overstate the true degree of risk. However, this is not of much concern to us here, for obvious reasons. It should be cold comfort that a method of calculating risk provides unnecessarily restrictive results in some cases when it produces dramatically underprotective ones in others. Protecting against all risks, not underprotecting some and overprotecting others, should be the goal of environmental law, and error should be on the side of caution.

[144]*See* Collin & Collin at 55 (citing Steve Arnold, *Synergistic Activation of Estrogen Receptor with Combinations of Environmental Chemicals*, 272 SCIENCE 1489 (1996)).

[145]Kuehn, *supra* note 14, at 120 (citing R. Michael M'Gonigel, Taking Uncertainty Seriously, 32 Osgoode Hall L.J. 99, 110 (1994)).

[146]*Id.*

Some chemical synergies have already been studied, and in such cases there is no excuse for not considering them in an impact assessment. OCR should thus adopt a third approach to cumulative risk assessment, incorporating chemical synergies wherever data is available. This approach has been adopted in some environmental laws.[147] Furthermore, as unanimously endorsed by the range of stakeholders on the Title VI Implementation Advisory Committee, EPA should conduct, and should encourage states to conduct, further research into chemical synergies.[148] Such programs could draw on existing state and local initiatives such as the Multiple Air Toxics Exposure Study of the South Coast Air Quality Management District.[149] We recognize that the task of investigating all possible chemical synergies is unreasonable, although investigating the synergistic effects of some of the most common combinations of chemicals would be useful. However, it is not reasonable simply to ignore the existence of chemical synergies and pretend that the additive approach is accurate. The shortage of information in this area is one reason, among many, for adopting a precautionary principle, (as discussed below). It is also a reason to consider the siting of a polluting facility as an adverse impact for the purpose of proceeding to disparity analysis.

ii. Uncertainty

OCR should endorse a "precautionary principle" with respect to unknown risks.

Communities of color should not be disproportionately exposed to substances which may be harmful, even if the degree to which they are harmful is uncertain.[150] Racially disparate patterns in distributing unknown risks essentially force people of color to bear not only disproportionate but uncertain risks. The U.S. government has for the most part chosen not to regulate the emission of pollutants that do not have known and demonstrated deleterious effects.[151] We can criticize that decision, but it is at least in theory a choice by a democratic electorate to take certain risks in exchange for the benefits of industrialization. But a basic principle of nondiscrimination is that risks that society chooses to undertake should be borne across society, not targeted against certain racial

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[147] The TSCA requires EPA to consider "cumulative or synergistic effects." 15 U.S.C. 2603(b)(2)(A).

[148] *See Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs*, 12-13, 20 (March 1, 1999).

[149] *See id* at 21.

[150] The problem of unknown consequences is widespread. "Of the more than 70,000 chemicals in commercial use, no information on toxic effects is available on seventy-nine percent, less than one-fifth have been tested for acute toxic effects, and less than one-tenth for chronic, reproductive, or mutagenic effects." Kuehn, *supra* note 14, at 144.

[151] *Id.* at 145-148 (describing "regulatory paralysis" in the absence of conclusive data). The policy of not regulating chemicals about which little is known has been found to deter the development of information on risk, since chemical producers have an incentive to avoid regulation. *Id.* at 154 (citing Elizabeth Anderson et al., *Key Issues in Carcinogenic Risk Assessment Guidelines*, 13 RISK ANALYSIS 379, 381 (1993)).

groups. Thus, although EPA may not have incorporated the precautionary principle into its general regulatory scheme, it is nevertheless its civil rights obligation to adopt it with respect to assessing Title VI claims.

Uncertainty is a common, perhaps ubiquitous, problem in environmental regulation and risk assessment. This is likely to be a particular problem in the context of Title VI investigations. A report conducted for EPA by the Integrated Human Exposure Committee of the Science Advisory Board concluded that no method of adverse disparate impact analysis limited to scientific evidence would be very effective, given the inherent limitations of risk assessment and the particular difficulty imposed by the 180-day deadline for processing of Title VI complaints.[152] Because of these problems, it is essential that OCR treat uncertain risks as what, in any meaningful sense, they are: adverse impacts. There is no doubt that living with exposure to chemicals whose detrimental impacts are unknown is a harm that anybody would prefer not to face. Exposure to an unknown risk is therefore a cognizable adverse impact that should be taken into account in OCR's assessment.[153]

The precautionary principle holds that when facing uncertain yet potential risks, one should err on the side of caution. In the context of a Title VI investigation, when risks due to a chemical exposure (or to a synergistic combination of exposures) is unknown, it should be considered an "adverse impact," and OCR should proceed to the disparity assessment which would focus on the extent to which these unknown risks are unequally distributed.[154]

2. Non-Health Based Standards in the Adversity Assessment

Under Title VI, as discussed previously, the agency's statutory mandate is broad. Where the alleged discriminator is a state environmental agency that receives EPA funds, and especially where discrimination in environmental permitting is alleged, there must only be a causal connection between the agency's decision and the alleged discrimination.[155] Any discriminatory impact resulting from the issuance of an environmental permit by a recipient of EPA funds is firmly within the reach of Title VI and EPA's implementing regulations.[156]

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[152]SAB REPORT: REVIEW OF DISPROPORTIONATE IMPACT METHODOLOGIES 1, EPA-SAB-IHEC-99-007 (Dec. 8, 1988).

[153]As discussed above in section B, *all* adverse impacts–that is, anything that's bad–are cognizable under Title VI; there is no requirement that these impacts be premised on a health risk that is scientifically proven.

[154]*Cf.* Collin & Collin, *supra* note 144, at 49 (advocating placing burden of proof on polluters to show a substance is not dangerous). At the very least, EPA should rely on qualitative approaches suggesting harm where quantitative data are not available. *See* Kuehn, *supra* note 14, at 157.

[155]*Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993).

[156]A requirement that the discriminatory activity be related to the environment (e.g. issuing a permit) would actually be a more stringent nexus requirement than is statutorily allowed under the Civil Rights Restoration

In order to consider these other impacts in the adversity assessment, OCR should assess quantitatively such issues as property value decline. It should also consider aesthetic, cultural, and other impacts, when presented or implicated, taking into account the complainant's position. It is perhaps difficult to compare these adverse impacts for the purpose of assessing disparity, but OCR's response to this difficulty should not be to avoid them. We propose, instead, that a finding that a state EPA has disproportionately issued permits for siting of locally undesirable land uses (LULUs) in communities of color should itself create a presumption that adverse disparate impact exists, regardless of whether there is a significant increase in exposure to known pollutants. The statistical analysis should be of the siting pattern itself, not just of exposures and health risks. Thus, if it is shown that a landfill has a negative effect (health, socioeconomic, etc.) on a community, and that the state has disproportionately allowed landfills (or other LULUs) to be sited in communities of color neighborhoods, OCR need not quantify the negative effect in a way that can be compared across neighborhoods. Rather, it should make a preliminary finding of adverse disparate impact and force the state agency to justify siting another such facility in a community that is already overburdened.[157]

Finally, OCR should outline, in both Guidances, a methodology for taking into account such non-health-based impacts. Many states do have laws that mandate or allow consideration of socioeconomic and other impacts.[158] Furthermore, in cases where EPA has delegated permitting authority to the state agency pursuant to, for example, the Clean Air Act, the state inherits the obligation to consider those impacts as required by federal law. Thus, OCR investigations will consider these types of impacts. OCR should, therefore, set forth a methodology for conducting such investigations, especially since a major goal of the Guidance is to clarify the process for all stakeholders and for OCR staff. The quantitative, health-based, and environmental regulation-based investigative processes outlined in the Guidance may not necessarily translate directly into a means of investigating other types of impacts. OCR staff investigating those impacts, then, may be left without direction. Furthermore, the Recipient Guidance should encourage recipients to incorporate such impacts into their own analyses, and it should lay out some examples of how one might do so. Otherwise, there is a large danger that recipients will assume, incorrectly, that the only relevant adverse impacts to assess are those on human health, and they will thus have no incentive to undertake proactive measures that could address communities' broader concerns and thus reduce the incidence of Title VI complaints.

a. Sub-Populations

Act; 42 U.S.C. §2000d-4a..

[157] *Cf.* Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas: Balancing the Considerations of Clean Air, Environmental Justice, and Industrial Development*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 379, 384 (advocating permit denial on basis of disproportionate exposure alone, independent of health or environmental impact).

[158] *See* discussion *supra* under Recommendation A.

Adverse impact assessment should account for variations in susceptibility of different demographic groups to the same levels of environmental exposure to hazards. Physical differences, socioeconomic differences such as health care access, and cultural differences such as diet should all be incorporated.

Under the Guidance, adverse impact assessment would rely, at least to some extent, on exposure and risk benchmarks set by environmental regulations.[159] These benchmarks, as well as the rest of the methodology OCR proposes for analyzing risk, start from the assumption that the "safe" exposure is equal for all persons and populations. Benchmarks based on this assumption are inappropriate for use in the analysis of Title VI complaints, because they are inaccurate in recognizing "disparate impact" that a given action might have on a particular racial group. Such benchmarks must therefore be replaced with methods of analysis that take into account individual and group-based variability.[160]

We are a diverse nation, with many differences. A litany of scientific studies have demonstrated these differences in terms of susceptibility to environmental toxins.[161] These differences can affect the degree of exposure from the amount of emissions or the level of a toxin in the environment. Cultural factors such as diet or the amount of time typically spent outdoors also have a major influence. For example, subsistence fishers (notably including numerous Native American populations) are exposed to a higher degree of water pollutants that bioaccumulate in fish.[162]

There is no question that environmental benchmarks were promulgated to protect the "average" person and therefore do not reflect the characteristics of members of a particular racial group.[163] Whatever the propriety of these environmental benchmarks for the population at large, they cannot be imposed as barriers to the acknowledgment of demonstrable differences among different racial groups

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[159]Investigation Guidance p. 84.

[160]The Draft Investigation Guidance already mentions the issues of variable susceptibility and exposure in two places: on page 85 it refers to "adverse impacts on some subpopulations (e.g. asthmatics)" and on page 90 it alludes briefly to "subsistence fish consumption patterns." The issues must also be addressed in the Recipient Guidance so that recipients' own assessments will take them into account.

[161]*See* Kuehn, s*upra* note 14, at 123-124 (discussing higher rates of asthma and other respiratory conditions in certain communities when level of air pollution exposure increases)

[162]*See* O'Neill, *supra* note 135, at 50-51 (citing several studies showing that a number of tribes have mean fish consumption rates that are 10 times those of the average American, while some individual Native Americans consume fish at 100 times the rate of the average American).

[163]*See* Verchick at 64 (citing numerous studies showing that the benchmarks set by EPA environmental regulations do not adequately account for these differences, including EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (June 1992)); Kuehn, supra note 14, at 153.

when determining whether a particular action will, in fact, have a disparate impact on members of a particular race.[164] It is true, however, that data demonstrating these differences is scarce.[165] EPA and recipient agencies, therefore, should promote such data collection.

Thus, this methodology, and the regulatory benchmarks derived from it, should not play a significant role in OCR's investigation of Title VI complaints.[166] One of the basic principles of American civil rights law, as demonstrated by the Supreme Court's Fourteenth Amendment equal protection jurisprudence, is that populations that are not alike should not be treated alike where to do so would further inequality.[167] This principle has been recognized by Congress in requiring, for example, reasonable accommodation for persons with disabilities. It has also been applied in Occupational Safety and Health Act regulations.[168] Also, it is the underlying basis for the entire theory of disparate impact discrimination. That is, some people are situated differently from others, and therefore "neutral" practices and criteria will affect them adversely and disproportionately.[169] Thus, OCR is legally and ethically obliged to consider the differential susceptibilities and exposures of different population groups when analyzing whether they have been adversely and disparately

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[164]*See* EPA at 18; Verchick at 65, Kuehn, *supra* note 14, at 123. (discussing studies underlying benchmarks that use a set of research subjects typically comprised exclusively of healthy, white, 70 kg male workers.) The same bias is found in published medical research. For example, a "survey of published occupational cancer epidemiologic studies found that only 2% of the studies had any analysis of the effects on nonwhite women and only 7% addressed the effects on nonwhite men." Id. (citing Sheila H. Zahm, *Inclusion of Women and Minorities in Occupational Cancer Epidemiologic Research*, 36 J. OCCUPATIONAL MED. 842, 843 (1994)).

[165]*Cf.* O'Neill, *supra* note 135, at 117 (advocating grants to subpopulations to fund quantitative studies of food consumption patterns). *See generally* Kuehn, *supra* note 14, at 130-131 (discussing community groups' lack of necessary resources to conduct risk assessments), and 163-165 (advocating technical assistance grants for community risk assessments); Title VI Implementation Advisory Committee, Next Steps for EPA, State, and Local Environmental Justice Programs, 38-39 (March 1, 1999) (discussing value of small grants and technical assistance for data gathering and analysis); *See* Collin & Collin, *supra* note 144 at 79-81 (discussing Greenport/Williamsburg neighborhood study, in which community members received funding via a court order to conduct an epidemiological study and measure pollution rates). Native American tribes have also undertaken studies to document fish consumption patterns. *See* O'Neill, *supra* note 135, at 37.

[167]*See, e.g., Michael M. v. Superior Ct. of Sonoma Cty*., 450 U.S. 464, 469 (1981) (holding that equal protection does not require "things which are different in fact to be treated in law as though they were the same," but rather that groups who are not similarly situated should be treated accordingly).

[168]*See* 29 C.F.R. § 1910.1043(h)(2)(iii) (1995) (requiring, in cotton dust standards, adjustment of predicted pulmonary function measurements for African Americans to account for smaller average lung capacity).

[169]*See, e.g., Griggs v. Duke Power*, 401 U.S. 424 (1971) (establishing disparate impact claim under Title VII).

impacted by state permitting processes.[170] This obligation stems from OCR's own 5th Amendment equal protection responsibility, as well as its responsibilities in enforcing Title VI, a statute passed pursuant to Congress's power to enforce the 14th Amendment equal protection clause against state governments.

DISPARITY ASSESSMENT

Many of the concerns listed above, including the range of relevant impacts and the degree to which impact assessment accounts for variations in susceptibility and exposure, are also relevant to the disparity stage of the analysis. In addition, we have two further recommendations.

1. Statistical Significance

The requirements for statistical significance of disparity should be lessened, and at a minimum, OCR should not require more *than a showing of statistical significance.*

It is worrisome that the Guidance seems at times to require that a sort of "super-significance" threshold be met for a finding of disparate adverse impact. Statistical significance to two or three standard deviations is a serious burden to meet, particularly when sample sizes are low as in many cases.[171] This threshold is higher than that set by some courts, and it should be lowered.[172] Furthermore, consistent with court decisions, proof of statistical significance should not be required at all in cases where sample sizes are too low for such an analysis to be meaningful.[173] EPA should also adopt the "four-fifths rule" set by the EEOC in its Uniform Guidelines on Employment Selection Procedures, which would, applied to the environmental context, mean that if the level of exposure or

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[170]Regulatory agencies have the authority to adjust regulatory thresholds to account for heightened risk to susceptible populations. *See Building and Constr. Trades Dept., AFL-CIO v. Brock*, 838 F.2d 1258 (D.C.Cir. 1988); see also Carl F. Cranor, *Risk Assessment, Susceptible Subpopulations, and Environmental Justice*, in THE LAW OF ENVIRONMENTAL JUSTICE, supra note __, at 307, 335.

[171]*See* Collin and Collin, *supra* note 144, at 49.

[172]In a handbook for civil rights litigators, Alan Jenkins describes current case law: "A plaintiff may be reasonably certain that a cognizable discriminatory effect exists where the proportion of her racial group that is adversely affected by the challenged action is greater than two to three standard deviations from that of the baseline population as a whole. . .. Nevertheless, as a practical matter, courts generally do not require this level of statistical sophistication in order to recognize a prima facie violation." Jenkins, *supra* note ___, at 187-88 (citing *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 630 F.2d 79, 88 (2d Cir. 1980) (a Title VII case); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110, 127 (S.D. Ohio 1984); *Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1983); Meek v. Martinez, 724 F.Supp. 888, 899, 906 (S.D. Fla. 1989)). *See also Castaneda v. Partida*, 430 U.S. 482, 496 (holding 2-3 standard deviations *sufficient* for showing of disparity, but not stating that this threshold is *necessary*).

[173] *See Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir. 1986).

other impacts faced by the comparison population is less than 80%of the affected population, disparity would be inferred automatically; smaller differentials may also give rise to a disparity finding if they are statistically significant.[174]

Whether or not OCR chooses to maintain the significance threshold at its current level, when a disparity is significant, it should not matter whether it is "a little or a lot" over the threshold, or whether the impact is "severe" or "frequent."[175] No further balancing should be necessary in order to make a preliminary finding of discrimination and, at least, force the recipient to justify its actions and consider alternatives. To require more is to send the message that a "little" bit of racial discrimination is acceptable.

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[174]*See Watson v. Ft. Worth Bank & Trust*, 487 U.S. at 995 n.3, 997 (1988) (discussing EEOC Guidelines).

[175]Investigation Guidance at 90. Another worrisome passage states that "if an exposure occurs above a benchmark level, it may not be possible to conclude from those data alone that an effect would necessarily occur." *Id.* at 83, FN 127; *see also id.* at 85 (stating that a hazard index above 1 will not always translate to an adversity finding). While it is obviously true that one can never state conclusively that an effect will occur in a given case, which is why the concepts of risk and probability are used, this is no reason that OCR should decline to say that a risk exists! Although regulatory benchmarks may be underprotective, common sense dictates an exposure or combination thereof that *exceeds* those benchmarks should always be assumed to be an adverse impact.

2. Comparison Populations

The Guidance should not impose limitations on indentfying comparison populations, which should be determined on a case-by-case basis. If multiple comparisons are conducted and any of them shows disparity, a finding of disparate adverse impact should be made. Comparison populations should not include the affected population.

The Guidance lists a number of different possible comparison populations that could be used in a disparity assessment. We agree that identifying and evaluating comparison populations should be conducted according to flexible process. Comparisons should be determined on a case-by-case basis without artificial limitations. However, the affected and non-affected population should be defined clearly and separately.

Accordingly, the most preferable comparison population, at least as a default, should be the non-affected population. The comparison population should not be inclusive of the affected population (i.e., the "general population"). The relevant comparison is not the difference between how the affected population of color is treated and how the "general population," including the same affected group, is treated, but the difference in treatment of two different groups. To include the affected population of color in the comparison population will, by definition, artificially reduce disparity, since a comparison is then being made between two groups that are, in part, the same.

Consider the following simplified hypothetical: If neighborhood A has two incinerators and B has zero incinerators, what is the disparity in the number of incinerators? Clearly, there is a disparity of two. If B is compared to the average of the "general population" A + B, however, the disparity appears to be only one. But describing the situation as "A has two incinerators, but the average neighborhood has one" does not adequately describe the situation, since there is, after all, no such "average neighborhood" with exactly one incinerator. The difference in the way A and B were treated (or the effects on them) is two, no less. In civil rights law, it is the difference in the way groups A and B are treated or affected that matters, not the difference between group A and some kind of average.

Additionally, the Guidance suggests that in a given case, two or more different comparisons may be appropriate, but it does not clarify what the outcome of the disparate impact analysis would be if the results of the two comparisons were different. Since Title VI prohibits *any* discrimination on the part of recipients, the law requires that a showing of disparity between the affected population and *any* appropriate comparison population is sufficient for a finding of disparate impact, requiring the recipient to at least provide a justification for its choice and a defense against less discriminatory alternatives.

Finally, the Guidance sets the threshold too high for an adverse disparate impact finding based on comparisons. It requires a "significant disparity" that is "clearly evident in multiple measures of

both risk or measures of adverse impact, and demographic characteristics."[176] This is not only impractical, it is unrealistic given the errors, omissions and uncertainties often associated with demographic data.[177]

WARRANTING NONCOMPLIANCE

Even if all the problems previously discussed were corrected, EPA's Title VI enforcement would almost certainly be largely ineffective without substantial revision to the Justification and Less Discriminatory Alternatives sections. We, therefore, have further recommendations.

1. Justification

A burden on a particular population should not be justified by benefits to the population at large. Economic development should not justify disparate impacts.

As the Guidance rightly recognizes, disparate impacts are not *per se* a violation of Title VI. Only "actions having an *unjustifiable* disparate impact" on populations of color constitute a violation of Title VI disparate impact regulations.[178] When describing a justifiable disparate impact, however, the Guidance focuses solely on "benefits" without accounting for burdens. This imbalance is not supported by disparate impact precedent.

A sewage treatment plant, for example, is discussed as a benefit that may justify a disparate impact. Because the plant would benefit the affected community, it could justify the burden. This could potentially be true in every case, however. Equally, the non-affected community would also receive the benefit yet without any burden. This reasoning, taken to the extreme, would continuously justify one segment of the community bearing the burden for the whole community. Justification, however, is not satisfied by such slippery slope type reasoning in the civil rights context.

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[176]Investigation Guidance, p. 90.

[177]EPA OCR, Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, Draft Revised Demographic Information, April 1998; Bradford Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify their Siting Decisions*, 73 Tul.L.Rev. 787, 838 (Feb. 1999)(discussing the criticisms about census and pollution data used by EPA in the draft report examining the Shintech complaint); Also citing Bruce Albert, Times-Picayune, June 15, 1998, at A1; Vicki Ferstel, *Data for EPA's Shintech Decision Confusing at Best*, Advocate (Baton Rouge, La.), July 2, 1998, at 1B.

[178] *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (characterizing the Court's holding in *Guardians Ass'n v. Civil Service Comm'n of New York City*, 463 U.S. 582) (emphasis added). *Cf Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110, 127 (S.D. Ohio 1984) ("Defendants are not per se prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification.").

A burden on a particular population cannot be justified by benefits to the population at large. When conducting a disparate impact analysis, the focus is on the group of individuals directly affected by the challenged practice, not the community at large. *Betsy v. Turtle Creek Associates*, 736 F.2d 983, 986-7 (4th Cir. 1984). Title VI, like Title VII and Title VIII, protects individuals.[179] Therefore, in analyzing whether a disparate impact is justified, "burdens" on one group cannot be balanced against "benefits" to another. Instead, the analysis should remain focused on the group directly affected. That means, a sewage treatment plant cannot justify burdens placed on the racial or ethnic minority group by providing a public benefit to a larger group of people.

The Guidance also suggests that broader interests such as economic development may be an acceptable justification for the disparate impact if the benefits are "delivered directly" to the affected population and if the broader interest is "legitimate, important and integral" to the recipient's mission. We recognize that including economic factors as an impact appears to support including such factors as a justification. Economic development, however, is typically not an interest that is "integral" to the mission of an environmental protection agency, at any level, whether federal, state, local or tribal. Also, economic development could essentially be used to justify every permit decision in every case.

Justifying disparate impact on economic grounds, at a minimum, should be strictly limited. The concept of "economic benefit" as a justification must be defined with specificity to allow adequate opportunity for public comment. Without clear definition, no notice has been provided on a major point. A definition, for example, must be sufficiently detailed to answer whether the opportunity for jobs to some community residents or the stimulus for local economic development, alone or together, would justify a disparate impact.

2. Less Discriminatory Alternatives

The Guidance correctly states that if a less discriminatory alternative exists, it must be implemented. In the Title VII context, an employer may still be liable for discrimination for an employment practice that is both justified and "job-related," if there is an alternative employment practice with a lesser adverse impact that the employer refuses to adopt.[180] This duty has been recognized in case law interpreting Title VI.[181]

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[179] 42 U.S.C. § 2000d ("No person ... shall, on the ground of race, color or national origin..."); Betsy, 736 F.2d at 987(discussing Title VII and Title VIII protection of individuals based on language prohibiting discrimination against any "person").

[180] See 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[181] See *N.A.A.C.P. v. Medical Center, Inc*., 657 F.2d 1322, 1336-37 (3rd Cir. 1981)(a defendant may need to go "forward with evidence showing that it has chosen the least discriminatory alternative."); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110, 127 (S.D. Ohio 1984)(discussing the requirement that the action taken must be the least discriminatory alternative).

Under Title VI, a challenged practice resulting in a disparate impact will be justified only if it is the *least* discriminatory alternative.[182] In order to determine whether a challenged practice is indeed the least discriminatory, EPA must consider a wide range of alternatives. The Guidance, however, fails to discuss how EPA will conduct its alternatives analysis. It only states that less discriminatory alternatives must "cause less disparate impact than the challenged practice" and must be "practicable and comparably effective."[183] These standards are meaningless unless measured against a sufficient amount of actual alternatives.

The Guidance also discusses "less discriminatory alternatives" in terms of "cost and technical feasibility."[184] This standard is consistent with EPA's fixed reliance on technical criteria, even in the context of civil rights enforcement. Aside from the inherent limitations of such reliance, EPA should further define how cost and technical feasibility will be included within an alternatives analysis. Without that clarification, complainants will never be settled with decisions that conclude that their civil rights have been outweighed by costs or technical feasibility involving a facility.

DUE WEIGHT

The Guidance affords substantial deference to recipient's own investigations. Whether through pre-complaint agreements or post-complaint analyses, recipients receive generous incentives and presumptions in their favor. Specifically, OCR will "rely" on a recipient's submissions "in a finding that the recipient is in compliance with EPA's Title VI regulations" if such submissions are "sufficient scope, completeness, and accuracy" and/or promise pollution reductions.[185] Only if "significant deficiencies" exist or "circumstances had changed substantially" will OCR refrain from relying upon such submissions within its decisions. The Guidance coins this deferential approach under the term "due weight."

EPA nevertheless states that, even with its "due weight" approach, it will not "defer to a recipient's own assessment." That, however, is precisely what EPA does. Submitted analyses or agreements meriting "due weight" will preclude further inquiry into a complainant's allegations and grant a recipient a presumption of compliance with Title VI.

What is required to receive "due weight" further illustrates EPA's deference. Submissions must only appear sufficient because EPA's review of such submissions will not "seek to duplicate or

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[182]Id.

[183]Investigation Guidance p. 93.

[184]Investigation Guidance p. 93.

[185]Investigation Guidance p. 72.

conduct such analyses" nor "conduct a first hand investigation of allegations."[186] Therefore - based on nothing more than a facial inspection – recipient's submissions could be relied upon to essentially shield them against all present and future Title VI complaints until another facial inspection shows that these submissions contain "significant deficiencies" or that "circumstances had changed substantially." This is inexcusable, regardless of its underlying purpose of providing Title VI compliance incentives.

"Due weight" offers EPA the ability to provide an incentive for recipients to conduct analyses/studies, enter into agreements, and submit information regarding Title VI. Incentives are indeed a positive pro-active approach to foster civil rights compliance. Incentives, however, can only encourage, not ensure, Title VI compliance and enforcement. Instead of relying on a recipient's data and analysis, EPA should verify both its sufficiency and merit. That verification cannot be done through a facial review alone, without an independent assessment and determination of Title VI compliance.

1. Analyses/ Studies

OCR should conduct its own first hand investigations of allegations to promote accurate and complete investigations that include counter-analyses. Complainants should have the opportunity to present, review and respond to submitted data.

EPA repeatedly requests submitted data to facilitate investigations. OCR expects its investigation process "to be substantially improved and expedited by information submitted by complainants and recipients."[187] Submitted analyses are requested "in response to allegations, or during the course of an investigation" from both recipients and complainants.[188] In exchange for such submissions, OCR will defer to their conclusions if they are "sufficient scope, completeness, and accuracy," and are "relevant to the Title VI concerns in the complaint."[189]

Although the Guidance provides that both recipients and complainants may submit supporting data and analysis, complainants will be less equipped to do so. Data necessary to conduct sophisticated statistical studies and computer-generated analyses will likely require resources beyond the means available to most complainants. Complainants will therefore be disadvantaged without equal access to participate. In order for this approach to be fair, it is crucial that both recipients and complainants have the resources and technical expertise to submit their own analysis and challenge

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[186]Investigation Guidance p. 72-3.

[187]Investigation Guidance, p. 70.

[188]Investigation Guidance, p. 71.

[189]Investigation Guidance, p. 71.

competing data. OCR cannot assume that demographic and pollution information is accurate and complete,[190] particularly when one-sided.

As an enforcement agency, OCR must perform its investigations thoroughly. OCR therefore should conduct its own first hand investigations fully pursuing complainants' allegations. Without this support, no data or analyses outside of recipients' submissions will be produced and analyzed. Alternatively, recipient data should be made available for review by complainants. Independent data or review is imperative not only to ensure thorough investigations but also to understand the complexities of determining adverse disparate impacts. These complexities are evident in the Guidance, whether in measuring the adversity of impacts;[191] calculating cumulative exposure; defining the relevant area and affected populations;[192] determining the appropriate facilities, or the amount of disparity. All of these factors clearly involve complex scientific judgments. Therefore, the complainant, like the recipient permitting agency, should be afforded an equal opportunity to present, review and respond to data and analysis.

2. Area Specific Agreements

OCR and communities should have a role in ensuring that area-specific agreements and other settlements between recipients and complainants are enforced.

The Guidance encourages recipients to reach agreements directly with communities, in a manner that fairly addresses a broad range of community concerns, not merely those related to the specific contested permit. But given the weight that OCR intends to give to these agreements – including dismissing future complaints by new parties, it is vital that a credible monitoring and enforcement mechanism be in place to ensure that these agreements are obeyed. Otherwise these agreements could become a means for a recipient to escape its obligations under Title VI and EPA's implementing regulations.

With regard to settlements between OCR and recipients, the Guidance already states that any "settlement agreement should provide for enforcement by EPA, which may include special conditions

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[190]See Bruce Alpert, Times-Picayune, June 15, 1998, at A1 (discussing EPA's problem with relying on questionable census data within one mile of proposed Shintech facility, and also with measuring the amount of pollution in four-mile area).

[191]Investigation Guidance p. 82-3 ("OCR intends to use all relevant information to determine whether the predicted impact is significantly adverse under Title VI." "The reliability, degree of scientific acceptance, and uncertainties of impact assessment methods varies greatly. OCR expects to weigh these uncertainties in the data and methods as part of its decision process.")

[192]Investigation Guidance p.87 ("OCR expects to use mathematical models, when possible, to estimate the location and size of affected populations," based on "environmental factors and other conditions such as wind direction, stream direction, or topography," "location of a plume or pathway of impact," or "proximity.").

on future assistance grants for failure to comply with the agreement."[193] This language is commendable. However, the Guidance should state explicitly that such enforcement would also be required for agreements negotiated directly between recipients and complainants or community members, such as area-specific agreements. Industries and states have often negotiated with community groups over the siting of facilities, promising them various benefits and protections that have ultimately failed to materialize. These failures have undermined the credibility of such negotiations to communities. Thus, a Title VI process that relies heavily on informal agreements must involve a strong and credible mechanism for ensuring that the agreements actually are implemented in a way that meets the needs of communities.[194]

Community members should play an active role in this monitoring and enforcement process to ensure its credibility and responsiveness. Communities, however, often lack the resources or the expertise to handle enforcement on their own. It is evident, therefore, that both communities and EPA must play an active role in monitoring compliance, particularly in light of the technical analysis involved in implementing environmental standards. This monitoring should be an absolute requirement for EPA to give "due weight" to area-specific agreements when considering future complaints. If future complaints are brought that allege–either directly or by implication–a failure to comply with the terms of an agreement, OCR should, naturally, not dismiss the complaint on the basis of the earlier agreement, but should thoroughly investigate that agreement's continued effectiveness.

Area-specific agreements should not necessarily bind parties to future disputes who were not involved in the original investigation and informal resolution process.

The Guidance allows area- specific agreements to have a preclusive effect on future allegations. That is, "if a later filed complaint raises allegations regarding other permitting actions by the recipient that are covered by the same area specific agreement, OCR would generally ... dismiss the allegations."[195] This effect is problematic in light of basic principles underlying our legal system.

The most appropriate legal analogy is the principle of *res judicata,* which holds that matters already litigated that have reached a final resolution, cannot be re-litigated.[196] Constitutional due process places an important limit on this principle, however. It protects the opportunity to be heard so that persons who were not parties to the original litigation cannot be precluded from bringing their

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[193]Investigation Guidance p. 69.

[194]The recommendations of the Title VI Implementation Advisory Committee, representing a consensus of all stakeholders, propose allowing communities to "continue to assess the compliance of permitted facilities" after complaint resolution. *See Advisory Committee Report, supra* note __, at 53. "Building community capacity to monitor industry performance may prove very effective in assuaging community anxiety about the health and environmental risks posed by individual facilities." Id.

[195]Investigation Guidance, p.73.

[196]*Heiser v. Woodruff*, 327 U.S. 726, 735 (1946).

own claims.[197] The notable exception to this rule is the area of class action suits, which can bind all members of a class, even if they do not all agree to a settlement.[198] However, the class action process includes considerable procedural safeguards intended to ensure that all class members at least have their interests fairly represented. [199] For example, a class must be defined to include only persons with common and typical interests and class counsel and representatives must adequately represent the interests of the class, otherwise the judge must refuse to certify a class.[200] Similarly, class action settlements are closely scrutinized by judges to ensure that they are fair, reasonable and adequate with respect to those whose rights they affect. Although class action requisites do not directly apply here, OCR should be cautious when precluding potentially valid charges when carrying out its Title VI enforcement responsibilities.

These basic due process principles, therefore, should lend specific guidance to OCR. Some procedural safeguards should exist when enacting an approach that removes a complainant's opportunity to be heard, particularly in both the present and future, regarding civil rights allegations. This is especially true given a complainant's right to request that EPA enforce the civil rights obligations of recipients. For those reasons, OCR should reconsider the preclusive effect of area specific agreements that dismiss Title VI complaints. Alternatively, any preclusive effect afforded should be evaluated against the due process protections underlying the class action rule. For example, if the person or group bringing such a complaint was not involved in the original dispute, the original area-wide agreement, and the informal resolution process that brought it about, it should be scrutinized to ensure that, at least, any potential violations of Title VI are fairly considered and the interests of non-represented parties were fairly represented. Otherwise, persons with distinct and legitimate Title VI concerns could find their rights adversely affected by a previous process that had little or nothing to do with the issues they are facing. In addition, a particular degree of caution should be exercised when considerable time has passed since the original agreement, or when circumstances have changed in some way, so as to make the agreement less relevant to the current situation.[201] Based on these principles, OCR should incorporate at least some procedural safeguards with respect to these agreements.

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[197] *Hansberry v. Lee*, 311 U.S. 32, 37 (1940)(holding that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to an earlier judgment to which they were not parties and in which they were not adequately represented); *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996) ("opportunity to be heard is essential requisite of due process of law in judicial proceedings.")

[198] Fed.R.Civ.Pro 23(b)(2).

[199] Fed.R.Civ.Pro 23(a).

[200] Fed.R.Civ.Pro. 23(a).

[201] The Guidance recognizes this latter principle: "An exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented." Investigation Guidance, p. 73.

We appreciate the opportunity to provide EPA with comments concerning its Title VI Guidance. We encourage EPA to continue to develop its Guidance and welcome the opportunity to discuss our comments further or provide additional suggestions during its finalization.

Sincerely,

Thomas J. Henderson, Esq.
Janette L. Wipper, Esq.
Sonya Starr, Law Clerk
LAWYERS COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

and

Norman Chachkin, Esq.
N.A.A.C.P. LEGAL DEFENSE
& EDUCATIONAL FUND, INC.

(b) (6) - Privacy [redacted] on 08/28/2000 10:48:18 AM

To: Group Civilrights@EPA
cc:

Subject: EPA comment on Rule

Ann Goode,
EPA Office of Civil Rights (MC1201A),
1200 Pennsylvania Ave., NW
Washington, DC 20460.

Dear Ms Goode,

Please take note! We are watching and we do not find the EPA's new Title 6 of the Civil Rights Act guidance to be a JUST method of increasing economic opportunities in poor communities. Everyone has the right to live in the most toxic free environment possible. It is YOUR job to protect children, men, and women, not the short term interest of a corporation seeking profit over the welfare of the people it should be serving.

It is appaling that there is no process for these communities to appeal EPA decisions on Title 6 complaints. It is imperative in the light of this that you bend over backwards to reduce, not increase pollution levels in our least empowered communities.

If you think scientific evidence of "less" than a substantial increase in cancer risks and other health problems is reason enough to allow compani Yahoo! Mail - Free email you can access from anywhere!

(b) (6) - Privacy [redacted] on 08/28/2000 10:54:32 AM

To: Group Civilrights
cc:

Subject: EPA letter

Ann Goode
EPA Office of Civil Rights (MC 1201 A)
1200 Pennsylvania Ave NW
Washington D.C. 20460

I am very concerned about stopping discrimination by state environmental departments that issue permits to industries that continue to pollute our communities and harm our health particularly in low income communities.

The new Title 6 of the Civil Rights Act must be changed. It ignores existing civil rights law and policy and seems to be leaning towards protecting industries rather than communities. The new EPA Guidance will allow facilities to increase the pollution that is concentrated in communities of color by requiring scientific proof that the pollution causes a "substantial" increase in cancer risks and other health problems. NO increase in these diseases is acceptable.

Also promises that the company will create jobs should not be a defense to a Title 6 civil rights complaint. Also, why is there no appeal's process for Title 6 Yahoo! Mail - Free email you can access from anywhere!

State of Louisiana

Department of Environmental Quality

M.J. "MIKE" FOSTER, JR.
GOVERNOR

J. DALE GIVENS
SECRETARY

August 25, 2000

Title VI Guidance Comments
Attention: Ann Goode
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Comments on Title VI Guidance Documents and Request for Extension of Time to Comment.

Dear Ms. Goode:

Pursuant to the instructions published at 65 Fed. Reg. 39,650 (June 27, 2000), please find enclosed the Louisiana Department of Environmental Quality's (LDEQ) comments on the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (*Recipient Guidance*) and the *Draft Revised Guidance for Investigation Title VI Administrative Complaints* (*Investigation Guidance*). The LDEQ also will be submitting these comments electronically.

In addition, during an EPA (Region 6) Title VI "listening session" held in Baton Rouge, Louisiana, on Monday, August 21, 2000, many Louisiana citizens who attended complained that EPA failed to provide adequate notice of the *Recipient Guidance* and *Investigation Guidance*. The citizens also complained that they were not provided a sufficient amount of time to review and/or comment on the documents.

Because of these and other similar complaints, the LDEQ formally requests that the comment period for the *Recipient Guidance* and *Investigation Guidance* be extended for at least an additional 60 days to allow citizens of Louisiana more time to review the Guidance documents and to offer meaningful comment.

Sincerely,

J. Dale Bohlinger
Deputy Secretary

for Dale Givens
Secretary

Enclosure

received 8/31/00

Louisiana Department of Environmental Quality

Comments on U.S. EPA Draft Title VI Recipient Guidance and Investigation Guidance

In accordance with instructions contained in the Federal Register, the Louisiana Department of Environmental Quality (LDEQ) submits to the United States Environmental Protection Agency the following comments regarding the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (*Recipient Guidance)* and the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Investigation Guidance)*.

In general, the LDEQ believes that substantial revision of the guidance documents is still required, since the new draft *Recipient Guidance* and *Investigation Guidance* fail to address with sufficient clarity and detail many fundamental issues regarding Title VI responsibilities and administration processes.

TECHNICAL COMMENTS

1. The *Investigation Guidance* discussion of data evaluation methods for determining impact disparities and demographic disparities is far too vague. Concrete guidance is needed.

Although the LDEQ agrees with many of the data evaluation statements provided in this document (e.g., inclusion of a discussion of uncertainties, giving greater weight to the most representative data, etc.), we are concerned that the information provided is too vague to provide decision-makers with any definitive guidelines for assessing data. The document should include, *at a minimum*, "guiding principles" for data evaluation. Better yet the guidance could include specific examples of appropriate data evaluation techniques. As a starting point, the guiding principles for data evaluation may include the following:

- The *null hypothesis* should be that there is no disparity (i.e., statistically significant evidence is required to reach the conclusion of a disparate impact).
- Data assessment should always focus on addressing whether the permitting action or actions will result in a change (especially an increase) in disparate impact.
- A significance level of at most 0.05, for example, for all statistical tests should be used; or for confidence intervals, a confidence level of at least 0.95 should be used. (Note: this provides more guidance to data evaluators than to say that test shall achieve a "statistical significance of two to three standard deviations").
- The magnitude of the disparity will be considered in addition to the statistical significance of the disparity.

- Longitudinal (across time) data evaluations should be considered wherever feasible.
- The sampling unit should be considered in all statistical tests. For example, if the sampling unit is a census block, then statistical tests based on individuals (where *n* = the number of people rather than the number of blocks) may be inappropriate. At a minimum, the uncertainties and potential biases associated with performing statistics on individuals when the sampling unit is a group of individuals (e.g. census block) should be discussed.

2. The *Investigation Guidance* framework fails to address discriminatory effects of permitting decisions within the agency's authority to consider.

A. As described in section I A, *Purpose of the Revised Investigation Guidance,* the stated intention is to "provide a framework explaining how OCR intends to process and investigate allegations about discriminatory effects resulting from environmental permitting decisions."

Why then, is there no specific discussion in the document about how data should be evaluated so that a causal link can be established between a permitting decision and an adverse disparate impact? The document does not even state that one of the objectives of the data evaluations should be to assess the link between the permitting action(s) and the discriminatory effects.

Section VI B, *Description of Adverse Disparate Impact Analysis,* states for example, that a complaint might be filed as a result of a permit renewal and that the "universe of sources" may include a broad array of regulated and permitted facilities. If a broad array of regulated and permitted facilities are included in an investigation designed to identify discriminatory effects of permitting decisions, the data should be evaluated in such a way that either:

- It can be concluded that the activity named in the complaint (such as a new permit or permit renewal) will significantly increase the disparity of an adverse impact caused by the "universe of facilities", or
- It can be shown with data covering an appropriate time period that the pattern of granting permits to the "universe of facilities" resulted in the current disparity, and
- It can be shown that the disparity is not a result of demographic patterns that can be explained by economic or population migration considerations outside the control of the recipient.

An investigation that fails to address the above issues cannot be said to evaluate whether a recipient's permitting decisions result in adverse disparate impacts. Although it may have been EPA's intent to focus data assessments on establishing a causal link between recipient activities and either current disparities or future increases in disparity, the document contains no guidance to this effect. Rather, it appears to suggest that, regardless of the progression of events that led to the disparity, if there is a disparity, the

recipient will not be allowed to either grant new permits or renew existing ones without risking a finding of noncompliance. The LDEQ believes that this is a fundamental flaw in this guidance document.

B. In section I C, *Scope of the Guidance*, the document states that "It likely will be a rare situation where the permit that triggered the complaint is the sole reason discriminatory effects exist." It goes on to state that because of this fact, there should be cooperative efforts between permitting agencies and communities to address disparate impacts, outside the context of Title VI-related problems.

   Although the LDEQ concurs with these statements, the document falls short in that it fails to call attention to the fact that the evolution of disparate impacts often is not well understood. Any community efforts to address disparity need to begin with an understanding of the factors that, over time, led to the disparity. Otherwise, there is a strong risk of "treating the symptoms" only, instead of identifying and treating the root cause of disparities.

3. Since the *Investigation Guidance* framework fails to consider whether past permitting decisions are the cause of discriminatory effects, investigations of permit actions that do not result in increased disparity should be closed.

A. Section VI B 1 a, *Determine Type of Permit*, states one of the types of permit actions that could form the basis for a Title VI investigation is a permit action that allows existing levels of stressors, predicted risks, or measures of impact to continue unchanged.

   The LDEQ believes that if permit actions do not result in an *increase* of existing levels of disparity, then the investigation should be closed, unless it can be demonstrated that the past permitting activities *led to* the current disparity. Such an analysis would require a longitudinal study to evaluate whether the past permitting decisions created a disparity, or if post-permitting settlement and migration patterns led to the current levels of disparity (based on economic factors or population migration factors, for instance, or other factors outside the recipient's authority).

B. Section VI B 2 b, *Determine Universe of Sources*, states one "universe of sources" may include a wide range of regulated and permitted sources as well as unregulated and unpermitted sources, depending on the scope of the complaint.

   Although the LDEQ agrees that permit decision-makers may consider the broad circumstances surrounding the permitting activity, much more emphasis needs to be placed on evaluating whether the activities covered by the recipient's authority constitute a significant portion of the total disparate impact. As such, the assessment should identify the relative contribution of various source categories. In fact, the *only* reason for considering other sources that are not covered by the permit(s) in question should be to provide the ambient background levels for assessing whether the permit(s) in question will result in a significant increase in disparity above what currently exists.

4. The *Investigation Guidance* does not adequately address uncertainties in performing impact disparity and demographic disparity evaluations.

A. Section VI B 3, *Impact Assessment,* states that the investigation report should include a discussion of uncertainties in the impact assessment.

Although the LDEQ concurs with this statement, the document would be well served to include a list of factors that should be considered in the uncertainties. As a start, this could include the following:

- How accurate are the measurements?
- How representative are the data (based on source, date, etc)?
- How variable is the population?
- How many sampling units are available (note: if there are a large number of people, but a small number of census reporting units, the distinction between individuals and sampling units may be important).

B. In section VI B 5 a, *Identify and Characterize Affected Population*, the document states that the OCR would expect to use the smallest geographic resolution feasible for the demographic data, such as census blocks, when conducting disparity assessments.

The LDEQ concurs but believes that the guidance document should go further and state the level of data resolution will be accounted for in the data evaluation statistical assessment of uncertainty. For example, if the resolution is census blocks, then tests based on counts of individuals should be interpreted with caution (some approaches based on counts of individuals may be appropriate, but it may also be necessary to document caveats and/or uncertainties as a result of the approach).

5. The *Investigation Guidance* is unclear as to how the significance of impact disparities and demographic disparities should be determined.

A. Section VI B 6, *Adverse Disparate Impact Decision,* and other places throughout the document, state that the data normally will be evaluated statistically to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations.

Although the LDEQ has developed an interpretation of the author's intended meaning, it is very unclear what this means in the context of general hypothesis testing. It would be more appropriate to provide guidance, for example, that hypothesis tests will be performed at the 0.05 significance level or below and that confidence intervals of at least 95% confidence will be constructed.

B. In section VI B 5 b, *Comparison to Assess Disparity*, the document provides a list of "minimal" comparisons that should be performed. One of these is to compare the demographic characteristics of the most likely affected population (e.g. highest impacted 5% of population) to the least likely affected (e.g., lowest impacted 5% of population).

In general, the LDEQ would caution against statistics that only consider ten percent of the population as the basis for policy decisions. The LDEQ does not agree that the demographics of the most likely affected portion of the population are of interest (for example, the top 5%). However, it would be more appropriate to compare this subset of the population to the population at large or to the 50% least likely to be affected.

C. Section VI B 6, *Adverse Disparate Impact Decision*, includes a discussion about the magnitude of impact disparities and the magnitude of the demographic differences.

This discussion is confusing and does not provide any real guidance to decision-makers. For example, what is a "relatively slight (under 20%) demographic disparity"?

6. Existing multimedia risk assessment approaches evaluate cumulative impacts of permitting decisions to protect the health and quality of life of all persons, regardless of their race, color, or national origin.

Section I B, *Title VI of the Civil Rights Act of 1964, as amended*, in the *Recipient Guidance* states that Title VI prohibits discrimination based on race, color, or national origin under any program or activity of a Federal financial assistance recipient.

Title VI can be interpreted to mean that *all persons*, regardless of race, color, or national origin, should be protected from adverse effects. In other words, if adverse health effects are found to result from a proposed permit action, it should not matter whether the receptors (affected population) are Native-American, African-American, Hispanic, Caucasian, or some other race or national origin. Adverse effects should not be allowed to occur upon any individual or social group; therefore, one shouldn't have to evaluate whether there is a disparity from a racial standpoint to determine that the proposed action causes adverse effects and should be denied.

Permits often rely upon the use of health-based risk assessments to determine whether a proposed facility meets a certain *de minimis* risk level. Risk assessment results are based on a series of health protective assumptions and calculations which are designed to ensure that risks are over-estimated and that sensitive populations, regardless of their race, color, or national origin, are provided an adequate margin of safety. The LDEQ therefore urges EPA to consider risk assessment results showing no adverse health effects when making adverse disparate impact determinations.

7. If the guidance must evaluate disparate impacts on populations rather than ensure protection of health and quality of life for all persons, then the threshold for what constitutes a population must be defined.

Section II B 3 f of the Recipient Guidance, Conducting Disparity Analyses and Assessing Significance, states that

> As part of the adverse impact [analysis], one method of identifying an affected population would involve assessing the distribution of adverse impacts in the

> environment, and associating populations with them. Where this method is infeasible, estimating affected populations based on proximity to sources may provide initial estimates for assessment.

EPA should define the *reasonable* threshold for the size of an affected population. Is it 1 person, 2, 3, 10,000? Does unequal health risk for 1 person constitute an adverse impact that warrants a finding of noncompliance with Title VI? Furthermore, estimating affected populations based on proximity to sources does not tell anything about the potential health risk or adverse impact to quality of life. As such it should not be used to make a judgement regarding whether a permitting action causes discriminatory effects.

8. Defining comparison populations on a case-by-case basis will lead to unequal protection of "affected populations" since the level of impact on comparison populations will vary.

Section II B 3 f of the *Recipient Guidance, Conducting Disparity Analyses and Assessing Significance,* states

> Another element of [an investigation] involves a disparity analysis that compares the affected population to a comparison population to determine to what degree a disparity exists. EPA expects that appropriate comparison populations will be decided on a case-by-case basis. Generally, relevant comparison populations would be drawn from those who live within a reference area such as your jurisdiction (*e.g.*, an air district, a state), a political jurisdiction (*e.g.*, city, parish (county)).

EPA should provide specific guidance on how to perform an adverse impact disparity analysis. What are the implications if the comparison population is also found to have high risks (or whatever the selected impacts metric is)? Does this make it acceptable for the "affected" population to have high risk? Furthermore, an appropriate comparison population could turn out to have the same ethnic composition as the affected population, which would also seem to indicate no disparity regardless of the level of risk. Given these concerns, would it not be better to establish socially acceptable risk levels, and protect *all* populations, or better yet, *all persons*, equally?

9 The discussion of how to perform an adverse impact assessment is entirely vague. Clear guidance is needed.

The discussion of impact assessment steps in section II B 3 b of the *Recipient Guidance, Potential Steps for Conducting Adverse Disparate Impact Analyses,* states

> The analysis should determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, cause one or more impacts. The analysis should also include measure(s) of the magnitude of impact and likelihood of impact occurrence.

Clear guidance is needed on how to perform an impact assessment. The LDEQ further asks EPA to clarify how to handle a situation where a facility has no effect on its own,

but may have an effect in combination with others when multimedia sources and stressors are considered.

10. The discussion of how to determine the significance of an adverse impact is vague. Definitive guidance is needed.

The *Recipient Guidance* states that, before an adverse impact decision is made, the analyst must determine whether impacts are sufficiently adverse to be considered significant.

EPA should explain the meaning of "sufficiently adverse". Many potential precedents exist for defining sufficiently adverse impacts, such as national ambient air quality standards and de minimis risk levels established for carcinogens and non-cancer toxicity. The guidance is unclear however, as to whether such standards apply to adverse impacts determinations.

Although section VI B 4 a, *Example of Adverse Impact Benchmarks*, in the *Investigation Guidance*, does provide an example of possible thresholds for determining adverse effects, many questions remain.

> EPA uses a range of risk values for implementing various environmental programs, depending upon the legal, technical, and policy context of the decision at issue. Based on these values, OCR would expect that cumulative risks of less than 1 in 1 million (10^{-6}) of developing cancer would be very unlikely to support a finding of adverse impact under Title VI. OCR may make a finding in instances where cumulative risk levels fall in the range of 1 in 1 million (10^{-6}) to 1 in 10,000 (10^{-4}). OCR would be more likely to issue an adversity finding for Title VI purposes where the cumulative cancer risk in the affected area was above 1 in 10,000 (10^{-4}). A finding of adverse impact at this stage of the investigation does not represent a finding of noncompliance under Title VI, but rather represents a criterion for proceeding further in the analysis.
>
> For cumulative non-cancer health effects, which are often measured as a hazard index, the range of values previously used is less well-documented, and has been less often applied in a <u>cumulative exposure</u> context. Based on the available precedents, OCR generally would be very unlikely to use values of less than 1 to support a finding of adverse impact under Title VI. Values above 1 cannot be represented as a probability of developing disease or other effect.

This discussion, although appreciated, provides very uncertain guidance as to what levels of risk constitute an adverse impact. If the above statement is meant to imply that, except in cases with extenuating legal, technical, and policy circumstances

- cancer risks of 10^{-6} do not constitute adverse impacts;
- hazard indexes less than 1 do not constitute adverse impacts;
- cancer risks of 10^{-6} to 10^{-4} indicate potential adverse impact and warrant further investigation; and
- cancer risks greater than 10^{-4} indicate adverse impact

what are some examples of extenuating legal, technical, and policy circumstances? Is the interpretation provided above supported by EPA? What about standards, other than NAAQS, that are "presumptively protective of human health", as discussed in section VI B 4 b, *Use of National Ambient Air Quality Standards*? Will they also be used as thresholds for making adverse impact decisions? If so, why is this not stated in the guidance? If not, why have NAAQS been singled out by EPA?

11. The guidance causes unnecessary confusion in its discussion of "acceptable" adverse impact analysis methods. The guidance does not support the use of best-available science and confuses technological tools with scientific methods.

A. Section V B 1 of the *Investigation Guidance, Analyses or Studies*, states

> OCR would expect that a relevant adverse impact analysis or a disparity analysis would, at a minimum, generally conform to accepted scientific approaches.

There are not any—at least they are not described or cited in this guidance. Defining generally accepted scientific approaches for adverse impact and disparity analyses is, or rather *should be*, the purpose of this guidance.

B. Section II B 3 c of the *Recipient Guidance, Availability of Tools and Methodologies for Conducting Adverse Impact Analyses*, states that

> Geographically detailed estimates of risks or other measures of impact are the most useful in assessing adverse disparate impacts because they often provide a clearer connection between sources, stressor, and impacts. However, producing these estimates or measures can require significant resources. Moreover, in some contexts, less detailed methods or measures can be as useful. For example, ambient risks may often be directly proportional to release amounts and toxicity of the stressors. As a result, by examining the amount and toxicity of stressors coming from the relevant source(s), it is often possible to identify sources or combinations of sources that have a higher likelihood of being associated with adverse disparate impacts.

The LDEQ agrees with EPA that geographically detailed risk studies can require significant resources. However, the LDEQ disagrees that "less detailed measures or methods can be as useful." The suggestion to use less detailed methods (i.e., examine only the amount and toxicity of stressors) may be less time consuming but may provide misleading information and either underestimate or overestimate health risks in various situations. EPA must carefully consider the merits of less-time consuming but also less-accurate methods, since their results are more likely to be contested and less likely to stand as proof that (a) adverse impacts exist, and (b) that a recipient's permitting program contributes to adverse impacts.

Although the LDEQ agrees that less detailed methods of analysis may, in certain cases, be useful in identifying "sources or combinations of sources that have a higher *likelihood* of being associated with adverse disparate impacts", EPA's investigation must go much farther than that. EPA must show that adverse impacts actually do exist

and have been exacerbated by the recipient's permitting program. "Less detailed approaches" are not suitable for this task.

Even in the case of an analysis that considers actual release amounts or exposure levels, the link to adverse health effects or some other indicator of degradation of quality of life must be made clear, since it is the dose that determines whether a chemical will produce adverse effects. Unequal exposure to doses of chemical that have no acute or chronic health effects should not be "sufficiently adverse to be considered significant".

While it may be true in some cases that higher amounts and toxicity of stressors may indicate a higher likelihood of adverse effects, it may not always be the case. For instance a neighborhood dry cleaner may well produce a higher cancer risk than a refinery, but an analysis of amount and toxicity of stressors would lead to the opposite conclusion.

C. Section II B 3 c of the *Recipient Guidance, Availability of Tools and Methodologies for Conducting Adverse Impact Analyses*, states that

> When designing, selecting, and using adverse impact methodologies, you should consider the…availability of tools, resources, and training to evaluate risks (both from single and multiple stressors).

This can be taken to imply that if an agency doesn't have adequately trained personnel or adequate resources to conduct more costly analyses it could consider an alternative evaluation approach. This is not guidance. If it were, it would describe the best approach for conducting impacts analyses. The "guidance" provided above will result in "apples vs. oranges" impacts comparisons and may result in a disincentive to use the best available science.

D. Section VI B 3, *Impact Assessment,* of the *Investigation Guidance* discusses toxicity-weighted emissions approaches***:***

> This approach sums the releases of multiple stressors (usually chemicals) that may be associated with significant risks, weighted by a relative measure of each's toxicity or potential to cause impacts.

The use of such a score does not provide any useful information regarding whether or not these emissions are causing health effects. As such they are not useful and should not be used.

E. Section II B 3 c, *Availability of Tools and Methodologies for Conducting Adverse Impact Analyses,* of the *Recipient Guidance* states that

> One tool which is likely to be useful is a geographic information system (GIS). Many organizations have found GIS useful in environmental impact analyses. GIS is not, however, a specific demographic or impact analysis method. Instead, GIS software can be used to perform a range of analyses and produce maps and other display products that are effective means of communicating the findings and facilitating public participation.

GIS may be a useful tool for displays and some types of analyses, but this statement does nothing more than say "consider using GIS technology" when performing investigations. If this were definitive guidance, EPA would specify what types of analyses to perform. In comparison to providing guidance on what analyses to perform, providing guidance on the tools used to perform the (unspecified) analyses is an insignificant issue. Suggesting the use of specific tools, like GIS, is fundamentally flawed when key analyses to be made have not been delineated.

12 The investigation process does not allow for substantive technical input from recipients, permittees, or complainants.

Section IV B 5 a, *Submission of Additional Information*, of the *Investigation Guidance* states

> During the course of the investigation, complainants and recipients may submit additional relevant information to supplement EPA's analyses. OCR intends to balance the need for a thorough investigation with the need to complete the investigation in a timely manner. Therefore, at the conclusion of interviews of the complainants, recipients, or other witnesses, OCR expects to ask each to submit, within a reasonable time of the interview (*e.g.*, 14 calendar days), any additional information that they would like considered as OCR drafts its investigative report. Also, "While recipients are not required to submit complaint-specific analyses or to develop more comprehensive Title VI approaches, such as the area-specific agreements described below, such efforts could help avoid Title VI problems by identifying and addressing potential adverse disparate impacts.

It is not likely that the type(s) of analyses required of recipients and complainants could be performed in 14 days. EPA should provide for longer comment periods or a mechanism to petition for longer comment periods. As it stands, the 14-day period has the effect of prohibiting recipients and complainants from providing anything more than cursory input.

13. The discussion of area-specific agreements is not clear on the levels of protection that must be achieved in protected areas.

A. Section V B 2, *Area-Specific Agreements*, of the *Investigation Guidance* states that conditions of area-specific agreements should

> result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA's Title VI regulations.

The LDEQ requests a specific definition of "to the extent required by Title VI" (e.g., what is a significant disparity?) and "reasonable time." Since the guidance is not specific, are these definitions left to the discretion of the recipient agency?

B. Section V B 2, *Area-Specific Agreements*, of the *Investigation Guidance* states

> An exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented.

"Substantially" should be defined and examples provided. This is extremely important, since it would speak directly to the criteria required by EPA in implementing and administering area-specific agreements.

14. The *Recipient Guidance* fails to consider the unintended, potentially detrimental effects to populations covered by area-specific agreements.

The LDEQ believes that all persons have the right to a reasonable level of protection of their health and quality of life and understand EPA's guidance for recipients to consider forming area-specific agreements is intended to serve these ends. In practice, however, area-specific agreements have the potential to slow, if not halt, economic development and place existing industries at a competitive disadvantage. Once formed, both people and businesses will likely see these areas as less-appealing places to locate, which could have unintended, but nonetheless negative consequences on local economies.

All people, regardless of race, color, or national origin, share a fundamental need for an environment that provides basic levels of health and well-being. Environmental justice can be defined as "the fair treatment of people of all social groups with respect to the development and enforcement of environmental, laws, regulation, and policies. Fair treatment implies that no social group should be required to shoulder a disproportionate share of environmental impacts". Environmental justice thus focuses on the human need for a healthy environment as a component of *social justice*, which also includes *economic justice* and justice in the distribution of social positions and access to political and legal systems.

In practice, the goals of economic and environmental justice often conflict. Economic development zones, for example, have the potential to improve economic justice, but pollution from these enterprises may contribute to existing environmental inequity. Conversely, areas protected by area-specific agreements may have the potential to improve environmental justice, but the cost may include reinforcing or even increasing existing economic inequity. What is needed in such cases is a process that identifies the most beneficial balance between economic and environmental justice. Therefore, the LDEQ strongly urges EPA to consider the balance between environmental justice and

broader goals of social justice, including economic justice, when forming policy on area-specific agreements.

15. It is highly questionable whether recipient agencies have the authority to enter into area-specific agreements and enforce all actions required to meet their stated objectives.

Section V B II, *Area-Specific Agreements*, in the *Investigation Guidance* states that, in order for an area-specific agreement to be granted due-weight, the agreement must be:

> supported by underlying analyses that have sufficient depth, breadth, completeness, and accuracy, and are relevant to the Title VI concerns; and [must] result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA's Title VI regulations.
>
> The greatest weight OCR could accord such an agreement is to find that the actions taken under it will eliminate or reduce, to the extent required by Title VI, existing adverse disparate impacts. If OCR makes such a finding, it would then close its investigation into the allegation.

Although the guidance provides two examples of area-specific agreements with specific objectives—one to reduce lead exposure levels in an area of a city and one to reduce pollutant releases with a steady reduction over time—no examples are given of the specific actions that could be taken by the recipient agency to achieve these objectives. The LDEQ is concerned that, in practice, recipients will have only limited power to enforce many of the types of actions required to meet objectives of area-specific agreements such as those cited above.

For example, in an area with high pollutant releases, it may turn out that the only way to bring about "actual reductions to the extent required by Title VI" is for existing permittees to reduce emissions and for the recipient agency to allow no new industrial development in the area. Although many, but not all, approaches for requiring emissions reductions from existing permittees are within the agency's authority, reductions realized through this approach may not result in reductions "to the extent required by Title VI." The other step, disallowing new industrial development, even if a new industry meets all existing permit requirements, is a zoning decision that, if made by the agency, encroaches on the authority of local government.

16. Implementing *Recipient Guidance*, Section II B 2, *Encourage Meaningful Public Participation and Outreach*, would require significant agency resources.

The LDEQ recognizes the value of the public participation process and believe it is one of the most effective means of identifying and resolving issues of concern before they lead to formal administrative complaints. However, significant recipient agency resources may be required to initiate and maintain an effective public participation program at the level suggested by the *Recipient Guidance*.

The LDEQ is concerned that an inadequately funded public participation program may raise expectations within the community that cannot be met. Communities that have been led to believe they have a stake in the process are likely to perceive *increased* discrimination when it becomes apparent that, due to a lack of adequate funding, on-the-ground public participation activities (e.g., on-going public meetings and workshops, information distribution) are not taking place.

Should it be the recipient agency's expectation that the permittee will fund the outreach effort? If so, the recipient will need to issue specific guidance on the minimum acceptable effort required of permittees. Recipients need specific guidance from EPA before they can communicate outreach requirements to permittees.

17. Attempting alternative dispute resolution before performing a complaint investigation would be at best ineffective, and at worst grounded by concerns that are irrelevant to adverse disparate impacts as defined by EPA.

The LDEQ recognizes the value of Alternative Dispute Resolution (ADR) as a concept. However, we are unclear as to when and how it is appropriate to use ADR.

For example, assume a case where an adequate public participation process has been undertaken but has not been able to resolve an issue of concern, and an administrative complaint has been filed. The parties would enter into ADR with no more data than was available during the public participation process. What new could be accomplished at this stage? Would we assume a neutral ADR facilitator could achieve a resolution that thus far had been eluded? Would it be more productive to postpone ADR until adverse disparate impact analyses had been completed so that the process could be based on the evidence from an objective, scientific evaluation?

The LDEQ would appreciate a more complete explanation of the practical, rather than theoretical, use of ADR in the permitting process.

18. The administrative complaint investigation and resolution process as described in the *Recipient Guidance* and *Investigation Guidance* poses an undue burden on recipient agencies.

In section II B 3 a of the *Recipient Guidance, Availability of Demographic Data and Exposure Data*, EPA lists not fewer than 19 EPA regulatory program databases that should be consulted during analyses to determine adverse impacts, and states that "OCR does not expect to limit its disparate adverse impact analyses to [only] information in these databases." The guidance further suggests that recipients "may also examine other available sources (*e.g.*, those developed by states and localities) for additional important data, and consider collecting additional locally-relevant data."

The *Shintech* investigation, *Select Steel* investigation, and other Title VI investigations performed since 1998 under the *Interim Guidance* required substantial time and resources to complete. The scope of these investigations was also limited. For example,

the draft (February 1998) and revised (April 1998) *Shintech* investigations relied only upon data from TRI and TEDI databases. The LDEQ believes expanding the scope of evaluations to include a multitude of other data sources places an unreasonable burden on the time and resources of recipient agencies and seriously question whether such broad-reaching investigations could be completed within the specified 180-day time period. The LDEQ requests that EPA revise the guidance to adopt a more streamlined investigation approach.

19. The LDEQ seriously doubts there is any location in the United States where some form of disproportionate impact cannot be found if Title VI complaints are investigated as outlined in the *Recipient Guidance* and *Investigation Guidance*.

In any form of quantitative analysis involving assessment of statistical significance, it is almost certain that, if one has a large amount of data and looks at that data using a number of analytical methods, statistically significant patterns will occur *by chance alone*. As an example, although it is highly unlikely one will flip a coin five times and have it come up heads each time, if one keeps flipping the coin one is bound to eventually observe that result. In the case of Title VI, this means that, if one looks hard enough and long enough, one will find statistical evidence of disproportionate impacts in an area. And conversely, if one looks hard enough and long enough, one will find statistical evidence that disproportionate impacts do not exist in an area.

The LDEQ seriously questions whether there is any location in the United States where some form of disproportionate impact cannot be found when considering the multitude of data and analysis techniques allowed for in the guidance. Based on the discussion of data sources available for analyzing adverse impacts provided in section II B 3 a, *Availability of Demographic Data and Exposure Data* (see discussion in comment 18), it is not unreasonable that adverse impact analyses could include investigation of 30 or more EPA, state, and local datasets. The combinations of parameters available for analysis are endless if you add to the multitude of data the number of choices available in determining investigation methods (e.g., proximity-based, emissions-weighted, toxicity-weighted, risk-based, etc.), the "universe of facilities", "affected populations", "comparison populations", and thresholds of significance. The LDEQ compliments EPA for providing a discussion of the range of data and analytical techniques available for analyzing disparity, but do not believe this discussion constitutes definitive guidance as to (a) what evidence is sufficient to form the basis of a finding of disparate adverse impact and (b) what studies should be conducted in determining that evidence.

20. A Title VI complaint may have the effect of suspending permittee operations.

In section A, *Preamble*, EPA states:

> The filing or acceptance for investigation of a Title VI complaint does not suspend an issued permit. Title VI complaints concern the programs being implemented by Federal financial assistance recipients and any EPA investigation of such a complaint primarily concerns the actions of recipients rather than permittees. While a particular permitting

> decision may act as a trigger for a complaint, allegations may involve a wider range of issues or alleged adverse disparate impacts within the legal authority of recipients.

Although a Title VI complaint may not suspend an issued permit, what of other permits required for a facility to operate? Take for example a case where the permit to construct a facility has been granted, construction commences, and a Title VI complaint is filed and accepted for investigation by EPA. The statement above implies that facility *construction* can continue during the investigation period. However, before the facility can begin *operation*, it must obtain a number of other permits (e.g., air, water, etc.). Should the process of reviewing and approving the facility's operating permits continue without regard to the pending Title VI investigation involving the construction permit? Or, should the process of reviewing and approving operating permits be suspended until the Title VI investigation is closed? Furthermore, is the facility's construction permit not in jeopardy of being suspended? If a finding of noncompliance is made, could suspending the facility's construction permit be made a condition of achieving compliance?

ADDITIONAL COMMENTS

21. Area-Specific Agreements that the Guidances recommend will have the effect of redlining African-American communities in Louisiana. Promoting redlining conflicts with the Civil Rights Act of 1964.
22. EPA still relies on the flawed and highly subjective "Adverse Disparate Impact Analysis" to make a determination of whether a recipient is in violation of Title VI. Both the Title VI Implementation Advisory Committee and the National Environmental Justice Advisory Council have expressed opposition to this analysis and it should be eliminated from the Investigation Guidance.
23. The Guidances do not respect local land-use plans and authorities. The Guidances hold states responsible for the autonomous decisions of local governments and recommend that states perform demographic and disparate impact analyses not required in current laws. Traditionally, land use is limited by local planning controls and the requirements of parish (county) or municipal governments. These decisions are made at the local level with no interference from states. The Guidance would have states oversee local decisions using demographic and other analyses that are inappropriate and not based in law. The Guidance impinges upon the zoning authority legally delegated to local government.
24. There is no "standing' requirement in the jurisdictional criteria. Thus, an individual in Maine who has never set foot in Louisiana can file an administrative complaint against the LDEQ alleging violation of Title VI. This can be done without demonstrating that complainant is an intended beneficiary, has suffered injury-in-fact, has shown the injury-in-fact is concrete and particularized and fairly traceable to the actions of the LDEQ, and that the actions are within the complainant's zone of interest.
25. The *Investigation Guidance* relies on an incorrect interpretation of Title VI in that it misconstrues and misapplies the holding in *Alexander v. Choate*, 469 U.S. 287 (1985). Contrary to EPA's assertion, *Alexander* only addresses section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and any discussion of Title VI in *Alexander* is *dicta*.

(*Investigation Guidance*, p. 5, fn. 12). Further, nothing in Title VI of the Civil Rights Act of 1964, as amended, or its legislative history ever envisioned that Title VI would be used to prohibit unintentional discrimination in the context of environmental permitting. The LDEQ agrees with Justice O'Connor's concurrence in *Guardian Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983) that proof of purposeful discrimination is a necessary element of a valid Title VI claim, and that hence Title VI implementing regulations incorporating an impact standard are not valid.

26. The Guidance fails to provide clear definitions of many crucial issues such as what constitutes a "disparate impact."
27. There are no clearly defined standards and methodologies which are precise, based on sound, peer-reviewed science and provide a high degree of certainty in decision-making outcomes.
28. The use of weasel-words such as "generally, likely" and the freedom granted to EPA to diverge from the Investigation Guidance at whim fail to end the uncertainty surrounding the Title VI complaint review process.
29. The Guidances assume that all Title VI Administrative complaints are filed for legitimate purposes. The Guidances fail to consider instances where such complaints are filed merely as a stall tactic. There are no guidelines for rejecting unfounded or frivolous Title VI complaints filed solely for the purpose of delaying the permit process and/or exhausting government resources.
30. There are no safeguards and/or sanctions in place to deter groups or individuals from filing unfounded or frivolous Title VI Administrative complaints.
31. The fact that no burden is placed on complainant to prove allegations is contrary to our legal tradition. Under the *Investigation Guidance*, a recipient is not deemed to be "innocent until proven guilty" but is forced to prove its innocence.
32. In the event of an EPA referral of the matter to another Federal agency (such as HUD), it is unclear what enforcement authority and remedies the Federal agency to whom the matter is referred will have over an entity alleged to be in violation of Title VI. This is especially true when the accused is not a recipient of federal funds from the Federal agency.
33. If OCR cannot delegate its enforcement authority and defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations, as it claims on page 22 of the Investigations Guidance, then how can OCR defer a matter to another Federal agency?
34. The threshold for processing and accepting Title VI administrative complaints contained in the jurisdictional criteria remains too low.
35. Some recipients may lack statutory authority to implement certain recommended methods of informal resolution.
36. Translation of permits and other documents into languages other than English is not realistic and would exhaust resources.
37. It is ridiculous for EPA to establish timelines to which it will not adhere or can easily waive. [DEQ has been waiting for disposition of the Title VI administrative complaint filed in the Supplemental Fuels, Inc. matter (long since moot) nearly seven years ago]. The term "good cause", as it relates to the waiving on the 180-day time limit in which to file a Title VI administrative complaint is not defined.

38. The Guidances fail to recognize that informal resolution often requires compromise, something that often is not feasible in emotionally charged situations involving a contested pollution control permit.
39. It is wrong for EPA to find a violation of Title VI of EPA's Title VI regulations based solely on alleged discrimination in the procedural aspects of the permitting process (*e.g.*, public hearings, translations of documents) without a finding of discrimination in the substantive outcome of that process (*e.g.,* discriminatory human health or environmental effects).
40. *Investigation Guidance* fails to explain how EPA will undertake factual investigation of the Title VI complaint.
41. The *Investigation Guidance* fails to detail the specific procedures EPA will use "to deny, annul, suspend, or terminate EPA assistance," or what "other means authorized by law" EPA will utilize to ensure compliance.
42. Although *Investigation Guidance* states that the Office of Civil Rights "may choose not to proceed with a complaint investigation if the allegations in the complaint were actually litigated and substantively decided by a Federal court," it is not clear what action OCR would or would not take in the event allegations were actually litigated and substantively decided by a state court. In the past, OCR has rejected complaints if there is litigation pending before a state court. This should be clarified.
43. There is no basis in law that grants EPA approval authority over any proposed informal resolution. If a resolution is truly informal, then why does a recipient need EPA approval?
44. It is illogical for the Office of Civil Rights to conduct a compliance review even after it dismisses a complaint on the basis of emissions decrease. If there is no violation of Title VI, there is no need to conduct a compliance review and to do so, without just cause, is nothing more than harassment.
45. It is not clear how the OCR will attempt to conduct an assessment to identify the relative contribution of various source categories where the activities covered by a recipient's authority constitute a portion of the impact. See *Investigation Guidance*, p. 33.
46. The process that OCR will use to determine whether the recipient's programs or activities have resulted in an "unjustified adverse disparate impact" is not clear.

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August 28, 2000

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Re: Comments of draft Revised Guidance for Investigating Title VI Administrative Complaints, Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

Dear Administrator Browner and Ms. Goode:

The EPA's draft Revised Guidance for Investigating Title VI complaints is extremely bad news for the communities of color directly affected by the rules and good news for polluting industries and agencies desiring to ignore the widespread environmental justice complaints pandemic across the nation's people of color communities near environmental hazards, including Texas. The draft Title VI Guidance rules are a bureaucratic, legal, medical and technical nightmare for the public and will make it impossible for Title VI complaints to be accepted for investigation, which will allow a perpetuation of the current injustices and potentially lead to acceleration of new environmental racism cases! Is this EPA's and the Clinton Administration's intent--to ignore environmental hazards, as well as to support and cover-up thousands of environmental injustices across America, and to allow the creation of a new universe of environmental hazards in people of color communities across America? These Title VI Guidance rules are so bad and unjust that their implementation will set back environmental justice and civil rights decades if EPA adopts them as proposed, so the best recommendation is to scrap them and start all over.

The Title VI Guidance rules turn the 1964 Civil Rights Act on its head and reveals that the President's 1994 Executive Order on Title VI environmental justice as basically meaningless words on paper and that the current administration has no real plans or intentions of implementing protective environmental justice rules. The Title VI Guidance rules appear to be not only inappropriate and inconsistent with civil rights laws, but they are illegal. Is this the civil rights legacy and environmental justice non-protection that President Clinton intends to leave as an example of his leadership? Hopefully that's not the case and EPA can still redraft more protective Title VI Guidance rules.

Communities of color in Texas have a huge stake in the Title VI Guidance rules because there are dozens of such communities and neighborhoods that are currently being and have been for years disproportionately impacted by major and minor environmental hazards across the state. Many communities suffer cumulative pollution assaults and burdens of numerous chemicals and exposures over time. As a result of the pandemic environmental injustice in Texas' communities of color over decades, a series of Title VI complaints have been filed with EPA since 1993 and nothing has resulted from EPA's acceptance of these complaints.

LIST OF PENDING ENVIRONMENTAL JUSTICE SITES IN TEXAS

List of Texas Environmental Justice Sites under Governor Bush and the Texas Natural Resource Conservation Commission (TNRCC) includes many Title VI complaints to EPA about TNRCC noncompliance and Dallas citizens filed even a civil rights lawsuit against the TNRCC.

1. East Houston (East Harris County) - leads nation's urban areas in toxic air pollution including benzene; nation's largest concentration of oil refining-petrochemical plants, hazardous waste incinerators, bulk chemical-oil-fuel tank farms, smoke stacks and pipelines; hundreds of chemical warehouses; several paper mills, pesticide mfg, superfund sites, etc.

2. Corpus Christi (Nueces County) - 15 miles of massive refinery-petrochemical complex, bulk chemical-oil-fuel tank farms, pipelines, sour gas plant, contamination sites, sewage treatment, outdoor petroleum coke storage, cement storage, power plant, military site.

3. Texas City (Galveston County) - major refinery-petrochemical complex, bulk chemical-oil-fuel tank farms, pipelines, superfund sites.

4. Port Arthur (Jefferson County) - major refinery-petrochemical complexes, hazardous waste incinerator, bulk oil-fuel-chemical tank farms, pipelines, abandoned toxic sites.

5. Beaumont (Jefferson County) - major refinery-petrochemical complex, bulk chemical-fuel-oil tank farms, pipelines, pesticide plants, and more.

6. El Paso (El Paso County) - major petroleum refineries, smelters, bulk oil-fuel tank farms, pipelines, numerous manufacturing plants.

7. Sweeny (Brazoria County) - major refinery-petrochemical complex, bulk oil-fuel tank farms.

8. West Dallas (Dallas County) - hazardous waste storage and processing, lead smelters causing lead contamination, bulk gasoline tank farms, and other sites.

9. South Dallas (Dallas County) - massive sprawling illegal dumps next to black neighborhoods.

10. Winona-Tyler (Smith County) - American Ecology's hazardous waste processing, storage and deep injection well facility destroyed small rural black community and slave cemetery.

11. East Austin (Travis County) - East Austin bulk gasoline tank farm, pipelines, electronics manufacturing plants, waste processing and recycling facilities, power plants, and more.

12. North Ferris (Ellis County) - Waste Management regional garbage landfill site.

13. South Frisco (Collin County) -GNB lead battery recycling and other industrial sites.

14. South Odessa (Ector County) - major petroleum refinery-petrochemical complex, contaminated well water, hazardous waste injection sites.

15. Sierra Blanca (Hudspeth County) - nation's largest sewage sludge dump, proposed nuclear dump.

16. Robstown (Nueces County) - commercial hazardous waste injection wells and contamination.

17. East San Antonio and Southwest San Antonio (Bexar County) – military toxic waste sites, hazardous waste processing, regional garbage dumps, bulk jet fuel-gasoline tank farms, superfund sites, and miscellaneous environmental hazards.

18. Bryan (Brazos County) - Elf Atochem/Pennwalt arsenic acid-pesticide plant contaminated the City of Bryan with arsenic dust contributing to recent cluster of anencephalic births.

19. College Station-Brushy (Brazos County) - Texas A & M pig farm relocated from site next to the George Bush Presidential Library to next to black community, Brushy near other unwanted sites.

20. Texas/Mexico border communities: Brownsville, Laredo, Eagle Pass, Harlingen, El Paso - industrial plants, dumps, and toxic waste sites and other environmental hazards.

21. Longview (Harrison county) - chemical plant and municipal sewage treatment plant.

22. Brenam (Austin County) - garbage waste transfer station sited in black neighborhood.

23. Pittsburg (Camp County) - Pilgrim's Pride chicken processing plant site, incinerator.

24. Texarkana (Bowie County) - Superfund site from old creosote plant at Carver Terrace.

25. Lubbock (Lubbock County) - burial vault industrial plant with toxic air pollution.

26. Fort Worth (Tarrant County) - steel and miscellaneous industrial plants.

27. Waco (McLennan County) - industry and bulk gasoline tank farms.

28. Marshall (Harrison County) - major chemical manufacturing site.

29. Waller County - proposed American EnviroGuard Commercial medical waste incinerator.

30. Three Rivers (Live Oak County) - major petroleum refinery, oil-fuel tank farms, and pipelines.

31. Sommerset (Bexar County) - sour crude oil tank battery and illegal permitting.

32. Mt. Pleasant (Camp County) - Pilgrim's Pride chicken processing plant site.

33. Rosenberg (Fort Bend) - closed municipal landfill leaking methane gas and causing other problems.

34. Commerce (Hunt county) - VPG/Hi-Yield arsenic-pesticide plant left arsenic contaminated site and ground water contamination.

35. Bonham (Fannin county) - VPG/Hi-Yield contaminated arsenic waste dumped and may have contaminated ground water.

Several of the obvious concerns about EPA's Title VI Guidance document are summarized here. The draft Title VI document is so bad that you could write a book criticizing it.

If EPA moves forward with it's new Title VI Guidance as proposed, environmental protection for communities of color will move backwards rather than forwards as it may serve as a justification for perpetuating regulatory agencies past practices into the future of simply rubberstamping environmental injustices as reasonable and fair treatment of such communities under the EPA's Civil Rights policies and procedures.

EPA seems to be relying on a heavy bureaucratic process to overwhelm and discourage people of color communities from submitting Title VI complaints - EPA's Title VI Guidance document basically sets too many bureaucratic barriers for communities to hurdle considering that so many lack the necessary legal, technical, economic, social and political resources to overcome and file successful Title VI complaints. Without such resources, it will be extremely difficult for such communities to prepare satisfactory

Title VI complaints that meet EPA's requirements to be accepted for investigation and agency action. Even with the proper resources, the EPA's barriers will make it more difficult for any Title VI complaints to be investigated and helpfully resolved to assist the impacted community in a positive way. Unfortunately, this new bureaucratic process to review future EJ complaints for consideration by the agency appears consistent with EPA's inadequate actions regarding current EJ complaints.

EPA appears to want to prohibit or at least discourage Title VI complaints as far as accepting them for agency investigation and action - EPA's Title VI Guidance document sets an exceptionally high burden of proof (legally and technically for evidence) on people of color communities to try to establish that disparate pollution impacts are occurring by requiring them to make submission of unreasonable evidence to prove up their health effects. The EPA has certainly not required state agencies and industry to submit epidemiological studies or any semblance of community health symptom surveys to scientifically support that hazardous facilities are not causing adverse impacts on communities. Yet EPA is expecting communities to research and submit exhaustive and novel credible scientific evidence proving a correlation between toxic emissions from the hazardous facilities and community illnesses. The current state of science on health effects and toxic exposure is encumbered with serious difficulties and research questions in proving cause-effect relationships which EPA does not require regulators or the regulated industry to submit for obtaining pollution permits. EPA is expecting communities of color to compile a body of health effects evidence to support their claim that not even the best scientists could assemble given today's limited knowledge on chemical exposure.

EPA fails to give recognition to existing discriminatory impact patterns across the nation as evidence of racial discrimination and constituting violations of Title VI of the 1964 Civil Rights Act - EPA's Title VI Guidance document totally ignores the current existence of disparate concentrations of various hazardous facilities with toxic emissions in the neighborhoods and communities of color. By applying a persistent agency philosophy to subtly obfuscate citizen efforts to submit Title VI complaints, EPA is acting in a consistent pattern exhibited since the EJ issue first appeared and token efforts were applied to the apparent problem. EPA is completely ignoring that people of color neighborhoods and communities have been routinely targeted to build hazardous and toxic facilities, which flies in the face of civil rights legal victories and statute.

EPA relies on an illegal and arbitrary time period for receipt of complaints - EPA's Title VI Guidance document requires that a Title VI complaint must be submitted within 180 days of the alleged discriminatory activity which is inconsistent with Title VI of the 1964 Civil Rights Act where no such time line is required since several years may be necessary to establish the pattern of discriminatory environmental regulation by an agency and toxic polluter. EPA has chosen an arbitrary time requirement in order to potentially discourage certain older Title VI complaint actions where individuals may need considerable time to perform their own investigation and establish reasonable evidence as a basis that racial discrimination occurred.

EPA's Title VI Guidance document appears to be significantly favoring industry and state environmental agencies over impacted communities in all phases of the Title VI complaint process.

EPA is willing to allow unusual evidence by state agencies - EPA's Title VI Guidance document opens the door to state/local environmental programs to consider the so called economic interests and benefits of a pollution permit as justification for the specific project and negate community TitleVI concerns.

The Galveston-Houston Association for Smog Prevention and the Lone Star Chapter of the Sierra Club in requesting that you act in your capacity as Administrator of the US Environmental Protection Agency to formally redraft and prepare the most publicly protective Environmental Justice proposal under Title VI of the 1964 Civil Rights Act as expeditiously as possible. The health of nearly 2 million Texans depends upon EPA adopting the most protective EJ rule.

Cities in Texas like the Houston, Texas City, Dallas, Fort Worth, Beaumont, Port Arthur Corpus Christi, El Paso, Longview, Tyler, Marshall, Austin, and San Antonio are already suffering under too much air pollution and are a major contributing source to this public health burden. We urge EPA to stringently protect the health of several million people of color in Texas.

Respectfully yours,

Neil J. Carman, Ph.D.
Technical Consultant
Galveston-Houston Association for Smog Prevention &
Clean Air Program Director
Lone Star Chapter, Sierra Club
54 Chicon Street
Austin, Tx 78702-5431

cc: President Clinton and Vice President Al Gore

CITY HALL
LOS ANGELES, CALIFORNIA 90012

August 28, 2000

Ann E. Goode, Director
Office of Civil Rights
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1201A)
Washington, DC 20460

Dear Ms. Goode:

The City of Los Angeles appreciates the opportunity to review and comment on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" (Recipient Guidance) and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Complaint Investigation Guidance) printed in the Federal Register June 27, 2000 (65 FR 39650). The City supports Title VI and programs to ensure that disparate impacts to low-income and minority groups are avoided and/or addressed. The City continues to develop policies and strategies to address environmental justice issues on a local level.

The draft Recipient Guidance and Complaint Investigation Guidance are substantial improvements over the previously released "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits." However, the proposed guidance must be further clarified and modified to ensure timely resolution of complaints to avoid unintended consequences. Detailed comments and recommended changes to the proposed Recipient Guidance and Complaint Investigation Guidance are attached. The key issues of concerns that remain to be addressed in the guidance include:

- Development of a more detailed methodology to assist recipient agencies in avoiding and addressing potential disparate impacts through integration of civil rights concerns into existing environmental and regulatory programs; and

- Development of a more efficient, predictable, consistent, and timely Title VI Complaint resolution process; and

received
9/20/00

- Ensuring full and open participation of all key stakeholders throughout the Title VI complaint evaluation and resolution process; and

- Placing greater emphasis on a recipient agency's underlying permitting processes and on cumulative impacts rather than on the issuance of individual permits and on impacts from individual facilities; and

- Addressing potential effects on local land use planning and decision-making authority.

The City of Los Angeles looks forward to working with the U.S. Environmental Protection Agency (EPA) to resolve these issues so that the communities, recipient agencies, and the permitted facilities can proactively avoid and/or address potential disparate impacts. The City appreciates EPA's attention to our concerns and staff is available to meet with EPA to further discuss our comments as appropriate.

Sincerely,

John Ferraro
President
Los Angeles City Council

Attachment

City of Los Angeles Comments on the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

I. DEVELOPMENT OF A MORE DETAILED METHODOLOGY TO ASSIST RECIPIENT AGENCIES IN AVOIDING AND ADDRESSING POTENTIAL DISPARATE IMPACTS THROUGH INTEGRATION OF CIVIL RIGHTS CONCERNS INTO EXISTING ENVIRONMENTAL AND REGULATORY PROGRAMS

Public Education to Encourage Early Participation in the Decision-Making Process

The Title VI complaint process should encourage individuals and groups to participate as early as possible in the local planning processes to identify and resolve issues and concerns that have the potential to create disparate impacts. Early stakeholder involvement in the development of policies and/or projects could serve to alleviate any potential disparate impacts.

Because of the complexities of Title VI requirements, the Office of Civil Rights (OCR) should provide Title VI technical assistance and financial incentives to recipient agencies, local governments, and community members. This assistance could take the form of training for recipient agency staff members in Title VI compliance or providing a regional EPA contact or ombudsman familiar with a local area (e.g., southern California) who is available to offer guidance and advice to recipient agencies, local governments and community members. Assistance and other incentives to recipients in designing a comprehensive Title VI program that could help agencies avoid disparate impacts in the planning stages would be particularly helpful.

Avoiding Complaints Through EPA's Proactive Review of Recipient Programs

The EPA proposes to review recipient programs and "area-specific agreements"and provide due weight to such programs as part of the Title VI complaint investigation process (*Federal Register* p. 39675). However, such review is afforded only once a Title VI complaint has been submitted to EPA. In areas such as southern California where thousands of environmental regulatory program permits are issued, a more appropriate method of assuring consistent consideration of civil rights issues in all permit actions, not just those appealed to EPA, would be to evaluate the permitting programs as a whole. Recipient program evaluation would assure a more consistent implementation of methodologies designed to identify and address disparate impacts associated with permits as they are reviewed and approved. Consistent application of permitting criteria and enforcement is essential to ensuring non-discrimination in the conduct of recipient agency permitting programs.

Finally, development of "area-specific agreements" would be very time consuming and resource intensive. In the absence of some provision for EPA's review and agreement that such area-specific agreements appropriately consider and address potential disparate impacts, it is unlikely that such agreements would be utilized.

The City therefore recommends that EPA modify the Recipient Guidance to encourage and provide for recipient agencies to voluntarily submit programs and proposed area-specific agreements for EPA review for compliance with Title VI. Such a process would ensure regulatory programs appropriately and consistently address potential disparate impacts and would assist in streamlining the Title VI Complaint evaluation process. EPA could integrate such proactive reviews into its existing oversight and approval responsibilities over various aspects of recipient agency activities (i.e. State Implementation Plans, rules and regulations, monitoring programs, etc.). Areas where a large number of permits are issued by recipient agencies should be given priority for proactive reviews by EPA.

Due Weight for Existing Programs

The southern California region has several unique regulatory programs which should be provided "due weight" in the Title VI complaint processes. In addition, several agencies may have oversight over a particular project, each of which have independent responsibilities for review of a project's appropriateness. Such programs have been developed with significant public participation and are designed to balance several important social factors including costs of compliance, implementation time lines, and environmental and public health benefits. Each program in and of itself should address disparate impacts, but taken as a whole these programs should integrate to further provide the checks and balances appropriate to ensure the identification of disparate impacts and appropriate project justification in light of disparate impacts which cannot be fully mitigated. The City therefore requests that as EPA reviews recipient agency programs for "due weight," programs administered by other agencies which are considered by the recipient agency, such as the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), in its project review and decision making process also be considered and provide due weight by EPA.

Integration of Recipient Guidance requirements for public participation into the federal NEPA process would minimize costs and/or duplication of effort. However, the integration of civil rights concerns into existing programs may require modification to those programs. For example, public noticing for NEPA documents is generally confined to the *Federal Register* which is not readily available to low-income and minority populations. EPA's recipient Title VI Guidance appears to require more accessible public noticing requirement to ensure that affected communities are aware of their opportunities to participate in the process. Federal programs such as NEPA should be expanded to include such public outreach consistent with the Recipient Guidance.

Consideration of Low-Income Communities

Although Title VI focuses on "race, color, or national origin," Executive Order 12898 requires review for "minority and low-income populations." The City supports this type of comprehensive approach to environmental justice. The integration of disparate impact considerations and assessment methodologies into existing regulatory programs, as recommended by the City, would address low-income population concerns. The modification of the Recipient Guidance to provide for EPA's proactive review of Recipient Agency programs for Title VI compliance would address low-income communities and therefore better reflect the requirements of Executive Order 12898.

Benchmarks

The City supports EPA's proposal to utilize regulatory standards as benchmarks for evaluating the significance of potential disparate impacts. The overall purpose of local regulatory and permitting programs are to reduce pollution to achieve health based standards for water quality and air quality (both regional and site specific as through CAA Title III), and to reduce risks associated with hazardous materials. Therefore, if permits are consistently issued based upon the adopted regulatory programs and consistently enforced, disparate impacts should be minimized. Benchmarks must then be inclusive of plans to achieve health based standards within the time frame allowed by law, not just the standard itself. If local environmental regulatory programs are not designed to reduce pollutants to healthful levels, then we urge the EPA to review the federal laws and standards upon which those programs are based.

Cumulative Impact Benchmarks

While the City supports EPA's use of existing health based regulatory standards for benchmarks, we caution EPA's use of benchmarks developed for individual permits, facilities, or pollutants in evaluating cumulative impacts. For example the *Federal Register* at page 39680 indicates that a cumulative risk of 1 in 10,000 would be likely to support a finding of adverse impact. However, this benchmark is not reflective of regulatory standards for cumulative risk, but rather is reflective of standards established for individual pollutants. Recent air quality studies in the South Coast Air Basin have indicated that the cumulative health risk associated with ambient concentrations of air toxics are approximately 1 in 1,000 (1,400 in 1,000,000). The use of EPA's urban air toxic program, which is cumulative in nature, would be a more appropriate benchmark than the 1 in 10,000 discussed by EPA in the guidance. Similar caution must be employed when selecting cumulative impact benchmarks for other environmental media.

II. DEVELOPMENT OF A MORE PREDICTABLE, CONSISTENT, AND TIMELY TITLE VI COMPLAINT RESOLUTION PROCESS

Complaint Processing Timeline

The City supports the complaint processing timelines presented in the draft guidance, but is concerned that EPA may have inadvertently created some opportunities for delays that should be rectified. In particular, the informal resolution process should occur in parallel with the formal investigative process, rather than delay commencement of the investigation. OCR must ensure that the established timelines, including completing the investigative process within 180 days, are consistently met. In this way, OCR can ensure that the Title VI complaint processing procedures are clear, certain, and predictable. To that end, the City would further recommend that OCR be provided with sufficient staff and resources to ensure that investigations are completed within the established timelines.

Better Integration of the Title VI Complaint Processes

In the draft guidance EPA proposes to process complaints on a single project for different environmental media separately. The draft guidance further indicates that EPA will forward complaints as appropriate to other federal agencies with jurisdiction. As commented on the Interim Guidance, it is essential that a single Title VI administrative process be established to prevent

repeated complaints through subsequent permit actions administered by different regulatory programs receiving federal funds or administered by different federal agencies.

In many cases, projects may require several permits directly from several federal agencies, or agencies receiving federal funds. One such example would be port expansion activities which often require approvals/entitlements by the Army Corps of Engineers, the metropolitan planning organization (which receive federal transportation funds), the Coastal Commission, permits from the local air quality management district, the state or regional water control board, and the State Department of Toxic Substances (DTSC) (which receive EPA funding), fire department clearances, sewer connection permits, (most local government recieve federal funds for one program or another), etc. Rather than allow subsequent permit appeals for an individual project with independent review of each complaint, as is currently proposed by EPA, a process which comprehensively addresses the project should be established. A prolonged and repetitive Title VI complaint evaluation and resolution process creates enormous uncertainty for complainants and project proponents. Therefore, EPA must develop a Title VI complaint investigation and resolution process that integrates consideration of other environmental media and other federal agency permitting programs. The draft guidance should be modified to include an integrated project review process to address Title VI complaints against a single project with regard to all environmental permits and non-permitted sources.

Consideration of the project as a whole is also essential to evaluating the justification for the project in light of potential disparate impacts. As indicated by EPA in the proposed guidance, construction of wastewater treatment plants is imperative to public health and safety and has an overall benefit to society. However, EPA goes on to limit project justification to the media over which an agency has jurisdiction (*Federal Register* p. 39677). Therefore, if the air quality permits for a wastewater treatment plant were the subject of a Title VI complaint, the air quality regulatory agency would have no justification for issuing a permit, since air quality is its sole purview and responsibility. Therefore, both project review and project justification should consider the project as a whole.

More Detailed Methodology on Appropriately Assessing Potential Disparate Impacts

Consistent, peer reviewed methodologies and evaluation criteria should be established to assist agencies in evaluating potential disparate impacts and their significance early in the process to avoid Title VI complaints. The EPA should develop methodologies that are circulated for public and peer review and comment, for use by local agencies and integration into existing programs.

III. ENSURING FULL AND OPEN PARTICIPATION OF ALL KEY STAKEHOLDERS THROUGHOUT THE TITLE VI COMPLAINT EVALUATION AND RESOLUTION PROCESS

Inclusion of All Stakeholders Throughout the Process

The Title VI guidance should clearly outline the responsibilities and participation opportunities for each of the various parties involved in a Title VI complaint, including the complainant, recipient, permittee, other federal and state agencies, the local municipal government, potentially affected

communities (including low-income communities), geographically proximate and/or similar facilities, the general public, and other interested stakeholders. In conducting a Title VI complaint investigation it is important that all agencies involved in project approval be included. Local governments have project oversight through land-use decisions and therefore would be integral in the complaint evaluation process and would have information and documentation essential to the complaint evaluation process.

In developing voluntary compliance agreements, it is particularly important that there be comprehensive stakeholder involvement. Such voluntary agreements may affect other similar or nearby facilities who are not part of the complaint and could affect the local government, other permitting agencies, and other communities (including low-income communities). Therefore, all potentially impacted parties should be included in the development of such voluntary compliance agreements.

Inclusion of All Sources

As indicated by EPA, sources that contribute to cumulative impacts, including non-permitted sources, may also need to be addressed. Therefore, if mobile sources of air toxic sources are contributing to a disparate impact, agencies responsible for controlling mobile sources, such as EPA and the California Air Resources Board, must be included in the Title VI process so that control options for addressing the cumulative impact of all sources can be considered. The need for expanded stakeholder participation to develop comprehensive approaches that address cumulative impacts raises the importance of focusing the Title VI complaint resolution process from individual permits to an agency's underlying permitting program as discussed in greater detail below.

Public Outreach

Public education and outreach activities are essential to identifying issues of concern to communities and ensuring that potential disparate impacts are assessed and addressed as appropriate. Low-income and minority populations must be informed not only of projects that may impact their community, but of their opportunities to participate in the entire decision-making process, including Title VI complaints. It is important that all stakeholders be encouraged to participate in project evaluation and environmental permitting processes as early as possible to help identify potential disparate impacts and to develop strategies to avoid those impacts. Such public participation is encouraged through several existing programs, such as NEPA and CEQA. As discussed above, such existing programs should be considered in EPA's "due weight" analyses during Title VI complaint evaluation.

Deadline for Filing a Complaint Concerning Public Participation

In the Complaint Investigation Guidance EPA indicates that Title VI complaints regarding the public participation process must occur within 180 days of the alleged discriminatory act in that process (e.g., exclusion from a hearing) (*Federal Register* p. 39670). Such an interpretation does not recognize that, within local governments, public participation is an ongoing open process that is not completed until a final decision has been rendered in a public hearing before the decision making body. Therefore, failures to comprehensively outreach to or otherwise include an individual or

community at any single event in the public participation process could be addressed at subsequent public workshops or hearings. Because the ability to participate in the public process does not end until a final decision is rendered, it is this final public hearing that should signal the opening of the 180-day filing of a complaint, not an individual event which may have occurred and could be corrected through the public participation process as a whole. The City therefore requests that the Complaint Evaluation Guidance be clarified to indicate that the 180-day complaint filing period for public process Title VI complaints commences at the end of the public participation process. Such a process would be consistent with EPA's proposed policy of not addressing complaints until the administrative permit appeal process has been completed (i.e. the action is final).

IV. PLACING GREATER EMPHASIS ON AN AGENCY'S UNDERLYING PERMITTING PROCESSES AND ON CUMULATIVE IMPACTS RATHER THAN ON THE ISSUANCE OF INDIVIDUAL PERMITS AND ON IMPACTS FROM INDIVIDUAL FACILITIES

Contributors to Cumulative Disparate Impacts

Disparate impacts associated with existing facilities could be the result of the lack of authority of any agency to address a specific pollutant or source, the operation/location of regional facilities, the result of decisions made by other agencies and/or higher levels of government, etc. Furthermore, the baseline conditions, such as demographic and information changes over time, may be the reasons for the newly identified disparate impact. Such situations create complex problems which may require more programmatic solutions, as opposed to the imposition of control strategies at an individual facility. Neither a single facility nor a recipient agency should be held solely responsible for disparate impacts which are cumulative in nature and which are the result of actions and circumstances beyond their control. When investigating disparate impacts, EPA must consider the full range of complex interactions and sources that may contribute to a disparate impact or effect, and the various agencies with oversight over such cumulative sources. Furthermore, EPA must provide "due weight" for programs being undertaken by agencies other than the recipient agency in response to a Title VI complaint involving a cumulative impact.

Comprehensive Programmatic Approach

A more programmatic regulatory program review approach, as opposed to a permit-by-permit review/complaint driven process, would be more appropriate. By working to comprehensively address impacts within an area, pollutants from all contributing sources could be comprehensively addressed based upon cost-effectiveness, technical feasibility, specific agency authorities, and reasonable compliance time frames. Such a program is essential to addressing sources which are not permitted, but which substantially contribute to cumulative disparate impacts. In addition, future permits could then be evaluated within the context of contribution to cumulative impacts.

Potential for Creating Inequities Between Facilities and Industries

In evaluating cumulative impacts for existing permit renewals, a potential for creating significant competitive differences between facilities exist. For example, where several similar facilities are located in the same geographic area, a complaint against the renewal of one facility's permit could result in that facility being be held responsible to undertake facility modifications at substantial costs,

while the other like facilities could potentially continue to operate unaffected, simply because their permit was not challenged or has not yet come up for renewal. Such an individual permit complaint driven Title VI resolution scheme could easily result in inequities between facilities and industries.

V. LOCAL LAND USE PLANNING AND DECISION-MAKING AUTHORITY IMPACTS AND ISSUES

Local government has traditionally held jurisdiction over land use planning and zoning, and the Title VI complaint review process must ensure that such local control is maintained. The concept of local control over planning is based upon the desire of residents to organize and plan their own communities. In addition, unlike single purpose agencies, such as environmental, transportation, and housing agencies, local governments are responsible for, and must balance, a wide variety of issues. Local government provides essential public services, such as solid resources collection, processing, and disposal, wastewater collection and treatment, electric utility services, potable water delivery, and emergency services at a reasonable cost to the public. In addition, local governments are responsible for balancing economic growth and job needs with open space, recreation, housing, and quality of life needs. Local elected officials must consider and accommodate all of these issues in making land use decisions.

Therefore, it is imperative that the review of any land use decisions, such as that contemplated by the EPA Title VI complaint review process, consider the full range of factors that go into the actions and decision-making processes of local government. We strongly request that the local jurisdiction primarily responsible for approving a project be included in the Title VI complaint review, evaluation, and resolution process.

August 8, 2000

Title VI Guidance Comments,
U.S. Environmental Protection Agency
Office of Civil Rights (1201)
1200 Pennsylvania Ave NW
Washington,DC20460

Attention: Reggie Harris

Dear Mr. Harris,

I am very concerned about the proposed guidance documents that have been drafted by EPA on the VI guidance documents. I agree completely with the Public Interest Law Center of Philadelphia. I have listed the most outstanding things I believe that should be included in the documents.

EPA <u>Should</u> accept a complaint prior to the grant of a state permit.
EPA <u>Should</u> seek a stay of the permit.
EPA <u>Should</u> be able to rescind the permit.
<u>Draft Recipient Guidance is more important than the Draft EPA Guidance</u>

History, The largest medical waste incinerator in the nation, Medical Waste Associates, now known as Phoenix, could have been prevented from building the largest oversized facility in the nation. This facility has filed bankruptcy three times. A man was just killed at the plant. This is now under investigation. The residents could not afford an injunction. The plant was built in a depressed neighborhood. A neighborhood that had been relocated 4 years before. This plant was built on the site of the community play ground in Hawkins Point, Baltimore City zip 21226. ....This zip has one of **the <u>highest cancer rate in the State..</u>**

Please make sure my comments are entered into the record. I am sorry that I will not be able to attend the meeting in Philadelphia. I would hope some day you will come to Maryland so you can allow the residents in need of this protection to speak to you in person. These above position was also taken by the Maryland Waste Coalition, a volunteer environmental group. I am vice president of that group. The new president is Doris McGuigan. Her address is 3908 3rd. St. Brooklyn, MD 21225. Please send her your response as well.

Sincerely,

Mary Rosso

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF ENVIRONMENTAL QUALITY

"Better Service for a Better Environment"

HOLLISTER BUILDING, PO BOX 30473, LANSING MI 48909-7973

INTERNET: www.deq.state.mi us

RUSSELL J. HARDING, Director

August 28, 2000

VIA E-MAIL AND UPS

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

SUBJECT: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs; Draft Revised Guidance for Investigating Title VI Administrative Complaints

Enclosed are comments submitted by the Michigan Department of Environmental Quality on the two U.S. Environmental Protection Agency draft guidance documents referenced above. Please contact Mr. Gary R. Hughes, Deputy Director, or Ms. Lynn Y. Buhl, Director of the Southeast Offices, if you have questions or need additional information. Mr. Hughes can be contacted at 517-241-7394, or by e-mail at hughesg@state.mi.us. Ms. Buhl can be contacted at 313-392-6480, or by e-mail at buhll@state.mi.us.

We urge you to consider these comments thoroughly, and hope that the final guidances will reflect our concerns and those of many other state environmental departments.

Sincerely,

Russell J. Harding
Director
517-373-7917

Enclosure
cc/enc: Mr. Gary R. Hughes, Deputy Director, MDEQ
Ms. Lynn Y. Buhl, Director, Southeast Offices, MDEQ
bcc/enc: Mr. Bryan Roosa, Governor's Washington Office

Michigan Department of Environmental Quality
Comments on US EPA Environmental Justice Guidance(s)

August 28, 2000

The United States Environmental Protection Agency ("US EPA") drew tremendous attention to the issue of Environmental Justice and the application of Title VI of the Civil Rights Act of 1964 ("Title VI") to environmental permitting processes by issuing its "Draft Interim Guidance for Investigating Title VI Administrative Complaints" ("Interim Guidance") in February 1998.

Despite widespread criticism, US EPA declined to withdraw the Interim Guidance and in fact used it to adjudicate the *Select Steel* complaint (US EPA File No. 5R-98-R5), finding no violation of Title VI in an opinion released in October 1998. The Director of the Michigan Department of Environmental Quality (MDEQ) participated in US EPA's Title VI Advisory Group and on other occasions also discussed the shortcomings of the Interim Guidance with Office of Civil Rights (OCR) and other US EPA staff. The MDEQ advocated: (1) revising the Interim Guidance after conducting more public outreach and affording a better opportunity for input from state and municipal officials, and (2) shifting away from the "tail-end" review, focusing more on how a potential Title VI issue can be identified early and addressed so that any adverse health or environmental impact is prevented. The MDEQ recommended that US EPA design a comprehensive process by which permitting under environmental laws can be conducted fairly and consistently, incorporating Title VI concerns as well as requirements of the underlying environmental statutes. Separately, or as part of a permitting process, a Title VI review process must be objective, replicable, based on sound science, and ensure consistent outcomes within and between states.

The US EPA then issued revised guidance in two documents published in the Federal Register on June 27, 2000. Those are entitled "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" ("External Guidance") and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" ("Internal Guidance"). Neither of these documents addresses MDEQ's fundamental concerns. The following comments are organized so that fundamental, overall concerns with how US EPA has approached the resolution of this issue are delineated in the next seven bullet points, followed by specific comments addressing technical and procedural details within particular provisions in one or both guidances.

- <u>Deficient Public Outreach</u>. First, although US EPA apparently solicited input from a variety of interested parties in the two years between issuance of the Interim Guidance and the revised guidances, its approach ironically has not provided the same level of outreach and opportunity for public comments that

it is professing should be done by the state environmental departments or other recipient agencies ("Recipients"). The guidances state that a Recipient must encourage public participation and outreach, noting that an effective public participation process must be early, inclusive, and meaningful. For example, the public participation process should use communications likely to reach the affected community and should schedule meetings at times and places that are convenient. The Internal and External Guidances were published in the Federal Register on June 27, 2000. While written comments can be submitted until August 28, 2000, the opportunity to provide verbal comments in no way represents effective public participation. The US EPA has identified seven listening sessions held around the country. However, the notice, location, and meeting times are not convenient for the majority of citizens. In fact, the first listening session, held in Washington, D.C. on June 26, 2000, was held prior to the Federal Register publishing of the two draft documents. Nearly half of the public listening sessions did not receive 30-day advance public notice. Next, the meetings were held at US EPA regional offices, which are somewhat centrally located, but certainly not convenient for the average citizen. Finally, comments were limited to five minutes. Setting time limits, especially one so short does not convey the message that comments are welcome. Rather than providing an opportunity for meaningful comments, US EPA appears to do everything they could to discourage or limit verbal comments.

- A comprehensive process is a better approach. In short, we favor a process that (1) allows a Title VI concern to be recognized early, and (2) allows the Fund Recipient or permit applicant or any other interested party an opportunity to address it effectively without US EPA involvement. The process should prevent a Title VI violation. The US EPA has declined to take the more proactive, preventative approach that MDEQ encouraged, that would essentially incorporate consideration of Title VI issues into the permitting process. The MDEQ continues to advocate that approach.

  Furthermore, it is an ineffective use of federal and state resources to create a process that scrutinizes the impact of a state permitting decision on the health of a surrounding community after it has been made. This is especially true when the triggering, timing and content of a US EPA review is vague and subject to judgment calls by OCR staff.

  The issuance of the permit should be the end result of a process that has already examined all aspects of its protectiveness of human health and the environment. A permit should be evidence that all legal requirements have been satisfied. This is what we mean by a comprehensive process.

- Examine whether the underlying environmental statutes are not protective. In both the Internal and External Guidances, US EPA continues to sidestep the fundamental allegation inherent in Title VI claims, which is that the underlying

environmental law is NOT adequately protective of human health and the environment in all instances. The guidances state simply that compliance with environmental laws does not constitute *per se* compliance with Title VI. An example is the National Ambient Air Quality Standards (NAAQS). The Clean Air Act requires US EPA to establish NAAQS that define the maximum permissible concentrations for the criteria pollutants. These standards are designed to protect the public health with an adequate margin of safety. The levels are set to protect the health of the most susceptible individuals in a population, including the children, elderly, and those with chronic respiratory ailments. The Internal Guidance indicates that this presumption could be negated if there are unusually high levels of the pollutant in other media – paint, soil, or water, in the case of lead. By law, the NAAQS are established to protect all individuals.

Furthermore, US EPA in the guidances concedes that tools such as detailed methodologies and monitoring data are not always available. Clearly, additional scientific research is needed to confirm the causal link between an emission and a health effect. Rather than presenting a plan for how those tools will be developed, US EPA simply prioritizes the existing (inadequate) tools for us, from most effective to least effective. Whether the Title VI review is separately or part of the permitting process, the tools must be developed to achieve an objective and fair result. A better approach would be to amend the enabling environmental statutes.

The US EPA should clarify and elaborate on the legal underpinnings that exist for US EPA to hold Recipients responsible for: (1) requiring additional actions or control measures from a permit applicant when the causal link between emission and impact is unproven; (2) addressing public health problems that go well beyond permitted emissions; and (3) coordinating efforts to address larger community issues. These concepts, which appear in the guidances, appear to us to exceed the authority granted to us under the enabling statutes. If we are misinterpreting those statutes, or Title VI somehow grants us the additional authority to make these judgments, we need to better understand the derivation and extent of that authority.

- <u>The process fails to provide certainty.</u> The Internal Guidance states on page 39669 that, "EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented." This is not consistent, fair government when US EPA declines to articulate how differences in fact patterns will impact its decision(s) on whether to investigate a Title VI claim or to conclude that the law has been violated.

  The External Guidance contains numerous suggestions on how a Recipient may address Title VI issues earlier in the process. However, US EPA has stated repeatedly that compliance with its language or implementation of its suggestions is voluntary. The US EPA acknowledges that Recipients should

be allowed flexibility in designing their programs. However, a party considering taking some or all of the actions in the External Guidance should know how those actions will be treated by US EPA. In other words, there should be more certainty that the implementation of certain measures - voluntarily - will satisfy Title VI claims. The guidance indicates US EPA will give a Recipient's actions "appropriate due weight." Although the term is defined, its meaning is still vague. At a minimum, a Recipient who engages in certain of the suggestions in the External Guidance should get more favorable treatment under the Internal Guidance. More specifically, MDEQ recommends that the guidance establish a higher threshold for complaints or a higher burden of proof for a complainant in the situation where a Recipient engaged in efforts to address Title VI, but a complaint was filed nevertheless.

The Internal Guidance contains additional discussion of the "due weight" concept but offers no assurances that a Recipient's efforts to address Title VI concerns will be accorded any weight, even if existing adverse disparate impacts are eliminated or reduced. The US EPA leaves itself unquantified discretion by adding, "to the extent required by Title VI." In the end, the Internal Guidance outlines a series of judgment calls that are unpredictable, inevitably subjective and overall contrary to efficient and effective government. The result is that neither a Recipient, a permit applicant, a local government official, nor a member of an affected community can take action to resolve a Title VI issue with the confidence or certainty that its action addresses the problem.

- Burdensome on Resources. The External Guidance states "[y]ou may not necessarily have to hire new staff in order to address Title VI concerns. You may consider using existing staff and training them about Title VI. . ." This is simply naïve. It is important to note that US EPA has stated that the handling of Title VI concerns through the formal administrative process can consume a substantial amount of time and resources for all parties involved. The MDEQ staff devoted more than 100 additional hours to the *Select Steel* case in order to respond to US EPA's investigation. This extra effort cannot be sustained at an unlimited number of sites where the filing of a Title VI complaint requires little more than a modest familiarity with the facts and the belief that a violation has occurred.

  It is clearly important to the management of our department that we be able to anticipate when such additional time may be required and better yet, find ways to avoid such demand on staff time by changing the permitting process. In familiar terms, we believe "an ounce of prevention" is the better course to follow in terms of resource allocation and management. Since the guidances do not allow us the certainty we need to make resource judgments, we recommend that US EPA review the realistic impact of this guidance on Recipients and make a recommendation as to how all levels of government

involved in this issue can obtain adequate resources to implement effective programs.

- Scope of Review is Arbitrary. The guidances state that US EPA will only examine sources of stressors "within the [R]ecipient's authority." The External Guidance repeatedly encourages "bringing all agencies and parties together," yet acknowledges "you may not have the authority, resources or expertise to address all of the elements that may contribute to the issues of concern to the community." The Internal Guidance begins by echoing the "within the Recipient's authority" approach, but then references other laws such as state environmental policy acts. So, while US EPA is proposing to adhere to the *Select Steel* decision in defining the scope of its review, it leaves itself the option of looking at broader legal authority.

- No role defined for local governments. A related concern is that US EPA refrains from defining the role of local governments in the Title VI process. Obviously, local governments have an important role due to their authority over land use decisions and zoning. A better approach would be, as mentioned above, one that tries to prevent Title VI claims from arising – and that approach must include local government as a central player. Rather than tackle that task, it appears that US EPA wants to place the responsibility on state environmental departments to work with local governments and other interested parties to address larger community issues.

Specific Technical and Procedural Comments on Guidance Provisions

Adverse Disparate Impact Analysis

There are numerous portions of the adverse disparate impact analysis that lack clarity or appear to be particularly problematic in implementation. It is unfortunate that the section of the guidance document where the most prescriptive information is needed is the one without any bright lines. The US EPA indicates a recipient "should use the best available tools for conducting analyses to identify potential adverse impacts." They state that peer review tools and methodologies are the most credible. However, no guidance is provided on how to determine which is the best tool. The guidance should be establishing the protocol used in such an analysis. For example, specific answers are needed to the following types of questions or issues:

- The type of pollutants reviewed
- Do you use data on actual emissions or permitted (potential emissions)?
- What area do you look at – 1 mile, 3 mile, 6 mile radius circle or do you look at area of impact? What level of impact is the cut-off?
- Do you look at the last census data that may be 10 years old or do you use data from another source?

- When assigning population to an area based upon census block data, what do you do when only part of the census block is in the affected area? Do you assume it is proportional?
- How do you determine a comparison population?
- What happens if the facilities impacting the area in question aren't within your jurisdiction, i.e., another state or country?
- How do you account for demographic changes over time, especially since the last census?

In *Step 1: Assess[ing] Applicability*, there is an extremely broad definition of the types of permit actions which could form the basis for initiating a Title VI investigation, including any type of permit that would cause any amount of pollutant ("stressor") emission, or permit actions which allow existing conditions to continue unchanged. There are no *de minimis* conditions, or limits on the types of emission sources or of the magnitude or nature of the emissions, which would narrow the scope of the program. "Significant" (undefined) decreases in emissions may not support an investigation, as determined on a case-by-case basis, and will depend on the quantity and toxicity of emissions.

The program is also very broad in that the complaint does not need to specify the pollutants of concern. The US EPA will determine the relevant pollutant(s) of concern, based on the complaint's allegations and the permitting action at issue. These are examples of the numerous "judgment calls" that US EPA staff will be making under the Internal Guidance. Again, this is not fair, consistent government.

In *Step 2: Defin[ing] Scope of Investigation*, the Internal Guidance states that "OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations." So the type of stressor and universe of sources will be determined on a case-by-case basis by US EPA, which may include other air emission sources, background exposures, exposures via other pathways, etc. This is very uncertain, and may be very broadly inclusive. The guidance does not enable a recipient (e.g., State) to accurately foresee the scope of an OCR investigation, and therefore recipients cannot efficiently attempt to pro-actively address complaints.

In *Step 3: Impact Assessment,* the Internal Guidance presents four types of approaches from which OCR can select for a given set of circumstances. The first of these is, "Direct link to impacts." As noted in the guidance, this direct causal link between a stressor and an adverse impact will rarely be available. The second, "Risk," compares ambient monitoring data or modeled estimates of exposures, either singularly or cumulatively, to risk factors which will characterize the likelihood of toxic effects occurring. Thirdly, "Toxicity-weighted emissions" involves linking emissions to "toxicity potency factor scores," to derive toxicity-weighted stressor scores which are only relative in nature. This is of concern,

because this sort of approach is only appropriately applied as a screening step, and should not be employed by complainants or US EPA to assess charges of adverse impacts. The weighted score has no relationship to excess health risks, and has the danger of giving the impression that it can represent risk. The fourth approach, "Concentration levels," is essentially the same as the "Risk" approach described above, with more emphasis on benchmarks of concern. The MDEQ asserts that the primary appropriate approach is the estimation of risk, as via the "Risk" and "Concentration levels" approaches.

In *Step 4: Adverse Impact Decision*, inadequate direction is provided on how to determine if an impact is "significantly adverse." The definitions section (pages 39684-39686) defines "impact" as "…a negative or harmful effect on a receptor…" and, "Adverse impact" is defined as "…a negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance..." "Significant" is defined as, "A determination that an observed value is sufficiently large and meaningful to warrant some action." It is painfully obvious that the textual discussion, and the definitions in the External Guidance, provide inadequate certainty of the triggers that are generally indicative of what constitutes an impact that is significantly adverse. This is one of the two crucial pillars of a disparate impact investigation. The US EPA states that OCR will utilize benchmarks for significance that are "provided under any relevant environmental statute, EPA regulation, or EPA policy". This adds little clarity.

The example provided on page 39680, "a. Example of Adverse Impact Benchmarks," is not of any real use. It states, "OCR would expect that cumulative risks of less than 1 in 1 million of developing cancer would be very unlikely to support a finding of adverse impact under Title VI," while US EPA "may make a finding in instances where cumulative risk levels fall in the range of 1 in 1 million to 1 in 10,000." The US EPA continues that, "OCR would be more likely to issue an adversity finding for Title VI purposes where the cumulative risk in the affected area was above 1 in 10,000." These represent criteria for the decision point, "…for proceeding further in the analysis." These criteria will likely fail to screen out many complaints, since the cumulative cancer risk from air pollutants is believed to be above 1 in 1 million everywhere in the U.S., and may be generally above 1 in 100,000 in major urban areas nationwide. For noncancer risk assessment, there is a lack of useful direction from US EPA on what will constitute an adverse impact.

On page 39680, it is stated that the NAAQS standard for lead may fail to ensure adequate protection due to background sources of contamination, therefore attainment with the lead NAAQS should not be presumed to be adequately protective against adverse impacts. This is consistent with the *Select Steel* decision, although not noted as such. The US EPA should ensure that the Internal and External Guidances are consistent with the *Select Steel* decision and confirm its precedential effect.

In *Step 5. Characterize Populations and Conduct Comparisons*, the External Guidance states on page 39681 that, "The affected population is that which suffers the adverse impacts of the stressors from assessed sources." Just as there is inadequate definition of what is to be considered "significantly adverse," this language fails to provide useful criteria for defining the affected population. Ensuing discussion by US EPA fails to enlighten on how risks or impact measures will be used to define this population. This is critical, since this step determines the population that will be evaluated demographically to determine disparity of impacts.

The description of the various ways that US EPA may choose to utilize as the reference area is intentionally very vague to give US EPA maximum flexibility. In turn, this lends no certainty or predictability to the investigative approach; it leaves open the question of which potential reference areas may be most appropriate, and what one does if the approaches give conflicting comparisons to the affected population area. It may be preferable to establish a procedure that the county or the state will always be the reference area.

The lack of consistency and clarity in the OCR's investigations is summed up as, "Since there is no one formula or analysis to be applied, OCR intends to use appropriate comparisons to assess disparate impact depending on the facts and circumstances of the complaint" (page 39681). This approach does not ensure a fair and consistent result.

Step 6: Adverse Disparate Impact Decision contains a discussion of how OCR will determine whether the disparity is significant, or if the investigation will likely be closed. This discussion includes the factors to be taken into consideration, and refers to some potential use of statistical tests, but is generally very vague. Again, this approach does not ensure a fair and consistent result, and represents a moving target for parties trying to recognize and resolve the issue.

On page 39682, the Internal Guidance states that, "A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear. For example, where credible measures of both the demographic disparity and the disparity in rates of impact are at least 2 times higher in the affected population, OCR would generally expect to find disparate impact under Title VI." It seems that <u>many</u> urban areas in Michigan would meet these criteria at present due to urban demographics and our present understanding of urban air toxics concentrations. Therefore, one could "redline" these areas as likely settings for Title VI complaints, an idea no one supports. The US EPA qualifies this by noting, "However, for both demographic disparity and disparity of impact, there is no fixed formula or analysis to be applied."

In summary, the sections of the External Guidance describing US EPA's investigation process have substantial and critical issues that are discussed in extremely vague terms. Numerous terms are either undefined or their definitions are too vague, simplified or cross-referencing. Although this may have been intentionally done for the purpose of retaining OCR's flexibility in its future investigations, the lack of clear definitions, triggers and procedures does not enable permitting agencies to consider potential pro-active programmatic changes and prevent viable Title VI claims from arising.

Legal/Procedural Issues

The US EPA's guiding principles used to develop the guidances are very broad and do not appear to be based upon law. These guiding principles are not included in 40 CFR Part 7 entitled Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency. This part which codifies US EPA's Title VI regulations was promulgated on January 12, 1984. It is the regulatory framework upon which the guidance should be based. It is important that the guiding principles are realistic and based upon law. The statement "[I]ntergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints," while an excellent goal, is quite utopian. In the real world, the structure within and between governmental agencies, the division of power between the federal, state, and local governments, and the interaction between all the regulatory schemes are significant barriers. Recipients are being held responsible for solving a problem, or achieving such a goal, without being given tools or structure needed.

Both US EPA's implementing regulations (40 CFR Part 7) and the guidance documents encourage the resolution of complaints informally. The guidance documents strongly push the alternative dispute resolution ("ADR") process to reduce or eliminate the situation. Part of their reasoning is that the handling of Title VI concerns through the formal administrative process can consume a substantial amount of time and resources for all parties involved. It is important to note that resolution on an informal basis can also consume a substantial amount of time and resources, although perhaps not the federal agency's. Further, the ADR process would occur before the permit is issued. This may be in direct conflict with federal, state or local statutory requirements for the processing of permit applications. The guidance document is rather weak in providing detail on how to resolve such disputes. Instead it is suggested a Recipient offer to provide various forms of remediation. We remain concerned that unless there is total consensus on a form of remediation, a Title VI complaint will still be filed. Thus significant resources (by all participants) will have been spent to no avail. Since US EPA admits readily that "It will be a rare situation where the permit which triggered the complaint is the sole reason a discriminatory effect exists," there seems to be a disproportionate amount of pressure on the permitting process to address impacts whose source is unrelated. Again, it would improve the process if US EPA were to

create a higher burden of proof or a higher threshold for complaints when efforts, including ADR, have been undertaken to address an issue.

The External Guidance provides a menu of possible options from which a Recipient may choose to address Title VI concerns. In actuality, there are three identified: case-specific (based upon a permit submittal), area-specific (based upon red-lining an area), or both. In the area-specific approach, the process outlined appears to be very similar to the process identified in the Clean Air Act to address areas not meeting the NAAQS. When an area does not meet the NAAQS, a State Implementation Plan (SIP) call is made and a specific plan to solve the problem is developed. This plan includes one or more initiatives to reduce the pollutant in the specific area not meeting the standard. The initiative may be source specific reductions, targeted source category reductions, an across the board reduction for sources in that area, or a combination of both. In addition, any new source of that pollutant must install control technology that meets the lowest achievable emission rate and the source must also offset any proposed emission increase by reducing actual emissions of that pollutant by 10 percent. This assures that the air will continue to improve in that area. The Clean Air Act and state and federal law are the basis for this program. There is no mechanism for addressing cross media issues. In the area-specific approach for environmental justice, the same concepts are used, but there currently is no regulatory basis that would allow the state to make an “environmental justice SIP call” and certainly no leverage to enforce such a plan.

The US EPA creates a time frame for addressing its Title VI complaints that is unrealistic and unenforceable. It has not met similar time frames in its current regulations. The agency needs to clarify how it will discipline its own review in order to comply and expect compliance from others.

Further, the Internal Guidance creates too low of a threshold for filing complaints. First, the jurisdictional criteria should grant “standing” to someone who is truly impacted negatively. Secondly, it invites frivolous claims for the guidance to state that “complainants do not have the burden of proving that their allegations are true.” At a minimum, the complainant should have to attest to the accuracy of his allegations and be subject to penalty if they are exaggerated or untrue.

As mentioned earlier, the *Select Steel* case was the first and only case adjudicated under the Interim Guidance. Neither guidance refers to the case. The US EPA needs to clarify how this administrative ruling under the Interim Guidance will be treated under the final Internal Guidance. The decision is an interpretation of law and regulations, so it would appear to represent precedent upon which Recipients can rely and to which US EPA must defer. The subsequent change in non-binding guidance should not affect the weight of the *Select Steel* decision as a legal ruling.

Neither guidance confirms that Title VI only applies to “protected classes.” The US EPA should clarify the scope of Title VI and distinguish its reach from that of

Executive Order 12898. It is our understanding that the Executive Order requires federal agencies to consider both the protected classes under Title VI and low income populations in gauging whether there is a disproportionate negative impact from a federally-regulated activity. Title VI and hence the guidances do not have as broad an application, and apply to the Recipients of federal aid, not to the federal government. Notwithstanding these distinctions, we remain convinced that the better approach to resolving this issue would start with an examination of the underlying environmental statutes. If they do not adequately protect human health in all instances, then they should be revised. Demographic category is irrelevant to an assessment of human health. We want a process that protects all people. Neither of these two guidances nor the Executive Order would do so.

EPA OCR's

Misguidance Document

COMMENTS SUBMITTED BY

MOTHERS ORGANIZED TO STOP ENVIRONMENTAL SINS

(M.O.S.E.S.)

REGARDING USEPA OCR'S

Draft Revised Guidance for Investigating Title VI Administrative Complaints

Challenging Permits

AUGUST 28, 2000

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Mothers Organized to Stop Environmental Sins (M.O.S.E.S.) in its analysis of the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* has reached the key conclusions that:

EPA, because of conflicts and a demonstrated lack of political will to enforce Title VI, made apparent by this Guidance, lacks the capability of properly enforcing Title VI and another agency or mechanism for enforcement must be sought.

Introduction: Guidance ignores OCR's terrible track record

The *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (the "Guidance") pretends like the last eight years of non-action by USEPA's Office of Civil Rights to enforce civil rights did not happen. It seems as though EPA assumes that citizens, who have been denied their civil rights, are going to go along with this pretense as silently and compliantly as lambs. The Guidance should open with a forthright apology from the Office of Civil Rights (OCR) for what has been a highly egregious delay in administering justice. Meanwhile thousands, if not millions of American citizens, have lost their civil rights due to actions by federally assisted government agencies and programs. EPA's abandonment and utter neglect of their duties in enforcing Title VI of the Civil Rights Act, has had a serious negative impact on people's lives, denying them basic civil rights granted under the law. We do not have to look at communist regimes for human rights violations. We have them right here at home.

Further, this revised Guidance is a bit like closing the door after the horse is out of the barn. The focus of the Guidance is on handling new complaints. It does not address

the obvious fact that some Title VI complaints have been sitting at EPA for many years. The Guidance does not address how EPA will efficiently manage this incredible backlog. "Justice delayed is justice denied." The Guidance, with its focus on timetables for new complaints, fails completely to address issues unique to the complaints that have been collecting dust for years. What time frame is OCR going to apply to these complaints that have already languished for years?

It is much more difficult to measure the disparate impacts from a facility that now is in closure, as in Winona, but for fifteen long and terrible years caused adverse disparate impacts on the surrounding community with a black population three times the state average. The facility remained in operation and civil rights violations continued for years after the M.O.S.E.S. complaint was filed with USEPA OCR. The harm already done to citizens' health, lives, and civil rights due to the failure of the Texas Natural Resource Conservation Commission (TNRCC) to properly enforce basic environmental laws is, of course, far from moot.

Specific Comments

Guidance contains no credible threat to state agencies that violate civil rights

There are some items in the Draft Guidance which are particularly disturbing from the perspective of the citizen's of Winona.

Overall, the Guidance conveys the message that state agencies will *never* actually be taken to task for violating Title VI. The Guidance contains no credible threat to state agencies for violating citizen's civil rights. These violations, in environmental justice circumstances, could pose life threatening or adverse health impacts, birth defects,

property devaluation and literally drive poor people into poverty. These agencies can read this Guidance and breathe a sigh of relief, as there is every form of "out" and loophole for these violating agencies. EPA OCR's Guidance makes it plain that not even a slap on the wrist or harsh word will not be forthcoming from them. USEPA's OCR is not going to touch environmental injustice because it is a political hot potato and they do not know what to do with it. As a result it is being swept under and its existence denied.

If OCR should ever pick up the Title VI complaints that it has neglected or abandoned, the process outlined in the Guidance, will never result in an actual enforcement action against an agency which has violated citizens' civil rights. Besides a cumbersome health-based method for determining an adverse disparate impact, the Guidance includes, among other things, opportunities for alleged "informal resolution," "mitigation," and "justification." In addition, the Guidance provides an appeals process that is *exclusive* to the recipient state agencies (those accused of violating people's civil rights) denying American citizens equal rights to due process. Since when does the accused receive preferential treatment over the victim? The involved appeal process could well drag on for years more. If, inconceivably, EPA ever reached the point where it decided to withdraw state agency funds, it would sometimes not even be done within the lifetime of the facility or its victims, as has already happened in Winona. From its actions and the language of the Guidance, it appears that EPA designed it that way. EPA appears content to stand back and let the harm happen to people's health and civil rights.

Justification Loophole

Regarding justification, the Guidance document states that:

> OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are

> delivered directly to the affected population and if the broader interest is legitimate, important and integral to the recipient's mission.

§ VII. A. 1. It would not take much imagination on the part of a state agency's legal counsel to come up with a justification based on "economic development" for any violation of Title VI. Considering EPA's lack of political will in enforcing Title VI, it is our concern that EPA will accept literally any justification that a state agency can make sound half-way credible. The alleged safeguards that the economic benefit is delivered "directly to the affected population" is dangerously vague, and makes no difference when the adverse health impacts are also being delivered "directly" to the community. *Any* project can be characterized as "important and integral to the recipient's mission." Justification is simply a gaping loophole, through which any violating agency can escape, with EPA's assistance.

Mitigation Loophole

The Guidance further states that:

> Practicable <u>mitigation</u> measures associated with the permitting action could be considered as less discriminatory alternatives, including in some cases, modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impacts.

§ VII. A. 2. Mitigation, first of all, does not address the issue of accidents and upsets that happen frequently after a permit has been issued, nor the many other means by which the presence of these polluting facilities profoundly affect the lives of people in communities of color. Secondly, mitigation appears to be an open invitation for an agency to make a token effort by requiring some mitigation efforts, but essentially making a "Gentleman's Agreement," thereby allowing for adverse disparate impacts to continue. "Less

discriminatory alternatives" means that discrimination will continue, and when that discrimination involves an actual threat to the health and lives of citizens, this concept is utterly unacceptable in a civilized and moral society.

Informal Resolution Loophole

The Guidance states also that:

> complainants *may* play an important role in the informal resolution process . . . *OCR may seek to informally resolve the complaint directly with the recipient.* In those situations, the complainant's role is determined by the nature and circumstances of the claims.

And further states:

> OCR may also consult with complainants, although their consent is not necessary.

It is particularly disturbing that OCR would contemplate cutting citizens out of negotiations all together—especially considering how far trust has eroded in EPA OCR's ability to enforce civil rights at all. Leaving citizens out is not acceptable. A provision of this sort is against the principles of open government, anti-democratic and most certainly anti-community. It goes against the policy of public participation, which EPA trumpets so frequently, but fails to deliver itself. Invariably, this will result in back room deals of which citizens would never be made aware. This is an invitation for states to approach OCR with secret deals that may be rife with civil rights violations, finding acceptance by EPA because they appear to lessen the violations. EPA perpetuates business as usual with this Guidance. It sounds, by this provision, like OCR finds the process of democracy too messy and burdensome. When citizens are excluded from the resolution, it is virtually a

100 % guarantee of disastrous results and bigger and further problems that will not go away.

> OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before the formal finding. However, it is OCR's responsibility to ensure that the interests of the Federal government are served and no violations of Title VI or EPA's implementing regulations exist in a recipient's programs or activities.

§ IV. A. 2. M.O.S.E.S. does not find credible OCR's assurances that in these deals, which cut out citizen involvement, that "no violations of Title VI" will exist. First, informal resolution may not be possible, as civil rights cannot be negotiated. As EPA knows, that citizens would find the continued adverse disparate impacts under an informal resolution unacceptable, thus EPA seeks to exclude the citizens. Second, even if an informal resolution could be reached, inclusion of affected citizens is the *only* means by which the process could result in no violations of Title VI. This even is unsure because the unequal bargaining power between the two sides could still result in an agreement where serious Title VI violations would still occur.

Particularly suspect is the statement that "during the informal resolution process, recipients can propose broader measures that are outside those matters ordinarily considered in permitting process." § IV. A. 2. The Guidance gives the example where the recipient would require a facility that emits lead lowering some of their lead emissions, and perhaps also require other facilities in the area to lower lead emissions. This obviously still would not account for the additional lead, so the Guidance also suggests a "household lead abatement program." This virtually guarantees a disparate impact on certain individuals, which Title VI forbids. For example, if a child lives near the facility that will be emitting more lead, that child is in a toxic hot spot and reductions

in lead from facilities further away would not decrease exposure. The facility next door to the child, however, would definitely increase lead emissions. This child may live in housing that has no lead problems and thus a household lead abatement program would be useless for reducing that child's lead exposure. These "broader measures" may appear fair on paper, yet can result in serious harm to health and a violation of civil rights in reality.

Voluntary Compliance Loophole

The Guidance also contains the very sweeping provision:

> OCR expects to explore a range of possible options to achieve voluntary compliance . . .the approaches explored may be assessed with respect to implementation considerations such as cost and technical feasibility.

§ VII. A. 3. "Voluntary compliance" typically lacks any safeguards to assure that the provisions are enforced or adequate—especially when "cost and technical feasibility" are the bottom line. This is not to forget politics as usual. A provision like this is so broad—"OCR expects to explore a range of possible options to achieve voluntary compliance"--it could mean just about anything OCR wants it to mean and it serves as an open invitation to state agencies to discriminate as business as usual might dictate. The real bottom line is that compliance with our civil rights laws is not voluntary—they are mandatory, albeit not enforced by the EPA. The violator must realize that compliance is not an option and that noncompliance will be swiftly and severely dealt with. That is simply not the case with this Guidance.

Severely Narrowed Scope of Enforcement Loophole

Another reason there is no credible threat of enforcement for civil rights violations by the state agencies is that a great number of real violations have been excluded. Economic, social and cultural impacts are not addressed. It begs the question—if EPA OCR is not going to address these obvious infringements on civil rights, which often are the direct result of an environmental permit, what agency is? The simple answer, which OCR and the state agencies already know is, "none." Title VI authorizes enforcement against these violations as does EPA's regulations. The Guidance, however, states:

> In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations.

§ VI. B. 2. a. It is only this Guidance, and not Title VI or EPA regulations, which unjustifiably narrows the scope of Title VI to only those impacts allegedly "within the recipient's authority." It may be true under environmental statutes that the agency cannot recognize certain impacts, but Title VI does not put EPA in that box. EPA has put itself in that box. EPA is actually narrowing Title VI in such a way that EPA violates Title VI, itself. Despite EPA's argument to the contrary, in practical terms, EPA is an agency that receives federal tax dollars, and thus in a legitimate reading of Title VI, EPA itself would be a violator.

Property values in Winona were impacted by the presence of a hazardous waste facility. The county lowered tax assessments of surrounding properties based specifically

on the impact of underground injections migrating beneath the property. Any Guidance must clearly state that OCR is to consider all impacts arising from a permitted facility.

Litigation Loophole

Another loophole for state agencies is OCR's decision not to conduct a civil rights investigation during the pendency of litigation. The Guidance states:

> If the complainant seeks to pursue a Title VI complaint with OCR on issues that are the subject of ongoing Federal or state court litigation, the complaint should be re-filed within a reasonable time period, generally no more than 60 calendar days after the conclusion of the litigation.

§ III. B. 3. b. Though the Guidance refers to court decisions regarding discrimination, however, OCR has communicated to M.O.S.E.S. that it did not want to take action on the M.O.S.E.S. complaint pending tort litigation against the hazardous waste facility in Winona by surrounding residents. Discrimination was not the subject of this law suit.

Litigation, as in Winona, may be tort litigation against a company, and not related to the permitting or enforcement done by the state agency, and yet OCR can, and indeed has in the case of Winona, used this as an excuse not to take any action. This in itself constitutes a civil rights violations. Tort litigation often goes on for many years. There is no excuse for OCR to allow civil rights violations to continue for years because of litigation. There will often be litigation, and this is just another way states may avoid ever being held accountable.

Impossible Standards Loophole

Another reason state agencies will not see any credible threat of enforcement from this Guidance, is that the standards for proving a disparate impact—Direct link to impacts, Risk, Toxicity-weighted emissions and Concentration levels §VI.B.3--are

beyond the capacity of a poor community of color to demonstrate. State agencies, on the other hand, will always have the technical expertise to submit reports and analysis to show that none of the standards for a disparate adverse impact are met. The emphasis on these types of scientific analysis tips the scales greatly to the advantage of the state agencies.

In one standard, EPA calls for a direct link between stressor and adverse health outcome. Even well bank rolled personal injury firms are challenged to meet this standard in a personal injury suit, especially in Texas. OCR acknowledges the difficulty in obtaining this data, however, as far as affected communities are concerned, the data necessary for the other standards is just as impossible to produce. As a result, state agencies will always submit an analysis which show no adverse disparate impact (and this analysis will be given "due weight"), whereas only under the rarest circumstances will citizens be able to submit their own report or rebut a state agency's self-serving analysis. The bottom line is, any type of additional exposure to toxic substances *is* an impact. EPA should focus on simple exposure to pollution, not only on health outcomes or impossibly complex risk analyses.

The "no Guidance" Loophole

This Guidance also states that "enforcement-related matters and public participation, will be addressed in future internal EPA guidance documents as appropriate." That future date may never arrive, just as justice has not. It seems that any complaints alleging a failure to enforce will be kept forever on hold. These are cases where the agency is more directly implicated in the violation of Title VI. However, the

agencies can see they have nothing to fear, as there is not even a Guidance to deal with enforcement issues.[1]

The Appeals Only for Recipients Loophole

All of the above mentioned points pale in comparison to the fact that under this Guidance, without good reason, recipient state agencies are granted appeal rights and the citizens who actually brought the complaint are denied. OCR explains:

> The investigation of Title VI complaints does not involve an adversarial process between the complainant and the recipient. . . . because the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant built into EPA'' Title VI regulatory process.

§ II. B. 2. Whether or not OCR believes denying appeal rights to citizens is justified, the practical result is that they have handed victory over to state agencies in every instance. This schizophrenic policy denies one party appeal rights under the rationale that this is not an adversarial process, yet allows an appeal to the civil rights violator under the same rationale. This most surely violates Title VI. Though EPA claims that, as a federal agency it does not come under Title VI, MOSES believes that this may well prove to be incorrect in a court of law. This treatment is highly discriminatory.

It appears that there are more than one reason why the Guidance contains no credible threat of enforcement against state agencies violating Title VI.

[1] The Guidance states that, "Until that time, such allegations will be addressed under the regulations." This is rather vague. Will none of this Guidance be used in enforcement cases? It appears that portions probably will be used. In all reality it will be used to not address the enforcement cases, which are some of the tougher cases. These involve operating facilities and thus there could be serious consequences to industry and a state agency.

Guidance viewed in political context—the big guns win

First, in regards to the initial Guidance issued over two years ago, state agencies and industry essentially paired up together, and expended considerable resources on attacking the first Guidance document. Industry exerted enormous pressure through certain Republican members of Congress, and nearly succeeded in cutting off funding to OCR to handle Title VI complaints. The citizens' response, on the other hand, has been primarily from isolated groups and networks, and some members of Congress that have come to their aid. This Guidance appears to be an exact reflection of the difference in political power between the two sides. The Guidance has been pushed so far in favor of state agencies and industry that even someone unfamiliar with the issue in viewing this document for the first time, would be astonished at the inequities.

EPA too interdependent on state agencies to credibly enforce Title VI

Second, EPA's relationship is too interdependent on the state agencies to reliably enforce Title VI, which means withdrawing funding. EPA, as decision maker has an inherent conflict of interest. Representatives of MOSES have been present at meetings where EPA has stated it doesn't have the manpower or inclination to take over state jobs. Relationships between many state agencies and EPA are already seriously strained, and this would be the final straw. EPA is thus put in a position where it is virtually impossible, despite statements to the contrary, to pull the plug on state agencies and state agencies know it. As a result they have little or no motivation for complying with Title VI.

States, of course, make loud noises about their commitment to civil rights. It will take a *powerful* and truly impartial federal agency to bring these states around to real compliance with Title VI, not EPA! Discrimination by agencies happens—the United States Department of Agriculture has had to publicly admit the problems with discrimination within their agency as a result of a lawsuit by black farmers.

EPA needs to create an enforcement mechanism that really holds state's feet to the fire

Communities, such as Winona, that have suffered adverse disparate impacts, demand to see that this does not continue to happen to other communities. For this to happen there must be a great price to pay when civil rights are violated. State agencies must be held accountable. ***This Guidance document must be scrapped and replaced with a process that contains a clear and credible threat to state agencies that have violated Title VI.***

Civil rights violations will only stop when filing of a Title VI complaint stays the issuance of a permit

The Guidance states flatly that, "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." § V. E. The fact that this profoundly important provision, which is at the core of why EPA's Title VI policy has failed, contains no discussion, speaks volumes. If a Title VI complaint accepted for investigation did indeed stay the permit at issue, then both industry and state agencies would be exceedingly careful to avoid a Title VI complaint and take all the proper steps to avoid it. Without any harsh consequence, discrimination simply continues as the status quo.

The fact that construction and operation of a facility is not affected by the filing of a Title VI complaint, makes the process meaningless as disparate impacts are allowed to occur for the entire period during which the investigation is conducted. In Winona, our investigation has not begun even after 6 years . In Winona, disparate impacts continued for years after the filing of the complaint. Disparate impacts have continued since 1992 at a facility in Michigan where the first complaint was filed. The neglect works to the clear and obvious benefit of industry and state agencies which violate citizens' civil rights.

Harmful violations of Title VI are assured under this procedure, especially where enforcement rather than permitting is at issue. Since there is no compensation to the affected community under this process, there is also no compensation for the community that suffered for *additional* years under this process. In practical reality, a 180 day resolution will not happen under this Guidance unless massive changes in staffing occur at EPA. It will take more than extra staff, however; it will take genuine political will by the EPA to do justice and enforce against civil rights violations.

Communities lack resources to engage in a fair Alternative Dispute Resolution process

The Guidance promotes the use of Alternative Dispute Resolution (ADR), but does not address the obvious fact that in ADR the parties would have an enormously uneven bargaining position in terms of data, financial resources, and expertise among other things. Affected citizens lack resources for ADR and often lack basic negotiation skills. Communities need resources for an equal process. Some investigation by USEPA

needs to be done to assist communities with critical data with which they can come to the table. Most importantly, there needs to be a message from USEPA to the state agency accused of violating Title VI that, swift and severe enforcement is likely, however, there is one last opportunity to resolve the matter through ADR. Only under these circumstances would the agencies have any interest in settling. The state agency must realistically see the prospect of a much greater loss before they would reach any meaningful settlement with the communities.

As citizens get nothing directly from the Title VI process, it is an all or nothing deal for a community, and thus citizens are likely to accept a highly deficient offer because it is their only chance to get anything. USEPA or the mediator needs to have some control over this process to avoid totally deficient offers being made to communities that may accept the offer out of desperation.

The state agency can take the position in ADR that because they have data analysis and experts and the poor citizens of color do not, that they, the agency, are correct and the community is not. The fact that communities may lack data and have to rely greatly on oral testimony (in instances where disparate impacts are already occurring) does not make the state right and the citizens wrong simply because the difference in resources effect the degree to which a citizen complaint can be verified. "Due weight" needs to be given to citizens' first hand testimony regarding the impact of a permitted facility or facilities on their health and life. Though a different form of evidence from that suggested in the Guidance, citizen testimony, especially when many citizens report the same impacts, has a high degree of credibility and reliability. This is

the type of evidence commonly relied upon by judges and juries in making important decisions in civil trials of all sizes and scope.

If OCR is going to promote ADR with these obvious imbalances they must take large practical steps to create some balance. EPA, on its part must be willing to sponsor the community with a sizable grant so that a community can afford the services of legal and scientific experts to guide them through process. A grant would still, no doubt be cheaper than the type of highly complex modeling that EPA proposes doing. Thus far, EPA has been willing to give grant money to defendants in the Title VI context, but complainants have been neglected in this regard.

The Guidance states, "To the extent resources are available, EPA expects to provide support for efforts at informal resolution." This, as we have learned, excludes any direct support for citizens.

Due weight

EPA, in the Guidance, claims:

> EPA believes that it can, under certain circumstances, recognize the results of such analyses and give them appropriate due weight.

§ V. B. 1 M.O.S.E.S. does not believe that EPA, despite its criteria, will be able to determine biases which can be part of any analysis and are invariably going to be part of any analysis submitted by a state agency to defend the agency's decision. Virtually all of these studies, which EPA suggest they will grant "due weight," will be submitted by state agencies. Thus EPA indicates a preference for evidence, that in most cases only one side will be able to submit, and that side can and will control what they submit. There is thus an automatic bias for recipients built into the investigation process by the "due weight" provision of the Guidance.

The allowance of “due weight” to information that meets certain criteria outlined in the Guidance seems highly ironic in light of the Select Steel decision. If anything, after that decision, OCR should be bending over backwards to assure citizens that their information and evidence will be given “due weight.”

In these analyses by agencies, there is not just science, but politics at play. OCR could safely rely on a state agency’s analysis, giving it “due weight” and claim it was relying on science, when in fact it is relying on politics and business as usual.

Conclusion

There is nothing in this system to hold EPA accountable to the citizens whose civil rights they are charged with protecting. Recipients are given every conceivable chance informal resolution, mitigation, and even justification. EPA clearly never wants to ever arrive at the end of the road where they must take action.

EPA is being held accountable to state agencies and industry. This Guidance is a product of that accountability. Companies will not be hesitant to locate in communities of color and states will not be hesitant to permit a facility in a neighborhood of color under this Guidance. The message is — Business as usual without any problem!

No light at the end of the tunnel

The Guidance further highlights that EPA is not the right agency to handle Title VI complaints. EPA is in an awkward position, as EPA is not willing to take back delegated programs, and does not wish to strain established relationships with states. EPA has a conflict of interest.

This Guidance is prime evidence that EPA will not enforce Title VI. EPA lacks the political will. This policy has been apparent in EPA's behavior for years. It clearly goes to a lack of will within the agency. When the agency desired to make a decision for political reasons, it did so with great expediency. Now the draft Guidance has forced EPA to put into words its intentions. Even a casual examination of the Guidance makes it apparent that EPA OCR, despite its claims to the contrary, has no intention of enforcing Title VI now or ever.

ADDENDUM

The following comments were given on behalf of M.O.S.E.S. during the listening session held by EPA in San Antonio, Texas on August 24, 2000.

Comments at Aug. 24, 2000 EPA Listening Session on Draft Revised Investigation Guidance. Prepared by MKS.

My name is Mary Sahs. I represent Mothers Organized to Stop Environmental Sins or MOSES. The purpose of Title VI and the regulations promulgated under Title VI is to use the threat of withdrawal of federal funds to force a state or local government to rectify discriminatory practices, including those that cause disparate impacts based on race, color or national origin. Despite the best motives, EPA has created a review process for Title VI complaints that (1) is impossible to implement and (2) would never result in a finding of noncompliance.

It appears that the Guidance is a result of EPA's attempt to appease all stakeholders and EPA's inability to think outside the "scientific" box that guides most of its programs and policies. The Guidance appears to be setting up a super-permitting review process, not a civil rights enforcement process.

My main point is that determining the existence of discrimination is not a scientific inquiry. By imposing standard environmental regulatory scientific thinking to such a determination, EPA has created a program that is impossible to implement. I have not taken an active part in the environmental justice debate leading up to development of this Guidance. I was asked to represent MOSES tonight so I began reading the draft. Clearly enormous thought and resources went into drafting this document. EPA appears to have listened and heard the comments of various stakeholders, particularly in response to the fallout from the Select Steel decision. Several times, I stopped my reading to note that certain aspects of the analysis sounded thorough and even-handed. But at some point I became so overwhelmed that I had to stop and laugh. Despite any good intentions, EPA has created a monster. I have practiced in the environmental law field for nearly twenty

years and it is clear to me that EPA could never implement the scientific review system it has outlined in the Guidance.

In addition, by imposing standard environmental regulatory scientific thinking to determining whether discrimination exists, EPA has created a program that would never result in a finding of noncompliance. Let's consider for a moment the Impact Assessment – whether the activities of the permitted entity, either alone or in combination with other sources, may result in an adverse impact.

First, the science and the data do not exist to perform the analysis proposed by EPA. Second, even if the science and data did exist, such an analysis could never be completed within the time frames allowed by law. Third, even if the science and data exist and the analysis is completed on time, the political fall out from such a finding-for any community-would be horrendous. For example, let's assume the EPA performs its analysis and finds a significant adverse impact for a particular community. Then it fails to find a significant disparate impact. Isn't it the case that EPA has then concluded that a community, of whatever race and ethnic background, is being significantly adversely impacted, but because there is no disparate impact based on race or ethnicity, nothing needs to be done? The adverse impact analysis in itself is a political timebomb, which will give EPA even a further disincentive to find adverse impacts.

EPA writes that it is not requiring or expecting the local and state governments to address social and economic issues they are not prepared to address., neither of which limits impacts solely to health impacts. But wait. We need to look at this again. This Guidance epitomizes the old adage "You can't see the forest for the trees." EPA and needs to step back and see the forest. The forest of discrimination is a social and economic issue, not a scientific issue. Once EPA defines the issue and analyzes it in scientific terms it becomes unworkable and meaningless, despite the best intentions of all concerned.

Discrimination cannot be analyzed or addressed scientifically. No thinking person can dispute the fact that the bulk of polluting, industrial facilities in our nation have been located in communities of color and low income communities. That is the forest. No thinking person can dispute the fact that polluting, industrial facilities adversely affect the communities in which they are located, either through adverse health effects or quality of life effects. That is the forest. The federal government has expressed its desire to address this disparate impact but what EPA has devised is a method to look at each individual tree.

Even if EPA could implement this Guidance, it would never find noncompliance. The bar is too high. The analysis is too complex. The exceptions are too broad. Thus, at the end of the day, after enormous commitment of time and resources, EPA would conclude that the forest does not exist; communities of color do not host most industrial, polluting facilities. The scientific paradigm does not work in analyzing and addressing the pervasive sociological and economic problem of disparate impact caused by environmental permitting decisions made at the state and local levels.

Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, I believe that EPA should scrap the current Guidance and begin again.

(b) (6) - Privacy on 08/28/2000 11:06:08 AM

To: Group Civilrights@EPA
cc:

Subject: EPA

I CAN NOT see any way that this Title Six Guidance can be said to fulfill the obligations of the Environmental Protections Agency. Not only would more pollution ooze into our environment; Title Six Guidance gives communities no opportunity to appeal a harmful ruling. In order to protect our future health and well-being, it must be struck down.

(b) (6) - Privacy
Salem, OR

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Comments of the Business Network for Environmental Justice
On EPA's Draft Title VI Investigation Guidance Document

The Business Network for Environmental Justice is pleased to submit the following comments on the U.S. Environmental Protection Agency's "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)," *65 Fed. Reg. 39,650* (June 27, 2000).

The Business Network for Environmental Justice

The Business Network for Environmental Justice (BNEJ) was formed in 1995. It is a voluntary organization of businesses, corporations, industry trade associations, industry service providers and business groups interested in environmental justice issues. The BNEJ believes all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color or national origin. We support open and informed dialogue with citizens about environmental decisions that affect local communities. We also support continued sound scientific research into factors affecting human health and the environment, and the use of scientifically sound risk assessments in evaluating and prioritizing health and environmental risks. Appendix A lists the organizations and companies that are members of the BNEJ and ascribe to these comments.

Executive Summary of the BNEJ's Comments

The BNEJ supports the many substantial improvements in the Investigation Guidance from the 1998 Interim Guidance. The BNEJ also commends the EPA for the outreach, public participation and stakeholder dialogue effort that is reflected in the Investigation Guidance.

Despite these improvements, the BNEJ has reluctantly concluded that the Investigation Guidance is still in need of substantial revision. As is, the Investigative Guidance will not provide the predictability and certainty that are absolutely essential for all stakeholders.

While, the BNEJ believes all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color or national origin; this does not mean that all persons can be guaranteed identical environmental results. As a practical matter, this is impossible. The guidance should be revised to reflect this truism, which appears in the applicable Supreme Court precedent. In fact, the Investigation Guidance should be revised to identify the legal precedent for the various interpretations of Title VI that are reflected in it. Without this specificity, the Guidance suffers from many of the flaws that plagued the 1998 Interim Guidance. No one will be able to predict which impacts are unlawful, based on the Investigation Guidance.

In evaluating complaints and determining whether to conduct investigations, the BNEJ recommends that the final Investigation Guidance --

- focus OCRs limited investigative resources on state permitting programs, not on individual permits;

- alternatively, if any specific permit actions are allowed to trigger Title VI investigations, further limit investigations to permit actions that authorize a significant net increase in emissions of concern that cause a significant adverse impact;

- narrow the scope of impacts considered to those that are actually within the legal authority of the permitting agency;

- limit analysis to “significant adverse” impacts;

- clarify how OCR will attempt to identify the “affected” population; and

- acknowledge the difficulties involved, in and clarify the approach to, defining an “appropriate” comparison population.

To make the investigation process fairer to all stakeholders, the BNEJ recommends that the final Investigation Guidance:

- require that complaints be filed by persons with a genuine stake in the community;

- recognize the role of the permittee in the investigation;

- require complainants to exhaust their administrative remedies in the permit process;

- require the use of data and analytic methods of acceptable quality;

- articulate a broader and more flexible view of justification;

- avoid using the “less discriminatory alternative” concept to undermine the scope of potential justifications;

- avoid encouraging “informal resolution” of Title VI complaints that may not have any merit in the first instance;

- clarify the timelines set forth for investigation and resolution of complaints; and

- require fairness in the remedy for any Title VI violation.

These measures are needed to ensure fairness and reasonable predictability in the Title VI process. The BNEJ hopes that these comments will contribute to the multi-stakeholder process and assist the agency in its efforts to better implement its Title VI regulations.

Introduction

Although the Investigation Guidance is not a rule, and cannot unreflectively be relied upon by EPA's Office of Civil Rights (OCR) as if it were a rule, it has clearly benefited from the rigors of the notice-and-comment process EPA has conducted. Among the major substantive improvements are the following:

- recognizing that permits requiring significant decreases in relevant emissions should not trigger Title VI investigations, and thus indicating that complaints triggered by such permits will be dismissed;

- recognizing that permit modifications on administrative issues should not trigger Title VI investigations, and thus indicating that complaints triggered by such permit modifications will be dismissed;

- encouraging the exhaustion of administrative remedies during the permitting process;

- recognizing that Title VI investigations should be limited to those stressors and impacts that are within the recipient's legal authority to consider in the permitting process;

- limiting Title VI investigations to impacts that are significantly adverse because they exceed a recognized significance level;

- requiring Title VI investigations to be based on valid and reliable data;

- allowing recipients to demonstrate their justifications for disparate impacts prior to any finding of non-compliance; and

- recognizing that recipients' justifications may be based on the environmental or public health benefits of facilities, or on broader interests such as economic development.

Additionally, the Investigation Guidance rests upon a set of guiding principles, derived largely from the Title VI FACA process, most of which are sound, even if

they are not applied consistently in the Investigation Guidance.[1]

Despite these improvements, the BNEJ has reluctantly concluded that the Investigation Guidance is still in need of substantial revision. It will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders.[2]

In this respect, the Investigation Guidance still suffers from some of the same flaws that characterized the 1998 Interim Guidance. One recent commentator summarized those flaws as follows:

> The Interim Guidance adopts a reactive strategy that promotes uncertainty for all involved. Instead of defining clear standards about which facilities and operations will be allowed in which communities, the Interim Guidance encourages ad hoc challenges to proposed or existing environmental permits. The results are: (1) affected communities and other environmental justice advocates are always reacting to specific projects, rather than proactively establishing clear standards to protect their communities; (2) the momentum of an existing or even proposed facility can be difficult to stop; (3) state permitting agencies and facility owners/operators face substantial uncertainty about whether a proposed activity will be found to have an impermissible disparate impact . . . ; and (4) a facility owner/operator can invest substantial amounts in a particular facility (including an established, long-permitted facility) and/or permit application only to have it unpredictably investigated and rejected ….

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1 For example, one of EPA's principles endorses early steps "to prevent potential Title VI violations and complaints." *65 Fed. Reg. at 39,669*. The BNEJ believes that such efforts are best undertaken "through voluntary initiatives by industry," rather than pursuant to direct or indirect governmental compulsion, even though BNEJ recognizes that actions of permittees may neither cause nor redress many of the concerns that animate Title VI complaints. Any state programs aimed at preventing Title VI violations should reflect the actual contributions of industrial sources to any impacts of concern, as well as any efforts made by those sources to eliminate or mitigate such impacts. As discussed below in Part I, however, the Investigation Guidance appears to adopt as a guiding principle a mistaken understanding of the purposes of Title VI. This mistaken understanding was not derived from the FACA process or its recommendations.

2 In fact, the Investigation Guidance, in its current form, seems likely to disrupt some of the most innovative and promising regulatory programs now in existence, by undermining the level of predictability and certainty available to the community and to the permittee. For example, EPA's cap-and-trade marketable emission permit approach developed for interstate ozone transport may be vulnerable to a Title VI challenge if EPA were to adopt the theory of discriminatory effects articulated in the Investigation Guidance. EPA should not jeopardize its most promising environmental programs – which may achieve better environmental results much more quickly and at substantially lower costs – unless such a result is absolutely necessary, which the BNEJ does not believe is the case.

Craig Arnold, *Land Use Regulation and Environmental Justice*, 30 Env'tl L. Rptr. (ELI) 10395, 10397-98 (June 2000).

The BNEJ believes that these comments aptly describe the situation under the Investigation Guidance, as well. For that reason, we urge substantial further revisions as described in these comments before EPA issues the Investigation Guidance in final form.[3]

BNEJ COMMENTS

I. EPA Should Acknowledge That Title VI Was Not Intended to Guarantee Equal Environmental Results.

Although the Investigation Guidance does provide somewhat greater clarity than did the 1998 Interim Guidance as to OCR's interpretation of "disparate impacts," one consequence of that clarity is to highlight just how far the Guidance would expand the meaning of "discrimination" beyond the intended reach of Title VI. We first address this legal issue before turning to the specifics of the Investigation Guidance.[4]

Nothing in Title VI or its legislative history suggests that Congress ever imagined this civil rights law would be used to prohibit unintentional disparities in environmental quality. Nor did EPA originally interpret Title VI in such sweeping terms. Certainly, when EPA issued its Title VI regulations in 1973, it gave no indication that it would construe Title VI to prohibit unintentional disparities in environmental quality. 38 *Fed. Reg*. 17,968 (1973).

Somewhere between 1973 and 1998, when EPA issued its Interim Guidance, EPA apparently came to a different understanding of Title VI and expanded the meaning

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[3] That these comments do not address EPA's Draft Recipient Guidance should not be taken as an endorsement of that draft Guidance. For just one example, the suggestion for "area-specific approaches" could have numerous adverse effects for the identified areas, including but not limited to discouraging businesses from locating in those areas, discouraging beneficial changes to existing facilities (including their pollution control equipment) that would trigger permit modifications, and encouraging the filing of frivolous Title VI complaints.

[4] This legal issue is addressed in much greater detail in Thomas A. Lambert, *EPA's "Revised Guidance" for Implementing Title VI: Environmental Justice on a Faulty Legal Footing,* Policy Brief 206 (Center for the Study of American Business) (July 2000), a copy of which is attached.

to include a prohibition on unintentional disparities in environmental quality.[5] In the Investigation Guidance, EPA cites various legal authorities as support for this new interpretation of its authority to issue regulations effectuating Title VI. As we show below, these authorities cannot bear the weight that EPA asks them to support.

In fact, the Investigation Guidance appears to adopt an interpretation of Title VI that is in conflict with Supreme Court decisions. "EPA generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented [state environmental] programs, unless justification can be provided." 65 *Fed. Reg*. at 39,682. This statement suggests that, if EPA finds disparities in the distribution of risk, those disparities alone demonstrate unlawful discrimination. This is inconsistent with the Supreme Courts understanding of "disparate impact" discrimination that EPA's Title VI regulations prohibit.

A. Title VI Was Not Intended To Guarantee Equal Results for All Persons.

A useful indication of the limited scope of Title VI comes from the Supreme Court's unanimous decision in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court held that section 504 of the Rehabilitation Act – which was patterned on Title VI[6] – did not require the state to implement its Medicaid program to guarantee equal results -- equal health – for all persons. As applied to a state's environmental permitting program, Title VI does not provide a guarantee of equal results -- equal environmental conditions – for all persons. Conceptual confusion exists in the Investigation Guidance from EPA attempt to use Title VI to address unequal environmental results that are "caused" by a funding recipients' authorization of permitted activities, but which do not reflect discrimination by the funding recipient (or permittee).

To understand this point, consider the facts of *Alexander v. Choate*. The plaintiffs in that case were Medicaid recipients living in Tennessee. On behalf of handicapped individuals, they challenged Tennessee's proposed reduction -- from

[5] One need only examine the environmental justice materials posted on the Web sites of several different EPA regional offices to realize that considerable confusion and uncertainty exists in this area.

[6] Interpretation of section 504 is directly relevant to ascertaining the meaning and scope of Title VI, and vice-versa. 469 U.S. at 293 n.7, 295 n.13.

20 days to 14 days -- of the length of inpatient hospital care annually covered by its state Medicaid program. Plaintiffs claimed that the proposed reduction would have a disparate impact on handicapped users of Medicaid.

In support of their discrimination claim, plaintiffs demonstrated that the proposed reduction would actually affect handicapped persons differently than non-handicapped persons. They showed that 27.4 percent of handicapped users of Medicaid required more than 14 days of inpatient hospital care, while only 7.8 percent of non-handicapped users required more than that number of days of such care. 469 U.S. at 289-90. The plaintiffs prevailed at trial, and again on appeal to the Sixth Circuit, which "apparently concluded that any action by a federal grantee that disparately affects the handicapped states a cause of action." 469 U.S. 291. The Supreme Court reversed.

The Supreme Court rejected the notion that a difference in impact necessarily amounts to a prima facie case of discrimination. As the court put it, "we reject the boundless notion that all disparate-impact showings constitute prima facie cases." 469 U.S. 299. In essence, the court held that it is not enough to prove that a challenged action causes a disparity of impacts. The plaintiff must also demonstrate that the disparity is discriminatory in some relevant way. This demonstration can be made either by referring to an <u>appropriate</u> comparison group of persons entitled to the same results but actually receiving better results – thereby providing an inference of discrimination -- or by demonstrating that the disparity was the result of conscious or unconscious intentional discrimination.[7]

To make this point even clearer, the Court noted that the benefit provided by state Medicaid programs was not intended to be "adequate health care." 469 U.S. 303. Instead, the benefit offered was a particular package of health care services. The Court then held that federal civil rights law "does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." 469 U.S. at 303. *The law "does not . . . guarantee the handicapped equal results from the provision of state Medicaid .... Tennessee is not required to assure that its handicapped Medicaid users will be as*

[7] If the disparity results from intentional discrimination, it also violates the Equal Protection Clause of the Fourteenth Amendment. Unlike for Section 504 and Title VI, the Supreme Court has clearly held that the Equal Protection Clause is limited to intentional discrimination and does not address "disparate impact" discrimination proved solely by comparing results. *See Washington v. Davis,* 426 U.S. 229 (1976). But even for intentional discrimination, the Court has repeatedly stressed that the "settled rule" is "that the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 273 (1979).

healthy as its nonhandicapped users." 469 U.S. 305-06 (emphasis supplied). Because the handicapped still had "meaningful and equal access" to the package of benefits offered by the state Medicaid program, Tennessee had not violated the "disparate impact" discrimination prohibition that the Court assumed was a permissible interpretation of Section 504 of the Rehabilitation Act.

In summary, a funding recipient's environmental permitting program does not violate Title VI simply because one community or one group of persons is not provided with "equal results" in regard to human health risks or environmental risks as compared to another community or group of persons. So long as all persons receive fundamentally the same benefits and services -- the particular package of environmental protection laws that the recipient's program provides -- there is no unlawful "discrimination" to address.

B. EPA Has Identified No Legal Precedent To Support Its Current Interpretations of Its Title VI Authority.

The Investigation Guidance cites various legal authorities in support of the many interpretations of Title VI reflected in the Investigation Guidance. But none of these authorities actually supports the principles for which the Guidance cites them.

For example, EPA quotes the Supreme Court's statement that Title VI

> delegated to the [federal funding] agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander v. Choate, 469 U.S. at 293-94 (1985).

This passage does not support various provisions of the Investigation Guidance, which we discuss in Part III.D. below. Those provisions would target various adverse impacts for investigation, without regard to whether those impacts were actually caused by the funding recipient's permit program. First, EPA has made no "complex determination" regarding which environmental impact disparities are either "sufficiently significant social problems" or "readily enough remediable" to warrant interpreting its existing Title VI regulations to extend to such impacts.

Second, EPA could not make such findings in regard to many environmental impact disparities, as the quoted language focuses on practices of federal grantees that had *produced* the relevant impacts. This means that only impacts that are *caused* by the recipients of federal funding should be evaluated by the funding agency. Although, as we discuss in Part II.C. below, the Investigation Guidance properly limits investigations to impacts that are cognizable by the recipients' permit program, it fails sufficiently to limit investigations to actual and significant impacts that are caused by the permitted activities, as we discuss in Part II.B. below.

Similarly, the other legal authorities that EPA cites do not and plainly cannot expand Title VI beyond its limits in order to guarantee equal environmental results for all communities and persons. These other materials are Executive Branch and administrative agency materials, which cannot overturn binding Supreme Court interpretive precedent. For example, EPA cites the July 14, 1994,memorandum from Attorney General Janet Reno on the disparate impact standard under Title VI. Tat four-paragraph memorandum offers no definition of "disparate impact," much less a definition tailored to the context of environmental permitting by state agencies. Certainly nothing in the Reno memorandum suggests that Title VI mandates the creation of equal environmental conditions for all persons.

Similarly, EPA cites Executive Order 12,250, which gives the Department of Justice a coordination role in the overall federal enforcement effort under Title VI. But that Executive Order provides no definition of "disparate impact," much less a definition suited to the particular circumstances of environmental permitting by state agencies. Nor does the Executive Order even hint that Title VI mandates the creation of equal environmental conditions for all persons.

EPA also cites regulations issued in 1976 by the Department of Justice as authority for issuing its Investigation Guidance. Those 1976 regulations say nothing, however, about the content of the Title VI regulations or guidelines to be issued, and thus they offer no support for EPA's approach to finding disparate impacts in the Investigation Guidance.[8]

In sum, Title VI was never intended to guarantee equal environmental results for all

[8] The BNEJ notes that each federal agency that implements Title VI was required by these 1976 DOJ regulations to "develop a written plan for enforcement which sets out its priorities and procedures" and to make that written plan "available to the public." 28 C.F.R. § 42.415 (1999). The BNEJ is unaware that EPA has developed such a plan or has made any such plan public.

communities or for all persons. EPA should frankly acknowledge this in its final Investigation Guidance and should focus its efforts on identifying those disparate impacts that actually violate the law.

I. EPA Has Not Presented in the Investigation Guidance a Predictable Process for Deciding Which Disparate Adverse Impacts Amount to Discrimination That Violates Title VI.

Because the Investigation Guidance attempts to interpret Title VI to guarantee equal environmental results, it necessarily suffers from many of the same flaws associated with the 1998 Interim Guidance. Perhaps the most fundamental flaw in the Investigation Guidance is the lack of a predictable process for OCR to use in determining which disparate impacts actually violate Title VI and which do not. Simply stated, no one -- not the permittees, not the recipients and not the communities -- will be able to predict which impacts are unlawful based on the Investigation Guidance. The BNEJ recommends that the final Investigation Guidance should, among other things:

- focus OCRs limited investigative resources on state permitting programs, not on individual permits;
- alternatively, if any specific permit actions are allowed to trigger Title VI investigations, further limit investigations to permit actions that authorize a significant net increase in those emissions of concern that cause a significant adverse impact;
- narrow the scope of impacts considered to those that are actually within the legal authority of the permitting agency;
- limit analysis to “significant adverse” impacts;
- clarify how OCR will attempt to identify the “affected” population; and
- acknowledge the difficulties involved in and clarify the approach to defining an “appropriate” comparison population.

We address each of these issues in turn.

A. OCR's Limited Investigative Resources Should Focus on State Permitting Programs, Not on Individual Permit Actions.

The BNEJ believes that many of the substantive and procedural concerns raised by the 1998 Interim Guidance, and revived by the new Investigation Guidance, stem from EPAs decision to focus OCR's limited investigation resources on individual permit actions, as opposed to state permitting programs. The BNEJ seriously questions EPAs decision to establish an investigation process based on the assumption that complaints should be triggered by individual permit actions, given EPA's recognition that: (1) individual facility permits are "rarely" the sole cause of disparate adverse impacts, 65 *Fed. Reg*. at 39,669, 39,683; and (2) the Title VI complaints EPA has received to date have focused on a wide range of issues, including alleged *patterns* in siting or permitting decisions, 65 *Fed. Reg*. at 39,668. Complaints alleging discrimination in the states administration of its permitting program may be filed at any time, without artificially linking them to specific permit actions as "trigger" events.

The point here is not that the individual permit actions and permitted activities are immune from scrutiny -- they are not -- but rather that they typically will not be the primary basis for a claim of disparate impact discrimination. Accordingly, the BNEJ strongly recommends that EPA substantially revise its approach and issue a final Investigation Guidance that focuses primarily on state permitting programs, not on individual permit actions.

B. Alternatively, Only Permits Allowing Significant Net Increases in Emissions That Cause Significant Adverse Impacts Should Be Able To Support Title VI Complaints.

Under the approach taken in the draft Investigation Guidance, the very first step in the disparate adverse impact analysis is to determine the type of permit action involved and assess whether that permit action may have contributed to the alleged disparate adverse impact. 65 *Fed. Reg*. at 39,677. This is an important aspect of the analysis, because it should screen out those permit actions that are unlikely to create disparate adverse impacts.

As noted above, EPA clearly recognizes that individual permits are "rarely" the sole cause of disparate adverse impacts. 65 *Fed. Reg*. 39,669, 39,683. In light of this recognition, even if EPA retains its current focus on individual permit actions, the

best use of OCR's limited resources would be to focus its investigations on complaints stemming from those permit actions that at least appear likely to play a major part in disparate adverse impacts.

1. Only Permits Authorizing Actual Significant Net Emissions Increases That Cause Significant Adverse Impacts Can Be Considered Triggers for Title VI Investigations.

The only categories of permit actions that potentially could be considered to trigger a Title VI complaint are permit issuances, renewals or modifications that authorize an actual, significant net *increase* in emissions of "pollutants of concern," which in turn cause significant adverse impacts. (These pollutants and adverse impacts in the relevant media[9] can be identified either by the complainant or by EPA.) Whether or not any particular permit action actually contributes to a disparate adverse impact that reflects discrimination, of course, will depend upon the facts and circumstances of each case. For any permit action that does not authorize a significant net increase in any pollutant of concern, however, or that does so but does not cause a significant adverse impact, EPA should recognize the same "safe harbor" that it has already recognized for "significant decrease" permits. 65 *Fed. Reg*. at 39,677; see infra Section II.D (discussing the limitation on Title VI investigations to significant adverse impacts).

To better understand this point, consider permits issued in attainment areas for criteria air pollutants under EPA's prevention of significant deterioration ("PSD") regulations issued pursuant to the Clean Air Act. EPA's PSD regulations prevent increases in emissions that would adversely affect attainment of the relevant human health or environmental protection benchmark levels, which otherwise could result from changes in operations of major sources. Issuance, renewal, or modification of a major source's permit that results in increased emissions of the applicable criteria pollutant can occur only under these conditions, which necessarily will deem the increased emissions to be sufficient to protect human health and the environment. Nothing more is or should be required of the major source, as Title VI does not require equal environmental results. In contrast, applying Title VI in a manner that would prevent emissions increases in specific locations even though the increases are permitted by the PSD regulations would result in unequal and unfair application

[9] If the complaint alleges discrimination on the basis of VOCs in *ground water*, for example, a permit that authorized increased *air emissions* of VOCs should not support an investigation or a finding of noncompliance.

of a law that Congress enacted after Title VI. Thus, EPA should limit its investigations to permit actions that authorize significant net increases in emissions that cause significant adverse impacts.

Further, it is important to recognize that an increase in emissions must be actual, not just potential, for a permit action to support a Title VI complaint. It is possible to measure actual emissions increases by comparing “actual to actual” emissions, and it is possible to predict actual emission increases by comparing “potential to potential” emissions. EPA should not attempt to base its Title VI evaluations on potential increases in emissions, as determined by the “actual to potential” test EPA relies on in the Clean Air Act New Source Review program. Use of an “actual to potential” test would generate apparent emissions increases that are not real, and thus could result in EPA finding Title VI violations where none exist.

2. Minor Permit Modifications on Administrative Issues Are Properly Excluded by the Investigation Guidance.

The BNEJ supports EPA's proposed treatment of certain minor permit modifications. According to the Investigation Guidance, "[m]odifications, such as a facility name change or a change in a mailing address, that do not involve actions related to the stressors identified in the complaint, generally will not form the basis for a finding of noncompliance and will likely be closed." 65 Fed. Reg. at 39,677. The BNEJ also endorses this "safe harbor" provision for administrative issues. Finding a "safe harbor" here makes sense, because there is no change in the facility's operations or emissions that would create an impact on the community. The change is merely administrative.

3. "No Emissions Increase" Permit Renewals Also Should Be Excluded.

The BNEJ does not endorse EPA's approach to permit renewals that make no changes in facility operations and therefore also "do not involve actions related to the stressors identified in the complaint." EPA's position appears to be that "renewals . . . that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged" can form the basis for a Title VI complaint and a full investigation by OCR. 65 Fed. Reg. at 39,677. Analytically, a renewal that does not alter existing levels of stressors is quite similar to a permit modification that involves administrative changes, because there is no change in the facility's

operation that would create or contribute to a disparate impact in the community. Both categories of permit decisions "do not involve actions related to the stressors identified in the complaint" and so both should be treated in the same manner. Neither one should trigger an investigation or support a complaint or a finding of noncompliance.

In fact, allowing renewals to serve as trigger events for Title VI complaints is totally contrary to any notion of finality or certainty. It means that the same level of environmental performance established in the initial permit -- a level of performance that is presumably in compliance with all applicable environmental standards -- can be used over and over again as a "lightning rod" to investigate alleged disparate impacts.[10] The renewal permit by itself should not trigger a complaint or investigation, because nothing has changed at the renewing facility.

4. "Significant Emissions Decrease" Permits Are Properly Excluded in the Investigation Guidance.

Finally, the BNEJ supports EPA's decision in the Investigation Guidance to create a "safe harbor" for two related types of permit actions. The first type consists of permits that significantly decrease all emissions from a facility. The second type consists of permits that significantly decrease emissions of the "pollutants of concern," as specified by the complainant or as determined by EPA. In both cases, OCR will generally close the investigation.

The BNEJ endorses this limited "safe harbor" provision, which is a clear improvement over the 1998 Interim Guidance.[11] Not only will this "safe harbor" better focus OCR's limited resources, it will enable the siting and/or continued operation of facilities that provide lower emissions, as well as economic benefits, to the community.

C. The Investigation Guidance Should Screen Out Impacts and Stressors

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10 Such repeated reviews are particularly inappropriate when the permit renewal continues to conform to applicable health and environmental protection benchmarks, such as those in the Clean Air Act ambient air quality regulations. As discussed in Section II.D. below, compliance with such benchmarks should preclude any Title VI concern; in such cases no adverse impact, disparate or otherwise, will be caused.

11 One aspect of this "safe harbor" requires clarification, however. The preamble discussion of this issue suggests that "[t]he decreases are measured based on actual, contemporaneous emissions from the facility being permitted." 65 Fed. Reg. at 39,677 (footnote omitted). Presumably, as EPA suggests in footnote 188, the decrease can be demonstrated by comparing the emissions limits found in the old permit and the new permit. In other words, the permittee should not be required to conduct additional monitoring to confirm that the decrease is "actual." A decrease in permitted emissions should suffice.

That Are Beyond the Recipient's Legal Authority.

Under the Investigation Guidance, the second step in the disparate adverse impact analysis is to determine which stressors and impacts should be evaluated, before determining which sources may contribute to those stressors and impacts. 65 Fed. Reg. at 39,678. This is a critically important aspect of the disparate adverse impact analysis, because it determines the scope and bounds of the entire investigation.

The BNEJ agrees strongly with EPA's decision to limit the investigation to those stressors and impacts that "are within the recipient's authority to consider, as defined by applicable laws and regulations." 65 Fed. Reg. at 39,678, 39,691. This is a major improvement over the 1998 Interim Guidance.

While EPA does not discuss in detail its rationale for adopting this limitation, one obvious reason is simple fairness to the recipient. It would be unfair if EPA were to base a finding of violation on disparate impacts, such as noise, odor, truck traffic, etc., that the recipient had no legal authority to address in its permitting process. EPA would effectively be punishing the state permitting agencies for "allowing" impacts that they actually had no legal authority to prevent or control. To put it another way, if the state agencies are legally obligated to issue permits to applicants that satisfy all applicable regulatory requirements, EPA would effectively be punishing the state agencies for properly conforming their actions to the limits of their authority under state law and delegated federal environmental programs. Thus, EPA's decision to limit its investigations to stressors and impacts that are within the recipient's authority makes good sense.

Unfortunately, certain language in the Investigation Guidance can be read to deprive this limitation of meaning. Specifically, OCR states that it will evaluate the recipient's authority in the broadest terms:

> ["Applicable laws and regulations"] could include laws and regulations that concern permitting programs and laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts. For example, a state statute might require all major state actions ... to take into consideration impacts resulting from noise and odors associated with the action. Even if these were not explicitly covered by the permitting program, they would appropriately be considered as part of the adverse disparate impact analysis, since the recipient has some obligation or authority concerning them.

65 Fed. Reg. at 39,678.

Thus, OCR is stating that so long as a state permitting agency has some obligation to consider noise, odor, and other impacts under its state statutes, then EPA will include such impacts in the Title VI disparate adverse impact analysis -- even if the state agency lacked any authority to address those impacts when it issued the permit that is the trigger for the Title VI complaint. This runs directly counter to the basic notion of fairness to the recipient, because EPA could well end up punishing the state agency for "allowing" impacts that it had no authority to prevent or control. It also invalidates EPA's decision to limit the scope of the investigation to impacts within the recipient's authority. Finally, given the difficulties associated with measuring noise, odor, and other similar impacts, OCR would confront intractable problems in assessing whether these impacts are "significantly adverse" for some subset of the affected population.

D. The Investigation Guidance Properly Limits the Analysis to "Significantly Adverse" Impacts.

An important positive feature of the Investigation Guidance is the explicit limitation of Title VI investigations to those impacts that are "significantly adverse"[12] because they exceed a recognized "significance level." 65 Fed. Reg. at 39,680. In EPA's words, "[I]f the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance with EPA's Title VI regulations and will likely be closed." Id.

This is a sound result that flows directly from EPA's recent decision in *Select Steel*,[13] which recognized that applicable environmental standards, such as the National Ambient Air Quality Standards, are presumed to provide adequate protection for all affected persons, absent specific evidence to the contrary. (*Select Steel* represents an important clarification of a point left implicit in the 1998 Interim

12 Although there is no single definition of "significant" in this context, the BNEJ notes that it should not be confused with the "significance" analysis performed in the final step of the disparate adverse impact determination. 65 Fed. Reg. at 39,682. That analysis focuses in part on whether a difference is statistically "significant," as expressed in standard deviation units. That terminology should not be imported into the adverse impact determination, which is not statistical in nature.

13 Letter from Ann E. Goode, Director, Office of Civil Rights, Re: EPA File No. 5R-98-R5 (Select Steel Complaint) to St. Francis Prayer Center and Michigan Department of Environmental Quality (Oct. 30, 1998).

Guidance.)

E. The Investigation Guidance Should Clarify How EPA Will Define the Population Affected by the Impacts or Stressors.

Under the Investigation Guidance, the fifth step in the disparate adverse impact analysis is to identify, and determine the characteristics of the affected population, which then provides a basis for comparison to an appropriate reference population. 65 Fed. Reg. at 39,681. This is an extremely important aspect of the disparate adverse impact analysis, because the ultimate issue will be whether the affected population differs significantly from the comparison population. Unfortunately, the Investigation Guidance fails to clarify how OCR will approach this vital task.

To identify the affected population, the Investigation Guidance states that "approaches based primarily on proximity may … be used where more detailed estimates cannot be developed." 65 Fed. Reg. at 39,681. This statement suggests that EPA will draw circles of various radii around the source(s) and then assumes that the population within the circles are somehow "affected" by air emissions or other impacts. This approach will leave the community, the recipient, and the permittee completely unable to predict the outcome. They have no way of knowing how large or how small the circles should be or will be. Nor do they have any way of telling how accurately any circles can reflect the realities of exposure, given that emissions are rarely distributed in circular patterns. There can be neither predictability nor certainty to EPA's investigations when no one knows in advance whether EPA will rely on proximity approaches and if so how EPA will determine the size of the circles.[14]

In sum, the Investigation Guidance needs to include additional clarification as to how EPA will identify and evaluate the affected population for purposes of Title VI, to avoid defaulting to simple, unrealistic, and improper evaluations of the demographic distribution of impacts. EPA should build off of the work already performed by the FACA when seeking to clarify this issue. EPA's simple approaches to identifying the affected population described in the Investigation Guidance, moreover, make even more problematic EPA's suggested approaches to

14 A related problem arises from EPA's statement that the demographic composition of the affected population at the time the permit was originally issued may not be relevant. 65 Fed. Reg. at 39,697. The BNEJ believes that changes in the demographic composition of the community surrounding a facility are beyond the control of the recipient and the permittee, and so should be considered as part of the disparate adverse impact analysis.

selecting the “appropriate” comparison population, the issue we address next.

F. The Investigation Guidance Should Clarify How EPA Will Select Appropriate Populations for Comparison.

Once the affected population has been identified, the next step in the process is for OCR to "compare the affected population to an appropriate comparison population" in order to assess potential disparate impacts. 65 Fed. Reg. at 39,681. The BNEJ wholeheartedly agrees with EPA's stated goal of selecting an "appropriate" comparison population. An appropriate comparison is required before concluding that any disparity in impacts provides an inference of discrimination, rather than reflects unequal results.

The Investigation Guidance speaks in the following very general terms about selecting as a comparison population "a reference area such as the recipient's jurisdiction (e.g., an air district, a state, an area of responsibility for a branch office), or an area defined by environmental criteria, such as an airshed or a watershed." 65 Fed. Reg. at 39,681. This passage suggests that the state as a whole, or an entire county, may be an appropriate population to compare to the affected population. Id. But this statement and others in the Investigation Guidance are too general and do not reflect the complexities involved in selecting an appropriate comparison population.

Broadly stated, the comparison population should have land use patterns similar to those of the affected population. More specifically, the comparison population should have a similar balance to the affected population of rural, urban, and suburban areas, with a similar range of residential, commercial, and industrial activities. The following example illustrates why similar land use patterns are important to assure a meaningful evaluation.

Consider a Title VI complaint alleging that a new industrial facility permit will expose local residents to VOC emissions that are both significantly adverse and disparate. If the affected population lives in an urban area where air quality is presently limited by ozone precursors from mobile sources, whereas the state as a whole is primarily characterized by suburban and rural land uses, then the BNEJ believes the state as a whole is <u>not</u> an "appropriate" comparison population.[15]

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15 To say that the state as a whole <u>is</u> an "appropriate" comparison population would be tantamount to saying that Title VI forbids any significant disparities between <u>any</u> particular subset of the population and the population as a whole, regardless of the explanation for those disparities. Title VI does not do so, and particular local populations rarely reflect the precise demographic composition of the surrounding state.

Instead, OCR should select a comparison population with similar land use patterns.

EPA states in the Investigation Guidance that consideration of land use and zoning "would place an inappropriate focus on the siting of facilities" because their impacts may extend beyond the boundaries of zoned or designated land. 65 Fed. Reg. at 39,700. This statement does not take into account the fact that if an industrial facility is affecting an urban residential neighborhood, then it should be compared to a similar situation -- not to an isolated town without any nearby industrial sources.

Land use may be the only non-arbitrary method of determining an appropriate comparison population. For example, if the affected population is compared to the area of responsibility of the agency's branch office, the demographic comparison may yield dramatically different results than if the comparison is to an entire county or to the state as a whole. These differences will generally reflect the land use and demographic patterns within the state. The critical question for EPA is how to decide which comparison population is “appropriate,” given that apparent differences in disparities result from using differing geographic areas to determine the reference population. Yet, the Investigation Guidance disavows resort to land use to answer this question and provides no other answer.

This failure to explain how EPA will identify the appropriate comparison population in particular cases takes on even greater importance in light of the statement in the Investigation Guidance that "EPA generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented [state environmental] programs, unless justification can be provided." 65 Fed. Reg. at 39,682. Here EPA seems to be saying two related things: First, absent unlawful discrimination on the part of the recipient, EPA would expect to find "similar" levels of risk everywhere within that state, regardless of where one looks. Second, where EPA finds major disparities in the distribution of risk, they are evidence of unlawful discrimination.

However, the meaning of this "expectation" and the support for it are not clear from the Investigation Guidance. The statement does not appear to be an empirical claim based on EPA's experience measuring risk levels in various parts of the country. Nor does it appear to be a predictive claim based on EPA's expert (but counter-intuitive) opinion that risk tends to be distributed uniformly even though population

is not. The BNEJ simply does not understand why EPA holds to this "expectation."

In sum, the lack of clarity and predictability on this pivotal issue makes the Investigation Guidance an unsound tool for deciding which disparate adverse impacts actually amount to "discrimination" that violates Title VI.

II. The Investigation Process Should Be Made Fairer to the Community, the Recipient, and the Permittee.

Putting aside the substantive issues raised by the Investigation Guidance -- most notably the problems relating to what amounts to "discrimination" under Title VI -- there are also a number of significant procedural issues. Simply stated, the Investigation Guidance outlines an investigative process that is needlessly unfair to the community, the recipient, and the permittee. The BNEJ recommends that the final Investigation Guidance should, among other things:

- require that complaints be filed by persons with a genuine stake in the community;
- recognize the role of the permittee in the investigation;
- require complainants to exhaust their administrative remedies in the permit process;
- require the use of data and analytic methods of acceptable quality;
- articulate a broader and more flexible view of justification;
- avoid using the "less discriminatory alternative" concept to undermine the scope of potential justifications;
- avoid encouraging "informal resolution" of Title VI complaints that may not have any merit in the first instance;
- clarify the timelines set forth for investigation and resolution of complaints; and
- require fairness in the remedy for any Title VI violation.

We address each of these issues in turn.

A. The Investigation Guidance Should Require that Complaints Be Filed By Persons With A Genuine Stake in the Community.

A significant concern of the BNEJ is that the Investigation Guidance does not limit the process to genuine and substantial complaints by requiring that the complainant be a person with a stake in the community. Under the literal language of the Investigation Guidance, an outside group with no members in a community could file a complaint about a local facility so long as the group has some members who belong to the same protected class (defined by race, color, or national origin) as those alleged to have been discriminated against.

EPA should acknowledge and deal with the problem of outside groups using environmental justice claims to achieve their own purposes and agendas. For example, in *In re Chemical Waste Management of Indiana, Inc.*, 1995 EPA App. LEXIS 25 (EAB June 29, 1995), the petitioners claimed that a landfill permit would have a disparate impact on African-American and low-income residents. The petitioners themselves, however, were white and affluent, and their claims were ultimately rejected on the merits. But allowing such parties to initiate claims in the first place is a waste of time and resources for everyone, including OCR.

The BNEJ strongly recommends that EPA remove the statement in the Investigation Guidance that allows "a person who is a member of a specific class of people that was allegedly discriminated against" to file a Title VI complaint even if that person does not allege any discrimination against him or her. At a minimum, EPA should provide an explanation and legal justification for granting standing to file complaints to persons who have suffered no discrimination themselves, but who purport to "represent" the victims of alleged discrimination.

B. The Investigation Guidance Should Involve the Permittee in the Process.

The investigation process described in the Investigation Guidance is for the most part silent regarding the role of the permittee. For example, Section II-B of the Investigation Guidance, which is entitled "Roles and Opportunities to Participate," discusses the role of the complainant and the role of the funding recipient, but it

does not discuss the role of the permittee. 65 Fed. Reg. at 39,671-72.

Additionally, in its response to comments on the 1998 Interim Guidance, EPA states:

> The permittee may also be asked to provide information to assist in the investigation of the complaint. The recipient may wish to notify the permittee about the investigation . . . . During several investigations, permit applicants have sent information to OCR that they believe is relevant. In those instances, OCR has reviewed the information and placed it in the investigatory file.

65 Fed. Reg. at 39,693 (emphasis supplied).

Apparently this means that OCR will neither notify permittees of pending complaints nor require the recipients to do so. This falls far short of a workable process, given EPA's decision to develop guidance focused on individual permit actions rather than on state permitting programs.[16]

EPA should recognize that the permittee typically has a strong and legitimate interest in any proceedings relating to its facility. The issue need not be viewed solely in terms of whether a permit amounts to a legally protected property interest.[17] Instead, it can be viewed in terms of ensuring, as OCR's outreach effort did, that all persons with an interest in the proceedings are informed and afforded a reasonable opportunity to submit any information they believe may be useful. Clearly, there is a formal role for the permittee in this process and EPA should recognize such a role. Further, persons with an interest include many other parties than the complainant, EPA, the recipient, and the permittee. Thus, public notice should be provided by publication in the Federal Register, state register, and local newspapers to assure that all potentially affected stakeholders are notified.

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16 Apart from advancing a legal argument that EPA is not required to involve permittees as a matter of due process, 65 Fed. Reg. at 39,698, EPA offers no explanation of its reasoning for not involving permittees in investigations relating to their facilities.

17 The BNEJ believes that operating permits and construction permits do confer legally protected property interests that trigger the procedural protections guaranteed by the due process clause. See BNEJ's May 6, 1998 Comments on the 1998 Interim Guidance at part III-C. The approach outlined in the Investigation Guidance does not appear to satisfy even minimal due process requirements.

The BNEJ strongly recommends that EPA require the recipient to notify the permittee of the filing of the complaint. Leaving it up to the recipient as to whether the permittee is even notified of the proceeding is inappropriate and EPA would likely be depriving itself of information that could play an important part in the investigation. The permittee will likely be in possession of the most up-to-date information about actual facility emissions, available pollution control technologies, the cost of installing them, and their technical practicability. In many cases, the recipient will rely upon the permittee to help defend the permit decision by providing information that helps demonstrate the lack of any significant disparate adverse impact, or that helps establish the justification for the impact.

The permittee's perspective may be particularly crucial in cases where a regulatory benchmark, rather than a risk level, is used to assess the facility's emissions. Regulatory limits on emissions are often established through a lengthy process that considers various margins of safety, impacts on sensitive sub-populations, and other complexities. In *Select Steel*,[18] for example, one critical fact was that the National Ambient Air Quality Standards were established to protect human health with an adequate margin of safety. The permittee will often have a unique appreciation of issues such as these from having participated in the standard-setting process. To leave the permittee uninvolved is to risk the loss of this potentially vital information.

Lastly, not requiring the recipient to notify the permittee of the complaint is simply not being fair to a stakeholder with a strong and legitimate interest in the proceeding. Permittees may be investing substantial amounts in facilities that may never be allowed to operate, and they obviously need to know that their permits are potentially at risk.

C. **The Investigation Guidance Should Require Complainants to Exhaust Their Administrative Remedies During the Permit Process.**

Despite its "guiding principle" of seeking to prevent Title VI violations and

18 Letter from Ann E. Goode, Director, Office of Civil Rights, Re: EPA File No. 5R-98-R5 (Select Steel Complaint) to St. Francis Prayer Center and Michigan Department of Environmental Quality (Oct. 30, 1998).

complaints, 65 Fed. Reg. at 39,669, the Investigation Guidance does not require would-be Title VI complainants to exhaust their administrative remedies in the permit process. This is a serious flaw in the process outlined by OCR because it is much better for the community, the recipient, and the permittee if these issues are pursued to the greatest extent possible during the permit process.

EPA itself acknowledges the importance of having these issues pursued during the permit process, because EPA states that in deciding whether "good cause" exists to extend the 180-day deadline for filing a complaint, OCR will consider the extent to which the complainant raised its Title VI concerns during the permit process. "This will encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process." 65 Fed. Reg. at 39,673.[19]

The BNEJ strongly recommends that EPA require would-be Title VI complainants to exhaust their administrative remedies in the permit process. Doing so will help avoid Title VI complaints in two ways. First, if the complainant achieves its objectives through the permit process, then there is no need to file a Title VI complaint. Second, if the complainant does not achieve its objectives, but the permitting agency considers and rejects the complainant's arguments, then the complainant may reconsider the merit of filing a Title VI complaint with OCR.

Even if a Title VI complaint is eventually filed, exhaustion helps insure that OCR will be presented with a well-developed factual record on which to base its decision-making. The recipient likely will not be required to gather new data, as the issue will already have been aired during the permit process. Additionally, the community, the recipient, and the permittee would all be guaranteed early awareness of the issues underlying the complaint, rather than dealing with a new set of issues when a complaint is filed up to 180 days after the permit is issued.

Nevertheless, the Investigation Guidance expresses the following concerns:

> Imposing a requirement that complainants use all of the recipient's available permit appeal processes prior to filing a Title VI complaint would be inconsistent with the structure of Title VI. Courts have held that those who believe they have been discriminated against in violation of

19 Similarly, EPA explains that if "complaints alleging discriminatory effects from a permit are filed prior to the issuance of the permit, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." 65 Fed. Reg. at 39,673. The BNEJ supports this approach. Moreover, this logic also favors requiring exhaustion of remedies in the permitting process.

> Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their administrative remedies with EPA. In other words, Title VI does not require complainants to utilize the Federal administrative process, so it would seem inconsistent to require complainants to utilize state administrative processes. Nonetheless, as discussed above, OCR strongly encourages all parties to seek early resolution of their Title VI concerns.

65 Fed. Reg. at 39,694 (footnote omitted).

EPA's logic for not requiring exhaustion of state remedies is flawed in two respects. First, EPA wrongly suggests that the law is clear that Title VI plaintiffs may bring suit in federal court without exhausting their federal administrative remedies with EPA. EPA cites only a single court case for this proposition. The law on this issue is still developing, as illustrated by the Supreme Court's decision in June of 1998 to review a Third Circuit case holding that Title VI plaintiffs can sue in federal court. *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296 (1998), *dismissed as moot*, 119 S. Ct. 22 (1998).

Second, even if EPA were correct regarding the law on exhaustion of federal remedies, that would not argue in favor of allowing Title VI complainants to bypass the state permit process. The rationale for not requiring exhaustion at the federal level is that the agency's Title VI investigation cannot provide the plaintiff with the relief he desires; all the agency can do is to terminate federal funding. This logic does not apply to the state permit process, which clearly can afford relief to the complainant. The state agency may deny, condition, or even revoke a permit, all in accordance with state substantive law and procedure.

In short, EPA has acknowledged the importance of exhaustion of state remedies and has tried to encourage such exhaustion, but has stopped short of requiring it. Because no persuasive reason exists not to require exhaustion, EPA should impose such a requirement in the final Investigation Guidance.[20]

D. The Investigation Guidance Should Require The Use of Data And Analytic Methods of Sufficient Quality to Support Findings of

20 EPA should also consider requiring potential claimants to attempt to resolve their concerns through the Community Relations Service established under Title X of the Civil Rights Act of 1964.

Violation.

Although the Investigation Guidance expresses a preference for valid and reliable data, it also indicates a willingness to use other data -- data that do not meet these criteria -- in cases where good data are unavailable. This does a disservice to the permittee, the recipient, and the community, by allowing decisions to be made on the basis of information or analytic methods that may not be sufficient to justify the conclusions that will be drawn from the available data or that may not present an accurate picture of the actual situation.

This problem is most readily apparent in EPA's discussion of the "impact assessment" step in the disparate adverse impact analysis. The focus of this step is to "[d]etermine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, may result in an adverse impact." 65 Fed. Reg. at 39,679. In other words, the critical issue here is individual or aggregate causation: Does the facility, either alone or in combination with other sources, actually cause a disparate adverse impact?

According to EPA, "[t]he facts and circumstances of each complaint will determine whether a likely causal link exists." Id. But in making those determinations, EPA recognizes that data may be inadequate and analytic methods may not be sound, but suggests anyway that the best available data be used simply to reach some conclusion. 65 Fed. Reg. at 39,679 ("In some situations, the data may be insurricient to perform an analysis."); id. ("OCR expects to use all readily available data in conducting its assessments."); see also Draft Recipient Guidance, 65 Fed. Reg. at 39,660 ("Generally, all readily available and relevant data should be used to conduct adverse impact assessments. Data may vary in completeness, reliability, and geographic relevance to the assessment area. You should evaluate available data and place the greatest weight on the most reliable data."). As EPA at one point recognizes, it should not perform analyses when the data or analytic methods are insufficient to assure that any conclusions to be drawn are valid.

For example, in numerous places, the Investigation Guidance states that EPA will decide causation in some cases based on information that falls far short of establishing any actual exposure mechanism. The Guidance, however, does not explain how EPA will assure that any proxy for an actual exposure that is evaluated is the cause of a discriminatory disparate impact. For example, EPA states that it will consider "[t]he manufacture, use, or storage of quantities of pollutants, and

their potential for release . . . ." Id. In other words, EPA will look at potential exposure scenarios and make various assumptions in order to use this information in support of overall findings about adverse impacts. But the "use" or "storage" of pollutants cannot be equated with actual releases or actual exposure. It would be highly inappropriate for EPA to evaluate the specifics of such "use" and "storage" in order to predict the likelihood of possible future releases. See *Fertilizer Institute v. United States EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (even the broad CERCLA definition of "release" does not include storage). This kind of prediction should not be considered to support a finding of adverse impact that, if also disparate relevant to an appropriate comparison, would in turn support a prima facie case of a Title VI violation.

Similarly, the Investigation Guidance states that EPA will consider "potential exposures to stressors (e.g., facilities that are generally likely to use significant quantities of toxic chemicals which could be routinely or catastrophically released...)." Id. (emphasis supplied). This is one step further removed from actual data on actual exposure mechanisms. Instead, it focuses on emissions and exposures that have not taken place, but that might take place in the future under various circumstances. Calculations of potential exposures should not be used to support a finding of adverse impact that would in turn support a finding of violation.

The Investigation Guidance also is mistaken when it suggests that a mere increase in the permitted capacity of a landfill might be viewed as an adverse impact. 65 Fed. Reg. at 39,690. Depending upon the controls imposed in the permit, an expanded landfill might well represent a reduction in the potential impact on a community.

The point here is not that EPA must always have current pinpoint emissions monitoring data in order to draw any conclusions about releases and exposures from a facility. Estimates of emissions may be entirely appropriate where actual data are unavailable.[21] However, actual releases and actual exposures, not potential releases, should be the focus of any adverse impact determination. 65 Fed. Reg. at 39,675.

EPA recognized this same point in a somewhat different context when it properly rejected a commenter's suggestion that OCR make a finding of noncompliance

21 Because the permittee will often have the best information about releases from the facility, this is yet another reason why the permittee should be involved in the investigation from its inception.

whenever significant adverse health effects occur in close proximity to an industrial facility. 65 Fed. Reg. at 39,699. In EPA's words, this proposal was rejected because it "does not appear to require any [causal] link between the adverse health effects and the programs or activities of a recipient." Id. Just as EPA was right to insist on that causal link and to reject a proposal to abandon it, so EPA should insist on evidence of actual releases, rather than merely potential releases, in conducting a Title VI investigation.

Finally, despite EPA's stated preference for valid and reliable data, some of the databases and other potential sources discussed in the Investigation Guidance fall short of the mark. TRI reporting data, for example, are widely recognized as having built-in limitations due to the "one size fits all" rules that govern the way facilities must calculate or estimate their own data. The CERCLIS database maintained by the Superfund program is also known to have varying data quality among the EPA regional offices. It may not be possible to specify in advance in a guidance document which data sources will and will not be considered in all cases. But EPA should recognize that data from some of the most common databases may well be unsuitable for use in Title VI investigations because they are neither valid nor reliable.

E. **The Investigation Guidance Takes An Overly Narrow View of Justification By the Recipient.**

In two major improvements over the 1998 Interim Guidance, EPA has now (1) allowed recipients to demonstrate their justifications prior to any finding of noncompliance and (2) spelled out OCR's preliminary view of what justifications will be accepted for disparate adverse impacts that would otherwise constitute violations of Title VI. The BNEJ applauds EPA for providing these improvements and for providing this added discussion on such an important topic. However, the Investigation Guidance still takes what the BNEJ regards as an overly narrow view of justification. A broader view would be more appropriate.

The concept of justification originates from Title VII of the 1964 Civil Rights Act, which broadly prohibits discrimination in the terms or conditions of employment:

> In Title VII cases, courts have often concluded that business practices having disparate impacts are justified if a defendant can show that its decision to adopt the practice was motivated by significant cost savings, efficiency, or

> safety considerations rather than discriminatory animus.
>
> Even though the EPA's Title VI regulations appear to prohibit any discriminatory practices; courts have generally interpreted Title VI implementing regulations to prohibit *unjustified* disparate impacts. Accordingly, courts in Title VI cases are likely to allow defendants to present justifications for their siting decisions similar to the business necessity justifications used in Title VII cases. Title VI cases suggest that defendants may be able to justify disparate impacts through safety or efficiency justifications, significant cost savings, or the unavailability of any physically suitable alternative sites.

Bradford C. Mank, *Title VI*, in The Law of Environmental Justice 39 (ABA 1999) (italics in original).

Despite this broad and flexible standard, EPA's Investigation Guidance takes a highly restrictive approach by requiring the recipient to "show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." 65 Fed. Reg. at 39,683 (emphasis supplied).[22] The stringency of this standard can be seen by restating it in the negative: If the challenged activity were halted, the recipient would fail to meet a goal that is integral to its institutional mission. In other words, the challenged activity must be essential to the recipient's success as an institution, or it cannot serve as a justification under the Investigation Guidance.

This is a strained and unwarranted reading of Title VI. In the Title VII context, it would be comparable to saying that a business must show that without the challenged employment practice, the company would become unprofitable. The bar has never been set that high under Title VII, and should not be set so high under Title VI.

Moreover, EPA's discussion of how it would apply this very stringent standard suggests an overly narrow focus on the community where the permittee is located. EPA states that "OCR expects to consider provision of public health or

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22 The Investigation Guidance incorrectly focuses on justification as applying to the issuance of a particular permit by the recipient. See, e.g., 65 Fed. Reg. at 39,683 (recipient may seek to justify "the decision to issue the permit"). Given EPA's recognition that individual permit decisions are rarely, if ever, the cause of or the solution for disparate adverse impacts, id. at 39,669, 39,683, the concept of justification should apply more broadly.

environmental benefits (e.g., waste water treatment plant) to the affected population from the permitting action to be an acceptable justification . . . ." 65 Fed. Reg. at 39,683.

The language quoted above suggests that EPA will consider health or environmental benefits as justification only to the extent that they are provided directly to the affected population. But many permitted industrial facilities provide important health and environmental benefits not only to their local communities, but also on a much broader basis. Consider the following examples:

- A petroleum refinery produces cleaner-burning gasoline that is marketed in several states and provides air quality benefits on a regional basis.

- A chemical plant manufactures chemicals used in drinking water treatment and purification systems around the country.

- An automobile assembly plant undergoes modifications needed to produce new cars whose lower emissions provide air quality benefits on a regional basis.

- A pharmaceutical plant produces prescription drugs used to fight infectious diseases throughout the country.

In each of these examples, the facilities provide substantial public health and/or environmental benefits not only to the local community, but also far beyond its boundaries. These benefits should be considered part of the recipient's justification of any disparate adverse impact. Yet it is unclear from the Investigation Guidance whether any of these would count under EPA's formulation of the test.

A related problem involves the use of justifications other than public health and environmental benefits. EPA states that "OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population . . . ." 65 Fed. Reg. at 39,683 (emphasis supplied). Once again, the quoted language suggests an unnecessarily narrow focus.

Many industrial facilities provide substantial direct and indirect economic benefits to the communities in which they operate. The direct benefits take various forms,

including employment, tax revenues, production of goods, and the like. The indirect benefits may include enhanced community services, such as education and health care, as well as attraction of additional investment, and rehabilitation of blighted neighborhoods.[23]

Significantly, these economic benefits are not, and typically cannot be, provided directly or exclusively to the subset of the community that is most directly affected by whatever environmental impacts the facility may have. By their very nature, these benefits are distributed more broadly throughout the community.

EPA seems to be suggesting that these benefits cannot be considered justification for disparate adverse impact under Title VI. If so, then EPA is effectively saying that economic benefits will never be considered as justification under Title VI. That position that is difficult to reconcile with the Title VII case law, which gives substantial weight to economic considerations without analyzing how they are distributed within -- and beyond -- the local community.

Moreover, the BNEJ urges EPA not to lose sight of the fact that the permittee's circumstances, as well as those of the recipient, may form part of the justification for disparate impacts. For example, facilities engaged in extraction of natural resources, such as mining, often have little choice of where they can locate, because the location of the resources themselves is the decisive factor. In examining the alleged impacts from such facilities, and the justification for those impacts, OCR should take into account the lack of available alternative locations for the facilities.

Finally, the very complexity and ambiguity surrounding the concept of justification, coupled with EPA's decision to put the burden of proof on the recipients,[24] will pose a major challenge for the states. The states have limited resources, and EPA must recognize this in fashioning the ground rules by which justifications will be presented and evaluated.[25]

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23 One serious unintended effect of the Investigation Guidance will be to promote urban sprawl by encouraging companies to build in "greenfields" locations instead of in urban areas.

24 EPA's decision to put the burden of proof on the recipient seems inconsistent with EPA's statements that Title VI investigations are not adversarial processes and that "it is OCR's job to investigate allegations and determine compliance." 65 Fed. Reg. at 39,672.

25 Some state permitting agencies lack sufficient resources to fully implement their own or delegated federal programs. Without additional resources, the additional burdens of addressing Title VI concerns may further degrade their programmatic capability. Similarly, the lack of resources may lead those states to perform inadequate Title VI analyses. To avoid these consequences, EPA should provide additional

In sum, EPA should revisit the concept of justification and adopt a broader, more flexible standard that is more in keeping with the case law under both Title VI and Title VII.

F. The Investigation Guidance Puts Inappropriate Weight on the "Less Discriminatory Alternative" Test.

The Investigation Guidance concludes its discussion of justification by stating that even if adequate justification is presented by the recipient, "a justification may be rebutted if EPA determines that a less discriminatory alternative exists." 65 Fed. Reg. at 39,683. The BNEJ believes that EPA's treatment of the "less discriminatory alternative" concept in the Investigation Guidance puts far too much weight on a concept drawn from Title VII that should play a fairly limited role under Title VI.

EPA defines a less discriminatory alternative as "an approach that causes less disparate impact than the challenged practice, but is practicable and comparably effective in meeting the needs addressed by the challenged practice." Id. Unfortunately, EPA overlooks the fact that in the Title VII context, the "alternative" is one that could be selected and implemented by the employer. In the Title VI context, the "alternative" also must be one that could be selected and implemented by the recipient. This makes the "less discriminatory alternative" concept difficult to apply under Title VI.

For example, consider a new, state-of-the-art industrial facility in a minority neighborhood. A Title VI complaint is filed after the operating permit is issued. OCR finds that an disparate adverse impact exists due to the existing cumulative background levels of various pollutants. The recipient -- the state environmental regulatory agency -- points to the facility's environmental benefits as justification. EPA agrees that those benefits are substantial, but then it asks: Is there a less discriminatory alternative?

The BNEJ suggests that the answer should be "no." The new facility is not the cause of the existing cumulative background levels of pollution, and thus its impacts are not the cause of any discrimination that individuals may suffer.[26]

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resources and expertise to states if EPA intends for them to address Title VI concerns as contemplated in the Investigation Guidance.

26 Nor can the facility change the demographics of the community in which it operates.

Nevertheless, EPA states that "practicable mitigation measures ... could be considered as less discriminatory alternatives." 65 Fed. Reg. at 39,683. While it may be possible to make other improvements in the facility's environmental performance, doing so should not be deemed a "less discriminatory alternative" to the facility operations as permitted by the recipient. To require the permitted facility to shoulder a substantial burden of further reducing its emissions in order to redress existing environmental conditions that it did not create and to which it may not even appreciably contribute is patently unfair. This is particularly true when the mitigation measures are unlikely to remove or even to substantially ameliorate the existing, unequal conditions and the principal contributors to those conditions will not be subject to similar, imposed burdens.

Indeed, this is the problem with EPA's statement that "[p]racticable mitigation measures associated with the permitting action could be considered as less discriminatory alternatives . . . ." 65 Fed. Reg. at 39,683. If this is true, there will always be less discriminatory alternatives, and so there will never be a complete justification, because it is always theoretically possible to improve the performance of a facility. This would be a very harsh result, and the BNEJ believes it may not be at all what EPA intended. Without some clarification, the quoted statements in the Investigation Guidance are likely to create further confusion and uncertainty for the community, the recipient, and the permittee.

G. The Investigation Guidance Places Too Much Weight on Informal Resolution of Title VI Complaints.

The Investigation Guidance consistently emphasizes EPA's preference for informal resolution of Title VI complaints prior to a formal finding of noncompliance. 65 Fed. Reg. at 39,673-74. This preference may simply reflect the reality that most legal disputes are resolved through settlement, not through adjudication on the merits. Certainly, the BNEJ does not oppose settlement of disputes.

What is troubling about the Investigation Guidance as a whole, however, is that it seems to encourage the filing of Title VI complaints in the hope of bringing pressure to bear upon the recipient and the permittee, thereby paving the way for an "informal resolution" in which one or both of them make various concessions simply to bring the dispute to a close. This very unfortunate set of incentives results from several aspects of EPA's process, including:

- The ability of persons without a genuine stake in the community to file complaints (see Section III-A above);

- The lack of predictability as to which disparate adverse impacts amount to violations of Title VI (see Section II above);

- The decision not to grant "due weight" to state permitting decisions except in some situations where area-specific agreements have been reached, 65 Fed. Reg. at 39,674-76;

- The very narrow approach to justification taken in the Investigation Guidance (see Section III-E above); and

- EPA's pointed reminder that complainants may seek, and recipients may agree to implement, "broader measures that are outside those matters ordinarily considered in the permitting process," 65 Fed. Reg. at 39,674.

The BNEJ is especially troubled that EPA would essentially invite state environmental permitting agencies to agree to implement "measures that are outside those matters ordinarily considered in the permitting process." The matters that state permitting agencies "ordinarily" consider in the permitting process are exactly those matters that state law and state regulations require the agencies to consider. EPA, by encouraging reliance on other factors "outside" those specified by state law, is not only encouraging the filing of Title VI complaints as a means of gaining leverage at the bargaining table, but is also unwittingly leading state permitting agencies into legal, fiscal, and political hot water if they accept EPA's invitation.

H. The Investigation Guidance Should Clarify and Shorten the Timelines Set Forth For Investigation and Resolution of Complaints.

The Investigation Guidance asserts that EPA will notify recipients of preliminary findings “within 180 days from the start of complaint investigation,” reiterating the timeframe provided in EPA’s existing regulation. 65 Fed. Reg. at 39,670, 39,695. However, the Guidance does not clearly identify when an investigation must start. For example, there appear to be no time limits on how long EPA may allow efforts at reaching informal resolution before OCR begins its investigation of the

complaint, and that investigation will not “start” until attempts at informal resolution have been completed. Specifically, the Investigation Guidance states:

> If a complaint is accepted for investigation, OCR will first attempt to resolve it informally. If informal resolution fails, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create an adverse disparate impact or add to an adverse disparate impact . . . .

65 Fed. Reg. at 39,670 (footnote omitted).

The insertion of informal resolution into the process before the "start" of the investigation extends -- to well over a year -- the length of time that a permit may be at risk, because potential complainants have 180 days after the permit is issued to file a complaint and EPA then has 180 days to investigate. The 180-day requirement for EPA to complete its investigations has been honored more in the breach than in the observance. Further, the Investigation Guidance allows for filing of complaints more than 180-days after permit issuance, upon a showing of “good cause.” To prevent this exception from becoming the rule, EPA needs to explain and to provide examples of the type of reasons that would constitute good cause.

It is imperative that EPA clarify when the 180-day clock for complaint investigation will "start," and that EPA actually conform to the schedule in its regulations. For example, EPA could establish a presumptive time limit, such as 60 days, on how long informal resolution should be pursued before OCR will "start" its investigation. Otherwise, a permittee may invest substantial resources in a particular facility (including an established facility receiving a renewal permit), only to have it unfairly rejected long after the fact.

I. The Investigation Guidance Should Require Fairness in the Remedy.

A final aspect of unfairness that permeates the Investigation Guidance involves the potential remedy for any finding of violation. Despite EPA's frequent acknowledgment that a single permitted facility is rarely the sole cause of an disparate adverse impact, there is no mention in the Investigation Guidance of how the remedy for such an impact should be distributed among the various sources that contribute to it.

For all that appears, the complainant or the recipient could look to the facility that received the most recent permit to provide sufficient emissions reductions or offsets to address any impacts of concern, even though the facility in question contributed very little to those impacts in the first place. The BNEJ believes that EPA must commit itself strongly and explicitly within the Investigation Guidance to a rule of proportionality -- a facility that is a minor part of the problem should not be expected to bear a major share of the solution. This is really nothing more than simple fairness, but it is currently absent from the Investigation Guidance.

Similarly, OCR should recognize the same principle of fairness in cases where a Title VI complaint involves emissions that are covered by an area-specific agreement developed by the recipient. 65 Fed. Reg. at 39,675. Thus, if a particular facility is doing its part under the area-specific agreement that is acceptable to EPA, then that facility's permit should not be the subject of a Title VI complaint, even if other aspects of the agreement are not being implemented as quickly or completely as they should be. Again, the BNEJ urges EPA to commit itself explicitly to this concept of fairness in all aspects of its final Investigation Guidance.

CONCLUSION

The BNEJ supports the many substantial improvements in the Investigation Guidance from the 1998 Interim Guidance and commends EPA for the outreach, public participation, and stakeholder dialog effort that is reflected in the Investigation Guidance. In particular, the BNEJ supports the following decisions reflected in the Investigation Guidance:

- limiting precious investigative resources by seeking to address complaints triggered by permit actions that are most likely to have a disparate adverse impact;
- evaluating only those stressors and impacts that are within the permitting authority’s power to prevent or control;
- considering for disparity analysis only adverse impacts that are significant;
- providing greater clarity regarding the process by which OCR will conduct its investigations; and
- requiring exhaustion of administrative remedies in the permit process.

Despite these improvements, the BNEJ has reluctantly concluded that the

Investigation Guidance is still in need of substantial revision. It will not provide the predictability and certainty to which it aspires and which are absolutely essential for all stakeholders. The BNEJ respectfully suggests that EPA revise the Investigation Guidance as follows:

- further limit investigations to address state permitting programs rather than individual permit actions or, alternatively, to address only permit actions that authorize a significant net increase in emissions of concern that cause a significant adverse impact;
- further clarify the critical elements of how EPA will identify the affected population and the "appropriate" population for comparison;
- limit filing of complaints to persons with a genuine stake in the community;
- recognize the role of the permittee in the investigation;
- require the use of data and analytic methods of acceptable quality when evaluating complaints;
- articulate a broader and more flexible view of justification, and avoid the "less discriminatory alternative" approach to justification;
- avoid encouraging "informal resolution" of Title VI complaints that may not have any merit in the first instance;
- clarify the timelines set forth for investigation and resolution of complaints; and
- require fairness in the remedy for any Title VI violation.

These additional steps are needed to assure fairness and reasonable predictability in the Title VI process. The current Investigation Guidance provides inadequate consideration of the potential benefits of a project or permitted activity and of the disruption to business planning and state environmental regulatory programs that would result from its adoption.

The BNEJ is committed to working with the EPA, states, our host communities, and other stakeholders on environmental justice concerns. Our members are committed to the non-discrimination mandate of Title VI and seek to be responsible community members. The BNEJ hopes that these comments will provide an important contribution to the multi-stakeholder process EPA adopted to develop Title VI guidance and will assist the Agency in its efforts to better implement its Title VI regulations.

Appendix A -- List of BNEJ Members Ascribing to These Comments

- Alabama Chemical Association
- Alliance of Automobile Manufacturers
- Alliance of Chemical Industries of New York State
- American Gas Association
- American Petroleum Institute
- The American Road and Transportation Association
- Chemical Industry Council of Illinois
- Chemical Industry Council of New Jersey
- Edison Electric Institute
- Massachusetts Chemical Technology Alliance
- Mississippi Manufacturers Association
- National Association of Manufacturers
- National Mining Association
- National Solid Waste Management Association
- Tennessee Association of Business
- Texas Chemical Council

ADDENDUM TO BNEJ TITLE VI COMMENTS

Appendix A – List of BNEJ Members Ascribing to These Comments

- Alabama Chemical Association
- Alliance of Automobile Manufacturers
- Alliance of Chemical Industries of New York State
- American Chemistry Council
- American Forest and Paper Association
- American Gas Association
- American Petroleum Institute
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- Chemical Industry Council of Illinois
- Chemical Industry Council of New Jersey
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- Massachusetts Chemical Technology Alliance
- Mississippi Manufacturers Association
- National Association of Manufacturers
- National Mining Association
- National Solid Waste Management Association
- Tennessee Association of Business
- Texas Chemical Council

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Title VI Task Force
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August 26, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs***

Dear Administrator Browner and Ms. Goode:

We file these comments as the Title VI Task Force of EPA's National Environmental Justice Advisory Council (NEJAC). NEJAC's Title VI Task Force is a cross-subcommittee body comprised of representatives of non-governmental, labor, community, Tribal/Indigenous, environmental, and state government stakeholders. The Title VI Task Force has representatives from each of NEJAC's six subcommittees, including the chair and vice-chair of the Executive Council and the chairs of four of the six subcommittees.[1] These comments are the unanimous recommendation of the Title VI Task Force. [2]

These comments concern both the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (which we will call the "Guidance" throughout these comments) and the *Draft Title VI Guidance for EPA Assistance Recipients Administering*

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[1]Enforcement, Indigenous Peoples, International, and Waste and Facility Siting.

[2]We note that although there was insufficient time to have these comments approved by the full NEJAC Executive Council, the Title VI Task Force is comprised of 13 of the 25 members of that Council, as well as members of subcommittees.

Environmental Permitting Programs (which we will call the "Recipient Guidance" throughout these comments).

We are disappointed, in EPA and in the Guidance. The combined Guidance document sets the tone on its very first, prefatory page: "The guidance strikes a fair and reasonable balance between EPA's strong commitment to civil rights enforcement and the practical aspects of operating permitting programs." This balancing act has no place in anti-discrimination law. Civil rights law exists to protect minority interests against just this sort of balancing, not to be part of the balancing itself.

At every opportunity, EPA has ignored the input of the NEJAC, submitted on the Interim Guidance in 1998. In almost every policy decision in the Guidance, EPA has chosen to hurt the civil rights complainant, and help the civil rights violator. In many situations EPA's new Guidance is in direct conflict with its own Title VI regulations, and in other cases it simply narrows the regulations' scope in a way which limits the rights of complainants and protects civil rights violators.

Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, we request that EPA scrap the current Guidance and begin again. We offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

GENERAL COMMENTS

A. Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

The Guidance is a significant retreat from even the paltry protections proposed by the 1998 Interim Guidance. At every step, EPA has made the policy decision to hurt the civil rights complainant and help the civil rights violator.

The Guidance inhabits a fantasy world in which discrimination is rare and hard to find, whereas in the real world, discrimination is quite common and often easy to see. This fantasy has many manifestations, but four of them are particularly important because they undermine the very concept of civil rights enforcement.

First, EPA acts as though benefits and burdens are not *systematically* distributed in unequal fashion. It sets up an extremely laborious process to determine whether, in any particular case, a community of color is being adversely affected by an environmental, social, cultural, or

economic insult – when in most cases, one just has to look: at East St. Louis, at Lousiana's Cancer Alley, at East Los Angeles. The concentrations of environmentally questionable and downright harmful projects in those places, and hundreds of communities of color like them around the country, *are not present* in Beverly Hills, Grosse Pointe Farms, the Hamptons, or in hundreds of white communities like them.

Second, EPA acts as if "benefits" can somehow "justify" discrimination. Two examples are illustrative of EPA's failed approach:

• In §VII.A.1, EPA gives the example of a sewage treatment plant, which it says benefits the community of color in which it is placed by treating that community's sewage. That is true, but not very relevant. The treatment plant also treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.

• Throughout the Guidance, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. § VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

Third, EPA proposes to approve discriminatory effects it finds if recipients come up with plans to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here instead to *institutionalize* discrimination, allowing recipients' actions to be approved of by EPA even when they have demonstrable discriminatory impact.

Finally, EPA also refuses to make the fundamental move of discrimination law: comparison of the impacts among different demographic groups. The Guidance appears to be setting up a super-permitting review process, not a civil rights enforcement process. From the point of view of civil rights law, it simply *does not matter* if the permitting process at issue might have some reasonable basis for the result it produced. If the impact is not felt by white people, or would be different in a white area, or would have been reduced or eliminated in a white area, a discriminatory effect has occurred in violation of the Title VI regulations.

An agency's power manifests itself not only by what it mandates, but by what it tacitly allows. Specifically, despite ample regulatory discretion to address environmental justice concerns under existing environmental laws, in the absence of an explicit legal duty many state agencies have consistently failed to address continuing disparities. This makes the EPA's

regulations and administrative proceedings under Title VI a critical legal avenue for residents in environmentally devastated communities. In response to numerous Title VI complaints, EPA committed time and resources to devising the Guidance. However, a reading of the Guidance leads to the inescapable conclusion that – despite the effort expended – the EPA will not deliver on its promise to ensure compliance with civil rights laws, nor will it comply with President Clinton's executive order on environmental justice.

We are troubled by EPA's chosen terminology in its repeated references to "adverse disparate impact analysis." The implication in this choice of phrase is that there can be a "disparate impact" that is not an "adverse disparate impact," a semantic distinction that EPA seems bent on proving but which in the real world does not exist. If there is a disparate impact, it is an adverse impact. We find this odd construction through-out the Guidance, in §§ I.B, I.C, I.E, II, II.A.3, IV.B, V.B, V.B.2, VI.A, VI.B.1.b, VI.B.4.c, VI.B.6. We discuss why EPA's analysis is actually not an "adverse disparate impacts analysis," but instead a "disparate adverse impact analysis," in our comments on §VI, below.

The Guidance is also written in technical language that is largely inaccessible to community groups which may look to it for an idea on how EPA would handle their complaints.

We urge EPA to scrap the current Guidance and begin again to include the many suggestions provided by community groups and environmental justice advocates on this Guidance and the Interim Guidance.

As noted above, we offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

B. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

A substantial part of the Recipient Guidance is devoted to the EPA imploring and cajoling recipients to do the right thing, to devise strategies to reduce pollutant levels in overburdened communities. Yet, just under the surface of this encouragement is a much stronger message: the regulated community is sure to understand from this guidance that the EPA will go to *extraordinary lengths* to avoid administering a Title VI remedy, either withdrawing funds or requesting the Department of Justice to seek injunctions. The EPA's trepidation is evident in the generous presumptions and ample procedural protections given the recipient in stark contrast to the lack of recourse available to the complainants. Although the Agency may not relish withdrawing fund, without a credible threat by the EPA to use Title VI, many recipients will continue to take actions that cause and contribute to oppressive environmental inequities.

The Recipient Guidance should be strengthened to actually force recipients to admit and address the disparate impact within their jurisdictions. We recommend that EPA require all recipients to:

- Meet with current Title VI complainants to resolve complaints.
- Compile relevant demographic information in the permitting process.
- Conduct a state-wide (or agency-wide) demographic analysis of current permits.
- Place a moratorium on granting permits until the above three recommendations rae implemented.

SPECIFIC COMMENTS

A. Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

In these comments, we use the same numbering system as that used in the Guidance itself.

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964

As we noted above in our General Comments, we are disturbed by EPA's use of the term "adverse disparate impact." It is particularly galling, and misleading, as used in §I.B:

> In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects. This is often referred to as reaching actions that have an unjustified adverse disparate impact.

This construction implies that the Supreme Court endorses the "adverse disparate impact" concept, when in fact, the Supreme Court has never in its history used that tortured construction.

C. Scope of Guidance

The Guidance is very narrow in that it only covers complaints in the permitting context, and even there it does not cover complaints alleging intentional discrimination or complaints alleging discrimination in the public participation processes associated with permitting. Many

other activities conducted by recipients of EPA federal financial assistance, both substantive and procedural, may implicate Title VI. For example, substantively, agencies are responsible for enforcement (or non-enforcement) of environmental laws, clean-up of contaminated sites, and awarding of sub-grants, among other duties; procedurally, agencies are also responsible for such things as the size of penalty awards and the length of time for remedial or enforcement action. Many current environmental injustices arise from selective enforcement of environmental laws by state agencies.[3] Additionally, there are at least several pending Title VI complaints outside the permitting context, such as *Chester Street Block Club Association v. Department of Toxic Substances Control*, No. 8R-97-R9 (refusal to require clean-up of toxic substances, including known carcinogens, prior to construction with potential to release toxic substances into community); *Hyde/Aragon Park Improvement Committee v. Georgia Department of Environmental Protection*, No. 8R-94-R4 (failure to investigate, monitor and correct environmental violations in a RCRA clean-up in black community as in white community); and *Mothers Organized to Stop Environmental Sins v. Texas Natural Resource Conservation Commission*, No. 5R-94-R6 (failure to enforce environmental violations which disproportionately affected blacks). The fact that EPA has taken seven years to produce this flawed Guidance, which covers only permitting outcomes, does not make us hopeful that it will ever get around to issuing any future guidances on permit processes, enforcement, clean-up, sub-granting, and other potential complaint areas, as well as a guidance for covering allegations of intentional discrimination. The principles of a credible civil rights investigatory strategy are broadly applicable, and a new Guidance could easily cover these other areas, as well.

We are disappointed that EPA has chosen an avenue for Title VI enforcement – the Guidance – which by its own explicit terms is not "enforceable by any party in litigation." The fact that the Guidance itself is so weak, and EPA is not even committing to follow it, is testament to the lack of commitment to civil rights enforcement at EPA. By giving itself this enormous loophole, EPA is hurting the civil rights complainant and helping the civil rights violator.

D. Coordination with Recipient Guidance

We reiterate that without a credible civil rights enforcement threat in this Guidance -- which is wholly lacking in this version – the Recipient Guidance is meaningless.

E. Principles for Implementing Title VI at EPA

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[3]*See, e.g., States Neglecting Pollution Rules, White House Says; Sanctions Threatened; Violations Are Underreported, EPA Officials Assert -- Full Review is Sought,* NEW YORK TIMES (December 15, 1996), at 1.

For our critique of EPA's misguided principle that "Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved," please see §IV.A. In fact, such informality hurts civil rights complainants and favors civil rights violators, as discussed in §IV.A.1.c.

F. EPA's Nondiscrimination Responsibilities and Commitment

Although EPA professes to be "committed to a policy of nondiscrimination in its own permitting programs," the repeated examples of policy choices made in this document to hurt the civil rights complainant and help the civil rights violator give lie to this representation from the agency. If EPA is unable to have a policy of nondiscrimination in its own civil rights enforcement, it is unlikely to have a credible such policy in its permitting programs. We would like to see EPA implement a policy under which if the agency were the subject of a Title VI-like complaint, it would refer that complaint to the Department of Justice for investigation.

II. FRAMEWORK FOR PROCESSING COMPLAINTS

EPA limits its determination of whether a recipient is in violation of Title VI and EPA's implementing regulations to sources of stressors, stressors, and/or impacts "within the recipient's authority." For a critique of this limitation on the types of impacts considered, please see our comments on §VI.B.2.a. For a critique of this limitation on the range of impacts considered to only those "within the recipient's authority," please see our comments at §VI.B.2.

EPA states here that "informal resolution will often lead to the most expeditious and effective outcome for all parties." Please see our comments on §IV.A.1. which counter this mistaken assumption.

A. Summary of Steps

Section II.A sets forth a series of deadlines, taken from EPA's Title VI regulations, for EPA to accomplish certain milestones in the complaint processing framework. EPA's intent in establishing definite deadlines for acknowledgment, acceptance and investigation is laudable. By setting a maximum time period of 205 days for a complaint to be received, reviewed and investigated before a decision on the merits is made, EPA is apparently pledging once more to abide by its regulations. There are three concerns with this scheme: that EPA will not follow its own deadlines, that the deadlines will be used as an excuse for substandard investigation of accepted complaints, and, as detailed below in §II.A.3, that EPA has opened a potential loophole with the introduction of informal dispute resolution into the process timeline.

We feel it unlikely that EPA has the self-discipline and resources to comply with the deadlines set forth in the Guidance. EPA has an abysmal history with regard to the deadlines that Congress or EPA itself has set for various environmental controls. In addition, EPA has missed its regulatory deadlines in every single Title VI case accepted for investigation in the history of the agency, with one exception, and missed the regulatory deadlines for acknowledgment of complaints (the 20 days specified in §II.A.2) in almost every case. Given this history, there is reason to suspect that EPA will not always meet the deadlines imposed by the Guidance. EPA has few resources dedicated to investigating Title VI complaints, and it seems likely that OCR will have trouble investigating all of the complaints that will come through its door, in addition to the 51 complaints that are pending. Indeed, some of these 51 complaints have been pending since 1993. Given that seven (7) years have passed since acceptance for investigation in some cases, and only one complaint has ever been resolved on the merits, there is little reason to believe OCR can turn around all complaints in 180 days. What are the consequences to EPA of failing to meet its deadlines?

Because of the lack of resources, there is also a distinct possibility of sub-standard investigation of complaints within the 180-day window. Many of the signatories of this letter have witnessed shoddy investigations of their own complaints, even when EPA has taken years to undertake such work. Certainly OCR staff that are under pressure may spend less time than necessary to fully investigate a complaint, if they feel that they must have a decision on the complaint within 180 days. This creates obvious problems for communities at risk from environmental harm. Each complaint deserves a full hearing, and EPA should not tolerate any system that encourages sub-standard investigations of these complaints.

To remedy these problems, we suggest the following recommendations:

• The easiest solution to both of these problems is to ensure that OCR is adequately staffed to investigate all Title VI complaints in a manner that provides for a fair and timely investigation. This may require diverting resources from other parts of EPA, but EPA should recognize the seriousness and importance of civil rights enforcement generally, and specifically a Title VI investigatory program.

• In addition to adequate staffing, EPA should have certain oversight procedures in place to make sure that investigations are being handled properly. This could occur in a number of ways, from an internal annual report outlining the progress and success of complaint investigation to full public disclosure of such progress. At least some public oversight of OCR's process would be valuable to EPA, since there may be occasions where investigations do not include any contact with the community that filed the complaint, immediately raising suspicions that OCR is not conducting a thorough investigation. If there are good reasons for a short investigation that does not appear to fulfill lay expectations of a thorough investigation, then EPA should make those

reasons known. We also suggest that a process be put in place for appeals by complainants to the Department of Justice.

1. Acknowledgment of Complaint

This section allows a recipient to make a written submission to EPA responding to, rebutting or denying the complaint within 30 calendar days. What if the recipient misses the deadline? In our experience with numerous complaints, EPA has generously extended this deadline and often accepted such responses months after the deadline; this stands in marked contrast to EPA's treatment of complainants, whose complaints are rejected if they are even a few days late.

2. Acceptance for Investigation, Rejection, or Referral

We are gratified to see that EPA will request clarification if a complaint is unclear. In several cases to date, EPA has simply denied the complaint rather than request clarification.

3. Investigation

The timeline of EPA's investigation is not clear in the Guidance, leaving enough loopholes that EPA will not be bound by the times specified in its own Title VI regulations. Section II.A.3, on investigation, lays out the timeline and states that "OCR intends to promptly investigate all Title VI complaints." (Communities with experience with EPA know better, but that is not the point of these comments.) In that section, if a complaint is accepted for investigation, EPA will first try informal resolution. If that fails, only then will EPA conduct an investigation. The guidance next states that within 180 calendar days of the start of the investigation, EPA will make preliminary findings. The question is, when does that 180 day clock start to run? Under the present Guidance, it sounds like EPA can have as much time as it likes to try "informal resolution" before it even *starts* to investigate. This would be a disaster for communities, more of a disaster than EPA's current do-nothing policy.

This section of the Guidance conflicts with EPA's regulations, which say that 180 days after the acceptance of a complaint the EPA has to make a preliminary finding. Otherwise, EPA has an enormous loophole for not complying with the regulatory deadline of 180 days – it can just say it is trying to "informally resolve" the problem. That is our fear, and it is also a concrete way which the new Guidance will have a negative impact on communities of color.

EPA also introduces a subtle but difficult hurdle for complainants in stating, "If based on its investigation, OCR concludes that there is no discriminatory effect (*i.e.*, no unjustified adverse disparate impact), the complaint will be dismissed." By introducing *justification* into the

investigation stage, EPA is giving recipients yet another chance to elude civil rights compliance. We urge EPA to remove justification from the investigation stage, and place it at the end of the process – in a post-finding-of-violation stage – where it belongs. This is yet another instance of EPA hurting the civil rights complainant by introducing hurdles into the Guidance not found in Title VI and EPA's regulations.

4. Preliminary Finding of Noncompliance

Please see our comments on §VI.B.2 on EPA's limitation of disparate impact analysis to those which result "from factors within the recipient's authority to consider[.]" This limitation hurts the civil rights complainant and helps the civil rights violator.

B. Roles and Opportunities to Participate

2. Complainants

In §II.B.2, EPA explains that the proceedings are not "adversarial" between the complainant and recipient and therefore the complainant has no right to appeal. However, EPA employs a different standard to the recipient, affording it substantial procedural protections, including the right of appeal after an adverse decision. As a consequence of this discrepancy, a governmental entity's monetary interest ironically is given far more protection than private citizens' constitutional interests. Here, again, EPA is hurting the civil rights complainant while helping the civil rights violator.

EPA's interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, EPA has effectively made the complainants' civil rights contingent upon the political will of EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court. Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with civil rights laws.

Section II.B.2 states that "complainants do not have the burden of proving that their allegations are true," but given the "due weight" EPA promises to give recipients' data, it is

apparent that complainants have the burden of *disproving* recipients' data, which is essentially the same thing as proving their allegations are true.

III. ACCEPTING OR REJECTING COMPLAINTS

A. Criteria

We note that although EPA relegates it to a footnote, federal financial assistance is a jurisdictional requirement for EPA's Title VI investigations and should be elevated to the text as #5 in the list of jurisdictional criteria. In fact, more complaints are rejected for failing to fulfill this jurisdictional criteria than any other – 18 of 43 complaints thus far rejected, or 42 percent, almost double the percentage of the closest other reasons for rejection – and thus we find it odd that EPA would not make this requirement more obvious to the reader of the Guidance.

EPA should accept complaints that have a telephone number *or* an address. The Guidance ambiguously states that it will not investigate complaints that fail to provide a way to contact the complainant, "*e.g.*, no phone number, no address." There are many potential complainants who have no phone, and thus the provision of a phone *or* an address should be sufficient for EPA to reach them.

In a footnote to this section, EPA asserts that it may use information presented by a complainant which it does not accept as a complaint to conduct a compliance review of the complained-of recipient. This statement is of little comfort to complainants and those similarly situated. As a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

1. EPA misleads the public as to when it will accept a complaint.

At the beginning of §III.A, EPA states that it "is the general policy of OCR to investigate *all* administrative complaints concerning the conduct of a recipient of EPA's financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." §III.A (emphasis added). This assertion is repeated at the end of §III.A, as well.[4] This is fundamentally misleading because elsewhere in this very section of the Guidance EPA promises to *dismiss* complaints that "satisfy the jurisdictional criteria in EPA's implementing regulations" if complainants are attempting to exhaust their administrative remedies before the recipient agency (§III.B.3.a) or

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[4]"OCR's threshold decision to accept a complaint for investigation or reject it is based on the jurisdictional criteria provided in EPA's Title VI regulations[.]"

pursue their rights in court (§III.B.3.b). This contradiction in the Guidance points out the ill-advised nature of EPA's policy to dismiss complaints that meet its jurisdictional criteria, as outlined more fully at §§ III.B.3.a and III.B.3.b, below.

2. EPA illegally narrows who may file a complaint with it.

The Guidance will have a direct, negative impact on communities because EPA has tried to narrowly limit who may file a Title VI complaint with the agency, in direct conflict with its own regulations. In Section III.A, EPA has decreed new criteria for acceptance or rejecting complaints. That section states that the EPA will accept and investigate a complaint if it is filed by:

A. A person who was allegedly discriminated against in violation of EPA's Title VI regulations;

B. A person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or

C. An authorized representative of such a person or class of people.

These new criteria conflict with EPA's Title VI implementing regulations. At 40 CFR § 7.120, entitled "complaint investigations," the regulations state:

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

The regulations do not make the limitation found in the Guidance in point B, that the person filing the complaint be "a member of a specific class of people that was allegedly discriminated against." Instead they state that a "person who believes that he or she *or* a specific class of persons has been discriminated against" may file a complaint -- a much broader standard. Here again EPA has made a policy decision which hurts the civil rights complainant, and helps the civil rights violator, without even noting that the regulations differ.

B. Timeliness of Complaints

EPA ignored comments on its Interim Guidance and continues with a statute of limitations policy which will have a detrimental impact on civil rights complainants. The language used in §III.B is vague and can easily confuse potential complainants regarding the appropriate time for filing a complaint, leading to premature, duplicative, or late complaints. Further, EPA's policy

decision to take no action on complaints filed before a permit is issued is an abdication of responsibility for *preventing* civil rights violations.

1. Start of 180-day "Clock"

Although community groups and complainants pointed out in detail the flaws with EPA's approach to the start of the 180-day clock in comments on the Interim Guidance, the same approach is carried forward into the new Guidance in §III.B. EPA continues to narrowly construe the beginning of the statute of limitations in a way which hurts civil rights complainants and aids civil rights violators. Many of the comments in this section will appear familiar to EPA as they were made on the Interim Guidance, but ignored by the agency.

EPA has rejected many complaints on the grounds of timeliness, including a number that complainants have felt were timely, because of differing interpretations of when the statute of limitations begins to run. EPA has generally ruled that the statute begins to run when a permit is issued; many complainants have argued that it should begin to run when all administrative appeals are exhausted. Complainants should be encouraged to try to resolve the issues of disproportionate impact within the permitting process without having to file a civil rights complaint. Thus, they should not be penalized for exhausting their administrative remedies before an agency by having EPA construe the statute of limitations to have run on the complainants' Title VI claim. The Guidance ignores this principle, and forces complainants to file a complaint before exhausting their administrative remedies; as discussed below in §III.B.3, it then will *dismiss* that timely filed complaint, however, because the complainant is exhausting its administrative remedies! This policy of EPA's creates unworkable hurdles for the civil rights complainant, with the Catch-22 of never being able to file a complaint which EPA will investigate.

EPA's Title VI regulations state that a complaint must be filed within 180 days of the action complained about, or allege an ongoing violation of Title VI. 40 C.F.R. § 7.120(b)(2). The Guidance states EPA's position as "Complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit." §III.B.1. This is a subtle change from the Interim Guidance, which required a complaint to be filed within 180 days of the issuance of the *final* permit. The change makes EPA's statute of limitations *more* confusing, not less. The implicit message in the removal of the word "final" is that complaints must be filed after the initial granting of a permit.

The Guidance's policy of requiring a complaint to be filed within 180 days of the *initial* – as opposed to the *final* – permit action is not supported by the law. Not only does the interpretation deviate from EPA's own policy and regulations, but it is contrary to state and federal law, which support the conclusion that the statute of limitations begins to run on the date

which a permit became *legally final*. Moreover, EPA's interpretation creates an unworkable legal framework in which complainants must file an administrative Title VI complaint long before the agency action becomes final and is thus subject to judicial review. Federal EPA regulations, state regulations, and federal case law provide an established body of law defining "final agency action." The Guidance's interpretation conflicts with all of these well-settled authorities, and thus should be reversed.

The Guidance flatly contradicts EPA's own regulations defining "final agency action." EPA's regulations, at 40 C.F.R. § 124.19(f)(1), state that "[f]or purposes of judicial review under the Appropriate Act, final agency action occurs when a *final* RCRA, UIC, or PSD permit is issued or denied by EPA *and agency review procedures are exhausted*." (Emphasis added) In the Guidance, EPA makes little provision for the agency review procedures (see §III.B.3, below), even though the filing of an administrative appeal with an agency usually means that the permit in question is not legally enforceable. Further, an appeal might obviate or mitigate (or even exacerbate) the very impacts giving rise to a Title VI complaint; in the course of an appeal, a change in permit conditions could alleviate the impact on the surrounding community. Thus, in most cases there is not yet a cognizable discriminatory effect until the appeal is resolved.[5] The Guidance's interpretation attempts to begin the statute of limitations before there is a final, reviewable agency action, as defined in EPA's own regulations, 40 C.F.R. § 124.19(f)(1), and, in the case of an administrative appeal, before there is actually even a discriminatory effect of an agency's action.

State law mirrors EPA's regulations concerning final agency action: California state law, to take but one example, establishes that the permit *becoming final* – through the expiration of the administrative review period -- is the final agency action, not the *issuance of the permit* as found in the Guidance. In language almost identical to the EPA regulations,[6] the California Code of Regulations state that the agency action is final for judicial review when a final permit is issued *and* agency review procedures and the administrative adjudication procedures are exhausted. 22 Cal. Code Reg. § 66271.8(h).

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[5]The Guidance even recognizes this in §III.B.3, stating "The outcome of such permit appeals... could affect the circumstances surrounding the complaint[.]" Why EPA would resist the logical outcome of its own statements – beginning the statute of limitations *after* the administrative appeal process – eludes us, but is yet another example of EPA working to make the process confusing and difficult for complainants.

[6]40 C.F.R. § 124.19(f)(1).

Federal Court interpretations deciding analogous claims also contradict the Guidance's interpretation of when the statute of limitations should start to run. An agency action is final under the Administrative Procedures Act (APA) when the agency completes its decisionmaking process and the result of that process is one that will directly affect the parties. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992); *Dresser Industries, Inc. v. U.S.*, 596 F.2d 1231 (1979), *rehearing denied* 601 F.2d 586 (1979), *cert. denied* 100 S.Ct. 731 (1979) (finding that the core question in deciding whether the action is final is whether the agency has completed its decisionmaking process, and whether the litigation will expedite rather than delay or impede, effective enforcement by the agency).[7]

EPA's current interpretation would require parties to use a different definition of "final agency action" when seeking judicial review of the agency's action than when seeking EPA administrative review for a Title VI complaint. Federal law, state law, and EPA's own regulations are consistent in stating that the statute of limitations for requesting judicial review of a permit begins to run after issuance of the final permit and after exhaustion of all administrative agency review procedures. 22 Cal. Code Reg. § 66271.18(h); 40 C.F.R. § 124.19(f)(1); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992). The Guidance's different interpretation is an aberration that creates an inconsistent and incoherent legal framework for Title VI complainants. EPA's current interpretation places Title VI complainants in a confusing position: an agency action can simultaneously be "not final" and "final." Under state law and analogous federal authority, it is *not* a final agency action; under EPA's Guidance, it is a *final* agency action. This confusing and arbitrary outcome should be rejected.

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[7]Federal Courts have looked to five indicia of the finality of an administrative action: 1) the action is the definitive statement of agency's position; 2) the action has direct and immediate effect on day-to-day business of complaining party; 3) the action has status of law; 4) immediate compliance with the terms is expected; and 5) the question is a legal one. *Mt. Adams Veneer Co. v. U.S.*, 896 F.2d 339, 343 (9th Cir. 1989); *Boise Cascade Corp. v. F.T.C.*, 498 F. Supp 772 (1980), *stay denied*, 498 F.Supp. 782 (1980) (agency action not final until its effect had been felt in a concrete way and the administrative decision had been formalized). This case law directly contradicts the Guidance. For example, when a permit is first issued, but before appeals are exhausted -- the Guidance's starting point for the 180-day statute of limitation -- none of the five criteria set forth by the Federal Court in *Mt. Adams* are applicable: 1) the permit is not the definitive statement of the agency because it could still be altered significantly or even revoked during the consideration of an appeal; 2) the issuance of the permit does not have a direct effect on day-to-day business because it has not become effective; 3) the permit does not have the status of law; 4) immediate compliance with the permit is not expected because the permit is not yet enforceable; and 5) the possibility of administrative review provides a remaining opportunity to decide questions of fact. *Mt. Adams*, *supra*, 896 F.2d at 343.

The central flaw in EPA's current interpretation is that it begins the running of the statute of limitation before there is a legal "final agency action." A different and more constructive approach, which would allow complainants and federal financial aid recipients the opportunity to fully address disputes before having to file a complaint, would be for EPA to run the 180-day statute of limitations from the *latest* of:

• the issuance of an unappealed permit;

• the completion of all agency (non-court) appeals of permit;

• the completion of any agency-mandated dispute resolution procedure; or

• the completion of any voluntary dispute resolution procedure, as long as it has included the complainants, the recipient and the applicant.

Such an approach would allow all stakeholders the opportunity to informally resolve the conditions giving rise to a potential complaint without the necessity of filing a complaint first.

EPA does make one useful clarificaton in §III.B.1, pointing out that complainants should file complaints alleging discriminatory permit processes within 180 days of the event during the process, rather than after the permit has been issued.

In §III.B.1, EPA again states that it may "choose to conduct a compliance review" of a program even if a complaint is rejected on the basis of timeliness. As we noted in §III.A, as a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews. We urge the EPA to fully fund an office which would be able to do compliance reviews while OCR staff conducted the necessary Title VI investigations to relieve the backlog of complaints.

2. Good Cause Waiver

Section III.B.2 states that good cause exceptions will be given to certain untimely complaints. Unfortunately, EPA does not specify what the conditions for these exceptions are. Instead, EPA simply states that they may be given. This is confusing. Without guidance from EPA on what "good cause" means, people may think they have a good cause while EPA may not agree. Although EPA has latitude to accept late-filed complaints "for good cause," EPA has thus far narrowly read the statute of limitations on complaints, and has never accepted a complaint which on its face alleged ongoing discrimination if the complaint was filed after what the EPA deemed to be the 180-day statute of limitations. Several signatories of this comment letter are familiar with the effects of EPA's "good cause" policy, which hurts the civil rights complainant

while helping the civil rights violator.[8] A list of examples describing situations in which EPA believes "good cause" existed would clarify this seemingly random and arbitrary standard.

3. Ongoing Permit Appeals or Litigation

a. Permit Appeal Processes

EPA states that if a party submits a timely application while administrative proceedings are ongoing, then the complaint will be dismissed without prejudice, allowing for the complaint to be refiled later. This places the burden on the complainant to refile the complaint, even if it has been timely filed and meets all EPA's jurisdictional criteria. This is yet another example of EPA's policies hurting the civil rights complainant and aiding the civil rights violator.

Here, EPA is creating a policy which will lead to the dismissing of complaints which meet all its jurisdictional criteria, simply because the complainants are trying to exhaust their administrative remedies. Such complainants could have their future complaints rejected by EPA, as well, as the agency only "expects" – but does not guarantee – to waive the statute of limitations. This is an astonishingly backward policy that penalizes civil rights complainants by imposing on them a new hurdle not found in Title VI or EPA regulations.

If EPA is not willing to alter its policy on when the 180-day clock begins – which would remove this ludicrous situation of dismissal of timely filed complaints – we urge the EPA to establish a different policy for complaints filed during permit appeals processes: accept the complaint, but stay its investigation. If Title VI complaints were accepted and stayed during the pendency of the appeal process, EPA could then alert the recipient that an investigation will take place if the Title VI issues are not resolved during the appeal process. This would provide an incentive to the recipient to avoid the investigation by resolving the issues through changes in the application itself or through additional permit conditions.

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[8]For example, in *Midway Village Advisory Committee v. California Environmental Protection Agency*, No. 01R-99-R9, the complaint was rejected because it was filed 183 days after the permit issued. In *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9, and *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9, the complaints were rejected as untimely because the complainant groups had diligently appealed the permit to the administrative agency, trying unsuccessfully to resolve the civil rights issue before bringing it to EPA, and had filed within 180 days of the rejection of the permit appeal.

The vagueness of the language in §III.B.3 creates further problems for potential complainants, and for EPA. Clarification is required regarding the ability to refile a complaint after appeals and litigation options have been exhausted. What happens to complaints that are not filed during administrative appeal proceedings but rather wait until such proceedings are exhausted? Must aggrieved parties file a timely complaint while pursuing administrative appeals in order to receive the waiver? EPA's language is unclear in referring to complaints submitted and dismissed without prejudice, saying that such complainants will be able "to refile their complaints after the appeal or litigation." §III.B.3. This language appears to make the waiver conditional upon initial timely filing followed by a dismissal without prejudice. If this is indeed the case, then it is unfair. If EPA wishes to encourage potential complainants to exhaust administrative remedies, it should not penalize complainants who pursue remedies without filing a complaint during the appeals process. EPA should grant waivers to all parties who pursue administrative remedies, regardless of whether or not the complaint has been filed and dismissed. If indeed EPA intends to grant waivers to all complainants who go through administrative processes, then it needs to make this clear.

Secondly, EPA conditions the waivers by saying that EPA "may" grant waivers if the complainants go through the appeals process. Clearly this conditional waiver system will not encourage people to use the appeals process. If EPA wants people to try to resolve problems with recipients rather than file Title VI complaints, it should not make the decision to grant a waiver subject to administrative whim. Given the choice between filing a timely complaint within the 180 day window, or taking a chance with an appeals process that "may" result in an untimely complaint, many complainants will choose to file with the EPA before going through the appeals process if only to ensure the legitimacy of the complaint.

In order to reduce the filing of untimely complaints, EPA should make the waiver guaranteed – or, accept the complaint and stay the investigation, or start the 180-day clock at the end of the administrative appeals process, as recommended above. If EPA guarantees the waiver, it should allow complaints to be refiled within 180 days; the use of a 60-day clock in the permit appeals and litigation sections penalizes civil rights complainants, who should have the full 180-day clock guaranteed by EPA's Title VI regulations.

b. Litigation

EPA erects a new hurdle for civil rights complaiants – one not found in Title VI itself or in the agency's regulations – when it states, in §III.B.3, that it will generally dismiss complaints if the issues raised in the complaint are the subject of "litigation in Federal or state court." This broad policy has the potential to significantly harm complainants who seek to challenge permit actions on environmental grounds in court, while challenging those same permit actions on civil rights grounds by filing an administrative complaint. Such complainants would have their civil

rights complaint dismissed because they sought to force an agency to abide by environmental law – because the "issues raised in the complaint," say, air pollution, would be the same issues raised in the lawsuit. Such a policy once again hurts the civil rights complainant, and helps the civil rights violator. It also has no place in EPA's Title VI Guidance. EPA should investigate Title VI complaints that meet the agency's jurisdictional criteria, rather than erect new hurdles which are not found in Title VI or in EPA regulations.

While the Guidance notes that the complaints will be dismissed "without prejudice," there is also no guarantee that EPA will accept a complaint filed long after the 180-day statute of limitations has run. Based on EPA policy to date, EPA would certainly reject such a complaint, making its dismissal of the earlier "without prejudice" meaningless as a new complaint would never be accepted. If EPA is to retain this policy, it should guarantee a waiver of the statute of limitations to all parties who filed complaints within the original 180-day limitations period.

EPA also states that it will most likely not consider complaints based on permits judged upon by a court. This does not encourage use of the appeals system. By suggesting that all complaints are foreclosed if not heard at EPA first, EPA ensures that some complainants will dispense with those other channels, and go straight to the EPA to have their complaints heard. While barring complaints of this kind may save some resources of EPA, it will not help the agency fulfill its obligations to investigate possible violations of Title VI. Again, EPA should either accept the complaints and then stay investigation during the pendency of the litigation, or guarantee a waiver to encourage the use of non-EPA resources to resolve civil rights violations.

4. Premature Complaints

To ensure that discrimination does not take place EPA must prevent industries from polluting areas where the pollution would result in discriminatory adverse effects. However, the Guidance states that a permit must be issued before a complaint can be considered ripe, otherwise it will be dismissed as premature.[9] While this creates an easy marker for EPA to judge ripeness by, it hurts the communities that are supposed to be protected by Title VI. Using permit issuance as a ripeness test means that EPA misses its best chance to *prevent* discriminatory impacts – before they happen. If it is clear that a permit will be issued, and if a complaint is sent to EPA that meets the initial acceptance determination, then there seems to be little reason for EPA to delay investigation. Potential EPA investigation may also encourage agencies and polluters to negotiate with communities to revise the siting plans. Without a compelling reason for the delay in

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[9] "When complaints… are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." Guidance at §III.B.4.

investigation, this seems to be a pointless ripeness test for EPA to use. Why waste time and put a community's health at risk by delaying investigation until a permit is issued when the investigation may commence as soon as a permit is in the works? EPA is abdicating a low-cost, efficient way of preventing civil rights violations.

IV. RESOLVING COMPLAINTS

A. Reaching Informal Resolution

EPA's Title VI regulations call for the Office of Civil Rights (OCR) to pursue informal resolutions of administrative complaints wherever practicable through alternative dispute resolution (ADR) techniques.[10] The Guidance, at §IV.A, notes that EPA will encourage informal resolution. EPA cites efficiency, time, and costs, among others, as reasons for employing ADR. In addition, EPA claims that ADR is helpful to "design and implement a process leading to an outcome acceptable to all parties."

EPA provides guidance for the use of ADR in two circumstances: in informal resolutions between recipients of federal funding ("recipients") and complainants, and informal resolutions between EPA and the recipients. In either setting, EPA lists dialogue, consensus building, and mediation as approaches to consider when developing an ADR process. For informal resolutions between recipients and complainants, EPA states that the goal is to have the parties resolve the dispute "between themselves." Specifically, EPA advocates the use of a third party acting as a mediator and a structured process through which the parties can participate in ADR approaches useful in resolving Title VI complaints. For informal resolutions between EPA and the recipients, EPA states its willingness to use ADR to reach informal resolutions at any point during the administrative process before a formal finding.

1. Informal Resolution Between Recipient and Complainant

a. EPA's preference for using ADR to reduce complaints deprives communities of the ability to exercise their civil rights.

EPA's insistence on using ADR techniques may be in the interest of efficiency, cost and time for EPA and the recipients, but does not protect the civil rights or environmental interests of communities of color who actually have to face the environmental hazards. EPA's preference for using ADR is apparently to minimize the overall number of Title VI complaints it has to investigate and decide. Attempting to limit the number of Title VI complaints decided, however,

[10] 40 CFR 7.120(d)(2).

deprives communities of the ability to use Title VI as a tool for achieving equality in civil rights. Furthermore, EPA also states a preference for granting permits, only denying them in "rare situations." As a result, EPA's use of ADR to "reduce" Title VI administrative complaints will not prevent discrimination, but instead may encourage recipients to move forward with potentially discriminatory and environmentally harmful permitting actions and then settle any disputes with a complainant later.

b. EPA's use of ADR creates a pre-ordained outcome unfavorable to complainant communities.

EPA's proposed use of ADR to resolve complaints creates an outcome that all parties are forced to accept, but an outcome that may not necessarily be acceptable to all parties. When a recipient of federal funds decides to issue a permit, the community cannot file a complaint until the permit is granted. In addition, once EPA begins an investigation into the complaint, the complainant has limited rights to participate in EPA's investigation, and no avenue to appeal a dismissal. With EPA's stated goal of using ADR to avoid Title VI complaints, a situation is set up where there is a preference towards granting the permit. As a result, the community, which often times does not want the permit to be granted at all, is forced to enter into an ADR negotiation that is aimed at granting the permit. Although EPA claims this process allows the complainant an opportunity to benefit from the entire permit review process, the reality is that the permit will inevitably be granted except, in EPA's own words, in "rare situations." EPA's ADR scheme does not realistically result in a resolution where a permit is withdrawn or rejected. Instead, EPA has set up a situation where a community is coerced into entering into a potentially binding negotiation that is not aimed at fulfilling its objective of not having a facility at all. This is contrary to EPA's stated reason of using ADR to "implement a process leading to an outcome acceptable to all parties."

c. ADR puts complainants in a position of unequal bargaining power with recipients in the negotiation process.

ADR fails to take into account the inherent inequalities in bargaining powers between the recipient and the complainant in the Title VI process. Unequal bargaining power in issues of negotiation often arise due to differences in education, culture, and training for negotiations. EPA's suggested use of ADR in Title VI complaints, however, does not address the problem of unequal bargaining power. To the contrary, ADR merely institutionalizes this inequality.

ADR places people of color in a disadvantage due to its focus on low cost, speed, and efficiency; it places little weight on creating open communication and an understanding of cultural, racial, and class issues. The formal adjudication process has built-in procedural safeguards and codes of evidence to minimize prejudice in the administrative process and, if

necessary, the courtroom. In the formal process, procedure and rules reinforce the idea that justice is blind to race, ethnicity, nation, and handicap.[11] The ADR process, however, takes the procedural safeguards and puts them aside in favor of informal negotiation between the disagreeing parties. This informal atmosphere may allow weaker parties to be coerced into settlements that they may not necessarily want to enter into.[12] In fact, research has shown that informality only allows for more unfairness and power inequality.[13] For example, if members of a low-income community of color are forced to informally negotiate with attorneys and highly-trained negotiation experts of a recipient without procedural safeguards to curb discriminatory actions, abuse of power, and refusals to cooperate, chances are the community residents will not leave the negotiation getting what they want. In other words, once the procedural safeguards that traditionally protect disadvantaged individuals and groups disappear, there is no guarantee that a negotiation will in fact be fair, inclusive, and non-judgmental.

ADR is also disadvantageous to complainants because they may lack the resources necessary to gather crucial data and facts to prove disparate impact. In any negotiation, knowledge is power. With a voluntary exchange of facts and data in the ADR process, the parties must do their own homework in order to increase their bargaining power and persuasiveness. Low-income communities of color, however, do not have the money or resources to hire legal and technical experts to gather facts and data to bolster their Title VI complaints. State agencies and industry, however, have enormous resources at their disposal, allowing them to use expert research and analysis to support their arguments. With vast resources, facts, and data, the state

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[11]Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEORGETOWN L.J. 667, 685-686 (1997)(formality in judicial processes remind and ensure everyone of the values of fairness and equal treatment).

[12] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-1550 (1991)(informal methods of dispute resolution can be destructive for participants because it requires them to speak in a setting that they have not chosen and often imposes rigid orthodoxy as to how they should speak, make decisions, and be); *See* Delgado, supra note 3 at 685-686 (informality increases power differentials and formality triggers a better, equal result); Luke W. Cole, *The Theory and Reality of Community-based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY LAW QUARTERLY 751 (1999)(informality of the local advisory committee process led to disenfranchisement of communities of color); and Richard Delgado, *et al.*, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISCONSIN LAW REVIEW 1359 (1985).

[13]*See* Delgado, *The Problem of the Shanty*, *supra*, at 681, 685-686 ("Informality increases power differentials").

and industry representatives enter the ADR proceedings in a superior position to disadvantaged communities. The practical effect is that the community is left without much evidence to rebut the facts presented by the recipient, thus further handicapping its bargaining power. If ADR is used, EPA should provide technical assistance grants to complainant groups to hire consultants to advise the groups on technical issues and on negotiation.

d. Little research and data exists on whether ADR is an appropriate method of dispute resolution with low-income communities of color.

Little, if any, research and empirical analysis has been conducted on whether ADR is necessarily the most appropriate or effective method of resolving conflicts with traditionally disempowered groups of people, such as African Americans and the poor.[14] Specifically, there has been a lack of research and analysis on whether ADR is an appropriate method of resolving disputes regarding discrimination and racism.[15]

e. ADR does not address overall patterns and systems of discrimination that constitute significant social problems that may be practiced in the permitting of environmental hazards.

ADR poorly serves the larger goals of EPA's Title VI obligations because it focuses narrowly on the resolution of individual disputes as opposed to addressing larger patterns and systems of discrimination that recipients may practice in the permitting of environmental hazards. First, ADR looks at discrimination on a case-by-case basis. The disadvantage of this approach for communities is that communities can not rely on precedent-setting cases where courts have spoken on issues involving patterns or systems of discrimination, a sometimes-powerful tool for ensuring that the rights of the disadvantaged are not violated. In other words, ADR forces the community to negotiate their position on its own, without the benefit of judicial wisdom and experience. The recipient, however, has the advantage of negotiating on a case-by-case basis.

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[14]Cherise D. Hairston, *African Americans in Mediation Literature: A Neglected Population*, 16 MEDIATION QUARTERLY 360, 370 (1999).

[15]Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L.REV. 1055, 1058-1060 (1996).

f. ADR, often conducted in a closed setting, presents little opportunity, if any, for public scrutiny, political accountability, or accessibility.

The ADR process is inadequate for protecting the civil rights of complainants because it does not result in a written opinion, is generally closed to the public, and is usually exclusive to the parties involved. As a result, none of the proceedings enter into the public record, creating little, if any, opportunity for public scrutiny, accountability, or accessibility. Environmental justice disputes, however, exist in a public arena. Since the disputes affect those in the public arena, the agreements reached in the ADR process must withstand public scrutiny.[16] In ADR, however, parties often want "off-the-record" discussions, although the public may have the right to know how the discussions are progressing and what is being said. If discussions are not open to the public, then there is no guarantee that a group may not be taken advantage of in the ADR process.

Unlike ADR, the written decisions and opinions of judges and administrators are part of the public record, and thus create a level of public accountability and scrutiny – as well as precedent. In the 1980s, there was a great deal of public criticism of EPA's "sweetheart deals" between EPA and regulated firms.[17] EPA's use of ADR in the deals created little faith and great public distrust in its ADR process for environmental regulation.[18] As a result, improper deal-making in the ADR process is a real risk the EPA may take by implementing ADR for Title VI complaints. In addition, in certain cases, such as civil rights cases, ADR is inappropriate because of the high level of public interest and concern in the issues involved and its outcome.[19] If formally adjudicated in the administrative process, the public may have full access to all proceedings, decisions, and events of the case.

The reality is that the ADR process is, by nature, private and thus deprives complainants, who may be facing discrimination or racism, from the protection of the decision-making process occurring within the view of the public. Although ADR does have mechanisms to ensure fairness,

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[16]Challenges that Arise for Mediators of Complex Public Policy Disputes, in COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES (Society of Professionals in Dispute Resolution, 1992), pp. 2-5.

[17]Edward Brunet, *The Cost of Environmental Dispute Resolution*, 18 ENVIRONMENTAL LAW REPORTER, 10515, 10517 (1988).

[18]*See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10517.

[19]Judge Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARVARD LAW REVIEW 668 (1986).

such as a third-party neutral mediator, the negotiation is only as fair and reasonable to all the parties involved as the individual mediator allows. In addition, traditionally, ADR resolutions are viewed as contractual agreements. Therefore, there is little process or procedure that allows for appeals of agreements or decisions made on substance and procedure in the ADR process.

g. Neutral third-party mediators lack the authority and power of a judge to prevent unfair and discriminatory acts in the ADR process.

There is an assumption in the ADR process that a third-party neutral mediator serves the same equalizing purpose as a judge in a formal adjudicative process. In the ADR process, however, mediators are often relied upon to act only as informal "judges."[20] Unlike a judge, however, the neutral third-party mediator may not have the authority to force or demand a fair or voluntary party exchange of facts and data. This lack of authority further accentuates the potential for unfair and discriminatory acts in the ADR process. Formal adjudicative processes, however, have strict rules enforceable by a judge regarding discovery to prevent abuse by parties. The ADR mediator may not have the authority or force to compel actions on one party. In addition, although EPA states that a neutral third-party mediator may be appointed when necessary, there is not any procedure or guidance outlined on how and when a “neutral” third-party mediator is proper, may be selected, or agreed upon by the parties.

h. ADR’s lack of formal discovery prevents a fair resolution of a dispute.

Without a formal discovery process, ADR fails to provide a fair resolution of a dispute due to its lack of a high quality and degree of accurately determined facts. Instead, ADR’s focus on efficiency, cost, and speed only provides for a voluntary exchange of data that often results in facts that are incomplete, one-sided, and inaccurate. Without substantial and complete "facts" as weapons, communities are at a disadvantage when negotiating with recipients, who usually will have more resources to rely on.

i. ADR has no precedential value.

A unique feature of the common law system is that any legal command or decision becomes a part of the background data that constitutes our legal rules. A foundational principle of our legal system is that like cases should be treated alike, and different cases differently. Consequently, each legal order is of some value as a precedent for similar future situations. Some

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[20] *See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10515.

reasons for this system are the desires for uniformity, equality in treatment, and the ability to learn from lessons in the past.

In contrast, ADR schemes have no such internal structure of precedential value. The lack of precedent destroys the opportunity for the law to be applied uniformly, fairly, and equally. In issues of environmental justice, the lack of any precedential value in ADR not only prevents parties from utilizing past favorable (or adverse) court rulings, but also prevents any long-term growth and learning within the ADR processes. As a result, the ADR process in any specific area does not grow or evolve with any uniformity or equality. Practically, in an environmental justice context, two similar communities facing similar environmentally hazardous threats in similar areas can both enter into an ADR process and leave with completely different results. In addition, in cases where it is clear that the law has yet to address a problem, ADR fails to provide any precedential history or value.

j. Recommendations

The current draft guidance is vague on how, when, and in what manner ADR will be used as a method of resolving Title VI complaints. As it is in this guidance, the description of ADR does not address the needs of complainants – which is to prevent discriminatory impact of environmental hazards. ADR, as it is proposed by EPA in this policy, has a preference for granting permits and rejecting Title VI complaints. Therefore, the use of ADR as it appears in this policy is contrary to the purpose and intent of Title VI. The prevention of discrimination does not occur by forcing the discriminated to "settle" their complaint with the recipient for efficiency. ADR creates an outcome that all the parties are forced to accept, but not necessarily acceptable to all parties. Therefore, EPA should abandon efforts to encourage the use of ADR between the complainant and recipient according to the current policy. Instead, EPA should allow the administrative process to decide disputes under Title VI. If, however, ADR is implemented as EPA's primary process of dispute resolution for Title VI complaints, EPA should:

- Consult and conduct investigations, research, and analysis on whether the ADR process is the appropriate method of resolving complaints from people of color who are poor and traditionally disadvantaged and discriminated against.

- Draft a specific guidance on how ADR will be implemented in order to resolve complaints under Title VI and open up the guidance to public comment so that the ADR process includes all the elements that complainants feel will level the playing field. Included in the guidance, for example, should be a detailed procedure on how to identify parties in the convening process, when a third-party neutral mediator is necessary, and the process in which the mediator is selected.

• Examine different approaches to ADR and implement one that takes into account the inherent inequalities in bargaining power between EPA, the recipient, and complainant.

• Recognize that the ADR process for Title VI may deal with parties that are traditionally discriminated against and thus must be sensitive to cultural, social and racial issues.

• Require that the ADR process be more open and accessible to the public eye. The public is skeptical of results and decisions made out of the public eye, and opening the ADR negotiations to public scrutiny may increase its trust in the process, in addition to ensuring that one party does not continue to discriminate and take advantage of another party.

• Practice a heightened standard for employing ADR in cases where one of the party members may be part of a traditionally disadvantaged or discriminated class.

• Practice discretion and not use ADR when there are potentially important precedent-setting legal issues that need resolution.

• Not employ ADR when the conduct of one of the parties is so egregious as to make it in the public interest to subject that party to the most visible trial and punishment available.

• Not employ ADR in instances where it would require one party to compromise moral or value beliefs (i.e. siting hazardous waste facilities in religiously sacred areas).

• Not employ ADR when the result may have a substantial effect on people who are not at the actual negotiation.

B. Implementing Informal Resolutions

1. EPA should cause permits to be denied or at least stayed during the pendency of its Title VI investigations.

In §IV.B, EPA states that "denial of the permit at issue will not necessarily be an appropriate solution." EPA repeats this language elsewhere in the Guidance, as well (§VII.A.3). This language is deeply troubling. Experience and common sense indicate that affected communities generally raise complaints in response to a single proposed new or expanded facility, discovering or realizing that they are subject to a disparate impact in such instances.[21] The

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[21]*See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 JOURNAL

suspension, denial, or revocation of a permit is a powerful tool for communities fighting against disparate impact. EPA, in essence, is robbing complainants of the most effective tool they have to prevent disparate adverse impact. While EPA may believe that encouraging recipients to come into "voluntary compliance" is an acceptable solution to disparate adverse impact, the idea improperly holds complainants' health and safety hostage. EPA here again acts in a way which hurts the civil rights complainant, and helps the civil rights violator.

The EPA Guidance states explicitly that "it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." By this surprising statement, the EPA makes it virtually impossible to successfully challenge the legitimacy of a permit proceeding (or other agency action for that matter) in light of Title VI. Consider the case of a flagrant violation: a hypothetical official advises a permit applicant that the agency will only grant a permit for a major facility if it is sited in an overburdened Latino community. This action is taken because the environmental agency doesn't want to contend with opposition from a white wealthy community situated near a more geographically appropriate site for the facility. Under the logic reflected in the Guidance, denial of the permit in this fictional case would *not* be an appropriate solution simply because the permit is not the "sole" cause of the impacts within the Latino community. No one discrete agency action is likely ever to be solely responsible for an adverse impact, but it does not follow that actions that contribute to disparate impacts should be allowed.

Instead of adopting this baffling position, the EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases. The EPA, in attempting to assuage the regulated community by categorically rejecting permit denial as a potential solution in a Title VI case, while at the same time sending a strong message that withdrawal of funds is unlikely to ever occur, effectively decimates the authority of this Civil Rights law in the permitting context, and probably beyond that.

The "sole cause" idea is contrary to cumulative impacts analysis, which EPA embraces in theory. The whole point is that this project is *adding to* the burden. If "sole cause" is taken to an extreme, the more polluted an area gets, the less likely ti is that a permit will be denied, exactly what Title VI is supposed to combat.

2. EPA's approach to mitigation measures is flawed.

OF ENVIRONMENTAL LAW AND LITIGATION 326 (1994). Of the first 17 Title VI complaints filed with the EPA and examined in this article, almost every single one, whether accepted or rejected, was prompted by individuals or groups challenging the permitting of a single facility.

EPA's faith that mitigation measures employed by the recipient agency are sufficient to assure compliance with Title VI is misplaced and will ultimately result in increased violations of Title VI.

EPA sets out the guidelines for its policy regarding mitigation measures in §II.B.6 of the Recipient Guidance and in §IV.B of the Guidance.[22] EPA couches these measures as steps that the recipient agency can take in order to "reduce or eliminate alleged adverse disproportionate impact." Generally speaking, using these measures to compensate for current Title VI violations by creating additional violations of Title VI in other areas is unjust. Granting such measures due weight and considering such measures a "less discriminatory alternative" is ill-advised since it will likely not eliminate adverse disparate impact "to the extent required by Title VI" in the area actually affected by the sited facility. The following mitigating factors and their usage should be carefully reviewed.

a. Mitigation must focus on the site complained about

Mitigation measures are sometimes devices used by agencies and polluters to trade certain pollution to other areas or media. This may include promising to reduce water pollution while increasing air pollution, or buying wetlands in another region to compensate for increased air and water pollution. One difficulty with mitigation is that it may not actually cause a reduction in the harmful pollution at the site itself, since mitigation could potentially take the form of positive environmental action in other regions.

Thus, EPA needs to require that any mitigation measure undertaken must solve problems at the actual site, and not deal with an unrelated problem that has no bearing on the community where the facility is to be located.[23] This means keeping mitigation at the site, and concentrating mitigation on the medium specifically claimed to be causing the violation. There is no sense in

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[22] Those recommendations are short, but generally point out that mitigation is an appropriate way to deal with potential violations of Title VI.

[23] "The significance of the adverse environmental impact of the particular agency action can not be obviated by pointing to the beneficial environmental impact of a different and unrelated action." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982). *See also* Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 831 (1999) ("EPA should amend its supplemental mitigation proposal to require that any mitigation address similar health or environmental risks as those caused by the project").

allowing for reductions in water pollution at a site if the air pollution is the focus of the complaint.[24] This would appear to be the only way to truly address Title VI concerns. Buying wetlands in another region will not help minority communities who are exposed to disproportionate environmental impacts.

b. Offsets

One confusion that EPA needs to clear up is what it means by offsets. Offsets can be promises by a polluter to reduce pollution at other facilities in exchange for keeping emissions high at the disputed facility (the classic Clean Air Act example). Or offsets can mean allowing the polluter to send pollution to another area in exchange for having to reduce its pollution at the disputed facility (the Prevention of Significant Deterioration (PSD) model). Assuming EPA means reducing pollution at other areas, this is inadequate to address Title VI concerns. Only offsets that apply to the specific neighborhood directly affecting the complaining community would reduce an adverse impact as required by Title VI. Otherwise, a facility's emissions could pollute an area in violation of Title VI, while pollution is reduced in areas where it does not require reductions (perhaps, ironically, in white neighborhoods, the result Title VI is intended to prevent).

Even if applied in areas directly affecting the complaining community, offsets will not serve to reduce the emissions that would create a disparate impact. Any increase in emissions in the region is likely to cause an impact (due to the cumulative nature of adverse impacts). Therefore, any offset program that allows for total emissions in the area to increase, even if the emissions at the sited facility decrease, will violate Title VI. Without something more than a 1:1 ratio for intra-community offsets, it is likely that those emissions would cause the cumulative impact to register a violation of Title VI.

Assuming EPA intends to give due weight to PSD-style offsets, there are significant possible problems. Implementation of pollution offsets (in this case allowing for more pollution in another area to compensate for having to reduce emissions at the complained-about site) will necessarily reroute pollution to other areas that in all likelihood are in violation of Title VI

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[24] *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 189-90 (1998) (stating generally that the success cross-media mitigation measures are difficult to establish since a baseline comparison to classic regulation is difficult).

already.[25] As a result, Title VI's core purposes will not be achieved by this sort of scheme. It will be a "rare situation" that the extra pollution created in another area will be placed in an area inhabited by rich, white, property owners. Instead, it would invariably be most economical for a company to deposit its offset pollution in an area that is poor and relatively powerless. Giving companies an incentive to pollute in other poor areas by advocating offsets for Title VI violation areas does not solve the problem of disparate impact, it merely moves it somewhere else.

If EPA wishes to use offsets in a Title VI context, it should limit the recipient of the offset pollution to communities that do not experience adverse disparate impact, and *would* experience no adverse impact as a result of the offset. By limiting the offset destinations, EPA can ensure that the goals of Title VI are not defeated.

c. Abatement procedures should be avoided as they place the burden on the host community.

Abatement procedures are generally those measures that involve reducing chemical exposure by attacking exposure routes that might exist in the homes of the community residents experiencing adverse impact or elsewhere in the community, but not the emitting facility itself. Abatement procedures by their very nature ignore the serious pollution problem that creates the violation in the first place, and as a result, abatement will not in all likelihood solve the root cause of the problem – the emissions that create an adverse impact.

By not addressing the facility actually emitting the pollutant, and rather assigning responsibility for unhealthy conditions to low-income home owners (as in the case of lead), no effective solutions can be truly formed. Given that the data for a source of emissions is much easier to interpret than possible extra-site sources of pollution, the first source targeted for controls should be the sited facility. While data is understandably difficult to ascertain, clearly some polluters are worse than others and no amount of abatement will make up for their emissions.

Until the main source is cleaned up, all abatement measures will likely prove ineffective. It is unlikely that any abatement measure will conclusively eliminate the basis for a Title VI

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[25] *See Communities for a Better Environment v. South Coast Air Quality Management Dist*., EPA File No. 10R-97-R9, filed June 23, 1997 (generally alleging that source pollution, wherever it exists in the SCAQMD, is concentrated in minority communities); Vicki Ferstel, *The Advocate (Baton Rouge, LA)*, June 21, 1998, at 1A (reporting on a 1984 consultative report to the city of Los Angeles that recommended siting facilities in already highly industrialized neighborhoods in low-income neighborhoods).

complaint. Allowing abatement as a mitigating factor in rare cases where abatement may be considered will not solve the Title VI problem and should not generally be granted due weight. EPA should restrict the use of abatements as mitigating features to only those circumstances where abatement is *proven* to be as effective as shutting the facility down completely.

d. The complainants and the affected community must endorse the mitigation measures chosen by EPA and recipients.

By allowing state agencies to submit a mitigation plan to OCR without consulting with the affected community, EPA lacks the input it needs to make a determinative finding. EPA can not adequately find that a mitigation plan will eliminate impact "to the extent required by Title VI" without checking with the community first to make sure they are comfortable with the plan. One of the first assumptions of democracy is that all information is colored by perspective. All perspective and voices are needed to make sound policy decisions. These democratic goals are not met if the decisions regarding solutions to Title VI violations are made without community input, by people who do not live where the violation is occurring. The assumption behind a Title VI administrative complaint is that the regulators and policy makers have failed to adequately assure equality of environmental condition. Moreover, excluding affected community members at a crucial policy making stage is fundamentally unjust, and will ultimately lead to EPA decisions that do not adequately address Title VI violations. It therefore seems illogical to exclude groups which have the crucial perspective needed to evaluate a plan from the process of plan approval.

EPA acknowledges the value of hearing community concerns and ideas when it recommends as most effective mitigation plans those which involve community groups that filed the Title VI complaint.[26] EPA should keep this in mind and strike the language on page 72 that reads "OCR may also consult with complainants, although their consent is not necessary," and replace it with "OCR will consult with complainants" or something to that effect.

e. The overall efficacy of mitigation measures must be monitored.

Communities' main suspicion regarding mitigation procedures is that they will not actually work. If a state agency promises to carry out mitigation procedures, and then fails to do so or implements them inadequately, there is very little recourse for the community members affected. Even if the mitigation measures are faithfully put in place, there is no guarantee that they will

[26]Recipient Guidance at §II.B.6.

actually work.[27] Therefore, it is important that EPA do two things to ensure that mitigation schemes will actually work.

First, EPA should make sure that third parties that are responsible for conducting mitigation (namely the polluters or state agency) actually do it. The Supreme Court's position in *Robertson v. Methow Valley*[28] is instructive in this regard. The Court there decided that mitigation schemes did not have to be proven sound in order for a project to be legal under NEPA, only that they must be discussed. But the Court insisted that this was because NEPA holds no requirement for substantive environmental protection, so no proof of such protection is required in a mitigation scheme.[29] Since in the Guidance EPA is looking toward mitigation schemes to provide substantive environmental protection, the original reliance standard set out in *Pierce*[30] opinion, and not the Supreme Court's *Methow* decision, applies. In short, if EPA wants to rely on third parties to provide mitigation that is supposed to guarantee substantive environmental protection, than those measures must work, and EPA must make sure they do. The lighter standard should only be used in NEPA cases, where there is no requirement for substantive environmental protection. Regular EPA monitoring would be required in order to guarantee that mitigation measures were working.

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[27]*See* Michael G. LeDesma, Note, *A Sound Of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497, 500-501 (1994) (stating that wetland bank mitigation is generally unmonitored and in fact starts a race to the regulatory bottom among states); Daniel Jack Chasan, *Salmon; Ruling: Agencies Violate Law; So What? It Happens All The Time*, SEATTLE POST-INTELLIGENCER, March 19, 2000, at P-I FOCUS, Pg. G1 (stating again that wetland programs are ineffective and that generally, state environmental agencies do not follow the law with regard to their mitigation plans, at least in Washington state); Michael J. Bean, Testimony Before the Senate Subcommittee on Fisheries, Wildlife and Drinking Water, November 3, 1999 (stating generally that HCP mitigation efforts are underregulated, hard to enforce, and difficult to judge in terms of efficacy); Keith Rogers, *Employees Say Agency Retaliating*, LAS-VEGAS REVIEW JOURNAL, December 9, 1998, at 1B (stating how Clark County Health District (NV) officials were accused of harassing employees who reported violations of mitigation schemes to EPA).

[28]490 U.S. 332 (1989).

[29]"Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Robertson v. Methow Valley*, 490 U.S. 332, 353 (1989).

[30]*Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982).

Second, EPA should include administrative recourse for parties who put their faith in mitigation only to see it fail. While EPA grants that an area-specific agreement or other such mitigation scheme may be reviewed if circumstances change (*i.e.*, if it does not work), this review process seems to require a new permitting action in order to make the complaint ripe. And even then, community members must still wait while EPA investigates. Given what is at stake, EPA should allow for a direct review of mitigation measures if the scheme is accused of failure.

V. INVESTIGATIVE PROCEDURES

A. Submission of Additional Information

In §§ V.A and V.B.1, EPA states that recipients may submit evidence to support their position that disparate impacts do not exist "during the course of the investigation." This apparently conflicts with EPA deadline at §II.B.1 of the recipient having 30 days – and just 30 days – to rebut the complaint.

B. Granting Due Weight to Submitted Information

In general, the idea that the EPA can dismiss complaints merely because a state agency claims it is in compliance with Title VI is contrary to EPA's obligations under the Civil Rights Act. EPA grants that these obligations exist, saying that EPA "cannot grant a recipient request that EPA defer to a recipient's own assessment." EPA resolves the contradiction between policy and obligation by saying that it will review state plans to make sure they are adequate. This promise is insufficient to legitimize the prima facie illegality of EPA's due weight policy under Title VI. EPA should be much more specific about its review process for both scientific studies and area-specific plans.

In §V.B, EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

1. Analyses or Studies

Requiring that studies that be granted due weight conform to "accepted scientific approaches" necessarily biases due weight in favor of industry and state agencies. Clearly, a low-income community group fighting for environmental protection is not generally going to have the resources to pay for a comprehensive study that meets EPA's standards. There is also evidence to

suggest that EPA ignores studies by community groups, even when submitted in a scientifically acceptable fashion.[31]

Thus, it is likely that most studies of the area mentioned in a particular complaint will be filed by the party adverse to the complainant. This creates an obvious objectivity problem. How can EPA trust a study paid for and conducted by the agency whose funding is riding on the outcome of the study? Does EPA truly expect any result other than one that would lead to a finding of Title VI compliance? While the study itself must meet methodological criteria in order to pass muster with EPA, this seems to be inadequate to truly guarantee the objectivity of any such study. As former EPA Administrator William Ruckelhaus said, “a risk assessment is like a captured spy. Torture it enough and it will tell you whatever you want.”

In addition, EPA's promise not to duplicate a study if relevant studies meet the methodological criteria seems foolish. In the unlikely event that a community group can actually afford a study, it is likely that their study and the one submitted by the state agency would reach opposite conclusions. Faced with such contradiction, there seems to be no way for EPA to resolve the matter except to make its own survey of the situation. While EPA is likely to argue that it can resolve any such conflict by examining the methodology of the two studies to see which is superior, this is inadequate. EPA itself grants that data and interpretation of data is difficult and it is certainly possible that two different studies can reach opposite conclusions even if conducted properly.

EPA should conduct its own studies, when able, because the standard for dismissing a study is too high. By denying due weight only to studies that have "significant deficiencies," EPA sets a standard for dismissal that allows for “moderately” deficient studies to be accepted. For example, if community residents complain of adverse impact, an agency study suggests that there are no impacts, and the study has "minor" deficiencies, EPA could grant the study due weight under the current Guidance. By making the standard "significant" EPA allows for too much inconsistency in studies that may result in unchecked violations of Title VI.

EPA should also do the following:

- If an agency study contains discrepancies, then EPA should not rely on it, instead of using the current “likely not” language in §V.B.1.

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[31] Catherine O’Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and “Acceptable” Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

• Be flexible in allowing unscientific studies from community groups to have at least some weight, perhaps enough to trigger an EPA study. Understandably, EPA does not want to grant full weight to a study that does not conform to "accepted scientific principles." But at the same time, EPA should be sensitive to the fact that many poor communities may not be able to pay for scientific studies, and out of respect for their means, EPA should grant those studies at least some weight.

• If a complainant requests that EPA conduct an independent study, EPA should not grant due weight to a study submitted by a recipient but should evaluate the recipient's study in light of EPA's own findings.

2. Area-specific Agreements

EPA has taken a seriously wrong turn with its promotion of "area-specific agreements." Ostensibly put forward as a way for recipients to be more pro-active in identifying and working to remedy or prevent environmental justice problems (Recipient Guidance § II.A.2), these agreements turn out to be a part of EPA's Title VI enforcement plan (*see, e.g.*, Guidance § V.B.2). EPA encourages recipients to develop area-specific agreements (ASAs) which contain plans to eliminate or reduce existing disparate impacts. As an incentive, EPA will review such plans and if they meet certain criteria, they will be given "due weight" in a Title VI investigation. The precise role the Guidance ascribes to ASAs in the course of a civil rights investigation is both ambiguous and troubling. Despite EPA's assertions in § V.B. ¶ 1 that it "cannot grant a recipient's request that EPA defer to a recipient's own assessment," the treatment of area-specific agreements in essence does just that.

The Guidance suggests that unless certain criteria are met, plans "might not be sufficient to constitute an agreement meriting due weight." This suggests that "due weight" is a threshold rather than a range. This makes "due weight" operate like a presumption rather than a factor warranting typical evidentiary weight. This distinction is not merely academic. If a determination that an ASA merits "due weight" precludes further inquiry into the recipient's actions, then operationally it is an improper presumption of compliance with Title VI. For example, consider a hypothetical recipient who establishes an agreement that meets the "due weight" criteria because the plan it contains will optimistically result in some pollutant reduction over time. But the plan is mediocre at best and it is not as good as plans developed in other jurisdictions under similar scenarios. Nevertheless, if this plan meets the "due weight" threshold, the Guidance suggests that at that point the EPA will determine without further inquiry that the recipient is adequately responding to the disparate impact and therefore is not violating Title VI. In such a case, a mediocre plan operates just as effectively in a Title VI investigation as a much more comprehensive plan. If interpreted this way, the Guidance promotes the perverse incentive for recipients to do the minimum necessary to trigger the "due weight" determination and insulate

the recipient from an adverse Title VI decision. Once again, EPA hurts the civil rights complainant and rewards the civil rights violator.

EPA proposes to rely on its findings about such a *general agreement* to dismiss a *specific complaint* alleging violations of the agency's Title VI regulations. It is difficult to see how this would fulfill EPA's legal responsibilities under Title VI, which require the agency to investigate the complaints that are filed. EPA could not itself legally adopt a policy that said, "We will dismiss all Title VI complaints brought against recipients which have announced that they are trying to address environmental justice issues in some fashion, without determining whether the complaints of actions in violation of the regulations are in fact justified." But by proposing in the Guidance to rely on area-specific agreements, EPA manages to adopt such a policy by the back door.

The construct of area-specific agreements thus has no basis in law, and indeed flies in the face of EPA's legal obligations. Even if one were to assume that the notion of the area-specific agreement were legitimate, it is completely devoid of any features that could assure the recipient's compliance with any goals of pollution reduction, pollution prevention, or environmental justice. There is no requirement that anyone monitor progress, or revise the plan to meet changed circumstances. There is no requirement that the community groups that are parties to such an agreement be able to enforce it in court. The only thing about the area-specific agreement that has *any* enforceable consequences is EPA's proposal to use it to dismiss complaints without deciding whether the complaint, considered on its own, has merit. The agreement is voluntary and informal. There is no requirement that the any of the parties actually represent any people in any affected community, or that any party has the power to deliver what it is promising. There is no provision for any EPA evaluation of these issues. EPA appears to be prepared to take any area-specific agreement at face value, no matter how unrepresentative the process by which it was arrived at, how unrealistic the goals it announces, or unfair the result of its application to preclude particular complaints.

This advocacy of an informal, unenforceable, uncontrolled method to preclude investigation of Title VI complaints is a disgrace. It should be completely eliminated in favor of what this Guidance should have presented, but did not: a program of civil rights enforcement, in which EPA informs recipients of their obligations to obey federal civil rights law, provides examples of what this means, and decides whether recipients who are complained against have failed to live up to their legal responsibilities.

With regard to ASAs and due weight in general, EPA should carefully consider the lessons learned from the experiences with states under the Clean Air Act. The due weight provisions of this part of the Guidance are strikingly similar to the theory if not the practice of certifying state implementation plans under the Clean Air Act. Those plans have not been universally successful,

and indeed, in some cases appear to give states a blank check to continue polluting with little or no enforcement threat from EPA. As of December 13, 1999, 119 areas around the country were in nonattainment for one or more listed air pollutant, 29 years after the passage of the Clean Air Act.[32]

EPA must not repeat the mistakes it has made under the Clean Air Act. Some examples of these failures are: 1) constantly granting interim approval to inadequate state permitting schemes resulting in slow action by states to correct them; 2) certifying SIPs only to see them ignored by states (leaving enforcement to citizen groups[33]); and 3) many urban areas of the country still contain unhealthy air that do not meet the NAAQS some thirty years after the passage of the Clean Air Act. The easiest thing that EPA could do is to be less conditional in its enforcement language in the Guidance. Let state agencies know that if they violate EPA regulations, they will indeed be held accountable. For example, by saying that EPA *may* investigate if the ASA is inadequate, EPA is sending a message that it is not serious about making state agencies abide by the law. This is a mistake.

EPA should drop ASAs altogether. The ASA framework completely ignores the reality and the history of the environmental justice movement, and will only end up hurting, not helping the communities in need.

a. EPA penalizes complainants by using ASAs in later-filed complaints.

The practical consequences of a threshold-type "due weight" standard are more disturbing considering EPA's position that if a later-filed complaint raises allegations regarding "other permitting actions" by the recipient, EPA will generally rely on the earlier finding (presumably of due weight) and dismiss the complaint. Not only does the existence of an ASA act as an evidentiary presumption in the current Title VI investigation but, remarkably, it effectively operates as *res judicata* or *collateral estoppel* in subsequent Title VI proceedings.

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these exceptions raise

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[32]<http://www.epa.gov/airs/nonattn.html> checked on July 5, 2000.

[33] *See Coalition for Clean Air, Inc. v. South Coast Air Quality Management District* (C.D. Cal. 1999) 1999 U.S. Dist. LEXIS 16106; *Citizens for a Better Environment v. Bay Area Air Quality Management District* (N.D. Cal. 1990) 746 F.Supp. 976.

further ambiguity. Normally, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency's position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an ASA is no longer is entitled to "due weight."

b. Area Specific Agreements are a majoritarian impulse that has no place in civil rights enforcement.

The lack of any EPA quality control and the potentially preclusive effect of ASAs create an open invitation to fraud. Recipients – and even more, polluters and developers – have every incentive to draft a fine-sounding plan, set up a few front groups of employees, friends, and/or relatives of the industry or developer, and have the front groups sign the plan. Then, after a group whose members are actually residents of the affected community of color files a Title VI complaint with EPA, the recipient triumphantly produces the area-specific agreement for EPA's review, with the expectation that the complaint will be dismissed.

At base, ASAs are a majoritarian impulse: get agencies and community leaders to agree on what is best for a community, and then preclude complaints about that agreement. However, Title VI was passed to protect minority interests from just such majoritarian tyranny – to protect community residents who disagree with their governments and "leaders." As such, ASAs have no place in Title VI enforcement.

E. Filing/Acceptance of Title VI Complaint Does Not Invalidate Permit

The Guidance states that the OCR will not consider a complaint until the permit has issued, and further that the submission of a complaint will not stay the permit. This means that the most meritorious Title VI complainants will nevertheless experience a substantial lag time and possibly irreversible impairment to their communities before any relief is provided. Considering the current backlog of cases, even the most flagrant violators can expect to continue plainly illegal practices for years, even decades, before any sanctions occur. Yet, in light of this troubling potential situation, the Guidance contains no provision to consider the stay of a new permit (and associated adverse impacts) pending an investigation in cases which would warrant a temporary injunction in an analogous court proceeding. EPA's failure to stop the permit complained about from going into action during the investigation of a Title VI complaint discourages the resolution of Title VI complaints. Because EPA is refusing to stay the permit in question, the agency being complained against has no incentive to either change its practices or resolve the Title VI complaint.

EPA has not ever decided a Title VI complaint against a state or local agency. In fact, of the almost 100 complaints filed in the past 7 years, EPA has only decided one – and in that one, it decided it against the complainant and for the state of Michigan. Some 51 complaints are pending at the time this comment is filed, and there is no hope for resolution of those cases anytime soon. With this record, state agencies have no fear of EPA's Title VI enforcement when the agencies see a new complaint come in, because they know EPA will never do anything about it.

By refusing to stay permits while a complaint is investigated, EPA is guaranteeing that communities' civil rights will be violated. Rather than practicing a precautionary principle – first, do no harm – EPA lets the violation go on, unchecked, for years. If, instead, the permits were stayed, then agencies would move to quickly resolve the complaints, leading to actual civil rights improvements.

VI. DISPARATE ADVERSE IMPACT ANALYSIS

A. Framework for Disparate Adverse Impact Analysis

A troubling aspect of the new EPA civil rights policy is found in §§ VI.A (steps 1 and 4) and VI.B.1.a. In § VI.A, step 4, the Guidance states that "if a permit action clearly leads to a decrease in adverse disparate impacts, it is not expected to form the bass of a finding of a recipient's non-compliance with EPA's Title VI regulations and will be closed." Similarly, section VI.B.1.a notes two situations "where OCR will likely close its investigation into allegations of discriminatory effects":

(1) If the complaint alleges discriminatory effects from emissions and the permit significantly decreases overall emissions; and

(2) If the complaint alleges discriminatory effects from emissions and the permit significantly decreases the pollutants of concern named in the complaint.

Two examples of how this new policy of EPA's will allowed continued discriminatory effects on communities of color throughout the U.S. illustrate why it is flawed, and should be withdrawn.

First, let's look at the "multiple similar sources of pollution under the control of one jurisdiction" example. In this example, imagine that a particular state has three power plants, each of which emit 100 tons of toxic chemicals per year. Two of the power plants are located in white communities, and one in an African American community; the state is roughly 66 percent white an 33 percent African American, so there is no disproportionate distribution of the plants themselves. Each plant comes up for review of its new permits. The state grants a permit to plants #1 and #2,

both in white communities, which impose new pollution control techniques that both require and enable the power plants to emit only 25 tons per year of toxic chemicals. It also grants a permit to plant #3, in the African American community, but there, it imposes permit conditions that only require the plant to reduce its emissions to 75 tons per year of toxic chemicals. Is this discriminatory impact? Clearly – the African American community is forced to bear 50 tons more toxic chemicals than similarly situated white communities. What would EPA do? Well, under this Guidance, EPA would determine that the permit reduced the tons of emissions from power plant #3 by 25 tons – and 25% is certainly a "significant reduction" in emissions in anyone's book – and would thus dismiss the complaint. Thus, EPA, far from enforcing civil rights laws, would, through this new guidance, allow continued discrimination. We pointed out this same flaw in EPA's Interim Guidance, but that input was ignored.

The second example is the "unique source." Let's say there is a pollution source that is unique in a particular jurisdiction, for example a medical waste incinerator. There is only one in the entire state, and it is located squarely in the middle of a Latino and African American community. Now, the hypothetical plant emits 100 tons of toxic chemicals each year, and that pollution clearly has adverse impacts, and those impacts are clearly disparate on the basis of race. The plant has been there 20 years, and now comes in for a permit renewal. The agency gives it a permit, but says to the plant, "you have to reduce your emissions to 75 tons per year." The new permit will still have significant, disparate adverse impact – 75 tons per year of toxic pollutants borne by people of color and not whites – but it is a *reduction* from the old permit. A clear violation of civil rights. What would EPA do? Under this Guidance, EPA would determine that the permit reduced the tons of emissions from the incinerator by 25 tons – again, a "significant reduction" – and would thus dismiss the complaint. Thus, EPA would again avoid enforcing civil rights laws, and would allow continued discrimination.

Even if projects do decrease the total pollution, the emissions, even with the reductions, could still result in disparate impact. Title VI and EPA regulations make it illegal for a federally-funded program or project to discriminate, intentionally or unintentionally, against people of color. The Guidance should not make exceptions for disparate impact by allowing projects that are only *less* discriminatory than an alternative, or than the project originally was.

B. Description of Adverse Disparate Impact Analysis

EPA's Title VI regulations prohibit federally funded programs and projects from having a disparate impact on people on the basis of race, color, or national origin. EPA must revise at least two sections of its impact analysis to comply with that charge. First, the Guidance currently allows recipients to discharge hazardous amounts of pollutants in exchange for reducing overall pollution in a way that has a disparate impact on people of color. Second, it sets forth a

dangerously narrow view of impact. We address both of these flaws in their respective sections, below.

1. Assess Applicability

a. Determine Type of Permit

According to the Guidance, EPA will likely dismiss a complaint if the permit action that triggered the complaint significantly decreases overall emissions at the facility. To prevail, the recipient must demonstrate that the decreases occur in the same media and facility. For instance, EPA will not dismiss a complaint alleging adverse disparate impact from air discharges where the recipient demonstrates a decrease in water discharges.

The Guidance should also require the recipient to show that the decrease came from the *same pollutant* within that same media. Trading different pollutants from the same media can adversely affect communities of color in violation of the regulations implementing Title VI. Because different air pollutants have different properties, they interact differently, and affect humans and the environment in different ways. Air pollutants are not interchangeable. Some air pollutant emissions spread out throughout a basin, while others hover, affecting primarily the immediate area. Other air pollutants are highly toxic, while some are relatively benign. For EPA to treat all air pollutants as the same for purposes of "overall emissions" reduction is to ignore the very real health consequences that reductions in relatively non-toxic chemicals – and increases in more toxic chemicals – can have. For instance, if OCR dismisses a Title VI claim because a facility has reduced its emission of SOx, bringing down its overall air emissions, but emits larger quantities of ammonia, persons located in the vicinity of the facility likely will face dire adverse impacts. The Guidance should state that in order to show that the permit action triggering the complaint significantly decreases the overall emissions at the facility, the recipient must demonstrate that the decreases occur within the same media, *pollutant* and facility. Thus, if a facility emits toxic and relatively non-toxic pollutants, it should not be allowed to trade one for the other for the purposes of "significantly reducing" its emissions overall.

In footnote 117 in §VI.B.1.a, the Guidance notes that "if OCR determines that an area-specific agreement meets the criteria described [earlier]... then investigations into future complaints regarding permit actions covered by the area-specific agreements generally will be closed." We refer to our comments on §V.B.2, above, but also point out that this is completely antithetical to civil rights enforcement and goes far beyond EPA's regulations in narrowing EPA's Title VI obligations. Simply because a permit is covered by an area-specific agreement does not mean that it will not have disparate impact on the basis of race, color or national origin. Further, the ASAs do not measure conditions on the ground and thus cannot be dispositive of whether or not there is disparate impact. Finally, because EPA would apply the ASA dismissal to future

complaints, it is effectively telling people in jurisdictions with ASAs that EPA will never enforce civil rights in their communities – a flagrant disregard for Title VI and EPA's obligations to enforce it. This is yet another example of EPA hurting the civil rights complainant, and helping the civil rights violator.

Here again EPA asserts it may conduct compliance reviews even if complaints are dismissed on the basis of a decrease in permitted emissions. As we have noted in §§ III.A, III.B.1 and V.B, the fact that EPA has the authority to undertake such a review is no solace to complainants. As a practical matter, EPA is incapable of timely investigating the 51 complaints currently pending before it, much less undertaking independent *sua sponte* compliance reviews.

Please also see the comments under section VI.A, above.

b. Determine if Permit is Part of an Agreement to Reduce Adverse Disparate Impacts

The EPA should not defer to Area Specific Agreements, because such agreements are conceptually flawed and may also not mirror the reality on the ground. Please also see our comments on §§ V.B.2 and VI.B.1.a, above.

2. Define Scope of Investigation

In §VI.B.2, EPA again illegally limits the scope of its investigation and enforcement to only impacts "cognizable under the recipient's authority." This arbitrary and artificial limitation on which impacts will be examined ignores the fact that the recipient may be the proximate cause of the impacts complained of – that the impacts would not occur but for the recipient's actions, whether or not such impacts are "cognizable under the recipient's authority." This is a radical narrowing of EPA's Title VI enforcement from the mandate found in Title VI itself and EPA's Title VI regulations.

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving federal financial assistance.[34] Nothing in Title VI limits its application to "discrimination on the basis of race, color or national origin *which manifests itself in ways cognizable under the recipient's authority*," as the Guidance would read it.

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[34]42 USC §2000d (1988).

EPA's regulations under Title VI explicitly codify the disproportionate impact, or discriminatory impact, standard. Under 40 CFR §7.35(b),

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

Nothing in this regulation states that a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *cognizable under the recipient's authority* because of their race, color or national origin." The regulations simply say, a recipient cannot take actions which have a discriminatory effect. Period.

This is yet another example of EPA taking a policy position in clear conflict with its own Title VI regulations, and EPA's action is thus arbitrary and capricious. It is also yet another example of EPA taking a policy position which hurts the civil rights complainant and helps the civil rights violator.

a. Determine the Nature of Stressors and Impacts Considered

The Guidance construes "impact" in an unacceptably narrow way. According to the Guidance, impact is "a negative or harmful effect on a receptor resulting from exposure to the stressor," and, "generally, a stressor is any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems." This definition does not take into account the social, cultural or economic impacts of projects, and is a significant narrowing of both Title VI and EPA's Title VI regulations, neither of which limits impacts solely to health impacts. Looking again at 40 CFR §7.35(b), quoted above, nothing in the regulatory language says a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *in terms of health impacts* because of their race, color or national origin." Here again EPA is hurting the civil rights complainant and helping the civil rights violator, in dramatically limiting the scope of its investigation. This narrowing is far more limited than 40 CFR §7.35(b), putting the Guidance once more in conflict with its own regulations.

In Title VII and Title VIII cases, the basic inquiry is whether a policy has a disproportionate impact on people of color "in the total group to which the policy was applied."[35]

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[35] *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4th Cir. 1989).

Here, the corresponding inquiry is whether the program or the stressor has a disproportionate impact based on race, color, or national origin. It is EPA's power and duty to consider all impacts, including health, social, cultural and economic.

Although we feel this is unnecessary, if EPA needs to hang its enforcement of civil rights on environmental statutes, there are ample opportunities for it to do so. The purpose of environmental statutes is often not only to prevent health impacts but also aesthetic injuries. For example, the Clean Water Act states in §101 that a primary purpose of the Act is to make water swimmable and suitable for recreation. The National Environmental Policy Act similarly requires environmental impact statements to consider not only the health impacts but also the social impacts that major projects will have on a community before commencing those projects.

i. EPA must consider cultural and social impacts.

To illustrate the cultural impacts a project can have, consider a situation in which a company proposes to build a factory that would have the effect of destroying a piece of land which was culturally significant to a certain protected class – say, for example, a Native American burial mound or a historical African American church. In such a situation, the activity that destroyed the cultural resource would clearly have a disparate impact on the basis of race, but that impact would not be a health-based impact. Under EPA's Guidance, a Title VI claim in this context would be rejected. This is an illegal narrowing of EPA's Title VI enforcement responsibilities.

Federal courts repeatedly have rejected the narrowing of Title VI which EPA proposes here. Instead, the courts have construed disproportionate impact to relate to the impact of the project as a whole. In *Bear Lodge Multiple Use Association v. Babbitt*, a Title VI case, the court construed impact broadly to include cultural, spiritual and religious impacts.[36] Several Native American Nations consider Devil's Tower the place of creation and hold their religious and cultural practices there. Devil's Tower is also a recreation spot for avid rock-climbers. The National Park Service considered the impact of the climbing activity on the cultural and spiritual life of Native Americans, to protect the cultural resources of Devil's Tower and to provide visitor enjoyment. The NPS developed a Climbing Management Plan. The plan, among other things, restricted climbing at the Tower during certain times. The Court upheld the NPS's decision and supported the view that preservation of the cultural quality of the site was an appropriate consideration.

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[36]*Bear Lodge Multiple Use Association v. Babbitt,* 175 F.3d 814 (1999), *cert. denied* (2000).

In other Federal Civil Rights cases, plaintiffs have raised social and cultural impacts. In *Grimes v. Sobol*,[37] plaintiffs alleged that a public school curriculum discriminated against African American students, and contributed to the low self-esteem and high crime rate, of African Americans. In *Allen v. Wright*,[38] the court acknowledged that stigma was a legally cognizable injury. In *Rozar v. Mullis*,[39] plaintiffs alleged injury to property values and welfare as well as to health. In none of these cases did the court deny or dismiss the claim because cultural injuries were not appropriate.

ii. EPA must consider economic impacts.

The Guidance also fails to consider economic impacts, although one of the central truths of environmental discrimination is that it has profound economic impact on people of color. Even facilities that do not have a demonstrable health impact often have a dramatic impact on housing and land values; where such impact is distributed in a discriminatory pattern, Title VI clearly applies. EPA's failure to consider economic impacts again hurts the civil rights complainant and helps the civil rights violator, and is a marked limitation of its own Title VI regulations. Ironically, EPA *is* willing to consider the *positive* economic effects of the permit, as "justification" for the facility offered by the recipient.

The Guidance's definitions fail to fully reflect the true impact of facilities that require environmental permits. To choose to limit the definitions construing impact solely as health impact, is artificial, arbitrary and capricious.

iii. EPA must change other sections of the Impact Analysis.

In clarifying that impact extends to injury of cultural and social life, EPA will need to adjust some sections of its impacts analysis. For instance, in step 5 of the impact analysis, (disparate impact), the Guidance explains that if there is a health impact, OCR will consider the complaint regardless of the complainants' proximity to the stressor, so long as there is a pathway.

This recognition is significant because injury does not always correspond with proximity. For example, if African Americans attend a Baptist Church in a white section of town, and a large factory is built next door to that church, the white residents might not be adversely affected but the African Americans who attend the church will be. The Guidance should state clearly that

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[37] 832 F. Supp. 704 (1993).
[38] 468 U.S. 737 (1984).

[39] 85 F.3d 556 (11th Cir. 1996).

OCR is to consider all impacts arising from the permitted facility, including health, cultural, social and economic impacts, regardless of the complainants proximity to the stressor.

The same applies to the impact assessment, step 3 of the impact analysis, in which OCR inquires into whether there is a "direct link" from the stressor to an adverse health or environmental impact. Currently, that approach does not take into account a direct link from the stressor to social, cultural or economic impacts. The Guidance should consider all the discriminatory effects arising from stressors that EPA regulates.

The EPA is required to comply with Title VI which prohibits racial discrimination. In that vein, EPA should revise its subsection that exempts recipients who show a decrease in overall pollution from the Title VI complaint process, and clarify its impacts analysis to include social, cultural and economic impacts.

b. Determine Universe of Sources

3. Impact Assessment

EPA's "hierarchy of data types," found in §VI.B.3, should move "known releases of pollutants or stressors into the environment" into the top position on the hierarchy, certainly above modeled exposure concentrations.

EPA calls for a "direct link" between an adverse health or environmental outcome and the "source of the stressor." This, as the EPA well knows, is virtually impossible except in the most egregious cases of toxic poisoning. Further, as EPA notes, it may require data gathered longitudinally over years – far longer than the 180 days which EPA gives complainants to assemble data and file a complaint – to discover such a link. Further, there may be impacts which do not manifest themselves for many years after exposure, such as certain types of cancer. Thus, EPA should focus on exposure to pollution, not only health outcomes.

4. Adverse Impact Decision

The Guidance suggests that where risks or other measures of potential impacts meet or exceed a relevant "significance level," the impact will be presumed adverse. While this is may be a good approach, EPA should not make the converse assumption, *i.e.*, a presumption of no adverse impact if a significance level is not exceeded. It is not unheard of for permit applicants and regulatory officials to manipulate baselines and emission factors to keep from triggering applicable significance levels. This risk is likely to be greater in those very cases that Title VI is designed to address, cases where regulatory agencies have an inappropriate bias in favor of the regulated community to the detriment of residents near the polluting facilities. Thus, even in cases

where significance levels are *not* exceeded, EPA should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, EPA should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

EPA should also keep in mind, as discussed below in §VI.B.4.b, that significance thresholds are not set by science but through a political process which is subject to influence by industry and rarely subject to influence by affected communities.

a. Example of Adverse Impact Benchmarks

EPA's use of a significance threshold of 1 in 10,000 to define "adverse impact" is extremely loose, more so than every single EPA regulation establishing significance thresholds, where such thresholds range from 1 in 100,000 to 1 in 1,000,000. EPA should consider an cancer risk of greater than 1 in 1,000,000 an adverse impact.

In its example of using the Hazard Index, it appears that EPA will only use the benchmark to find against complainants, but not to find for them. EPA states that a hazard index score of under 1 would make it "unlikely" for EPA to find the impact adverse, while values over 1 – the significance threshold for many regulations – would not trigger EPA's automatic finding of adversity. This double standard is again a policy decision EPA has made which hurts the civil rights complainant and rewards the civil rights violator.

b. Use of National Ambient Air Quality Standards

The Guidance sets forth EPA's policy position that if the area in question is in compliance with a health based standard ambient air quality standard, there is no "adverse" impact. The Guidance further suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. In the context of the backlog of cases, intense political pressure from industry and some state regulators, budget constraints, this facile presumption is not only a recipe for regulatory inertia, but a convenient escape hatch as well. Moreover, since the complainant does not have standing as an "adverse party," and the recipient will not challenge such a finding, the OCR is in the awkward position of having to rebut its self-imposed presumption. This procedural deformity is a consequence of the EPA's curious attempt to cast the process as non-adversarial with respect to the complainant, while at the same time affording the recipient the protections (and more) of an adjudicative, adversarial process. Perhaps the better approach would be to recognize that the because the complainants' civil rights may have been violated by the recipient, the process is necessarily

adversarial, even though the proceedings are labeled an administrative investigation. Moreover, since the recipient has significantly more resources than the complainant, EPA should be extremely cautious in imposing procedural roadblocks that operate to leave the complainants without recourse. The use of the presumption – which is wholly unsupported, as detailed below – is a burden on complainants, another example of where EPA hurts the civil rights complainant and helps the civil rights violator.

In addition to the procedural burden on complainants, EPA's reliance on the National Ambient Air Quality Standards (NAAQS) is misplaced, because an air basin's attainment status under NAAQS does not mean a polluting facility will not have an adverse impact on the surrounding community.[40] EPA's reasoning is flawed because polluting facilities can still have an impact on a community even when NAAQS are met. EPA's rationale – that attainment under NAAQS equals no adverse impact – is factually incorrect and conceptually flawed on six different grounds: it ignores toxic hotspots, ignores the fact that significant health effects can occur at exposure to air pollution levels below the NAAQS, ignores that "health-based" standards are set through a political process, ignores acute health effects of exposure to VOCs, ignores accidents and upset conditions at plants, and ignores the fact that health based standards are normed on healthy white males. These deficiencies are detailed below.

First, the EPA's rationale ignores toxic hotspots, or localized impacts from air pollution sources that do not cause an area-wide effect. U.S. environmental history is replete with examples of facilities that have had a significant impact on the health of nearby residents, while the air basin remained in compliance with NAAQS. Such local impacts may be diluted or lessened when averaged or spread across an entire air basin. This is particularly true for some VOCs, such as toxic air contaminants, which have their greatest effect when they are most concentrated, and for lead, which tends to "fall out" close to its source of emission. The general determination that an area is in compliance with NAAQS – although perhaps appropriate for SIP planning purposes – may be virtually meaningless at the local level. Air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

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[40]EPA's approach also appears to contradict its statement in the Recipient Guidance, at §III.B.3.e, that "risks [which] meet or exceed a significance level as defined by law, policy *or* science... would likely be recognized as adverse in a Title VI approach." (Emphasis added) In relying on the NAAQS, EPA is embracing only law, ignoring the fact that both science and public policy indicate that exposure to pollutants at the NAAQS levels is harmful to human health.

Second, EPA's presumption that compliance with ambient air quality standards equals no impact ignores the fact that significant health damage can occur at exposure levels well below the NAAQS levels. Researchers funded by the EPA have found significant health damage to humans exposed to pollution at levels lower than EPA's "health-based" standards. For example, researchers at Loma Linda University studied more than 6,000 non-smoking volunteers over 15 years to determine the impact of ozone and other airborne pollutants on them. The study found that men exposed to ozone levels of 80 parts per billion (ppb) -- EPA's 8-hour "health-based" NAAQ standard – ran three times the risk of lung cancer as men exposed to lower levels. Additionally, both men and women regularly exposed to levels of particulate matter lower than the NAAQS of 50 micrograms per cubic meter ran an increased risk of lung cancer. Both men and women exposed to elevated levels of sulfur dioxide also ran an increased risk of lung cancer.[41] Other studies have demonstrated that long-term exposure to low levels of lead can also have significant impact to kidney function.[42]

One can see how EPA's new policy plays out in practice by examining the recent *Select Steel* decision,[43] in which EPA dismissed a Title VI complaint because the facility complained of, the Select Steel mill in Flint, Michigan, would not have caused the state to violate the NAAQS for ozone. According to Michigan state records, Flint's average 8-hour ozone levels were between .082 and .086 parts per million (ppm) in 1996-1998. Not only does this violate EPA's health-based standard of .080 ppm, but it is also above the 80 ppb (=.080 ppm) level at which EPA-funded researchers found significant health impacts. In the *Select Steel* decision, EPA equated this level of ozone pollution – which caused levels of lung cancer three times normal and was actually *above* the NAAQS – with "no adverse impact."

EPA's rationale also ignores the fact that the setting of "health-based" standards for air pollutants such as ozone is partly a political process, in which the standards are often set based on negotiation with industry. Nor are the "health-based" standards infallible: in case after case, new, more restrictive standards have been promulgated when the existing "health-based" standard has

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[41]W. Lawrence Beeson, David Abbey and Synnopve Knutsen, *Long-term Concentrations of Ambient Air Pollutants and Incident Lung Cancer in California Adults*, 106 ENVIRONMENTAL HEALTH PERSPECTIVES 813-823 (December 1998).

[42]Ja-Liang Lin, Huei-Huang Ho and Chun-Chen Yu, *Chelation Therapy for Patients with Elevated Body Lead Burden and Progressive Renal Insufficiency*, 130 ANNALS OF INTERNAL MEDICINE 7-13 (January 1999).

[43]*St. Francis Prayer Center v. Michigan Department of Environmental Quality*, EPA File No. 5R-98-R5.

proven inadequate. Examples include the failure of government to set correct or adequate standards for blood lead levels – the Centers for Disease Control has lowered the "safe" blood lead levels from 40μ/dl to 25μ/dl to 20μ/dl to today's current 10μ/dl over the past 15 years -- to the constant readjustment of buffer zones and re-entry intervals for pesticides in agriculture. Further, significant data gaps exist, particularly in the area of volatile organic compounds (VOCs), which make it impossible to state with certainty that exposure to such chemicals -- even at "safe" levels -- will not have an impact.

EPA's reasoning does not take into account acute health impacts of exposure to VOCs, and also omits the cumulative physiological and psychological effects of environmental pollution from trucking, odors, noise, vibrations and stigma, which all increase human stress. There is considerable evidence that exposure to air pollutants such as VOCs causes increased stress.[44]

Overlooked in EPA's analysis, but perhaps of greatest consequence of all to communities adjacent to hazardous facilities, are industrial accidents and upset conditions. The fact that a facility's permit meets health-based standards is no guarantee there will not be accidents or upset conditions at that facility. The impact of industrial accidents has been well documented by federal agencies – including the EPA – and watchdog groups. The United States Chemical Safety and Hazard Investigation Board (CSHIB) reports that "[n]o comprehensive, reliable historical records exist" regarding chemical accidents in the United States, and thus the scope of accidents is under-reported. The number of accidents that *is* reported, however, is staggering. CSHIB reports that "[d]uring the years 1988 through 1992, six percent, or 2070 of the 34,500 accidents that occurred resulted in immediate death, injury and or/evacuation; an average of two chemical-related injuries occurred every day during those five years."[45] Further, CSHIB notes that between 1982 and 1986, 464,677 people were evacuated from their homes or jobs due to chemical accidents.[46]

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[44]*See, e.g.*, J. Timmons Roberts, *Stress, Trauma, and Hidden Impacts of Toxic Exposures on Vulnerable Populations*, Testimony presented at the National Environmental Justice Advisory Council, Baton Rouge, Louisiana, December 9, 1998.

[45]United States Chemical Safety and Hazard Investigation Board, "What Human Consequences Result from Chemical Accidents," CSHIB website, http://www.csb.gov/about/why_04.htm (February 2, 1999).

[46]*Id.* The United States Public Interest Research Group (USPIRG), in its recent report *Too Close to Home*, chronicles some of serious impacts on surrounding communities from chemical accidents at facilities. In August and September, 1994, in Rodeo, California, a 16-day release of 125 tons of a caustic catalyst at a Unocal facility sickened and injured 1500 people living near the plant**.** The report elaborates:

Victims experienced vomiting, headaches, memory loss, brain damage, and other cognitive

EPA itself has documented the impact of industrial accidents on communities. A summary by EPA's Chemical Emergency Preparedness and Prevention Office (CEPPO) of Accident Investigations is a sobering look at life in a community where an industrial accident has occurred. One such community is Savannah, Georgia, where an accident happened at Powell Duffryn Terminals, Inc., on April 10, 1995. EPA reports that 2000 residents were evacuated — some for as long as 30 days. The local elementary school was temporarily closed. Water in an adjacent marsh was heavily contaminated.[47] Other reports by EPA's CEPPO chronicle similar evacuations of the surrounding community. One accident at a Shell Chemical facility in Deer Park, Texas on June 22, 1997 mentions "[b]roken window damage reported in area" and an explosion that could be heard ten miles away.[48] Another accident at the Accra Pac facility in Elkhart, Indiana on June 24, 1997 reports a fire and explosion involving ethylene oxide where approximately 2500 residents were evacuated and 59 people were treated at the hospital.[49]

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disorders. Some residents remained sick for well over a year after the Unocal accident.

U.S. Public Interest Research Group, *Too Close to Home: A Report on Chemical Accident Risks in the United States* (1998). The report can be found at http://www.pirg.org/pirg/enviro/toxics/home98/page4.htm (February 2, 1999). USPIRG's *Too Close To Home* found a strong correlation between high disaster potential and actual accident frequency. The report publishes a table titled "Top U.S. Counties ranked by worst-case disaster potential," which found Harris County, Texas (Houston) number one, Los Angeles County, California number two and Cook County, Illinois (Chicago) number three in the nation for disaster potential. These areas already have well documented environmental justice problems.

In Williamsport, Pennsylvania, on January 4, 1996, a thick cloud of chlorine gas blanketed the city, sending 26 people to the hospital. Victims suffered headaches, eye irritation, and breathing problems. The cloud formed as a result of a chlorine leak from a railroad tanker at the Lonza Chemical Plant. A 1993 accident at General Chemical Corp. in Richmond, California sent 24,000 people to the hospital from inhaled acid mist. The USPIRG report lists several other mass evacuations, including one in Superior, Wisconsin in 1992 where 40,000 people were evacuated. *Id.*

[47]Chemical Emergency Preparedness and Prevention Office, Office of Solid Waste and Emergency Reponse, U.S. Environmental Protection Agency, http://www.epa.gov/awercepp/pubs/accsumma.html (February 2, 1999).

[48]*Id.*

[49]*Id.*

Similarly, EPA's rationale that a facility, once permitted, cannot be considered to have a disparate impact on a community, ignores the reality of compliance violations (sometimes in the form of upset conditions). Communities and the public are well aware, and facts substantiate, that accidents and even the potential for accidents and compliance violations from an industrial facility have a serious impact on community health and well-being.

Finally, the "health-based" standards historically have been set using the norm of a healthy, white male of average weight. The use of such standards may be discriminatory in itself, and certainly does not take into account sensitive receptors and people who are outside the "norm." By omitting any consideration of the critiques of existing regulatory standards and procedures, by the environmental justice movement and others, the EPA's Guidance naturalizes environmental injustice.

There are some among us who are concerned that EPA's new Title VI policy may create a legal hurdle that is impossible to surmount for Title VI complainants in areas that are in attainment under the Clean Air Act. By setting the threshold of "adverse" impact at the level at which a facility will affect the area's compliance with the national ambient air quality standards (NAAQS), EPA has effectively shut the door on any Title VI complaints from areas in attainment under the Clean Air Act, because the EPA's hurdle is legally impossible to meet. It is legally impossible for an agency to grant a permit in an attainment area which would result in the violation of NAAQS. Under the Clean Air Act, an agency may not grant a permit which would violate NAAQS.[50] In other words, if a facility applied for a permit that would violate NAAQS, the agency would be required to turn it down; if a facility is granted a permit, by definition it does not violate NAAQS. Thus, EPA's hurdle – that a permit must cause a violation of NAAQS to have an impact – means that, legally, there can never be a successful Title VI claim filed in an attainment area. EPA has effectively read Title VI out of the equation entirely.

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[50] 42 U.S.C. §7475(a)(3); 40 C.F.R. §52.21(k). The Code of Federal Regulations is clear:

> The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification... would not cause or contribute to air pollution in violation of:
>
> (1) Any national ambient air quality standard in any air quality control region[.]

40 C.F.R. §52.21(k).

VII. DETERMINING WHETHER A FINDING OF NONCOMPLIANCE IS WARRANTED

A. Justification

EPA proposes to tolerate concededly discriminatory effects if the recipient comes up with a plan to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here to institutionalize discrimination, allowing recipients who are known to be responsible for discriminatory impacts to patch things up and get a clean bill of health.

EPA gives recipients "the opportunity to 'justify' the decision to issue the permit *notwithstanding the adverse disparate impact*, based on a *substantial, legitimate justification*." §VII.A (emphasis added). This position, contrary to EPA's stated goal of complying with Executive Order 12898,[51] opens wide the door to recipients to continue practices that cause disparate adverse impacts in violation of Title VI and EPA's regulations. A recipient merely needs to claim "legitimate justification" of the permitting action to avoid a successful Title VI claim. Specifically, the recipient simply shows that "the challenged activity ... meets a goal that is legitimate, important, and integral to the recipient's institutional mission." §VII.A.1. The Guidance uses the permitting of a waste water treatment plant as an example of "acceptable justification." EPA considers the "public health or environmental benefits ... to the affected population" as "generally legitimate, important and integral to the recipient's mission."
All of what EPA says about the plant may be true – it may treat the sewage of nearby residents – but not very relevant. The treatment plant *also* treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.[52]

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[51]Executive Order 12898 "directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin." Executive Order 12898, 59 FR 7629 (1994); *see also* Guidance at §I.F.

[52]Further, the justification may fail on a factual level as well as the conceptual level detailed above. In the sewage plant example, the recipient attempts to justify the plant by arguing that nearby residents will benefit by having their water bill reduced, by better overall service, or, perhaps, by being hired at the expanded facility. But if the expanded facility creates a larger and more omnipresent plume of odor and pollution in the area, and threatens to devalue local property, has the project really rendered a benefit at all? One simply cannot calculate the value of good health.

The issue is not whether or not these facilities are legitimate or necessary, but whether the permitting and siting of them causes an disparate adverse impact in violation of Title VI. With the present "justification" model in place, no Title VI complaint is ever likely to be resolved in a complainant's favor. Here again EPA has worked to hurt the civil rights complainant and reward the civil rights violator.

1. Types of Justification

Throughout, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. §VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

The complainant can only challenge a recipient's invocation of justification by showing that the challenged activity is not legitimate, important or integral to the agency's mission. This burden is nearly impossible to carry. Few would deny that most, if not all, challenged activities are legitimate. Everyone agrees that waste water treatment plants and disposal sites are generally necessary, even if not desirable. Likewise, it is hard to imagine that a recipient state agency would authorize, or a private company would wish to build, a polluting facility for no legitimate reason.

EPA also asserts that OCR will consider "broader interests, such as economic development ... to be an acceptable justification, if the benefits are delivered directly to the affected population[.]" §VII.A.1. EPA, however, does not specify what "economic development benefits" are weighed and how much so against the disparate adverse impact?

Finally, EPA took some of its "justification" language from Title VII cases, which cover employment law. Courts often look to Title VII in construing Title VI claims and vice versa. But when considering justification, employment cases are distinguishable. The very premise of employment law is contract. There is an assumption, rightly or wrongly, that the parties, the employer and employee, come to the table with some degree of choice, and consent to enter a relationship with one another. By contrast, Title VI is more akin to nuisance or trespass, where one party unilaterally imposes its will upon another. In those cases, one party might not receive a value that it could rationally choose. Justification is inappropriate for Title VI complaints in which the element of choice is absent. Even where a few members of the community might receive a job, the others cannot be made to get cancer in exchange. A community does not choose to enter the such relationships. If a recipient can choose to justify a project, that agency

should bear a heavier burden. For instance, the agency would have to show that they had no reasonable alternative but to site the facility in a particular place notwithstanding reliance that had formed since the permit was issued.

2. Less Discriminatory Alternatives

The description of what EPA considers a "less discriminatory alternative" (LDA) run contrary to the spirit and letter of EPA's Title VI regulations.[53] While the due weight given to mitigation schemes discussed above in §IV.B requires them to at least reduce emissions "to the extent required by Title VI," there is no such threshold for LDA as represented in §VII.A.2. Rather, LDAs must only cause "less disparate impact." This is of course allows for some, perhaps significant, disparate impact; as long as it is "less" than the impact that occurred when the complaint was filed. Any adverse disparate impact is illegal under Title VI; merely lessening disparate impact is not good enough.

Indeed, while EPA interprets *Georgia State Conference of Branches of NAACP v. Georgia*[54] to allow for any "less discriminatory alternative" to be justified under Title VI, the Supreme Court case that the *Georgia State Conference* court relies on to justify its LDA rationale says that an LDA must eliminate *as many discriminatory effects as possible*.[55] This is a much tougher standard than what EPA is proposing. Basically, the Guidance allows for the diminishment of some, but not all, adverse impacts, while the Supreme Court reasons that an LDA should eliminate all possible effects, and not just some. If EPA wants to rely on *Georgia State Conference* for its LDA standard, than it should follow the Supreme Court's reasoning in *Albermarle*.[56] Discriminatory impact must be statistically eliminated in order for EPA to comply

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[53] EPA defines an LDA as "an approach that causes less disparate impact than the challenged practice." §VII.A.2.

[54] 775 F.2d 1403.

[55] "Where racial discrimination is concerned, the (district) court has not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

[56] EPA also cites *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993) to justify its LDA standard. Yet again, this case fails to adequately justify EPA's toothless standard. This case defines the requirement of an LDA in the face of a state action that is legitimate, important and integral to its mission. Clearly, Title VI complaints are distinguishable. While siting is an important mission of a state regulatory agency, compliance with Title VI is as

with Title VI. Otherwise, this justification arrangement outlined in the Guidance becomes a rather wide loophole that agencies may use to skirt the spirit of Title VI, allowing them to mandate token mitigation.

The Guidance regarding LDA should be revised to include the same Title VI compliance threshold as exists for due weight. Although the LDA language comes in the context of "justification" (§VII) and not necessarily "due weight," this semantic distinction does not seem sufficient to justify the large difference in thresholds. Clearly, an agency that satisfies the LDA threshold can simultaneously run afoul of EPA's mission to ensure compliance with Title VI by perpetuating an adverse disparate impact. In order to preserve the integrity of Title VI, EPA must close this loophole.

The Guidance does not clearly explain how heavily the EPA will weigh "cost and technical feasibility" in its evaluation of less discriminatory alternatives. Will EPA consider it cost effective if certain measures or conditions will reduce pollution five percent, but at a cost of, say, 10 percent more than the proposed or approved plan? What about the same reduction but at an increase in cost of 50 percent? How and where will EPA draw the line? Affected community members must be certain that EPA properly keeps their health concerns and best interests in perspective when the agency balances them against costs and feasibility.

Please also see our comments on mitigation measures at §IV.B.

3. Voluntary Compliance

EPA's plan to encourage recipients to examine all "permitted entities and other sources within their authority to eliminate or reduce ... the disparate adverse impacts of their programs[.]" is a laudable suggestion. However, EPA's general position that it expects "that denial or revocation of a permit is not necessarily an appropriate solution" to complaints is troubling. Please see our comments on this topic at §IV.B.

APPENDIX A: GLOSSARY OF TERMS

EPA should define "acute toxicity."

Hazardous air pollutant is singular in the term and plural in the definition.

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well. One can not be considered prior to the other.

"Informal resolution" would better be defined as "Any settlement of complaint allegations prior to the formal resolution of a complaint." For example, informal resolution may dispose of a complaint before dismissal of the complaint, not just "prior to the issuance of a formal finding of non-compliance by EPA," as suggested in the current definition.

The use of the term "compartments" in the definition of "media" is confusing.

In the definition of "pollution prevention," the word "excessive" should be removed. Pollution prevention refers to the practice of identifying activities that create waste, period, and reducing that waste.

In the definition of "statistical significance," EPA needs to make the following addition to reflect what statistical significance really is about:

> An inference that there is a low probability that the observed difference in measured or estimated quantities is due to *chance or* variability in the measurement technique, rather than to an actual difference in the quantities themselves.

The term "stressor" should not be limited to "chemical, physical and biological" impacts but also include cultural, religious, social and economic impacts.

We note that only the definitions of ECOS and PLAN have the term itself repeated in the definition.

Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

I. INTRODUCTION

A. Purpose of the Recipient Guidance

NEJAC is gratified that EPA is looking for preventive approaches to potential Title VI complaints, and finds that the Recipient Guidance is useful in pointing out ways to work with communities.

B. Title VI of the Civil Rights Act of 1964, as Amended

EPA undercuts its entire Recipient Guidance by stating that "Fund suspension or termination is a means of last resort." EPA's active avoidance of even threatening to use the tools at its disposal to enforce civil rights law sends a clear signal to recipients that they may violate that law with impunity.

D. Stakeholder Involvement

EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she specifically declined to endorse the Advisory Committee's final report to EPA.

We refer EPA to our comments on §IV.A.1 of the Investigatory Guidance, above, for our critique of EPA's statement that the "use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved."

II. TITLE VI APPROACHES AND ACTIVITIES

A. Title VI Approaches

2. Area-Specific Approaches

Please refer to our comments on §V.B.2 of the Investigatory Guidance, above, on area-specific agreements.

The first sentence in the second paragraph of this section is a sentence fragment. In the third paragraph, EPA refers to “one environmental media” when it should read “one environmental medium.”

B. Title VI Activities

The first line of this section contains a typographical error: “you may should consider.”

2. Encourage Meaningful Public Participation and Outreach

In the Recipient Guidance, EPA encourages recipients to consider integrating various activities into their permitting programs in order to identify and resolve issues that could lead to the filing of a Title VI complaint. Specifically, EPA encourages effective public participation and outreach to "provide permitting and public participation processes that occur early, and are inclusive and meaningful." EPA indicates that integrating meaningful public participation and outreach activities will likely reduce the filing of Title VI complaints alleging discrimination in the public participation process for a permit. We define meaningful input to mean substantive input – not merely a fancy process – so that the community’s input and desires are reflected in the permit outcome.

When a decision may disproportionately affect people of color, it is imperative to encourage the maximum level of meaningful public participation from the affected people of color. Without a higher level of scrutiny for public participation activities that affect people of color, there is no way to be sure that those who are traditionally disadvantaged and left out of the decision-making process will be included.

a. EPA fails to make recommendations to recipients that will make the public participation process "meaningful."

Public participation is meaningful if community groups not only participate early in the process, but also have a tangible *influence* on a potential project's design and location. The first myth that the proposed public participation activities create is the idea that affected communities have a "meaningful" say in the permitting process. Nowhere in EPA's recommended "meaningful" public participation activities, however, are there any references to activities where the public actually has the opportunity to participate actively in the decision-making process. All the recommended activities focus on education, communication, providing understandable information, and making the process clear and visible. All the activities are one-way processes, from a recipient to a community. The only activity that differs is the activity that recommends that recipients "provide clear explanations for reasons for the decisions made with respect to the issues

raised by the community." This activity simply requires that the recipient justify its decision in light of the community's concerns. The activity does not require that the recipient give any "meaningful" weight to the public's comments. As a result, EPA's recommendations for meaningful public participation activities fails to encourage recipients to "meaningfully" include the affected people and stakeholders in the actual decision-making process.

b. Public participation does not guarantee fairness.

The second myth that EPA's proposed "meaningful" public participation activities create is that the availability of public participation eliminates the possibility of discriminatory decision-making in the siting of human health and environmental hazards. EPA assumes that procedures for increased public participation will create fairness or "level-playing field" in the decision-making process. This myth is wrong for two reasons:

1. The disparity in legal and technical expertise and resources between recipients and communities are barriers to meaningful public participation.

It cannot be assumed that procedures for increased public participation will necessarily address the fundamental differences in expertise and resources between communities of color and recipients.[57] For example, the recipients may ignore or overlook the comments and views of community members because they may have a preference for the opinions and advice of industry and state experts with advanced degrees.[58] In addition, environmental issues are commonly extremely technically complex. Even legislators admit that issues are too complex and often delegate their power to administrative agencies with the justification that the issues require the technical expertise of a panel of experts.[59] If legislators, with their vast resources of highly educated staffers and legislative assistants, cannot understand complex technical environmental issues, it is not reasonable to expect that low-income communities of color, without technical experts and university degrees, will understand the technical issues. Therefore, it is difficult, or

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[57]Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARVARD ENVIRONMENTAL LAW REVIEW 115, 181 (2000).

[58] John C. Duncan, *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J.ENVTL. L. 169, 188-193 (1999).

[59]Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17 (1998).

near impossible, for the community to meaningfully participate in the procedural aspects of permitting if they cannot understand the complexities of the crucial issues that may affect their community.

Although EPA suggests that recipients should provide supplemental technical information and technical assistance to make data more meaningful, neither of EPA's options substitute for a technical expert who works specifically for the community. Technical assistance from the recipient may be helpful, but it would be dangerous to conclude that the recipient's expert knows what is best, and what the needs are, for the community. The community should have the capacity to determine itself what its needs are.

If community residents decide to get their own experts to represent their own needs, the next problem that arises is where they are going to get the money to hire the experts. EPA cannot award damages to complainants under its section 602 regulations or provide attorney fees.[60] As a result, there is no guarantee that a community can actually afford to hire or pay for a technical or legal expert. Many technical and legal experts are hesitant to do work for these communities knowing that there is a chance they might not get paid for their work. Also, as in other areas of environmental law, without legal or technical assistance, the community may find it difficult to even apply for an EPA technical assistance grant (TAG) in the first place because the application process is often so complex that it requires the help of another expert.[61] For example, in the case of Superfund TAG grants, EPA has admitted that "the agency has made it difficult for local citizens or environmental groups to win [grants] because of unnecessary 'restrictions, complexity, costs, and red tape.'"[62] One of the restrictions in that case was that the community group had to supply funds matching twenty percent of the total grant unless it obtained a waiver.[63]

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[60]*See* 40 C.F.R. § 7.130(a) (1997) and *North Carolina Department of Transportation v. Crest Street Council, Inc.*, 479 U.S. 6, 12-16 (1986).

[61]Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TULANE LAW REVIEW 787, 834 (1999)(application process for TAGs in other areas of environmental law are so cumbersome for the average community organization that they often need to hire experts to apply for a grant to hire more experts).

[62]Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: Need for Legislative Authorization*, 25 ECOLOGY LAW QUARTERLY 1, 78 (1998) (quoting 1989 SUPERFUND MANAGEMENT REVIEW at 5-16).

[63]*See* Mank, *Environmental Justice and Title VI*, supra, at 835.

Some of the other restrictions that may prevent communities from receiving grants and other federal assistance include that the applicant must demonstrate that it has reliable procedures or has plans for establishing reliable procedures for record-keeping and financial accountability related to the management of the TAG, and that the applicant is an incorporated non-profit organization.[64] This precludes assistance to communities that do not have an organization with 501(c)(3) non-profit status.

Such grants and technical assistance are imperative for communities who are filing a Title VI complaint. Although the complaint only requires a written letter, the community may need a technical expert to review pollution and demographic data. In addition, with a number of criteria required for the complainant to file a Title VI complaint that will be accepted by EPA, the community may need a legal expert to evaluate the best approach to take in filing the complaint. Without the grants and assistance it is difficult for a community even to participate in the administrative process of filing a Title VI complaint.

2. Time constraints in public hearings often unfairly prevent disadvantaged people of color from meaningfully participating.

Although EPA does encourage recipients to schedule meeting times and places that are convenient for residents who work and those who use public transportation, EPA fails to take into account the fact that the public hearing process itself does not guarantee meaningful public participation. Disadvantaged people of color may be unfairly left out of the public hearing process due to time constraints imposed by those running the hearing. Such time constraints often control how public hearings are run. It is common that public hearing may address a large array of issues, limiting the amount of time that can be spent on any single issue. The result is that an issue that is important to large numbers of people may only be allotted a small amount of time on the agenda. Often times, an issue will have a significant impact on a large number of people. It, however, may be impossible to allow every single potentially affected person to have an individual time to voice all her comments on the topic within the issue's allotted time. In addition, the social position of an individual may dictate how much time, if any, she will have to wait to testify. Although a moderator must be fair in allotting speaking times to individuals, a person who may be more powerful, influential, or connected may be able to influence the timing of the agenda and manipulate the hearing to disadvantage less influential members of the public. As a result, the time constraints of public hearings may unfairly affect a low-income, person of color's ability to

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[64] *See* 40 C.F.R. Section 35.4020 (1997).

effectively participate in a public hearing, further increasing the individual's feeling of powerlessness and frustration. In addition, the public participation process often ignores the fact that different social and cultural groups have different ways of communicating or participating.[65]

c. EPA fails to address the cultural and social barriers to meaningful public participation.

Nowhere in EPA's recommendations for meaningful public participation is there an emphasis on understanding cultural and social differences in communication, problem solving, and perspectives or world views. When a decision is being made that may disproportionately affect people of color, it is appropriate to encourage the maximum level of participation from the affected people.[66] An understanding of the cultural and social differences between various cultures is vital for a recipient if it is to include different, non-white cultures in an effective public participation process.[67] Among separate cultures there are different methods of communication through non-verbal communication, values and behavioral styles, frames of references, and cultural awareness. Awareness of the differences in communication may be the difference between reaching an agreement and stirring more anger and distrust. For example, how people look at each other and what a particular look or expression means often varies within different cultures within a society. To effectively communicate, one must be aware of these differences, identify them, and make an effort to create an understanding. If recipients and EPA desire effective public participation, they must take the steps necessary to effectively communicate and accept differences, but be aware enough to respect the differences. Otherwise, when attempts that are made to understand each other fail, cultural differences are commonly ignored, causing for a culturally and socially different group of people to not have the opportunity to meaningfully participate in a permitting decision and thus claim discrimination.

d. Recommendations

EPA should include further advice to recipients on achieving the three keys to meaningful public participation in the context of permitting:

1. Maximizing the inclusion of the affected people of color in the permitting process by actively seeking them out and attempting to understand their social and cultural background;

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[65] *See* Duncan, *Multicultural Participation in the Public Hearing Process, surpa,* at 188-193.

[66] *See* Duncan, *Multicultural Participation in the Public Hearing Process, supra,* at 188.

[67] *Id.*

2. Supplying them with the technical and legal knowledge and expertise so they may actively and meaningfully participate in the permitting process; and

3. Giving recognition and weight to the needs and opinions of affected people of color so they may be empowered to participate meaningfully in the decision-making process.

Without inclusion, knowledge, and weight to their opinions and needs, public participation activities will fail to reduce Title VI complaints alleging discrimination. Steps EPA should encourage recipients to take in order to ensure meaningful public participation among low-income communities of color include:

• Recipients should strive to achieve a level playing field for low-income communities of color, not only during the public participation process, but also within political and legal processes.

• Recipients should engage in aggressive outreach to embrace a large spectrum of the public.

• Recipients should run public meetings with affected communities of color that include attempts to understand and respect cultural differences. These meetings should increase respect for differences and allow for a more effective and "meaningful" public participation process.

• Recipients should create Community Advisory Boards (CABs) that include environmental scientist or engineers, health experts, elected representatives, and community representatives. The CAB should also participate early in the planning and permitting process. CABs may potentially provide ideas and suggestions about a broad range of issues, including possible alternatives sites or proposals, community relations, monitoring, mitigation, and economic development. The criteria for selecting community representatives should be focused on including members of low-income communities of color who are not involved in politics and citizens at highest risk from a potential project.

• Recipients should be encouraged to create community advisory groups (CAGs) that participate early in the planning and permitting process. Unlike CABs, who only participate at one or two points of the process, the CAGs would publicly participate throughout the process. In addition, the CAG would have some decision-making authority, as opposed to the purely advisory function of the CAB. Much like the proposed Community Working Groups under 1994 proposed Superfund legislation, the CAGs should receive “substantial weight” by the EPA on their

recommendations achieved by consensus.[68] The formation of a CAG would be, in part, designed to supplement the sometimes limited capacity of an agency or recipient to take into consideration public input under review and comment on procedure. Ideally, the CAG would also negotiate rule-making, as opposed to the traditional role of the public only participating in reviewing and commenting on substantive issues.

• Recipients should include a diverse range of citizens on the CAGs, especially people of color and those at highest risk from the project. The CAG should be a collective voice that speaks for people who do not traditionally have individual voices. It is important to recognize, however, that CAGs still may not effectively, completely, or accurately reflect or account for all public concerns and should not be depended on for the sole source of community outreach.

Additionally, EPA should provide meaningful technical assistance grants (TAGs) to allow complainants to thoroughly investigate a complaint once the EPA concludes after a preliminary investigation that the complaint raises serious health issues. This would allow the complainant to hire its own technical or legal expert who has the flexibility to pursue the complainant's own investigative leads, as opposed to the narrowly tailored assistance of a recipient expert.

3. Conduct Impact and Demographic Analyses

a. Availability of Demographic Data and Exposure Data

In footnote 13, the use of the term “data release” in the last line is confusing in the context of discussing toxic releases.

d. Relevant Data

Known emissions should be above modelled data in the data hierarchy.

5. Participate in Alternative Dispute Resolution

We refer EPA to our comments on §IV.A.1 of the Investigatory Guidance, above, for a critique of alternative dispute resolution and EPA’s reliance on it.

6. Reduce or Eliminate Alleged Adverse Disparate Impact

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[68] H.R. 3800, §§ 117(g)(3); S. 1834, §§ 103 (Version 4, Oct. 3, 1994) (proposing to amend CERCLA §§ 117(1)(3)).

We refer EPA to our comments on §IV.B of the Investigatory Guidance for our comments on mitigation measures.

C. Due Weight

We refer EPA to our comments on §V.B of the Investigatory Guidance, above, for a critique of EPA's "due weight" concept.

EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

GLOSSARY OF TERMS

Please see our comments on the identical Glossary of Terms found following the Investigatory Guidance, above.

V. CONCLUSION

Because the Investigatory Guidance is fatally flawed in so many ways, each of which penalizes the communities suffering civil rights violations and benefits the civil rights violators, we request that the Guidance be withdrawn and scrapped. We request that EPA begin again the process of formulating a Guidance, this time with the ambition not of making "stakeholders" satisfied but with enforcing civil rights.

Signed,

Luke Cole
Executive Council
Chair, Enforcement Subcommittee
Chair, NEJAC Title VI Task Force

Rose Marie Augustine
Executive Council
Health and Research Subcommittee

Daisy Carter
Air and Water Subcommittee

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Michel Gelobter
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Tom Goldtooth
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NATIONAL BLACK ECONOMIC AND ENVIRONMENTAL JUSTICE COORDINATING COMMITTEE

EPA's Revised Title VI Guidance Fails to Enforce Important Civil Rights Law
A Summary of Key Findings

1. EPA's Revised Title VI Guidance fails to recognize that the concentration of waste sites and toxic facilities in communities of color is a form of racial discrimination that violates the civil rights of people who live in these communities. The EPA's Title VI Guidance ignores existing civil rights law and policy. For example, the Department of Housing and Urban Development found that a civil rights violation existed when public housing was concentrated in African American neighborhoods. Courts have also found similar situations to constitute a violation of Title VI of the Civil Rights Act. By failing to recognize that communities of color have been unlawfully targeted for toxic industries, the EPA has made a fundamental error and abandons established civil rights law.

2. EPA's Title VI Guidance creates a difficult and highly technical standard of proof that is biased in favor of state environmental agencies and the industries that they permit. According to the EPA's Title VI Guidance, it is not enough that a proposed facility would, if permitted, increase the pollution that is concentrated in communities of color. The Guidance requires scientific proof that the pollution would actually cause a substantial increase in cancer risks or other health problems. The Guidance requires this proof of causation at a time when scientific tools can not prove or disprove to the satisfication of everyone the harmful effects of toxic chemicals. Currently, the health effects of chemical exposure are hotly debated and inconclusive. The Guidance further requires additional proof that the impact of a proposed facility, which is based in part on the scientific proof of health risks, must be "significant." Even if the racially disproportionate pollution burden on a community of color can be proven with scientific certainty to create a substantial health risk, the EPA may determine that this burden is not "significant," and close the Title VI complaint. This standard of proof unreasonably and unnecessarily raises the bar on what constitutes a Title VI violation. In addition, the Guidance ignores the numerous damaging effects of toxic industries on the quality of life in a community of color, which go beyond health effects.

3. EPA's Title VI Guidance fails to recognize that any justification that can be offered by a state environmental agency as a defense to a Title VI complaint must be limited to the substantial, legitimate interest of that agency. Such an interest can only be the protection of the environment and public health. However, the Guidance states that it will consider interests outside of the mission of a state environmental agency, specifically economic benefits of the permitted project, as justification. Economic benefits are speculative, at best, and have been consistently used by industries and state governments to defeat community opposition to a permitted project. This opposition is borne out of the poor quality of life and polluted environment that are directly caused by permitted industries. It is clear that so-called economic benefits have not remedied the multitude of problems that toxic industries bring to communities. The evaluation of so-called economic benefits is clearly outside the scope and expertise of EPA's Office of Civil Rights and should not be considered as a defense of a state environmental agency permitting decision.

4. EPA's Title VI Guidance excludes communities of color from the appeal process. The Guidance only explains the procedures for hearings and appeals involving state environmental agencies. According to the Guidance, communities of color are not provided with a process for appealing EPA decisions. Nor are communities of color involved in proceedings for determining how a state environmental agency can come into compliance with Title VI of the Civil Rights Act. Yet, state agencies are provided with several options for negotiating with EPA on compliance, as well as appealing EPA decisions to an administrative law judge. The process provided in the Guidance is unfairly designed to shut out communities of color that file civil rights complaints. [Revised 7/31/00]

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

The New York City Environmental Justice Alliance (NYCEJA) submits these comments on the "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits."

NYCEJA is an umbrella organization comprised of 14 grass-roots member groups based in low-income communities of color throughout New York City. NYCEJA's constituent communities are among the poorest, the sickest and the most heavily polluted in New York City. The residents are primarily African-American and Latino. Their neighborhoods are saturated with pollution from industrial plants, sludge treatment and waste processing facilities, toxic release sites, and truck traffic.

In 1996, NYCEJA members identified the siting of private waste transfer stations in their communities as the number their one environmental problem. Reaching out to other waterfront manufacturing communities that are also overburdened with transfer stations, the members formed the Organization of Waterfront Neighborhoods (OWN) to fight the inequitable concentration of waste facilities. Since then, several NYCEJA and OWN members, together with Congressman Jose Serrano and Congresswoman Nydia Velazquez, have filed Title VI complaints regarding the permitting practices of both the New York City Department of Sanitation (DOS) and the New York State Department of Environmental Conservation (DEC), two recipient agencies.

Consequently, your Title VI permitting guidance is of great concern to NYCEJA and OWN members. Our comments on the revised draft, which follow, are informed by the continuing environmental injustices that are perpetrated by DOS and DEC in their solid waste permitting programs.

Very truly,

Leslie H. Lowe,
Executive Director

Comments on the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

II.A.3. *Investigation* (p. 4):

> In determining whether a recipient is in violation of Title VI of EPA's implementing regulations, the Agency expects to assess whether the adverse disparate impact results from factors within the recipients's authority to consider as defined by applicable laws and regulations. [Emphasis added.]

Limiting the analysis to "factors within the recipient's authority" is very problematic for it may allow the underlying causes of the disparate impacts to evade review. Recipient agencies are part of larger governmental-political units which may either a tolerate historic patterns of discrimination or may actively engage in discriminatory practices that set the stage for siting polluting facilities in certain communities and not others. A "facially neutral," discretionary action by the larger governmental unit may predetermine siting outcomes that are racially disparate. Seemingly "neutral" factors, like zoning, often mask historic and intentional discrimination; although "spot zoning" has been proscribed by the courts, it is still practiced in numerous subtle ways.

For example, in New York City, waste facilities are to be sited in manufacturing (M2 and M3) zones, most of which are located along the waterfront. However, in 1998, the New York State Legislature enacted a Hudson River Park bill that excludes new uses from the manufacturing zones along the lower Manhattan waterfront that are not "park compatible." This effectively, exempts wealthy, white areas of Manhattan – which generates 60% of the City's commercial waste – from receiving any new garbage facilities. These facilities must now be concentrated in the M2 and M3 zones in low-income communities of color like the South Bronx, Greenpoint-Williamsburg and Red Hook, Brooklyn.

The impact of the Hudson River Park bill was entirely predictable, given that the Legislature had just passed a law mandating closure of the City's only remaining landfill. Moreover, the City was, at the time, actively soliciting bids for construction of new private transfer stations to help export municipal waste. The Legislature did not conduct an Environmental Impact Study or any Title VI analysis to determine what the effect of this legislation would be. Given the context in which it was adopted, this law exempting lower Manhattan from new garbage facilities, has the hallmarks of racially motivated action. Clearly it leads to disparate adverse outcomes: protecting affluent white communities from shouldering any of the City's waste management burdens while concentrating those burdens in communities of color. Facts such as these must be considered in assessing the "justification" for the recipient's action and whether there are "alternatives" available.

VI.A. *Framework for Adverse Disparate Impact Analysis* (p. 27-28)

> • If the complaint alleges discriminatory effects from emissions, including cumulative emissions, determine whether the permit action that triggered the complaint significantly decreases overall emissions at the facility. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts. [Emphasis added.]

This provision is stunningly myopic. If cumulative impact is alleged, the issue is not whether the facility is producing less pollution than others in or near the affected community. The issue is whether the added pollution from the facility – whatever it may be – contributes adversely to the disparity between an already overburdened area and the comparison area. The proposed language reveals an indefensible shift in focus away from protection of people and their environment to what is feasible (read profitable) for industry. In communities already saturated with pollution, where rates for environmentally-related illnesses like asthma exceed national and local averages, any incremental increase may be too much.

EPA's approach flies in the face of the basic public health concept of "prudent avoidance"of additional harm to vulnerable populations. Incremental increases in pollution must be assessed with reference to the existing pollution load and the impact on human health. The proposed language also betrays EPA's very serious failure to develop an analytic framework for cumulative, multi-media impact assessment. In the absence of such a framework we are left with the "drop in the bucket" approach. No matter how many additional "drops" of pollution are added to the poison stew, the bucket never overflows.

Step 2: *Define Scope of Investigation* (p. 28)

> Determine the nature of the stressors, sources of stressors and/or impacts cognizable under the recipient's authority [...]

As in our comment for II.A.3., above, limiting Title VI analysis to impacts exclusively under the recipients authority is taking a "one-eyed look" at the problem; one guaranteed not to reveal its true nature or extent. Even if the recipient lacks authority to control or mitigate an impact, that impact may be highly relevant to the disparity analysis and should not be ignored. Prior and foreseeable future actions which result in disparate adverse impacts when examined together with the permit under review, must be taken into account by the recipient and by EPA. Often, permits are issued or renewed in areas where other agencies have jurisdiction over projects planned or undertaken by government or the private sector. Should the recipient turn a blind eye to adverse impacts these projects will create when deciding whether to permit a facility? This would constitute impermissible segmentation of the environmental review and it should be equally unacceptable in Title VI analysis.

VI.B.2.a. *Determine the Nature of Stressors and Impacts Considered*

> In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider (p.31) [Emphasis added]

Once again, this is an unjustifiable limitation on the scope of the Title VI analysis. Although the text describes a situation where the recipient has authority but has not exercised it, no example is given where a relevant impact or stressor is identified that is not within the recipient's authority. However, as noted above, the issue is not whether the recipient has authority to alleviate a particular impact or eliminate a stressor. It is whether the existence and/or severity of the impact should have figured in the recipient's determination to issue the permit. Existing disparate impacts over which the recipient may have no authority (*e.g.*, pollution from diesel bus garages in the community) must be part of the Title VI analysis.

NYCEJA believes that the more sound approach is simply to identify the Title VI community, the relevant Universe of Sources (VI.B.2.b., p. 32-33), the adverse impacts emanating therefrom, and pathways to sensitive receptors. If the challenged permit would create or exacerbate disparity in the level of adverse impacts borne by the affected community *viz* the comparison community, then a *prima facie* claim under Title VI has been stated and the burden of persuasion should shift to the recipient.

VI.B.4.b. Use of National Ambient Air Quality Standards (p.38)

NYCEJA strongly objects to reliance on the NAAQS to set "adverse impact benchmarks." The essence of a Title VI complaint is that an insular community is forced to bear disproportionate *localized impacts* that the population of the larger community does not bear. Consequently, the use of a regional air quality standard to assess local impacts is completely inappropriate. Where localized impacts are alleged, empirical evidence (not computer simulations using spurious data) must be gathered whenever possible. The inadequacies of the NAAQS and EPA's air program, generally, are painfully obvious to all of us who have lived in this "non-attainment" area for the past 30 years.

Despite the fact that asthma rates in communities of color throughout the City are multiple times the national average, the State's network of air monitors historically bypassed these neighborhoods. NYCEJA and other environmental justice advocates have long fought for placement of air monitors in communities with high asthma levels and in heavy industrial neighborhoods, like the South Bronx and Red Hook. Although some new $PM_{2.5}$ monitors have been located in heavily impacted areas, it will take three years to establish a baseline for them. Regional air models based on data from suburban and rural communities have no logical nexus to or predictive value regarding discrete local conditions in dense urban areas.

New York City, for example, is comprised of 5 counties of the State. The New York Metro air quality region includes 9 counties in the "down-state" region (New York City and 4 suburban counties, plus several cities in yet a tenth county). In assessing whether traffic and air impacts generated by a facility are significant, current methodology looks to the vehicular miles traveled within this very large region. But to assess local traffic impacts against the volume generated in such a large region is nonsensical. Yet, this is precisely what occurs

In 1998, the City began sending municipal garbage to two private transfer stations in Greenpoint-Williamsburg, Brooklyn. These facilities are located within less than two miles of each other, in a community that has 18 other garbage transfer stations within the same small area. These waste facilities generate over 10,000 heavy diesel truck trips per week. Although the City garbage added over 2300 trips per week, both DOS and DEC determined that the diversion of municipal waste to this already overburdened community would have no significant environmental impact. This determination rested on the claim that, in terms of total regional VMT, the additional truck traffic through Greenpoint-Williamsburg was insignificant. It was, however, highly significant to local residents who could no longer cross the street safely.

VI.B.5.b. Comparison to Assess Disparity (p.40-41)

In assessing the level of risk experienced by the affected community and the comparison community, EPA should look to known genetic susceptibility of the affected racial/ethnic population to environmentally related illness linked to various stressors.

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John P. Cahill
Commissioner

August 28, 2000

Ann E. Goode, Director
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attn: Title VI Guidance Comments

Dear Ms. Goode:

This letter responds to the EPA's request for comment on the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Programs* (Draft Recipient Guidance) and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Draft Revised Investigation Guidance). In general, both guidance documents provide a basic framework for addressing potentially discriminatory practices within the context of environmental permitting. EPA staff clearly devoted time and resources on the guidance development and should be commended for the attention to comments and concerns raised during guidance development. However, the draft documents still fail to provide sufficient detail to identify, analyze and address potentially significant adverse disparate impacts on protected classes. Furthermore, the documents fail to include key concepts and criteria critical to ensure due process and fair, transparent procedure. The New York State Department of Environmental Conservation (DEC) encourages EPA to again consider the public comments received and revise the documents accordingly.

On May 6, 1998, the DEC submitted comments on the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits*. The DEC recommends that EPA again consider the comments raised therein and submits the following for additional consideration.

The draft guidance fails to lay out a clear process that if followed will satisfy Title VI concerns. The guidance gives EPA very broad discretion with respect to how it will conduct an investigation and make its findings. At a minimum, EPA must define key terms and include an appendix with a detailed discussion of the methodologies it will utilize to conduct investigations and make determinations with respect to, among other things, adverse impacts, discriminatory impacts, significant impacts and Title VI compliance.

The Draft Revised Investigation Guidance should require that a complainant seek remedy in the recipient's administrative process prior to filing a complaint with EPA. The guidance does encourage the complainant to pursue remedy through administrative appeal. However, participation in the administrative review process should be a prerequisite for filing a complaint under Title VI, particularly when a recipient has adopted a policy to implement Title VI compliance. Such a

prerequisite would: 1) provide incentive for recipients to adopt Title VI policies; 2) provide recipients with the opportunity to identify and address environmental justice concerns in the course of project review, when there is more flexibility to address Title VI concerns; 3) provide applicants with certainty in the permit outcome; and 4) encourage applicants to be more responsive to Title VI concerns in the permit process. Requiring that complainants seek remedy in the recipient's administrative process also benefits potentially impacted communities, since Title VI concerns would be identified and addressed within the administrative process, when project modifications are possible, rather than forcing communities to await remedy in the form of assistance withdrawal to the recipient. In connection with this requirement, EPA should devote significant resources to assist recipients in developing and adopting public participation processes which include all stakeholders in the administrative process.

The guidance remains unclear with respect to its affect on state-funded programs which receive no federal funding. Purely state-funded and state run programs should not be subject to the guidance and Title VI challenge. The guidance should clearly state that its applicability and legal authority is limited to Federally delegated state permit programs.

The guidance must clarify the circumstances which warrant permit denial or revocation, if any. Due process dictates that project sponsors possess certainty with respect to process outcome, particularly where a permit has been processed in accordance with all applicable federal and state standards. While the guidance intends to seek resolution through the recipient program, guidance language leaves open the possibility that a permit could be denied as a result of the investigative process. (See IV.B. , "Denial of the permit at issue will not *necessarily* be an appropriate solution." emphasis added). Absent the required clarity, the guidance may subject the state to legal challenges by a project sponsor, should the State be compelled to revoke or deny a permit based on discriminatory effect.

Permit renewals and minor modifications should be exempt from Title VI investigation. New York State's Uniform Procedures regulations require that all renewals and modifications for permits issued under federally delegated permit programs be treated as new applications, with some federally approved or federally cited exceptions for certain modifications. By treating federally delegated permits as new applications, New York State has established a procedure of review for permit actions which potentially relate to Title VI "stressors" and warrant potential scrutiny under Title VI. All other permit renewals and modifications, which do not relate to Title VI stressors, should be exempt from challenge. Applying the guidance to all state programs would have a significant effect on state resources given that on average over 2000 requests for permit renewals are submitted each year.

A list of the minor modifications that will not trigger an investigation should be included in the guidance. While the guidance indicates that OCR will not generally initiate an investigation where the permit that triggered the complaint is a modification, such as a facility name change or a change in mailing address, such an investigation is not precluded. The guidance should clearly state that minor modifications will not form the basis for a complaint and include a list of relevant modifications.

The guidance fails to articulate necessary technical and legal standards for filing a Title VI complaint. The guidance should require explicit documentation of the alleged discriminatory act. Without specific documentary evidence, a recipient, once notified of a complaint filing, will lack the information necessary to respond to the complaint. Moreover, a recipient should have an opportunity to request a more definite statement of the alleged discriminatory act. As previously stated, the guidance should require that the complainant exhaust its administrative relief in the recipient's permit and permit appeals process. The guidance should also require that the complainant document its role in that process and include a statement of Title VI issues raised in that process.

Pursuant to the guidance, a timely complaint is one which is filed within 180 days of the alleged discriminatory act. Therefore, complaints alleging discriminatory effect resulting from the issuance of a permit are timely if filed within 180 days after issuance of the permit. This time frame is too long and creates problems for all stakeholders. The problems are further exacerbated by potential extensions of the 180 day time frame for "good cause." At a minimum, EPA must define "good cause" and establish criteria for waiver of the 180 day clock.

The time frame within which a recipient must submit a response or answer to the complaint is inadequate and must be extended. The policy states that a recipient will have 30 days to respond to a Title VI complaint after being served. This time frame is insufficient to assemble necessary information such as facts, demographic data, and health data, and prepare a response incorporating those facts and relevant points of law. Similarly, the time frame set forth for recipient compliance is inadequate and must be extended.

Adverse Impacts should be defined relative to existing federal and state standards where those standards exist, particularly since environmental standards tend to be health based. Recipients may attempt to incorporate strict pollution reduction standards into the permit process and applicants may voluntarily agree to stricter standards. However, absent firm legal authority, a recipient cannot require permit applicants to adhere to a stricter standard, nor can a recipient impose wide reaching pollution reduction standards on existing sources to attain a standard that has not been promulgated.

The guidance still fails to address the role of local government and zoning laws in the siting of facilities and fails to recognize its relationship to the permitting process. We believe local zoning needs to be specifically addressed in the context of this guidance.

The DEC recognizes the inherent difficulties of developing specific criteria and methodologies for investigating the wide range of potential Title VI complaints. While the current guidelines begin to define such criteria and methodologies, further detail is necessary in order to achieve a workable document. EPA must further develop criteria related to identifying and comparing potentially impacted communities and reference communities and conducting disparity analyses.

While the comments herein focus on the Draft Revised Investigation Guidance, the DEC encourages EPA to further develop the Draft Recipient Guidance. By providing recipients with a variety of *detailed* Title VI activities, recipients may easily adopt such activities into their programs and avoid potentially discriminatory practices and administrative complaints challenging permits.

New York State remains committed to address environmental justice issues and to remedy potentially discriminatory effects. These are DEC's preliminary comments and DEC requests that the comment period remain open an additional 30 days. DEC reserves the right to provide additional comment to EPA.

Environmental Justice is an extremely important issue for Commissioner Cahill and DEC staff. We look forward to discussing this topic further with you and assisting EPA in its efforts to finalize a workable approach for this issue.

Sincerely,
/s/

Monica L. Abreu Conley
Environmental Justice Coordinator

Attachment

cc: J. Fox - Regional Administrator, USEPA Region II
M. Hayden - Environmental Justice Coordinator, USEPA Region II

New York State Department of Environmental Conservation
Office of General Counsel, Room 618
50 Wolf Road, Albany, New York 12233-1500
Phone: (518) 457-4415 FAX: (518) 485-8484

John P. Cahill
Commissioner

May 6, 1998

Ann E. Goode
Director, Office of Civil Rights
USEPA - Attention: Title VI Guidance
Office of Civil Rights
Mail Code 1201
Washington, D.C. 20460

Re: Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits

Dear Ms. Goode:

This letter responds to the EPA's request for comments on its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Environmental Permits.* While the Department of Environmental Conservation (DEC) supports efforts to ensure environmental programs are carried out in a non-discriminatory manner, EPA's proposed guidance fails to establish a workable vehicle to achieve this worthy and critical objective. The guidance conflicts with New York State's current permit program and would significantly disrupt the State program. For the reasons enumerated below, we urge EPA to withdraw its interim guidance.

The first major concern involves the timeliness of a complaint and its effect on the State permitting scheme. Pursuant to the guidance, a timely complaint is one which is filed within 180 days of the alleged discriminatory act. Therefore, complaints alleging discriminatory effect resulting from the issuance of a permit are timely if filed within 180 days after issuance of the permit. This creates several problems. Since a complainant need not exhaust its administrative remedies, it is possible that the State could first learn of the discriminatory effect claim *after* the permit has been issued and significant project construction has begun. Discriminatory effect claims can and should be properly raised and addressed in the context of New York State's existing administrative permit process, which provides for public notice and comment *prior* to permit issuance. The guidance allows a complainant to bypass the most appropriate forum available for resolving these issues efficiently and effectively. The guidance should require that a complainant first raise the environmental justice claim during the State public comment period to facilitate informal resolution of the complaint.

Permitted activity may be delayed unnecessarily by a complainant who files a complaint well after a permit has been issued. Since the guidance provides for waiver of the 180 day filing limitation, a project which benefits the environment and the affected community may be delayed indefinitely. For example, continued reliance on an aging solid waste facility could result if a permit for a state-of-the-art facility is delayed.

Additionally, complaints initiated after the permit is issued render ineffectual the due process afforded project sponsors and the public during the State permit process. The guidance may subject the state to legal challenges by a project sponsor, should the State be compelled to revoke or deny a permit based on discriminatory effect.

The second major issue concerns notice to the state that a claim has been filed. The complaint process outlined in the guidance fails to provide the state and the project sponsor timely notice of the complaint. Pursuant to the guidance, EPA's Office of Civil Rights ("OCR") will notify the state of the existence of a complaint only after it has determined that the complaint states a valid claim. The state should be made aware of the complaint immediately. Early notification will enable the state to submit comment regarding the claim before OCR makes an initial finding of disparate impact. Such comment would likely assist EPA in evaluating whether the complaint states a valid claim. Furthermore, early notification will facilitate informal resolution with affected stakeholders and, if appropriate and timely, the issues of the claim may be considered in the formal permit review process.

Third, the guidance's objective to determine whether permits "will create a disparate impact, or add to an existing disparate impact on a racial or ethnic population" is not served by subjecting renewals and minor modifications to Title VI review. By definition, minor modifications and renewals will not have a significant adverse environmental impact. Therefore such permits have little or no likelihood of creating a disparate impact or adding to an existing disparate impact. The DEC urges EPA to remove minor permit modifications and renewals from the interim guidance. The guidance states that permit modifications such as facility name change or otherwise beneficial modifications that are neutral in terms of their impact on human health or the environment are likely to be dismissed. This suggests that such claims would be accepted, if properly pleaded, and reviewed by OCR. To allow public comment and challenge on permit renewals would severely tax the limited financial and staff resources of New York State. In 1997, the Department received 2,032 requests for permit renewals.

Next, the requirements for a properly pleaded complaint are not adequate. In addition to the requirements set out in the guidance, the complainant should provide a verified complaint supported by affidavits and statistical evidence documenting disparate impact. The claimant should also demonstrate a good faith basis for the claim. This is particularly important given that a claim filed with OCR may significantly affect the operations of a permitted facility. Since the affect of the claim is considerable, the claimant should provide ample proof substantiating its claim.

The State is also concerned that the scope of the guidance with respect to its affect on State funded programs which receive no federal funding. The guidance should specify EPA's legal authority to issue guidance applicable to wholly state-funded programs. Purely state-funded and state run program should not be subject to the guidance and Title VI challenge. The guidance creates an avenue of legal challenge pursuant to Title VI which may not have previously existed and exposes the State to increased litigation. Moreover, the revocation of federal funds for state-funded and federal-funded programs diminishes the State's overall ability to preserve the environment for the people of the State. Given the significant affects of this guidance on all state programs, comments provided by the states should be given considerable weight.

In general, the guidance lacks necessary detail, fails to define key terms and fails to provide a method of analysis for disparate impact. Without explicit guidance, the State lacks the tools to identify and evaluate disparate impact in order to avoid Title VI challenges. More importantly, the policy completely

lacks any standards which DEC can use to ensure it is in compliance with the policy. EPA should not issue this policy unless and until it defines specific criteria and methodologies that are acceptable for identifying disparate impacts and affords states and the public a comment period on the criteria and methodology. This is an essential prerequisite of a workable policy that is totally lacking in EPA's interim guidance. Impacted communities need such criteria to evaluate whether they are subject to disparate impacts. States need the criteria to avoid or mitigate impacts in minority or disadvantaged communities. EPA needs criteria to carry out its responsibilities to evaluate the legitimacy of complaints. Such standards would allow and encourage states to incorporate disparate impact analysis into current permit review process, thereby avoiding complaints filed under Title VI. Furthermore, the guidance should define the elements of an appropriate supplemental mitigation project, and describe the legitimate interests that justify the decision to proceed with the permit notwithstanding the disparate impact.

Finally, the guidance fails to address the role of local zoning laws in the siting of facilities and recognize its relationship to the permit process. This is a critical issue. Project sponsors select a site based on a host of factors, including local zoning which is pivotal. Once a site has been selected, the project sponsor then applies for environmental permits. The DEC's ability to require a project sponsor to look at alternative sites is limited to situations where an Environmental Impact Statement has been required. Addressing discriminatory effect issues after a siting decision has been made and the permit has been issued, rather than prior to siting, is sure to create delay and confusion. The DEC's ability to require the consideration of alternative sites is totally foreclosed for minor permit modifications and renewals involving existing facilities.

New York State remains committed to address environmental justice issues and to remedy potentially discriminatory effects. These matters are best addressed within the State's current regulatory framework. Therefore, we request EPA to withdraw the interim guidance
and give New York State the opportunity to voluntarily comply with Title VI within its own permitting framework.

These are DEC's preliminary comments and DEC requests that the comment period remain open an additional 30 days. DEC reserves the right to provide additional comment to EPA.

Environmental Justice is an extremely important issue for Commissioner Cahill and DEC staff. We look forward to discussing this topic further with you and assisting EPA in its efforts to finalize a workable approach for this issue.

Sincerely,
/s/

Frank V. Bifera
General Counsel

cc: C. Browner - Administrator, USEPA
J. Fox - Regional Administrator, USEPA Region II
M. Hayden - Environmental Justice Coordinator, USEPA Region II

State of New Jersey
Department of Environmental Protection

Christine Todd Whitman
Governor

Robert C. Shinn, Jr.
Commissioner

August 22, 2000

Yasmin Yorker, Title VI Team Leader
Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Ms. Yorker:

The following comments are hereby submitted by the New Jersey Department of Environmental Protection regarding the Draft Title VI Recipient Guidance and Draft Title VI Investigation Guidance:

An initial review of the two guidances issued by EPA regarding Title VI is a combination of good news and bad news. The good news is that EPA has demonstrated in the external guidance it clearly listened to the comments and arguments from the states to permit flexibility in the design of their respective environmental justice programs. The suggestions outlined in the external guidance, resemble many of the ideas and suggestions that the various states have been working on over this past two years. The bad news is that EPA still clings to the position, that no matter what a state recipient does in implementing a Title VI program, that they reserve the right to a de novo investigation and determination as to whether the state effort is good enough.

Once a complaint is filed, the burden is still on the recipient to prove the negative. EPA's statement that no single definition of adverse disparate impact is possible due to the differing nature of impacts and the various environmental media, may impact the likelihood of a successful environmental justice effort. If there is no consistent definition of disparate impact, how is a recipient, the EPA, the Courts and most importantly the community to know that discrimination has occurred. What is the standard? Can each

received 8/28/00

interested stakeholder have a different definition?

A positive element is EPA's acceptance of the ability of the recipient to justify a disparate impact, however defined. This is critical to the ability of projects of significance that are for the broader public good to proceed. However, EPA claims the right to rebut a justification if it determines there may be a less discriminatory alternative. Does this mean that EPA now will be able to over ride a state and local determination of the significance of a project of public import. What are the standards for this determination. Is this an Alternatives Analysis in disguise?

Many of the issues raised by the former guidance are resolved by EPA in the new external guidance with broad statements of intent that still leaves the states guessing. And if the states are guessing, those industries that need permits are going to be even more leery to come forward and volunteer to participate in state efforts to address EJ issues. Without an EPA endorsed state program many states will opt out of the effort to create an Environmental Justice program, which will certainly result in EPA being inundated with Title VI complaints.

As positive as the external guidance tries to be, the new internal guidance is disappointing. It creates a maze in which the recipient and the community must negotiate. The time frames ensure that state programs will not be able to assure finality to a permitting process. In these respects the internal guidance has changed little. The internal guidance clearly states that a goal is to informally resolve complaints. This "informality" unfortunately comes at the end of the permitting process where a state may have already undertaken legitimate "informal" and formal dispute resolution processes and even come to some agreement.

It appears that EPA gives itself 180 days to make its preliminary finding. However, when one reads the detailed analysis that is required, it is doubtful that such a deadline could be met. There are no less than six complex steps in the adverse disparate impact analysis. The reality is that the science has not caught up with legal requirements as interpreted by EPA. Several of these steps involve considerable scientific and statistical information , much of which will have to be new data or culled from a host of sources.

While EPA has tried to provide a degree of flexibility to the recipient, they likewise have allowed their decision making process to be so broad and uncertain, that the agency could at some future time allow other influences to impact decision making. While this may not occur, the decision making process may however lead to such an adverse appearance.

Much more work needs to be completed before this guidance takes on a quasi-regulatory effect.

New Jersey's Approach

The New Jersey Department of Environmental Protection advocates an up-front approach

to address environmental justice concerns. **Section II-C, "Due Weights"**, of the revised Draft Recipient Title VI Guidance states: "...While EPA encourages efforts to develop proactive Title VI approaches, under the Civil Rights Act of 1964, EPA is charged with assuring compliance with Title VI. Thus, EPA cannot completely defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations.... EPA believes that it can, under certain circumstances, recognize the results of analyses you submit and give them appropriate due weight." Although this position is clear, we would hope that the "due weight" would be **significant.** Such significant consideration is vital to those states, like New Jersey, that have developed EJ processes that are voluntary. Such consideration will encourage permit applicants to participate in the EJ process.

As one of the original five recipients to receive an EPA funded State and Tribal Environmental Justice Grant to develop our EJ program, the NJDEP has focused on a pro active approach which utilizes a screening tool to evaluate each permit application for potential environmental justice concerns. **Section IV- B, " Implementing Informal Resolutions"** of the Draft Investigative Guidance states: "Denial of the permit at issue will not necessarily be an appropriate solution. It will likely be a rare situation where the permit that triggered the complaint is the **sole** reason a discriminatory effect exists "recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing sources..." The model which NJ is proposing to use to identify potential EJ areas has the ability to implement this strategy.

As mentioned, New Jersey's process advocates the evaluation of each permit application independently. This avoids the pre-identification of communities, a process that may be detrimental to urban revitalization, which is occurring in New Jersey at a record pace.

Once the application review is complete, and if our evaluation determines that an application has environmental justice implications, affected communities are informed about the respective permit application during the initial stages of the permitting process. In addition, affected applicants are encouraged to enter into a series of informational meetings with the community to determine if concerns exit, and if so, to work with the community, in partnership with the NJDEP, to address the issues of concern. This proactive, community partnership approach would occur simultaneously with the permit application review. Information detailing this process is attached for your consideration.

Adverse Impact and Disparity

Section VI-C, "Adverse Disparate Impact Analysis", presents a methodology which appears to make a finding of disparate impact the inevitable outcome of any analysis. This occurs because portions of the two population related variables which are being tested for independence (adverse impacts and demographic characteristics) are initially selected on the basis of being at the extremes of their respective distributions. These groups are then compared in a way, which essentially restates that variations exist in populations and relabels that variation disparate. The current methodology can produce a

finding of disproportionate impact even when the exposures to all race, color, and national origin groups are identical **between** groups (indicating no disparity) but normally distributed **within** groups.

Section VI-B-5b, "Comparison to Assess Disparity" states that one of the comparisons to be conducted will be "the demographic characteristics of an affected population to demographic characteristics of a non-affected population or general population". The problem with the implied use of a non-minority, **non-affected** (less exposed) population as a comparison population or control for a minority and affected population is that it is the wrong group to test whether or not there is disparity of exposure between minority and non-minority communities. The comparison of interest is among the demographic characteristics of all the **affected** communities. It must be ruled out that there is not a non-minority population which is as highly exposed as the highest of the minority populations.

A further problem with the comparison population concept in this methodology is evident in the third paragraph of section VI- B-6. Here it is stated: "For instance, measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations." A statistically significant difference cannot be determined to exist between only two numbers, such as the percentages of minority composition of an affected population and a comparison population. It could be determined, however, if the minority population of one population is at least 2 or 3 standard deviations above the mean of the distribution of minority populations of all the communities. If this is done, however, there is no single comparison population.

There has been an attempt in this version of the EPA Title VI Guidance to be more explicit in the explanation of the methodology for the determination of disparate impact by race, color, or national origin resulting from permitting decisions. Imbedded in the methodology, however, is a mathematical algorithm which must be demonstrated to be correct with multiple tests on either real or synthetic data. As far as can be determined no test has been undertaken, and thus there is no evidence right now on whether this method will produce valid and reliable results. An alternative to the comparison population method is the "Emission Index Approach to Analysis" found in Perlin (1995) page 75. From tests of this methodology undertaken by the state of NJ it appears to avoid the fundamental problems that may exist in the current version of the USEPA Title VI Guidance.

Sincerely,

Pamela Lyons

Pamela Lyons
Director

Reference: Perlin et al. (1995) Distribution of Industrial Air Emissions by Income and Race in The United States: An Approach Using the Toxic Release Inventory. Environmental Science and Technology

lfoushee@mtn.org on 08/28/2000 12:40:51 PM

To: Group Civilrights
cc:

Subject: Title VI Guidance for EPA Assistance Recipients

Lea Foushee
North American Water Office
PO BOX 174
Lake Elmo, MN 55042
651-770-3861 (phone)

Comments on the Draft Title VI Guidance for EPA Assistance Recipients and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits.

--These documents have been available for distribution and public comment for 60 days. Yet, my review and comment was not solicited until less than ten calendar days before the deadline today, by the Minnesota Pollution Control Agency. This is woefully inadequate for extensive comment, but with the brief amount of time available I have a few comments as follows:

If an individual or group alleges discrimination from either human health or environmental effects from a pollution permit or from a public participation process to a Recipient Agency, The Recipient Agency in question MUST provide that person or organization with the complaint guidelines and protocols in writing immediately. The 180 day time period for filing complaints assumes the person or group has immediate access to the complaint process documents.

A permit, especially a reissuance, should be stayed if disparate health effects are documented in the filing. Justification for disease and death from pollution permits is not possible. Just because pollution permits may have secondary economic benefits in a given Community of Color does not remove the ultimate insults of genocide and/or cultural assimilation. The quality of economic development benefits must be sustainable to be considered genuine. Disease, death or poor health cannot be part of the bargain. Try living next to a nuclear waste dump and see how much you like it.

Any disparate impact analysis must include threats to culture, especially Indigenous Peoples, whereby the only alternative to avoiding or mitigating an adverse impact is assimilation or genocide.

curtisseyfried@mindspring.com on 07/24/2000 04:28:53 PM

To: Group Civilrights@EPA
cc:

Subject: To: Ann Goode, Title VI Aug 1 in NYC

I will NOT be able to attend the "Public Listening Session" on August 1, 2000 at Region 2 headquarters in NYC as I will be away. I WILL be submitting written comments before Aug. 28th, 2000.

The following are some initial brief comments and questions:

1. Would these guidance principles , if adopted, be applicable to EPA having authority over New York state Department of Environmental Conservation, and New Youk City Department of Environmental Protection? BOTH of these agencies accept Federal $$$$'s and BOTH of these issue environmental permits. Please respond to this to me by e-mail. Also I would like this question posed at the "Public Listening Session."

2. A comment on the "Public Listening Session." I guess EPA is getting wise in telling CBO's ahead of time that their input will not be taken at the session, that CBO's and the Public are ONLY here to "LISTEN" to what EPA has to say. You WILL find that, even if I am not there to raise this issue, there will be many unhappy CBO representatives at this meeting who will bring EPA to task for ONLY expecting us to Listen ! This may NOT have been your intent, but it is the message sent !
3. This, #2, is the whole crux of the EJ and Civil Rights issues, government agencies ARE NOT responsive to, and DO NOT want to listen to, CBO's and the general public !! Well, you will listen to us whether you want to or not !

Sincerly yours,
Curtis Seyfried, Project Manager.
Nos Quedamos
811 Courtlandt Ave.
Bronx, NY. 10452
718-585-2323 FX: 718-585-8628
E-mail: quedamos@aol.com
Detailed Written comments to follow.

Biography of Nos Quedamos Project Manager, Curtis Seyfried

Curtis Seyfried, B.Sc., M.A., Project Manager for Environmental and Health Programs. He represents Nos Quedamos in coalitions, working groups, and task forces dealing with issues such as: equitable solid waste disposal; transportation and air quality; the

Hudson River Estuary Management Program; Bronx & NYC waterfront; environmental justice; and parks and open spaces, including community gardens.
He previously has worked: 1), For three years in the Office of the Mayor of NYC, in Council On The Environment Of NYC's (CENYC), Waste Prevention and Recycling Service (WPRS), as a project manager for waste prevention audits and studies; 2), For major law firms, such as Simpson, Thatcher and Bartlett; 3), In the Legal -- Environmental Health and Safety department of Pfizer, Inc., a major pharmaceutical company; 4), and, in Chemical Bank, for the Vice President of the Customer Account Service department producing Management Information Systems (MIS) reports for four years.
He holds an MA., in Environmental Policy Studies and Analysis, 1996, from SUNY Empire State College; a B.Sc., in Biological and Environmental Sciences, 1992, from SUNY Empire State College; and, Diplomas, from New York University in: Paralegal Studies 1995; and, Project Management 1988.
It is suspected that in this section of the Bronx there are extraordinarily high levels of lead, and other heavy metals, and hydrocarbons in the soil. This assumption is supported by previous activity that has occurred. It is known that buildings that were previously located on these sites were razed by implosion. Thus, the lead and other toxins from paint, building materials, pesticide residues from years of chemical vermin control, have settled into the site.
Additionally, the building heating fuel oil storage tanks that were in the basements of these buildings were not emptied or removed when the building was imploded into the site. This represents the likelihood of numerous "hot spots" of hydrocarbon contamination.
The practice of scraping and painting the overhead roadways and bridges that span the South Bronx communities, contribute significant amounts of additional lead, hydrocarbon and other heavy metal contaminants to the environment.
Nos Quedamos will work to assess and document these conditions and plan remediation projects for the South Bronx Community. We will be working in partnership on these projects with: Bronx Community College Environmental Technology Program, Dr. Reid Strieby; Greenway Environmental Services, Shabaz Jackson & Josephine Papagni, principals; Mt. Sinai Medical Center, Dr. Luce Claudio; Montefiore Medical Center, Dr. Philip Ozuah & Dr. Maslinsky; Albert Einstein College of Medicine, Dr. Strelnick; Columbia University School of Public Health, Dr. Patrick L. Kinney; and others.
Nos Quedamos additionally plans, with these partners to create educational programs for qualified community residents so that our constituents will be able to be employed in this expanding environmental remediation industry. As an added benefit of these projects our community's residents will become qualified to participate and plan their community's future environmental health.

Peace and Good Health, (;->)
Curtis Seyfried curtisseyfried@mindspring.com 410 East 156th St, 6A Bronx, NY.

10455
(718) 993-9451
==========
A quote from John Warren - "You never know when, where, how, or under what circumstances, you will see something, hear something, read something, experience something, or meet someone who will change your life forever. Look for those experiences in 2000!"

"Technology is of no use to us if it is used without respect for the earth and its processes." -- Aldo Leopold
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August 28, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*

Dear Administrator Browner and Ms. Goode:

The Natural Resources Defense Council (NRDC)[1] submits the following comments in response to the U.S. Environmental Protection Agency's (EPA) recently released *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* ("The Guidance"). NRDC commends EPA for investing time and resources to formulating a comprehensive strategy to investigate Title VI complaints in the environmental permitting arena. This momentous task places EPA at the crossroads and presents an extraordinary opportunity to move beyond the contentious debate on the causes of environmental inequities and to implement action to revive environmentally devastated communities.

Real life experience shows that many state recipient agencies have consistently failed to address blatantly unfair distributions of environmental harms, despite wide discretion to do otherwise. This makes EPA's Title VI Guidance an indispensable tool for communities fighting against overwhelming environmental and public health threats.

However, a review of the new Guidance reveals serious flaws. Despite efforts expended thus far, the Guidance still fails to yield a framework that will guarantee compliance with civil rights laws. Much of the document is spent on imploring recipient agencies to address and reduce pollution in affected communities. Yet, on the heels of this directive is an even stronger message: that EPA will go to great lengths to escape administering a Title VI remedy, either through termination of funding or seeking injunctive relief via the U.S. Department of Justice. This is apparent in the substantial deference afforded to the recipient agencies, through

[1] NRDC is a national nonprofit organization dedicated to protecting the world's natural resources and ensuring a safe and healthy environment for all people. With 400,000 members and a staff of lawyers, scientists, and other environmental specialists, NRDC combines the power of law, the power of science, and the power of people in defense of the environment.

significant procedural protections and generous presumptions, as compared to the absence of ample avenues for redress to civil rights complainants.

To comply with the letter and spirit of civil rights law, as well as its duties under Title VI, EPA should reconsider its position. NRDC respectfully offers the following comments which outlines the more serious deficiencies in the Guidance and proposes recommendations.

II. Framework for Processing Complaints

A. Summary of Steps

Guidance states: Section II(A) establishes a strict timeline to facilitate acknowledgment, acceptance and investigation of Title VI complaints. EPA should be commended for setting a maximum window of 205 days for a complaint to be received and ultimately decided upon based on its merits.[2]

Deficiency: It is highly improbable that EPA currently has the resources to comply with the deadlines set forth in the Guidance. In fact, EPA has missed its regulatory deadlines in every single Title VI case accepted for investigation in the history of the agency, with only one exception, and missed the regulatory deadlines for acknowledgment of complaints in almost every case. Given this current state of affairs, it seems likely that OCR will encounter difficulty in responding to future complaints filed, in addition to the 51 complaints that are awaiting resolution.[3]

Recommendation: EPA should (1) ensure that OCR is adequately staffed to investigate all Title VI complaints in a manner that provides for a fair and timely investigation; (2) implement oversight procedures to make sure that investigations are being handled properly, ranging from periodic reports submitted by investigators to full public disclosure of such progress.

6. Voluntary Compliance

In Section II.A.6, the Guidance states that if the recipient does not voluntarily comply after the receipt of a formal determination of noncompliance, EPA *must* start proceedings to deny, annul, suspend, or terminate EPA assistance. It is commendable that EPA has committed itself, at least in theory, to actually enforcing funding termination sanctions for recalcitrant violators.

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[2] The Guidance states that EPA will acknowledge receipt of the complaint within five (5) days, accept the complaint for investigation, rejection or referral within twenty (20) days, and then spend a maximum of 180 days investigating an accepted complaint before making a finding on the merits of the complaint. §§ II.A.1, II.A.2, II.A.3. This makes for a total of 205 days from start to a preliminary finding.

[3] Indeed, some of these 51 complaints have been pending since 1993. Given that seven (7) years have passed since acceptance for investigation in some cases, and only one complaint has ever been resolved on the merits, there is little reason to believe OCR can turn around all complaints in 180 days.

B. Roles and Opportunities to Participate

Guidance states: In Section II(B)(2), EPA describes the proceedings between the complainant and recipient as not "adversarial" and therefore, the complainant has no right to appeal.

Deficiency: However, EPA affords a disturbingly different standard to the recipient, offering it substantial procedural protections, including the right of appeal after an adverse decision. This scheme unfairly elevates and offers significantly more protection to a governmental entity's monetary interest over private citizens' constitutional interests.

Recommendation: It is critical for EPA to remember that its interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, EPA has effectively made the complainants' civil rights contingent upon the political will of EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court (Section II.7). Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with civil rights laws.

III. Accepting or Rejecting Complaints

B. Timeliness of Complaints

b. Ongoing Permit Appeals or Litigation

Guidance states: EPA states that it will generally dismiss complaints without prejudice if the issues raised in the complaint are the subject of "litigation in Federal or state court."

Deficiency: This broad policy has the potential to penalize complainants who seek to challenge permit actions on environmental grounds in court, while challenging those same permit actions on civil rights grounds by filing an administrative complaint with EPA. Such complainants would have their civil rights complaint dismissed because they sought to force an agency to abide by environmental law – simply because the "issues raised in the complaint" would be the same issues raised in the lawsuit.

Recommendation: Since, in effect, this provision forces complainants to choose between vindicating certain rights and foregoing others, it should be eliminated from the Guidance.

4. Premature Complaints

Guidance states: EPA states that when complaints are filed prior to the issuance of the permit by the recipient, the complaint will be deemed premature and dismissed without prejudice.

Deficiency: As a general matter, to ensure that discrimination does not take place EPA must prevent industries from polluting areas where the pollution would result in discriminatory adverse effects. However, the Guidance ignores this approach by stating that a permit must be issued before a complaint can be considered ripe, otherwise it will be dismissed as premature.[4] While this language provides a clear and simple definition of ripeness for EPA, it disadvantages the communities supposedly protected by Title VI. Using permit issuance as a ripeness test means that EPA misses the ideal opportunity to *prevent* discriminatory impacts – before they occur.

Recommendation: If all indicators show that a permit will be issued, and if a complaint meets the initial acceptance criteria, then there is little reason for EPA to delay investigation. Potential EPA investigation may also encourage agencies and polluters to negotiate with communities to revise the siting plans. Without a compelling reason for the delay in investigation, this ripeness test is relatively meaningless.

IV. Resolving Complaints

B. Implementing Informal Resolutions

(i). Eliminating or Reducing Adverse Disparate Impacts

Guidance states: EPA states that it will encourage recipients to informally resolve Title VI complaints. The agency further explains that it "expects that measures that eliminate or reduce *to the extent required by Title VI* the alleged adverse disparate impact will be an important focus of the informal resolution process (emphasis added)."

Deficiency: The Guidance fails to explain what "eliminate or reduce [adverse disparate impacts] to the extent required by Title VI means.

Recommendation: At the very least, this language can be read to mean that it should be a reduction to the level at which they are no longer "significant" enough to be considered "adverse" or "disparate" under Title VI. EPA must propose how it will define legal significance, with respect to both level of impacts and demographic distribution of impact.

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[4] "When complaints… are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." Guidance at §III.B.4.

(ii) Denials of Permits

Guidance states: EPA states that "it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts " and reiterates this point elsewhere in the Guidance (Section VII.A.3).

Deficiency: This language is alarming given that communities generally raise complaints in response to a single proposed new or expanded facility, discovering or realizing that they are subject to a disparate impact in such instances.[5] In these cases, the suspension, denial, or revocation of a permit is a powerful tool for communities fighting against disparate impact. In essence, EPA is robbing complainants of the most effective tool they have to prevent disparate adverse impact.

Recommendation: While, no one discrete agency action is likely ever to be solely responsible for an adverse impact, actions that contribute to disparate impacts should NOT be allowed. Indeed, the "sole cause" concept is antithetical to cumulative impacts analysis, which EPA embraces, at least in theory. Accordingly, EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases.

(iii). Mitigation Measures

Guidance states: During the informal resolution process, recipients can offer "to provide various measures to reduce or eliminate impacts…such measures include changes in policies or procedures, additional pollution control, pollution prevention, *offsets*, and emergency planning and response."

Deficiency: In effect, EPA proposes to tolerate concededly discriminatory effects if the recipient comes up with a plan to "mitigate," but not eliminate, those impacts. Less discrimination is still discrimination.

Recommendation: Civil rights enforcement must have as its goal the prevention and elimination of discrimination. Within the framework described in the Guidance, EPA's faith that mitigation measures employed by the recipient agency are sufficient to ensure compliance with Title VI is dangerously misplaced.

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[5] *See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 326 (1994). Of the first 17 Title VI complaints filed with the EPA and examined in this article, almost every single one, whether accepted or rejected, was prompted by individuals or groups challenging the permitting of a single facility.

It is important for EPA to acknowledge that mitigation measures are devices often used by agencies and polluters to trade certain pollution to other areas or media. For example, a facility may propose to reduce water pollution while increasing air pollution, or preserve pristine areas in another region to compensate for increased emissions at a particular site. One pitfall with mitigation is that it may not actually cause a reduction in the harmful pollution at the site itself, since mitigation could potentially take the form of positive environmental improvements in locations outside the community in which the facility is located.

Thus, EPA should require that any mitigation measure undertaken must address concerns at the actual site, and not propose to address issues that have no relevance to the community where the facility is to be located.[6] Therefore, mitigation must be targeted to the site at issue in the complaint and concentrate on the medium specifically claimed to be causing the violation. There is no sense in allowing for reductions in water pollution at a site if the air pollution is the focus of the complaint.[7]

Moreover, if a state agency promises to carry out mitigation procedures, and then fails to do so, there is currently no avenue of redress for the community members affected. Even if the mitigation measures are faithfully put in place, there is no guarantee that they will actually work.[8] Therefore, it is important that EPA ensure that third parties that are responsible for conducting mitigation actually do it and should include administrative recourse for complainants. Also, while EPA grants that an area-specific agreement or other such mitigation scheme may be reviewed if circumstances change, this review process suggests that a new permitting action is

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[6] "The significance of the adverse environmental impact of the particular agency action can not be obviated by pointing to the beneficial environmental impact of a different and unrelated action." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982). *See also* Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 831 (1999) ("EPA should amend its supplemental mitigation proposal to require that any mitigation address similar health or environmental risks as those caused by the project").

[7] *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 189-90 (1998) (stating generally that the success cross-media mitigation measures are difficult to establish since a baseline comparison to classic regulation is difficult).

[8] *See* Michael G. LeDesma, Note, *A Sound Of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497, 500-501 (1994) (stating that wetland bank mitigation is generally unmonitored and in fact starts a race to the regulatory bottom among states); Daniel Jack Chasan, *Salmon; Ruling: Agencies Violate Law; So What? It Happens All The Time*, SEATTLE POST-INTELLIGENCER, March 19, 2000, at P-I FOCUS, Pg. G1 (stating again that wetland programs are ineffective and that generally, state environmental agencies do not follow the law with regard to their mitigation plans, at least in Washington state); Michael J. Bean, Testimony Before the Senate Subcommittee on Fisheries, Wildlife and Drinking Water, November 3, 1999 (stating generally that HCP mitigation efforts are underregulated, hard to enforce, and difficult to judge in terms of efficacy); Keith Rogers, *Employees Say Agency Retaliating*, LAS-VEGAS REVIEW JOURNAL, December 9, 1998, at 1B (stating how Clark County Health District (NV) officials were accused of harassing employees who reported violations of mitigation schemes to EPA).

required to make the complaint ripe. Instead, EPA should allow for a direct review of mitigation measures if the scheme is accused of failure.

Furthermore, by allowing state agencies to submit a mitigation plan to OCR without consulting with the affected community, EPA lacks the input it needs to make a fair determination. Sound policy decisions require the input of all interested perspectives and, as such, EPA should make it explicit that the affected community shall have a meaningful role in fashioning mitigation plans.

(iv). Offsets

Guidance states: During the informal resolution process, recipients can offer "to provide various measures to reduce or eliminate impacts…such measures include changes in policies or procedures, additional pollution control, pollution prevention, *offsets*, and emergency planning and response."

Deficiency: EPA should clarify what the agency means by "offsets." Typically, offsets include either (1) reducing pollution at other facilities in exchange for keeping emissions high at the disputed facility; or (2) sending pollution to another area in exchange for reducing its pollution at the disputed facility (the Prevention of Significant Deterioration (PSD) model). Assuming EPA means reducing pollution at other areas, this is inadequate to address Title VI concerns. Only offsets that apply to the specific neighborhood directly affecting the complaining community would reduce an adverse impact as required by Title VI. Otherwise, a facility's emissions could pollute an area in violation of Title VI, while pollution is reduced in areas where it does not require reductions, such as an affluent community with fewer environmental threats present.

Still, PSD style offsets pose potential problems. Implementation of pollution offsets (in this case allowing for more pollution in another area to compensate for having to reduce emissions at the complained-about site) will likely reroute pollution to other areas that in all probability are in violation of Title VI already.[9] Giving companies an incentive to pollute in other poor areas by advocating offsets for Title VI violation areas does not solve the problem of disparate impact, it merely moves it somewhere else.

Recommendation: Ultimately, if EPA insists on using offsets in a Title VI context, it should limit the recipient community of the offset pollution to areas that do not experience adverse disparate impact, and *would* experience no adverse impact as a result of the offset. In doing this, EPA can ensure that the goals of Title VI are not defeated.

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[9] *See Communities for a Better Environment v. South Coast Air Quality Management Dist.*, EPA File No. 10R-97-R9, filed June 23, 1997 (generally alleging that source pollution, wherever it exists in the SCAQMD, is concentrated in minority communities); Vicki Ferstel, *The Advocate (Baton Rouge, LA)*, June ___, 1998, at 1A (reporting on a 1984 consultative report to the city of Los Angeles that recommended siting facilities in already highly industrialized neighborhoods in low-income neighborhoods).

Lastly, if EPA is going to defer to “informal resolutions” reached between complainants and recipients, there must be some independent investigation to ensure that the complainant that entered in to the agreement was adequately representative of the affected community.[10]

V. Investigative Procedures

B. Granting Due Weight to Submitted Information

1. Analysis or Studies

Guidance states: EPA states that recipients as well as complainants may submit “evidence such as data and analyses to support their position that an adverse impact does or does not exist.”

Deficiency: Requiring that studies that be granted due weight conform to "accepted scientific approaches" necessarily favors submissions by industry and state agencies over submissions by affected communities. Generally, a low-income community group in an environmentally devastated area will not have the resources to pay for a comprehensive study that meets EPA's standards. Moreover, there is also evidence to suggest that EPA ignores studies by community groups, even when submitted in a scientifically acceptable fashion.[11] Thus, it is likely that most studies of the area at issue in a particular complaint will be filed by the party adverse to the complainant; i.e. the agency whose funding is dependent on the outcome of the study and subsequent investigation. Hence, EPA is confronted with an objectivity dilemma.

Recommendation: To assist in overcoming this objectivity problem that offers too much deference to the recipient agencies, EPA should conduct its own studies, when possible, because the standard for dismissing a study is too high. In other words, by denying due weight only to studies that have "significant deficiencies," EPA sets a standard for dismissal that allows for "moderately" deficient studies to be accepted. For example, if community residents complain of adverse impact, an agency study suggests that there are no impacts, and the study has "minor" deficiencies, EPA could grant the study due weight under the current Guidance. By making the standard "significant" EPA allows for too much inconsistency in studies that may result in unchecked violations of Title VI.

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[10] (Cf. Federal Rules of Civil Procedure R. 23(a)(4) requiring adequate representation of the class by the class representative.) If the complainant was not adequately representative – especially as indicated by the presence of other community organizations opposing the informal resolution, whether or not such groups have filed a Title VI complaint of their own – then EPA should not dismiss the complainant’s original complaint but rather continue its investigation, as before, despite complainant’s attempt to withdraw the complaint. (Cf. FRCP R. 23(e), requiring court approval of settlements in class actions to ensure that the interests of absent class members is adequately protected.) If EPA proposes to make a finding that the complainant is adequately representative, and that an informal resolution will therefore be deemed to satisfy the requirements of Title VI, EPA should first provide notice and an opportunity for comment by all interested parties.

[11] Catherine O’Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples* , 19 STAN. ENVTL. L.J. 3 (2000).

Lastly, EPA should be sensitive to the fact that low-income affected communities may not be able to pay for costly scientific studies, and out of respect for their means, EPA should afford those studies weight and consideration (see additional comments on Section VI.3. “Impact Assessment).

2. Area-Specific Agreements

Guidance states: EPA encourages recipients to develop area-specific agreements (ASAs) which contain plans to eliminate or reduce existing disparate impacts, and if they meet certain criteria, they will be given "due weight" in a Title VI investigation.

Deficiency: The precise role the Guidance ascribes to ASAs in the course of a civil rights investigation is vague and disturbing. Despite EPA's assertions in § V.B.1 that it "cannot grant a recipient's request that EPA defer to a recipient's own assessment," the described treatment of ASA’s in essence does just that. EPA’s proposal to rely on its findings about such a *general agreement* to dismiss a *specific complaint* thwarts EPA's legal responsibilities under Title VI, which require the agency to actually investigate the complaints that are filed. ASA’s may be fatally flawed in that they are devoid of any features that could assure the recipient's compliance with any goals of pollution reduction, pollution prevention, or environmental justice. Furthermore, there may be no mechanisms to (a) monitor progress, (b) revise the plan to meet changed circumstances, (c) allow community groups that are parties to such an agreement be able to enforce it in court.

Recommendation: As a backdrop to ASAs and standards for due weight, EPA should carefully consider experiences with states under the Clean Air Act since the due weight provisions of this part of the Guidance parallel the practice of certifying state implementation plans under the Clean Air Act. Those plans have not been universally successful, and indeed, in some cases fail to prevent states from polluting with little or no threat from EPA. As of December 13, 1999, 119 areas around the country were in nonattainment for one or more listed air pollutant, 29 years after the passage of the Clean Air Act.[12]

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these vague exceptions is problematic. Typically, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency’s position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an ASA is no longer is entitled to "due weight.”

[12] <http://www.epa.gov/airs/nonattn html> checked on July 5, 2000.

VI. Adverse Disparate Impact Analysis

B. Description of Adverse Disparate Impact Analysis

EPA's Title VI regulations prohibit federally funded programs and projects from having a disparate impact on people on the basis of race, color, or national origin. To fulfill this duty, EPA must revise various sections of its adverse disparate impact analysis.

1. Assess Applicability

a. Determine Type of Permit

Guidance states: EPA will likely dismiss a complaint if the permit action that triggered the complaint significantly decreases overall emissions at the facility. To prevail, the recipient must demonstrate that the decreases occur in the same media and facility. For instance, EPA will not dismiss a complaint alleging adverse disparate impact from air discharges where the recipient demonstrates a decrease in water discharges.

Deficiency: Trading different pollutants from the same media can adversely affect communities of color in violation of the regulations implementing Title VI. Because different air pollutants have different properties, they interact differently, and affect humans and the environment in different ways. Air pollutants are not interchangeable. Some air pollutant emissions spread out throughout a basin, while others hover, affecting primarily the immediate area. Other air pollutants are highly toxic, while some are relatively benign. For EPA to treat all air pollutants as the same for purposes of "overall emissions" reduction is to ignore the very real health consequences that reductions in relatively non-toxic chemicals – and increases in more toxic chemicals – can have.

Recommendation: The Guidance should also require the recipient to show that the decrease came from the *same pollutant* within that same media. Accordingly, the Guidance should state that in order to show that the permit action triggering the complaint significantly decreases the overall emissions at the facility, the recipient must demonstrate that the decreases occur within the same media, *pollutant* and facility. Thus, if a facility emits toxic and relatively non-toxic pollutants, it should not be allowed to trade one for the other for the purposes of "significantly reducing" its emissions overall.

2. Define Scope of Investigation

Guidance states: EPA will utilize the nature of stressors, sources of stressors, and/or impacts "cognizable under the recipient's authority" to define the scope of the investigation.

Deficiency: The language of Title VI and EPA's implementing regulations are not, on their face, limited to any particular type of discriminatory impacts. Title VI provides in broad terms that "[n]o person in the United states shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[13] EPA's Title VI regulations state that a recipient shall not "use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination" nor "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 to which this Part applies."[14]

Here, EPA incorrectly interprets Title VI as prohibiting only "impacts cognizable under the recipients authority." This view is too narrow and limits the impacts to environmental ones as regulated under environmental laws and regulations. And because federal environmental laws, in many instances, provide for delegation to the states, states in effect will be choosing what standards to implement Title VI. In effect, this will lead to a lack of uniformity in implementing federal civil rights law.

Recommendation: To its credit, EPA acknowledges that impact should be evaluated if the recipient has "some obligation or authority regarding them" and that " a recipient need not have exercised this authority for the impact to be deemed within the recipients authority." Section VI.B.2.a. This suggests that applicable laws and regulations may in fact include more than environmental laws and regulations, which by themselves, do not provide the protection required by Title VI and its underlying civil rights objectives.

Therefore, it can be argued that any impacts on a community's well-being which are linked to a permitted facility -- e.g., health,[15] environmental,[16] socioeconomic, and other quality of life impacts[17] -- are cognizable under Title VI's broad anti-discrimination mandate.[18]

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[13] 42 U.S.C.A. § 2000d (West 1999).

[14] 40 C.F.R. § 7.35 (b)-(c) (West 1999). Note, however, that the full text of § 7.35(b) reads: "A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, *or have the effect of defeating or substantially impairing accomplishment of the objectives of the program* with respect to individuals of a particular race, color, national origin, or sex." 40 C.F.R. § 7.35(b) (emphasis added).

[15] "Health" impacts include actual illness or injury, as well as increased risk of illness or injury. The term may also include mental and psychological health as well as physical health. *See, e.g.,* TITLE VI ADVISORY COMMITTEE REPORT at 000021.

[16] "Environmental" impacts include pollution of air, water, land, noise and odor. *See, e.g.,* TITLE VI ADVISORY COMMITTEE REPORT at 000021; Complaint, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960, ¶ 43 (E.D. Pa., 1996) (alleging, *inter alia*, toxic contamination of air, water, and soil; increased noise and vibration due to added trucking; emission of malodorous and noxious odors adversely creating acute health problems; increased dirt and litter on community roads).

a. Determine Nature of Stressors and Impacts Considered

Guidance states: According to the Guidance, impact is "a negative or harmful effect on a receptor resulting from exposure to the stressor," and, "generally, a stressor is any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems."

Deficiency: The Guidance construes "impact" in an unacceptably narrow way. The proposed framework ignores the social, cultural or economic impacts of projects, and is a significant narrowing of both Title VI and EPA's Title VI regulations, neither of which limits impacts solely to health and environmental impacts. This approach places the Guidance once more in conflict with its own regulations.

Recommendation: The approach to evaluating impacts taken in Title VII and Title VIII cases is instructive here. The basic inquiry is whether a policy has a disproportionate impact on people of color "in the total group to which the policy was applied."[19] Within the Guidance, the corresponding inquiry is whether the program or the stressor has a disproportionate impact based on race, color, or national origin.

Therefore, EPA has a duty to consider all impacts from a facility, including health, social, cultural and economic. In fact, federal courts repeatedly have rejected the narrowing of Title VI that EPA proposes here. Instead, the courts have construed disproportionate impact to relate to the impact of the project as a whole. For example, in *Bear Lodge Multiple Use Association v. Babbitt*, a Title VI case, the court construed impact broadly to include cultural, spiritual and religious impacts.[20] In other federal Civil Rights cases, plaintiffs have raised social and cultural

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[17] "Socioeconomic and other quality of life impacts" includes such diverse impacts as decreased property value, traffic, aesthetics, impacts to cultural, religious, spiritual and archaeological resources. *See, e.g.,* TITLE VI ADVISORY COMMITTEE REPORT at 000021; Complaint, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960, ¶ 43 (E.D. Pa., 1996) (alleging, *inter alia*, interference with residents' peaceful enjoyment of their property and interference with residents' sleep; decreased property values; stigmatization of the community; loss of self-esteem of residents, which adversely affects community "esprit-de-corps").

[18] TITLE VI ADVISORY COMMITTEE REPORT at 61, 62, 000021, 000027. *See also* Brief of Plaintiffs in Opposition to Defendants' Motion to Dismiss, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960 (1996), at 2-3 (on file with author) ("Though it is the waste facility permit applicant, in the first instance, who proposes the waste facility location, defendants [Pennsylvania Dept. of Env'l Protection] have the authority and power to deny the permit application. . . . Defendants, therefore, have the power and duty to deny a waste facility permit to prevent the construction or operation of a proposed waste facility whenever the proposed facility is found to be violative of applicable laws and regulations *or whenever defendants' grant of a permit would violate defendants' obligations under the civil rights laws and regulations*." (emphasis added)).

[19] *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4th Cir. 1989).

[20] *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (1999), *cert. denied* 120 S. Ct. 1530 (2000).

impacts. In *Grimes v. Sobol*,[21] plaintiffs alleged that a public school curriculum discriminated against African American students, and contributed to the low self-esteem and high crime rate, of African Americans. In *Allen v. Wright*,[22] the court acknowledged that stigma was a legally cognizable injury. In *Rozar v. Mullis*,[23] plaintiffs alleged injury to property values and welfare as well as to health. In none of these cases did the court deny or dismiss the claim because the alleged cultural and social injuries were deemed irrelevant.

Generally, EPA should avoid limiting the scope of it civil rights enforcement on environmental statutes. However, if EPA insists on using such statutes as a leading guide, it must recognize that the purpose of environmental statutes is often not only to prevent health and environmental impacts but also aesthetic injuries. For example, the Clean Water Act states in §101 that a primary purpose of the Act is to make water swimmable and suitable for recreation. The National Environmental Policy Act similarly requires environmental impact statements to consider not only the health impacts but also the social impacts that major projects will have on a community before commencing those projects.

3. Impact Assessment

Guidance states: EPA states that "the strongest evidence demonstrating a causal link between the alleged discriminatory act and the alleged adverse impact would *directly link* an adverse health or environmental outcome with the source of the stressor. Although such evidence is preferred. . .it is rarely available."

Deficiency: EPA calls for a "direct link" between an adverse health or environmental outcome and the "source of the stressor." In reality, this is virtually impossible except in the most horrific cases of toxic poisoning. As EPA acknowledges, it may require data gathered systematically over years – much longer than the timeframe provided for investigation in the Guidance - to discover the causation. Further, there may be impacts, which do not manifest themselves for many years after exposure, such as certain types of cancer.

Recommendation: EPA should make explicit that the unavailability of preferred data on "direct links to impacts" will not in any way prejudice a Title VI complaint. Furthermore, EPA needs to be explicit that, where the ideal form of evidence about impacts is not available, whatever the best available form of evidence is will be used, and it will be given, in such a case, no less weight than any other more "ideal" type evidence would have received. Indeed, the Guidance alludes to such an approach in Section VI. B.5. where it states that "simpler approaches based primarily on proximity may also be used where more detailed (e.g., modeled) estimated cannot be developed. . . ." This language should be expanded upon to make clear that a proximity analysis is always

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[21] 832 F. Supp. 704 (1993).

[22] 468 U.S. 737 (1984).

[23] 85 F.3d 556 (11th Cir. 1996).

appropriate where other forms of analysis are unavailable due to lack of data or methodological difficulties. Lastly, EPA should also focus on exposure to pollution, not solely health outcomes.

4. Adverse Impact Decision

Guidance states: EPA suggests that where risks or other measures of potential impacts meet or exceed a relevant "significance level," the impact will be presumed adverse.

Deficiency: While this is a reasonable framework, the Agency should be careful that the converse assumption is not made, i.e., a presumption of no adverse impact if a significance level is not exceeded. As a practical matter, EPA should acknowledge that permit applicants and regulatory officials can manipulate baselines and emission factors to keep from triggering applicable significance levels.

Recommendation: Thus, even in cases where significance levels are *not* exceeded, EPA should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, the OCR should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

Guidance states: To its credit, in determining whether an impact is “adverse” EPA generally states that it will consider adverse impacts outside of the traditional environmental regulatory framework.

Deficiency: However, EPA then goes on to frame its adverse impact analysis in terms of risk values, based upon hazard indexes and risk assessments, which are used to implement environmental laws and regulations. EPA reiterates the position that if the area in question is in compliance with a health based standard, there is no “adverse “ impact. For example, EPA states that “if an investigation includes an allegation raising air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as “adverse” within the meaning of Title VI.”

Recommendation: EPA should avoid limiting the evaluation of whether an impact is adverse to safe levels as defined by environmental laws and regulations is inadequate. By relying solely on such mechanisms, EPA is in effect reducing Title VI compliance and enforcement to compliance and enforcement of environmental law, thereby undermining the civil rights objectives of Title VI.

Furthermore, the Guidance suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. Given the

extreme backlog of Title VI cases, resource limitations and unrelenting pressure from industry and some state regulators, this presumption is relatively meaningless. Given that the complainant does not have standing as an "adverse party," and the recipient is unlikely to challenge such a finding, EPA is in the awkward position of having to rebut its self- imposed presumption. Moreover, since the recipient has significantly more resources than the complainant, the EPA should avoid imposing procedural roadblocks that operate to leave the complainants without recourse.

a. Example of Adverse Impact Benchmarks

Guidance states: EPA appropriately concludes that " a recipient's Title VI obligations exists in addition to the Federal or state environmental permitting program," in large part, since "Title VI is concerned with how the effects of the programs and activities of a recipient are distributed based on race, color or national origin." EPA appropriately acknowledges that "in some cases, the relevant environmental laws may not identify regulatory levels for the risks of the alleged human health impact or may not address them for Title VI purposes."

Deficiency: At various points in the Guidance, EPA takes positions that fly in the face of this important premise. For example, EPA states that it will" evaluate the risk or measure of impact compared to benchmarks for significance provided under any environmental statute, EPA regulation or EPA policy." Environmental laws, as EPA acknowledges, do not address the cumulative effects and risks from multiple exposure media. Moreover, EPA admits that "environmental laws do not regulate concentrations of sources, or take in to account impacts on some sub-populations which may be disproportionately present in an affected population."

Recommendation: The list of elements that environmental laws fail to regulate should be expanded to include, for example, not only cumulative impacts (multiple sources of the same pollutant) but also synergistic impacts (multiple pollutants combining to have a different or heightened health impact). The Guidance should provide for ways to include these relevant factors in an adverse disparate impact analysis and avoid citing to only environmental laws as though they are the paramount benchmarks for analysis.

b. Use of Ambient Air Quality Standards

Guidance states: EPA relies on National Ambient Air Quality Standards (NAAQS) as an ideal example of a health-based standard appropriate for use in an adverse impact investigation.

Deficiency: EPA's reliance on the National Ambient Air Quality Standards (NAAQS) is misplaced, because an air basin's attainment status under NAAQS does not mean a polluting facility will not have an adverse impact on the surrounding community.[24] EPA's reasoning is

[24] EPA's approach also appears to contradict its statement in the Recipient Guidance, at § III.B.3.e, that "risks [which] meet or exceed a significance level as defined by law, policy *or* science... would likely be recognized as adverse in a Title VI approach." (Emphasis added) In relying on the NAAQS, EPA is embracing only law, ignoring the fact that both science and public policy indicate that exposure to pollutants at the NAAQS levels is harmful to

flawed because polluting facilities can still have an impact on a community even when NAAQS are satisfied; NAAQS typically ignore toxic hotspots, ignores the fact that significant health effects can occur at exposure to air pollution levels below the NAAQS, ignores that "health-based" standards are set through a political process, ignores acute health effects of exposure to VOCs, ignores accidents and upset conditions at plants, and ignores the fact that health based standards are based on healthy white males.

Recommendation: If the agency is committed to using health-based standards to raise presumptions, it should avoid doing so when the standard applies to a large geographical area, such as an air shed. These general determinations–although perhaps appropriate for SIP planning purposes--may be virtually meaningless at the local level. For example, air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

Moreover, EPA's reasoning omits the cumulative physiological and psychological effects of environmental pollution from trucking, odors, noise, vibrations and stigma, which all increase human stress. There is considerable evidence that exposure to air pollutants such as volatile organic compounds causes increased stress.[25]

Thus, the sufficiency of compliance with such standards as a defense to a Title VI complaint should be closely scrutinized by EPA, on a case-by-case.

5. Characterize Populations and Conduct Comparisons

Guidance states: In analyzing disparate effects, EPA describes the various ways in which it may consider an "affected community" and a "comparison community."

Deficiency: Ultimately, the Guidance does little to define how the disparity of the impact is defined. Specifically, the Guidance is agnostic as to whether the appropriate comparison is between (1) the "affected population" and the "general population" (i.e., including the "affected population") or (2) the "affected population" and the "non-affected population" (i.e., the "general population" excluding the "affected population"). This seems to be an important methodological choice that could have a bearing on the outcome of a complaint investigation. Second, the Guidance is also agnostic as to whether disparity should be assessed by comparisons of (1) the different prevalence of race, color, or national origin of the two populations; or (2) the level of risk of adverse impacts experienced by each population; or (3) both. It is striking that EPA does not state which comparisons are preferred or which comparisons EPA will use if some comparisons show disparity while others do not.

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human health.

[25] *See, e.g.,* J. Timmons Roberts, *Stress, Trauma, and Hidden Impacts of Toxic Exposures on Vulnerable Populations*, Testimony presented at the National Environmental Justice Advisory Council, Baton Rouge, Louisiana, December 9, 1998.

Recommendation: By the end of this section, EPA simply states that it will choose the "appropriate comparisons . . . depending on the facts and circumstances of the complaint." Given that this analysis is a highly important and potentially outcome-determinative methodological choice, EPA should go further and solicit advice from those in the environmental justice movement who have experience and expertise with these methodological issues as to which approaches are most methodologically sound and reasonable.

VII. Determining Whether A Finding of Noncompliance is Warranted

A. Justification

Guidance states: EPA gives recipients "the opportunity to 'justify' the decision to issue the permit *notwithstanding the adverse disparate impact*, based on a *substantial, legitimate justification*." §VII.A (emphasis added).

Deficiency: This position, contrary to EPA's stated goal of complying with Executive Order 12898,[26] extends an open invitation to recipients to continue practices that cause disparate adverse impacts in violation of Title VI and EPA's regulations. A recipient merely needs to claim "legitimate justification" of the permitting action to avoid a successful Title VI claim. Specifically, the recipient simply shows that "the challenged activity ... meets a goal that is legitimate, important, and integral to the recipient's institutional mission." §VII.A.1.

In turn, the complainant can only challenge a recipient's invocation of justification by showing that the challenged activity is not legitimate, important or integral to the agency's mission. In reality, this burden is nearly impossible to carry. Few would deny that most, if not all, challenged activities are legitimate. Everyone agrees that wastewater treatment plants and disposal sites are generally necessary, even if not desirable. Likewise, it is hard to imagine that a recipient state agency would authorize, or a private company would wish to build, a polluting facility for no legitimate reason.

To illustrate "acceptable justification" the Guidance uses the permitting of a wastewater treatment plant as an example." EPA considers the "public health or environmental benefits ... to the affected population" as "generally legitimate, important and integral to the recipient's mission." All of what EPA says about the plant may be true – it may treat the sewage of nearby residents – but not very relevant. The treatment plant *also* treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.

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[26] Executive Order 12898 "directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin." Executive Order 12898, 59 FR 7629 (1994); *see also* Guidance at §I.F.

Recommendation: Generally, benefits to the larger population, including both the affected population and the non-affected population, should not be used to justify burdening only one segment of the population. While it is true that the affected population would receive benefits from a proposed facility, it would also receive burdens that the rest of the benefited population would not. This reasoning cannot be used to potentially justify every permitted facility.

Thus, the critical and determinative issue is not whether or not these facilities are legitimate or necessary, but whether the permitting and siting of them causes an disparate adverse impact in violation of Title VI. With the present "justification" model in place, no Title VI complaint is ever likely to be resolved in a complainant's favor. Here again EPA has worked to hurt the civil rights complainant and reward the civil rights violator.

1. Types of Justification

Guidance states: EPA suggests that "economic development" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. §VII.A.1.

Deficiency: It is impossible to imagine a project whose economic benefits would flow solely to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

The Guidance properly adopts the standard of *Elston v. Talladega County Bd. of Education*, 997 F.2d 1394, 1412-13 (11th Cir, 1993), which requires that the recipient's challenged practice be "necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." [27] EPA's actual application of the *Elston* standard to "economic development," for example, however, is more problematic. After stating that the justificatory purpose must be "integral to the recipient's institutional mission," the Guidance nonetheless states that EPA "would likely consider broader interests [than the "provision of public health or environmental benefits"], such as economic development. . .if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." Economic development (and other government interests not related to protection of human health and the environment) cannot, by definition, be "integral to the recipient's mission." The "recipients" in Title VI complaints are almost always environmental permitting agencies whose institutional mission – as those recipients have repeatedly sought to remind EPA in the context of the "jurisdiction" issue – does *not* integrally include economic development, or any other similar justificatory purpose (such as saving the permit applicant money, allowing the

[27] Inexplicably, however, the Draft Guidance also cites to *NAACP v. Med. Ctr.*, 657 F.2d 1322 (3d Cir. 1981) in support of the *Elston* standard. The *Med. Ctr.* case, however, adopted a much weaker standard of justification that has been largely superseded by the Civil Rights Act of 1991 and should not under any circumstances be adopted by EPA.

permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc.).

Recommendation: "Economic justifications" should be disallowed as a rule under the *Elston* standard adopted by the Draft Guidance.

2. Less Discriminatory Alternatives

Guidance states: EPA expresses a willingness to consider "practicable mitigation measures associated with the permitting [that] could be considered as less discriminatory alternatives."

Deficiency: The description of what EPA considers a "less discriminatory alternative" (LDA) runs contrary to the spirit and letter of EPA's Title VI regulations.[28] While the due weight given to mitigation schemes discussed above in §IV.B requires them to at least reduce emissions "to the extent required by Title VI," there is no such threshold for LDA as represented in §VII.A.2. Rather, LDAs must only cause "less disparate impact." This is of course allows for some, perhaps significant, disparate impact; as long as it is "less" than the impact that occurred when the complaint was filed. Any adverse disparate impact is illegal under Title VI; merely lessening disparate impact is insufficient to comply with the civil rights mandates of Title VI.

Indeed, while EPA interprets *Georgia State Conference of Branches of NAACP v. Georgia*[29] to allow for any "less discriminatory alternative" to be justified under Title VI, the Supreme Court case that the *Georgia State Conference* court relies on to justify its LDA rationale says that an LDA must eliminate *as many discriminatory effects as possible*.[30] This is a much tougher standard than what EPA is proposing. Basically, the Guidance allows for the diminishment of some, but not all, adverse impacts, while the Supreme Court reasons that an LDA should eliminate all possible effects, and not just some.

Recommendation: If EPA wants to rely on *Georgia State Conference* for its LDA standard, than it should follow the Supreme Court's reasoning in *Albermarle*.[31] Discriminatory impact must be

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[28] EPA defines an LDA as "an approach that causes less disparate impact than the challenged practice." §VII.A.2.

[29] *775 F.2d 1403 (11th Cir. Ga. 1985).*

[30] "Where racial discrimination is concerned, the (district) court has not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

[31] EPA also cites *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993) to justify its LDA standard. Yet again, this case fails to adequately justify EPA's toothless standard. This case defines the requirement of an LDA in the face of a state action that is legitimate, important and integral to its mission. Clearly, Title VI complaints are distinguishable. While siting is an important mission of a state regulatory agency, compliance with

statistically eliminated in order for EPA to comply with Title VI. Otherwise, this justification arrangement outlined in the Guidance becomes a rather wide loophole that agencies may use to skirt the spirit of Title VI, allowing them to mandate token mitigation.

In addition, consideration of cost in assessing the practicability of alternatives suggests, however, that such factors as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc., may come into play again here. The Guidance should be explicit that cost will not be a consideration in this respect. It is important to remember, it is the recipient permitting agency – not the permit applicant – which is the "defendant" in a Title VI complaint. Thus, it is the recipient agency whose costs would be considered, not those of the permit applicant; it is hard to imagine the case where the agency's costs would be raised so excessively by choosing some "less discriminatory alternative" that such alternative would not be practicable.

Conclusion

As currently drafted, the Guidance is fatally flawed in numerous ways. While laden with language that speaks to reducing disparate environmental burdens, the Guidance in reality undermines the spirit of Title VI by penalizing the civil rights complainant and aiding the civil rights violator. EPA should place the Guidance back on the drawing board, continue the ongoing dialogue with interested stakeholders and ultimately finalize a viable and workable remedy for long standing disparities.

Sincerely,

Michelle B. Alvarez
Staff Attorney
Natural Resources Defense Council

Title VI is as well. One can not be considered prior to the other.

NUCLEAR ENERGY INSTITUTE

Robert Willis Bishop
Vice President &
General Counsel

May 15, 2017

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

SUBJECT: Comments on Draft Title VI Guidance
(65 Fed. Reg. 39650 – June 27, 2000)

These comments are submitted by the Nuclear Energy Institute (NEI),[1] on behalf of the nuclear energy industry, in response to the U.S. Environmental Protection Agency's *Federal Register* notice seeking public comment on the Draft Title VI Guidance that EPA promulgated June 27, 2000. The *Federal Register* notice promulgated draft guidance for EPA assistance recipients administering environmental permitting programs (Draft Recipient Guidance) and draft revised guidance for investigating Title VI administrative complaints challenging environmental permits (Draft Revised Investigation Guidance). The latter guidance is intended to replace the *Interim Guidance for Investing Title VI Administrative Complaints Challenging Permits (Interim Guidance)* issued in February 1998.

The EPA guidance is intended to assist recipients of EPA financial assistance in implementing environmental permitting programs in compliance with Title VI of the Civil Rights Act of 1964, as amended. Although Title VI does not directly apply to EPA, EPA has the authority to ensure that local or state agencies, or other entities receiving financial assistance from EPA, do not, in the course of their activities, discriminate on the basis of race, color, or national origin either intentionally or through programs that have a discriminatory affect based on race, color, or national origin.

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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In addition to the express terms of the Civil Rights Act and cases interpreting federal agency responsibilities under that Act, EPA also cites Executive Order 12898 (59 Fed. Reg. 7629; February 11, 1994), *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, as further authority for EPA to ensure that it conducts its activities in a manner that its programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination under such programs, policies and activities, because of their race, color, or national origin. In accordance with the Executive Order and an accompanying "Memorandum on Environmental Justice for the Heads of All Departments and Agencies, February 14, 1994," federal agencies are to identify and address, as appropriate, disproportionately high and adverse human health and environmental effects of their programs, policies, and activities on minority populations and low-income populations. Critically important to federal agencies regarding the application of Executive Order 12898 is Section 6-609, *Judicial Review*. That provision states unequivocally that the Executive Order is "intended only to improve the internal management of the Executive Branch and is not intended to, nor does it create any right, benefit or trust responsibility, substantive or procedural, enforceable at law or equity by party against the United States, its agencies, its officers, or any person."

Since the issuance of the Executive Order, the concept of "environmental justice" has been applied in a variety of federal agency licensing and permitting proceedings in ways to obstruct the siting of facilities despite their compliance with all applicable laws and regulations. The effect has been to subvert the fundamental precepts of the Executive Order by allowing it to be used as a mechanism to thwart legitimate economic development. The explicit terms of the Executive Order demonstrate that it was only intended to affect the government's internal management and not the private rights of any person or entity. However, there appears to be a growing tendency to read into environmental justice a governmental responsibility to affect (i.e., change) decisions regarding siting, permitting, and other activities involving governmental approval of private actions.

EPA correctly notes that neither Executive Order 12898 nor EPA guidelines create any new legal rights or obligations. Neither the Executive Order nor the EPA guidelines have the legal authority to create any new enforceable substantive or procedural law, as the Executive Order explicitly acknowledges.

As a matter of policy, both Executive Order 12898 and the EPA guidelines encourage early and frequent public participation in the permitting process, which is also a laudable goal. However, neither Executive Order 12898 nor the EPA guidelines have the legal authority to mandate the adoption of expanded public participation processes that are "suggested," and the failure of a permitting authority to adopt additional "suggested" procedures does not make the permitting process unlawful.

Unless the application of "environmental justice" is limited in a manner consistent with the explicit language of the Executive Order, there could be an enormous economic impact on the domestic economy. An expansion of the Executive Order beyond its terms could adversely affect the ability of many American businesses to site facilities or develop additional facilities on sites already in use, and thus substantially reduce commerce that can be brought into economically disadvantaged areas. There is a significant risk that federal agency licensing and permitting proceedings could result in grave injustice to those whom they are designed to protect.

Although the EPA proposed guidance, as opposed to the Interim Guidance, does not directly address the application of Executive Order 12898 in the context of guidance to financial assistance recipients, the likelihood is that the concept will continue to be raised in that context. Therefore, it would be beneficial for EPA to articulate its position regarding the application of Executive Order 12898 to EPA financial assistance recipients, individuals or entities involved in permitting processes conducted by those agencies, and to members of the general public. A critical part of that discussion should be the recitation of the scope of the Executive Order, including a clear statement that the Executive Order creates no new rights or responsibilities of any person, organization or party. Such a clarification should eliminate much of the disquiet that greeted EPA's Interim Guidance when it was promulgated.

Unfortunately, neither Executive Order 12898 nor the EPA guidelines establish specific criteria, allowing environmental justice issues to be inferred solely because a site for which a permit application has been submitted may be in an area where there is a sizeable minority population or a low income population. A site selection process, using objective engineering, technical and environmental criteria, cannot legally be prohibited because the area in which in it is located has a high minority or low income population. Unfortunately, the lack of specificity with which such concepts as "disparate impacts," "high and disproportionate impacts" and similar terms are used in the environmental justice context will fail to bring any stability to

the permitting processes where a complaint is raised. For example, proximity to a facility should not be the only criteria for determining whether a "disparate impact" will occur in the neighboring community, given the context for which many positive benefits might also impact that same community. EPA should articulate the criteria by which it will determine whether a proposed facility would result in a "disparate impact" on that community and how other terms used in the "environmental justice" context will be applied to enable stability to be achieved in permitting processes. Comparable changes should be made to EPA's *Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, issued April 1998.

The nuclear energy industry supports the significant changes that EPA has made in superseding the 1998 Interim Guidance with the more thoughtful approach taken in the Draft Recipient Guidance and Draft Revised Investigation Guidance. However, further clarification is necessary as described above. Further, the nuclear energy industry recommends for EPA's consideration the very thoughtful comments filed by the Business Network for Environmental Justice.

Please fell free to contact me at 202.739.8139 if you have any questions concerning these comments or to discuss any other matters raised by the EPA's draft guidance.

Sincerely,

Robert W. Bishop

(Transmitted by e-mail. Hard copy to follow by regular mail.)

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

The New York City Environmental Justice Alliance (NYCEJA) submits these comments on the "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits."

NYCEJA is an umbrella organization comprised of 14 grass-roots member groups based in low-income communities of color throughout New York City. NYCEJA's constituent communities are among the poorest, the sickest and the most heavily polluted in New York City. The residents are primarily African-American and Latino. Their neighborhoods are saturated with pollution from industrial plants, sludge treatment and waste processing facilities, toxic release sites, and truck traffic.

In 1996, NYCEJA members identified the siting of private waste transfer stations in their communities as the number their one environmental problem. Reaching out to other waterfront manufacturing communities that are also overburdened with transfer stations, the members formed the Organization of Waterfront Neighborhoods (OWN) to fight the inequitable concentration of waste facilities. Since then, several NYCEJA and OWN members, together with Congressman Jose Serrano and Congresswoman Nydia Velazquez, have filed Title VI complaints regarding the permitting practices of both the New York City Department of Sanitation (DOS) and the New York State Department of Environmental Conservation (DEC), two recipient agencies.

Consequently, your Title VI permitting guidance is of great concern to NYCEJA and OWN members. Our comments on the revised draft, which follow, are informed by the continuing environmental injustices that are perpetrated by DOS and DEC in their solid waste permitting programs.

Very truly,

Leslie H. Lowe,
Executive Director

Comments on the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

II.A.3. *Investigation* (p. 4):

> In determining whether a recipient is in violation of Title VI of EPA's implementing regulations, the Agency expects to assess whether the adverse disparate impact results from factors within the recipients's authority to consider as defined by applicable laws and regulations. [Emphasis added.]

Limiting the analysis to "factors within the recipient's authority" is very problematic for it may allow the underlying causes of the disparate impacts to evade review. Recipient agencies are part of larger governmental-political units which may either a tolerate historic patterns of discrimination or may actively engage in discriminatory practices that set the stage for siting polluting facilities in certain communities and not others. A "facially neutral," discretionary action by the larger governmental unit may predetermine siting outcomes that are racially disparate. Seemingly "neutral" factors, like zoning, often mask historic and intentional discrimination; although "spot zoning" has been proscribed by the courts, it is still practiced in numerous subtle ways.

For example, in New York City, waste facilities are to be sited in manufacturing (M2 and M3) zones, most of which are located along the waterfront. However, in 1998, the New York State Legislature enacted a Hudson River Park bill that excludes new uses from the manufacturing zones along the lower Manhattan waterfront that are not "park compatible." This effectively, exempts wealthy, white areas of Manhattan – which generates 60% of the City's commercial waste – from receiving any new garbage facilities. These facilities must now be concentrated in the M2 and M3 zones in low-income communities of color like the South Bronx, Greenpoint-Williamsburg and Red Hook, Brooklyn.

The impact of the Hudson River Park bill was entirely predictable, given that the Legislature had just passed a law mandating closure of the City's only remaining landfill. Moreover, the City was, at the time, actively soliciting bids for construction of new private transfer stations to help export municipal waste. The Legislature did not conduct an Environmental Impact Study or any Title VI analysis to determine what the effect of this legislation would be. Given the context in which it was adopted, this law exempting lower Manhattan from new garbage facilities, has the hallmarks of racially motivated action. Clearly it leads to disparate adverse outcomes: protecting affluent white communities from shouldering any of the City's waste management burdens while concentrating those burdens in communities of color. Facts such as these must be considered in assessing the "justification" for the recipient's action and whether there are

"alternatives" available.

VI.A. *Framework for Adverse Disparate Impact Analysis* (p. 27-28)

> · If the complaint alleges discriminatory effects from emissions, including cumulative emissions, determine whether the permit action that triggered the complaint significantly decreases overall emissions at the facility. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts. [Emphasis added.]

This provision is stunningly myopic. If cumulative impact is alleged, the issue is not whether the facility is producing less pollution than others in or near the affected community. The issue is whether the added pollution from the facility – whatever it may be – contributes adversely to the disparity between an already overburdened area and the comparison area. The proposed language reveals an indefensible shift in focus away from protection of people and their environment to what is feasible (read profitable) for industry. In communities already saturated with pollution, where rates for environmentally-related illnesses like asthma exceed national and local averages, any incremental increase may be too much.

EPA's approach flies in the face of the basic public health concept of "prudent avoidance"of additional harm to vulnerable populations. Incremental increases in pollution must be assessed with reference to the existing pollution load and the impact on human health. The proposed language also betrays EPA's very serious failure to develop an analytic framework for cumulative, multi-media impact assessment. In the absence of such a framework we are left with the "drop in the bucket" approach. No matter how many additional "drops" of pollution are added to the poison stew, the bucket never overflows.

Step 2: *Define Scope of Investigation* (p. 28)

> Determine the nature of the stressors, sources of stressors and/or impacts cognizable under the recipient's authority [...]

As in our comment for II.A.3., above, limiting Title VI analysis to impacts exclusively under the recipients authority is taking a "one-eyed look" at the problem; one guaranteed not to reveal its true nature or extent. Even if the recipient lacks authority to control or mitigate an impact, that impact may be highly relevant to the disparity analysis and should not be ignored. Prior and foreseeable future actions which result in disparate adverse impacts when examined together with the permit under review, must be taken into account by the recipient and by EPA. Often, permits are issued or renewed in areas where other agencies have jurisdiction over projects planned or undertaken by government or the private sector. Should the recipient turn a blind eye to adverse impacts these projects will create when deciding whether to permit a facility? This would constitute impermissible segmentation of the environmental review and it should be equally unacceptable in Title VI analysis.

VI.B.2.a. *Determine the Nature of Stressors and Impacts Considered*

> In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider (p.31) [Emphasis added]

Once again, this is an unjustifiable limitation on the scope of the Title VI analysis. Although the text describes a situation where the recipient has authority but has not exercised it, no example is given where a relevant impact or stressor is identified that is not within the recipient's authority. However, as noted above, the issue is not whether the recipient has authority to alleviate a particular impact or eliminate a stressor. It is whether the existence and/or severity of the impact should have figured in the recipient's determination to issue the permit. Existing disparate impacts over which the recipient may have no authority (*e.g.*, pollution from diesel bus garages in the community) must be part of the Title VI analysis.

NYCEJA believes that the more sound approach is simply to identify the Title VI community, the relevant Universe of Sources (VI.B.2.b., p. 32-33), the adverse impacts emanating therefrom, and pathways to sensitive receptors. If the challenged permit would create or exacerbate disparity in the level of adverse impacts borne by the affected community *viz* the comparison community, then a *prima facie* claim under Title VI has been stated and the burden of persuasion should shift to the recipient.

VI.B.4.b. Use of National Ambient Air Quality Standards (p.38)

NYCEJA strongly objects to reliance on the NAAQS to set "adverse impact benchmarks." The essence of a Title VI complaint is that an insular community is forced to bear disproportionate *localized impacts* that the population of the larger community does not bear. Consequently, the use of a regional air quality standard to assess local impacts is completely inappropriate. Where localized impacts are alleged, empirical evidence (not computer simulations using spurious data) must be gathered whenever possible. The inadequacies of the NAAQS and EPA's air program, generally, are painfully obvious to all of us who have lived in this "non-attainment" area for the past 30 years.

Despite the fact that asthma rates in communities of color throughout the City are multiple times the national average, the State's network of air monitors historically bypassed these neighborhoods. NYCEJA and other environmental justice advocates have long fought for placement of air monitors in communities with high asthma levels and in heavy industrial neighborhoods, like the South Bronx and Red Hook. Although some new $PM_{2.5}$ monitors have been located in heavily impacted areas, it will take three years to establish a baseline for them. Regional air models based on data from suburban and rural communities have no logical nexus to or predictive value regarding discrete local conditions in dense urban areas.

New York City, for example, is comprised of 5 counties of the State. The New York Metro air quality region includes 9 counties in the "down-state" region (New York City and 4 suburban

counties, plus several cities in yet a tenth county). In assessing whether traffic and air impacts generated by a facility are significant, current methodology looks to the vehicular miles traveled within this very large region. But to assess local traffic impacts against the volume generated in such a large region is nonsensical. Yet, this is precisely what occurs

In 1998, the City began sending municipal garbage to two private transfer stations in Greenpoint-Williamsburg, Brooklyn. These facilities are located within less than two miles of each other, in a community that has 18 other garbage transfer stations within the same small area. These waste facilities generate over 10,000 heavy diesel truck trips per week. Although the City garbage added over 2300 trips per week, both DOS and DEC determined that the diversion of municipal waste to this already overburdened community would have no significant environmental impact. This determination rested on the claim that, in terms of total regional VMT, the additional truck traffic through Greenpoint-Williamsburg was insignificant. It was, however, highly significant to local residents who could no longer cross the street safely.

VI.B.5.b. Comparison to Assess Disparity (p.40-41)

In assessing the level of risk experienced by the affected community and the comparison community, EPA should look to known genetic susceptibility of the affected racial/ethnic population to environmentally related illness linked to various stressors.

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August 28, 2000

Ann Goode, Director of the Office of Civil Rights
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC
Email: civilrights@epa.gov

Re: EPA Draft Investigative Guidance for Title VI Complaints

Dear Ms. Goode:

We are writing to comment on the EPA Draft Investigative Guidance for Title VI Complaints ("Guidance"). We commend the EPA's attempt to bring clarity to the Title VI Complaint process and application of law. However, the Guidance falls short in its effort to protect public health and the environment in many communities of color. Our critique of the guidance is brought to your attention in light of the severity of the environmental justice problem throughout the U.S. and in New York City, in particular.

On August 1, 2000, we submitted oral comments on the Guidance. Our oral comments focused on the importance of considering cumulative impacts in an impacts assessment, particularly in the context of communities of color that are already burdened with environmental insults. Moreover, on August 1, 2000, the Center for Constitutional Rights submitted written comments on the Guidance. Rather than duplicating comments already provided, we support and adopt the comments of the Center for Constitutional Rights and will not reiterate the statements contained therein. In addition to those comments already provided, we submit the following brief points:

Scope of the Guidance

The Guidance states that its scope is limited to those complaints involving disparate treatment from permitting. We question the value of such a limitation. In attempting to narrow the scope, the document becomes confusing. The Guidance should include reminders that individuals with complaints concerning intentional discrimination or

discrimination in the public process should submit complaints that outline those issues as well. Without this acknowledgment, individuals' rights under Title VI cannot be fully exercised.

Evaluation of Impact

The issue of greatest concern regarding the Guidance is how adverse impact will be evaluated. Recently, in every attempt made by the State or the City to address environmental justice concerns in communities of color, the respective agencies have found no adverse impact associated with the project under review. In all of those environmental assessments, the issue of cumulative impact was ignored and the potential impact evaluated was based solely on compliance with NAAQS. As stated above, many communities of color in New York City are inundated with polluting facilities and associated diesel truck traffic. Many of these communities suffer some of the highest rates of asthma in the country, if not the world. EPA has stated publicly time and time again that, in many instances, NAAQS are not protective of public health and the environment. They are regional averages and often do not consider localized impacts.

If the Guidance is to address disparate impacts faced by communities of color, it must require that those direct and indirect impacts that are associated with an action be identified (multiple stressors that contribute to the cumulative impact) and the cumulative impact of the project and all other polluting facilities in a localized area be fully evaluated. Cumulative impact should consider all stressors, whether under the recipients' legal authority or regulated by some other entity. In addition, impact should be compared not only to "benchmarks for significance under any relevant environmental statute, EPA regulation, or EPA policy", but also EPA scientific and technical research. See Guidance at (VI)(B)(4). It is not enough to state that compliance with NAAQS comes with a presumption of "no adverse impact" that may be rebutted by the complainant. It is the permitee and the agency that should bear the burden of a comprehensive assessment of the cumulative impact on the health and welfare of a community slated to house multiple polluting facilities.

Consideration of State Court Proceedings

When OCR receives a complaint that a recipient of federal funds has violated Title VI, OCR should conduct its own review of both the facts and the law. The Guidance states, "if a state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process." See Guidance at III(3)(b). This provision is inappropriate; state court decisions should not be given precedential value in an OCR review. OCR's review should be *de novo*. State court decisions that applied state laws and procedures should have no bearing on OCR's determination. OCR should apply its own standards and federal law when determining if an agency has violated Title VI. To do otherwise would allow inconsistent reviews and diminish the weight of federal civil rights law.

Justifications

The Guidance fails to describe the traditional Title VI standard for determining whether a justification is "necessary." Also, EPA must evaluate whether the justification is pretextual. In other words, is the justification simply a pretext used to hide the agency's true actions? For example, the Guidance states that economic development may be a satisfactory justification. However, considering the EPA's primary mission, we question whether economic development could ever be a necessary justification for harming the environment and human health.

Burden of Proof

The Guidance must not diminish any rights provided for under the implementing regulations. However, the Guidance does just that. For instance, when delineating the obligations to provide racial data, the Guidance is written in a permissive fashion, whereas the implementing regulations clearly require the agencies to provide this important information. Without unequivocal language, the burden for producing this information will invariably fall to the complainant. To avoid this unacceptable result, the Guidance should be reviewed in context of the rights afforded under the implementing regulations and edited with a focus on preserving rights of the complainants.

Loopholes

In clarifying the implementation of Title VI the Guidance must be careful not to create new loopholes by which violators may excuse their conduct. The Guidance states that the Title VI investigation will be closed automatically if the facility results in a decrease of pollutants. What if a facility is temporarily closed, then applies for a permit where the facility will be cleaner than the old facility but undeniably creates more pollution than when it was closed? This happens quite often in communities of color where heavily polluting facilities close after decades of violations and adverse environmental impacts. The reopening of such facilities will still have adverse impact on these communities. In the Title VI analysis, OCR should factor in years of discriminatory siting practices and lack of environmental enforcement.

Drafting Problems

There are a number of places in the Guidance where the only explanation for the illogical statements is that there are problems with the actual drafting of the document. These drafting problems are serious concerns in that they both change the meaning of the Guidance and make the Guidance difficult for complainants to understand and use. For instance:

- The Guidance states that OCR will notify the recipient of the preliminary findings but neglects to mention that it will also notify the complainant. See Guidance at II(A)(4).

- When listing the jurisdictional criteria that the complaint must be filed within 180 calendar days of the alleged discriminatory act, the Guidance inadvertently does not include the phrase "or which can be waived for good cause (see below)." See Guidance at III(A)(3).

- The sentence "EPA will likely accept a complaint alleging a continuing violation as along as an action subject to Title VI has occurred within the 180-day period" is illogical. See Guidance at III(B)(1). By definition, a continuing violation is continuing and should not be evaluated within the 180-day period.

- The Guidance states that in defining the scope of the investigation, OCR will "determine the nature of stressors, sources of stressors and/or impacts cognizable under the recipient's authority…." This statement neglects to include both the multiple other stressors that contribute to the cumulative impact of an action and impacts that occur as a result of an action whether or not under the recipients' legal authority. See Guidance at VI(B)(2).

In sum, the purpose of the Guidance should be to provide a meaningful process for identifying and eliminating violations of Title VI. It is critical that EPA redraft the Guidance to accomplish this goal. Thank you for taking the time to consider these comments. If you have any questions, please call us at (212) 244-4664.

Sincerely,

E. Gail Suchman
Senior Environmental Counsel

Gail E. Horwitz
NAPIL Equal Justice Fellow

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Ms. Goode:

The New York State Environmental Facilities Corporation ("EFC") is pleased to respond to your call for public comments regarding the draft guidance, Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from discriminating in their programs on the basis of race, color, or national origin. EFC would like to submit the following two comments:

1. It is our understanding that when an M/WBE is selected as a prime contractor, often there is confusion over whether they are exempt from meeting the M/WBE program requirements because they have been designated as a certified Minority or Woman Owned Business. We recommend for clarification that a statement be included that states, "All Prime Contractors, whether MBE/WBE or not, are required to make good faith efforts to meet the goals".

2. The second issue that we would like to raise concerns the EPA quarterly report form. The current form does not specify what is being measured. We suggest that a separate section be created to capture the MBE quarterly payments, WBE quarterly payments, MBE subcontracts and WBE subcontracts for both the CWSRF and DWSRF programs.

Thank you for the opportunity to comment. If you have any questions regarding EFC's statements, please contact Mr. Kenneth Shider, MWBE Program Manager, at 518/457-0918.

Sincerely,

Thomas J. Kelly
President

SUMMARY OF KEY STAKEHOLDER COMMENTS

ON

THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S

Draft Title VI Guidance
for
EPA Assistance Recipients
Administering Environmental Permitting Programs
(Draft Recipient Guidance)
and
Draft Revised Guidance
For
Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)
65 *Fed. Reg*. 39650 et seq
June 27, 2000

Submitted by:

Frances A. Dubrowski, Esq.

January 5, 2001

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I. OVERVIEW:

This report summarizes the key issues raised in written public comments on EPA's proposed Title VI guidance, the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, published in the *Federal Register* on June 27, 2000. (65 *Fed. Reg*. 39650 et seq.).

Ninety-eight commenters filed comments on EPA's proposed guidance. Eighteen commenters represented industries or industry trade associations, networks, coalitions, or chambers of commerce *(hereafter referred to as "Industry").* Fourteen commenters represented individual State or territorial agencies or coalitions of such agencies *(hereafter referred to as "State").* Seven commenters represented local government entities, officials, or management associations *(hereafter referred to as "Local").* Twenty-seven commenters were private citizens. Twenty-six commenters represented non-governmental organizations (i.e., community, grassroots, public interest, civil rights, environmental, or other nonprofit organizations) *(hereafter referred to as "Non-governmental organization").* Three commenters were academicians *(hereafter referred to as "Academic").* One commenter represented a Tribal organization *(hereafter referred to as "Tribal").* One commenter was a U.S. Congressman *(hereafter referred to as "Congress").* One commenter was the Title VI Task Force of EPA's National Environmental Justice Advisory Council *(hereafter referred to as "Task Force").*

Many commenters filed on behalf of a larger network of organizations, agencies, or individuals. For example, eighteen industries or industry associations ascribed to one industry set of comments. Agencies from six different States ascribed to a single set of comments. One non-governmental organization filed on behalf of more than 125 community groups, environmental justice organizations, coalitions, individuals, and an Indian nation. Thus, the level of stakeholder involvement in commenting on EPA's proposed guidance was significantly greater than ninety-eight individuals or organizations. (Appendix A to this report identifies each individual, entity, or organization submitting comments.)

The comments addressed the overall goals of the Title VI program, the process employed to develop the guidance, and the general thrust as well as the specific provisions of the guidance.

II. GOALS OF THE TITLE VI PROGRAM:

Comments directed to the general goals of the Title VI program: a) addressed the need for action to address environmental injustice, b) supported the basic principles of the civil rights laws, c) asked EPA to add certainty as a guiding principle of the guidance, and d) questioned the applicability of Title VI to environmental permitting altogether.

Need for Action to Address Environmental Injustice:

Numerous private citizens and non-governmental organizations and one Congressman attested to the persistence of environmental injustice in their communities and urged EPA to take action to eliminate such injustice. (See, e.g., Private citizen #8, #15, #26, #32, #42, #54, #56, #76, #77, #79, #86, #90, #92; #4L; Non-governmental organization #22, p. 2-6; #23, p. 1-2; #29, #36, p. 1-2; #49, p. 2-4; #55; #64, p. 1, 2; #65, p. 1-2; #68, p. 2; #70; #74, p. 1; #5L, p. 3; Congress #45, p. 1-2.)

Many of these commenters urged EPA to stop discrimination by State environmental agencies, which issue permits to industries that continue to pollute low-income communities. (See, e.g., Private citizen, #7, #9, #44, #43, #48, #38, #92; Non-governmental organization #22, p. 2-6.)

Several commenters asked EPA to strengthen the civil rights of poor and minority communities which have few resources to fight environmental sites (see, e.g., Private citizen #15; #86), or, at the very least, to avoid making it easier for companies to take advantage of low income, minority, or disadvantaged communities. (See, e.g., Private citizen #1.)

A State commenter recognized EPA's legal and moral obligation to investigate any allegation, especially those of groups or individuals without resources to conduct elaborate analyses and health studies. (See State #13, p. 1-2.)

A non-governmental organization commenter challenged the evidentiary basis for many environmental justice claims. (See Non-governmental organization #20, p. 4-7.)

Support for the Principles Inherent in Civil Rights Laws:

Numerous industry and State commenters expressed support for the principles and purposes of Title VI. Many industry and State commenters agreed that all persons regardless of race, color, or national origin are entitled to fair treatment under the nation's environmental laws and to a safe and healthful environment. (See, e.g., Industry #4, p. 1; #5, p. 4; #16, cover letter: p. 1, text: p. i, 1; #72, p. 1; #3L, p. 1; State #39, p. 2; #52, p. 11; #83, p. 2. See also Industry #91, p. 1.)

Many others emphasized how essential it is to foster broad compliance with, and strong enforcement of, the civil rights laws. (See Industry #2; #5, p. 3; #16, cover letter: p. 1; #72, p. 1; State #18, p. 1-2; #53; #63, p. 3; Local #14, p. 1.) Still others stressed their support for EPA's efforts to implement Title VI fairly and effectively. (See Local #82, p. 3; State #18, p. 4; Industry #28, p. 1.)

Some stressed that enforcement of civil rights laws and environmental laws are complementary and can be achieved in a manner consistent with sustainable economic development. (See Industry #16, cover letter: p. 1; #72, p. 1.) One State perceived a conflict between the goals of economic and environmental justice and urged EPA to balance the two. (See State #52, p. 11-12.)

Certainty as a Guiding Principle:

One industry commenter proposed adding certainty as a <u>guiding principle</u> for the guidance document. (See Industry #17, p. 2-3.)

Applicability of Title VI to Environmental Permitting:

Some industry commenters argued that the original Civil Rights Act of 1964 Title VI was never intended to be applied in environmental permitting situations (see Industry #4, p. 2; #6, p. 2), or to anything other than intentional discrimination. (See Industry #4, Supp. p. 2; Non-governmental organization #20, p. 1-4; #93, p. 1-12.) (See also State #52, p. 16.) (Comments pertaining to the applicability of Title VI to specific guidance provisions or permitting decisions are discussed below in Section V, "Specific Provisions of the Guidance: Applicability of Title VI.")

III. PROCESS FOR DEVELOPING EPA'S GUIDANCE:

Comments directed to the process for developing EPA's guidance commended EPA for its efforts to develop guidance, addressed the adequacy of EPA's public outreach and public comment period, and requested a document responding to public comments.

Level of Effort Devoted to the Guidance:

Numerous commenters commended EPA for the significant effort involved in issuing its guidance. These commenters praised EPA for its:

- extensive outreach to all stakeholders
  (see, e.g., Industry #5, p. 1; #16, cover letter: p. 1, p. 1; #24, p. 1; #60, cover letter: p. 1; State #13, p. 2; #18, p. 2),
- thoughtful deliberation
  (see, e.g., Academic #19, p. 1; Industry #71, p. 3),
- substantial commitment of time and resources
  (see, e.g., State #63, p. 1; #73, p. 3; #2L, p. 3; Local #14, p. 1; #41, p. 1; #50, p. 1; #82, p. 2, 3; Industry #6, p. 2; #16, cover letter: p. 1; Non-governmental organization #34, p. 3; #59, p. 20-22; #62, p. 1),
- inclusion of a variety of methodologies
  (see, e.g., Non-governmental organization #21, p. 1),
- attempt to educate recipients regarding Title VI compliance
  (see, e.g., Industry #24, p. 1-2),
- attempt to bring clarity to the process
  (see, e.g., Non-governmental organization #64, p. 1; Industry #51, p. 1; #60, cover letter: p. 1), and
- attention to public comments and concerns
  (see, e.g., State #13, p. 1; #63, p. 1; Local #14, p. 1).

Adequacy of Public Outreach:

Some stakeholders, as noted above, praised EPA for its public outreach; others criticized the adequacy of outreach.

Two State commenters viewed the public outreach as deficient. See State #52, cover letter; #58, p. 2.) According to one, EPA did not provide the level of outreach and opportunity for public comment it exhorts recipients to provide. Specifically, the notice, location (in EPA Regional offices), and meeting times for the listening sessions were not convenient for the majority of citizens. The short time limits for testimony were not welcoming. The guidance documents were published in the Federal Register, rather than in communications likely to reach the affected community. (See State #58, p. 2.)

Several commenters criticized EPA's Advisory Committee for including only one community representative, who declined to endorse the final report. (See Non-governmental organization #22, p. 6, 51; Task Force #61, p. 45.) One commenter criticized EPA for failing to address comments from non-governmental organizations and private citizens. (See Non-governmental organization #22, p. 6.)

An industry commenter argued that States, as co-regulators, should have the opportunity to work with EPA to develop policies, rather than face mere after-the-fact opportunity to comment on EPA's proposed policy. (See Industry #12, p. 2.)

Adequacy of the Public Comment Period:

One State requested an additional 30 days for comment (see State #63, p. 3), while another requested an additional 60 days. (See State #52, cover letter.) Some commenters noted "barely enough" or "inadequate" time to comment. (See Non-governmental organization #11, p. 1; #69.) A non-governmental organization asked for additional public hearings. (See Non-governmental organization #93, p. 1.)

Need for a Document Responding to Public Comments:

One local government recommended that EPA publish a document summarizing and responding to public comments prior to issuing final guidance. (See Local #82, p. 3.)

IV. GENERAL THRUST OF THE GUIDANCE:

Comments directed to the general thrust of the guidance both supported and criticized the outcome of EPA's deliberations.

A. Support for the General Thrust of the Guidance:

Supportive comments addressed the clarity, responsiveness, and usefulness of the guidance.

Clarity of the Guidance:

Numerous commenters believed the proposed guidance improved the clarity of processes, procedures, or definitions compared to EPA's 1998 Interim Guidance. (See, e.g., Industry #2; #4, p. 2, 9; #5, p. 1; #16, p. 1; #17, p. 2; #24, p. 1; #28, p. 1, 3; #51, p. 1; #60, cover letter: p. 1; State #13, p. 1; #18, p. 2; #2L, p. 1, 3; Local #25, p. 1-4; #50, p. 2; #82, p. 3; Non-governmental organization #34, p. 3.)

Responsiveness of the Guidance:

Five State and local government commenters deemed the guidance responsive to concerns they had expressed, especially with respect to the need for States to have flexibility in designing their environmental justice programs. (See State #18, p. 4; #39, p. 2; #67, p. 1; #89, p. 2; Local #14, p. 1.)

Usefulness of the Guidance:

Five State and local government commenters concluded that the guidance would be useful for considering alternative approaches or activities for identifying and relieving discrimination. (See Local #31; #41, p. 1; #50, p. 2; #82, p. 2; and State #53, p. 1.) An industry commenter also thought the guidance did an excellent job of identifying potential activities recipients could undertake to minimize the potential for Title VI complaints. (See Industry #51, p. 2.)

A State commenter regarded the guidance as useful in clarifying that: a) permit decision-making is not shifted to the federal government, b) EPA's interest is in ensuring nondiscrimination by recipients, and c) Title VI complaints must not create unnecessary delays. (See State #89, p. 3.)

A local government commenter supported EPA's assumption that a comprehensive, rather than case-specific or area-specific, approach to Title VI is best. (See Local #82, p. 2.)

A territorial agency which does not issue permits nonetheless adjudged the guidance in accord with its public policy. (See State #6L.)

A law professor emphasized that the guidance represented a major step forward in addressing the deficiencies in environmental permitting programs. (See Academic #3, p. 1-3.)

B. Criticism of the Outcome of the Guidance:

Commenters critical of the outcome of EPA's deliberations addressed the scope of the guidance, its legal underpinnings, the choice of guidance over rulemaking (or statutory changes), and the fairness, acceptability, usefulness, and clarity of the guidance. Finally, comments addressed the potential impact of the guidance on other regulatory programs, the benefits of State programs and facilities, and alternative approaches.

Scope of the Guidance:

Numerous industry, State, non-governmental and other commenters criticized the guidance for focusing only on individual permits, ignoring permitting programs. They reasoned that this narrowly restricted focus forced EPA into a reactive, rather than proactive strategy. (See Industry #5, p. 3; #12, p. 3; #16, p. 1, 4, 10, 11, 38; #17, p. 6-7; #24, p. 3; #37, p. 3, 5; #72, p. 1, 8, 9; #91, p. 1-18; State #58, p. 2; #89, p. 2; Local #1L, p. 1, 6-7; Non-governmental organization #21, p. 3; #22, p. 10; #40, p. 3-4; #46, p. 10-11; #5L, p. 4; Task Force #61, p. 4.)

Industry saw the net result as uncertainty: putting substantial investments in particular facilities at risk. (See Industry #5, p. 3; #16, p. 4, 38; #17, p. 6; #37, p. 2, 6; #72, p. 1, 8, 9; #91, p. 16.) Industry commenters noted that permits are rarely the sole cause of adverse disparate impacts; indeed, one observed that complaints to date have focused on patterns in siting or permitting. (See Industry #5, p. 3; #12, p. 3; #16, p. 1, 10, 11; #17, p. 6; #24, p. 3.) One industry commenter also urged EPA to focus on implementing the Civil Rights Commission's recommendations for improving EPA's overall implementation of Title VI. (See Industry #91, 7-10.)

Non-governmental organizations and EPA's Task Force saw missed opportunities; namely, promoting overall compliance by emphasizing the full range of Title VI's application to specific programs, practices, public participation processes, methods of enforcement, grants, and remedial actions as well as to intentional discrimination. (See Non-governmental organization #21, p. 3; #22, p. 10; #40, p. 3-4; #46, p. 10-11; #5L, p. 4; Task Force #61, p. 4.) Some urged EPA, at a minimum, to require that recipients consider and document the demographic characteristics of affected populations as part of their permitting process. (See Non-governmental organization #46, p. 10-11; #5L, p. 4.)

States and local government welcomed the opportunity to avoid Title VI complaints altogether. (See State #58, p. 2; #89, p. 2; Local #1L, p. 1. See also Industry #12, p. 5.) One saw a chance to avoid inequities in the responsibilities of similar facilities based solely on when their permits came up for renewal. (See Local #1L, p. 7.) This commenter also envisioned the opportunity to integrate the consideration of "low-income populations" required by Executive Order 12898 as well as Title VI's focus on "race, color, or national origin" into existing regulatory programs. (See Local #1L, p. 2-3.)

One commenter also criticized EPA's focus on only some environmental regulatory programs, to the exclusion of TOSCA, FIFRA, and CERCLA programs. (See Non-governmental organization #21, p. 3.)

Legal Underpinnings of the Guidance:

State, industry, and non-governmental organization commenters questioned EPA's interpretation of current law, either claiming EPA lacked legal authority for its guidance or calling upon EPA to support its interpretation of Title VI with a thorough legal analysis. (See

Industry #6, p. 3; #12, p. 1-2; #16, p. 1; #91, 13-16; State #58, p. 3, 9; Non-governmental organization #20, p. 1-4; #93, p. 1-12.) One State, in particular, sought clarification of the legal authority for EPA to hold recipients responsible for: 1) requiring additional actions or control measures when the causal link between emissions and impacts is unproven, 2) addressing public health problems that go well beyond permitted emissions, and 3) coordinating efforts to address larger community issues. (See State #58, p. 3.) Some recommended EPA work with Congress to establish clear boundaries for federal executive branch authority in this area. (See Industry #12, p. 2; State #89, p. 2.) An industry commenter argued that the guidance illegally focused attention and consequences on the permit holder, rather than the recipient. (See Industry #91, p. 6-7, 13-14.)

Several commenters challenged Executive Order 12898 as a basis for EPA's actions. (See Industry #12, p. 1-2; #71, p. 2-3; Non-governmental organization #93, p. 11-12.) One noted that the Executive Order, by its terms, only operates "consistent with, and to the extent permitted by [current law]." (See Industry #12, p. 1-2.) Another claimed the Executive Order was only intended to affect the government's internal management, not the private rights of any person or entity. This commenter asked EPA for a clear reminder that the Executive Order creates no new rights or responsibilities. (See Industry #71, p. 2-3.)

Non-governmental organizations and EPA's Task Force, on the other hand, criticized the guidance as a substantial departure from the purpose, intent, and meaning of Title VI because they perceived the guidance as limiting enforcement of civil rights protections. (See Non-governmental organization #22, p. #30, p. 1-2; #36, p. 2; #46, p. 1; #49, p. 1; #81, p. 1, 3; Task Force #61, p. 1-2.) Several added that the guidance directly conflicts with EPA's Title VI regulations. (See Task Force #61, p. 1-2; Non-governmental organization #22, p. 1-2) One concluded that the guidance violates the 14th Amendment to the U.S. Constitution. (See Non-governmental #30, p. 1-2.)

Rulemaking vs. Guidance:

Industry commenters advised EPA not to finalize this guidance, but instead to initiate formal notice and comment rulemaking on environmental justice regulations. (See Industry #6, p. 3; #12, p. 1-2, 6; #60, cover letter: p. 2; #91, p. 2, 18.) One industry commenter added: the guidance has the effect of a major rule, subject to APA notice and comment rulemaking as well as an advocacy review panel analysis under the Small Business Regulatory Enforcement Fairness Act, a Regulatory Flexibility Analysis, an Unfunded Mandates Act analysis, and OMB evaluation under E.O. 12866. (See Industry #12, p. 1-2, 5.) A State commenter also recommended that an environmental justice policy be established through a comprehensive set of regulations, not through a complaint-resolution process, because the former approach lays out prospectively what needs to be done. (See State #39, p. 9, 11.)

One industry commented that attempts to address disparate impacts (as opposed to intentional discrimination) must be done by rulemaking supported by evidence of discrimination. (See Industry #4, Supp., p. 2.)

Finally, several commenters noted that guidance, unlike regulation, is not binding on states. (See Industry #12, p. 1-2, 5; State #89, p. 2.) An industry commenter predicted implementation will vary across states, creating uncertainty. (See Industry #12, p. 1-2, 5.)

Statutory Changes vs. Guidance:

One commenter argued that EPA would be better off examining the underlying environmental statutes and, if appropriate, revising them. (See State #58, p. 11.)

Fairness of the Guidance:

Several commenters concluded that the guidance was not fair. (See Private citizen #10, #35; Non-governmental organization #21, p. 6; #36, p. 3; #40, p. 2; #49, p. 1-6; #59, p. 12-14, 18-19; #5L, p. 1; Industry #16, cover letter: p. 2, text: p. 36-38; #24, p. 3; #37, p. 4, 8; #91, p. 18.) One industry commenter stated that the permittee should be provided with constitutional due process and whatever process is due under state agency regulations. (See Industry #12, p. 3.) Another surmised that EPA had set up a process that is easily exploited to stall projects with unsubstantiated allegations. (See Industry #91, p. 18.)

Acceptability of the Guidance:

Numerous non-governmental organizations, private citizens, and industry commenters as well as EPA's Task Force found the guidance so flawed, they called upon EPA to withdraw it. Most of these commenters reasoned that the guidance undermined Title VI by weakening protections or penalizing the civil rights complainant and aiding the civil rights violator. (See Non-governmental organization #22, p. 2, 8; #23, p. 2; #27, p. 1; #49, p. 1-6; #59, p. 14, 22; #62, p. 1, 17; #74; #75, p. 10-11; #78; #84, p. 1; #5L, p. 1; Private citizen #38; #43; #44; #47; #57; #79; #87; Task Force #61, p. 1-2.) (See also Private citizen #10 and #35, citing lack of fairness.) However, one commenter interpreted Title VI to prohibit only intentional discrimination (see Non-governmental organization #93, p. 1-14), while another found the guidance at odds with Title VI, DOJ and EPA implementing regulations, and the Civil Rights Commission's recommendations. (See Industry #91, p. 1-18.)

Several of these commenters perceived broader opposition to the guidance. For example, one commenter reported that the guidance had been opposed by all members of the Implementation Advisory Committee and received no support, and numerous denouncements, at EPA's NEJAC meeting. (See Non-governmental organization #75, p. 4.) Another characterized the guidance as very similar to the 1998 Interim Guidance, which had been opposed by state and local government officials, business, and community leaders. (See Industry #91, p. 15.)

Usefulness of the Guidance:

Numerous commenters concluded the guidance created an unworkable maze. (See State #39, p. 3; #52, p. 13-14; #67, p. 2; #2L, p. 3; Non-governmental organization #20, p. 5; #22, p. 2; #27, p. 1-4; #49, p. 1-6; #55; #59, p. 20-22; #81, p.2; #5L, p. 1; Congress #45, p. 3; Industry #28, p. 1; #37, p. 2; Task Force #61, p. 1-2.)

A State elaborated by characterizing the guidance as too undefined, complex, and infeasible. According to this commenter, the guidance is so devoid of standards that permitting authorities cannot know how to meet the requirements. It requires scientific tools that have not been developed, complex methodologies that are not developed (or not generally accepted within the scientific community), and comprehensive data that are not available. It requires decisions beyond the expertise, scope, and authority of permitting authorities. According to this commenter, the Clean Air Act ozone control program is less difficult to implement. (See State #39, p. 3.)

Non-governmental organizations, EPA's Task Force, and a Congressman feared the complexity of the procedures required by the guidance would prevent many communities from filing complaints. (See Non-governmental organization #22, p. 2; #27, p. 1-4; #55; #81, p. 2; Congress #45, p. 3; Task Force #61, p. 1-2.)

Clarity of the Guidance:

Numerous State and industry stakeholders commented that the guidance fails to provide sufficient detail to enable recipients to identify, analyze, and address potentially significant adverse disparate impacts on protected classes. (See State #18, p. 2-3; #39, p. 3, 11; #52, p. 1, 16; #63, p. 1, 3; #83, p. 1; #89, p. 1, 5; Industry #12, p. 2, 6; #17, p. 2-6; #37, p. 2; #71, p. 3; #3L, p. 2-3.) State and industry commenters cited failure to define key terms, concepts, criteria, methodologies, and procedures. (See State #63, p. 1; Industry #71, p. 3; #3L, p. 2-3.) For example, a local government recommended the Investigations Methodology include a checklist of defined, specific analyses, embodying ranges of acceptability, which, when performed, will result in a definitive determination of discrimination or dismissal of a complaint. (See Local #50, p. 6.)

Numerous State and industry commenters believed the guidance lacks sufficient certainty and predictability. (See State #18, p. 2-3; #39, p. 3, 11; #52, p. 1-2, 16; #83, p. 1; #63, p. 1, 3; #89, p. 1, 5; Industry #4, p. 2, 9; #12, p. 1-3; #16, cover letter: p.1-2, text: p. 1, 4, 10, 38; #24, p. 3; #37, p. 2, 6, 8-12; #60, p. 1-2; #71, p. 3; #91, p. 16; #3L, p. 2, 5.)

Impact of the Guidance on Other Regulatory Programs:

One industry commenter surmised that, by undermining predictability and certainty, the guidance seems likely to disrupt some of the most innovative and promising current regulatory programs, such as EPA's cap-and-trade marketable emission permit approach for interstate ozone transport. (See Industry #16, p. 4.) Another declared EPA should address the impact on previously adopted state Title VI regulations. (See Industry #12, p. 2.)

Benefits of State Programs and Facilities:

Some commenters believed the guidance fails to recognize the environmental, social, and health benefits achieved by existing state programs (see Industry #12, p. 3), or the potential economic and social benefits a regulated facility may bring to a community. (See Industry #12, p. 3, 4; #16, p. 38; #71, p. 3.) One industry commenter entreated EPA to give credit to recipients and permittees for ongoing compliance activities in the Title VI process. (See Industry #60, p. 8.)

Alternative Approaches:

One commenter suggested EPA address Title VI issues through air and water quality attainment planning, rather than permitting, because attainment plans require both an evaluation of cumulative impacts and EPA review and approval. This commenter would require every new attainment plan to identify heavily impacted areas (i.e., areas receiving impacts one to three standard deviations above the average on an annual average, population weighted, exposure basis). According to this commenter, this alternative approach would guide EPA to allot limited investigative resources according to the relative severity of impacts, assist permit applicants with site selection, and provide communities with information with which to seek relief. To encourage this approach, the commenter proposed setting a higher threshold for filing Title VI complaints where attainment plans included an approved impact disparity analysis and an approved plan for

reasonable further progress. (See Industry #72, p. 1, 5-6.) (See also Industry #37, p. 6, addressing area-wide emission reductions.)

V. SPECIFIC PROVISIONS OF THE GUIDANCE:

Comments directed to specific provisions by more than one stakeholder addressed at least thirty-six separate items, arranged in alphabetical order below.

ADVERSE DISPARATE IMPACT ANALYSIS:

Terminology:

Some commenters objected to the term "adverse disparate impact," arguing that if there is a "disparate" impact, it is "adverse." (See Non-governmental organization #22, p. 8-10; Task Force #61, p. 2-4.)

Support for EPA's Approach:

Several commenters expressed support for EPA's approach to determining whether there is an adverse impact. (See, e.g., Industry #24, p. 3; #51, p. 5, and Local #41, p.2, calling the guidance "excellent" on this point.) One commended EPA for determining first if the actions of a recipient result in a significant adverse impact on an affected population and then determining if the impact is disparate before moving forward on a complaint. (See Industry #5, p. 4.) Several supported EPA's position that a determination of adverse impact evaluate the risk compared to benchmarks of significance. (See Local #14, p. 4; Industry #5, p. 10; #24, p. 3; #60, p. 7.)

Burden on Complainants:

Numerous commenters concluded that EPA's approach to determining adverse impact is too burdensome for communities to use. (See Non-governmental organization #21, p. 5-6; #22, p. 7-8; #27, p. 1-4; #49, p. 4-6; #59, p. 4, 10-11, 20-22; #74, p. 2; #75, p. 5-6, #78; #81, p. 2; #84, p. 1; #5L, p. 1; Congress #45, p. 2-3; Task Force #61, p. 1-2.) Some criticized the language as too technical for communities to utilize. (See Non-governmental organization #22, p. 8; Task Force #61, p. 2.) Commenters also deplored the amount, detail, and complexity of information required and the cost of expert and legal assistance needed for input. (See Non-governmental organization #21, p. 5-6; #75, p. 5-6; #78.) The Congressional commenter observed that the investigation should be thorough and based on sound principles, but it does not have to be rocket science or onerous. (See Congress #45, p. 2-3.)

Burden on Recipients and Permittees:

Several State and industry commenters also viewed the analysis as overly burdensome. (See State #52, p. 13-14; Industry #4, p. 6; #37, p. 5.)
One thought that instead of determining whether a permit adds to an existing adverse impact, EPA should analyze whether the proposed action itself has a discriminatory effect. (See Industry #4, p. 6.) Others argued that a single standard should guide EPA permitting decisions, rather than different standards triggered by the racial composition of the community. (See Non-governmental organization #20, p. 6; State #52, p. 6.)

Uncertainty of the Guidance:

Numerous commenters criticized the degree of uncertainty associated with EPA's approach to determining adverse disparate impact.

States, local government, and industry commenters criticized the lack of sufficient standards and methodology for recipients to know how to conduct an acceptable adverse impact

analysis. (See State #39, p. 3-6; #52, p. 1-2, 6-7, 14-15, 17; #58, p. 5-9; #73, p. 3; #83, p. 1; #89, p. 2; Local #25, p. 3; Industry #12, p. 1-2; #17, p. 2-6; #71, p. 3; #72, p. 1, 8; #3L, p. 3.) One posited a list of specific questions: What type of pollutants are reviewed? Do you use actual or permitted (potential) emissions? What area do you look at? What level of impact is the cut-off? Do you look at 10-year old census data or other data? What do you do when only part of the census block is in the affected area – do you assume it is proportional? How do you determine a comparison population? What happens if the facilities impacting the area are not within your jurisdiction (i.e., in another state or county)? How do you account for demographic changes over time, especially since the last census? (See State #58, p. 5-9.) (See also Industry #37, p. 5-9.) Another asked: what constitutes an acceptable versus unacceptable impact level? (This same commenter urged EPA to give States the widest practical discretion to decide this matter for themselves.) (See Industry #72, p. 1, 8.)

One commenter said EPA misled the public by implying that discriminatory health impacts can be identified and redressed via environmental permits. (See Industry #37, p. 5, 7.)

Several States expressed concern that EPA would use different inputs to achieve different results. (See State #18, p. 6; #39, p. 4.) One State lamented that the burden is still on the recipient to prove a negative. (See State #67, p. 1.)

Non-governmental organizations and a Congressman predicted that uncertainty regarding appropriate sources, pollutants, nuisances, sciences, and reference communities would lead to subjective determinations, endless dispute between EPA and the States, lack of acceptance by either a losing permittee or losing community, and increased complaints to EPA. (Non-governmental organization #75, p. 5-7; #78; Congress #45, p. 2.) (See also Non-governmental organization #40, p. 10-11.)

Risk-Based Approaches:

Many commenters expressed their support for risk-based analyses. (See Industry #5, p. 10; #24, p. 3, 9; #51, p. 5; #60, p. 7; Local #14, p. 4.) (See also State #58, p. 6-7, recommending that this be the primary approach for estimating risk). On the other hand, one State asserted that conclusions drawn from risk assessment tools are, at best, debatable. (See State #39, p. 5, 6.) Another urged EPA to consider risk assessments showing no adverse impact (see State #52, p. 5), while a local government urged EPA to develop consistent, peer reviewed methodologies. (See Local #1L, p. 4.)

Missing Elements - Community Health:

Non-governmental organization commenters criticized EPA's approach for not requiring a Title VI investigation to address the existing, or comparative, public health of the affected community, noting that the health effect of environmental pollution is not the same for all communities. (See Non-governmental organization #27, p. 3; #46, p. 22-23; #75, p. 6.) One elaborated: the adverse impact assessment should address variations in susceptibility of different demographic groups to the same levels of environmental hazard exposure, accounting for differences that are physical, socioeconomic (e.g., health care access), and cultural (e.g., diet, greater exposure of subsistence fishermen to water pollutants). In addition, EPA and recipient agencies should promote data collection on such differences because Title VI and the Fifth and Fourteenth Amendments to the U.S. Constitution require EPA to address this issue. (See Non-governmental organization #46, p. 22-23.)

Missing Elements - Non-Health Based Impacts:

A non-governmental organization commenter advised that EPA should outline a methodology, complete with examples, for taking into account non-health-based impacts. Otherwise, recipients will assume, incorrectly, that the only relevant adverse impacts to assess are those on human health and will have no incentive to take proactive measures to address broader concerns. (See Non-governmental organization #46, p. 21-22.) Other commenters also recommended changing the guidance to address social, cultural, or economic impacts more thoroughly. (See Non-governmental organization #22, p. 42-43; Task Force #61, p. 36.)

Alternatives - Proximity Analysis:

Two non-governmental organization commenters suggested a simple alternative to the disparate impact analysis: EPA would define the affected area using a proximity formula, determine whether this is a minority community, and, if so, notify all residents. EPA then would compare the public health of the census tracts in the affected area with those of the county or state along four parameters: age-adjusted cancer mortality rate, age-adjusted non-cancer mortality rate, infant mortality rate, low birth weight rate. These commenters argued that this approach is readily replicable and has substantial public support, but EPA has never explained why it is unacceptable. (See Non-governmental organization #27, p. 3; #75, p. 7- 10.)

Alternatives – NJ Approach:

One State proffered a proactive alternative employed by New Jersey. This approach screens each permit application for potential environmental justice concerns (avoiding pre-identifying communities, which may be detrimental to urban revitalization). If an application has environmental justice implications, affected communities are informed and permit applicants are encouraged to enter into a series of informational meetings with the community to identify and resolve concerns. This community partnership approach occurs simultaneously with the permit application review. (See State #67, p. 2.)

Alternatives - Refocusing the Inquiry:

One commenter argued EPA should focus more on disparate impacts than disparate demographics, using Title VI as well as other authority. According to this commenter, if a statistical analysis is employed, it should be used first to identify communities with statistically higher impacts and only secondarily to confirm whether the impacted community might also have statistically different demographics. Demographic disparity is more appropriate as an indicator of the level of investigation warranted than as an indicator of what impacts are acceptable. (See Industry #72, p. 1, 3, 4.)

Alternatives – Limit to Risk Areas:

One commenter suggested EPA quantify cumulative levels of environmental stressors, determine if adverse health impacts could occur, and then limit its focus to recipient permitting programs which involve true environmental risks. (See Industry #37, p. 5-6.)

Alternatives - Permit Moratorium:

Some commenters suggested EPA place a moratorium on granting permits until recipients:

a) meet with current Title VI complainants to resolve complaints,
b) compile relevant demographic information in the permitting process, and
c) conduct a state-wide (or agency-wide) demographic analysis of current permits. (See Non-governmental organization #22, p. 9; Task Force #61, p. 3.)

Universal Disparate Impact Analysis:

One non-governmental organization commenter proposed that EPA consider requiring an adverse impact analysis for every permit. (See Non-governmental organization #11, p. 4.)

Permitting as a per se Adverse Disparate Impact:

Non-governmental organizations and private citizen commenters recommended that granting a permit in a minority community already suffering from disparate poor public health be an automatic violation of Title VI, because the permit would only increase the disparity. (See Non-governmental organization #27, p. 3; #75, p. 9; Private citizen #92.) One urged that the permit establish a *prima facie* violation, shifting the burden of persuasion to the recipient. (See Non-governmental organization #65, p. 3-4.) Another urged that siting of a polluting facility be considered an adverse impact for purposes of proceeding to a disparity analysis. (See Non-governmental organization #46, p. 20.)

An industry commenter countered that government cannot legally prohibit siting because of a high environmental justice population. (See Industry #71, p. 3.)

Concentrated Siting as a Form of Discrimination:

Several non-governmental organization commenters urged EPA to recognize that the disproportionate concentration of waste sites in a community is itself a form of discrimination. (See Non-governmental organization #46, p. 21; #49, p. 5; #78.) One explained: disproportionate siting should create a presumption that adverse disparate impact exists, regardless of whether there is a significant increase in exposure to known pollutants. The statistical analysis should be of the siting pattern itself, not just of exposures and health risks, forcing the State to justify siting another facility in an already overburdened community. (See Non-governmental organization #46, p. 21.)

Lack of Evidentiary Basis for EPA's Approach:

One State lamented the absence of evidence on whether the analysis would produce valid and reliable results. This State explained: imbedded in the methodology for determining adverse disparate impact is a mathematical algorithm which must be demonstrated to be correct with multiple tests on real or synthetic data. (See State #67, p. 3.)

Miscellaneous Approaches:

Several commenters were concerned about references to toxicity-weighted emissions, alleging that analyses based on this approach do not address whether the risks of different levels of exposure are significant. (See Industry #24, p. 9; State #52, p. 9; #58, p. 6-7.) One commenter urged EPA to delete references to this approach from the guidance (see Industry #24, p. 9); another recommended using the approach only as a screening tool, not to assess adverse impacts. (See State #58, p. 6-7.)

One commenter argued that EPA's focus should be more on distribution (i.e., whether the acceptable level of pollutants is uniformly applied), than on magnitude (i.e., whether a more stringent level should have been selected. (See Industry #72, p. 1, 7.)

Another argued that where facilities precede the surrounding community and land use rules require notifying buyers of higher impacts, EPA should require impacts to reach a greater level of disparity before becoming actionable. (See Industry #72, p. 9.)

One State argued that if permit actions do not increase disparity, investigations should be closed unless past permitting activities led to the disparity. (Proving this would require

longitudinal data.) This same commenter thought EPA should also identify whether the permit activities constitute a significant portion of the disparate impact. (See State #52, p. 2-3, 17.)

ALTERNATIVE DISPUTE RESOLUTION:

Support for Using Alternative Dispute Resolution:

One industry commenter supported the use of Alternative Dispute Resolution ("ADR") and other informal processes to encourage voluntary remedies. This commenter's support for ADR assumed that: a) such processes have clearly defined timeframes, b) each party can unilaterally end the informal process and move to a more formal process, and c) parties jointly can agree to continue the process beyond deadlines if they believe progress is being made. (See Industry #5, p. 5.)

Disadvantages of Using Alternative Dispute Resolution:

Non-governmental organizations and EPA's Task Force warned that ADR may not be well suited for complainants. (See Non-governmental organization #22, p. 22-27; #23, p. 3; #36, p. 5-6; #59, p. 16-17; #81, p. 2; Task Force #61, p. 16-21.) The disadvantages they outlined for ADR include:

- the complainant's preferred outcome, permit denial, is not on the table,
- a lack of procedural safeguards exacerbates inequalities in bargaining power and resources,
- there is little research on the effectiveness of ADR in such disputes,
- ADR addresses specific cases, not overall patterns of discrimination,
- ADR offers little opportunity for public scrutiny, accountability or accessibility,
- neutral third-party mediators lack the authority of a judge (e.g., to force exchanges of data),
- ADR lacks formal discovery mechanisms, and
- ADR settlements lack precedential value.

These commenters urged EPA to abandon efforts to encourage ADR. One cited experience in the Chester Street case as evidence that ADR is inappropriate in Title VI complaints. (See Non-governmental organization #36, p. 5-6.)

If EPA nonetheless uses ADR, some proponents of this viewpoint recommended: researching different ADR approaches, issuing guidance on ADR, providing technical assistance to complainants, requiring the ADR process to be more open, accessible, and sensitive to traditionally disadvantaged persons, or prohibiting use of ADR in inappropriate situations (e.g., those involving precedent-setting legal cases, egregious conduct, etc.). (See Non-governmental organization #22, p. 22-27; Task Force #61, p. 16-21.) One commenter recommended EPA allow complainants to reject ADR, triggering an investigation. (See Non-governmental organization #22, p. 27.) Another entreated EPA to provide financial assistance to complainants. (See Non-governmental organization #59, p. 16-17.)

Potential Conflicts with Statutory Deadlines:

One State commenter noted that an ADR process, which occurs before permit issuance, may conflict indirectly with federal, state, or local statutory requirements for processing permit applications. This commenter observed that the guidance does not provide adequate detail on how to resolve such conflicts. (See State #58, p. 9.)

Clarity of Guidance on Alternative Dispute Resolution:

Some commenters found the ADR discussion too vague to be useful. One noted it did not address who should bear the costs of pursuing ADR and what the timeline should be. This commenter urged EPA not to recommend ADR without further discussion of these issues. (See Non-governmental organization #34, p. 2.) Another questioned when and how to use ADR and asked for guidance on the practical, rather than theoretical, issues involved. (See State #52, p. 13.)

Rewards for Using Alternative Dispute Resolution:

One State commenter urged EPA to create a higher burden of proof or a higher threshold for complaints when ADR and similar efforts have been undertaken. (See State #58, p. 9.)

APPEALS:

Necessity for an Appeals Process:

Numerous commenters urged the creation of an appeals process for complainants on Title VI decisions. (See Private citizen #1, #7, #10, #43, #57; Non-governmental organization #22, p. 9, 14; #34, p. 2; #36, p. 3; #59, p. 4, 12; #62, p. 2-3; #78; #81, p. 2; Industry #80, p. 3-4; Task Force #61, p. 3, 8; Academic #3, p. 8; #33, p. 2-3.) Several argued either: a) standards are disturbingly different for recipients (who have the right of appeal and other substantial procedural protections) than for complainants, b) complainants often lack the resources to file court cases, or c) private rights of action under disparate impact regulations rest on uncertain legal ground. (See Non-governmental organization #22, p. 14; #34, p. 2; #59, p. 4, 12; #62, p. 2-3; Task Force #61, p. 8; Academic #33, p. 2-3.) An industry commenter argued that the absence of an appeals process makes court actions more attractive than administrative processes for complainants. (See Industry #80, p. 3-4.)

APPLICABILITY OF TITLE VI:

Applicability to Permitting:

Industry, State, and non-governmental organization commenters challenged the applicability of Title VI to many of the permitting decisions covered by EPA's guidance.

Six industry commenters observed that Title VI was not intended to guarantee all communities equal environments or to prohibit unintentional disparities in exposure to environmental pollutants. (Indeed, one commented that it is impossible to ensure that all parts of an airshed, for instance, have identical air quality.) According to these commenters, complainants must also demonstrate that a disparity is discriminatory. (See Industry #5, p. 4; #6, p. 3; #12, p. 1-2, 4-5; #16, cover letter: p. 1, text: p. 5-10; #28, p. 1; #72, p. 9.)

One State argued that there is no "state action" creating discriminatory effects in the context of consistent application of a nondiscriminatory permitting program because private parties and market forces determine the location of industry. Hence, there is no valid Title VI challenge. (This commenter noted a longstanding policy of grouping sources together through land use planning, zoning, and current Brownfields initiatives, but argued that if such forces create areas of high emissions, individual permit applicants should not suffer the consequences. (See State #39, p. 10.) (See also Industry #28, p. 2.)

Several commenters contended that Title VI prohibits only intentional discrimination. (See Industry #4, Supp. p. 2; Non-governmental organization #20, p. 1-4; #93, p. 1-12; State #52, p. 16.) An industry commenter said attempts to broaden Title VI's coverage to disparate impacts must be done by rulemaking supported by evidence of discrimination. (See Industry #4, Supp., p.

2.) A non-governmental organization said that causation is a basic element of a claim. (See Non-governmental organization #93, p. 12-13.) By contrast, a law professor commended EPA for focusing on disparate impacts, rather than discriminatory intent. (See Academic #3, p. 2.)

Low-Income Populations:

Some commenters recommended that EPA clarify the scope of Title VI and distinguish its reach from the broader reach of E.O. 12898. In their view, Title VI applies only to "protected classes," while E.O. 12898 considers both protected classes and low-income populations. (See State #58, p. 10-11; Industry #12, p. 3-4.) In addition, one commenter noted, Title VI applies to recipients, while E.O. 12898 refers to the federal government. (See State #58, p. 10-11.) A local government supported a comprehensive approach to environmental justice, which integrates consideration of low-income populations as well as "race, color, or national origin" into existing regulatory programs. (See Local #1L, p. 2-3.)

State-Funded Programs:

One State urged that EPA clearly limit applicability of its guidance to federally delegated state permit programs, not to state-funded programs which receive no federal funding. In fact, this commenter observed, encompassing permit renewals and minor modifications in non-federally delegated permit programs would have a significant effect on state resources because a single state can receive, on average, over 2,000 requests for permit renewals annually. (See State #63, p. 2.)

One State recommended EPA clarify whether Title VI applies to a state environmental permitting program which does not receive federal funding if EPA provides some funding to a non-permitting program of the same state agency. (See State #18, p. 9.)

Pass-Through Funding:

One State disagreed with EPA's conclusion that a Title VI violation by a local political entity receiving pass through money from the state impacts all federal funding of the state entity. This State argued that, under Title VI, only the federal funding that was passed through to the local government unit should be terminated. (See State #18, p. 10.)

Intentional Discrimination and Non-permit Programs:

Several commenters stated Title VI's reach is broader than disparate treatment from permitting. (See Non-governmental organization #22, p. 10; #64, p. 1-2; Task Force #61, p. 4.) One asked EPA either to include in the guidance reminders that individuals suffering intentional discrimination or discrimination in the public process should submit complaints as well. (See Non-governmental organization #64, p. 1-2.) Others requested guidance in other areas, including intentional discrimination, public participation, enforcement, grants, and remedial actions. (See Non-governmental organization #22, p. 10; Task Force #61, p. 4.)

AREA-SPECIFIC AGREEMENTS:

Types of Approaches:

One local government observed that, of the three approaches EPA suggests, a Comprehensive Approach would be prohibitively burdensome and impractical, an Area-Specific Approach would require extensive air quality and meteorological monitoring and be very taxing with regard to costs, but a case-by-case approach offers the most flexibility. (See Local #14, p. 2.)

An industry commenter thought the guidance inappropriately pushed States solely toward Area-Specific Approaches. (See Industry #91, p. 11.) Several academic commenters said that, properly crafted, these types of recovery plans with multiple stakeholder participation are a means to accomplish real progress in impacted communities. (See Academic #3, p. 3; #33, p. 3, 6.) Other commenters sharply disagreed, calling EPA's encouragement of such agreements illegal and unwise. (See Non-governmental organization #22, p. 31-36; Task Force #61, p. 25-29.)

Area Boundaries:

One industry commenter observed that the guidance offers little direction on how to establish the boundaries of the areas to be included in area-specific agreements; this commenter recommended the smallest reasonable scope for these areas. (See Industry #5, p. 8.) One commenter asked EPA to address potential conflicts along area boundaries among those participating, and not participating in, area-specific agreements. (See Industry #37, p. 3.)

Clarity of the Guidance:

One State requested more guidance on the area-specific approach to assist in identifying geographic areas where adverse disparate impacts may exist and comparison areas. (See State #18, p. 7.) Several commenters urged better-defined parameters. (See Non-governmental organization #21, p. 3; Academic #33, p. 5; Industry #37, p. 3.) One State asked for a definition of the level of protection needed. (See State #52, p. 11.) An industry commenter emphasized the agreement should focus only on significant, adverse disparate impacts resulting from actual releases and give "due weight" to pre-existing permit conditions. (See Industry #60, p. 9.)

Content of Agreements:

An academic commenter urged EPA to be conservative in measuring a plan's expected emission reductions because there is little or no margin for error in highly impacted communities. (See Academic #33, p. 5-6.)

Parties - Communities:

Several commenters expressed concern that parties to area-specific agreements fairly represent the affected community. (See Non-governmental organization #22, p. 34; #36, p. 7; #40, p. 7; #46, p. 30; #74, p. 2; #82, p. 7, 12; Task Force #61, p. 28.) Some urged EPA to investigate independently whether parties were adequately representative and had competent representation. (See Non-governmental organization #22, p. 34; #40, p. 7; Task Force #61, p. 28.)

Some urged that area-specific agreements should not bind parties to future disputes who were not involved in the original investigation and informal resolution process. Alternatively, preclusion should occur only where there are procedural safeguards, akin to those in class action suits, to ensure that the interests of all members of the class have been fairly represented. (See Non-governmental organization #36, p. 7; #40, p. 7; #46, p. 30.)

One commenter suggested that the extent of full participation by the complainant affect the weight given the agreement. (See Academic #33, p. 5.)

Parties - Industry:

State and industry commenters expressed concern over the extent to which agreements might affect parties who were not involved in developing the agreement but whose facilities are within or immediately outside the established boundaries. (See State #18, p. 7; Industry #5, p. 8.) An industry commenter questioned whether such facilities could be forced to meet the voluntary standard without an opportunity to participate in the agreement? (See Industry #5, p. 8) A State

recommended that the guidance specifically solicit the participation of affected facilities. (See State #18, p. 7.)

Parties - Local Government:

Several commenters observed that the role of local governments is ignored and suggested that the guidance specifically solicit the participation of local government entities (i.e., cities and counties). (See State #18, p. 7; #89, p. 5; Industry #12, p. 2.)

"Due Weight" for Agreements:

An industry commenter supported EPA's decision that area-specific agreements may be used to accord "due weight" to state or local permitting. (See Industry #5, p. 8.) This commenter suggested finding that such agreements reduce adverse disparate impacts to the point required by Title VI so that subsequent complaints could be dismissed. (See Industry #5, p. 8.)

Others remained troubled by EPA's assertion that it could not rely entirely on a recipient's assertion that a Title VI approach had been followed. They pointed out that localities expending time and resources on area-specific approaches may not derive any benefit if EPA may simply ignore such efforts when determining if Title VI has been violated. (See Local #14, p. 2; #1L, p. 1; Industry #12, p. 5.)

Still others believed that EPA had proposed affording too much deference to area-specific agreements. (See Non-governmental organization #22, p. 31-36; #62, p. 7; #81, p. 2; Academic #3, p. 7; #33, p. 3-4; Task Force #61, p. 25-29.) Some argued that the proposed deference thwarts EPA's legal responsibilities to investigate complaints. (See Non-governmental organization #22, p. 31-35; #62, p. 7; Academic #44, p. 3-4; Task Force #61, p. 25-28.) Some urged that EPA should not give "due weight" to an agreement lacking adequate enforcement mechanisms, including provisions allowing for EPA enforcement. (See Non-governmental organization #22, p. 34; #40, p. 8; Task Force #61, p. 28.) Some recommended assessing the fairness and effectiveness of an agreement before according it weight. (See Non-governmental organization #21, p. 3; #22, p. 34; Task Force #61, p. 28.)

Disregarding an Area-Specific Agreement:

Stakeholders argued for different thresholds for deciding when to disregard an area-specific agreement.

An industry commenter requested that EPA set a high threshold for, and explain the types of evidence that would be required to determine when, an agreement should be set aside due to changed circumstances or improper implementation. (See Industry #5, p. 8.)

Several commenters argued for caution in deferring to area-specific agreements when considerable time had passed or when circumstances had changed. (See Non-governmental organization #22, p. 34; #46, p. 30; #62, p. 8; Academic #33, p. 4; Task Force #61, p. 28.) Some proposed clarifying that new permitting actions resulting in new emissions constitute such "changed circumstances" that an area-specific agreement is no longer entitled to "due weight." (See Non-governmental organization #22, p. 35, 39; #62, p. 8; Academic #33, p. 4; Task Force #61, p. 29, 33.). An academic commenter proposed that emissions from subsequent permits be offset or mitigated within the same impacted area in a greater than 1:1 ratio to prevent new emissions from consuming the gains from the previous agreement. (See Academic #33, p. 4-5.)

Enforcement of Agreements:

Many commenters expressed concern about enforcement of area-specific agreements. (See Non-governmental organization #22, p. 34; #36, p. 6-7; #46, p. 29; #62, p. 7; #81, p. 2; Task Force #61, p. 28; Industry #16, p. 2, 21, 37; #37, p. 4.)

Some commenters noted that such agreements, as outlined in the guidance, do not contain mechanisms to: a) ensure compliance with pollution reduction, pollution prevention, or environmental justice goals, b) monitor progress, c) revise the plan to meet changed circumstances (including new environmental standards), or d) allow community groups to enforce the agreement in court. (See Non-governmental organizations #22, p. 34; #36, p. 6-7; #62, p. 7; Task Force #61, p. 28.) Some commenters worried about participants not performing or otherwise dropping out. (See Industry #16, p. 37; #37, p. 4.) One proposed that such agreements be treated like settlement agreements, which must provide for enforcement by EPA. Under this proposal, enforcement would also be required for area-specific agreements negotiated directly between recipients and complainants. Both EPA and communities would have an active role in such monitoring and enforcement in order for an agreement to receive "due weight." (See Non-governmental organization #46, p. 29.) Several commenters also proposed that, if complaints allege noncompliance with an agreement, EPA thoroughly investigate. (See Non-governmental organization #36, p. 6; #46, p. 29.)

Clean Air Act Parallels:

Several commenters noted parallels between the proposed area-specific agreements and various Clean Air Act requirements. Some drew a parallel with the practice of certifying state implementation plans ("SIPs") under the Clean Air Act. These commenters noted that such plans have failed to prevent unlawful pollution since 119 areas of the country remain nonattainment for one or more listed pollutants 29 years after passage of the Act. (See Non-governmental organization #22, p. 34-35; #62, p. 8; Task Force #61, p. 28-29.) A State observed that the area-specific approach is very similar to the Clean Air Act process of a SIP call for areas not meeting national ambient air quality standards. However, the State believed that, unlike the Clean Air Act, there is no regulatory basis that would allow the state to make an environmental justice SIP call and no leverage to enforce such a plan. (See State #58, p. 10.)

Adverse Consequences of Agreements:

Industry commenters identified numerous adverse effects that could emanate from area-specific agreements, including discouraging businesses from locating in the area, discouraging beneficial changes to existing facilities and their pollution controls, and encouraging the filing of frivolous complaints. (See, e.g., Industry #4, p. 3; #12, p. 4; #16, p. 5; #24, p. 4; #37, p. 4, 12-13; #51, p. 4; #60, p. 9; #91, p. 15-18; State #52, p. 11-12, 15.) One argued that businesses would be coerced into agreements to avoid Title VI complaints (see Industry #24, p. 3-40), but this and another commenter also argued that, because agreements offer so little protection, few facilities would find it in their interest to agree. (See Industry #24, p. 3-4; #60, p. 9.) One commenter worried about liabilities (such as joint and several liability) that could attach to participants. (See Industry #37, p. 4.)

COMPARISON POPULATIONS:

Defining the Populations and Methodology:

Numerous commenters believed the guidance does not adequately define how to compare an affected community with a comparison population. (See State #39, p. 4; #67, p. 2-3; #88, p. 2; 89, p. 2; Industry #5, p. 11; #12, p. 5; #16, p. 2, 11, 19-21, 38; #28, p. 2; #37, p. 8-10; #60, p. 5-6; #3L, p. 3; Local #25, p. 3; Non-governmental organization #20, p. 5; #21, p. 7; #36, p. 11; #40, p. 10-11; #46, p. 25; #62, p. 14.)

Several commenters elaborated on the questions raised by the guidance. Some questioned whether the comparison should be between: 1) the affected population and the general population (excluding members of the affected population), or 2) the affected population and the non-affected population? Should the analysis compare: 1) the prevalence of race, color, or national origin, 2) the risk of adverse impacts, or 3) both? (See Non-governmental organization #40, p. 10-11; #62, p. 14.) Another added: The reference area could be the recipient's jurisdiction, a political jurisdiction, an area defined by environmental criteria, or the entire State. The comparison population could be either the general population or the non-affected population. The assessment could include one of six different comparisons of demographic characteristics. There is no discernible basis for choosing among competing sets of criteria and, within each set of criteria, there are numerous undefined choices that could produce different results. (See State #39, p. 4.)

Some emphasized the affected and non-affected populations should be defined clearly and separately so as not to be coterminous. (See Non-governmental organization #21, p. 7; #46, p. 25.) One commented that the most preferable comparison should be between the affected and non-affected population because including the affected population in the comparison population artificially reduces the disparity. (See Non-governmental organization #46, p. 25.) Another suggested the comparison should not be between the non-affected and the affected populations, but rather among the demographic characteristics of all of the affected communities. (See State #67, p. 2-3.) Another cautioned against comparing the most likely to the least likely affected population, since this comparison bases policy on only ten percent of the population. (See State #52, p. 4-5.)

One commenter volunteered examples of more definitive guidance: compare urban settings to urban settings and consider similar proximity to key features like transportation infrastructure or industrial facilities. According to this commenter, it would not be appropriate, in most cases, to compare populations in widely separated geographic areas because geographic features, meteorology, etc. can have large impacts on the formation and movement of pollutants. (See Industry #5, p. 11.) One commenter noted the comparison population should have land use patterns similar to those of the affected population (e.g., a similar balance of rural, urban, and suburban areas and a similar range of residential, commercial, and industrial activities. (See Industry #16, p. 19-21.)

One stakeholder commented that the guidance suggests every permit must be subjected to area-wide modeling, which is time-consuming, requires enhanced resources, and may yet fail to yield a scientifically valid result. (See Local #25, p. 3.)

A State observed that the test appears to make a finding of disparate impact inevitable because the portions of the two population related variables being tested for independence represent the extremes of their respective distributions. (See State #67, p. 2-3.) An industry alleged a finding of disparate impact is inevitable because the minority population is subdivided by demographic group, rather than considered as a whole. (See Industry #4, p. 7.) This same commenter objected to use of a statewide average minority population as a reference population. (See Industry #4, p. 7.)

Finally, one commenter challenged the notion that disparately affected subgroups can be identified and compared given current scientific knowledge. (See Industry #37, p. 2.)

Case-by-Case Flexibility:

One commenter argued for preserving flexibility in the guidance. According to this commenter, the guidance should not impose limitations on identifying comparison populations, but should allow them to be determined on a case-by-case basis. (See Non-governmental organization #46, p. 25.)

Interpreting the Results of Multiple Comparisons:

Some commenters believed that the guidance lacked clarity as to what the outcome would be if the results of two or more comparisons are different. (See Non-governmental organization #40, p. 10-11; #46, p.25.) One argued disparity between the affected population and any comparison population should be sufficient for a finding of disparate impact. (See Non-governmental organization #46, p.25.)

Significance of Results:

One commenter advised that the threshold for finding disparity based on comparisons is too high. Requiring "a significant disparity" that is "clearly evident in multiple measures of both risk or measures of adverse impact and demographic characteristics" is impractical and unrealistic given the errors, omissions, and uncertainties often associated with demographic data. (See Non-governmental organization #46, p. 25.)

An industry commenter argued that the threshold for finding disparity cannot be slight; it must be sufficiently high with respect to both the level of risk or impact and the proportion of minority to non-minority persons exposed. (See Industry #4, p. 7-8.)

Statistical Significance of Results:

A State observed that a statistically significant difference cannot be determined to exist between only two numbers (i.e., the affected and comparison populations). However, one could determine if the minority population of one population is at least 2 to 3 standard deviations above the mean of the distribution of minority populations of all the communities. If this is done, however, there is no single comparison population. (See State #67, p. 3.)

Alternative Approaches:

A State recommended an alternative to the comparison population method; namely, the Emission Index Approach to Analysis found in Perlin (1995) "Distribution of Industrial Air Emissions by Income and Race in the United States: An Approach Using the Toxic Release Inventory." Environmental Science and Technology, p. 75. (See State #67, p. 3-4.)

COMPLAINTS:

Thresholds for Accepting Complaints:

Several commenters proposed that EPA establish stricter thresholds of specificity for acceptable complaints. (See State #13, p. 1-2; #52, p. 16; #83, p. 1; #89, p. 4; #2L, p. 2; Industry #12, p. 5; #72, p. 6.) Reasons offered included the resources government will invest in resolving the allegation, (see State #13, p. 1-2; #2L, p. 2), the difficulty of filing a recipient response (see State #63, p. 2; #2L, p. 2), and the fear of frivolous complaints. (See State #52, p. 16; #89, p. 4; #2L, p. 2; Industry #12, p. 5.) Some commenters proposed that more effort be made to identify incremental approaches which will quickly separate serious situations from less threatening ones. (See State #13, p. 1-2; Industry #60, p. 2.) (See also Local #14, p. 8; #82, p. 11.)

Criteria for Complaints - Jurisdiction:

Several commenters urged EPA to make the jurisdictional requirement of federal financial assistance more obvious to complainants in the guidance since complaints are often

rejected for failing to fulfill this criteria. (See Non-governmental organization #22, 14; Task Force #61, p. 8.) A non-governmental organization asked EPA to spell out, and illustrate with examples, the type and specificity of other allegations needed in a complaint so as to avoid dismissals. (See Non-governmental organization #21, p. 2, 5.)

Several commenters urged EPA to accept complaints that lack a telephone number because many potential complainants do not have one. (See Non-governmental organization #22, p. 14; Task Force #61, p. 8.)

Criteria for Complaints - Notice Pleading:

Several commenters complained that the guidance inappropriately extends the bounds of notice pleading because complainants are simply allowed to allege that a violation has occurred. (See Local #25, p. 2; State #52, p. 16; #58, p. 6; #63, p. 2; #2L, p. 2; Industry #12, p. 5; #3L, p. 2.)

Proponents of this viewpoint offered EPA several alternatives. One proposed that complainants at least be encouraged to state the nature of the violation, why they believe the action violates Title VI, and (briefly) the nature of the harm. This requirement, the commenter believed, would avoid unnecessary expenditures of resources, wasted time, and unwarranted delay. (See Local #25, p. 2.) Another recommended requiring identification of the type of disparate impact and the affected population. (See State #2l, p. 2.) A third proposed requiring explicit documentation of the alleged discriminatory act so the recipient would have sufficient information to respond. (This commenter also proposed allowing the recipient to ask for a more definite statement of the alleged discriminatory act.) (See State #63, p. 2.) One commenter urged EPA to require the complaint to be "complete." (See Industry #4, p. 2-3.) A non-governmental organization urged EPA to require complaints to plead that environmental permitting causes the discriminatory effects in question. (See Non-governmental organization #93, p. 13.)

Criteria for Complaints – Clarity:

Several commenters approved EPA's decision to request clarification if a complaint is unclear. (See Non-governmental organization #22, p. 22; Task Force #61, p. 7; Academic #3, p. 6-7.) On the other hand, an industry commenter urged EPA not to investigate impacts or stressors where the complaint is unclear, because this could produce a fishing expedition, encourage open-ended complaints, and overextend EPA resources. (See Industry #80, p. 8.)

Criteria for Complaints – Emissions and Emissions Data:

A local government commenter proposed that EPA specify criteria for complaints, including, at a minimum, previous or current emissions data and projected unmitigated emissions. This commenter believed that the absence of such criteria could be an invitation for frivolous filings, swamping EPA with complaints. (See Local #50, p. 7.) One commenter proposed that complaints be required to be specific to a single pollutant or group of pollutants, rather than addressing cumulative effects. (See Industry #37, p.7.)

Criteria for Complaints - Evidence:

A State commenter proposed that EPA require a threshold of evidence of intentional discrimination or discriminatory effects for complaints to be investigated fully. (See State #18, p. 3.)

Criteria for Complaints – Verification of the Allegations:

A State commenter recommended that, before accepting a complaint, EPA should determine the veracity of the complaint and that the complaint broadly reflects concerns of the impacted community so as to avoid wasting resources. (See State #89, p. 4.)

CUMULATIVE RISK:

Clarity of the Guidance:

Many commenters observed that the standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, lack specificity. (See State #73, p. 3; #89, p. 2; Local #41, p. 2; Industry #6, p. 3; #12, p. 4; Non-governmental organization #21, p. 2-3, 6; #65, p. 3.) Some worried that sound peer-reviewed science would not be used. (See State #89, p. 2; Industry #6, p. 3; #12, p. 4.)

Tools for Assessing Cumulative Risk:

Several commenters emphasized the weakness of our current scientific tools in determining cumulative impact. (See State #13, p. 2; #39, p. 5; Industry #37, p. 7.) Given the demands on limited resources, one State commenter suggested EPA explore more incremental approaches to accepting complaints and conducting investigations. (See State #13, p. 2.)

De Minimis Risk Levels:

Some commenters argued that cumulative impact analyses cannot be completed for the large number of permits issued because neither the modeling tools nor the detailed input data are available. Therefore, these commenters believed EPA should establish incremental *de minimis* risk levels that can be used to screen out projects or facilities that do not significantly contribute to health risks. (See Local #14, p. 7; Industry #37, p. 7, 8.)

One commenter supported EPA's risk benchmarks as commonly accepted. (See Industry #60, p. 7.) However, this commenter asked EPA to clarify whether populations (as opposed to individuals) are to be compared to risk benchmarks.

One commenter stated EPA inappropriately used risk levels for judging the significance of incremental health risks (e.g., the risk from drinking water contaminated with a particular pollutant) to judge the significance of cumulative environmental risks. (See Local #14, p. 6, 7.) Other commenters also cautioned against using benchmarks developed for individual permits to address cumulative impacts. (See Local #1L, p. 3; Non-governmental organization #36, p. 9.)

State and local government commenters questioned the utility of EPA's *de minimis* risk levels because cumulative cancer risk from air pollutants is believed to be above 1 in 1 million everywhere in the U.S. and may be generally above 1 in 100,000 in major urban areas nationwide. (See State #58, p. 7; #73, p. 3; Local #14, p. 6; #82, p. 12.) One commenter believed that the urban air toxics program, which is cumulative in nature, provides more appropriate benchmarks for adverse impact than the 1 in 10,000 risk factor developed for individual pollutants and discussed in EPA's guidance. (See Local #1L, p. 3.)

Several commenters thought a cancer risk greater than 1 in 1,000,000 a more appropriate benchmark. (See Non-governmental organization #22, p. 44; Task Force #61, p. 37.)

Some commenters asked what benchmarks to use in evaluating non-carcinogens, chronic toxicity potency factor scores, or chemical concentrations. (See Non-governmental organization #21, p. 6; #36, p. 9; State #58, p. 7.)

Some entreated EPA to consider the genetic susceptibility of the affected racial/ethnic population to environmentally related illness in assessing risk levels. (See Non-governmental organization #65, p. 5.) (See also Non-governmental organization #36, p. 9.)

Cumulative Impacts;

Several commenters urged EPA to follow NEPA regulations and case law and consider "reasonably foreseeable" future impacts and "indirect" impacts in cumulative impacts. (See Non-governmental organization, #40, p. 9; #65, p. 2.)

Synergies:

Several commenters urged that assessments always include: a) the additive effects of exposure to multiple chemicals, and b) synergies between multiple chemicals, such that their combined effect is far more severe than the sum of individual impacts. They urged EPA to:

a) incorporate chemical synergies wherever data is available,
b) conduct, and encourage states to conduct, further research into chemical synergies (drawing, for example, on existing state and local initiatives such as the Multiple Air Toxics Exposure Study of the South Coast Air Quality Management District), and
c) adopt precautions with respect to unknown risks.

(See, e.g., Non-governmental organization #21, p. 1-2, 4, 6; #40, p. 9; #46, p. 20.)

Addressing Unknown Risks:

One commenter proposed that EPA adopt a precautionary principle with respect to unknown risks: i.e., where risks are unknown, they should be treated as adverse impacts and a disparity analysis conducted to determine the extent to which these unknown risks are unequally distributed. This commenter believed that communities of color should not be disproportionately exposed to substances of uncertain harmfulness; these risks should be borne across society. (See Non-governmental organization #46, p. 20.)

Duration of Exposure:

One commenter proposed that EPA clarify that cumulative risk is determined for annual or lifetime risk resulting from exposures to pollutants from the facility at issue. (See Industry #5, p. 10.)

DATA:

Data – Accuracy and Measurement:

Several commenters emphasized the importance of accurate, measured data. (See Industry #4, p. 7; #5, p. 10; #12, p. 4; #16, p. 3, 38; #60, p. 7; #91, p. 17-18.) Some worried about EPA's willingness to use less than the best available data; they urged that the data be sufficient to support EPA's findings. (See Industry #16, p. 2, 21, 27-29; State #52, p. 8.)

Some commenters discussed the hierarchy of available data sources. Some advised it is preferable to use actual or monitored data if available, then modeled data. (See Industry #5, p. 10; #12, p. 4; #60, p. 7; #91, p. 17-18.) Others stressed that "known releases of pollutants" are preferable to modeled data. (See Non-governmental organization #22, p. 43, 57; Task Force #61, p. 36, 51.) When it becomes necessary to use modeled data, EPA must ensure the modeling is based on scientifically sound assumptions, said one commenter. (See Industry #5, p. 10.) One commenter asked how to proceed if health effects are not measured, but based on modeling only. (See Industry #37, p. 8.)

Some commenters emphasized the importance of actual, as opposed to potential releases. They observed that measures of product production and use, storage of pollutants and their potential for release, or activities "associated" with potential exposure are generally not reliable enough to determine actual exposure and risk and, consequently, to demonstrate an impact. (See Industry #5, p. 10; #16, p. 27-29; see also Industry #60, p. 8.)

One commenter observed that EPA databases such as TRI and CERCLIS have data of varying quality. This commenter contended that some of the most common EPA databases are not sufficiently reliable for use in Title VI investigations. (See Industry #16, p. 29.)

Finally, some States concluded that the guidance is fundamentally flawed because it fails to use available tools and science. (See State #39, p. 3, 11; #52, p. 8; #83, p. 1; #89, p. 1, 5.)

Data – Avoiding Overly Scientific Approaches:

Several commenters opposed EPA's emphasis on scientific facts and technical data. (See Non-governmental organization #22, p. 41; #23, p. 3; #46, p. 20; #59, p. 20-22; #62, p. 7; #68, p. 2.) One explained that a standard that requires studies to conform to "accepted scientific approaches" favors submissions by industry and states over submissions by affected low-income communities (which generally lack resources to pay for comprehensive studies.) This commenter advised EPA either to conduct its own studies or to afford studies submitted by low-income communities weight out of respect for their limited means. (See Non-governmental organization #62, p. 7.) Another commenter reasoned that the Integrated Human Exposure Committee of the Science Advisory Board concluded that no method of adverse impact analysis limited to scientific evidence would be very effective, given the inherent limitations of risk assessment and the difficulty imposed by the 180-day deadline for processing complaints. (See Non-governmental organization #46, p. 20.) One stressed that some measure of value should be given to qualitative factors that are not quantifiable, such as proximity to the source. (See Non-governmental organization #36, p. 9.)

Developing Better Risk Assessment Data:

An industry commenter encouraged EPA to develop better environmental data on risk assessment. (See Industry #5, p. 10.) See also the section of this report entitled "Adverse Disparate Impact Analysis: Uncertainty of the Guidance."

Usefulness of Current Measurement Tools:

One commenter believed that the guidance already contains a useful list of resources for obtaining demographic and exposure data and of tools and methodologies for conducting adverse impact analysis. According to this commenter, the most useful way EPA can assist states is to update these lists continually and to provide more specific guidance on the methodologies EPA will accord due weight. (See State #18, p. 9.)

Use of Industry Data:

An industry commenter recommended EPA seek relevant data from the permittee (i.e., emissions estimates based on facility specific parameters.) (See Industry #5, p. 10.)

Use of Community Data:

Several commenters pointed out that the guidance overlooks potentially valuable resources. Sources mentioned include: well-documented community-based research, anecdotal evidence (e.g., coincidences between childhood asthma incidences or soil discoloration and facility activities), citizen testimony from multiple sources documenting identical impacts, and local government records (of emergency services or traffic counts on streets). (See Local #41, p.

2; Non-governmental organization #59, p. 17; #62, p. 7; Local #41, p. 2.) One commenter recommended that EPA ensure that data measurement and analysis are available to communities. (See Local #41, p. 2.)

Use of Census Data:

One commenter commended EPA for endorsing the use of 1990 census data (until year 2000 data becomes available) and urged EPA to issue a bulletin to its Regions explaining the rationale for this choice. (See Industry #4, p. 5.) One commenter criticized census data as ten years old. (See Industry #37, p. 8-9.) One commenter urged that the Shintech demographic analyses using 1990 census data not be used as models. (See Industry #80, p. 11-12.) One commenter noted historical flaws with census data, including failure to identify minorities, those who do not speak English, and pockets of minority or low-income residents. (See Non-governmental organization #36, p. 11-12.)

Causal Link Between Impacts and Activities:

Some commenters supported the need for a causal link between impacts and the recipient's permit program. (See Industry #12, p. 4; #16, p. 8-9, 10, 29; #28, p. 2; State #52, p. 2-3, 8-9; #2L, p. 2.)

Others found calls for evidence of a "direct causal link" between discriminatory activities and impacts inappropriate. (See Non-governmental organization #21, p. 1-2; #22, p. 43; #59, p. 11; #62, p. 11; Task Force #61, p. 37.) Some reasoned that such evidence is virtually impossible to acquire in a reasonably short timeframe (except in the most extreme cases of toxic poisoning) because it requires data systematically gathered over years, and some impacts, such as cancer, may not manifest themselves for many years after exposure. (See Non-governmental organization #22, p. 43; #40, p. 9-10; #62, p. 11; Task Force #61, p. 37.) Instead, one commenter thought EPA should make clear that:

a) unavailability of data on direct links will not prejudice a Title VI complaint,
b) where ideal evidence is not available, the best available evidence shall be used and given no less weight,
c) approaches based primarily on proximity are always appropriate where other forms of analysis are unavailable, and
d) EPA will focus on exposure to pollution, not solely health outcomes. (See Non-governmental organization #40, p. 9-10; #62, p. 11.)

One State urged additional scientific research to confirm the casual link between an emission and a health effect. According to this commenter, instead of presenting a plan for developing better scientific tools, the guidance simply prioritizes the existing, inadequate tools from most to least effective. A better approach would be to amend the enabling environmental statutes. (See State #58, p. 3.) Some commenters noted that language calling for links between stressors and health impacts failed to account for social, cultural, or economic impacts. (See Non-governmental organization #22, p. 42-43; Task Force #61, p. 36.)

Mapping Tools:

One commenter recommended EPA supplement facility-based mapping with community-based mapping to address cumulative toxic burdens on communities. (See Non-governmental organization #22, p. 57.)

Requiring Racial Data:

One commenter noted that the guidance uses permissive language to describe the need to compile racial data; the commenter urged EPA to clarify that agencies must provide this data. (See Non-governmental organization #64, p. 3.)

Acknowledging Uncertainties in Data:

Industry and State commenters supported EPA's decision to note uncertainties in data where they are known. They argued that EPA should be more explicit about the limitations of data sources and clearer about criteria for establishing data relevance. (See Industry #5, p. 10; #37, p. 8; State #52, p. 1, 4.) One State suggested identifying how: a) accurate are the measurements, b) representative are the data, c) variable is the population, and d) how many sampling units are available. (See State #52, p. 4.) This commenter also suggested accounting for the level of resolution (e.g., census blocks vs. individual tests). (See State #52, p. 2, 4.) One commenter observed that many databases are not designed for purposes of cumulative risk assessments. (See Industry #24, p. 7)

Addressing Deficiencies in Studies:

Several commenters asserted that a standard allowing for dismissal only of those studies with "significant deficiencies" inappropriately allows findings to be based on "moderately deficient" studies. (See Non-governmental organization #22, p. 32-33; #62, p. 7; Task Force #61, p. 26-27.) Some recommended that EPA: a) not rely on any agency study containing discrepancies, b) conduct its own studies (especially where complainants request an independent study), and c) be flexible in allowing unscientific studies from community groups with limited resources. (See Non-governmental organization #22, p. 32-33; Task Force #61, p. 26-27.)

DEFINITIONS:

"Actual" and "Allowable" Emissions:

One industry commenter observed that these terms are referred to interchangeably throughout EPA's guidance. This commenter believed the proper measure of emissions is actual emissions. (See Industry #5, p. 12.)

"Acute Toxicity:"

One commenter urged EPA to define this term. (See Task Force #61, p. 43.)

"Adequate (or Substantial/Legitimate) Justification:"

Several commenters believed this term is not defined. (See Industry: #6, p. 3; #12, p. 6; #3L, p. 3; State #89, p. 2.)

"Adequate Populations:"

One commenter thought this term is not defined. (See State #83, p. 1.) One commended EPA for using the term "population" rather than minority "community" or "neighborhood" and urged EPA to be consistent with this approach in other guidance documents. (See Industry #4, p. 2.)

"Adverse Impact:"

Many commenters deemed this term not well defined. (See Industry #5, p. 12; #6, p. 2; #12, p. 6; #3L, p. 3; State #58, p. 7-9; #67, p. 1; #73, p. 3; #83, p. 1; #89, p. 2; State #52, p. 7-8; Non-governmental organization #62, p. 4; Local #14, p. 6.) Some commenters asked EPA to explain what it means to eliminate or reduce adverse disparate impacts "to the extent required by Title VI" in terms of both level and demographic distribution of impacts. (See Non-governmental organization #62, p. 4; State #52, p. 10.)

"Affected Population:"

Many commenters believed this term is not clearly defined. (See State #39, p. 4; #52, p. 5-6; #58, p. 8; Local #25, p. 3; Industry #12, p. 3; #16, p. 2, 10, 17-18; #51, p. 3; #60, p. 5.) One emphasized that a recipient must guess whether a particular area will be considered an environmental justice area and the geographic boundaries of such an area. (See Local #25, p. 3.) One asked EPA to identify the appropriate dispersion models. (See Non-governmental organization #21, p. 7.)

On the other hand, one State believed the guidance already provides a fairly detailed description for characterizing the affected population. (See State #88, p. 2.)

Commenters also criticized the techniques (other than mathematical modeling) for identifying an affected population. Several found simpler approaches based on proximity (such as circles of impact for air releases) unscientific; they urged EPA to require scientifically based exposure assessments. (See Industry #12, p. 5; #24, p. 8-9; State #52, p. 6.) (See also Industry #60, p. 5.) However, one commenter observed that modeling tools by themselves do not consider cultural, economic, and social factors affecting impacts. (See Non-governmental organization #36, p. 11.)

One noted particular difficulty in defining affected populations where long range transport of pollutants is a concern (such as in EPA's acid rain, regional haze, and northeast state ozone transport programs). Rather than allowing complaints from communities several hundred miles away, this commenter proposed that EPA select an area of 50 square miles as appropriate. (See Industry #51, p. 3.)

One criticized the analysis for its emphasis on the size of the affected population, alleging procedural discrimination against smaller populations. (See Non-governmental organization #81, p. 3.)

Finally, one observed that it is important to include in the "affected population" persons who work in an area, eat from area sources, or are otherwise impacted even if they do not live in an area. (See Non-governmental organization #36, p. 11.)

"Area:"

Several commenters found this term vague. (See State #58, p. 8; Local #25, p. 3; #82, p. 13; Industry #24, p. 9; #37, p. 3.) One State suggested it may be preferable to establish a procedure that the county or state will always be the reference area. (See State #58, p. 8.) An industry commenter countered that a geopolitical boundary is rarely relevant and should be used only when a more appropriate area cannot be found. This commenter recommended using a bioregion (e,g, airshed or watershed) as the first choice, followed by an area with a direct relationship to the proposed project. (See Industry #4, p. 5.) Another commenter suggested that comparison areas should be similarly zoned, because environmental agencies have no authority to allow or require facilities to be located in areas not zoned for such uses. (See Local #82, p. 13-14.)

"Community:"

Several commenters urged EPA to define a community more clearly. (See State #18, p. 7; Industry #12, p. 3; Local #41, p. 1.) One questioned: does "community" mean residents, local governments, or all local stakeholders? (See Local #41, p. 1.) Some asked: how can an agency identify who speaks for the community in a diverse state with many racial and ethnic

communities? (See State #18, p. 7; Local #82, p. 7, 12.) One objected to the use of the term "community." (See discussion of "adequate population" above.)

"Comparison population:"

Industry and State commenters advised EPA to define a comparison population. (See Industry #6, p. 3; #12, p. 6; #28, p. 2; #60, p. 5-6; #3L, p. 3; State #83, p. 1; #89, p. 2.) See also the "Comparison Populations: Defining the Populations and Methodology" section of this report.

"Discrimination:"

One State thought a finding of discrimination should require a discriminatory outcome, not merely procedural discrimination. (See State #52, p. 17.)

"Disparate Impact:"

One commenter urged EPA to define this term. (See State #52, p. 16.)

"Disparity:"

One State noted that many urban areas would meet EPA's criteria for demographic disparity and disparity in rates of impact due to urban demographics and urban air toxics concentrations, yet no one would support redlining these areas as likely settings for Title VI complaints. (See State #58, p. 8.)

"Hazardous Pollutant:"

Several commenters observed that the term is singular, but the plural is used in the definition. . (See Non-governmental organization #22, p. 50; Task Force #61, p. 43-44.)

"Impacts:"

Many commenters argued that EPA's definition of "impacts" was too narrow. (See Non-governmental organization #22, p. 6, 40-42; #36, p. 9; #46, p 17, 21; #59, p. 9; #62, p. 9-11, 19; #69; #81, p. 2; Academic #3, p. 4; #19, p. 2-3; Task Force #61, p. 34-36.) Suggestions for broadening the term included encompassing:

- health effects (i.e. actual, or increased risk of, physical, mental, or psychological illness or injury or increased disease vectors),
- environmental effects (i.e., pollution of air, land, or water, noise, odor, vibration, dirt, litter, and aesthetic injury),
- socioeconomic effects (i.e., decreased property value, increased traffic, patterns of permitting based on race, concentration of landfills in minority communities, racial disparities in accessing municipal sewage facilities, and impacts to cultural -- especially indigenous peoples' religious, spiritual, and archaeological resources),
- physical disruption (displacement of homes, new roads, etc.),
- quality of life issues (e.g., contributing to sleep deprivation, interference with peaceful enjoyment of property, stigmatization of a community, racial polarization, or loss of residents' self-esteem). (See, e.g., Non-governmental organization #21, p. 2-3, 5, 7; #22, p. 6, 40-42; #36, p. 9; #46, p 17, 21; #59, p. 9; #62, p. 9-11, 19; #69; #81, p. 2; Academic #3, p. 4; #19, p. 2-3; Task Force #61, p. 34-36.)

Some argued that EPA's failure to address total project impacts violated Title VI, EPA's regulations, or federal case law. (See Non-governmental organization #22, p. 6, 40-42; #62, p. 9-11, 19; Academic #19, p. 2-3; Task Force #61, p. 34-36.) One commenter observed that a clearer definition saves money, decreases OCR labor requirements, enables protected parties to assess

whether discrimination has occurred, and expedites complaint resolution. (See Academic #19, p. 2-3.)

By contrast, a State commended EPA for clarifying that the adverse impacts to be considered are the health and environmental ones. (See State #18, p. 9.) An industry commenter countered that the scope of impacts considered is overly broad and includes factors outside the legal authority of the permit agency. (See Industry #12, p. 4.) Another industry commenter asked EPA not to include unregulated sources in cumulative impacts because recipients lack authority over such sources and such sources are difficult to identify and assess. (See Industry #80, p. 8-9.)

"Informal Resolution:"

Several commenters urged EPA to amend this definition to show that informal resolution can dispose of a complaint before dismissal of the complaint as well as prior to a finding of noncompliance. (See Non-governmental organization #22, p. 50; Task Force #61, p. 43-44.)

"Media:"

Several commenters found the use of the term "compartments" in this definition confusing. (See Non-governmental organization #22, p. 50; Task Force #61, p. 43-44.)

"Pathways of pollutants:"

A State commented that the expectations for this step are not defined. Should other pollutants or pathways of exposure be examined, even if the permit has no relation to them? (See State #39, p. 5.)

"Pollutants of concern:"

One State argued that, where there are multiple pollutants, the guidance does not say which to evaluate, whether to look at each separately, whether to add risks from separate analyses, or whether to look at synergistic effects. (See State #39, p. 4-5.)

An industry commenter advised EPA to clarify that it would focus primarily on pollutants deemed to have localized impacts (e.g., hazardous air pollutants). (See Industry #72, p. 7.)

"Pollution Prevention:"

Several commenters recommended omitting the word "excessive" from this definition. (See Non-governmental organization #22, p. 50; Task Force #61, p. 44.)

"Reasonable Opportunity:"

One commenter advised EPA to define "reasonable opportunity" in the context of filing written statements during the Administrator's review of an administrative law judge's determination. (See Non-governmental organization #22, p. 13.)

"Reasonable Time:"

One commenter asked EPA to define this term. (See State #52, p. 11.)

"Significant:"

Several commenters thought this term is not defined. (See Industry #17, p. 3-4; #3L, p. 3; Non-governmental organization #40, p. 13; State #52, p. 10.) See also the "Significant Impacts" and "Statistical Significance" sections of this report.

"Similar Stressors:"

One commenter asked EPA to define this term. (See Non-governmental organization #21, p. 4.) Several commenters said the definition of stressor should include cultural, religious, social, and economic impacts. (See Non-governmental organization #22, p. 50; Task Force #61, p. 44.)

"Sources:"

One commenter urged that the guidance be clarified to describe the universe of sources, including the full range of sources resulting in potential adverse disparate impacts. (See Non-governmental organization #46, p. 16-17.) A State argued that allowing the type of stressors and universe of sources to be determined on a case-by-case basis is very uncertain, may be broadly inclusive, and does not enable recipients to address complaints proactively. (See State #58, p. 6.)

"Statistical Significance:"

Several commenters urged EPA to amend this definition to reflect the meaning of statistical significance. (See Non-governmental organization #22, p. 50; Task Force #61, p. 44.)

"Substantially:"

One commenter asked EPA to define this term. (See State #52, p. 11.)

"DUE WEIGHT" TO RECIPIENT PROGRAMS:

Support for the Concept of "Due Weight:"

Several commenters commended EPA for offering to give "due weight" to certain recipient activities in determining whether a violation of Title VI has occurred. (See State #18, p. 2; Local #82, p. 6.)

Opposition for the Concept of "Due Weight:"

Others criticized EPA's "due weight" concept for, in essence, according undue deference to a recipient's own assessment of compliance with Title VI. (See Non-governmental organization #22, p. 7, 14, 31-33; #46, p. 27-29; #59, p. 17-18; #81, p. 2; Task Force #61, p. 8, 25-27; Academic #3, p. 7.) Some argued that this effectively shifted the burden of proof to complainants, who must disprove recipients' data. (See Non-governmental organization #22, p. 14; #59, p. 17-18; Task Force #61, p. 8.) Some urged EPA to verify compliance. To do so, they recommended EPA: a) conduct its own first hand investigations of allegations to promote accuracy and completeness, and b) allow complainants to present, review, and respond to, data and analysis. (See Non-governmental organization #36, p. 7-8; #40, p. 6-7; #46, p. 27-29.)

Expanding the Concept to Encompass Equivalent Programs:

Many commenters encouraged EPA to consider expanding its concept of what merits "due weight" beyond what is outlined in the guidance. These commenters urged EPA to establish practical, objective criteria for a recipient program to be given "due weight" even if there is no area-specific agreement. (See Local #14, p. 5; #50, p. 2; #82, p. 1, 5-8; State #18, p. 2-3, 5; #67, p. 2; #73, p. 1-2; #89, p. 3; Industry #12, p. 5; #24, p. 10-11; and #72, p. 1, 9, urging EPA to ease reviews for areas incorporating environmental justice concerns into land use planning.)

One commenter proposed that criteria for acceptable programs include:

1) public participation in program development and implementation,
2) identifying areas of greatest concern for relevant stressors (or use of methods to evaluate cumulative impacts),
3) measures to significantly reduce existing levels of relevant stressors, and

4) measures to ensure that new or modified permits do not cause significant adverse impacts. (See Local #82, p. 2, 4, 7-8.)

Some argued that without an EPA endorsed state program, many states may opt out of the effort to create an environmental justice program, inundating EPA with Title VI complaints. (See State #67, p. 2; Industry #24, p. 10.)

Several commenters observed that the South Coast Air Quality Management District in California has the most rigorous environmental justice program in the U.S. and should be accorded "due weight." (See Local #50, p. 2; Local #82, p. 1.)

Certainty of the Guidance:

Several commenters noted that EPA has not defined requirements for "due weight" specifically enough for recipients to rely on its approach. (See State #18, p. 3, 5, 9; #89, p. 1-3; Local #25, p. 2; Industry #12, p. 6; #3L, p. 4-5.) These commenters recommended that EPA either define a process that provides greater assurance to states, or heighten the threshold for a Title VI complaint to be accepted. (See State #58, p. 3-4, 9; #89, p. 1-3; Local #25, p. 2; Industry #12, p. 5.) (See also Local #50, p. 2, urging expedited review of complaints where "due weight" applies.)

Significance of Deference to Recipient Programs:

A State commenter advised that the "due weight" accorded to recipient programs should be "significant" because: a) significant consideration is vital to States that have developed voluntary environmental justice processes, and b) this will encourage permit applicants to participate in the environmental justice process. (See State #67, p. 2.)

Other State Programs:

A State and local government commenter advised EPA, when reviewing recipient permit programs, to look at other State statutes or programs that further the goals of Title VI (e.g., laws on administrative procedures or public participation). (See State #18, p. 3; Local #1L, p. 2, 6.)

Deference to State Court Proceedings:

One State questioned the degree of deference to be accorded State court proceedings. (See State #52, p. 17.) A non-governmental organization commenter believed EPA should not give state court decisions precedential value for purposes of determining compliance with the federal civil rights embodied in Title VI because state court decisions apply state laws and procedures. Instead, this commenter recommended EPA conduct a *de novo* review of such cases. (See Non-governmental organization #64, p. 2.)

EDUCATION:

Public Education:

An industry commenter recommended that EPA actively educate the public about the benefits local communities will reap from the Tier 2 and Sulfur Program. (See Industry #5, p. 2.)

Recipient Education:

One commenter observed that recipients also must be responsible for education, not only about environmental issues, but also about the related economic, social, and land use impacts of a facility. (See Local #41, p. 2.)

Some commenters noted that recipient agencies will need extensive training in exposure, risk and demographic analysis, cumulative impact assessments, and disparate impact analysis or some other source for this expertise is needed. These commenters urged EPA to provide financial and technical assistance and training to recipients. (See State #18, p. 3, 6, 9; Local #82, p. 14; #1L. p. 1.)

Local Government Education:

One commenter advised EPA to conduct extensive outreach and training for local government officials so that they may become aware of the potential environmental justice implications of their decisions. (See Local #82, p. 2, 14.)

ENFORCEMENT OF TITLE VI OBLIGATIONS:

Need for Strong Enforcement of Title VI:

Non-governmental organizations emphasized that Title VI implementation requires adequate, regular, and strong enforcement by EPA and other agencies. They urged EPA to focus on: a) promising to enforce Title VI, and b) outlining different enforcement mechanisms it might employ. (See Non-governmental organizations #11, p. 3; #59, p. 3-4, 8, 11-12; #74, p. 2; #81, p. 2; #84, p. 2.) One suggested EPA develop a compliance counseling function with respect to Title VI in addition to enforcement functions. (See Academic #3, p. 6.)

Addressing the Current Backlog of Title VI Complaints:

Numerous commenters encouraged EPA to move quickly to resolve pending Title VI complaints, citing the current backlog of cases. (See State #53, p. 1; Local #82, p. 4; Non-governmental organization #22, p. 2-10, 30; #34, p. 2; #46, p. 2; #49, p. 1-6; #59, p. 2-3; #62, p. 2, 18; #68, p. 2; #74, p. 1; #78; #5L, p. 3; Congress #45, p. 1-2; Task Force #61, p. 1-4, 36.)

EPA Commitment to Civil Rights Enforcement:

Many commenters criticized EPA for lacking a commitment to civil rights enforcement. (See Non-governmental organization #22, p. 2-6, 9-10, 36; #49, p. 1-6; #59, p. 2-4, 13-14, 18-19; #62, p. 1; #74, p. 1; #84, p. 1; Task Force #61, p. 3-4, 30; Academic #33, p. 2-3.) Some observed that EPA has never investigated a State's Title VI program or activities or found a Title VI violation among the more than 50 administrative civil rights complaints filed, despite numerous research reports revealing patterns of environmental injustice. (See Non-governmental organization #22, p. 2-6, 36; #27, p. 2; #49, p. 2; #75, p. 1; Task Force #61, p. 30; Industry #91, p. 8-9.) A Congressman contended that EPA had ignored appropriations directing it to deal with a complaint expeditiously. (See Congress #45, p. 1-2.) One commenter recommended that enforcement be transferred to another agency. (See Non-governmental organization #59, p. 2, 13-14, 18-19.)

History of Title VI Requirements:

Several commenters stressed that Title VI is not a new requirement; it has been the law for 36 years and EPA's regulations are 25 years old. (See Non-governmental organization #22, p. 5; #46, p. 3; #74, p. 1; #84, p. 1.)

Impact of Judicial Deference to EPA:

One commenter cautioned that, because courts will defer to EPA's guidance, the guidance will greatly influence Title VI enforcement, despite EPA's assertion that the guidance is not "enforceable" by any party. (See Non-governmental organization #46, p. 3.)

EPA OBLIGATIONS:

Applicability of Guidance to EPA Activities:

Many stakeholders found fault with the statement that EPA may follow, or act at variance with, its guidance, depending upon the specific facts presented. These stakeholders complained that this provision reduces certainty for all parties. They called upon EPA to commit itself to be bound by its own guidance. (See Industry #5, p. 5; #12, p. 5; #60, p. 2; Non-governmental organization #11, p. 3; #22, p. 10-11; State #39, p. 7; #89, p. 1, 2, 5; #2L, p. 1; Task Force #61, p. 4-5.) One added that fairness requires EPA to abide by requirements it would impose on states and local governments. (See State #39, p. 7.) This commenter also inferred from EPA's unwillingess to be bound that the guidance is unworkable. (See State #39, p. 3.) Others inferred a lack of commitment to civil rights enforcement. (See Non-governmental organization #22, p. 10-11; Task Force #61, p. 4-5.) One commenter urged EPA to commit to refer complaints against itself to the Department of Justice for investigation. (See Task Force #61, p. 5.)

JUSTIFICATION:

Opposition to the Concept of Justification Generally:

Many commenters criticized the guidance for allowing recipients to justify an adverse disparate impact if the "challenged activity … meets a goal that is legitimate, important, and integral to the recipient's institutional mission." (See Non-governmental organization #11, p. 4; #21, p. 8; #22, p. 7-8, 47; #30, p. 1-2; #59, p. 4-5; #62, p. 14-15; #64, p. 3; Task Force #61, p. 1-2, 41.) Some argued that virtually any challenged activity can meet this loose standard. (See Non-governmental organization #22, p. 47-48; #59, p. 4-5; #62, p. 14-15; Task Force #61, p. 41.) Others argued that benefits to the larger population should not be used to justify burdening only one segment of the population. (See Non-governmental organization #22, p. 7-8, 47-48; #36, p. 13-14; #46, p. 26; #62, p. 14-15; Task Force #61, p. 1-2, 41.) Others contended that this aspect of the guidance violates Title VI and the 14th Amendment to the U.S. Constitution. (See Non-governmental organization #22, p. 7-8; #30, p. 1-2; #64, p. 3; Task Force #61, p. 1-2.) One insisted that the substantial and legitimate justification must be non-discriminatory. (See Non-governmental organization #11, p. 4.) Another argued EPA must look to what is "necessary," rather than merely claimed. (See Non-governmental organization #64, p. 3.) Others argued that no increase in disease is acceptable. (See Private citizen #9; #43.)

Opposition to the Concept of Economic Justification:

Numerous commenters argued that economic justification should be disallowed as a reason for noncompliance, often arguing that, by definition, it cannot be integral to the recipient's mission. (See Non-governmental organization #21, p. 8; #22, p. 7-8, 48-49; #36, p. 13-14; #40, p. 12-13; #46, p. 26; #49, p. 6; #59, p. 4-5; #62, p. 15-16; #64, p. 3; #69; #74, p. 2; #78; #84, p. 1; #5L, p. 1; Task Force #61, p. 1-2, 41-42; Academic #3, p. 9; #33, p. 8.) (See also Private citizen #9, #43; Non-governmental organization #22, p. 8; Task Force #61, p. 1-2.) Some added that EPA has not clearly defined what it intends; therefore, EPA has not provided adequate notice and opportunity for comment on this issue. (See Non-governmental organization #46, p. 27; Academic #33, p. 8.) One urged EPA to clarify that, where state action is implicated, the U.S. Constitution establishes a heightened, more protective standard for review of adverse impacts. (See Non-governmental organization #11, p. 4.)

One commenter asked that if EPA adopt a concept of economic justification, it commit to consider community views on whether a facility will provide direct economic benefits to the community. (See Non-governmental organization #21, p. 8.) Others, reading the guidance as already providing this protection, addressed implementation issues. (See Non-governmental

organization #36, p. 13-14; Academic #3, p. 9-10.) One urged that EPA recognize a community's right to reject direct economic benefits in light of the disparate impact associated with the activity. This commenter argued that a permit applicants' economic gain should not be valued more than protecting a community from disparate impacts. (See Academic #3, p. 9-10.) Another asked what would happen if the promised benefits did not materialize? (See Non-governmental organization #36, p. 13-14.)

Support for the Concept of Justification Generally:

Many industry and State commenters viewed the ability to justify a disparate impact as a positive element of the revised guidance. (See Industry #4, p. 4; #16, p. 2, 3; 21, 29; #24, p. 3; #51, p. 5; State #67, p. 2; #89, p. 5.

Expansion of the Concept of Justification:

One commenter argued that the test for justification (i.e., show that a challenged activity is reasonably necessary to meet a goal integral to the recipient's mission) is too narrow to comply with Title VI. This commenter viewed the guidance as flawed because it focuses on: a) what is essential to the recipient's success as an institution, b) a particular permit, and c) health and environmental benefits delivered directly to the affected population (as opposed to the broader population). According to this commenter, the guidance also ignores the fact that, for some facilities (e.g., mining) location of resources dictates siting. (See Industry #16, p. 30-32, 38.)

One commenter proposed three additional types of justification:

- there is no reasonable or feasible alternative to the proposed action, considering cost and other factors;
- the action satisfies an overriding public need; and
- the recipient's program overall does not have discriminatory effect. (See Industry #4, p. 4.)

This same commenter suggested EPA revise its NEPA guidance to incorporate a similar concept of justification. (See Industry #4, p. 4.)

Support for the Concept of Economic Justification:

Several commenters advised that the economic benefit of the facility must remain a justification. (See Industry #12, p. 4; #16, p. 2, 3, 21, 31-32; #51, p. 5; Local #25, p. 3.) One reasoned that:

a) employment benefits the health and safety of the affected community and the local community at large;
b) new or modernized facilities often contain state-of-the-art environmental controls; and
c) lack of economic development relegates communities to less desirable uses, fewer overall benefits, and (often) lower standards of environmental accountability. (See Local #25, p. 3.)

Some argued that justification should be based on the reason for permit issuance, not on the recipient's mission, because many important activities may not be integral to the recipient's mission, which typically relates to a regulatory function. (See Industry #4, p. 8; #12, p. 4.) One commenter argued justification should be based on a reason which "significantly furthers important social goals which the recipient's program is designed to support or allow" because many permitting agencies have relatively narrow missions. (See Local #82, p.10.) Some saw no reason to confine economic justification to *direct* benefits to the affected population. (See

Industry #4, p. 4; #16, 30-32.) One concluded that this restriction effectively negated any possibility of showing economic justification. (See Industry #16, p. 31-32.)

Another posited that permit applications to manufacture Tier 2 low-sulfur gasoline justify disparate impacts because refiners have no choice but to construct new process units to manufacture this fuel and because the overall benefits to society far outweigh any increased impacts to local communities. (See Industry #51, p. 5.)

Certainty of the Guidance:

Several commenters took issue with the right to rebut a justification if there are less discriminatory alternatives. They argued that standards for this determination are lacking, creating uncertainty. (See State #67, p. 2; #89, p. 5.) One commenter suggested EPA include examples of less discriminatory alternatives and disallow permittee costs as a consideration. (See Non-governmental organization #40, p. 13.)

Several commenters commended EPA for choosing case law outlining the strongest standard of justification and least discriminatory alternatives, but criticized EPA for then confusing the guidance by suggesting a different standard. (See Non-governmental organization #22, p. 48; #40, p. 12-13.) One commenter recommended EPA delete the reference to NAACP v. Med. Ctr. (See Non-governmental organization #40, p. 12-13.)

One commenter argued that the "less discriminatory alternative" language is confusing. As worded, there will always be less discriminatory alternatives; the guidance unfairly requires permittees to redress existing environmental conditions which the permittee did not create and to which the permittee may not even appreciably contribute. (See Industry #16, p. 2, 21, 33-34, 38.)

Burden of Proving Justification:

One commenter argued that recipients should have the burden of proving justification after a preliminary finding of noncompliance; consequently, EPA should not inquire on its own into potential justifications for the recipient. (See Non-governmental organization #40, p. 12-13.) By contrast, another commenter argued that placing the burden of proof on recipients was inconsistent with a non-adversarial Title VI process and EPA's duty to investigate allegations. (See Industry #16, p. 32.)

Timing of Consideration of Justification:

Several commenters thought consideration of justification should occur after finding of violation, not during the investigative stage. (See Non-governmental organization #22, p. 13; Task Force #61, p. 7.)

MITIGATION:

Support for the Concept of Mitigation:

Several commenters acknowledged EPA's recognition of cost and technical feasibility in evaluating mitigation and less-discriminatory alternatives as a positive move. (See Local #14, p. 5; #82, p. 6.)

Opposition to the Concept of Mitigation:

Others countered that mitigation must have as its goal the elimination of discrimination, not merely less discrimination. (See Non-governmental organization #22, p. 8, 28, 47; #59, p. 4-6; #62, p. 5; #74, p. 2; #84, p. 1; Task Force #61, p. 2, 22, 41.) Several stated that the guidance

should require mitigation to reduce emissions to the extent required by Title VI. (See Non-governmental organization #22, p. 49; Task Force #61,p. 42-43.)

Limits on Mitigation - Site and Pollutants:

Some commenters recommended that EPA require that any mitigation measure address concerns at the actual site and on the medium that is the subject of the complaint (rather than at locations outside the community). (See Non-governmental organization #22, p. 28-29; #62, p. 5, 18; Task Force #61, p. 22-23.) Another commenter urged that mitigation cover the same types of impacts as the challenged permit activity; in other words, that there be a direct offset to the environmental stressors caused by the permit. (See Non-governmental organization #21, p. 3-4.)

However, another commenter advised that projects should be able to put the mitigation where it is needed most (e.g., allow cleaner natural gas trucks and buses in more heavily impacted urban areas for emissions for a new facility in a less impacted suburb.) (See Industry #72, p. 7.)

Limits on Mitigation - Least Discriminatory Alternative:

Several commenters argued that EPA illegally misconstrues case law to allow for less discriminatory alternatives. According to these commenters, the alternative should "eliminate as many discriminatory effects as possible" – a much tougher standard. (See Non-governmental organization #22, p. 49; #46, p. 27; #62, p. 16; Task Force #61, p. 42-43.)

Others observed that, in order to find the least discriminatory option, EPA must consider a wide range of alternatives. However, the guidance fails to discuss: a) how EPA will conduct its alternative analysis, and b) how cost and technical feasibility will be included. (See Non-governmental organization #46, p. 27; Task Force #61, p. 43.)

One commenter concluded that confining the least discriminatory alternatives analysis to the last stages of the process (and a stage unlikely to be reached) squanders the opportunity to consider appropriate alternatives throughout the process. (See Academic #33, p. 9.)

Limits on Mitigation - Types of Remedial Measures:

Some commenters were troubled by EPA's suggestion that States can propose "broader remedial measures" (such as emission offsets and caps) that are more stringent than underlying environmental standards. They noted that agencies imposing such requirements may be acting outside their legal jurisdiction, inviting legal challenge. (Industry #24, p. 8; #91, p. 12.) Other commenters opposed abatement measures (e.g. household lead removal) which attack other exposure routes than the emitting facility unless these measures are proven to be as effective as eliminating the emitting facility. (See Non-governmental organization #22, p. 29-30; Task Force #61, p. 24.)

Considering Costs of Mitigation:

Some commenters stated that costs of the permit applicant should not be a consideration in assessing the practicability of alternatives, only the costs of the recipient agency. (See Non-governmental organization #22, p. 49-50; #62, p. 17.) One commenter surmised that consideration of costs will perpetuate disparate impacts. (See Academic #3, p.10.)

Enforcement of Mitigation Requirements:

Some commenters stated that EPA should ensure that parties responsible for mitigation actually do it and that complainants have administrative recourse if the responsible parties fail to perform. EPA should also ensure direct review of the mitigation scheme if it doesn't work, without the need to wait for a new permitting action. (See Non-governmental organization #22,

p. 31; #62, p. 6; Task Force #61, p. 25.) (See also Non-governmental organization #36, p. 14.) One commenter argued that the mitigation provisions of the guidance do not address the effect of accidents and upsets after a permit is issued. (See Non-governmental organization #59, p. 4-6.)

Community Input to Choice of Mitigation:

Some commenters encouraged EPA to give the affected community a meaningful role in fashioning mitigation plans. They reasoned that, by allowing state agencies to submit a mitigation plan without consulting with the affected community, EPA lacks the input to make a fair determination. (See Non-governmental organization #22, p. 30; #36, p. 3-4; #62, p. 6; #5L, p. 4; Task Force #61, p. 24-25.)

Industry Input to Choice of Mitigation:

One commenter observed that the permittee should have input and concurrence on mitigation measures. (See Local #50, p. 8.)

Mitigation of Cumulative Impacts:

Some commenters entreated EPA to avoid making a single facility mitigate cumulative impacts from multiple facilities. (See Industry #24, p. 7; Local #1L, p. 6.)

NOTICE:

Notice to Permittee:

Numerous industry and local government commenters urged EPA to define the role of the permittee. (See, e.g., Industry #2; #5, p. 3, 5-6; #6, p. 2; #16, p. 2, 21-24, 38; #24, p. 5; #28, p. 2-3; #37, p. 3; #51, p. 3; #60, p. 6; #80, p. 5-6; #91, p. 17; Local #50, p. 8; #82, p. 8.)

Industry commenters recommended that EPA commit to notify the permittee as well as the permitting authority when it receives a Title VI complaint or decides to proceed with an investigation. Reasons for this recommendation included: a) the permittee's interests are at stake, b) the permittee should have the opportunity to offer information; c) the permittee should be able to defend against allegations of disparate impact, d) simple fairness requires such notice, and e) this may allow the community to negotiate directly with the permittee. (See, e.g., Industry #2; #5, p. 3, 5-6; #16, p. 2, 21-24; #24, p. 5; #28, p. 2-3; #60, p. 6; #72, p. 1-3; #80, p. 2-3.) (See also Local #82, p. 8.)

One commenter added that EPA should proactively seek input from the permittee at all points in the investigation and communicate to the permittee on an ongoing basis the status and results of its actions in processing a complaint. (See Industry #5, p. 6.) Other commenters endorsed providing public notice of complaints in the Federal Register, State register, and local newspapers to ensure that all potentially affected stakeholders received notice (see Industry #16, p. 2, 21, 23-24), or otherwise notifying the community at large. (See Industry #72, p. 1-2.) One suggested putting the burden of notice on the complainant, with reimbursement with interest out of recipient funds to follow if the complaint proved valid. (See Industry #72, p. 2.) Other stakeholders recommended that the permittee receive copies of correspondence between EPA and the recipient (see Local #50, p. 8; Industry #80, p. 2), or otherwise have a right to participate. (See Industry #12, p. 3; #17, p. 8; #24, p. 5-6; #28, p. 2-3; #37, p. 3; #60, p. 6; #80, p. 5-6; #91, p. 17; Local #82, p. 8; #1L, p. 5; State #52, p. 10.)

Notice to Complainant:

One commenter observed the guidance neglects to mention that EPA will notify the complainant as well as the recipient of its preliminary findings. (See Non-governmental

organization #64, p. 3.) Others outlined greater participation rights for complainants. (See the "Public Participation: Community Input" section of this report.)

Sufficiency of Notice:

A local government argued that EPA should not find a violation of Title VI requirements in the area of public participation where the recipient provides notice of public hearing above and beyond regulatory requirements and where the recipient's use of a mailing list of interested parties was consistent with regulatory requirements. (See Local #14, p. 3.)

OFFSETS:

Location of Adverse Impacts:

Several commenters recommended EPA ensure that offsets do not reroute pollution to communities which experience an adverse impact, either before or as a result of the offset. (See Non-governmental organization #22, p. 29; #62, p. 6; Task Force #61, p. 23.) (For related comments, see the "Mitigation: Limits on Mitigation - Site and Pollutants" section of this report.)

Location of Benefits:

Several commenters advised EPA to ensure that offsets reduce adverse impacts in the complaining community (as opposed to allowing facilities to pollute such an area in exchange for reducing pollution elsewhere.) (See Non-governmental organization #22, p. 29; #62, p. 6; Task Force #61, p. 23.)

OTHER AGENCIES:

Intergovernmental Coordination:

Several commenters thought EPA should work with other federal, state, and local agencies and interested stakeholders to address other causes of disparate impacts (such as land use and planning practices, taxation, spending, and other public policies). (See Industry #5, p. 3; State #18, p. 4-5.)

Some commenters said the recipients' guidance needs an expanded, clearer explanation of communication and coordination -- both inter-governmental (among jurisdictions within a region as well as between levels of federal, state, and local government) and intra-governmental (among environment, housing, or economic development agencies within one level of government). (See Local #41, p. 1.) (See also Local #1L, p. 5.)

One industry commenter advised EPA to create a mechanism for working with other federal agencies regarding environmental justice enforcement, especially when multiple agencies have regulatory authority over a single regulated entity (such as an airport). In particular, this commenter advocated working with the Department of Transportation to craft a more definitive direction regarding the applicability of Title VI of the Civil Rights Act to aviation activities. (See Industry #6, p. 2.)

One commenter asked EPA to defer to other federal agencies such as the Department of Transportation, Army Corps of Engineers, and Department of Interior in matters related to their jurisdiction. (See Industry #4, Supp., p. 1-2.) Another commenter asked EPA not to refer complaints to other agencies when EPA lacked jurisdiction over the matter, but instead to reject such complaints outright (informing the complainant of the agency with proper jurisdiction. (See Industry #80, p. 9-10.)

One commenter thought EPA's guidance would become a model for non-permit and non-EPA funded recipients as well; therefore, this commenter cautioned EPA to ensure that the concepts embodied in the guidance are generally applicable to issues of Title VI compliance. (See Industry #4, p. 2.)

One commenter asked EPA to work with other federal agencies on empirical health effects studies. (See Non-governmental organization #21, p. 1.)

Local Government Role:

Many commenters urged EPA to define the role of local governments in the Title VI process. (See State #58, p. 5; #63, p. 3; #73, p. 2; #83, p. 2; Local #41, p. 1; #82, p. 8; #1L, p. 5, 7; Industry #12, p. 2.) Several emphasized either the importance of local government or the impact the guidance would have on land use planning and economic development initiatives at the local level. (See Local #25, p. 1; #41, p. 1; #82, p. 8; #1L, p. 7; State #58, p. 5; #73, p. 2.) Some urged EPA to recognize that local governments have a right to participate. (See Local #82, p. 8; #1L, p. 7; Industry #17, p. 8.) Another encouraged EPA to address local zoning specifically. (See State #63, p. 3.)

Some commenters said EPA should be a catalyst for bringing city and county government agencies to the table with recipient agencies to solve Title VI issues. (See Local #14, p. 3; #50, p. 8.) One urged EPA to modify its guidance to encourage land use planning. (See Industry #72, p. 9.) Others recommended EPA train local land use planners to be more aware of environmental justice concerns. (See Local #50, p. 8; #82, p. 14.)

OTHER SOURCES:

One commenter argued that it was unfair and illegal that permittees operating under the terms of their own permits may be affected at any time by another permit action in their area. (See Industry #5, p. 1, 4, and 8.) This commenter argued that resolution of a single permit action should not mandate permit modifications for other sources in an area. In this commenter's view, if facilities agree to such reductions voluntarily, due process should be afforded to document the voluntary reductions, afford appropriate public notice and comment, and make any resulting agreements binding and enforceable on all parties. (See Industry #5, p. 8.)

PERMITS SUBJECT TO ANALYSIS:

Permits Authorizing Emission Increases:

Many commenters agreed that EPA should only investigate new permits or permit modifications that could result in a significant net increase of actual emissions. (See Industry #4, p. 3; #5, p. 9; #6, p. 3; #16, p. 1, 12-14, 38; #17, p. 5-6; #37, p. 6; #60, p. 3; Local #82, p. 6.)

Some specifically stated EPA should not investigate simple permit changes (i.e., change of name or mailing address) (see Industry #5, p. 9; #16, p. 3, 13; #60, p. 3; Local #14, p. 5; #82, p. 9; State #2L, p. 2), or permit renewals that make no changes in facility operations. (See Industry #4, p. 3; #36, p. 13-14; #37, p. 6; Local #14, p. 6; #50, p. 7.)

Reasons for this position included:

- These permit actions do not create or contribute to disparate impacts. (See Industry #36, p. 13-14; Local #82, p. 6.)
- These permit applicants have severe size, land, process, and cost restrictions that do not affect new construction. (See Local #50, p. 7; #82, p. 7; Industry #17, p. 6.)

- These permit actions do not lend themselves to a reasonable project alternative and mitigation analysis. (See Local #14, p. 6; #82, p. 7.)
- These permits are reviewed to correct any newly surfaced problems. (See Local #14, p. 6.)
- These permits can be monitored by EPA under 40 CFR 7.85(b), which allows EPA to seek compliance information from recipients even in the absence of a complaint. (See Local #14, p. 6; #82, p. 7.)
- It is unfair to subject the permittee to jeopardy merely because the surrounding demographics may have changed. (See Local #82, p. 7; Industry #4, p. 3.)
- A contrary result would impair finality or certainty. (See Industry #17, p. 6; #36, p. 13-14; Local #82, p. 7.)

Some argued that EPA should provide similar assurance that permit modifications will not be investigated. (See State #89, p. 5; Local #50, p. 7.) (See also Industry #37, p. 6, referring to minor modifications.) By contrast, one commenter argued permit modifications should receive the same analysis as new applications in order to address cumulative impacts. (See Academic #3, p. 5-6.)

One State urged EPA to clarify what kinds of permit renewals and what aspects of renewals are subject to de novo review because opening all renewals (even ministerial ones) to complaints may create an unnecessary resource drain. (See State #18, p. 3.) Another State encouraged EPA to include a list of the minor modifications that will not trigger an investigation. (See State #63, p. 2.)

Defining Emission Increases:

One industry commenter advocated that, in determining whether a permit results in a net increase in emissions, EPA consider State offsets (e.g. mobile source reductions to offset emission increases at refineries). (See Industry #5, p. 9.) Another emphasized the importance of counting only actual, not potential, emission increases. (See Industry #60, p. 3.)

Permits Resulting in Emission Decreases:

Many commenters supported EPA's proposal to close an investigation when a permit action "significantly decreases overall emissions at the facility." (See Industry #5, p. 9; #16, p. 3, 14; #17, p. 5-6; #37, p. 6; #51, p. 5; #60, p. 3; State #52, p. 17; #89, p. 4; #2L, p. 2; Local #14, p. 6; #82, p. 9-10.) One argued the recipient should not have to establish "significant" benefit. (See Local #82, p. 9.)

Reasons for this position included:

- There can be no adverse impact if a permit action does not increase emissions. (See Industry #5, p. 9.)
- This will better focus EPA's limited resources. (See Industry #16, p. 14-15.)
- This will facilitate permitting of facilities that lower emissions and provide economic benefits to the community. (See Industry #16, p. 14-15.)

One State decried the lack of standards for dismissing complaints where pollution will be reduced. (See State #83, p. 2.) Some admitted the possibility of making an exception for rare circumstances where a disparate impact occurs because a minority community receives a smaller benefit than a non-minority community. (See Local #14, p. 6; #82, p. 9-10.)

Some commenters objected to the proposal to dismiss complaints involving emission decreases. (See Non-governmental organization #22, p. 37-38; #36, p. 8; #40, p. 8-9; #65, p. 3; #81, p. 2; Task Force #61, p. 31-32.) They explained:

- there can be an increase in a particular pollutant despite an overall emissions decrease,
- pollutants might not be reduced to the same extent as in other communities, or
- the disputed facility might be solely responsible for the alleged disparate impact which, though decreased, could remain significant and disparate. (See Non-governmental organization #22, p. 37-38; #40, p. 8-9; Task Force #61, p. 31-32.)

Defining Emission Decreases:

Several commenters addressed issues which arise in defining whether a permit decreases emissions. One observed that EPA had not defined a baseline against which to assess decreases. (See Non-governmental organization #21, p. 4.)

Some argued that EPA should not allow trades between toxic and non-toxic emissions (see Non-governmental organization #21, p. 8; #62, p. 9); instead, some insisted decreases must come from the same pollutant. (See Non-governmental organization #22, p. 38-39; #62, p. 9; Task Force #61, p. 32-33.) Another advised that EPA should allow the decrease to be demonstrated by comparing the emissions limits found in the old and new permits; in other words, the permittee should not be required to conduct additional monitoring to confirm that the decrease is actual. (See Industry #16, p. 15.)

One cautioned that requiring decreases at the same facility contradicts the thrust of area-wide agreements; it may be cheaper to reduce emissions elsewhere. (See Local #50, p. 7-8.) Another recommended that the decreases occur at the permitted facility to avoid making small emitters clean up an airshed. (See Industry #4, p. 6.) Another commenter urged that EPA not equate "decreases" with temporary facility closures followed by a reopened facility which, though cleaner, still adversely impacts the community. (See Non-governmental organization #64, p. 3.)

Other Potential Exceptions:

Some expressed concern that the type of permit actions which could form the basis of a Title VI complaint are extremely broad; there are no *de minimis* limits on the types of emissions sources or magnitude or nature of emissions to narrow the scope of the program. (See State #58, p. 6; Local #25, p. 2.) Some complained there is no distinction between applications for temporary versus fixed emission sources. (See Industry #12, p. 3; #24, p. 11.) One used a Superfund remediation to illustrate that temporary, short-term emission increases may result in emission decreases over time. (See Industry #24, p. 11.) Another argued that complaints against Title V permits which simply document existing requirements should be dismissed. (See Industry #51, p. 4.)

One commenter asked EPA to clarify that a Clean Air Act conformity determination does not expose the SIP or transportation plan to Title VI complaints. (See Industry #4, Supp., p. 2.)

PROOF:

Opposition to Overly Stringent Requirements:

Some cautioned EPA not to make evidentiary requirements too strict. They argued that requiring scientific proof that pollution causes a substantial increase in cancer risks and other health problems is inappropriate because: a) low income communities do not have the resources

to conduct scientific studies, and b) by the time there is clear documentation of harm, it is too late to protect nearby residents. (See Private citizen #1, #43.) (See also Non-governmental organization #23, p. 3; #49, p. 1-6.) One citizen proposed that the test for a facility be is it safe enough to operate in the middle of a big city? (Private citizen #1.)

Support for Very Stringent Requirements:

Others, fearing frivolous claims, argued that EPA should require complainants to meet stringent standards of proof supported by adequate data (see Industry #6, p. 3), or to have the burden of proving their allegations. (See Industry #12, p. 5; State #89, p. 4.) One commenter argued it was inconsistent for EPA to make recipients bear the burden of proving justification, but to exempt complainants from the burden of proving their allegations. The commenter thought EPA should resolve the inconsistency by evaluating both types of claims independently. (See Industry #28, p. 3.)

PUBLIC PARTICIPATION:

Need for Additional Guidance on Public Participation:

Many commenters spoke to the need for EPA to issue public participation guidance. (See Local #14, p. 2; #50, p. 6; #82, p. 9; State #18, p. 6; Non-governmental organization #22, p. 10; #59, p. 11-12; Task Force #61, p. 4.) A local government urged EPA to outline clearly the responsibilities and participation opportunities for all parties, including the complainant, recipient, permittee, other federal and state agencies (including those with jurisdiction over mobile and other non-permitted sources), local government, potentially affected communities, nearby or similar facilities, general public, and other interested stakeholders. (See Local #1L, p. 5.) One commenter asked EPA to prepare a citizen's guide explaining how to file complaints. (See Non-governmental organization #5L, p. 6.)

A local government commenter recommended expanding other federal programs (such as NEPA) to include the public outreach requirements of this guidance. (See Local #1L, p. 2.)

Evaluation of Existing Guidance on Public Participation:

One State expressed support for EPA's suggestions for public participation and outreach, characterizing these as sound ideas that the State agency has long put in practice. (See State #18, p. 9.)

Several commenters criticized the public participation provisions of this guidance for focusing on education, communication, providing information, etc. – all activities consisting of one-way communications from recipients to communities. Instead, they suggested EPA stress meaningful consideration of public comments. (See Non-governmental organization #22, p. 51-52; Task Force #61, p. 46-47.)

Several commenters emphasized that public participation does not guarantee fairness because of disparities in resources and expertise, time constraints on public hearings, and failure to address cultural and social barriers to meaningful participation. They recommended that EPA take appropriate measures to ensure effective meaningful participation, including providing technical assistance grants to complainants who raise serious health issues and encouraging recipients to create Community Advisory Boards and groups. (See Non-governmental organization #22, p. 51-56; Task Force #61, p. 46-50.) (See also Non-governmental organization #5L, p. 4.)

Community Input:

A local government commenter thought recipients ought to include communities in developing public participation policies and community-based research strategies. (See Local #41, p. 2.)

Several commenters stated EPA should outline the participation opportunities for the complainant. (See Local #1L, p. 5; Non-governmental organization #36, p. 3-5; #81, p. 2; #5L, p. 4.) One suggested that a complainant's rights include access to evidence, an opportunity to comment, an opportunity to respond to a preliminary finding of compliance, a right to periodic status reports (e.g., every 6 months) and a right of appeal. (See Non-governmental organization #36, p. 3-5.)

Permittee Input:

For related comments on the need to define the role of the permittee, see the section of this report entitled "Notice: Notice to Permittee."

Local Input to the Title VI Process:

Several commenters observed that EPA should revise its complaint investigation process to give local governments the opportunity to participate. (See Local #82, p. 2; #1L, p. 5, 7; Industry #17, p. 8.)

Resources for Public Participation:

One noted EPA should devote significant resources to assist recipients in developing and adopting public participation processes which include all stakeholders in the administrative process. (See State #63, p. 2.) One asked for guidance on whether permittees should fund the level of public outreach expected by the guidance. (See State #52, p. 12-13.)

REMEDIES:

Permit Denial as an Inappropriate Remedy:

Several commenters supported EPA's position that denial or revocation of a permit is not necessarily an appropriate solution because it is unlikely that a particular permit is solely responsible for disparate impacts. (See State #18, p. 5; Local #14, p. 4; #82, p. 5; Industry #4, p. 3.)

One worried that the guidance still leaves open the possibility that a permit could be denied. In this commenter's view, the guidance must clarify the circumstances which warrant permit denial or revocation, if any, because: a) due process dictates that project sponsors possess certainty with respect to process outcome, and b) the guidance may subject the State to legal challenges by a project sponsor. (See State #63, p. 2.)

Permit Denial as an Appropriate Remedy:

Some commenters argued that permit denial may be an appropriate solution because either: a) communities generally raise complaints in response to a single proposed new or expanded facility, or b) a permitting agency's complicity may warrant this remedy. (See Non-governmental organization #22, p. 7, 27-28, 50; #55; #62, p. 5; Academic #3, p. 8; #33, p. 8; Task Force #61, p. 22, 43.) However, some expressed frustration that the guidance makes this remedy practically impossible. (See Non-governmental organization #22, p. 27-28, 50; #81, p. 2; Task Force #61, p. 22, 43; Academic #3, p. 8-9.) Where commenters saw funding termination as unlikely to occur, EPA's reluctance to insist on permit denial left the guidance, in their view, void of an effective remedy. (See, e.g., Academic #3, p. 8-9.)

Voluntary vs. Mandatory Remedies:

One State urged EPA to clarify that many of the listed remedial measures require using voluntary agreements because air permitting agencies have limited authority on permit renewals which do not involve modifications (although there is an opportunity to ensure that the facility is current in its compliance status). (See State #18, p. 6.) Others commended EPA's plan to encourage recipients to reduce disparate impacts voluntarily. (See Non-governmental organization #22, p. 50; Task Force #61, p. 43.)

Funding Withdrawal as an Appropriate Remedy:

Some commenters commended EPA for committing itself, at least in theory, to enforce funding termination sanctions against recipients who do not voluntarily comply after a formal determination of noncompliance. (See Non-governmental organization #40, p. 11; #62, p. 2.) (See also Industry #91, p. 2.) However, some saw this penalty as illusory because: a) it can be applied only after EPA gives 30 days notice to both houses of Congress, and b) since the regulations do not authorize EPA to stay or rescind the permit, the permittee can continue to operate. (See Non-governmental organization #27, p. 2; #75, p. 3-4.) One asked EPA to define the procedures it will use to invoke this remedy. (See State #52, p. 17.) One thought EPA should not be able to postpone funding termination proceedings after starting them. (See Non-governmental organization #40, p. 11.) Several commenters urged EPA to avoid referring to fund termination as a "means of last resort." (See Non-governmental organization #22, p. 51; Task Force #61, p. 45.)

Referral to Other Agencies:

One commenter asked for an explanation of: a) the basis for EPA's authority to defer to another federal agency, and b) the remedies the other federal agency would have. (See State #52, p. 16.)

Proportionality of Burden:

One commenter urged EPA to consider the fairness of remedies. This commenter proposed a rule of proportionality; i.e., a facility that is a minor part of the problem should not have to bear a major share of the solution. (See Industry #16, p. 2, 21, 36-38.) (See also State #52, p. 2-3, 17.)

Other Remedies:

One commenter thought the guidance needs to be more specific about what air agencies must do to rectify past actions without the counter-productive remedy of fund withholding. (See State #18, p. 2-3, 5, 6, 7.) Another thought the answer is for EPA to assume authority over State programs rather than questioning State decisions. (See Industry #24, p. 3.)

RESOLUTIONS:

Requiring Written Resolutions:

One commenter wanted EPA to clarify that both informal and formal resolutions of complaints need to be reduced to writing and enforceable. (See Industry #5, p. 8.)

Support for the Use of Resolutions:

Some commenters supported the informal resolution provision. (See Industry #4, p. 3; #80, p. 8; Academic #3, p. 3-4.) One noted that it offers the potential to reduce complaints, reach locally satisfying solutions, and, because its use is voluntary, control attempts at extortion. (See Industry #4, p. 3.)

Opposition to the Use of Resolutions:

Several commenters opposed the use of informal resolutions as outlined in the guidance. (See Non-governmental organization #22, p. 7, 11, 51; #23, p. 2; #30, p. 1-2; #59, p. 4-8; Task Force #61, p. 5, 45; Industry #16, p. 2, 21, 34-35, 38.) One commenter thought using such resolutions to stop investigations prevents essential evidence from being gathered in violation of other federal agency policy on Title VI complaints and the due process and equal protection provisions of the 14th Amendment to the U.S. Constitution. This commenter believed the guidelines should be changed to provide for an investigation immediately after receiving a complaint. (See Non-governmental organization #30, p. 1-2.) Others thought informality hurts complainants and favors violators. (See Non-governmental organization #22, p. 11; #23, p. 2; #59, p. 4-8; Task Force #61, p. 5.) Still others concluded the guidance pressured recipients and industry to make concessions simply to bring a dispute to a close, particularly by inviting recipients to implement measures not ordinarily considered in permitting. (See Industry #16, p. 2, 21, 34-35.)

Feasibility of Resolutions:

One commenter questioned the feasibility of resolutions, the recipient's authority to implement certain methods of resolution, and the basis for EPA's approval authority. (See State #52, p. 16-17.)

Clarity of the Guidance:

One State commenter regarded the guidance as vague on the process of informal dispute resolution. (See State #83, p. 2.) Another thought the absence of clear criteria for success placed unnecessary burdens on States. (See State #89, p. 5.) One commenter urged that resolutions reduce any disparate impacts to the level at which they are no longer significant. (See Non-governmental organization #40, p. 6.)

Parties - Community:

Several commenters objected to EPA's suggestion that the complainant's consent is unnecessary. (See Non-governmental organization #36, p. 4; #59, p. 6-7.) An industry commenter criticized the failure to include complainants in the informal resolution process, arguing that this impairs the credibility of the process and makes judicial action more attractive to complainants. (See Industry #80, p. 4-5.) A non-governmental organization suggested complainants have access to a tentative resolution, an opportunity to comment, and their consent should be required. (See Non-governmental organization #36, p. 3-5.)

Some recommended that, before EPA defers to informal resolutions, it should find, after notice and opportunity for comment, that the complainant entering into the agreement adequately represents the affected community. (Cf. FRCP 23(e) requiring court approved class action settlements to protect the interests of absent class members.) (See Non-governmental organization #40, p. 7; #62, p. 6, 18.) One commenter added that EPA should also find that the complainant had competent representation. (See Non-governmental organization #40, p. 7.)

Parties – Industry and Land Use Agencies:

A State commenter specified that the guidance should solicit the participation of affected facilities and land use agencies (i.e. cities and counties). (See State #18, p. 7.)

Enforcement of Resolutions:

One commenter urged EPA not to include penalties in such settlements, especially where no investigation demonstrated adverse disparate impacts. (See Industry #80, p. 7-8.) Several commenters insisted that resolutions include adequate enforcement provisions. (See Non-

governmental organization #36, p. 5; #40, p. 6.) One suggested a schedule of compliance, automatic penalties, and authority for EPA to enforce the agreement. (See Non-governmental organization #40, p. 6.) Another proposed provisions for monitoring implementation. (See Non-governmental organization #36, p. 5.)

Resources Required for Resolutions:

Several State commenters emphasized that the informal resolutions burdened State resources. (See State #58, p.9; #89, p. 5; #2L, p. 3.) One cited, in particular, EPA's right to reject a resolution as a disincentive to participating in the process. (See State #2L, p. 3.)

RESOURCES:

EPA Resources:

Several commenters urged EPA to provide its Office of Civil Rights with sufficient staff and resources to ensure that investigations are completed in a timely fashion. (See Non-governmental organization #22, p. 12; #62, p. 2; #81, p. 2; Task Force #61, p. 6; Local #1L, p. 3.) Several criticized the length of time current complaints have been pending. (See also the "Timeframes for Action: Resolving Complaints – Backlogged Cases" section of this report.) One State noted that EPA expects complete *de novo* investigations of virtually every complaint, but these investigations are well beyond available budget and staffing levels of EPA's Office of Civil Rights, which has been able to complete only one investigation in 5 years. (See State #39, p. 6.) (See also Academic #33, p. 3.)

Recipient Resources:

Many commenters expressed concern that the guidance does not adequately address the question of where recipients are to obtain the substantial resources they will undoubtedly need to comply with EPA's guidance. (See State #18, p. 3; #39, p. 3, 6-7, 11; #58, p. 4; #83, p. 1; #89, p. 2-3; Industry #12, p. 2-3; #16, p. 32-33; #24, p. 10; #3L, p. 3-4.)

Some States questioned whether EPA will allow reduced activities under federal grants to meet the considerable costs of operating State environmental justice programs. (See State #73, p. 2; #89, p. 2-3.) Some urged EPA to provide financial or technical assistance and training to States. (See State #18, p. 3; #73, p. 2; #89, p. 2-3; Industry #16, p. 32-33.) A State commenter recommended that EPA work with Congress to obtain adequate resources for all levels of government. (See State #89, p. 2.) One State recommended that resources not be exhausted by requiring translations of permits and other documents into languages other than English. (See State #52, p. 16.)

SCOPE OF AUTHORITY:

Support for Limiting the Scope of the Guidance to Permit Programs:

Numerous commenters supported EPA's position that a complaint's scope can only extend as far as the authority of the permitting agency. (See Industry #4, p. 4; #5, p. 3, 10; #16, p. 1, 3, 10, 15, 16, 37; #24, p. 3; #37, p. 3; #60, p. 4; State #18, p. 4-5; #88, p. 1; #89, p. 3; #2L, p. 1; Local #50, p. 2; #82, p. 13.) Several argued that it is unfair to punish recipients who have no legal authority to prevent or control emissions. (See Industry #16, p. 15; State #2L, p. 1.)

Many thought the guidance did not state this principle clearly enough or worried that the guidance provides no assurance EPA will stick to this principle; they advised EPA to state clearly that if the stressor or impact is beyond the scope of the recipient's authority, the complaint must be dismissed. (See State #58, p. 5; #2L, p. 1, 3; Industry #4, p. 4; #12, p. 4; #51, p. 3; #60, p. 4.)

One State noted that the guidance seeks to create a degree of equity in the siting of industry that can never be realized through the permitting process because: a) larger social and economic forces will prevent it, and b) recipients do not have authority to implement it. (See State #39, p. 8.)

Some also questioned the breadth of EPA's definition of authority. In their view, the fact that a statutory authority may require a recipient to protect or consider public health does not necessarily mean that the statute encompasses authority to mitigate all stressors which may affect public health. (See Local #82, p. 13; State #2L, p. 1-2.)

Support for Expanding the Scope of the Guidance Beyond Permit Programs:

Some commenters credited EPA for agreeing to consider stressors and impacts beyond the scope of the permitting program, even if the recipient has not exercised authority with respect to them. (See Non-governmental organization #40, p. 5; #62, p. 9-10.) (See also Non-governmental organization #64, p. 2.)

Still, many commenters thought the guidance did not sufficiently consider stressors and impacts which are not explicitly covered by the permit program. (See Non-governmental organization #22, p. 6, 39-40; #40, p. 4-5; #46, p. 12-16; #59, p. 9; #65, p. 2-4; Academic #33, p. 6; Task Force #61, p. 33-34.) Some commenters argued that EPA's narrow interpretation of Title VI is not supported by statutory language, judicial precedent, or EPA's own implementing regulations. They thought the authority and obligation to consider a full range of potentially adverse disparate impacts derives directly from Title VI, which binds recipients independently of their other responsibilities under state and federal environmental law. (See Non-governmental organization #22, p. 39-40; #46, p. 12-16; Task Force #61, p. 33-34.) One commenter concluded a contrary result:

a) allows the States to define, through their own laws, the limits of their obligations under federal civil rights law, in violation of the Supremacy Clause of the U.S. Constitution,
b) rewards States that restrict permitting agencies from considering a wide range of relevant civil rights concerns,
c) creates an unequal pattern of civil rights protection and enforcement from State to State, and
d) forces OCR to make legal determinations about the meaning and scope of State laws, something even federal judges generally avoid doing (or refer to State court for resolution).

(See Non-governmental organization #46, p. 12-16. See also Non-governmental organization #40, p. 4-5.) Another urged EPA to specify that failure to use discretionary authority under environmental laws (e.g., omnibus clauses) to address impacts could constitute a violation of Title VI. (See Academic #33, p. 6.)

Clarity of the Guidance:

One commenter commended EPA for holding recipients accountable for the disparate effects of their permitting decisions even if they were not responsible for preexisting inequities, because recipients might provide one of the few mechanisms for improvement. However, this same commenter thought language referring to stressors and impacts "cognizable under the recipient's authority" ambiguous and, under at least one potential interpretation, undermining of efforts to address cumulative impacts. (See Academic #3, p. 2, 4-5.)

One State suggested that a State decision be deemed immune to a Title VI complaint where:

a) a local enforcement agency develops and issues a permit (e.g. for a solid waste facility),
b) the State's role is to review and concur, and
c) there are only limited grounds to object (which do not include authority to object on grounds of disparate impacts or inadequate public participation).

If this is not the result, then in this commenter's view it is not clear whether EPA believes the obligation to comply with Title VI overrides the lack of statutory authority to use Title VI grounds to object to a permit. (See State #18, p. 8-9.)

A State commenter acknowledged that it is uncertain of EPA's expectations as to how a State waste permitting program is to resolve matters involving activities beyond program jurisdiction. (See State #13, p. 2.)

One commenter thought the following two statements inconsistent: 1) EPA will limit its inquiry to matters "within the recipient's authority to consider," and 2) "a recipient's Title VI obligation exists in addition to the Federal or State environmental laws governing its environmental permitting program. (See State #88, p.1.)

Addressing Legal Limits on State and Local Government Authority:

Some commenters thought the guidance failed to address legal limits on State and local government authority. (See Industry #12, p. 2; #91, p. 17; #3L, p. 2, 4; State #52, p. 12, 15.) Some State and industry commenters cautioned that the guidance does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, brownfields redevelopment, or greenspace preservation initiatives. (See State #89, p. 5; Industry #12, p. 2; #37, p. 2-3.)

One local government reminded EPA that local agencies have limited legal jurisdiction and authority. They are not general land use government entities like counties and cities and cannot mandate where a particular facility can locate. According to this commenter, EPA needs to acknowledge that there is a strong likelihood that "significant adverse impacts" may exist due to historical and present day land use and zoning patterns. (See Local #14, p. 2-3 and cover letter.)

One commenter criticized EPA for commandeering local land use planning authority. (See Industry #91, p. 17.)

SELECT STEEL DECISION:

Several commenters discussed the Select Steel case, the first and only case adjudicated under EPA's Interim Title VI Guidance.

Opposition to the Decision as Precedent:

A non-governmental organization characterized EPA's decision in Select Steel as controversial both because of its political underpinnings and questionable reasoning. (See Non-governmental organization #46, p. 3.)

Support for the Decision as Precedent:

Others stated that EPA needs to clarify how this administrative ruling will be treated under the final Interim Guidance. (See State #58, p. 10; #89, p. 3-4.) A State noted that since

the Select Steel decision interprets law and regulations, it would appear to represent a precedent that would remain unaffected by changes in EPA's guidance. (See State #58, p. 10.) Other commenters recommended that the guidance ensure consistency with the ruling. (See State #89, p. 3-4; Industry #24, p. 3.)

SIGNIFICANT IMPACTS:

Support for Requiring Impacts to be Significant:

Several commenters supported EPA's position that if an impact is not *significantly* adverse, the allegation is not expected to form the basis of a finding of noncompliance with Title VI. (See Local #14, p. 3-4; #82, p. 4; Industry #4, p. 7; #16, p. 3, 16, 37; #17, p. 4; #51, p. 5.) One reasoned that regulators expect pollution levels to be acceptable when facilities comply with their permits. (See Local #14, p. 3-4.) Another noted that existing Title VI case law holds that disparate impacts must be more than insignificant and minor. This commenter also noted that EPA's position recognizes that virtually every permit allows some pollution and prevents EPA from being inundated with complaints which will be dismissed after consuming substantial EPA and recipient resources. (See Local #82, p. 4.)

Verifying Allegations of Insignificance:

Some commenters urged EPA to investigate permit applicants' or regulatory officials' determination that impacts are not significant to ensure the determination is supportable and considers conditions which make the community vulnerable to any emission increases. (See Non-governmental organization #22, p. 43-44; #62, p. 11-12; Academic #33, p. 6-7; Task Force #61, p. 37.)

Threshold for Determining Significance:

One commenter criticized EPA for employing a different statistical criteria for measuring demographic disparity (i.e., 2 to 3 standard deviations) than for measuring disparity of impacts (i.e., any significant impact). (See Industry #72, p. 1, 3-4.)

Several commenters criticized EPA for using the Hazard Index as a benchmark only to find against complainants (i.e., to find that adverse impact is unlikely), but not to find for them (i.e., to assume that values over the threshold indicate adversity). (See Non-governmental organization #22, p. 44; Task Force #61, p. 37.)

STANDARDS:

Support for Using Current Standards as Benchmarks:

Many commenters supported the use of national ambient air quality standards (and, presumably, health-based standards for other media and pollutants) to establish a presumption of protectiveness. (See Industry #5, p. 11; #6, p. 3; Local #14, p. 5; #82, p. 5; #1L, p. 3; State #63, p. 3.) (See also Industry #51, p. 5.) Some commenters reasoned that, absent firm legal authority, a recipient cannot require permit applicants to adhere to a stricter standard nor one that has not been promulgated. (See State #63, p. 3; Industry #51, p. 5.) Others proposed that, if current standards are not "safe" and "healthful," the appropriate recourse is to change the underlying standards. (See Industry #5, p. 4, 11; Local #1L, p. 3.) An industry commenter asked EPA to clarify that the rebuttable presumption applied also in the context of area-specific agreements. (See Industry #80, p. 11.)

Opposition to Limiting Benchmarks to Current Standards:

Numerous commenters believed that EPA should avoid being limited by "safe levels" as defined in environmental laws and regulations. (See Non-governmental organization #21, p. 6; #22, p. 7, 44; #36, p. 9-11; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13; #64, p. 2; #65, p. 4; #75, p. 12-13; State #58, p. 7; Congressman #45, p. 2; Academic #3, p. 6; #33, p. 7; Task Force #61, p. 38.)

Commenters offered several reasons for this position. Several noted that the Title VI civil rights protections have independent significance; in other words, they extend beyond the limits of environmental law. (See Non-governmental organization #36, p. 11; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13.)

Others noted the absence of many health-based standards for pollutants of concern. (See Non-governmental organization #36, p. 9; #46, p. 18-19.) (See also Local #25, p. 3.)

Others reasoned that environmental laws, even when available, do not address cumulative or synergistic impacts, multiple exposure media, concentrations of sources, or impacts on sub-populations. They called on EPA to acknowledge the limitations of current standards. (See Non-governmental organization #21, p. 6; #36, p. 9; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13; #64, p. 2; Academic #3, p. 6.)

Many commenters challenged the primary NAAQS, in particular, as an adequate benchmark for disparate impact analysis. (See Non-governmental organization #21, p. 6; #22, p. 7, 44-47; #36, p. 9-11; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13; #64, p.2; #65, p. 4; Academic #3, p. 6; #33, p. 7; Task Force #61, p. 37-41.) Some commenters explained that NAAQS ignore toxic hotspots (that go undetected because of inadequate monitor placement or unreliable modelling), acute health effects, accidents and upsets at plants, the localized effect of all-too-common noncompliance, and the fact that the health effects research has been conducted on healthy white males. In addition, these commenters argued, NAAQS are set through a political process which ignores significant health effects at lower levels of exposure. (See Non-governmental organization #22, p. 44-47; #62, p. 12-13; Task Force #61, p. 37-41.) (See also Academic #33, p. 7.) Several commenters criticized State and local decisions equating environmental equity with air pollution control standards as insensitive to differences among communities in concentrations of facilities, public health, and disease susceptibility. (See Non-governmental organization #64, p. 2; #75, p. 12-13; Congress #45, p.2.)

A State commenter argued that EPA should avoid any presumption of the adequacy of a NAAQS to be consistent with the precedent EPA had already set in the Select Steel decision. (See State #58, p. 7.)

These commenters concluded that EPA should provide ways to include other impacts in a disparate impact analysis and avoid any presumption of protectiveness when a standard applies to a large geographic area such as an airshed. (See Non-governmental organization #36, p. 9-11; #62, p. 12-13; #64, p. 2; #65, p. 4; Congress #45, p. 2; Academic #33, p. 7.)

One commenter noted no consideration should be given to "technology-based" standards since these are not health or environmental quality-based. (See Non-governmental organization #40, p. 10.)

Several commenters criticized EPA's guidance for precluding Title VI complaints in attainment areas. (See Non-governmental organization #22, p. 47; Task Force #61, p. 40-41.)

Using Current Standards Besides NAAQS as Benchmarks:

Several commenters suggested that, if EPA did limit itself to existing environmental standards, it look more broadly than NAAQS.

One commenter argued that numerous environmental laws permit consideration of potentially adverse impacts beyond environmental health. This commenter cited Clean Air Act impact assessments encompassing "health, environmental, economic, social and energy effects;" secondary NAAQS protecting "public welfare;" TSCA language on "environmental, economic, and social impact;" NEPA environmental impact assessments addressing socioeconomic, aesthetic, and cultural impacts; and E.O. 12898 requiring that, in addition to quantifiable measures, risk assessments must incorporate "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." (See Non-governmental organization #46, p. 17-18.)

Some commenters advised that scientific and technical research also constitute "benchmarks of significance." (See Non-governmental organization #36, p. 11; #64, p. 2)

An industry commenter asked EPA to clarify that the rebuttable presumption applied to all media, not just air standards. (See Industry #80, p. 10-11.)

Using Secondary NAAQS as Benchmarks:

One commenter noted that secondary NAAQS, intended to protect public health and welfare, provide a more appropriate standard for adversity in the civil rights context than primary NAAQS. (See Non-governmental organization #46, p. 17-18.)

Using Local Standards as Benchmarks:

Local government and non-governmental commenters suggested EPA allow local pollution control regulations and levels of significance to serve as benchmarks of significance as well. (See Local #14, p. 4; #82, p. 5; Non-governmental organization #64, p. 2.)

Using Attainment Plans as Benchmarks:

One commenter cautioned EPA to include as a benchmark not just the individual health-based standard, but also the plans to achieve the standard in the time required by law. (See Local #1L, p. 3.)

Addressing Widespread Nonattainment of Current Standards:

A State asked EPA to address how to evaluate adverse impacts of criteria pollutants in nonattaiment areas, since all of a State's urban areas can be nonattainment for some pollutants. This commenter suggested using modeling analyses to show whether a facility would cause or contribute to a violation of an ambient standard. (See State #18, p. 7.)

Sufficiency of a Rebuttal Presumption of Protectiveness:

Many non-governmental commenters challenged the sufficiency of being able to rebut a presumption of protectiveness. (See Non-governmental organization #21, p. 6; #22, p. 44; #36, p. 11; #62, p. 12; #64, p. 2; Academic #3, p. 6; #33, p. 7; Task Force #61, p. 38.) Some argued that the ability to rebut is a meaningless safeguard because investigations face serious resource limitations and the complainant does not have standing as an adverse party. (See Non-governmental organization #22, p. 44; #36, p. 11; #62, p. 12; Academic #33, p. 7; Task Force #61, p. 38.) One commenter advised against placing the burden of rebuttal on the complainant; this commenter believed the permittee and the agency instead should bear the burden of a

comprehensive assessment of cumulative impacts. (See Non-governmental organization #64, p. 2.)

Need for Additional Health and Environmental Standards:

State and local government commenters acknowledged the lack of adequate environmental standards and offered other solutions.

One stated that EPA has yet to address standards for air toxics and other pollutants, making enforcement of a finding of adverse impact subject to legal challenges and rulemaking on a case-by-case basis. According to this commenter, there should be some threshold on which people can rely. (See Local #25, p. 3.) A State commenter concurred, explaining that the guidance sidesteps the fundamental allegation inherent in Title VI claims; namely, that the underlying environmental law is not adequately protective of human health and the environment. This commenter recommended that EPA examine and, if appropriate, amend the underlying environmental statutes. (See State #58, p. 3.)

STATISTICAL SIGNIFICANCE:

Clarity of the Guidance:

One commenter noted the definition and method of measuring statistical significance is unclear. (See Non-governmental organization #36, p. 12.) A commenter advised that the glossary definition should include the guidance language to the effect that 2 to 3 standard deviations from the mean is a measure of statistical significance in measuring the demographic disparity between the affected and reference populations. This commenter also sought clear examples of what EPA considers "significant" in all instances where the term is used. (See Industry #5, p. 12.)

Stringency of the Guidance:

An industry commenter supported the benchmark of using 2 to 3 standard deviations as a measure of statistical significance. (See Industry #60, p. 7.) Another supported at least 3 standard deviations. (See Industry #4, p. 8.)

Several non-governmental organizations viewed the requirements for statistical significance (i.e., two to three standard deviations) as too burdensome. (See Non-governmental organization #21, p. 7; #36, p. 12-13; #46, p. 23.) One found this particularly true when sample sizes are too low for an analysis to be meaningful. . (See Non-governmental organization #46, p. 23.) Another thought Title VI required a threshold no higher than 1.8 standard deviations. (See Non-governmental organization #21, p. 7.)

A State thought statistical significance should be required, but preferred using a significance level of 0.05 and a confidence level of 0.95. (See State #52, p. 1, 4.)

An academic commenter objected to a uniform standard deviation, instead recommending that the standard reflect the distinct vulnerabilities of the impacted community (e.g., require less statistical deviation where there is an abnormally high asthma rate). (See Academic #33, p. 6.)

Applying the Concept of Statistical Significance:

Some commenters thought EPA should not require more than a showing of statistical significance; when a disparity is significant, it should not matter whether there is a "little" or "a lot" over the threshold. . (See Non-governmental organization #40, p. 11; #46, p. 23-24.)

An industry commenter, by contrast, thought mere statistical significance does not mean there is a significant disparate impact. (See Industry #17, p. 3-5.) A State thought magnitude of disparity should be considered in addition to statistical significance, but found the guidance confusing on this point. (See State #52, p. 1, 5.)

A local government supported EPA's position that both demographic disparity and disparity in rates of impact should be statistically significant. (This commenter noted there may be an unusual case in which disparate impact exists although disparity in one factor is not large (e.g., demographics), if disparity in the other factor is sufficiently large (e.g., impact).) (See Local #82, p. 4-5.)

Alternatives to the Guidance:

A non-governmental organization commenter offered an alternative to the current guidance language on statistical significance. This commenter proposed that EPA adopt the EEOC's "four-fifths rule:" i.e., disparity would be inferred whenever the comparison population's level of exposure or impacts is 80% less than the affected population's. (See Non-governmental organization #46, p. 23.)

STAYS OF PERMITS:

Support for Staying the Effect of Challenged Permits:

Many non-governmental organizations, academic commenters, and EPA's Task Force proposed that a permit should be stayed if disparate health effects are documented. (See Non-governmental organization #22, p. 27-28, 36; #36, p. 5; #69, #55; #59, p. 14-15; #5L, p. 4; Academic #33, p. 3, 8; Task Force #61, p. 22, 30.) Some emphasized this is particularly important because complainants remain at risk during the years it takes for complaints to be resolved. (See Non-governmental organization #22, p. 36; #36, p. 5; Task Force #61, p. 30.) Several suggested a stay would be warranted upon a showing analogous to that necessary to obtain a temporary injunction in a court proceeding. (See Non-governmental organization #22, p. 36; Task Force #61, p. 30.)

Opposition to Staying the Effect of Challenged Permits:

Many commenters agreed with EPA that a permit should not be stayed by a Title VI challenge. (See Local #14, p. 3; #50, p. 2; #82, p. 4; State #18, p. 2; #88, p. 2; #89, p. 3; #2L, p. 1; Industry #12, p. 3; #17, p. 7; #24, p. 3; #51, p. 1.) They argued that this would lend certainty and predictability to the permitting process and prevent unmeritorious complaints from derailing a valuable project. (See, e.g., Local #82, p. 4; State #88, p. 2.) One argued that EPA's position is appropriate since the investigation focuses on the actions of recipients, not permit applicants. (See Local #14, p. 3.)

Clarity of the Guidance:

A State commenter recommended EPA clarify the effect of a preliminary finding of noncompliance on the permit. (See State #88, p. 2.)

Practical Impact of a Complaint:

Several commenters observed that, despite its language, EPA's guidance has the practical effect of staying the permit. (See Industry #12, p. 3; #51, p. 1; Local #50, p. 6-7; State #52, p. 14-15.) Reasons offered for this position included:

a) EPA advises complainants to file complaints within 180 days of a hearing from which they have been excluded (even if the permit has not issued). (See Local #50, p. 6-7.)
b) EPA will forward premature complaints to recipients so the allegations can be resolved during the permit process. (See Local #50, p. 6-7.)
c) The press often reports the filing as a complaint against the permittee. (See Industry #51, p. 1.)
d) Few facilities are willing to undertake activities until compliance has been resolved because different technology may be required. (See Industry #51, p. 1-2.)
e) Facilities often require multiple permits and subsequent permits await resolution of the complaint. (See Industry #51, p. 1-2; State #52, p. 14-15.)

TIMEFRAMES FOR ACTION:

Filing Complaints – Length and Certainty of the Deadline:

One non-governmental organization commented that the short, 180-day time period for filing complaints assumes that a complainant has immediate access to the complaint process documents; therefore, the recipient agency must provide the complainant with the guidelines and protocols in writing immediately. (See Non-governmental organization #69.)

Several commenters thought EPA should set a binding time limit on when to file a complaint. (See Industry #5, p. 7; #60, p. 3; Local #41, p. 2; State #63, p. 2; #2L, p. 2.) Some found the current 180-day limit too long. [See, e.g., State #63, p. 2; Industry #24, p. 6; Local #41, p. 2 (arguing 120 calendar days is long enough) and Industry #4, p. 6 (arguing for 60 days).] Some recommended making the time limit binding through a regulatory amendment. (See Industry #4, p. 6; #5, p. 7.) One commenter urged EPA not to investigate allegations from untimely complaints. (See Industry #80, p. 6.) On the other hand, one commenter regarded the 180-day time limit as illegal, arguing Title VI recognizes it may take years to establish a pattern of discrimination. (See Non-governmental organization #49, p. 5.)

One commenter urged EPA to deem a complaint filed when mailed. (See Non-governmental organization #40, p. 6.)

Filing Complaints – Start of the Clock:

A local government criticized the guidance for requiring complaints regarding public participation to occur within 180 days of the discriminatory act. Instead, this commenter urged that the 180-day period not commence until the end of the public participation process (i.e., the point at which a final decision is rendered in a public hearing before the decision-making body. (See Local #1L, p. 6.)

Some commenters argued that starting the 180-day clock for filing a complaint upon issuance of the initial permit contradicts EPA's regulations, penalizes complainants for exhausting their administrative remedies, and forces complainants into a Catch-22 where their complaint will be dismissed as premature. They suggested the statute of limitations run from the latest of:

- an unappealed permit,
- completion of all agency appeals,
- completion of any agency-mandated dispute resolution procedure, or
- completion of any voluntary dispute resolution procedure including the complainants, recipient, and applicant.

(See Non-governmental organization #22, p. 7, 16-19; Task Force #61, p. 10-12.) (See also #5L, p. 4.)

Others suggested that the 180-day clock not start until complainants are aware of the violation. (See Non-governmental organization #81, p.2.)

Non-governmental organizations recommended recognizing that complaints of continuing violations can be filed more than 180 days after a violation. (See Non-governmental organization #22, p. 18-19; #64, p. 4.) One identified three categories of such continuing violations. (See Non-governmental organization #22, p. 18-19.) An industry commenter, by contrast, thought the option of filing later for a continuing violation deprived the process of stability. (See Industry #3L, p. 2.)

"Good Cause" Extensions of the Filing Deadline:

Some commenters thought EPA should clarify when it might decide to investigate untimely complaints or to determine that "good cause" exists to extend the 180-day filing deadline. (See Industry #5, p. 7, #16, p. 36; State #52, p. 16; #63, p. 2; Non-governmental organization #22, p. 19; #23, p. 2; Task Force #61, p. 12-13.) One urged EPA to reference the "good cause" exception in its list of jurisdictional criteria for filing a complaint. (See Non-governmental organization #64, p. 4.) Others urged removal of the "good cause" waiver altogether. (See Industry #24, p. 6; #60, p. 3.) One proposed that only the Administrator be allowed to waive the limit. (See Industry #60, p. 3.)

Some commenters viewed the waiver as an illusory protection because they thought that EPA had never exercised a waiver in any case to date. (See Non-governmental organization #22, p. 7, 19; #23, p. 1-2; Task Force #61, p. 13.) Several commenters criticized EPA for dismissing a complaint filed one or two days late. (See Non-governmental organization #22, p. 15; #23, p. 1-2; Task Force #61, p. 6.) Some contrasted this with treatment of recipients, who are perceived as getting extra time to respond to complaints. (See Non-governmental organization #22, p. 12; Task Force #61, p. 6.) One commenter thought "good cause" criteria should reflect the merits of the complaint or the logistical difficulty of filing. (See Non-governmental organization #23, p. 1-2.)

Accepting Complaints:

One State commenter recommended that determinations on whether or not to accept a complaint be made within 20 days. (See State #89, p. 4.)

Dismissing Unmeritorious Complaints:

Some commenters recommended that EPA develop a procedure to dismiss promptly Title VI complaints lacking factual or legal merit. These commenters argued that, because complaints meeting the minimum jurisdictional requirements do not carry any burden of producing evidence to trigger an investigation, the uncertainty to all parties is unacceptable. These commenters proposed that EPA give the recipient a summary judgment, demurrer, or motion to dismiss procedure where the recipient bears the burden to justify early dismissal of the complaint. (See Local #14, p. 8; #82, p. 11.) (See also Industry #60, p. 2; State #13, p. 1-2.) One commenter urged EPA not to put recipients on "probationary status" subject to greater scrutiny once a complaint had been rejected. Instead, this commenter urged EPA to conduct compliance reviews based only on random checks, rather than on the existence of previous complaints. (See Industry #80, p. 7.)

Premature Filings:

Several comments supported EPA's approach of dismissing premature complaints. (See Industry #16, p. 25; #51, p. 5.)

Numerous commenters thought EPA should not dismiss complaints filed prior to the issuance of the final permit. (See Non-governmental organizations #22, p. 7, 16, 21, 36; #27, p. 2; #55; #62, p. 3-4; #75, p. 3-4; #81, p. 2; #5L, p. 4; Local #14, p. 8; #82, p. 8; Academic #3, p. 6; #33, p. 3; Task Force #61, p. 10, 15, 30.)

Commenters offered several reasons for this position:

- The guidance misses the opportunity to encourage productive negotiations and to prevent discriminatory impacts before they occur. (See Non-governmental organization #22, p. 21; #62, p. 3-4; Local #14, p. 8; #82, p. 7; Task Force #61, p. 15; Academic #3, p. 6.)
- The guidance allows a permittee to build or operate throughout the entire period of the investigation – indeed, even after a finding of violation, because the regulations authorize a termination of financial assistance to the recipient, not a stay of the permit. The effect is to restrict meaningful community involvement to the time before issuance of a permit. (See Non-governmental organization #22, p. 36; #27, p. 2; #75, p. 3-4; #81, p. 2; Task Force #61, p. 30.)
- The guidance penalizes complainants who seek to challenge the permit on both environmental and civil rights grounds. (See Non-governmental organization #62, p. 3.)

Some argued that EPA should either: a) guarantee a waiver of the filing deadline for all parties who pursue their administrative remedies, b) accept the complaint, but stay the investigation, or c) interpret the 180-day statute of limitations to run from the end of the administrative appeals process. (See Non-governmental organization #22, p. 19-21; Task Force #61, p. 13-15.)

One commenter observed that the dismissal of a complaint is particularly inappropriate where the allegations focus on the permitting regulations as the cause of discrimination. (See Non-governmental organization, #40, p. 4.)

Complainant Input:

One commenter asked EPA to set deadlines for responses to EPA information requests and to reject complaints for failure to provide timely responses. (See Industry #80, p. 1-2.) Another thought the 14-day response time for submission of complainant information too short for the types of analyses required. (See State #52, p. 10.)

Permittee Input:

One commenter thought the 14-day response time too short for permitteees to submit the types of analyses required. (See State #52, p. 10.)

Recipient Input:

Several comments addressed the timing of recipient input.

Some recommended that EPA have the benefit of the recipient's response before deciding whether to accept a complaint for investigation; the current guidance and regulations, in their view, suggest EPA will decide whether to accept a complaint before the time has expired for the recipient to file a response. (See Industry #4, p. 5; #5, p. 5; #51, p. 2.)

Another commenter noted an inconsistency regarding the timing of the recipient's written submission responding to, rebutting, or denying allegations set forth in a complaint. According to this commenter, the guidance places the time for this response immediately following EPA's receipt and acknowledge- ment of the complaint. EPA's rules and the Title VI Complaint Process Flowchart place this response after EPA accepts the complaint. This commenter believed that the timing mandated by EPA's rules is more logical: it avoids wasting resources responding to untimely, moot, or unsubstantiated claims. If EPA desires to change the timing in its rules, it must do through a rulemaking under the Administrative Procedures Act. (See State #88, p. 1.)

Some noted that the time for recipient's answer is inadequate to assemble necessary information such as facts, demographic and health data, and prepare a response. (See State #52, p. 10; #63, p. 3.) Others criticized EPA for tending to extend this deadline, while disallowing extensions for complainants. (See Non-governmental organization #22, p. 12; Task Force #61, p. 6.)

Some observed that the 30-day deadline for recipient's rebuttal appears to conflict with the right of complainants to submit additional information during the course of the investigation. (See Non-governmental organization #22, p. 31; Task Force #61, p. 25.)

Criteria for Expedited Review of Complaints:

One commenter thought EPA should guarantee expedited review of complaints (i.e., within 60 days) in States where EPA, after pre-review and approval, has determined that the State has highly developed cumulative toxics and environmental justice programs. (See Local #50, p. 2.)

Resolving Complaints – Support for the Timelines:

Several commenters commended EPA for establishing, at least in theory, a window of 205 days for resolving a complaint. (See Non-governmental organization #22, p. 11; #62, p. 2; Task Force #61, p. 5.) A local government supported the timeline for processing complaints. (See Local #1L, p. 3.) Other commenters simply urged EPA to make every effort to resolve complaints quickly. (See Industry #51, p. 2; #80, p. 1-2.)

Resolving Complaints – Certainty of the Guidance:

Several commenters argued that the guidance must incorporate a definitive timeframe for resolving a complaint. (See Industry #12, p. 5; #17, p. 7-8; #24, p. 6; Local #50, p. 5-6; #82, p. 8-9; Non-governmental organization #22, p. 13; Task Force #61, p. 7.) Some commenters commended EPA for adding investigative milestones, but still decried the seemingly endless process. According to these commenters, there is no deadline for informal resolution discussions; a rejected allegation may be referred to another federal agency or resubmitted at a later time without prejudice; and EPA can waive the 180 day time limit for good cause. These commenters observed that, if the Shintech report is an example, the resulting delay will be very considerable. (See Local #50, p. 5-6; #82, p. 9.)

Resolving Complaints – Realism of the Deadlines:

Several commenters thought the timeframes unrealistic because EPA has not met similar timeframes. (See State #52, p. 16; #67, p. 2; #83, p. 1; #89, p. 4; Industry #24, p. 6; Non-governmental organization #22, p. 11-12; Task Force #61, p. 5-6.) Some feared substandard investigations to meet deadlines. (See Non-governmental organization #22, p. 11-12; Task Force #61, p. 5-6.) Some urged EPA to clarify how it will discipline its own review in order to comply. (See State #58, p. 10; #89, p. 4.) One urged that a failure to meet the deadline result in dismissal of the complaint. (See Industry #24, p. 6.)

Resolving Complaints – Backlogged Cases:

Several commenters criticized EPA's handling of previous Title VI cases. They noted that, in almost every case, EPA has missed its regularly deadlines for acknowledging and resolving Title VI cases. They reported that fifty-one cases are pending -- some since 1993 -- and only one has ever been resolved on the merits. (See Non-governmental organization #22, p. 2-6, 11-13; #23, p. 2; #34, p. 2; #62, p. 2, 18; #5L, p. 3; Local #14, p. 8; Task Force #61, p. 5-7.)

These commenters recommended that EPA:

a) establish a timeframe for resolving the Title VI complaints already in its docket (see Local #14, p. 8; and Non-governmental organization #34, p. 2 recommending a 6 to 8 month deadline),
b) ensure that OCR is adequately staffed to investigate all Title VI complaints in a fair and timely manner (see Non-governmental organization #22, p. 12; #62, p. 2; Task Force #61, p. 6), and
c) implement oversight procedures, ranging from periodic reports to full public disclosure of progress. (See Non-governmental organization #22, p. 12; #62, p. 2; Task Force #61, p. 6.)

One also recommended allowing appeals to the Department of Justice. (See Task Force #61, p. 6.)

Resolving Complaints Involving Statutory Deadlines:

Industry and local government commenters addressed potential conflicts between the timeframes outlined in the guidance and Clean Air Act statutory deadlines. (See Industry #5, p. 7; #24, p. 11; Local #14, cover letter: p. 3.) Industry commenters argued EPA must prioritize its resources to resolve complaints promptly where companies face legally mandated deadlines (such as the Tier 2 and Sulfur Rulemaking). (See Industry #5, p. 7; and #24, p. 11, extending this principle to all permits reopened solely due to new legislative or regulatory requirements.) One explained:

a) there is a narrow window of time to begin construction and meet the regulatory deadline,
b) companies do not want to invest significant finances in equipment to meet such requirements without knowing the final permit conditions.
c) a complaint may generate considerable public interest, causing permit proceedings to be stayed, as a practical matter. (See Industry #5, p. 2.)

Resolving Complaints Involving Informal Resolutions:

Several commenters questioned whether the 180 day deadline for resolving the complaint ran from the start of the investigation or the end of the informal resolution process. (See Industry #16, p. 2, 21, 35-38; #24, p. 6; Non-governmental organization #22, p. 13; Task Force #61, p. 7.) Several argued the 180 days starts upon acceptance of the complaint. (See Non-governmental organization #22, p. 13; Task Force #61.) A local government urged that the informal resolution process occur in parallel with the formal investigation so as not to cause delay. (See Local #1L, p. 3.) Some commenters recommended a time limit for reaching an informal resolution. (See Non-governmental organization #36, p. 5; Industry #16, p. 2, 21, 35-36.) One proposed a presumptive time limit of 60 days. (See Industry #16, p. 2, 21, 35-36.)

Resolving Complaints Involving Simultaneous Court or Administrative Proceedings:

One commenter urged EPA to minimize occurrences of simultaneous court and administrative proceedings on similar facts and allegations. EPA could do so by notifying the

court of the pending administrative proceeding and, if appropriate, request the court to allow that proceeding to resolve the issues. (See Local #82, p. 11-12.) Others thought EPA's promise to dismiss complaints where complainants sought relief before courts or recipient agencies conflicted with EPA's regulations or was otherwise inappropriate. (See Non-governmental organization #22, p. 7, 15-21; #23, p. 2; #40, p. 5-6; #59, p. 10; Task Force #61, p. 9-15.)

Resolving Complaints Involving Multiple Permits or Media:

One commenter urged EPA to create an integrated project review process to address Title VI complaints against a single project which needs multiple permits and/or involves different environmental media (e.g., a port expansion). This commenter believed such a process would avoid delay, reduce uncertainty, and allow EPA to evaluate the justification for the project. (See Local #1L, p. 4.)

Deadlines for State Actions:

Several State commenters complained that the timeframes for State actions are unreasonably short. (See State #52, p. 10; #63, p. 3; #73, p. 2; #83, p. 1; #89, p. 4.) Specifically, these commenters referenced the the time for the recipient's response to a complaint (see State #63, p. 3), the 14 days to submit additional information (see State #52, p. 10; #83, p. 1; #89, p. 4), and the 10 days to comply after a finding of noncompliance (see State #63,p. 3; #83, p. 1; #89, p. 4; #2L, p. 2-3.) A State and an industry commenter noted that a recipient found to be in violation has 10 days to achieve compliance, but 30 days to request a hearing on the determination of noncompliance. They suggested EPA make the timeframe for complying and appealing identical. (See Industry #4, p. 6; State #2L, p. 2-3.) The State also suggested EPA: a) allow appeals to stay the compliance requirement, and b) indicate the recipient must take significant steps toward compliance, rather than achieve full compliance, within 10 days. (See State #2L, p. 2-3.) Finally, the industry commenter suggested that parties be given only 30 days to file written statements, rather than a "reasonable opportunity" to do so, if the Administrator elects to review an administrative law judge's determination. (See Industry #4, p. 6.)

Timing of Consideration of Title VI Issues Generally:

Several commenters were troubled that the Title VI process is appended to, rather than integrated into, the permitting process. These commenters urged EPA to explore ways that Title VI concerns can be fully examined during the permit process. (See Local #25, p. 3; State #18, p. 6; #67, p. 2; Industry #6, p. 3; #12, p. 4; #24, p. 4.) One noted that an early notice mechanism would not need to foreclose the filing of a complaint after permit issuance. (See State #18, p. 6.) Another urged justification occur before an initial finding is made. (See Industry #12, p. 4.)

TRIBAL ISSUES:

Avoidance of Delay on Tribal Guidance:

One Tribal commenter expressed concern that the deferral of tribal guidance will cause undue delays in the implementation of Title VI for Tribal entities. (See Tribal #85, p. 1.)

Lack of Consultation with Tribal Governments:

One commenter disagreed that EPA had conducted tribal consultation and requested EPA to establish a Tribal technical advisory group for risk-based disparity analysis. (See Tribal #85, p. 1.)

Crucial Elements of Tribal Guidance:

One commenter observed that Tribal guidance on complying with Title VI should include the following elements:

- increased emphasis on cumulative multi-stressor impacts,
- emphasis on the fact that affected people must also receive direct benefits from the permit holder,
- consideration of cultural risk,
- risk analysis based on spatial data (resource definition and location), not statistical data (demographics), and
- reworking of the definition of sustainable development and the concept of justification. (See Tribal #85, p. 2.)

UNINTENDED POTENTIAL CONSEQUENCES OF THE GUIDANCE:

Shifting Pollution to Other Communities:

One industry asserted that EPA needs to assure that its guidance does not have the unintended effect of shifting adverse impacts from minority populations to more diverse populations. (See Industry #5, p. 4.) Another argued that the guidance promotes sprawl, encouraging companies to build in "greenfields" locations instead of urban areas. (See Industry #16, p. 32.)

Inhibiting Growth in Low-Income and Minority Communities:

State and industry commenters worried that the guidance may cause business and economic development disparate impacts on minority communities, including reduced economic growth. (See State #39, p. 8, 9; Industry #37, p. 2, 6, 12-13; #71, p. 3.) (See also the related comments in the "Area-Specific Agreements: Consequences" section of this report.) One commenter thought EPA's resources would be better spent providing communities with the resources to negotiate the best possible deal regarding the siting of locally undesirable land uses (LULUs) in their communities. (See State #39, p. 8, 9.) Another urged EPA to coordinate its Title VI and Brownfields activities. (See State #73, p. 2.)

WHO MAY FILE A COMPLAINT:

Standing to File:

Many industry, State, and local government commenters urged EPA to remove the statement in the guidance allowing a party without a direct interest in the recipient's jurisdiction to file a complaint simply by being a member of a class of people allegedly affected by discrimination. (See Industry #5, p. 6; #12, p. 4; #16, p. 2, 21-22, 38; #72, p. 1-2; #3L, p. 2; State #58, p. 10; #89, p. 4; #2L, p. 2; Local #25, p. 2.) Some commenters argued that the jurisdictional criteria should grant standing only to someone who is truly negatively impacted. (See State #52, p. 15; #58, p. 10; Industry #12, p. 4.) Another concluded that EPA's broad language invites outsiders to make mischief without consideration for the concerns or support of the host community. (See Local #25, p. 2.) Others argued that the criteria were too narrow and that the complainant did not need to be a member of the class suffering discrimination. (See Non-governmental organization #22, p. 15; Task Force #61, p. 9.) One commenter proposed that complaints from outside the potentially affected community should not have the same weight as those from within the community. (See Industry #60, p. 3.)

Representation of Others:

Some industry commenters urged EPA to clarify that authorization for a party to represent another in filing a complaint is not intended to open the door to individuals or groups outside of the affected population unless representation has been specifically requested from someone within the affected population. (See Industry #5, p. 6; #51, p. 3.) One advised EPA to

outline criteria for a representative. (See Industry #51, p. 3.) Another thought EPA should clarify what it means to be "authorized to represent" others and justify granting standing to a person who has not suffered discrimination. (See Industry #24, p. 5.)

Single vs. Multiple Complainants:

An industry commenter proposed that EPA give greater weight to complaints supported by a quorum of adults (i.e. 8 to 10) from the affected community to discourage the filing of potential nuisance complaints from a single individual. (See Industry #5, p. 6.) Another said EPA should reject complaints filed on the same issues as those previously resolved unless significant new issues are raised. (See Industry #51, p. 4.)

Exhaustion of Administrative Remedies as a Prerequisite to a Complaint:

State and industry commenters and a non-governmental organization asserted that EPA should require, not just encourage, complainants to seek relief in the recipient's administrative process prior to filing a Title VI complaint. (See State #18, p. 10; #63, p. 1-2; Industry #5, p. 7; #12, p. 4; #16, p. 2, 3, 21, 24-26, 37; #51, p. 2; Non-governmental organization #93, p. 14.) (See also Industry #60, p. 4-5, urging EPA to give "due weight" only to such complainants.) Proponents of this approach suggested it has multiple benefits:

a) providing an incentive for recipients to adopt Title VI policies,
b) allowing environmental justice concerns to be addressed in the course of project review, when there is more flexibility to make modifications,
c) allowing Title VI concerns to be resolved in the permit process or to proceed to EPA for review accompanied by a well-developed factual record,
d) affording applicants certainty in the permit outcome,
e) encouraging applicants to be more responsive to Title VI concerns in the permit process, and
f) providing communities with better remedies than assistance withdrawal to the recipient.

(See State #63, p. 1-2; Industry #16, p. 2, 21, 24-26; #51, p. 2; #60, p. 4-5.) [A related requirement would be to insist that complainants document their role in the administrative process and state the Title VI issues raised in that process. (See State #63, p. 2.)]

An alternative to outright dismissal of the complaint would be for EPA at least to give additional deference to the results of the recipient's process where a complainant reasonably knew about the recipient's administrative process and chose not to participate or did not surface all relevant issues. (See Industry #5, p. 7; #51, p. 2.)

Several commenters would make an exception to any requirement to exhaust administrative remedies where there was inadequate public notice or insufficient opportunity to participate. (See Industry #5, p. 7; State #18, p. 10; Industry #51, p. 2.)

One commenter criticized EPA's logic for not requiring exhaustion of state remedies. According to this commenter, EPA misconstrues Title VI law when EPA claims that plaintiffs may sue in federal court without exhausting federal administrative remedies; the law is still developing on this point. In addition, unlike the federal agency, which can only terminate federal funding, the State permit agency can afford relief directly to the complainant. (See Industry #16, p. 26.)

One commenter criticized the guidance language on exhaustion of administrative remedies for not recognizing complainants' efforts to resolve problems and not acknowledging EPA's inaction during permit appeals. (See Non-governmental organization #23, p. 2-3.)

Verifying Allegations:

One State commented that complainants should have to attest to the accuracy of allegations and be subject to a penalty if the allegations are exaggerated or untrue. This commenter argued that the absence of such a requirement invites frivolous claims since complainants do not have the burden of proving their allegations. (See State #58, p. 10.)

MISCELLANEOUS ISSUES:

One industry commenter recommended clarifying that all prime contractors, whether MBE/WBE or not, are required to make good faith efforts to meet the goals. In addition, the quarterly report form should have a separate section to capture the MBE quarterly payments, WBE quarterly payments, MBE subcontracts and WBE subcontracts for both the CWSRF and DWSRF programs. (See Industry #66.)

One State commenter advised EPA to be more inclusive of the regions. (See State #53, p. 1.)

One industry commenter suggested ensuring that definitions in the guidance documents are consistent with those used in the underlying permitting provisions. (The commenter did not provide any examples of inconsistency.) (See Industry #5, p. 12.)

One industry commenter endorsed the objective of refining and streamlining the procedures for determining whether State or local environmental permits meet the requirements of Title VI. (See Industry #2.)

One industry commenter recommended that early steps to prevent Title VI violations are best undertaken through voluntary initiatives by industry rather than through government compulsion. (See Industry #16, p. 4.)

One commenter recommended that reducing mobile source emissions be a key part of any Title VI strategy since these sources are major contributors to air toxics exposure. Toward that end, EPA should encourage measures like monetary incentives and credit trading rules. (See Local #82, p. 10-11.)

One commenter stressed EPA should be willing to dismiss a complaint if the permit relied on "banked emissions" to achieve reductions. This commenter saw banked emissions as producing significant, quicker emission reductions, which have the potential to become permanent reductions if the credits are not used. (See Industry #51, p. 4.)

Two commenters said EPA should change its Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis, 44/98, to embody certain recommended changes in the application of environmental justice concepts to permitting/siting. (See Industry #4, p. 1, 2; #71, p. 3.) Another made the same comment regarding EPA's Clean Air Act Section 309 Guidance. (See Industry #4, p. 1.)

One commenter said EPA should remove statements from the guidance that EPA expects to find ""similar" levels of risk everywhere in a State and that where EPA finds significant,

adverse, disparate impacts, they can be considered evidence of unlawful discrimination. (See Industry #60, p. 6.)

One commenter suggested that the reference in footnote 63 on page 39670 be replaced with the actual criteria. (See Industry #4, p. 6.) This same commenter also suggested that EPA change the title of subsection VI.B.4 on page 39680 to "Significant Adverse Impact Decision" (see Industry #4, p. 7), and delete the parenthetical referring to landfill capacity on page 39690. (See Industry #4, p. 8-9.)

One commenter asked that the Shintech company name not be referenced until final resolution or rejection of the complaint involving its operating permit. (See Industry #80, p. 12.)

APPENDIX A

SUMMARY OF KEY STAKEHOLDER COMMENTS

ON

THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S

Draft Title VI Guidance
for
EPA Assistance Recipients
Administering Environmental Permitting Programs
(Draft Recipient Guidance)
and
Draft Revised Guidance
For
Investigating Title VI Administrative Complaints Challenging Permits
(Draft Revised Investigation Guidance)
65 *Fed. Reg*. 39650 et seq
June 27, 2000

Submitted by:

Frances A. Dubrowski, Esq.

January 5, 2001

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I. OVERVIEW:

This report summarizes the key issues raised in written public comments on EPA's proposed Title VI guidance, the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, published in the *Federal Register* on June 27, 2000. (65 *Fed*. *Reg*. 39650 et seq.).

Ninety-eight commenters filed comments on EPA's proposed guidance. Eighteen commenters represented industries or industry trade associations, networks, coalitions, or chambers of commerce *(hereafter referred to as "Industry")*. Fourteen commenters represented individual State or territorial agencies or coalitions of such agencies *(hereafter referred to as "State")*. Seven commenters represented local government entities, officials, or management associations *(hereafter referred to as "Local")*. Twenty-seven commenters were private citizens. Twenty-six commenters represented non-governmental organizations (i.e., community, grassroots, public interest, civil rights, environmental, or other nonprofit organizations) *(hereafter referred to as "Non-governmental organization")*. Three commenters were academicians *(hereafter referred to as "Academic")*. One commenter represented a Tribal organization *(hereafter referred to as "Tribal")*. One commenter was a U.S. Congressman *(hereafter referred to as "Congress")*. One commenter was the Title VI Task Force of EPA's National Environmental Justice Advisory Council *(hereafter referred to as "Task Force")*.

Many commenters filed on behalf of a larger network of organizations, agencies, or individuals. For example, eighteen industries or industry associations ascribed to one industry set of comments. Agencies from six different States ascribed to a single set of comments. One non-governmental organization filed on behalf of more than 125 community groups, environmental justice organizations, coalitions, individuals, and an Indian nation. Thus, the level of stakeholder involvement in commenting on EPA's proposed guidance was significantly greater than ninety-eight individuals or organizations. (Appendix A to this report identifies each individual, entity, or organization submitting comments.)

The comments addressed the overall goals of the Title VI program, the process employed to develop the guidance, and the general thrust as well as the specific provisions of the guidance.

II. GOALS OF THE TITLE VI PROGRAM:

Comments directed to the general goals of the Title VI program: a) addressed the need for action to address environmental injustice, b) supported the basic principles of the civil rights laws, c) asked EPA to add certainty as a guiding principle of the guidance, and d) questioned the applicability of Title VI to environmental permitting altogether.

Need for Action to Address Environmental Injustice:

Numerous private citizens and non-governmental organizations and one Congressman attested to the persistence of environmental injustice in their communities and urged EPA to take action to eliminate such injustice. (See, e.g., Private citizen #8, #15, #26, #32, #42, #54, #56, #76, #77, #79, #86, #90, #92; #4L; Non-governmental organization #22, p. 2-6; #23, p. 1-2; #29, #36, p. 1-2; #49, p. 2-4; #55; #64, p. 1, 2; #65, p. 1-2; #68, p. 2; #70; #74, p. 1; #5L, p. 3; Congress #45, p. 1-2.)

Many of these commenters urged EPA to stop discrimination by State environmental agencies, which issue permits to industries that continue to pollute low-income communities. (See, e.g., Private citizen, #7, #9, #44, #43, #48, #38, #92; Non-governmental organization #22, p. 2-6.)

Several commenters asked EPA to strengthen the civil rights of poor and minority communities which have few resources to fight environmental sites (see, e.g., Private citizen #15; #86), or, at the very least, to avoid making it easier for companies to take advantage of low income, minority, or disadvantaged communities. (See, e.g., Private citizen #1.)

A State commenter recognized EPA's legal and moral obligation to investigate any allegation, especially those of groups or individuals without resources to conduct elaborate analyses and health studies. (See State #13, p. 1-2.)

A non-governmental organization commenter challenged the evidentiary basis for many environmental justice claims. (See Non-governmental organization #20, p. 4-7.)

Support for the Principles Inherent in Civil Rights Laws:

Numerous industry and State commenters expressed support for the principles and purposes of Title VI. Many industry and State commenters agreed that all persons regardless of race, color, or national origin are entitled to fair treatment under the nation's environmental laws and to a safe and healthful environment. (See, e.g., Industry #4, p. 1; #5, p. 4; #16, cover letter: p. 1, text: p. i, 1; #72, p. 1; #3L, p. 1; State #39, p. 2; #52, p. 11; #83, p. 2. See also Industry #91, p. 1.)

Many others emphasized how essential it is to foster broad compliance with, and strong enforcement of, the civil rights laws. (See Industry #2; #5, p. 3; #16, cover letter: p. 1; #72, p. 1; State #18, p. 1-2; #53; #63, p. 3; Local #14, p. 1.) Still others stressed their support for EPA's efforts to implement Title VI fairly and effectively. (See Local #82, p. 3; State #18, p. 4; Industry #28, p. 1.)

Some stressed that enforcement of civil rights laws and environmental laws are complementary and can be achieved in a manner consistent with sustainable economic development. (See Industry #16, cover letter: p. 1; #72, p. 1.) One State perceived a conflict between the goals of economic and environmental justice and urged EPA to balance the two. (See State #52, p. 11-12.)

Certainty as a Guiding Principle:

One industry commenter proposed adding certainty as a <u>guiding principle</u> for the guidance document. (See Industry #17, p. 2-3.)

Applicability of Title VI to Environmental Permitting:

Some industry commenters argued that the original Civil Rights Act of 1964 Title VI was never intended to be applied in environmental permitting situations (see Industry #4, p. 2; #6, p. 2), or to anything other than intentional discrimination. (See Industry #4, Supp. p. 2; Non-governmental organization #20, p. 1-4; #93, p. 1-12.) (See also State #52, p. 16.) (Comments pertaining to the applicability of Title VI to specific

guidance provisions or permitting decisions are discussed below in Section V, "Specific Provisions of the Guidance: Applicability of Title VI.")

III. PROCESS FOR DEVELOPING EPA'S GUIDANCE:

Comments directed to the process for developing EPA's guidance commended EPA for its efforts to develop guidance, addressed the adequacy of EPA's public outreach and public comment period, and requested a document responding to public comments.

Level of Effort Devoted to the Guidance:

Numerous commenters commended EPA for the significant effort involved in issuing its guidance. These commenters praised EPA for its:

- extensive outreach to all stakeholders
  (see, e.g., Industry #5, p. 1; #16, cover letter: p. 1, p. 1; #24, p. 1; #60, cover letter: p. 1; State #13, p. 2; #18, p. 2),
- thoughtful deliberation
  (see, e.g., Academic #19, p. 1; Industry #71, p. 3),
- substantial commitment of time and resources
  (see, e.g., State #63, p. 1; #73, p. 3; #2L, p. 3; Local #14, p. 1; #41, p. 1; #50, p. 1; #82, p. 2, 3; Industry #6, p. 2; #16, cover letter: p. 1; Non-governmental organization #34, p. 3; #59, p. 20-22; #62, p. 1),
- inclusion of a variety of methodologies
  (see, e.g., Non-governmental organization #21, p. 1),
- attempt to educate recipients regarding Title VI compliance
  (see, e.g., Industry #24, p. 1-2),
- attempt to bring clarity to the process
  (see, e.g., Non-governmental organization #64, p. 1; Industry #51, p. 1; #60, cover letter: p. 1), and
- attention to public comments and concerns
  (see, e.g., State #13, p. 1; #63, p. 1; Local #14, p. 1).

Adequacy of Public Outreach:

Some stakeholders, as noted above, praised EPA for its public outreach; others criticized the adequacy of outreach.

Two State commenters viewed the public outreach as deficient. See State #52, cover letter; #58, p. 2.) According to one, EPA did not provide the level of outreach and opportunity for public comment it exhorts recipients to provide. Specifically, the notice, location (in EPA Regional offices), and meeting times for the listening sessions were not convenient for the majority of citizens. The short time limits for testimony were not welcoming. The guidance documents were published in the Federal Register, rather than in communications likely to reach the affected community. (See State #58, p. 2.)

Several commenters criticized EPA's Advisory Committee for including only one community representative, who declined to endorse the final report. (See Non-governmental organization #22, p. 6, 51; Task Force #61, p. 45.) One commenter criticized EPA for failing to address comments from non-governmental organizations and private citizens. (See Non-governmental organization #22, p. 6.)

An industry commenter argued that States, as co-regulators, should have the opportunity to work with EPA to develop policies, rather than face mere after-the-fact opportunity to comment on EPA's proposed policy. (See Industry #12, p. 2.)

Adequacy of the Public Comment Period:

One State requested an additional 30 days for comment (see State #63, p. 3), while another requested an additional 60 days. (See State #52, cover letter.) Some commenters noted "barely enough" or "inadequate" time to comment. (See Non-governmental organization #11, p. 1; #69.) A non-governmental organization asked for additional public hearings. (See Non-governmental organization #93, p. 1.)

Need for a Document Responding to Public Comments:

One local government recommended that EPA publish a document summarizing and responding to public comments prior to issuing final guidance. (See Local #82, p. 3.)

IV. GENERAL THRUST OF THE GUIDANCE:

Comments directed to the general thrust of the guidance both supported and criticized the outcome of EPA's deliberations.

A. Support for the General Thrust of the Guidance:

Supportive comments addressed the clarity, responsiveness, and usefulness of the guidance.

Clarity of the Guidance:

Numerous commenters believed the proposed guidance improved the clarity of processes, procedures, or definitions compared to EPA's 1998 Interim Guidance. (See, e.g., Industry #2; #4, p. 2, 9; #5, p. 1; #16, p. 1; #17, p. 2; #24, p. 1; #28, p. 1, 3; #51, p. 1; #60, cover letter: p. 1; State #13, p. 1; #18, p. 2; #2L, p. 1, 3; Local #25, p. 1-4; #50, p. 2; #82, p. 3; Non-governmental organization #34, p. 3.)

Responsiveness of the Guidance:

Five State and local government commenters deemed the guidance responsive to concerns they had expressed, especially with respect to the need for States to have flexibility in designing their environmental justice programs. (See State #18, p. 4; #39, p. 2; #67, p. 1; #89, p. 2; Local #14, p. 1.)

Usefulness of the Guidance:

Five State and local government commenters concluded that the guidance would be useful for considering alternative approaches or activities for identifying and relieving discrimination. (See Local #31; #41, p. 1; #50, p. 2; #82, p. 2; and State #53, p. 1.) An industry commenter also thought the guidance did an excellent job of identifying potential activities recipients could undertake to minimize the potential for Title VI complaints. (See Industry #51, p. 2.)

A State commenter regarded the guidance as useful in clarifying that: a) permit decision-making is not shifted to the federal government, b) EPA's

interest is in ensuring nondiscrimination by recipients, and c) Title VI complaints must not create unnecessary delays. (See State #89, p. 3.)

A local government commenter supported EPA's assumption that a comprehensive, rather than case-specific or area-specific, approach to Title VI is best. (See Local #82, p. 2.)

A territorial agency which does not issue permits nonetheless adjudged the guidance in accord with its public policy. (See State #6L.)

A law professor emphasized that the guidance represented a major step forward in addressing the deficiencies in environmental permitting programs. (See Academic #3, p. 1-3.)

B. Criticism of the Outcome of the Guidance:

Commenters critical of the outcome of EPA's deliberations addressed the scope of the guidance, its legal underpinnings, the choice of guidance over rulemaking (or statutory changes), and the fairness, acceptability, usefulness, and clarity of the guidance. Finally, comments addressed the potential impact of the guidance on other regulatory programs, the benefits of State programs and facilities, and alternative approaches.

Scope of the Guidance:

Numerous industry, State, non-governmental and other commenters criticized the guidance for focusing only on individual permits, ignoring permitting programs. They reasoned that this narrowly restricted focus forced EPA into a reactive, rather than proactive strategy. (See Industry #5, p. 3; #12, p. 3; #16, p. 1, 4, 10, 11, 38; #17, p. 6-7; #24, p. 3; #37, p. 3, 5; #72, p. 1, 8, 9; #91, p. 1-18; State #58, p. 2; #89, p. 2; Local #1L, p. 1, 6-7; Non-governmental organization #21, p. 3; #22, p. 10; #40, p. 3-4; #46, p. 10-11; #5L, p. 4; Task Force #61, p. 4.)

Industry saw the net result as uncertainty: putting substantial investments in particular facilities at risk. (See Industry #5, p. 3; #16, p. 4, 38; #17, p. 6; #37, p. 2, 6; #72, p. 1, 8, 9; #91, p. 16.) Industry commenters noted that permits are rarely the sole cause of adverse disparate impacts; indeed, one observed that complaints to date have focused on patterns in

siting or permitting. (See Industry #5, p. 3; #12, p. 3; #16, p. 1, 10, 11; #17, p. 6; #24, p. 3.) One industry commenter also urged EPA to focus on implementing the Civil Rights Commission's recommendations for improving EPA's overall implementation of Title VI. (See Industry #91, 7-10.)

Non-governmental organizations and EPA's Task Force saw missed opportunities; namely, promoting overall compliance by emphasizing the full range of Title VI's application to specific programs, practices, public participation processes, methods of enforcement, grants, and remedial actions as well as to intentional discrimination. (See Non-governmental organization #21, p. 3; #22, p. 10; #40, p. 3-4; #46, p. 10-11; #5L, p. 4; Task Force #61, p. 4.) Some urged EPA, at a minimum, to require that recipients consider and document the demographic characteristics of affected populations as part of their permitting process. (See Non-governmental organization #46, p. 10-11; #5L, p. 4.)

States and local government welcomed the opportunity to avoid Title VI complaints altogether. (See State #58, p. 2; #89, p. 2; Local #1L, p. 1. See also Industry #12, p. 5.) One saw a chance to avoid inequities in the responsibilities of similar facilities based solely on when their permits came up for renewal. (See Local #1L, p. 7.) This commenter also envisioned the opportunity to integrate the consideration of "low-income populations" required by Executive Order 12898 as well as Title VI's focus on "race, color, or national origin" into existing regulatory programs. (See Local #1L, p. 2-3.)

One commenter also criticized EPA's focus on only some environmental regulatory programs, to the exclusion of TOSCA, FIFRA, and CERCLA programs. (See Non-governmental organization #21, p. 3.)

Legal Underpinnings of the Guidance:

State, industry, and non-governmental organization commenters questioned EPA's interpretation of current law, either claiming EPA lacked legal authority for its guidance or calling upon EPA to support its interpretation of Title VI with a thorough legal analysis. (See Industry #6, p. 3; #12, p. 1-2; #16, p. 1; #91, 13-16; State #58, p. 3, 9; Non-governmental organization #20, p. 1-4; #93, p. 1-12.) One State, in particular, sought clarification of the legal authority for EPA to hold recipients responsible for:

1) requiring additional actions or control measures when the causal link between emissions and impacts is unproven, 2) addressing public health problems that go well beyond permitted emissions, and 3) coordinating efforts to address larger community issues. (See State #58, p. 3.) Some recommended EPA work with Congress to establish clear boundaries for federal executive branch authority in this area. (See Industry #12, p. 2; State #89, p. 2.) An industry commenter argued that the guidance illegally focused attention and consequences on the permit holder, rather than the recipient. (See Industry #91, p. 6-7, 13-14.)

Several commenters challenged Executive Order 12898 as a basis for EPA's actions. (See Industry #12, p. 1-2; #71, p. 2-3; Non-governmental organization #93, p. 11-12.) One noted that the Executive Order, by its terms, only operates "consistent with, and to the extent permitted by [current law]." (See Industry #12, p. 1-2.) Another claimed the Executive Order was only intended to affect the government's internal management, not the private rights of any person or entity. This commenter asked EPA for a clear reminder that the Executive Order creates no new rights or responsibilities. (See Industry #71, p. 2-3.)

Non-governmental organizations and EPA's Task Force, on the other hand, criticized the guidance as a substantial departure from the purpose, intent, and meaning of Title VI because they perceived the guidance as limiting enforcement of civil rights protections. (See Non-governmental organization #22, p. #30, p. 1-2; #36, p. 2; #46, p. 1; #49, p. 1; #81, p. 1, 3; Task Force #61, p. 1-2.) Several added that the guidance directly conflicts with EPA's Title VI regulations. (See Task Force #61, p. 1-2; Non-governmental organization #22, p. 1-2) One concluded that the guidance violates the 14th Amendment to the U.S. Constitution. (See Non-governmental #30, p. 1-2.)

Rulemaking vs. Guidance:

Industry commenters advised EPA not to finalize this guidance, but instead to initiate formal notice and comment rulemaking on environmental justice regulations. (See Industry #6, p. 3; #12, p. 1-2, 6; #60, cover letter: p. 2; #91, p. 2, 18.) One industry commenter added: the guidance has the effect of a major rule, subject to APA notice and comment rulemaking as well as an advocacy review panel analysis under the Small Business Regulatory Enforcement Fairness Act, a Regulatory Flexibility Analysis, an

Unfunded Mandates Act analysis, and OMB evaluation under E.O. 12866. (See Industry #12, p. 1-2, 5.) A State commenter also recommended that an environmental justice policy be established through a comprehensive set of regulations, not through a complaint-resolution process, because the former approach lays out prospectively what needs to be done. (See State #39, p. 9, 11.)

One industry commented that attempts to address disparate impacts (as opposed to intentional discrimination) must be done by rulemaking supported by evidence of discrimination. (See Industry #4, Supp., p. 2.)

Finally, several commenters noted that guidance, unlike regulation, is not binding on states. (See Industry #12, p. 1-2, 5; State #89, p. 2.) An industry commenter predicted implementation will vary across states, creating uncertainty. (See Industry #12, p. 1-2, 5.)

Statutory Changes vs. Guidance:

One commenter argued that EPA would be better off examining the underlying environmental statutes and, if appropriate, revising them. (See State #58, p. 11.)

Fairness of the Guidance:

Several commenters concluded that the guidance was not fair. (See Private citizen #10, #35; Non-governmental organization #21, p. 6; #36, p. 3; #40, p. 2; #49, p. 1-6; #59, p. 12-14, 18-19; #5L, p. 1; Industry #16, cover letter: p. 2, text: p. 36-38; #24, p. 3; #37, p. 4, 8; #91, p. 18.) One industry commenter stated that the permittee should be provided with constitutional due process and whatever process is due under state agency regulations. (See Industry #12, p. 3.) Another surmised that EPA had set up a process that is easily exploited to stall projects with unsubstantiated allegations. (See Industry #91, p. 18.)

Acceptability of the Guidance:

Numerous non-governmental organizations, private citizens, and industry commenters as well as EPA's Task Force found the guidance so flawed, they called upon EPA to withdraw it. Most of these commenters reasoned that the guidance undermined Title VI by weakening protections or

penalizing the civil rights complainant and aiding the civil rights violator. (See Non-governmental organization #22, p. 2, 8; #23, p. 2; #27, p. 1; #49, p. 1-6; #59, p. 14, 22; #62, p. 1, 17; #74; #75, p. 10-11; #78; #84, p. 1; #5L, p. 1; Private citizen #38; #43; #44; #47; #57; #79; #87; Task Force #61, p. 1-2.) (See also Private citizen #10 and #35, citing lack of fairness.) However, one commenter interpreted Title VI to prohibit only intentional discrimination (see Non-governmental organization #93, p. 1-14), while another found the guidance at odds with Title VI, DOJ and EPA implementing regulations, and the Civil Rights Commission's recommendations. (See Industry #91, p. 1-18.)

Several of these commenters perceived broader opposition to the guidance. For example, one commenter reported that the guidance had been opposed by all members of the Implementation Advisory Committee and received no support, and numerous denouncements, at EPA's NEJAC meeting. (See Non-governmental organization #75, p. 4.) Another characterized the guidance as very similar to the 1998 Interim Guidance, which had been opposed by state and local government officials, business, and community leaders. (See Industry #91, p. 15.)

Usefulness of the Guidance:

Numerous commenters concluded the guidance created an unworkable maze. (See State #39, p. 3; #52, p. 13-14; #67, p. 2; #2L, p. 3; Non-governmental organization #20, p. 5; #22, p. 2; #27, p. 1-4; #49, p. 1-6; #55; #59, p. 20-22; #81, p.2; #5L, p. 1; Congress #45, p. 3; Industry #28, p. 1; #37, p. 2; Task Force #61, p. 1-2.)

A State elaborated by characterizing the guidance as too undefined, complex, and infeasible. According to this commenter, the guidance is so devoid of standards that permitting authorities cannot know how to meet the requirements. It requires scientific tools that have not been developed, complex methodologies that are not developed (or not generally accepted within the scientific community), and comprehensive data that are not available. It requires decisions beyond the expertise, scope, and authority of permitting authorities. According to this commenter, the Clean Air Act ozone control program is less difficult to implement. (See State #39, p. 3.)

Non-governmental organizations, EPA's Task Force, and a Congressman feared the complexity of the procedures required by the

guidance would prevent many communities from filing complaints. (See Non-governmental organization #22, p. 2; #27, p. 1-4; #55; #81, p. 2; Congress #45, p. 3; Task Force #61, p. 1-2.)

Clarity of the Guidance:

Numerous State and industry stakeholders commented that the guidance fails to provide sufficient detail to enable recipients to identify, analyze, and address potentially significant adverse disparate impacts on protected classes. (See State #18, p. 2-3; #39, p. 3, 11; #52, p. 1, 16; #63, p. 1, 3; #83, p. 1; #89, p. 1, 5; Industry #12, p. 2, 6; #17, p. 2-6; #37, p. 2; #71, p. 3; #3L, p. 2-3.) State and industry commenters cited failure to define key terms, concepts, criteria, methodologies, and procedures. (See State #63, p. 1; Industry #71, p. 3; #3L, p. 2-3.) For example, a local government recommended the Investigations Methodology include a checklist of defined, specific analyses, embodying ranges of acceptability, which, when performed, will result in a definitive determination of discrimination or dismissal of a complaint. (See Local #50, p. 6.)

Numerous State and industry commenters believed the guidance lacks sufficient certainty and predictability. (See State #18, p. 2-3; #39, p. 3, 11; #52, p. 1-2, 16; #83, p. 1; #63, p. 1, 3; #89, p. 1, 5; Industry #4, p. 2, 9; #12, p. 1-3; #16, cover letter: p.1-2, text: p. 1, 4, 10, 38; #24, p. 3; #37, p. 2, 6, 8-12; #60, p. 1-2; #71, p. 3; #91, p. 16; #3L, p. 2, 5.)

Impact of the Guidance on Other Regulatory Programs:

One industry commenter surmised that, by undermining predictability and certainty, the guidance seems likely to disrupt some of the most innovative and promising current regulatory programs, such as EPA's cap-and-trade marketable emission permit approach for interstate ozone transport. (See Industry #16, p. 4.) Another declared EPA should address the impact on previously adopted state Title VI regulations. (See Industry #12, p. 2.)

Benefits of State Programs and Facilities:

Some commenters believed the guidance fails to recognize the environmental, social, and health benefits achieved by existing state programs (see Industry #12, p. 3), or the potential economic and social

benefits a regulated facility may bring to a community. (See Industry #12, p. 3, 4; #16, p. 38; #71, p. 3.) One industry commenter entreated EPA to give credit to recipients and permittees for ongoing compliance activities in the Title VI process. (See Industry #60, p. 8.)

Alternative Approaches:

One commenter suggested EPA address Title VI issues through air and water quality attainment planning, rather than permitting, because attainment plans require both an evaluation of cumulative impacts and EPA review and approval. This commenter would require every new attainment plan to identify heavily impacted areas (i.e., areas receiving impacts one to three standard deviations above the average on an annual average, population weighted, exposure basis). According to this commenter, this alternative approach would guide EPA to allot limited investigative resources according to the relative severity of impacts, assist permit applicants with site selection, and provide communities with information with which to seek relief. To encourage this approach, the commenter proposed setting a higher threshold for filing Title VI complaints where attainment plans included an approved impact disparity analysis and an approved plan for reasonable further progress. (See Industry #72, p. 1, 5-6.) (See also Industry #37, p. 6, addressing area-wide emission reductions.)

V. SPECIFIC PROVISIONS OF THE GUIDANCE:

Comments directed to specific provisions by more than one stakeholder addressed at least thirty-six separate items, arranged in alphabetical order below.

ADVERSE DISPARATE IMPACT ANALYSIS:

Terminology:

Some commenters objected to the term "adverse disparate impact," arguing that if there is a "disparate" impact, it is "adverse." (See Non-governmental organization #22, p. 8-10; Task Force #61, p. 2-4.)

Support for EPA's Approach:

Several commenters expressed support for EPA's approach to determining whether there is an adverse impact. (See, e.g., Industry #24, p. 3; #51, p. 5, and Local #41, p.2, calling the guidance "excellent" on this

point.) One commended EPA for determining first if the actions of a recipient result in a significant adverse impact on an affected population and then determining if the impact is disparate before moving forward on a complaint. (See Industry #5, p. 4.) Several supported EPA's position that a determination of adverse impact evaluate the risk compared to benchmarks of significance. (See Local #14, p. 4; Industry #5, p. 10; #24, p. 3; #60, p. 7.)

Burden on Complainants:

Numerous commenters concluded that EPA's approach to determining adverse impact is too burdensome for communities to use. (See Non-governmental organization #21, p. 5-6; #22, p. 7-8; #27, p. 1-4; #49, p. 4-6; #59, p. 4, 10-11, 20-22; #74, p. 2; #75, p. 5-6, #78; #81, p. 2; #84, p. 1; #5L, p. 1; Congress #45, p. 2-3; Task Force #61, p. 1-2.) Some criticized the language as too technical for communities to utilize. (See Non-governmental organization #22, p. 8; Task Force #61, p. 2.) Commenters also deplored the amount, detail, and complexity of information required and the cost of expert and legal assistance needed for input. (See Non-governmental organization #21, p. 5-6; #75, p. 5-6; #78.) The Congressional commenter observed that the investigation should be thorough and based on sound principles, but it does not have to be rocket science or onerous. (See Congress #45, p. 2-3.)

Burden on Recipients and Permittees:

Several State and industry commenters also viewed the analysis as overly burdensome. (See State #52, p. 13-14; Industry #4, p. 6; #37, p. 5.) One thought that instead of determining whether a permit adds to an existing adverse impact, EPA should analyze whether the proposed action itself has a discriminatory effect. (See Industry #4, p. 6.) Others argued that a single standard should guide EPA permitting decisions, rather than different standards triggered by the racial composition of the community. (See Non-governmental organization #20, p. 6; State #52, p. 6.)

Uncertainty of the Guidance:

Numerous commenters criticized the degree of uncertainty associated with EPA's approach to determining adverse disparate impact.

States, local government, and industry commenters criticized the lack of sufficient standards and methodology for recipients to know how to conduct an acceptable adverse impact analysis. (See State #39, p. 3-6; #52,

p. 1-2, 6-7, 14-15, 17; #58, p. 5-9; #73, p. 3; #83, p. 1; #89, p. 2; Local #25, p. 3; Industry #12, p. 1-2; #17, p. 2-6; #71, p. 3; #72, p. 1, 8; #3L, p. 3.) One posited a list of specific questions: What type of pollutants are reviewed? Do you use actual or permitted (potential) emissions? What area do you look at? What level of impact is the cut-off? Do you look at 10-year old census data or other data? What do you do when only part of the census block is in the affected area – do you assume it is proportional? How do you determine a comparison population? What happens if the facilities impacting the area are not within your jurisdiction (i.e., in another state or county)? How do you account for demographic changes over time, especially since the last census? (See State #58, p. 5-9.) (See also Industry #37, p. 5-9.) Another asked: what constitutes an acceptable versus unacceptable impact level? (This same commenter urged EPA to give States the widest practical discretion to decide this matter for themselves.) (See Industry #72, p. 1, 8.)

One commenter said EPA misled the public by implying that discriminatory health impacts can be identified and redressed via environmental permits. (See Industry #37, p. 5, 7.)

Several States expressed concern that EPA would use different inputs to achieve different results. (See State #18, p. 6; #39, p. 4.) One State lamented that the burden is still on the recipient to prove a negative. (See State #67, p. 1.)

Non-governmental organizations and a Congressman predicted that uncertainty regarding appropriate sources, pollutants, nuisances, sciences, and reference communities would lead to subjective determinations, endless dispute between EPA and the States, lack of acceptance by either a losing permittee or losing community, and increased complaints to EPA. (Non-governmental organization #75, p. 5-7; #78; Congress #45, p. 2.) (See also Non-governmental organization #40, p. 10-11.)

Risk-Based Approaches:

Many commenters expressed their support for risk-based analyses. (See Industry #5, p. 10; #24, p. 3, 9; #51, p. 5; #60, p. 7; Local #14, p. 4.) (See also State #58, p. 6-7, recommending that this be the primary approach for estimating risk). On the other hand, one State asserted that conclusions drawn from risk assessment tools are, at best, debatable. (See State #39, p. 5, 6.) Another urged EPA to consider risk assessments showing no adverse

impact (see State #52, p. 5), while a local government urged EPA to develop consistent, peer reviewed methodologies. (See Local #1L, p. 4.)

Missing Elements - Community Health:

Non-governmental organization commenters criticized EPA's approach for not requiring a Title VI investigation to address the existing, or comparative, public health of the affected community, noting that the health effect of environmental pollution is not the same for all communities. (See Non-governmental organization #27, p. 3; #46, p. 22-23; #75, p. 6.) One elaborated: the adverse impact assessment should address variations in susceptibility of different demographic groups to the same levels of environmental hazard exposure, accounting for differences that are physical, socioeconomic (e.g., health care access), and cultural (e.g., diet, greater exposure of subsistence fishermen to water pollutants). In addition, EPA and recipient agencies should promote data collection on such differences because Title VI and the Fifth and Fourteenth Amendments to the U.S. Constitution require EPA to address this issue. (See Non-governmental organization #46, p. 22-23.)

Missing Elements - Non-Health Based Impacts:

A non-governmental organization commenter advised that EPA should outline a methodology, complete with examples, for taking into account non-health-based impacts. Otherwise, recipients will assume, incorrectly, that the only relevant adverse impacts to assess are those on human health and will have no incentive to take proactive measures to address broader concerns. (See Non-governmental organization #46, p. 21-22.) Other commenters also recommended changing the guidance to address social, cultural, or economic impacts more thoroughly. (See Non-governmental organization #22, p. 42-43; Task Force #61, p. 36.)

Alternatives - Proximity Analysis:

Two non-governmental organization commenters suggested a simple alternative to the disparate impact analysis: EPA would define the affected area using a proximity formula, determine whether this is a minority community, and, if so, notify all residents. EPA then would compare the public health of the census tracts in the affected area with those of the county or state along four parameters: age-adjusted cancer mortality rate, age-adjusted non-cancer mortality rate, infant mortality rate, low birth weight rate. These commenters argued that this approach is readily replicable and has substantial public support, but EPA has never explained

why it is unacceptable. (See Non-governmental organization #27, p. 3; #75, p. 7- 10.)

Alternatives – NJ Approach:

One State proffered a proactive alternative employed by New Jersey. This approach screens each permit application for potential environmental justice concerns (avoiding pre-identifying communities, which may be detrimental to urban revitalization). If an application has environmental justice implications, affected communities are informed and permit applicants are encouraged to enter into a series of informational meetings with the community to identify and resolve concerns. This community partnership approach occurs simultaneously with the permit application review. (See State #67, p. 2.)

Alternatives - Refocusing the Inquiry:

One commenter argued EPA should focus more on disparate impacts than disparate demographics, using Title VI as well as other authority. According to this commenter, if a statistical analysis is employed, it should be used first to identify communities with statistically higher impacts and only secondarily to confirm whether the impacted community might also have statistically different demographics. Demographic disparity is more appropriate as an indicator of the level of investigation warranted than as an indicator of what impacts are acceptable. (See Industry #72, p. 1, 3, 4.)

Alternatives – Limit to Risk Areas:

One commenter suggested EPA quantify cumulative levels of environmental stressors, determine if adverse health impacts could occur, and then limit its focus to recipient permitting programs which involve true environmental risks. (See Industry #37, p. 5-6.)

Alternatives - Permit Moratorium:

Some commenters suggested EPA place a moratorium on granting permits until recipients:

a) meet with current Title VI complainants to resolve complaints,
b) compile relevant demographic information in the permitting process, and
c) conduct a state-wide (or agency-wide) demographic analysis of current permits. (See Non-governmental organization #22, p. 9; Task Force #61, p. 3.)

Universal Disparate Impact Analysis:

One non-governmental organization commenter proposed that EPA consider requiring an adverse impact analysis for every permit. (See Non-governmental organization #11, p. 4.)

Permitting as a per se Adverse Disparate Impact:

Non-governmental organizations and private citizen commenters recommended that granting a permit in a minority community already suffering from disparate poor public health be an automatic violation of Title VI, because the permit would only increase the disparity. (See Non-governmental organization #27, p. 3; #75, p. 9; Private citizen #92.) One urged that the permit establish a *prima facie* violation, shifting the burden of persuasion to the recipient. (See Non-governmental organization #65, p. 3-4.) Another urged that siting of a polluting facility be considered an adverse impact for purposes of proceeding to a disparity analysis. (See Non-governmental organization #46, p. 20.)

An industry commenter countered that government cannot legally prohibit siting because of a high environmental justice population. (See Industry #71, p. 3.)

Concentrated Siting as a Form of Discrimination:

Several non-governmental organization commenters urged EPA to recognize that the disproportionate concentration of waste sites in a community is itself a form of discrimination. (See Non-governmental organization #46, p. 21; #49, p. 5; #78.) One explained: disproportionate siting should create a presumption that adverse disparate impact exists, regardless of whether there is a significant increase in exposure to known pollutants. The statistical analysis should be of the siting pattern itself, not just of exposures and health risks, forcing the State to justify siting another facility in an already overburdened community. (See Non-governmental organization #46, p. 21.)

Lack of Evidentiary Basis for EPA's Approach:

One State lamented the absence of evidence on whether the analysis would produce valid and reliable results. This State explained: imbedded in the methodology for determining adverse disparate impact is a mathematical algorithm which must be demonstrated to be correct with multiple tests on real or synthetic data. (See State #67, p. 3.)

Miscellaneous Approaches:

Several commenters were concerned about references to toxicity-weighted emissions, alleging that analyses based on this approach do not address whether the risks of different levels of exposure are significant. (See Industry #24, p. 9; State #52, p. 9; #58, p. 6-7.) One commenter urged EPA to delete references to this approach from the guidance (see Industry #24, p. 9); another recommended using the approach only as a screening tool, not to assess adverse impacts. (See State #58, p. 6-7.)

One commenter argued that EPA's focus should be more on distribution (i.e., whether the acceptable level of pollutants is uniformly applied), than on magnitude (i.e., whether a more stringent level should have been selected. (See Industry #72, p. 1, 7.)

Another argued that where facilities precede the surrounding community and land use rules require notifying buyers of higher impacts, EPA should require impacts to reach a greater level of disparity before becoming actionable. (See Industry #72, p. 9.)

One State argued that if permit actions do not increase disparity, investigations should be closed unless past permitting activities led to the disparity. (Proving this would require longitudinal data.) This same commenter thought EPA should also identify whether the permit activities constitute a significant portion of the disparate impact. (See State #52, p. 2-3, 17.)

ALTERNATIVE DISPUTE RESOLUTION:

Support for Using Alternative Dispute Resolution:

One industry commenter supported the use of Alternative Dispute Resolution ("ADR") and other informal processes to encourage voluntary remedies. This commenter's support for ADR assumed that: a) such processes have clearly defined timeframes, b) each party can unilaterally end the informal process and move to a more formal process, and c) parties jointly can agree to continue the process beyond deadlines if they believe progress is being made. (See Industry #5, p. 5.)

Disadvantages of Using Alternative Dispute Resolution:

Non-governmental organizations and EPA's Task Force warned that ADR may not be well suited for complainants. (See Non-governmental

organization #22, p. 22-27; #23, p. 3; #36, p. 5-6; #59, p. 16-17; #81, p. 2; Task Force #61, p. 16-21.) The disadvantages they outlined for ADR include:

- the complainant's preferred outcome, permit denial, is not on the table,
- a lack of procedural safeguards exacerbates inequalities in bargaining power and resources,
- there is little research on the effectiveness of ADR in such disputes,
- ADR addresses specific cases, not overall patterns of discrimination,
- ADR offers little opportunity for public scrutiny, accountability or accessibility,
- neutral third-party mediators lack the authority of a judge (e.g., to force exchanges of data),
- ADR lacks formal discovery mechanisms, and
- ADR settlements lack precedential value.

These commenters urged EPA to abandon efforts to encourage ADR. One cited experience in the Chester Street case as evidence that ADR is inappropriate in Title VI complaints. (See Non-governmental organization #36, p. 5-6.)

If EPA nonetheless uses ADR, some proponents of this viewpoint recommended: researching different ADR approaches, issuing guidance on ADR, providing technical assistance to complainants, requiring the ADR process to be more open, accessible, and sensitive to traditionally disadvantaged persons, or prohibiting use of ADR in inappropriate situations (e.g., those involving precedent-setting legal cases, egregious conduct, etc.). (See Non-governmental organization #22, p. 22-27; Task Force #61, p. 16-21.) One commenter recommended EPA allow complainants to reject ADR, triggering an investigation. (See Non-governmental organization #22, p. 27.) Another entreated EPA to provide financial assistance to complainants. (See Non-governmental organization #59, p. 16-17.)

Potential Conflicts with Statutory Deadlines:

One State commenter noted that an ADR process, which occurs before permit issuance, may conflict indirectly with federal, state, or local statutory requirements for processing permit applications. This commenter

observed that the guidance does not provide adequate detail on how to resolve such conflicts. (See State #58, p. 9.)

Clarity of Guidance on Alternative Dispute Resolution:

Some commenters found the ADR discussion too vague to be useful. One noted it did not address who should bear the costs of pursuing ADR and what the timeline should be. This commenter urged EPA not to recommend ADR without further discussion of these issues. (See Non-governmental organization #34, p. 2.) Another questioned when and how to use ADR and asked for guidance on the practical, rather than theoretical, issues involved. (See State #52, p. 13.)

Rewards for Using Alternative Dispute Resolution:

One State commenter urged EPA to create a higher burden of proof or a higher threshold for complaints when ADR and similar efforts have been undertaken. (See State #58, p. 9.)

APPEALS:

Necessity for an Appeals Process:

Numerous commenters urged the creation of an appeals process for complainants on Title VI decisions. (See Private citizen #1, #7, #10, #43, #57; Non-governmental organization #22, p. 9, 14; #34, p. 2; #36, p. 3; #59, p. 4, 12; #62, p. 2-3; #78; #81, p. 2; Industry #80, p. 3-4; Task Force #61, p. 3, 8; Academic #3, p. 8; #33, p. 2-3.) Several argued either: a) standards are disturbingly different for recipients (who have the right of appeal and other substantial procedural protections) than for complainants, b) complainants often lack the resources to file court cases, or c) private rights of action under disparate impact regulations rest on uncertain legal ground. (See Non-governmental organization #22, p. 14; #34, p. 2; #59, p. 4, 12; #62, p. 2-3; Task Force #61, p. 8; Academic #33, p. 2-3.) An industry commenter argued that the absence of an appeals process makes court actions more attractive than administrative processes for complainants. (See Industry #80, p. 3-4.)

APPLICABILITY OF TITLE VI:

Applicability to Permitting:

Industry, State, and non-governmental organization commenters challenged the applicability of Title VI to many of the permitting decisions covered by EPA's guidance.

Six industry commenters observed that Title VI was not intended to guarantee all communities equal environments or to prohibit unintentional disparities in exposure to environmental pollutants. (Indeed, one commented that it is impossible to ensure that all parts of an airshed, for instance, have identical air quality.) According to these commenters, complainants must also demonstrate that a disparity is discriminatory. (See Industry #5, p. 4; #6, p. 3; #12, p. 1-2, 4-5; #16, cover letter: p. 1, text: p. 5-10; #28, p. 1; #72, p. 9.)

One State argued that there is no "state action" creating discriminatory effects in the context of consistent application of a nondiscriminatory permitting program because private parties and market forces determine the location of industry. Hence, there is no valid Title VI challenge. (This commenter noted a longstanding policy of grouping sources together through land use planning, zoning, and current Brownfields initiatives, but argued that if such forces create areas of high emissions, individual permit applicants should not suffer the consequences. (See State #39, p. 10.) (See also Industry #28, p. 2.)

Several commenters contended that Title VI prohibits only intentional discrimination. (See Industry #4, Supp. p. 2; Non-governmental organization #20, p. 1-4; #93, p. 1-12; State #52, p. 16.) An industry commenter said attempts to broaden Title VI's coverage to disparate impacts must be done by rulemaking supported by evidence of discrimination. (See Industry #4, Supp., p. 2.) A non-governmental organization said that causation is a basic element of a claim. (See Non-governmental organization #93, p. 12-13.) By contrast, a law professor commended EPA for focusing on disparate impacts, rather than discriminatory intent. (See Academic #3, p. 2.)

Low-Income Populations:

Some commenters recommended that EPA clarify the scope of Title VI and distinguish its reach from the broader reach of E.O. 12898. In their view, Title VI applies only to "protected classes," while E.O. 12898 considers both protected classes and low-income populations. (See State #58, p. 10-11; Industry #12, p. 3-4.) In addition, one commenter noted, Title VI applies to recipients, while E.O. 12898 refers to the federal government.

(See State #58, p. 10-11.) A local government supported a comprehensive approach to environmental justice, which integrates consideration of low-income populations as well as "race, color, or national origin" into existing regulatory programs. (See Local #1L, p. 2-3.)

State-Funded Programs:

One State urged that EPA clearly limit applicability of its guidance to federally delegated state permit programs, not to state-funded programs which receive no federal funding. In fact, this commenter observed, encompassing permit renewals and minor modifications in non-federally delegated permit programs would have a significant effect on state resources because a single state can receive, on average, over 2,000 requests for permit renewals annually. (See State #63, p. 2.)

One State recommended EPA clarify whether Title VI applies to a state environmental permitting program which does not receive federal funding if EPA provides some funding to a non-permitting program of the same state agency. (See State #18, p. 9.)

Pass-Through Funding:

One State disagreed with EPA's conclusion that a Title VI violation by a local political entity receiving pass through money from the state impacts all federal funding of the state entity. This State argued that, under Title VI, only the federal funding that was passed through to the local government unit should be terminated. (See State #18, p. 10.)

Intentional Discrimination and Non-permit Programs:

Several commenters stated Title VI's reach is broader than disparate treatment from permitting. (See Non-governmental organization #22, p. 10; #64, p. 1-2; Task Force #61, p. 4.) One asked EPA either to include in the guidance reminders that individuals suffering intentional discrimination or discrimination in the public process should submit complaints as well. (See Non-governmental organization #64, p. 1-2.) Others requested guidance in other areas, including intentional discrimination, public participation, enforcement, grants, and remedial actions. (See Non-governmental organization #22, p. 10; Task Force #61, p. 4.)

AREA-SPECIFIC AGREEMENTS:

Types of Approaches:

One local government observed that, of the three approaches EPA suggests, a Comprehensive Approach would be prohibitively burdensome and impractical, an Area-Specific Approach would require extensive air quality and meteorological monitoring and be very taxing with regard to costs, but a case-by-case approach offers the most flexibility. (See Local #14, p. 2.)

An industry commenter thought the guidance inappropriately pushed States solely toward Area-Specific Approaches. (See Industry #91, p. 11.) Several academic commenters said that, properly crafted, these types of recovery plans with multiple stakeholder participation are a means to accomplish real progress in impacted communities. (See Academic #3, p. 3; #33, p. 3, 6.) Other commenters sharply disagreed, calling EPA's encouragement of such agreements illegal and unwise. (See Non-governmental organization #22, p. 31-36; Task Force #61, p. 25-29.)

Area Boundaries:

One industry commenter observed that the guidance offers little direction on how to establish the boundaries of the areas to be included in area-specific agreements; this commenter recommended the smallest reasonable scope for these areas. (See Industry #5, p. 8.) One commenter asked EPA to address potential conflicts along area boundaries among those participating, and not participating in, area-specific agreements. (See Industry #37, p. 3.)

Clarity of the Guidance:

One State requested more guidance on the area-specific approach to assist in identifying geographic areas where adverse disparate impacts may exist and comparison areas. (See State #18, p. 7.) Several commenters urged better-defined parameters. (See Non-governmental organization #21, p. 3; Academic #33, p. 5; Industry #37, p. 3.) One State asked for a definition of the level of protection needed. (See State #52, p. 11.) An industry commenter emphasized the agreement should focus only on significant, adverse disparate impacts resulting from actual releases and give "due weight" to pre-existing permit conditions. (See Industry #60, p. 9.)

Content of Agreements:

An academic commenter urged EPA to be conservative in measuring a plan's expected emission reductions because there is little or no margin for error in highly impacted communities. (See Academic #33, p. 5-6.)

Parties - Communities:

Several commenters expressed concern that parties to area-specific agreements fairly represent the affected community. (See Non-governmental organization #22, p. 34; #36, p. 7; #40, p. 7; #46, p. 30; #74, p. 2; #82, p. 7, 12; Task Force #61, p. 28.) Some urged EPA to investigate independently whether parties were adequately representative and had competent representation. (See Non-governmental organization #22, p. 34; #40, p. 7; Task Force #61, p. 28.)

Some urged that area-specific agreements should not bind parties to future disputes who were not involved in the original investigation and informal resolution process. Alternatively, preclusion should occur only where there are procedural safeguards, akin to those in class action suits, to ensure that the interests of all members of the class have been fairly represented. (See Non-governmental organization #36, p. 7; #40, p. 7; #46, p. 30.)

One commenter suggested that the extent of full participation by the complainant affect the weight given the agreement. (See Academic #33, p. 5.)

Parties - Industry:

State and industry commenters expressed concern over the extent to which agreements might affect parties who were not involved in developing the agreement but whose facilities are within or immediately outside the established boundaries. (See State #18, p. 7; Industry #5, p. 8.) An industry commenter questioned whether such facilities could be forced to meet the voluntary standard without an opportunity to participate in the agreement? (See Industry #5, p. 8) A State recommended that the guidance specifically solicit the participation of affected facilities. (See State #18, p. 7.)

Parties - Local Government:

Several commenters observed that the role of local governments is ignored and suggested that the guidance specifically solicit the participation of local government entities (i.e., cities and counties). (See State #18, p. 7; #89, p. 5; Industry #12, p. 2.)

"Due Weight" for Agreements:

An industry commenter supported EPA's decision that area-specific agreements may be used to accord "due weight" to state or local permitting. (See Industry #5, p. 8.) This commenter suggested finding that such agreements reduce adverse disparate impacts to the point required by Title VI so that subsequent complaints could be dismissed. (See Industry #5, p. 8.)

Others remained troubled by EPA's assertion that it could not rely entirely on a recipient's assertion that a Title VI approach had been followed. They pointed out that localities expending time and resources on area-specific approaches may not derive any benefit if EPA may simply ignore such efforts when determining if Title VI has been violated. (See Local #14, p. 2; #1L, p. 1; Industry #12, p. 5.)

Still others believed that EPA had proposed affording too much deference to area-specific agreements. (See Non-governmental organization #22, p. 31-36; #62, p. 7; #81, p. 2; Academic #3, p. 7; #33, p. 3-4; Task Force #61, p. 25-29.) Some argued that the proposed deference thwarts EPA's legal responsibilities to investigate complaints. (See Non-governmental organization #22, p. 31-35; #62, p. 7; Academic #44, p. 3-4; Task Force #61, p. 25-28.) Some urged that EPA should not give "due weight" to an agreement lacking adequate enforcement mechanisms, including provisions allowing for EPA enforcement. (See Non-governmental organization #22, p. 34; #40, p. 8; Task Force #61, p. 28.) Some recommended assessing the fairness and effectiveness of an agreement before according it weight. (See Non-governmental organization #21, p. 3; #22, p. 34; Task Force #61, p. 28.)

Disregarding an Area-Specific Agreement:

Stakeholders argued for different thresholds for deciding when to disregard an area-specific agreement.

An industry commenter requested that EPA set a high threshold for, and explain the types of evidence that would be required to determine when, an agreement should be set aside due to changed circumstances or improper implementation. (See Industry #5, p. 8.)

Several commenters argued for caution in deferring to area-specific agreements when considerable time had passed or when circumstances had changed. (See Non-governmental organization #22, p. 34; #46, p. 30; #62,

p. 8; Academic #33, p. 4; Task Force #61, p. 28.) Some proposed clarifying that new permitting actions resulting in new emissions constitute such "changed circumstances" that an area-specific agreement is no longer entitled to "due weight." (See Non-governmental organization #22, p. 35, 39; #62, p. 8; Academic #33, p. 4; Task Force #61, p. 29, 33.). An academic commenter proposed that emissions from subsequent permits be offset or mitigated within the same impacted area in a greater than 1:1 ratio to prevent new emissions from consuming the gains from the previous agreement. (See Academic #33, p. 4-5.)

Enforcement of Agreements:

Many commenters expressed concern about enforcement of area-specific agreements. (See Non-governmental organization #22, p. 34; #36, p. 6-7; #46, p. 29; #62, p. 7; #81, p. 2; Task Force #61, p. 28; Industry #16, p. 2, 21, 37; #37, p. 4.)

Some commenters noted that such agreements, as outlined in the guidance, do not contain mechanisms to: a) ensure compliance with pollution reduction, pollution prevention, or environmental justice goals, b) monitor progress, c) revise the plan to meet changed circumstances (including new environmental standards), or d) allow community groups to enforce the agreement in court. (See Non-governmental organizations #22, p. 34; #36, p. 6-7; #62, p. 7; Task Force #61, p. 28.) Some commenters worried about participants not performing or otherwise dropping out. (See Industry #16, p. 37; #37, p. 4.) One proposed that such agreements be treated like settlement agreements, which must provide for enforcement by EPA. Under this proposal, enforcement would also be required for area-specific agreements negotiated directly between recipients and complainants. Both EPA and communities would have an active role in such monitoring and enforcement in order for an agreement to receive “due weight.” (See Non-governmental organization #46, p. 29.) Several commenters also proposed that, if complaints allege noncompliance with an agreement, EPA thoroughly investigate. (See Non-governmental organization #36, p. 6; #46, p. 29.)

Clean Air Act Parallels:

Several commenters noted parallels between the proposed area-specific agreements and various Clean Air Act requirements. Some drew a parallel with the practice of certifying state implementation plans (“SIPs”) under the Clean Air Act. These commenters noted that such plans have

failed to prevent unlawful pollution since 119 areas of the country remain nonattainment for one or more listed pollutants 29 years after passage of the Act. (See Non-governmental organization #22, p. 34-35; #62, p. 8; Task Force #61, p. 28-29.) A State observed that the area-specific approach is very similar to the Clean Air Act process of a SIP call for areas not meeting national ambient air quality standards. However, the State believed that, unlike the Clean Air Act, there is no regulatory basis that would allow the state to make an environmental justice SIP call and no leverage to enforce such a plan. (See State #58, p. 10.)

Adverse Consequences of Agreements:

Industry commenters identified numerous adverse effects that could emanate from area-specific agreements, including discouraging businesses from locating in the area, discouraging beneficial changes to existing facilities and their pollution controls, and encouraging the filing of frivolous complaints. (See, e.g., Industry #4, p. 3; #12, p. 4; #16, p. 5; #24, p. 4; #37, p. 4, 12-13; #51, p. 4; #60, p. 9; #91, p. 15-18; State #52, p. 11-12, 15.) One argued that businesses would be coerced into agreements to avoid Title VI complaints (see Industry #24, p. 3-40), but this and another commenter also argued that, because agreements offer so little protection, few facilities would find it in their interest to agree. (See Industry #24, p. 3-4; #60, p. 9.) One commenter worried about liabilities (such as joint and several liability) that could attach to participants. (See Industry #37, p. 4.)

COMPARISON POPULATIONS:

Defining the Populations and Methodology:

Numerous commenters believed the guidance does not adequately define how to compare an affected community with a comparison population. (See State #39, p. 4; #67, p. 2-3; #88, p. 2; 89, p. 2; Industry #5, p. 11; #12, p. 5; #16, p. 2, 11, 19-21, 38; #28, p. 2; #37, p. 8-10; #60, p. 5-6; #3L, p. 3; Local #25, p. 3; Non-governmental organization #20, p. 5; #21, p. 7; #36, p. 11; #40, p. 10-11; #46, p. 25; #62, p. 14.)

Several commenters elaborated on the questions raised by the guidance. Some questioned whether the comparison should be between: 1) the affected population and the general population (excluding members of the affected population), or 2) the affected population and the non-affected population? Should the analysis compare: 1) the prevalence of race, color, or national origin, 2) the risk of adverse impacts, or 3) both? (See Non-

governmental organization #40, p. 10-11; #62, p. 14.) Another added: The reference area could be the recipient's jurisdiction, a political jurisdiction, an area defined by environmental criteria, or the entire State. The comparison population could be either the general population or the non-affected population. The assessment could include one of six different comparisons of demographic characteristics. There is no discernible basis for choosing among competing sets of criteria and, within each set of criteria, there are numerous undefined choices that could produce different results. (See State #39, p. 4.)

Some emphasized the affected and non-affected populations should be defined clearly and separately so as not to be coterminous. (See Non-governmental organization #21, p. 7; #46, p. 25.) One commented that the most preferable comparison should be between the affected and non-affected population because including the affected population in the comparison population artificially reduces the disparity. (See Non-governmental organization #46, p. 25.) Another suggested the comparison should not be between the non-affected and the affected populations, but rather among the demographic characteristics of all of the affected communities. (See State #67, p. 2-3.) Another cautioned against comparing the most likely to the least likely affected population, since this comparison bases policy on only ten percent of the population. (See State #52, p. 4-5.)

One commenter volunteered examples of more definitive guidance: compare urban settings to urban settings and consider similar proximity to key features like transportation infrastructure or industrial facilities. According to this commenter, it would not be appropriate, in most cases, to compare populations in widely separated geographic areas because geographic features, meteorology, etc. can have large impacts on the formation and movement of pollutants. (See Industry #5, p. 11.) One commenter noted the comparison population should have land use patterns similar to those of the affected population (e.g., a similar balance of rural, urban, and suburban areas and a similar range of residential, commercial, and industrial activities. (See Industry #16, p. 19-21.)

One stakeholder commented that the guidance suggests every permit must be subjected to area-wide modeling, which is time-consuming, requires enhanced resources, and may yet fail to yield a scientifically valid result. (See Local #25, p. 3.)

A State observed that the test appears to make a finding of disparate impact inevitable because the portions of the two population related variables being tested for independence represent the extremes of their respective distributions. (See State #67, p. 2-3.) An industry alleged a finding of disparate impact is inevitable because the minority population is subdivided by demographic group, rather than considered as a whole. (See Industry #4, p. 7.) This same commenter objected to use of a statewide average minority population as a reference population. (See Industry #4, p. 7.)

Finally, one commenter challenged the notion that disparately affected subgroups can be identified and compared given current scientific knowledge. (See Industry #37, p. 2.)

Case-by-Case Flexibility:

One commenter argued for preserving flexibility in the guidance. According to this commenter, the guidance should not impose limitations on identifying comparison populations, but should allow them to be determined on a case-by-case basis. (See Non-governmental organization #46, p. 25.)

Interpreting the Results of Multiple Comparisons:

Some commenters believed that the guidance lacked clarity as to what the outcome would be if the results of two or more comparisons are different. (See Non-governmental organization #40, p. 10-11; #46, p.25.) One argued disparity between the affected population and any comparison population should be sufficient for a finding of disparate impact. (See Non-governmental organization #46, p.25.)

Significance of Results:

One commenter advised that the threshold for finding disparity based on comparisons is too high. Requiring "a significant disparity" that is "clearly evident in multiple measures of both risk or measures of adverse impact and demographic characteristics" is impractical and unrealistic given the errors, omissions, and uncertainties often associated with demographic data. (See Non-governmental organization #46, p. 25.)

An industry commenter argued that the threshold for finding disparity cannot be slight; it must be sufficiently high with respect to both the level of risk or impact and the proportion of minority to non-minority persons exposed. (See Industry #4, p. 7-8.)

Statistical Significance of Results:

A State observed that a statistically significant difference cannot be determined to exist between only two numbers (i.e., the affected and comparison populations). However, one could determine if the minority population of one population is at least 2 to 3 standard deviations above the mean of the distribution of minority populations of all the communities. If this is done, however, there is no single comparison population. (See State #67, p. 3.)

Alternative Approaches:

A State recommended an alternative to the comparison population method; namely, the Emission Index Approach to Analysis found in Perlin (1995) "Distribution of Industrial Air Emissions by Income and Race in the United States: An Approach Using the Toxic Release Inventory." Environmental Science and Technology, p. 75. (See State #67, p. 3-4.)

COMPLAINTS:

Thresholds for Accepting Complaints:

Several commenters proposed that EPA establish stricter thresholds of specificity for acceptable complaints. (See State #13, p. 1-2; #52, p. 16; #83, p. 1; #89, p. 4; #2L, p. 2; Industry #12, p. 5; #72, p. 6.) Reasons offered included the resources government will invest in resolving the allegation, (see State #13, p. 1-2; #2L, p. 2), the difficulty of filing a recipient response (see State #63, p. 2; #2L, p. 2), and the fear of frivolous complaints. (See State #52, p. 16; #89, p. 4; #2L, p. 2; Industry #12, p. 5.) Some commenters proposed that more effort be made to identify incremental approaches which will quickly separate serious situations from less threatening ones. (See State #13, p. 1-2; Industry #60, p. 2.) (See also Local #14, p. 8; #82, p. 11.)

Criteria for Complaints - Jurisdiction:

Several commenters urged EPA to make the jurisdictional requirement of federal financial assistance more obvious to complainants in the guidance since complaints are often rejected for failing to fulfill this criteria. (See Non-governmental organization #22, 14; Task Force #61, p. 8.) A non-governmental organization asked EPA to spell out, and illustrate with examples, the type and specificity of other allegations needed in a complaint so as to avoid dismissals. (See Non-governmental organization #21, p. 2, 5.)

Several commenters urged EPA to accept complaints that lack a telephone number because many potential complainants do not have one. (See Non-governmental organization #22, p. 14; Task Force #61, p. 8.)

Criteria for Complaints - Notice Pleading:

Several commenters complained that the guidance inappropriately extends the bounds of notice pleading because complainants are simply allowed to allege that a violation has occurred. (See Local #25, p. 2; State #52, p. 16; #58, p. 6; #63, p. 2; #2L, p. 2; Industry #12, p. 5; #3L, p. 2.)

Proponents of this viewpoint offered EPA several alternatives. One proposed that complainants at least be encouraged to state the nature of the violation, why they believe the action violates Title VI, and (briefly) the nature of the harm. This requirement, the commenter believed, would avoid unnecessary expenditures of resources, wasted time, and unwarranted delay. (See Local #25, p. 2.) Another recommended requiring identification of the type of disparate impact and the affected population. (See State #2l, p. 2.) A third proposed requiring explicit documentation of the alleged discriminatory act so the recipient would have sufficient information to respond. (This commenter also proposed allowing the recipient to ask for a more definite statement of the alleged discriminatory act.) (See State #63, p. 2.) One commenter urged EPA to require the complaint to be "complete." (See Industry #4, p. 2-3.) A non-governmental organization urged EPA to require complaints to plead that environmental permitting causes the discriminatory effects in question. (See Non-governmental organization #93, p. 13.)

Criteria for Complaints – Clarity:

Several commenters approved EPA's decision to request clarification if a complaint is unclear. (See Non-governmental organization #22, p. 22; Task Force #61, p. 7; Academic #3, p. 6-7.) On the other hand, an industry commenter urged EPA not to investigate impacts or stressors where the complaint is unclear, because this could produce a fishing expedition, encourage open-ended complaints, and overextend EPA resources. (See Industry #80, p. 8.)

Criteria for Complaints – Emissions and Emissions Data:

A local government commenter proposed that EPA specify criteria for complaints, including, at a minimum, previous or current emissions data and

projected unmitigated emissions. This commenter believed that the absence of such criteria could be an invitation for frivolous filings, swamping EPA with complaints. (See Local #50, p. 7.) One commenter proposed that complaints be required to be specific to a single pollutant or group of pollutants, rather than addressing cumulative effects. (See Industry #37, p.7.)

Criteria for Complaints - Evidence:

A State commenter proposed that EPA require a threshold of evidence of intentional discrimination or discriminatory effects for complaints to be investigated fully. (See State #18, p. 3.)

Criteria for Complaints – Verification of the Allegations:

A State commenter recommended that, before accepting a complaint, EPA should determine the veracity of the complaint and that the complaint broadly reflects concerns of the impacted community so as to avoid wasting resources. (See State #89, p. 4.)

CUMULATIVE RISK:

Clarity of the Guidance:

Many commenters observed that the standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, lack specificity. (See State #73, p. 3; #89, p. 2; Local #41, p. 2; Industry #6, p. 3; #12, p. 4; Non-governmental organization #21, p. 2-3, 6; #65, p. 3.) Some worried that sound peer-reviewed science would not be used. (See State #89, p. 2; Industry #6, p. 3; #12, p. 4.)

Tools for Assessing Cumulative Risk:

Several commenters emphasized the weakness of our current scientific tools in determining cumulative impact. (See State #13, p. 2; #39, p. 5; Industry #37, p. 7.) Given the demands on limited resources, one State commenter suggested EPA explore more incremental approaches to accepting complaints and conducting investigations. (See State #13, p. 2.)

De Minimis Risk Levels:

Some commenters argued that cumulative impact analyses cannot be completed for the large number of permits issued because neither the modeling tools nor the detailed input data are available. Therefore, these commenters believed EPA should establish incremental *de minimis* risk

levels that can be used to screen out projects or facilities that do not significantly contribute to health risks. (See Local #14, p. 7; Industry #37, p. 7, 8.)

One commenter supported EPA's risk benchmarks as commonly accepted. (See Industry #60, p. 7.) However, this commenter asked EPA to clarify whether populations (as opposed to individuals) are to be compared to risk benchmarks.

One commenter stated EPA inappropriately used risk levels for judging the significance of incremental health risks (e.g., the risk from drinking water contaminated with a particular pollutant) to judge the significance of cumulative environmental risks. (See Local #14, p. 6, 7.) Other commenters also cautioned against using benchmarks developed for individual permits to address cumulative impacts. (See Local #1L, p. 3; Non-governmental organization #36, p. 9.)

State and local government commenters questioned the utility of EPA's *de minimis* risk levels because cumulative cancer risk from air pollutants is believed to be above 1 in 1 million everywhere in the U.S. and may be generally above 1 in 100,000 in major urban areas nationwide. (See State #58, p. 7; #73, p. 3; Local #14, p. 6; #82, p. 12.) One commenter believed that the urban air toxics program, which is cumulative in nature, provides more appropriate benchmarks for adverse impact than the 1 in 10,000 risk factor developed for individual pollutants and discussed in EPA's guidance. (See Local #1L, p. 3.)

Several commenters thought a cancer risk greater than 1 in 1,000,000 a more appropriate benchmark. (See Non-governmental organization #22, p. 44; Task Force #61, p. 37.)

Some commenters asked what benchmarks to use in evaluating non-carcinogens, chronic toxicity potency factor scores, or chemical concentrations. (See Non-governmental organization #21, p. 6; #36, p. 9; State #58, p. 7.)

Some entreated EPA to consider the genetic susceptibility of the affected racial/ethnic population to environmentally related illness in assessing risk levels. (See Non-governmental organization #65, p. 5.) (See also Non-governmental organization #36, p. 9.)

Cumulative Impacts;

Several commenters urged EPA to follow NEPA regulations and case law and consider "reasonably foreseeable" future impacts and "indirect" impacts in cumulative impacts. (See Non-governmental organization, #40, p. 9; #65, p. 2.)

Synergies:

Several commenters urged that assessments always include: a) the additive effects of exposure to multiple chemicals, and b) synergies between multiple chemicals, such that their combined effect is far more severe than the sum of individual impacts. They urged EPA to:

a) incorporate chemical synergies wherever data is available,
b) conduct, and encourage states to conduct, further research into chemical synergies (drawing, for example, on existing state and local initiatives such as the Multiple Air Toxics Exposure Study of the South Coast Air Quality Management District), and
c) adopt precautions with respect to unknown risks.

(See, e.g., Non-governmental organization #21, p. 1-2, 4, 6; #40, p. 9; #46, p. 20.)

Addressing Unknown Risks:

One commenter proposed that EPA adopt a precautionary principle with respect to unknown risks: i.e., where risks are unknown, they should be treated as adverse impacts and a disparity analysis conducted to determine the extent to which these unknown risks are unequally distributed. This commenter believed that communities of color should not be disproportionately exposed to substances of uncertain harmfulness; these risks should be borne across society. (See Non-governmental organization #46, p. 20.)

Duration of Exposure:

One commenter proposed that EPA clarify that cumulative risk is determined for annual or lifetime risk resulting from exposures to pollutants from the facility at issue. (See Industry #5, p. 10.)

DATA:

Data – Accuracy and Measurement:

Several commenters emphasized the importance of accurate, measured data. (See Industry #4, p. 7; #5, p. 10; #12, p. 4; #16, p. 3, 38; #60, p. 7; #91, p. 17-18.) Some worried about EPA's willingness to use less than the best available data; they urged that the data be sufficient to support EPA's findings. (See Industry #16, p. 2, 21, 27-29; State #52, p. 8.)

Some commenters discussed the hierarchy of available data sources. Some advised it is preferable to use actual or monitored data if available, then modeled data. (See Industry #5, p. 10; #12, p. 4; #60, p. 7; #91, p. 17-18.) Others stressed that "known releases of pollutants" are preferable to modeled data. (See Non-governmental organization #22, p. 43, 57; Task Force #61, p. 36, 51.) When it becomes necessary to use modeled data, EPA must ensure the modeling is based on scientifically sound assumptions, said one commenter. (See Industry #5, p. 10.) One commenter asked how to proceed if health effects are not measured, but based on modeling only. (See Industry #37, p. 8.)

Some commenters emphasized the importance of actual, as opposed to potential releases. They observed that measures of product production and use, storage of pollutants and their potential for release, or activities "associated" with potential exposure are generally not reliable enough to determine actual exposure and risk and, consequently, to demonstrate an impact. (See Industry #5, p. 10; #16, p. 27-29; see also Industry #60, p. 8.)

One commenter observed that EPA databases such as TRI and CERCLIS have data of varying quality. This commenter contended that some of the most common EPA databases are not sufficiently reliable for use in Title VI investigations. (See Industry #16, p. 29.)

Finally, some States concluded that the guidance is fundamentally flawed because it fails to use available tools and science. (See State #39, p. 3, 11; #52, p. 8; #83, p. 1; #89, p. 1, 5.)

Data – Avoiding Overly Scientific Approaches:

Several commenters opposed EPA's emphasis on scientific facts and technical data. (See Non-governmental organization #22, p. 41; #23, p. 3; #46, p. 20; #59, p. 20-22; #62, p. 7; #68, p. 2.) One explained that a standard that requires studies to conform to "accepted scientific approaches" favors submissions by industry and states over submissions by affected low-income communities (which generally lack resources to pay for

comprehensive studies.) This commenter advised EPA either to conduct its own studies or to afford studies submitted by low-income communities weight out of respect for their limited means. (See Non-governmental organization #62, p. 7.) Another commenter reasoned that the Integrated Human Exposure Committee of the Science Advisory Board concluded that no method of adverse impact analysis limited to scientific evidence would be very effective, given the inherent limitations of risk assessment and the difficulty imposed by the 180-day deadline for processing complaints. (See Non-governmental organization #46, p. 20.) One stressed that some measure of value should be given to qualitative factors that are not quantifiable, such as proximity to the source. (See Non-governmental organization #36, p. 9.)

Developing Better Risk Assessment Data:

An industry commenter encouraged EPA to develop better environmental data on risk assessment. (See Industry #5, p. 10.) See also the section of this report entitled "Adverse Disparate Impact Analysis: Uncertainty of the Guidance."

Usefulness of Current Measurement Tools:

One commenter believed that the guidance already contains a useful list of resources for obtaining demographic and exposure data and of tools and methodologies for conducting adverse impact analysis. According to this commenter, the most useful way EPA can assist states is to update these lists continually and to provide more specific guidance on the methodologies EPA will accord due weight. (See State #18, p. 9.)

Use of Industry Data:

An industry commenter recommended EPA seek relevant data from the permittee (i.e., emissions estimates based on facility specific parameters.) (See Industry #5, p. 10.)

Use of Community Data:

Several commenters pointed out that the guidance overlooks potentially valuable resources. Sources mentioned include: well-documented community-based research, anecdotal evidence (e.g., coincidences between childhood asthma incidences or soil discoloration and facility activities), citizen testimony from multiple sources documenting identical impacts, and local government records (of emergency services or traffic counts on streets). (See Local #41, p. 2; Non-governmental

organization #59, p. 17; #62, p. 7; Local #41, p. 2.) One commenter recommended that EPA ensure that data measurement and analysis are available to communities. (See Local #41, p. 2.)

Use of Census Data:

One commenter commended EPA for endorsing the use of 1990 census data (until year 2000 data becomes available) and urged EPA to issue a bulletin to its Regions explaining the rationale for this choice. (See Industry #4, p. 5.) One commenter criticized census data as ten years old. (See Industry #37, p. 8-9.) One commenter urged that the Shintech demographic analyses using 1990 census data not be used as models. (See Industry #80, p. 11-12.) One commenter noted historical flaws with census data, including failure to identify minorities, those who do not speak English, and pockets of minority or low-income residents. (See Non-governmental organization #36, p. 11-12.)

Causal Link Between Impacts and Activities:

Some commenters supported the need for a causal link between impacts and the recipient's permit program. (See Industry #12, p. 4; #16, p. 8-9, 10, 29; #28, p. 2; State #52, p. 2-3, 8-9; #2L, p. 2.)

Others found calls for evidence of a "direct causal link" between discriminatory activities and impacts inappropriate. (See Non-governmental organization #21, p. 1-2; #22, p. 43; #59, p. 11; #62, p. 11; Task Force #61, p. 37.) Some reasoned that such evidence is virtually impossible to acquire in a reasonably short timeframe (except in the most extreme cases of toxic poisoning) because it requires data systematically gathered over years, and some impacts, such as cancer, may not manifest themselves for many years after exposure. (See Non-governmental organization #22, p. 43; #40, p. 9-10; #62, p. 11; Task Force #61, p. 37.) Instead, one commenter thought EPA should make clear that:

a) unavailability of data on direct links will not prejudice a Title VI complaint,
b) where ideal evidence is not available, the best available evidence shall be used and given no less weight,
c) approaches based primarily on proximity are always appropriate where other forms of analysis are unavailable, and
d) EPA will focus on exposure to pollution, not solely health outcomes. (See Non-governmental organization #40, p. 9-10; #62, p. 11.)

One State urged additional scientific research to confirm the casual link between an emission and a health effect. According to this commenter, instead of presenting a plan for developing better scientific tools, the guidance simply prioritizes the existing, inadequate tools from most to least effective. A better approach would be to amend the enabling environmental statutes. (See State #58, p. 3.) Some commenters noted that language calling for links between stressors and health impacts failed to account for social, cultural, or economic impacts. (See Non-governmental organization #22, p. 42-43; Task Force #61, p. 36.)

Mapping Tools:

One commenter recommended EPA supplement facility-based mapping with community-based mapping to address cumulative toxic burdens on communities. (See Non-governmental organization #22, p. 57.)

Requiring Racial Data:

One commenter noted that the guidance uses permissive language to describe the need to compile racial data; the commenter urged EPA to clarify that agencies <u>must</u> provide this data. (See Non-governmental organization #64, p. 3.)

Acknowledging Uncertainties in Data:

Industry and State commenters supported EPA's decision to note uncertainties in data where they are known. They argued that EPA should be more explicit about the limitations of data sources and clearer about criteria for establishing data relevance. (See Industry #5, p. 10; #37, p. 8; State #52, p. 1, 4.) One State suggested identifying how: a) accurate are the measurements, b) representative are the data, c) variable is the population, and d) how many sampling units are available. (See State #52, p. 4.) This commenter also suggested accounting for the level of resolution (e.g., census blocks vs. individual tests). (See State #52, p. 2, 4.) One commenter observed that many databases are not designed for purposes of cumulative risk assessments. (See Industry #24, p. 7)

Addressing Deficiencies in Studies:

Several commenters asserted that a standard allowing for dismissal only of those studies with "significant deficiencies" inappropriately allows findings to be based on "moderately deficient" studies. (See Non-governmental organization #22, p. 32-33; #62, p. 7; Task Force #61, p. 26-

27.) Some recommended that EPA: a) not rely on any agency study containing discrepancies, b) conduct its own studies (especially where complainants request an independent study), and c) be flexible in allowing unscientific studies from community groups with limited resources. (See Non-governmental organization #22, p. 32-33; Task Force #61, p. 26-27.)

DEFINITIONS:

"Actual" and "Allowable" Emissions:

One industry commenter observed that these terms are referred to interchangeably throughout EPA's guidance. This commenter believed the proper measure of emissions is actual emissions. (See Industry #5, p. 12.)

"Acute Toxicity:"

One commenter urged EPA to define this term. (See Task Force #61, p. 43.)

"Adequate (or Substantial/Legitimate) Justification:"

Several commenters believed this term is not defined. (See Industry: #6, p. 3; #12, p. 6; #3L, p. 3; State #89, p. 2.)

"Adequate Populations:"

One commenter thought this term is not defined. (See State #83, p. 1.) One commended EPA for using the term "population" rather than minority "community" or "neighborhood" and urged EPA to be consistent with this approach in other guidance documents. (See Industry #4, p. 2.)

"Adverse Impact:"

Many commenters deemed this term not well defined. (See Industry #5, p. 12; #6, p. 2; #12, p. 6; #3L, p. 3; State #58, p. 7-9; #67, p. 1; #73, p. 3; #83, p. 1; #89, p. 2; State #52, p. 7-8; Non-governmental organization #62, p. 4; Local #14, p. 6.) Some commenters asked EPA to explain what it means to eliminate or reduce adverse disparate impacts "to the extent required by Title VI" in terms of both level and demographic distribution of impacts. (See Non-governmental organization #62, p. 4; State #52, p. 10.)

"Affected Population:"

Many commenters believed this term is not clearly defined. (See State #39, p. 4; #52, p. 5-6; #58, p. 8; Local #25, p. 3; Industry #12, p. 3; #16, p. 2, 10, 17-18; #51, p. 3; #60, p. 5.) One emphasized that a recipient

must guess whether a particular area will be considered an environmental justice area and the geographic boundaries of such an area. (See Local #25, p. 3.) One asked EPA to identify the appropriate dispersion models. (See Non-governmental organization #21, p. 7.)

On the other hand, one State believed the guidance already provides a fairly detailed description for characterizing the affected population. (See State #88, p. 2.)

Commenters also criticized the techniques (other than mathematical modeling) for identifying an affected population. Several found simpler approaches based on proximity (such as circles of impact for air releases) unscientific; they urged EPA to require scientifically based exposure assessments. (See Industry #12, p. 5; #24, p. 8-9; State #52, p. 6.) (See also Industry #60, p. 5.) However, one commenter observed that modeling tools by themselves do not consider cultural, economic, and social factors affecting impacts. (See Non-governmental organization #36, p. 11.)

One noted particular difficulty in defining affected populations where long range transport of pollutants is a concern (such as in EPA's acid rain, regional haze, and northeast state ozone transport programs). Rather than allowing complaints from communities several hundred miles away, this commenter proposed that EPA select an area of 50 square miles as appropriate. (See Industry #51, p. 3.)

One criticized the analysis for its emphasis on the size of the affected population, alleging procedural discrimination against smaller populations. (See Non-governmental organization #81, p. 3.)

Finally, one observed that it is important to include in the "affected population" persons who work in an area, eat from area sources, or are otherwise impacted even if they do not live in an area. (See Non-governmental organization #36, p. 11.)

"Area:"

Several commenters found this term vague. (See State #58, p. 8; Local #25, p. 3; #82, p. 13; Industry #24, p. 9; #37, p. 3.) One State suggested it may be preferable to establish a procedure that the county or state will always be the reference area. (See State #58, p. 8.) An industry commenter countered that a geopolitical boundary is rarely relevant and

should be used only when a more appropriate area cannot be found. This commenter recommended using a bioregion (e,g, airshed or watershed) as the first choice, followed by an area with a direct relationship to the proposed project. (See Industry #4, p. 5.) Another commenter suggested that comparison areas should be similarly zoned, because environmental agencies have no authority to allow or require facilities to be located in areas not zoned for such uses. (See Local #82, p. 13-14.)

"Community:"

Several commenters urged EPA to define a community more clearly. (See State #18, p. 7; Industry #12, p. 3; Local #41, p. 1.) One questioned: does "community" mean residents, local governments, or all local stakeholders? (See Local #41, p. 1.) Some asked: how can an agency identify who speaks for the community in a diverse state with many racial and ethnic communities? (See State #18, p. 7; Local #82, p. 7, 12.) One objected to the use of the term "community." (See discussion of "adequate population" above.)

"Comparison population:"

Industry and State commenters advised EPA to define a comparison population. (See Industry #6, p. 3; #12, p. 6; #28, p. 2; #60, p. 5-6; #3L, p. 3; State #83, p. 1; #89, p. 2.) See also the "Comparison Populations: Defining the Populations and Methodology" section of this report.

"Discrimination:"

One State thought a finding of discrimination should require a discriminatory outcome, not merely procedural discrimination. (See State #52, p. 17.)

"Disparate Impact:"

One commenter urged EPA to define this term. (See State #52, p. 16.)

"Disparity:"

One State noted that many urban areas would meet EPA's criteria for demographic disparity and disparity in rates of impact due to urban demographics and urban air toxics concentrations, yet no one would support redlining these areas as likely settings for Title VI complaints. (See State #58, p. 8.)

"Hazardous Pollutant:"

Several commenters observed that the term is singular, but the plural is used in the definition. . (See Non-governmental organization #22, p. 50; Task Force #61, p. 43-44.)

"Impacts:"

Many commenters argued that EPA's definition of "impacts" was too narrow. (See Non-governmental organization #22, p. 6, 40-42; #36, p. 9; #46, p 17, 21; #59, p. 9; #62, p. 9-11, 19; #69; #81, p. 2; Academic #3, p. 4; #19, p. 2-3; Task Force #61, p. 34-36.) Suggestions for broadening the term included encompassing:

- health effects (i.e. actual, or increased risk of, physical, mental, or psychological illness or injury or increased disease vectors),
- environmental effects (i.e., pollution of air, land, or water, noise, odor, vibration, dirt, litter, and aesthetic injury),
- socioeconomic effects (i.e., decreased property value, increased traffic, patterns of permitting based on race, concentration of landfills in minority communities, racial disparities in accessing municipal sewage facilities, and impacts to cultural -- especially indigenous peoples' religious, spiritual, and archaeological resources),
- physical disruption (displacement of homes, new roads, etc.),
- quality of life issues (e.g., contributing to sleep deprivation, interference with peaceful enjoyment of property, stigmatization of a community, racial polarization, or loss of residents' self-esteem). (See, e.g., Non-governmental organization #21, p. 2-3, 5, 7; #22, p. 6, 40-42; #36, p. 9; #46, p 17, 21; #59, p. 9; #62, p. 9-11, 19; #69; #81, p. 2; Academic #3, p. 4; #19, p. 2-3; Task Force #61, p. 34-36.)

Some argued that EPA's failure to address total project impacts violated Title VI, EPA's regulations, or federal case law. (See Non-governmental organization #22, p. 6, 40-42; #62, p. 9-11, 19; Academic #19, p. 2-3; Task Force #61, p. 34-36.) One commenter observed that a clearer definition saves money, decreases OCR labor requirements, enables protected parties to assess whether discrimination has occurred, and expedites complaint resolution. (See Academic #19, p. 2-3.)

By contrast, a State commended EPA for clarifying that the adverse impacts to be considered are the health and environmental ones. (See State

#18, p. 9.) An industry commenter countered that the scope of impacts considered is overly broad and includes factors outside the legal authority of the permit agency. (See Industry #12, p. 4.) Another industry commenter asked EPA not to include unregulated sources in cumulative impacts because recipients lack authority over such sources and such sources are difficult to identify and assess. (See Industry #80, p. 8-9.)

"Informal Resolution:"

Several commenters urged EPA to amend this definition to show that informal resolution can dispose of a complaint before dismissal of the complaint as well as prior to a finding of noncompliance. (See Non-governmental organization #22, p. 50; Task Force #61, p. 43-44.)

"Media:"

Several commenters found the use of the term "compartments" in this definition confusing. (See Non-governmental organization #22, p. 50; Task Force #61, p. 43-44.)

"Pathways of pollutants:"

A State commented that the expectations for this step are not defined. Should other pollutants or pathways of exposure be examined, even if the permit has no relation to them? (See State #39, p. 5.)

"Pollutants of concern:"

One State argued that, where there are multiple pollutants, the guidance does not say which to evaluate, whether to look at each separately, whether to add risks from separate analyses, or whether to look at synergistic effects. (See State #39, p. 4-5.)

An industry commenter advised EPA to clarify that it would focus primarily on pollutants deemed to have localized impacts (e.g., hazardous air pollutants). (See Industry #72, p. 7.)

"Pollution Prevention:"

Several commenters recommended omitting the word "excessive" from this definition. (See Non-governmental organization #22, p. 50; Task Force #61, p. 44.)

"Reasonable Opportunity:"

One commenter advised EPA to define "reasonable opportunity" in the context of filing written statements during the Administrator's review of an administrative law judge's determination. (See Non-governmental organization #22, p. 13.)

"Reasonable Time:"

One commenter asked EPA to define this term. (See State #52, p. 11.)

"Significant:"

Several commenters thought this term is not defined. (See Industry #17, p. 3-4; #3L, p. 3; Non-governmental organization #40, p. 13; State #52, p. 10.) See also the "Significant Impacts" and "Statistical Significance" sections of this report.

"Similar Stressors:"

One commenter asked EPA to define this term. (See Non-governmental organization #21, p. 4.) Several commenters said the definition of stressor should include cultural, religious, social, and economic impacts. (See Non-governmental organization #22, p. 50; Task Force #61, p. 44.)

"Sources:"

One commenter urged that the guidance be clarified to describe the universe of sources, including the full range of sources resulting in potential adverse disparate impacts. (See Non-governmental organization #46, p. 16-17.) A State argued that allowing the type of stressors and universe of sources to be determined on a case-by-case basis is very uncertain, may be broadly inclusive, and does not enable recipients to address complaints proactively. (See State #58, p. 6.)

"Statistical Significance:"

Several commenters urged EPA to amend this definition to reflect the meaning of statistical significance. (See Non-governmental organization #22, p. 50; Task Force #61, p. 44.)

"Substantially:"

One commenter asked EPA to define this term. (See State #52, p. 11.)

"DUE WEIGHT" TO RECIPIENT PROGRAMS:

Support for the Concept of "Due Weight:"

Several commenters commended EPA for offering to give "due weight" to certain recipient activities in determining whether a violation of Title VI has occurred. (See State #18, p. 2; Local #82, p. 6.)

Opposition for the Concept of "Due Weight:"

Others criticized EPA's "due weight" concept for, in essence, according undue deference to a recipient's own assessment of compliance with Title VI. (See Non-governmental organization #22, p. 7, 14, 31-33; #46, p. 27-29; #59, p. 17-18; #81, p. 2; Task Force #61, p. 8, 25-27; Academic #3, p. 7.) Some argued that this effectively shifted the burden of proof to complainants, who must disprove recipients' data. (See Non-governmental organization #22, p. 14; #59, p. 17-18; Task Force #61, p. 8.) Some urged EPA to verify compliance. To do so, they recommended EPA: a) conduct its own first hand investigations of allegations to promote accuracy and completeness, and b) allow complainants to present, review, and respond to, data and analysis. (See Non-governmental organization #36, p. 7-8; #40, p. 6-7; #46, p. 27-29.)

Expanding the Concept to Encompass Equivalent Programs:

Many commenters encouraged EPA to consider expanding its concept of what merits "due weight" beyond what is outlined in the guidance. These commenters urged EPA to establish practical, objective criteria for a recipient program to be given "due weight" even if there is no area-specific agreement. (See Local #14, p. 5; #50, p. 2; #82, p. 1, 5-8; State #18, p. 2-3, 5; #67, p. 2; #73, p. 1-2; #89, p. 3; Industry #12, p. 5; #24, p. 10-11; and #72, p. 1, 9, urging EPA to ease reviews for areas incorporating environmental justice concerns into land use planning.)

One commenter proposed that criteria for acceptable programs include:

1) public participation in program development and implementation,
2) identifying areas of greatest concern for relevant stressors (or use of methods to evaluate cumulative impacts),
3) measures to significantly reduce existing levels of relevant stressors, and
4) measures to ensure that new or modified permits do not cause significant adverse impacts. (See Local #82, p. 2, 4, 7-8.)

Some argued that without an EPA endorsed state program, many states may opt out of the effort to create an environmental justice program, inundating EPA with Title VI complaints. (See State #67, p. 2; Industry #24, p. 10.)

Several commenters observed that the South Coast Air Quality Management District in California has the most rigorous environmental justice program in the U.S. and should be accorded "due weight." (See Local #50, p. 2; Local #82, p. 1.)

Certainty of the Guidance:

Several commenters noted that EPA has not defined requirements for "due weight" specifically enough for recipients to rely on its approach. (See State #18, p. 3, 5, 9; #89, p. 1-3; Local #25, p. 2; Industry #12, p. 6; #3L, p. 4-5.) These commenters recommended that EPA either define a process that provides greater assurance to states, or heighten the threshold for a Title VI complaint to be accepted. (See State #58, p. 3-4, 9; #89, p. 1-3; Local #25, p. 2; Industry #12, p. 5.) (See also Local #50, p. 2, urging expedited review of complaints where "due weight" applies.)

Significance of Deference to Recipient Programs:

A State commenter advised that the "due weight" accorded to recipient programs should be "significant" because: a) significant consideration is vital to States that have developed voluntary environmental justice processes, and b) this will encourage permit applicants to participate in the environmental justice process. (See State #67, p. 2.)

Other State Programs:

A State and local government commenter advised EPA, when reviewing recipient permit programs, to look at other State statutes or programs that further the goals of Title VI (e.g., laws on administrative procedures or public participation). (See State #18, p. 3; Local #1L, p. 2, 6.)

Deference to State Court Proceedings:

One State questioned the degree of deference to be accorded State court proceedings. (See State #52, p. 17.) A non-governmental organization commenter believed EPA should not give state court decisions precedential value for purposes of determining compliance with the federal civil rights embodied in Title VI because state court decisions apply state laws and procedures. Instead, this commenter recommended EPA conduct a

de novo review of such cases. (See Non-governmental organization #64, p. 2.)

EDUCATION:

Public Education:

An industry commenter recommended that EPA actively educate the public about the benefits local communities will reap from the Tier 2 and Sulfur Program. (See Industry #5, p. 2.)

Recipient Education:

One commenter observed that recipients also must be responsible for education, not only about environmental issues, but also about the related economic, social, and land use impacts of a facility. (See Local #41, p. 2.)

Some commenters noted that recipient agencies will need extensive training in exposure, risk and demographic analysis, cumulative impact assessments, and disparate impact analysis or some other source for this expertise is needed. These commenters urged EPA to provide financial and technical assistance and training to recipients. (See State #18, p. 3, 6, 9; Local #82, p. 14; #1L. p. 1.)

Local Government Education:

One commenter advised EPA to conduct extensive outreach and training for local government officials so that they may become aware of the potential environmental justice implications of their decisions. (See Local #82, p. 2, 14.)

ENFORCEMENT OF TITLE VI OBLIGATIONS:

Need for Strong Enforcement of Title VI:

Non-governmental organizations emphasized that Title VI implementation requires adequate, regular, and strong enforcement by EPA and other agencies. They urged EPA to focus on: a) promising to enforce Title VI, and b) outlining different enforcement mechanisms it might employ. (See Non-governmental organizations #11, p. 3; #59, p. 3-4, 8, 11-12; #74, p. 2; #81, p. 2; #84, p. 2.) One suggested EPA develop a compliance counseling function with respect to Title VI in addition to enforcement functions. (See Academic #3, p. 6.)

Addressing the Current Backlog of Title VI Complaints:

Numerous commenters encouraged EPA to move quickly to resolve pending Title VI complaints, citing the current backlog of cases. (See State #53, p. 1; Local #82, p. 4; Non-governmental organization #22, p. 2-10, 30; #34, p. 2; #46, p. 2; #49, p. 1-6; #59, p. 2-3; #62, p. 2, 18; #68, p. 2; #74, p. 1; #78; #5L, p. 3; Congress #45, p. 1-2; Task Force #61, p. 1-4, 36.)

EPA Commitment to Civil Rights Enforcement:

Many commenters criticized EPA for lacking a commitment to civil rights enforcement. (See Non-governmental organization #22, p. 2-6, 9-10, 36; #49, p. 1-6; #59, p. 2-4, 13-14, 18-19; #62, p. 1; #74, p. 1; #84, p. 1; Task Force #61, p. 3-4, 30; Academic #33, p. 2-3.) Some observed that EPA has never investigated a State's Title VI program or activities or found a Title VI violation among the more than 50 administrative civil rights complaints filed, despite numerous research reports revealing patterns of environmental injustice. (See Non-governmental organization #22, p. 2-6, 36; #27, p. 2; #49, p. 2; #75, p. 1; Task Force #61, p. 30; Industry #91, p. 8-9.) A Congressman contended that EPA had ignored appropriations directing it to deal with a complaint expeditiously. (See Congress #45, p. 1-2.) One commenter recommended that enforcement be transferred to another agency. (See Non-governmental organization #59, p. 2, 13-14, 18-19.)

History of Title VI Requirements:

Several commenters stressed that Title VI is not a new requirement; it has been the law for 36 years and EPA's regulations are 25 years old. (See Non-governmental organization #22, p. 5; #46, p. 3; #74, p. 1; #84, p. 1.)

Impact of Judicial Deference to EPA:

One commenter cautioned that, because courts will defer to EPA's guidance, the guidance will greatly influence Title VI enforcement, despite EPA's assertion that the guidance is not "enforceable" by any party. (See Non-governmental organization #46, p. 3.)

EPA OBLIGATIONS:

Applicability of Guidance to EPA Activities:

Many stakeholders found fault with the statement that EPA may follow, or act at variance with, its guidance, depending upon the specific facts presented. These stakeholders complained that this provision reduces

certainty for all parties. They called upon EPA to commit itself to be bound by its own guidance. (See Industry #5, p. 5; #12, p. 5; #60, p. 2; Non-governmental organization #11, p. 3; #22, p. 10-11; State #39, p. 7; #89, p. 1, 2, 5; #2L, p. 1; Task Force #61, p. 4-5.) One added that fairness requires EPA to abide by requirements it would impose on states and local governments. (See State #39, p. 7.) This commenter also inferred from EPA's unwillingess to be bound that the guidance is unworkable. (See State #39, p. 3.) Others inferred a lack of commitment to civil rights enforcement. (See Non-governmental organization #22, p. 10-11; Task Force #61, p. 4-5.) One commenter urged EPA to commit to refer complaints against itself to the Department of Justice for investigation. (See Task Force #61, p. 5.)

JUSTIFICATION:

Opposition to the Concept of Justification Generally:

Many commenters criticized the guidance for allowing recipients to justify an adverse disparate impact if the "challenged activity … meets a goal that is legitimate, important, and integral to the recipient's institutional mission." (See Non-governmental organization #11, p. 4; #21, p. 8; #22, p. 7-8, 47; #30, p. 1-2; #59, p. 4-5; #62, p. 14-15; #64, p. 3; Task Force #61, p. 1-2, 41.) Some argued that virtually any challenged activity can meet this loose standard. (See Non-governmental organization #22, p. 47-48; #59, p. 4-5; #62, p. 14-15; Task Force #61, p. 41.) Others argued that benefits to the larger population should not be used to justify burdening only one segment of the population. (See Non-governmental organization #22, p. 7-8, 47-48; #36, p. 13-14; #46, p. 26; #62, p. 14-15; Task Force #61, p. 1-2, 41.) Others contended that this aspect of the guidance violates Title VI and the 14th Amendment to the U.S. Constitution. (See Non-governmental organization #22, p. 7-8; #30, p. 1-2; #64, p. 3; Task Force #61, p. 1-2.) One insisted that the substantial and legitimate justification must be non-discriminatory. (See Non-governmental organization #11, p. 4.) Another argued EPA must look to what is "necessary," rather than merely claimed. (See Non-governmental organization #64, p. 3.) Others argued that no increase in disease is acceptable. (See Private citizen #9; #43.)

Opposition to the Concept of Economic Justification:

Numerous commenters argued that economic justification should be disallowed as a reason for noncompliance, often arguing that, by definition, it cannot be integral to the recipient's mission. (See Non-governmental

organization #21, p. 8; #22, p. 7-8, 48-49; #36, p. 13-14; #40, p. 12-13; #46, p. 26; #49, p. 6; #59, p. 4-5; #62, p. 15-16; #64, p. 3; #69; #74, p. 2; #78; #84, p. 1; #5L, p. 1; Task Force #61, p. 1-2, 41-42; Academic #3, p. 9; #33, p. 8.) (See also Private citizen #9, #43; Non-governmental organization #22, p. 8; Task Force #61, p. 1-2.) Some added that EPA has not clearly defined what it intends; therefore, EPA has not provided adequate notice and opportunity for comment on this issue. (See Non-governmental organization #46, p. 27; Academic #33, p. 8.) One urged EPA to clarify that, where state action is implicated, the U.S. Constitution establishes a heightened, more protective standard for review of adverse impacts. (See Non-governmental organization #11, p. 4.)

One commenter asked that if EPA adopt a concept of economic justification, it commit to consider community views on whether a facility will provide direct economic benefits to the community. (See Non-governmental organization #21, p. 8.) Others, reading the guidance as already providing this protection, addressed implementation issues. (See Non-governmental organization #36, p. 13-14; Academic #3, p. 9-10.) One urged that EPA recognize a community's right to reject direct economic benefits in light of the disparate impact associated with the activity. This commenter argued that a permit applicants' economic gain should not be valued more than protecting a community from disparate impacts. (See Academic #3, p. 9-10.) Another asked what would happen if the promised benefits did not materialize? (See Non-governmental organization #36, p. 13-14.)

Support for the Concept of Justification Generally:

Many industry and State commenters viewed the ability to justify a disparate impact as a positive element of the revised guidance. (See Industry #4, p. 4; #16, p. 2, 3; 21, 29; #24, p. 3; #51, p. 5; State #67, p. 2; #89, p. 5.

Expansion of the Concept of Justification:

One commenter argued that the test for justification (i.e., show that a challenged activity is reasonably necessary to meet a goal integral to the recipient's mission) is too narrow to comply with Title VI. This commenter viewed the guidance as flawed because it focuses on: a) what is essential to the recipient's success as an institution, b) a particular permit, and c) health and environmental benefits delivered directly to the affected population (as opposed to the broader population). According to this commenter, the

guidance also ignores the fact that, for some facilities (e.g., mining) location of resources dictates siting. (See Industry #16, p. 30-32, 38.)

One commenter proposed three additional types of justification:

- there is no reasonable or feasible alternative to the proposed action, considering cost and other factors;
- the action satisfies an overriding public need; and
- the recipient's program overall does not have discriminatory effect. (See Industry #4, p. 4.)

This same commenter suggested EPA revise its NEPA guidance to incorporate a similar concept of justification. (See Industry #4, p. 4.)

Support for the Concept of Economic Justification:

Several commenters advised that the economic benefit of the facility must remain a justification. (See Industry #12, p. 4; #16, p. 2, 3, 21, 31-32; #51, p. 5; Local #25, p. 3.) One reasoned that:

a) employment benefits the health and safety of the affected community and the local community at large;
b) new or modernized facilities often contain state-of-the-art environmental controls; and
c) lack of economic development relegates communities to less desirable uses, fewer overall benefits, and (often) lower standards of environmental accountability. (See Local #25, p. 3.)

Some argued that justification should be based on the reason for permit issuance, not on the recipient's mission, because many important activities may not be integral to the recipient's mission, which typically relates to a regulatory function. (See Industry #4, p. 8; #12, p. 4.) One commenter argued justification should be based on a reason which "significantly furthers important social goals which the recipient's program is designed to support or allow" because many permitting agencies have relatively narrow missions. (See Local #82, p.10.) Some saw no reason to confine economic justification to *direct* benefits to the affected population. (See Industry #4, p. 4; #16, 30-32.) One concluded that this restriction effectively negated any possibility of showing economic justification. (See Industry #16, p. 31-32.)

Another posited that permit applications to manufacture Tier 2 low-sulfur gasoline justify disparate impacts because refiners have no choice but

to construct new process units to manufacture this fuel and because the overall benefits to society far outweigh any increased impacts to local communities. (See Industry #51, p. 5.)

Certainty of the Guidance:

Several commenters took issue with the right to rebut a justification if there are less discriminatory alternatives. They argued that standards for this determination are lacking, creating uncertainty. (See State #67, p. 2; #89, p. 5.) One commenter suggested EPA include examples of less discriminatory alternatives and disallow permittee costs as a consideration. (See Non-governmental organization #40, p. 13.)

Several commenters commended EPA for choosing case law outlining the strongest standard of justification and least discriminatory alternatives, but criticized EPA for then confusing the guidance by suggesting a different standard. (See Non-governmental organization #22, p. 48; #40, p. 12-13.) One commenter recommended EPA delete the reference to NAACP v. Med. Ctr. (See Non-governmental organization #40, p. 12-13.)

One commenter argued that the "less discriminatory alternative" language is confusing. As worded, there will always be less discriminatory alternatives; the guidance unfairly requires permittees to redress existing environmental conditions which the permittee did not create and to which the permittee may not even appreciably contribute. (See Industry #16, p. 2, 21, 33-34, 38.)

Burden of Proving Justification:

One commenter argued that recipients should have the burden of proving justification after a preliminary finding of noncompliance; consequently, EPA should not inquire on its own into potential justifications for the recipient. (See Non-governmental organization #40, p. 12-13.) By contrast, another commenter argued that placing the burden of proof on recipients was inconsistent with a non-adversarial Title VI process and EPA's duty to investigate allegations. (See Industry #16, p. 32.)

Timing of Consideration of Justification:

Several commenters thought consideration of justification should occur after finding of violation, not during the investigative stage. (See Non-governmental organization #22, p. 13; Task Force #61, p. 7.)

MITIGATION:

Support for the Concept of Mitigation:

Several commenters acknowledged EPA's recognition of cost and technical feasibility in evaluating mitigation and less-discriminatory alternatives as a positive move. (See Local #14, p. 5; #82, p. 6.)

Opposition to the Concept of Mitigation:

Others countered that mitigation must have as its goal the elimination of discrimination, not merely less discrimination. (See Non-governmental organization #22, p. 8, 28, 47; #59, p. 4-6; #62, p. 5; #74, p. 2; #84, p. 1; Task Force #61, p. 2, 22, 41.) Several stated that the guidance should require mitigation to reduce emissions to the extent required by Title VI. (See Non-governmental organization #22, p. 49; Task Force #61,p. 42-43.)

Limits on Mitigation - Site and Pollutants:

Some commenters recommended that EPA require that any mitigation measure address concerns at the actual site and on the medium that is the subject of the complaint (rather than at locations outside the community). (See Non-governmental organization #22, p. 28-29; #62, p. 5, 18; Task Force #61, p. 22-23.) Another commenter urged that mitigation cover the same types of impacts as the challenged permit activity; in other words, that there be a direct offset to the environmental stressors caused by the permit. (See Non-governmental organization #21, p. 3-4.)

However, another commenter advised that projects should be able to put the mitigation where it is needed most (e.g., allow cleaner natural gas trucks and buses in more heavily impacted urban areas for emissions for a new facility in a less impacted suburb.) (See Industry #72, p. 7.)

Limits on Mitigation - Least Discriminatory Alternative:

Several commenters argued that EPA illegally misconstrues case law to allow for less discriminatory alternatives. According to these commenters, the alternative should "eliminate as many discriminatory effects as possible" – a much tougher standard. (See Non-governmental organization #22, p. 49; #46, p. 27; #62, p. 16; Task Force #61, p. 42-43.)

Others observed that, in order to find the least discriminatory option, EPA must consider a wide range of alternatives. However, the guidance fails to discuss: a) how EPA will conduct its alternative analysis, and b) how

cost and technical feasibility will be included. (See Non-governmental organization #46, p. 27; Task Force #61, p. 43.)

One commenter concluded that confining the least discriminatory alternatives analysis to the last stages of the process (and a stage unlikely to be reached) squanders the opportunity to consider appropriate alternatives throughout the process. (See Academic #33, p. 9.)

Limits on Mitigation - Types of Remedial Measures:

Some commenters were troubled by EPA's suggestion that States can propose "broader remedial measures" (such as emission offsets and caps) that are more stringent than underlying environmental standards. They noted that agencies imposing such requirements may be acting outside their legal jurisdiction, inviting legal challenge. (Industry #24, p. 8; #91, p. 12.) Other commenters opposed abatement measures (e.g. household lead removal) which attack other exposure routes than the emitting facility unless these measures are proven to be as effective as eliminating the emitting facility. (See Non-governmental organization #22, p. 29-30; Task Force #61, p. 24.)

Considering Costs of Mitigation:

Some commenters stated that costs of the permit applicant should not be a consideration in assessing the practicability of alternatives, only the costs of the recipient agency. (See Non-governmental organization #22, p. 49-50; #62, p. 17.) One commenter surmised that consideration of costs will perpetuate disparate impacts. (See Academic #3, p.10.)

Enforcement of Mitigation Requirements:

Some commenters stated that EPA should ensure that parties responsible for mitigation actually do it and that complainants have administrative recourse if the responsible parties fail to perform. EPA should also ensure direct review of the mitigation scheme if it doesn't work, without the need to wait for a new permitting action. (See Non-governmental organization #22, p. 31; #62, p. 6; Task Force #61, p. 25.) (See also Non-governmental organization #36, p. 14.) One commenter argued that the mitigation provisions of the guidance do not address the effect of accidents and upsets after a permit is issued. (See Non-governmental organization #59, p. 4-6.)

Community Input to Choice of Mitigation:

Some commenters encouraged EPA to give the affected community a meaningful role in fashioning mitigation plans. They reasoned that, by allowing state agencies to submit a mitigation plan without consulting with the affected community, EPA lacks the input to make a fair determination. (See Non-governmental organization #22, p. 30; #36, p. 3-4; #62, p. 6; #5L, p. 4; Task Force #61, p. 24-25.)

Industry Input to Choice of Mitigation:

One commenter observed that the permittee should have input and concurrence on mitigation measures. (See Local #50, p. 8.)

Mitigation of Cumulative Impacts:

Some commenters entreated EPA to avoid making a single facility mitigate cumulative impacts from multiple facilities. (See Industry #24, p. 7; Local #1L, p. 6.)

NOTICE:

Notice to Permittee:

Numerous industry and local government commenters urged EPA to define the role of the permittee. (See, e.g., Industry #2; #5, p. 3, 5-6; #6, p. 2; #16, p. 2, 21-24, 38; #24, p. 5; #28, p. 2-3; #37, p. 3; #51, p. 3; #60, p. 6; #80, p. 5-6; #91, p. 17; Local #50, p. 8; #82, p. 8.)

Industry commenters recommended that EPA commit to notify the permittee as well as the permitting authority when it receives a Title VI complaint or decides to proceed with an investigation. Reasons for this recommendation included: a) the permittee's interests are at stake, b) the permittee should have the opportunity to offer information; c) the permittee should be able to defend against allegations of disparate impact, d) simple fairness requires such notice, and e) this may allow the community to negotiate directly with the permittee. (See, e.g., Industry #2; #5, p. 3, 5-6; #16, p. 2, 21-24; #24, p. 5; #28, p. 2-3; #60, p. 6; #72, p. 1-3; #80, p. 2-3.) (See also Local #82, p. 8.)

One commenter added that EPA should proactively seek input from the permittee at all points in the investigation and communicate to the permittee on an ongoing basis the status and results of its actions in processing a complaint. (See Industry #5, p. 6.) Other commenters endorsed providing public notice of complaints in the Federal Register, State

register, and local newspapers to ensure that all potentially affected stakeholders received notice (see Industry #16, p. 2, 21, 23-24), or otherwise notifying the community at large. (See Industry #72, p. 1-2.) One suggested putting the burden of notice on the complainant, with reimbursement with interest out of recipient funds to follow if the complaint proved valid. (See Industry #72, p. 2.) Other stakeholders recommended that the permittee receive copies of correspondence between EPA and the recipient (see Local #50, p. 8; Industry #80, p. 2), or otherwise have a right to participate. (See Industry #12, p. 3; #17, p. 8; #24, p. 5-6; #28, p. 2-3; #37, p. 3; #60, p. 6; #80, p. 5-6; #91, p. 17; Local #82, p. 8; #1L, p. 5; State #52, p. 10.)

Notice to Complainant:

One commenter observed the guidance neglects to mention that EPA will notify the complainant as well as the recipient of its preliminary findings. (See Non-governmental organization #64, p. 3.) Others outlined greater participation rights for complainants. (See the "Public Participation: Community Input" section of this report.)

Sufficiency of Notice:

A local government argued that EPA should not find a violation of Title VI requirements in the area of public participation where the recipient provides notice of public hearing above and beyond regulatory requirements and where the recipient's use of a mailing list of interested parties was consistent with regulatory requirements. (See Local #14, p. 3.)

OFFSETS:

Location of Adverse Impacts:

Several commenters recommended EPA ensure that offsets do not reroute pollution to communities which experience an adverse impact, either before or as a result of the offset. (See Non-governmental organization #22, p. 29; #62, p. 6; Task Force #61, p. 23.) (For related comments, see the "Mitigation: Limits on Mitigation - Site and Pollutants" section of this report.)

Location of Benefits:

Several commenters advised EPA to ensure that offsets reduce adverse impacts in the complaining community (as opposed to allowing facilities to pollute such an area in exchange for reducing pollution

elsewhere.) (See Non-governmental organization #22, p. 29; #62, p. 6; Task Force #61, p. 23.)

OTHER AGENCIES:

Intergovernmental Coordination:

Several commenters thought EPA should work with other federal, state, and local agencies and interested stakeholders to address other causes of disparate impacts (such as land use and planning practices, taxation, spending, and other public policies). (See Industry #5, p. 3; State #18, p. 4-5.)

Some commenters said the recipients' guidance needs an expanded, clearer explanation of communication and coordination -- both inter-governmental (among jurisdictions within a region as well as between levels of federal, state, and local government) and intra-governmental (among environment, housing, or economic development agencies within one level of government). (See Local #41, p. 1.) (See also Local #1L, p. 5.)

One industry commenter advised EPA to create a mechanism for working with other federal agencies regarding environmental justice enforcement, especially when multiple agencies have regulatory authority over a single regulated entity (such as an airport). In particular, this commenter advocated working with the Department of Transportation to craft a more definitive direction regarding the applicability of Title VI of the Civil Rights Act to aviation activities. (See Industry #6, p. 2.)

One commenter asked EPA to defer to other federal agencies such as the Department of Transportation, Army Corps of Engineers, and Department of Interior in matters related to their jurisdiction. (See Industry #4, Supp., p. 1-2.) Another commenter asked EPA not to refer complaints to other agencies when EPA lacked jurisdiction over the matter, but instead to reject such complaints outright (informing the complainant of the agency with proper jurisdiction. (See Industry #80, p. 9-10.)

One commenter thought EPA's guidance would become a model for non-permit and non-EPA funded recipients as well; therefore, this commenter cautioned EPA to ensure that the concepts embodied in the guidance are generally applicable to issues of Title VI compliance. (See Industry #4, p. 2.)

One commenter asked EPA to work with other federal agencies on empirical health effects studies. (See Non-governmental organization #21, p. 1.)

Local Government Role:

Many commenters urged EPA to define the role of local governments in the Title VI process. (See State #58, p. 5; #63, p. 3; #73, p. 2; #83, p. 2; Local #41, p. 1; #82, p. 8; #1L, p. 5, 7; Industry #12, p. 2.) Several emphasized either the importance of local government or the impact the guidance would have on land use planning and economic development initiatives at the local level. (See Local #25, p. 1; #41, p. 1; #82, p. 8; #1L, p. 7; State #58, p. 5; #73, p. 2.) Some urged EPA to recognize that local governments have a right to participate. (See Local #82, p. 8; #1L, p. 7; Industry #17, p. 8.) Another encouraged EPA to address local zoning specifically. (See State #63, p. 3.)

Some commenters said EPA should be a catalyst for bringing city and county government agencies to the table with recipient agencies to solve Title VI issues. (See Local #14, p. 3; #50, p. 8.) One urged EPA to modify its guidance to encourage land use planning. (See Industry #72, p. 9.) Others recommended EPA train local land use planners to be more aware of environmental justice concerns. (See Local #50, p. 8; #82, p. 14.)

OTHER SOURCES:

One commenter argued that it was unfair and illegal that permittees operating under the terms of their own permits may be affected at any time by another permit action in their area. (See Industry #5, p. 1, 4, and 8.) This commenter argued that resolution of a single permit action should not mandate permit modifications for other sources in an area. In this commenter's view, if facilities agree to such reductions voluntarily, due process should be afforded to document the voluntary reductions, afford appropriate public notice and comment, and make any resulting agreements binding and enforceable on all parties. (See Industry #5, p. 8.)

PERMITS SUBJECT TO ANALYSIS:

Permits Authorizing Emission Increases:

Many commenters agreed that EPA should only investigate new permits or permit modifications that could result in a significant net increase of actual emissions. (See Industry #4, p. 3; #5, p. 9; #6, p. 3; #16, p. 1, 12-14, 38; #17, p. 5-6; #37, p. 6; #60, p. 3; Local #82, p. 6.)

Some specifically stated EPA should not investigate simple permit changes (i.e., change of name or mailing address) (see Industry #5, p. 9; #16, p. 3, 13; #60, p. 3; Local #14, p. 5; #82, p. 9; State #2L, p. 2), or permit renewals that make no changes in facility operations. (See Industry #4, p. 3; #36, p. 13-14; #37, p. 6; Local #14, p. 6; #50, p. 7.)

Reasons for this position included:

- These permit actions do not create or contribute to disparate impacts. (See Industry #36, p. 13-14; Local #82, p. 6.)
- These permit applicants have severe size, land, process, and cost restrictions that do not affect new construction. (See Local #50, p. 7; #82, p. 7; Industry #17, p. 6.)
- These permit actions do not lend themselves to a reasonable project alternative and mitigation analysis. (See Local #14, p. 6; #82, p. 7.)
- These permits are reviewed to correct any newly surfaced problems. (See Local #14, p. 6.)
- These permits can be monitored by EPA under 40 CFR 7.85(b), which allows EPA to seek compliance information from recipients even in the absence of a complaint. (See Local #14, p. 6; #82, p. 7.)
- It is unfair to subject the permittee to jeopardy merely because the surrounding demographics may have changed. (See Local #82, p. 7; Industry #4, p. 3.)
- A contrary result would impair finality or certainty. (See Industry #17, p. 6; #36, p. 13-14; Local #82, p. 7.)

Some argued that EPA should provide similar assurance that permit modifications will not be investigated. (See State #89, p. 5; Local #50, p. 7.) (See also Industry #37, p. 6, referring to minor modifications.) By contrast, one commenter argued permit modifications should receive the same analysis as new applications in order to address cumulative impacts. (See Academic #3, p. 5-6.)

One State urged EPA to clarify what kinds of permit renewals and what aspects of renewals are subject to de novo review because opening all renewals (even ministerial ones) to complaints may create an unnecessary resource drain. (See State #18, p. 3.) Another State encouraged EPA to include a list of the minor modifications that will not trigger an investigation. (See State #63, p. 2.)

Defining Emission Increases:

One industry commenter advocated that, in determining whether a permit results in a net increase in emissions, EPA consider State offsets (e.g. mobile source reductions to offset emission increases at refineries). (See Industry #5, p. 9.) Another emphasized the importance of counting only actual, not potential, emission increases. (See Industry #60, p. 3.)

Permits Resulting in Emission Decreases:

Many commenters supported EPA's proposal to close an investigation when a permit action "significantly decreases overall emissions at the facility." (See Industry #5, p. 9; #16, p. 3, 14; #17, p. 5-6; #37, p. 6; #51, p. 5; #60, p. 3; State #52, p. 17; #89, p. 4; #2L, p. 2; Local #14, p. 6; #82, p. 9-10.) One argued the recipient should not have to establish "significant" benefit. (See Local #82, p. 9.)

Reasons for this position included:

- There can be no adverse impact if a permit action does not increase emissions. (See Industry #5, p. 9.)
- This will better focus EPA's limited resources. (See Industry #16, p. 14-15.)
- This will facilitate permitting of facilities that lower emissions and provide economic benefits to the community. (See Industry #16, p. 14-15.)

One State decried the lack of standards for dismissing complaints where pollution will be reduced. (See State #83, p. 2.) Some admitted the possibility of making an exception for rare circumstances where a disparate impact occurs because a minority community receives a smaller benefit than a non-minority community. (See Local #14, p. 6; #82, p. 9-10.)

Some commenters objected to the proposal to dismiss complaints involving emission decreases. (See Non-governmental organization #22, p.

37-38; #36, p. 8; #40, p. 8-9; #65, p. 3; #81, p. 2; Task Force #61, p. 31-32.) They explained:

- there can be an increase in a particular pollutant despite an overall emissions decrease,
- pollutants might not be reduced to the same extent as in other communities, or
- the disputed facility might be solely responsible for the alleged disparate impact which, though decreased, could remain significant and disparate. (See Non-governmental organization #22, p. 37-38; #40, p. 8-9; Task Force #61, p. 31-32.)

Defining Emission Decreases:

Several commenters addressed issues which arise in defining whether a permit decreases emissions. One observed that EPA had not defined a baseline against which to assess decreases. (See Non-governmental organization #21, p. 4.)

Some argued that EPA should not allow trades between toxic and non-toxic emissions (see Non-governmental organization #21, p. 8; #62, p. 9); instead, some insisted decreases must come from the same pollutant. (See Non-governmental organization #22, p. 38-39; #62, p. 9; Task Force #61, p. 32-33.) Another advised that EPA should allow the decrease to be demonstrated by comparing the emissions limits found in the old and new permits; in other words, the permittee should not be required to conduct additional monitoring to confirm that the decrease is actual. (See Industry #16, p. 15.)

One cautioned that requiring decreases at the same facility contradicts the thrust of area-wide agreements; it may be cheaper to reduce emissions elsewhere. (See Local #50, p. 7-8.) Another recommended that the decreases occur at the permitted facility to avoid making small emitters clean up an airshed. (See Industry #4, p. 6.) Another commenter urged that EPA not equate "decreases" with temporary facility closures followed by a reopened facility which, though cleaner, still adversely impacts the community. (See Non-governmental organization #64, p. 3.)

Other Potential Exceptions:

Some expressed concern that the type of permit actions which could form the basis of a Title VI complaint are extremely broad; there are no *de minimis* limits on the types of emissions sources or magnitude or nature of

emissions to narrow the scope of the program. (See State #58, p. 6; Local #25, p. 2.) Some complained there is no distinction between applications for temporary versus fixed emission sources. (See Industry #12, p. 3; #24, p. 11.) One used a Superfund remediation to illustrate that temporary, short-term emission increases may result in emission decreases over time. (See Industry #24, p. 11.) Another argued that complaints against Title V permits which simply document existing requirements should be dismissed. (See Industry #51, p. 4.)

One commenter asked EPA to clarify that a Clean Air Act conformity determination does not expose the SIP or transportation plan to Title VI complaints. (See Industry #4, Supp., p. 2.)

PROOF:

Opposition to Overly Stringent Requirements:

Some cautioned EPA not to make evidentiary requirements too strict. They argued that requiring scientific proof that pollution causes a substantial increase in cancer risks and other health problems is inappropriate because: a) low income communities do not have the resources to conduct scientific studies, and b) by the time there is clear documentation of harm, it is too late to protect nearby residents. (See Private citizen #1, #43.) (See also Non-governmental organization #23, p. 3; #49, p. 1-6.) One citizen proposed that the test for a facility be is it safe enough to operate in the middle of a big city? (Private citizen #1.)

Support for Very Stringent Requirements:

Others, fearing frivolous claims, argued that EPA should require complainants to meet stringent standards of proof supported by adequate data (see Industry #6, p. 3), or to have the burden of proving their allegations. (See Industry #12, p. 5; State #89, p. 4.) One commenter argued it was inconsistent for EPA to make recipients bear the burden of proving justification, but to exempt complainants from the burden of proving their allegations. The commenter thought EPA should resolve the inconsistency by evaluating both types of claims independently. (See Industry #28, p. 3.)

PUBLIC PARTICIPATION:

Need for Additional Guidance on Public Participation:

Many commenters spoke to the need for EPA to issue public participation guidance. (See Local #14, p. 2; #50, p. 6; #82, p. 9; State #18, p. 6; Non-governmental organization #22, p. 10; #59, p. 11-12; Task Force #61, p. 4.) A local government urged EPA to outline clearly the responsibilities and participation opportunities for all parties, including the complainant, recipient, permittee, other federal and state agencies (including those with jurisdiction over mobile and other non-permitted sources), local government, potentially affected communities, nearby or similar facilities, general public, and other interested stakeholders. (See Local #1L, p. 5.) One commenter asked EPA to prepare a citizen's guide explaining how to file complaints. (See Non-governmental organization #5L, p. 6.)

A local government commenter recommended expanding other federal programs (such as NEPA) to include the public outreach requirements of this guidance. (See Local #1L, p. 2.)

Evaluation of Existing Guidance on Public Participation:

One State expressed support for EPA's suggestions for public participation and outreach, characterizing these as sound ideas that the State agency has long put in practice. (See State #18, p. 9.)

Several commenters criticized the public participation provisions of this guidance for focusing on education, communication, providing information, etc. – all activities consisting of one-way communications from recipients to communities. Instead, they suggested EPA stress meaningful consideration of public comments. (See Non-governmental organization #22, p. 51-52; Task Force #61, p. 46-47.)

Several commenters emphasized that public participation does not guarantee fairness because of disparities in resources and expertise, time constraints on public hearings, and failure to address cultural and social barriers to meaningful participation. They recommended that EPA take appropriate measures to ensure effective meaningful participation, including providing technical assistance grants to complainants who raise serious health issues and encouraging recipients to create Community Advisory Boards and groups. (See Non-governmental organization #22, p. 51-56; Task Force #61, p. 46-50.) (See also Non-governmental organization #5L, p. 4.)

Community Input:

A local government commenter thought recipients ought to include communities in developing public participation policies and community-based research strategies. (See Local #41, p. 2.)

Several commenters stated EPA should outline the participation opportunities for the complainant. (See Local #1L, p. 5; Non-governmental organization #36, p. 3-5; #81, p. 2; #5L, p. 4.) One suggested that a complainant's rights include access to evidence, an opportunity to comment, an opportunity to respond to a preliminary finding of compliance, a right to periodic status reports (e.g., every 6 months) and a right of appeal. (See Non-governmental organization #36, p. 3-5.)

Permittee Input:

For related comments on the need to define the role of the permittee, see the section of this report entitled "Notice: Notice to Permittee."

Local Input to the Title VI Process:

Several commenters observed that EPA should revise its complaint investigation process to give local governments the opportunity to participate. (See Local #82, p. 2; #1L, p. 5, 7; Industry #17, p. 8.)

Resources for Public Participation:

One noted EPA should devote significant resources to assist recipients in developing and adopting public participation processes which include all stakeholders in the administrative process. (See State #63, p. 2.) One asked for guidance on whether permittees should fund the level of public outreach expected by the guidance. (See State #52, p. 12-13.)

REMEDIES:

Permit Denial as an Inappropriate Remedy:

Several commenters supported EPA's position that denial or revocation of a permit is not necessarily an appropriate solution because it is unlikely that a particular permit is solely responsible for disparate impacts. (See State #18, p. 5; Local #14, p. 4; #82, p. 5; Industry #4, p. 3.)

One worried that the guidance still leaves open the possibility that a permit could be denied. In this commenter's view, the guidance must clarify the circumstances which warrant permit denial or revocation, if any, because: a) due process dictates that project sponsors possess certainty with

respect to process outcome, and b) the guidance may subject the State to legal challenges by a project sponsor. (See State #63, p. 2.)

Permit Denial as an Appropriate Remedy:

Some commenters argued that permit denial may be an appropriate solution because either: a) communities generally raise complaints in response to a single proposed new or expanded facility, or b) a permitting agency's complicity may warrant this remedy. (See Non-governmental organization #22, p. 7, 27-28, 50; #55; #62, p. 5; Academic #3, p. 8; #33, p. 8; Task Force #61, p. 22, 43.) However, some expressed frustration that the guidance makes this remedy practically impossible. (See Non-governmental organization #22, p. 27-28, 50; #81, p. 2; Task Force #61, p. 22, 43; Academic #3, p. 8-9.) Where commenters saw funding termination as unlikely to occur, EPA's reluctance to insist on permit denial left the guidance, in their view, void of an effective remedy. (See, e.g., Academic #3, p. 8-9.)

Voluntary vs. Mandatory Remedies:

One State urged EPA to clarify that many of the listed remedial measures require using voluntary agreements because air permitting agencies have limited authority on permit renewals which do not involve modifications (although there is an opportunity to ensure that the facility is current in its compliance status). (See State #18, p. 6.) Others commended EPA's plan to encourage recipients to reduce disparate impacts voluntarily. (See Non-governmental organization #22, p. 50; Task Force #61, p. 43.)

Funding Withdrawal as an Appropriate Remedy:

Some commenters commended EPA for committing itself, at least in theory, to enforce funding termination sanctions against recipients who do not voluntarily comply after a formal determination of noncompliance. (See Non-governmental organization #40, p. 11; #62, p. 2.) (See also Industry #91, p. 2.) However, some saw this penalty as illusory because: a) it can be applied only after EPA gives 30 days notice to both houses of Congress, and b) since the regulations do not authorize EPA to stay or rescind the permit, the permittee can continue to operate. (See Non-governmental organization #27, p. 2; #75, p. 3-4.) One asked EPA to define the procedures it will use to invoke this remedy. (See State #52, p. 17.) One thought EPA should not be able to postpone funding termination proceedings after starting them. (See Non-governmental organization #40, p. 11.) Several commenters urged

EPA to avoid referring to fund termination as a "means of last resort." (See Non-governmental organization #22, p. 51; Task Force #61, p. 45.)

Referral to Other Agencies:

One commenter asked for an explanation of: a) the basis for EPA's authority to defer to another federal agency, and b) the remedies the other federal agency would have. (See State #52, p. 16.)

Proportionality of Burden:

One commenter urged EPA to consider the fairness of remedies. This commenter proposed a rule of proportionality; i.e., a facility that is a minor part of the problem should not have to bear a major share of the solution. (See Industry #16, p. 2, 21, 36-38.) (See also State #52, p. 2-3, 17.)

Other Remedies:

One commenter thought the guidance needs to be more specific about what air agencies must do to rectify past actions without the counter-productive remedy of fund withholding. (See State #18, p. 2-3, 5, 6, 7.) Another thought the answer is for EPA to assume authority over State programs rather than questioning State decisions. (See Industry #24, p. 3.)

RESOLUTIONS:

Requiring Written Resolutions:

One commenter wanted EPA to clarify that both informal and formal resolutions of complaints need to be reduced to writing and enforceable. (See Industry #5, p. 8.)

Support for the Use of Resolutions:

Some commenters supported the informal resolution provision. (See Industry #4, p. 3; #80, p. 8; Academic #3, p. 3-4.) One noted that it offers the potential to reduce complaints, reach locally satisfying solutions, and, because its use is voluntary, control attempts at extortion. (See Industry #4, p. 3.)

Opposition to the Use of Resolutions:

Several commenters opposed the use of informal resolutions as outlined in the guidance. (See Non-governmental organization #22, p. 7, 11, 51; #23, p. 2; #30, p. 1-2; #59, p. 4-8; Task Force #61, p. 5, 45; Industry #16, p. 2, 21, 34-35, 38.) One commenter thought using such resolutions to

stop investigations prevents essential evidence from being gathered in violation of other federal agency policy on Title VI complaints and the due process and equal protection provisions of the 14th Amendment to the U.S. Constitution. This commenter believed the guidelines should be changed to provide for an investigation immediately after receiving a complaint. (See Non-governmental organization #30, p. 1-2.) Others thought informality hurts complainants and favors violators. (See Non-governmental organization #22, p. 11; #23, p. 2; #59, p. 4-8; Task Force #61, p. 5.) Still others concluded the guidance pressured recipients and industry to make concessions simply to bring a dispute to a close, particularly by inviting recipients to implement measures not ordinarily considered in permitting. (See Industry #16, p. 2, 21, 34-35.)

Feasibility of Resolutions:

One commenter questioned the feasibility of resolutions, the recipient's authority to implement certain methods of resolution, and the basis for EPA's approval authority. (See State #52, p. 16-17.)

Clarity of the Guidance:

One State commenter regarded the guidance as vague on the process of informal dispute resolution. (See State #83, p. 2.) Another thought the absence of clear criteria for success placed unnecessary burdens on States. (See State #89, p. 5.) One commenter urged that resolutions reduce any disparate impacts to the level at which they are no longer significant. (See Non-governmental organization #40, p. 6.)

Parties - Community:

Several commenters objected to EPA's suggestion that the complainant's consent is unnecessary. (See Non-governmental organization #36, p. 4; #59, p. 6-7.) An industry commenter criticized the failure to include complainants in the informal resolution process, arguing that this impairs the credibility of the process and makes judicial action more attractive to complainants. (See Industry #80, p. 4-5.) A non-governmental organization suggested complainants have access to a tentative resolution, an opportunity to comment, and their consent should be required. (See Non-governmental organization #36, p. 3-5.)

Some recommended that, before EPA defers to informal resolutions, it should find, after notice and opportunity for comment, that the complainant entering into the agreement adequately represents the affected community.

(Cf. FRCP 23(e) requiring court approved class action settlements to protect the interests of absent class members.) (See Non-governmental organization #40, p. 7; #62, p. 6, 18.) One commenter added that EPA should also find that the complainant had competent representation. (See Non-governmental organization #40, p. 7.)

Parties – Industry and Land Use Agencies:

A State commenter specified that the guidance should solicit the participation of affected facilities and land use agencies (i.e. cities and counties). (See State #18, p. 7.)

Enforcement of Resolutions:

One commenter urged EPA not to include penalties in such settlements, especially where no investigation demonstrated adverse disparate impacts. (See Industry #80, p. 7-8.) Several commenters insisted that resolutions include adequate enforcement provisions. (See Non-governmental organization #36, p. 5; #40, p. 6.) One suggested a schedule of compliance, automatic penalties, and authority for EPA to enforce the agreement. (See Non-governmental organization #40, p. 6.) Another proposed provisions for monitoring implementation. (See Non-governmental organization #36, p. 5.)

Resources Required for Resolutions:

Several State commenters emphasized that the informal resolutions burdened State resources. (See State #58, p.9; #89, p. 5; #2L, p. 3.) One cited, in particular, EPA's right to reject a resolution as a disincentive to participating in the process. (See State #2L, p. 3.)

RESOURCES:

EPA Resources:

Several commenters urged EPA to provide its Office of Civil Rights with sufficient staff and resources to ensure that investigations are completed in a timely fashion. (See Non-governmental organization #22, p. 12; #62, p. 2; #81, p. 2; Task Force #61, p. 6; Local #1L, p. 3.) Several criticized the length of time current complaints have been pending. (See also the "Timeframes for Action: Resolving Complaints – Backlogged Cases" section of this report.) One State noted that EPA expects complete *de novo* investigations of virtually every complaint, but these investigations are well beyond available budget and staffing levels of EPA's Office of

Civil Rights, which has been able to complete only one investigation in 5 years. (See State #39, p. 6.) (See also Academic #33, p. 3.)

Recipient Resources:

Many commenters expressed concern that the guidance does not adequately address the question of where recipients are to obtain the substantial resources they will undoubtedly need to comply with EPA's guidance. (See State #18, p. 3; #39, p. 3, 6-7, 11; #58, p. 4; #83, p. 1; #89, p. 2-3; Industry #12, p. 2-3; #16, p. 32-33; #24, p. 10; #3L, p. 3-4.)

Some States questioned whether EPA will allow reduced activities under federal grants to meet the considerable costs of operating State environmental justice programs. (See State #73, p. 2; #89, p. 2-3.) Some urged EPA to provide financial or technical assistance and training to States. (See State #18, p. 3; #73, p. 2; #89, p. 2-3; Industry #16, p. 32-33.) A State commenter recommended that EPA work with Congress to obtain adequate resources for all levels of government. (See State #89, p. 2.) One State recommended that resources not be exhausted by requiring translations of permits and other documents into languages other than English. (See State #52, p. 16.)

SCOPE OF AUTHORITY:

Support for Limiting the Scope of the Guidance to Permit Programs:

Numerous commenters supported EPA's position that a complaint's scope can only extend as far as the authority of the permitting agency. (See Industry #4, p. 4; #5, p. 3, 10; #16, p. 1, 3, 10, 15, 16, 37; #24, p. 3; #37, p. 3; #60, p. 4; State #18, p. 4-5; #88, p. 1; #89, p. 3; #2L, p. 1; Local #50, p. 2; #82, p. 13.) Several argued that it is unfair to punish recipients who have no legal authority to prevent or control emissions. (See Industry #16, p. 15; State #2L, p. 1.)

Many thought the guidance did not state this principle clearly enough or worried that the guidance provides no assurance EPA will stick to this principle; they advised EPA to state clearly that if the stressor or impact is beyond the scope of the recipient's authority, the complaint must be dismissed. (See State #58, p. 5; #2L, p. 1, 3; Industry #4, p. 4; #12, p. 4; #51, p. 3; #60, p. 4.)

One State noted that the guidance seeks to create a degree of equity in the siting of industry that can never be realized through the permitting process because: a) larger social and economic forces will prevent it, and b) recipients do not have authority to implement it. (See State #39, p. 8.)

Some also questioned the breadth of EPA's definition of authority. In their view, the fact that a statutory authority may require a recipient to protect or consider public health does not necessarily mean that the statute encompasses authority to mitigate all stressors which may affect public health. (See Local #82, p. 13; State #2L, p. 1-2.)

Support for Expanding the Scope of the Guidance Beyond Permit Programs:

Some commenters credited EPA for agreeing to consider stressors and impacts beyond the scope of the permitting program, even if the recipient has not exercised authority with respect to them. (See Non-governmental organization #40, p. 5; #62, p. 9-10.) (See also Non-governmental organization #64, p. 2.)

Still, many commenters thought the guidance did not sufficiently consider stressors and impacts which are not explicitly covered by the permit program. (See Non-governmental organization #22, p. 6, 39-40; #40, p. 4-5; #46, p. 12-16; #59, p. 9; #65, p. 2-4; Academic #33, p. 6; Task Force #61, p. 33-34.) Some commenters argued that EPA's narrow interpretation of Title VI is not supported by statutory language, judicial precedent, or EPA's own implementing regulations. They thought the authority and obligation to consider a full range of potentially adverse disparate impacts derives directly from Title VI, which binds recipients independently of their other responsibilities under state and federal environmental law. (See Non-governmental organization #22, p. 39-40; #46, p. 12-16; Task Force #61, p. 33-34.) One commenter concluded a contrary result:

a) allows the States to define, through their own laws, the limits of their obligations under federal civil rights law, in violation of the Supremacy Clause of the U.S. Constitution,
b) rewards States that restrict permitting agencies from considering a wide range of relevant civil rights concerns,
c) creates an unequal pattern of civil rights protection and enforcement from State to State, and
d) forces OCR to make legal determinations about the meaning and scope of State laws, something even federal judges generally avoid doing (or refer to State court for resolution).

(See Non-governmental organization #46, p. 12-16. See also Non-governmental organization #40, p. 4-5.) Another urged EPA to specify that failure to use discretionary authority under environmental laws (e.g., omnibus clauses) to address impacts could constitute a violation of Title VI. (See Academic #33, p. 6.)

Clarity of the Guidance:

One commenter commended EPA for holding recipients accountable for the disparate effects of their permitting decisions even if they were not responsible for preexisting inequities, because recipients might provide one of the few mechanisms for improvement. However, this same commenter thought language referring to stressors and impacts "cognizable under the recipient's authority" ambiguous and, under at least one potential interpretation, undermining of efforts to address cumulative impacts. (See Academic #3, p. 2, 4-5.)

One State suggested that a State decision be deemed immune to a Title VI complaint where:

a) a local enforcement agency develops and issues a permit (e.g. for a solid waste facility),
b) the State's role is to review and concur, and
c) there are only limited grounds to object (which do not include authority to object on grounds of disparate impacts or inadequate public participation).

If this is not the result, then in this commenter's view it is not clear whether EPA believes the obligation to comply with Title VI overrides the lack of statutory authority to use Title VI grounds to object to a permit. (See State #18, p. 8-9.)

A State commenter acknowledged that it is uncertain of EPA's expectations as to how a State waste permitting program is to resolve matters involving activities beyond program jurisdiction. (See State #13, p. 2.)

One commenter thought the following two statements inconsistent: 1) EPA will limit its inquiry to matters "within the recipient's authority to consider," and 2) "a recipient's Title VI obligation exists in addition to the Federal or State environmental laws governing its environmental permitting program. (See State #88, p.1.)

Addressing Legal Limits on State and Local Government Authority:

Some commenters thought the guidance failed to address legal limits on State and local government authority. (See Industry #12, p. 2; #91, p. 17; #3L, p. 2, 4; State #52, p. 12, 15.) Some State and industry commenters cautioned that the guidance does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, brownfields redevelopment, or greenspace preservation initiatives. (See State #89, p. 5; Industry #12, p. 2; #37, p. 2-3.)

One local government reminded EPA that local agencies have limited legal jurisdiction and authority. They are not general land use government entities like counties and cities and cannot mandate where a particular facility can locate. According to this commenter, EPA needs to acknowledge that there is a strong likelihood that "significant adverse impacts" may exist due to historical and present day land use and zoning patterns. (See Local #14, p. 2-3 and cover letter.)

One commenter criticized EPA for commandeering local land use planning authority. (See Industry #91, p. 17.)

SELECT STEEL DECISION:

Several commenters discussed the Select Steel case, the first and only case adjudicated under EPA's Interim Title VI Guidance.

Opposition to the Decision as Precedent:

A non-governmental organization characterized EPA's decision in Select Steel as controversial both because of its political underpinnings and questionable reasoning. (See Non-governmental organization #46, p. 3.)

Support for the Decision as Precedent:

Others stated that EPA needs to clarify how this administrative ruling will be treated under the final Interim Guidance. (See State #58, p. 10; #89, p. 3-4.) A State noted that since the Select Steel decision interprets law and regulations, it would appear to represent a precedent that would remain unaffected by changes in EPA's guidance. (See State #58, p. 10.) Other commenters recommended that the guidance ensure consistency with the ruling. (See State #89, p. 3-4; Industry #24, p. 3.)

SIGNIFICANT IMPACTS:

Support for Requiring Impacts to be Significant:

Several commenters supported EPA's position that if an impact is not *significantly* adverse, the allegation is not expected to form the basis of a finding of noncompliance with Title VI. (See Local #14, p. 3-4; #82, p. 4; Industry #4, p. 7; #16, p. 3, 16, 37; #17, p. 4; #51, p. 5.) One reasoned that regulators expect pollution levels to be acceptable when facilities comply with their permits. (See Local #14, p. 3-4.) Another noted that existing Title VI case law holds that disparate impacts must be more than insignificant and minor. This commenter also noted that EPA's position recognizes that virtually every permit allows some pollution and prevents EPA from being inundated with complaints which will be dismissed after consuming substantial EPA and recipient resources. (See Local #82, p. 4.)

Verifying Allegations of Insignificance:

Some commenters urged EPA to investigate permit applicants' or regulatory officials' determination that impacts are not significant to ensure the determination is supportable and considers conditions which make the community vulnerable to any emission increases. (See Non-governmental organization #22, p. 43-44; #62, p. 11-12; Academic #33, p. 6-7; Task Force #61, p. 37.)

Threshold for Determining Significance:

One commenter criticized EPA for employing a different statistical criteria for measuring demographic disparity (i.e., 2 to 3 standard deviations) than for measuring disparity of impacts (i.e., any significant impact). (See Industry #72, p. 1, 3-4.)

Several commenters criticized EPA for using the Hazard Index as a benchmark only to find against complainants (i.e., to find that adverse impact is unlikely), but not to find for them (i.e., to assume that values over the threshold indicate adversity). (See Non-governmental organization #22, p. 44; Task Force #61, p. 37.)

STANDARDS:

Support for Using Current Standards as Benchmarks:

Many commenters supported the use of national ambient air quality standards (and, presumably, health-based standards for other media and pollutants) to establish a presumption of protectiveness. (See Industry #5, p.

11; #6, p. 3; Local #14, p. 5; #82, p. 5; #1L, p. 3; State #63, p. 3.) (See also Industry #51, p. 5.) Some commenters reasoned that, absent firm legal authority, a recipient cannot require permit applicants to adhere to a stricter standard nor one that has not been promulgated. (See State #63, p. 3; Industry #51, p. 5.) Others proposed that, if current standards are not "safe" and "healthful," the appropriate recourse is to change the underlying standards. (See Industry #5, p. 4, 11; Local #1L, p. 3.) An industry commenter asked EPA to clarify that the rebuttable presumption applied also in the context of area-specific agreements. (See Industry #80, p. 11.)

Opposition to Limiting Benchmarks to Current Standards:

Numerous commenters believed that EPA should avoid being limited by "safe levels" as defined in environmental laws and regulations. (See Non-governmental organization #21, p. 6; #22, p. 7, 44; #36, p. 9-11; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13; #64, p. 2; #65, p. 4; #75, p. 12-13; State #58, p. 7; Congressman #45, p. 2; Academic #3, p. 6; #33, p. 7; Task Force #61, p. 38.)

Commenters offered several reasons for this position. Several noted that the Title VI civil rights protections have independent significance; in other words, they extend beyond the limits of environmental law. (See Non-governmental organization #36, p. 11; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13.)

Others noted the absence of many health-based standards for pollutants of concern. (See Non-governmental organization #36, p. 9; #46, p. 18-19.) (See also Local #25, p. 3.)

Others reasoned that environmental laws, even when available, do not address cumulative or synergistic impacts, multiple exposure media, concentrations of sources, or impacts on sub-populations. They called on EPA to acknowledge the limitations of current standards. (See Non-governmental organization #21, p. 6; #36, p. 9; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13; #64, p. 2; Academic #3, p. 6.)

Many commenters challenged the primary NAAQS, in particular, as an adequate benchmark for disparate impact analysis. (See Non-governmental organization #21, p. 6; #22, p. 7, 44-47; #36, p. 9-11; #40, p. 10; #46, p. 2-3, 18; #62, p. 12-13; #64, p.2; #65, p. 4; Academic #3, p. 6; #33, p. 7; Task Force #61, p. 37-41.) Some commenters explained that

NAAQS ignore toxic hotspots (that go undetected because of inadequate monitor placement or unreliable modelling), acute health effects, accidents and upsets at plants, the localized effect of all-too-common noncompliance, and the fact that the health effects research has been conducted on healthy white males. In addition, these commenters argued, NAAQS are set through a political process which ignores significant health effects at lower levels of exposure. (See Non-governmental organization #22, p. 44-47; #62, p. 12-13; Task Force #61, p. 37-41.) (See also Academic #33, p. 7.) Several commenters criticized State and local decisions equating environmental equity with air pollution control standards as insensitive to differences among communities in concentrations of facilities, public health, and disease susceptibility. (See Non-governmental organization #64, p. 2; #75, p. 12-13; Congress #45, p.2.)

A State commenter argued that EPA should avoid any presumption of the adequacy of a NAAQS to be consistent with the precedent EPA had already set in the Select Steel decision. (See State #58, p. 7.)

These commenters concluded that EPA should provide ways to include other impacts in a disparate impact analysis and avoid any presumption of protectiveness when a standard applies to a large geographic area such as an airshed. (See Non-governmental organization #36, p. 9-11; #62, p. 12-13; #64, p. 2; #65, p. 4; Congress #45, p. 2; Academic #33, p. 7.)

One commenter noted no consideration should be given to "technology-based" standards since these are not health or environmental quality-based. (See Non-governmental organization #40, p. 10.)

Several commenters criticized EPA's guidance for precluding Title VI complaints in attainment areas. (See Non-governmental organization #22, p. 47; Task Force #61, p. 40-41.)

Using Current Standards Besides NAAQS as Benchmarks:

Several commenters suggested that, if EPA did limit itself to existing environmental standards, it look more broadly than NAAQS.

One commenter argued that numerous environmental laws permit consideration of potentially adverse impacts beyond environmental health. This commenter cited Clean Air Act impact assessments encompassing "health, environmental, economic, social and energy effects;" secondary

NAAQS protecting "public welfare;" TSCA language on "environmental, economic, and social impact;" NEPA environmental impact assessments addressing socioeconomic, aesthetic, and cultural impacts; and E.O. 12898 requiring that, in addition to quantifiable measures, risk assessments must incorporate "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." (See Non-governmental organization #46, p. 17-18.)

Some commenters advised that scientific and technical research also constitute "benchmarks of significance." (See Non-governmental organization #36, p. 11; #64, p. 2)

An industry commenter asked EPA to clarify that the rebuttable presumption applied to all media, not just air standards. (See Industry #80, p. 10-11.)

Using Secondary NAAQS as Benchmarks:

One commenter noted that secondary NAAQS, intended to protect public health and welfare, provide a more appropriate standard for adversity in the civil rights context than primary NAAQS. (See Non-governmental organization #46, p. 17-18.)

Using Local Standards as Benchmarks:

Local government and non-governmental commenters suggested EPA allow local pollution control regulations and levels of significance to serve as benchmarks of significance as well. (See Local #14, p. 4; #82, p. 5; Non-governmental organization #64, p. 2.)

Using Attainment Plans as Benchmarks:

One commenter cautioned EPA to include as a benchmark not just the individual health-based standard, but also the plans to achieve the standard in the time required by law. (See Local #1L, p. 3.)

Addressing Widespread Nonattainment of Current Standards:

A State asked EPA to address how to evaluate adverse impacts of criteria pollutants in nonattaiment areas, since all of a State's urban areas can be nonattainment for some pollutants. This commenter suggested using modeling analyses to show whether a facility would cause or contribute to a violation of an ambient standard. (See State #18, p. 7.)

Sufficiency of a Rebuttal Presumption of Protectiveness:

Many non-governmental commenters challenged the sufficiency of being able to rebut a presumption of protectiveness. (See Non-governmental organization #21, p. 6; #22, p. 44; #36, p. 11; #62, p. 12; #64, p. 2; Academic #3, p. 6; #33, p. 7; Task Force #61, p. 38.) Some argued that the ability to rebut is a meaningless safeguard because investigations face serious resource limitations and the complainant does not have standing as an adverse party. (See Non-governmental organization #22, p. 44; #36, p. 11; #62, p. 12; Academic #33, p. 7; Task Force #61, p. 38.) One commenter advised against placing the burden of rebuttal on the complainant; this commenter believed the permittee and the agency instead should bear the burden of a comprehensive assessment of cumulative impacts. (See Non-governmental organization #64, p. 2.)

Need for Additional Health and Environmental Standards:

State and local government commenters acknowledged the lack of adequate environmental standards and offered other solutions.

One stated that EPA has yet to address standards for air toxics and other pollutants, making enforcement of a finding of adverse impact subject to legal challenges and rulemaking on a case-by-case basis. According to this commenter, there should be some threshold on which people can rely. (See Local #25, p. 3.) A State commenter concurred, explaining that the guidance sidesteps the fundamental allegation inherent in Title VI claims; namely, that the underlying environmental law is not adequately protective of human health and the environment. This commenter recommended that EPA examine and, if appropriate, amend the underlying environmental statutes. (See State #58, p. 3.)

STATISTICAL SIGNIFICANCE:

Clarity of the Guidance:

One commenter noted the definition and method of measuring statistical significance is unclear. (See Non-governmental organization #36, p. 12.) A commenter advised that the glossary definition should include the guidance language to the effect that 2 to 3 standard deviations from the mean is a measure of statistical significance in measuring the demographic disparity between the affected and reference populations. This commenter also sought clear examples of what EPA considers “significant” in all instances where the term is used. (See Industry #5, p. 12.)

Stringency of the Guidance:

An industry commenter supported the benchmark of using 2 to 3 standard deviations as a measure of statistical significance. (See Industry #60, p. 7.) Another supported at least 3 standard deviations. (See Industry #4, p. 8.)

Several non-governmental organizations viewed the requirements for statistical significance (i.e., two to three standard deviations) as too burdensome. (See Non-governmental organization #21, p. 7; #36, p. 12-13; #46, p. 23.) One found this particularly true when sample sizes are too low for an analysis to be meaningful. . (See Non-governmental organization #46, p. 23.) Another thought Title VI required a threshold no higher than 1.8 standard deviations. (See Non-governmental organization #21, p. 7.)

A State thought statistical significance should be required, but preferred using a significance level of 0.05 and a confidence level of 0.95. (See State #52, p. 1, 4.)

An academic commenter objected to a uniform standard deviation, instead recommending that the standard reflect the distinct vulnerabilities of the impacted community (e.g., require less statistical deviation where there is an abnormally high asthma rate). (See Academic #33, p. 6.)

Applying the Concept of Statistical Significance:

Some commenters thought EPA should not require more than a showing of statistical significance; when a disparity is significant, it should not matter whether there is a “little” or “a lot” over the threshold. . (See Non-governmental organization #40, p. 11; #46, p. 23-24.)

An industry commenter, by contrast, thought mere statistical significance does not mean there is a significant disparate impact. (See Industry #17, p. 3-5.) A State thought magnitude of disparity should be considered in addition to statistical significance, but found the guidance confusing on this point. (See State #52, p. 1, 5.)

A local government supported EPA’s position that both demographic disparity and disparity in rates of impact should be statistically significant. (This commenter noted there may be an unusual case in which disparate impact exists although disparity in one factor is not large (e.g.,

demographics), if disparity in the other factor is sufficiently large (e.g., impact).) (See Local #82, p. 4-5.)

Alternatives to the Guidance:

A non-governmental organization commenter offered an alternative to the current guidance language on statistical significance. This commenter proposed that EPA adopt the EEOC's "four-fifths rule:" i.e., disparity would be inferred whenever the comparison population's level of exposure or impacts is 80% less than the affected population's. (See Non-governmental organization #46, p. 23.)

STAYS OF PERMITS:

Support for Staying the Effect of Challenged Permits:

Many non-governmental organizations, academic commenters, and EPA's Task Force proposed that a permit should be stayed if disparate health effects are documented. (See Non-governmental organization #22, p. 27-28, 36; #36, p. 5; #69, #55; #59, p. 14-15; #5L, p. 4; Academic #33, p. 3, 8; Task Force #61, p. 22, 30.) Some emphasized this is particularly important because complainants remain at risk during the years it takes for complaints to be resolved. (See Non-governmental organization #22, p. 36; #36, p. 5; Task Force #61, p. 30.) Several suggested a stay would be warranted upon a showing analogous to that necessary to obtain a temporary injunction in a court proceeding. (See Non-governmental organization #22, p. 36; Task Force #61, p. 30.)

Opposition to Staying the Effect of Challenged Permits:

Many commenters agreed with EPA that a permit should not be stayed by a Title VI challenge. (See Local #14, p. 3; #50, p. 2; #82, p. 4; State #18, p. 2; #88, p. 2; #89, p. 3; #2L, p. 1; Industry #12, p. 3; #17, p. 7; #24, p. 3; #51, p. 1.) They argued that this would lend certainty and predictability to the permitting process and prevent unmeritorious complaints from derailing a valuable project. (See, e.g., Local #82, p. 4; State #88, p. 2.) One argued that EPA's position is appropriate since the investigation focuses on the actions of recipients, not permit applicants. (See Local #14, p. 3.)

Clarity of the Guidance:

A State commenter recommended EPA clarify the effect of a preliminary finding of noncompliance on the permit. (See State #88, p. 2.)

Practical Impact of a Complaint:

Several commenters observed that, despite its language, EPA's guidance has the practical effect of staying the permit. (See Industry #12, p. 3; #51, p. 1; Local #50, p. 6-7; State #52, p. 14-15.) Reasons offered for this position included:

a) EPA advises complainants to file complaints within 180 days of a hearing from which they have been excluded (even if the permit has not issued). (See Local #50, p. 6-7.)
b) EPA will forward premature complaints to recipients so the allegations can be resolved during the permit process. (See Local #50, p. 6-7.)
c) The press often reports the filing as a complaint against the permittee. (See Industry #51, p. 1.)
d) Few facilities are willing to undertake activities until compliance has been resolved because different technology may be required. (See Industry #51, p. 1-2.)
e) Facilities often require multiple permits and subsequent permits await resolution of the complaint. (See Industry #51, p. 1-2; State #52, p. 14-15.)

TIMEFRAMES FOR ACTION:

Filing Complaints – Length and Certainty of the Deadline:

One non-governmental organization commented that the short, 180-day time period for filing complaints assumes that a complainant has immediate access to the complaint process documents; therefore, the recipient agency must provide the complainant with the guidelines and protocols in writing immediately. (See Non-governmental organization #69.)

Several commenters thought EPA should set a binding time limit on when to file a complaint. (See Industry #5, p. 7; #60, p. 3; Local #41, p. 2; State #63, p. 2; #2L, p. 2.) Some found the current 180-day limit too long. [See, e.g., State #63, p. 2; Industry #24, p. 6; Local #41, p. 2 (arguing 120 calendar days is long enough) and Industry #4, p. 6 (arguing for 60 days).] Some recommended making the time limit binding through a regulatory amendment. (See Industry #4, p. 6; #5, p. 7.) One commenter urged EPA not to investigate allegations from untimely complaints. (See Industry #80, p. 6.) On the other hand, one commenter regarded the 180-day time limit as

illegal, arguing Title VI recognizes it may take years to establish a pattern of discrimination. (See Non-governmental organization #49, p. 5.)

One commenter urged EPA to deem a complaint filed when mailed. (See Non-governmental organization #40, p. 6.)

Filing Complaints – Start of the Clock:

A local government criticized the guidance for requiring complaints regarding public participation to occur within 180 days of the discriminatory act. Instead, this commenter urged that the 180-day period not commence until the end of the public participation process (i.e., the point at which a final decision is rendered in a public hearing before the decision-making body. (See Local #1L, p. 6.)

Some commenters argued that starting the 180-day clock for filing a complaint upon issuance of the initial permit contradicts EPA's regulations, penalizes complainants for exhausting their administrative remedies, and forces complainants into a Catch-22 where their complaint will be dismissed as premature. They suggested the statute of limitations run from the latest of:

- an unappealed permit,
- completion of all agency appeals,
- completion of any agency-mandated dispute resolution procedure, or
- completion of any voluntary dispute resolution procedure including the complainants, recipient, and applicant.

(See Non-governmental organization #22, p. 7, 16-19; Task Force #61, p. 10-12.) (See also #5L, p. 4.)

Others suggested that the 180-day clock not start until complainants are aware of the violation. (See Non-governmental organization #81, p.2.)

Non-governmental organizations recommended recognizing that complaints of continuing violations can be filed more than 180 days after a violation. (See Non-governmental organization #22, p. 18-19; #64, p. 4.) One identified three categories of such continuing violations. (See Non-governmental organization #22, p. 18-19.) An industry commenter, by contrast, thought the option of filing later for a continuing violation deprived the process of stability. (See Industry #3L, p. 2.)

"Good Cause" Extensions of the Filing Deadline:

Some commenters thought EPA should clarify when it might decide to investigate untimely complaints or to determine that "good cause" exists to extend the 180-day filing deadline. (See Industry #5, p. 7, #16, p. 36; State #52, p. 16; #63, p. 2; Non-governmental organization #22, p. 19; #23, p. 2; Task Force #61, p. 12-13.) One urged EPA to reference the "good cause" exception in its list of jurisdictional criteria for filing a complaint. (See Non-governmental organization #64, p. 4.) Others urged removal of the "good cause" waiver altogether. (See Industry #24, p. 6; #60, p. 3.) One proposed that only the Administrator be allowed to waive the limit. (See Industry #60, p. 3.)

Some commenters viewed the waiver as an illusory protection because they thought that EPA had never exercised a waiver in any case to date. (See Non-governmental organization #22, p. 7, 19; #23, p. 1-2; Task Force #61, p. 13.) Several commenters criticized EPA for dismissing a complaint filed one or two days late. (See Non-governmental organization #22, p. 15; #23, p. 1-2; Task Force #61, p. 6.) Some contrasted this with treatment of recipients, who are perceived as getting extra time to respond to complaints. (See Non-governmental organization #22, p. 12; Task Force #61, p. 6.) One commenter thought "good cause" criteria should reflect the merits of the complaint or the logistical difficulty of filing. (See Non-governmental organization #23, p. 1-2.)

Accepting Complaints:

One State commenter recommended that determinations on whether or not to accept a complaint be made within 20 days. (See State #89, p. 4.)

Dismissing Unmeritorious Complaints:

Some commenters recommended that EPA develop a procedure to dismiss promptly Title VI complaints lacking factual or legal merit. These commenters argued that, because complaints meeting the minimum jurisdictional requirements do not carry any burden of producing evidence to trigger an investigation, the uncertainty to all parties is unacceptable. These commenters proposed that EPA give the recipient a summary judgment, demurrer, or motion to dismiss procedure where the recipient bears the burden to justify early dismissal of the complaint. (See Local #14, p. 8; #82, p. 11.) (See also Industry #60, p. 2; State #13, p. 1-2.) One commenter urged EPA not to put recipients on "probationary status" subject to greater scrutiny once a complaint had been rejected. Instead, this commenter urged

EPA to conduct compliance reviews based only on random checks, rather than on the existence of previous complaints. (See Industry #80, p. 7.)

Premature Filings:

Several comments supported EPA's approach of dismissing premature complaints. (See Industry #16, p. 25; #51, p. 5.)

Numerous commenters thought EPA should not dismiss complaints filed prior to the issuance of the final permit. (See Non-governmental organizations #22, p. 7, 16, 21, 36; #27, p. 2; #55; #62, p. 3-4; #75, p. 3-4; #81, p. 2; #5L, p. 4; Local #14, p. 8; #82, p. 8; Academic #3, p. 6; #33, p. 3; Task Force #61, p. 10, 15, 30.)

Commenters offered several reasons for this position:

- The guidance misses the opportunity to encourage productive negotiations and to prevent discriminatory impacts before they occur. (See Non-governmental organization #22, p. 21; #62, p. 3-4; Local #14, p. 8; #82, p. 7; Task Force #61, p. 15; Academic #3, p. 6.)
- The guidance allows a permittee to build or operate throughout the entire period of the investigation – indeed, even after a finding of violation, because the regulations authorize a termination of financial assistance to the recipient, not a stay of the permit. The effect is to restrict meaningful community involvement to the time before issuance of a permit. (See Non-governmental organization #22, p. 36; #27, p. 2; #75, p. 3-4; #81, p. 2; Task Force #61, p. 30.)
- The guidance penalizes complainants who seek to challenge the permit on both environmental and civil rights grounds. (See Non-governmental organization #62, p. 3.)

Some argued that EPA should either: a) guarantee a waiver of the filing deadline for all parties who pursue their administrative remedies, b) accept the complaint, but stay the investigation, or c) interpret the 180-day statute of limitations to run from the end of the administrative appeals process. (See Non-governmental organization #22, p. 19-21; Task Force #61, p. 13-15.)

One commenter observed that the dismissal of a complaint is particularly inappropriate where the allegations focus on the permitting

regulations as the cause of discrimination. (See Non-governmental organization, #40, p. 4.)

Complainant Input:

One commenter asked EPA to set deadlines for responses to EPA information requests and to reject complaints for failure to provide timely responses. (See Industry #80, p. 1-2.) Another thought the 14-day response time for submission of complainant information too short for the types of analyses required. (See State #52, p. 10.)

Permittee Input:

One commenter thought the 14-day response time too short for permitteees to submit the types of analyses required. (See State #52, p. 10.)

Recipient Input:

Several comments addressed the timing of recipient input.

Some recommended that EPA have the benefit of the recipient's response before deciding whether to accept a complaint for investigation; the current guidance and regulations, in their view, suggest EPA will decide whether to accept a complaint before the time has expired for the recipient to file a response. (See Industry #4, p. 5; #5, p. 5; #51, p. 2.)

Another commenter noted an inconsistency regarding the timing of the recipient's written submission responding to, rebutting, or denying allegations set forth in a complaint. According to this commenter, the guidance places the time for this response immediately following EPA's <u>receipt</u> and acknowledge- ment of the complaint. EPA's rules and the Title VI Complaint Process Flowchart place this response <u>after</u> EPA accepts the complaint. This commenter believed that the timing mandated by EPA's rules is more logical: it avoids wasting resources responding to untimely, moot, or unsubstantiated claims. If EPA desires to change the timing in its rules, it must do through a rulemaking under the Administrative Procedures Act. (See State #88, p. 1.)

Some noted that the time for recipient's answer is inadequate to assemble necessary information such as facts, demographic and health data, and prepare a response. (See State #52, p. 10; #63, p. 3.) Others criticized EPA for tending to extend this deadline, while disallowing extensions for

complainants. (See Non-governmental organization #22, p. 12; Task Force #61, p. 6.)

Some observed that the 30-day deadline for recipient's rebuttal appears to conflict with the right of complainants to submit additional information during the course of the investigation. (See Non-governmental organization #22, p. 31; Task Force #61, p. 25.)

Criteria for Expedited Review of Complaints:

One commenter thought EPA should guarantee expedited review of complaints (i.e., within 60 days) in States where EPA, after pre-review and approval, has determined that the State has highly developed cumulative toxics and environmental justice programs. (See Local #50, p. 2.)

Resolving Complaints – Support for the Timelines:

Several commenters commended EPA for establishing, at least in theory, a window of 205 days for resolving a complaint. (See Non-governmental organization #22, p. 11; #62, p. 2; Task Force #61, p. 5.) A local government supported the timeline for processing complaints. (See Local #1L, p. 3.) Other commenters simply urged EPA to make every effort to resolve complaints quickly. (See Industry #51, p. 2; #80, p. 1-2.)

Resolving Complaints – Certainty of the Guidance:

Several commenters argued that the guidance must incorporate a definitive timeframe for resolving a complaint. (See Industry #12, p. 5; #17, p. 7-8; #24, p. 6; Local #50, p. 5-6; #82, p. 8-9; Non-governmental organization #22, p. 13; Task Force #61, p. 7.) Some commenters commended EPA for adding investigative milestones, but still decried the seemingly endless process. According to these commenters, there is no deadline for informal resolution discussions; a rejected allegation may be referred to another federal agency or resubmitted at a later time without prejudice; and EPA can waive the 180 day time limit for good cause. These commenters observed that, if the Shintech report is an example, the resulting delay will be very considerable. (See Local #50, p. 5-6; #82, p. 9.)

Resolving Complaints – Realism of the Deadlines:

Several commenters thought the timeframes unrealistic because EPA has not met similar timeframes. (See State #52, p. 16; #67, p. 2; #83, p. 1; #89, p. 4; Industry #24, p. 6; Non-governmental organization #22, p. 11-12; Task Force #61, p. 5-6.) Some feared substandard investigations to meet

deadlines. (See Non-governmental organization #22, p. 11-12; Task Force #61, p. 5-6.) Some urged EPA to clarify how it will discipline its own review in order to comply. (See State #58, p. 10; #89, p. 4.) One urged that a failure to meet the deadline result in dismissal of the complaint. (See Industry #24, p. 6.)

Resolving Complaints – Backlogged Cases:

Several commenters criticized EPA's handling of previous Title VI cases. They noted that, in almost every case, EPA has missed its regularly deadlines for acknowledging and resolving Title VI cases. They reported that fifty-one cases are pending -- some since 1993 -- and only one has ever been resolved on the merits. (See Non-governmental organization #22, p. 2-6, 11-13; #23, p. 2; #34, p. 2; #62, p. 2, 18; #5L, p. 3; Local #14, p. 8; Task Force #61, p. 5-7.)

These commenters recommended that EPA:

a) establish a timeframe for resolving the Title VI complaints already in its docket (see Local #14, p. 8; and Non-governmental organization #34, p. 2 recommending a 6 to 8 month deadline),
b) ensure that OCR is adequately staffed to investigate all Title VI complaints in a fair and timely manner (see Non-governmental organization #22, p. 12; #62, p. 2; Task Force #61, p. 6), and
c) implement oversight procedures, ranging from periodic reports to full public disclosure of progress. (See Non-governmental organization #22, p. 12; #62, p. 2; Task Force #61, p. 6.)

One also recommended allowing appeals to the Department of Justice. (See Task Force #61, p. 6.)

Resolving Complaints Involving Statutory Deadlines:

Industry and local government commenters addressed potential conflicts between the timeframes outlined in the guidance and Clean Air Act statutory deadlines. (See Industry #5, p. 7; #24, p. 11; Local #14, cover letter: p. 3.) Industry commenters argued EPA must prioritize its resources to resolve complaints promptly where companies face legally mandated deadlines (such as the Tier 2 and Sulfur Rulemaking). (See Industry #5, p. 7; and #24, p. 11, extending this principle to all permits reopened solely due to new legislative or regulatory requirements.) One explained:

a) there is a narrow window of time to begin construction and meet the regulatory deadline,

b) companies do not want to invest significant finances in equipment to meet such requirements without knowing the final permit conditions.
c) a complaint may generate considerable public interest, causing permit proceedings to be stayed, as a practical matter. (See Industry #5, p. 2.)

Resolving Complaints Involving Informal Resolutions:

Several commenters questioned whether the 180 day deadline for resolving the complaint ran from the start of the investigation or the end of the informal resolution process. (See Industry #16, p. 2, 21, 35-38; #24, p. 6; Non-governmental organization #22, p. 13; Task Force #61, p. 7.) Several argued the 180 days starts upon acceptance of the complaint. (See Non-governmental organization #22, p. 13; Task Force #61.) A local government urged that the informal resolution process occur in parallel with the formal investigation so as not to cause delay. (See Local #1L, p. 3.) Some commenters recommended a time limit for reaching an informal resolution. (See Non-governmental organization #36, p. 5; Industry #16, p. 2, 21, 35-36.) One proposed a presumptive time limit of 60 days. (See Industry #16, p. 2, 21, 35-36.)

Resolving Complaints Involving Simultaneous Court or Administrative Proceedings:

One commenter urged EPA to minimize occurrences of simultaneous court and administrative proceedings on similar facts and allegations. EPA could do so by notifying the court of the pending administrative proceeding and, if appropriate, request the court to allow that proceeding to resolve the issues. (See Local #82, p. 11-12.) Others thought EPA's promise to dismiss complaints where complainants sought relief before courts or recipient agencies conflicted with EPA's regulations or was otherwise inappropriate. (See Non-governmental organization #22, p. 7, 15-21; #23, p. 2; #40, p. 5-6; #59, p. 10; Task Force #61, p. 9-15.)

Resolving Complaints Involving Multiple Permits or Media:

One commenter urged EPA to create an integrated project review process to address Title VI complaints against a single project which needs multiple permits and/or involves different environmental media (e.g., a port expansion). This commenter believed such a process would avoid delay, reduce uncertainty, and allow EPA to evaluate the justification for the project. (See Local #1L, p. 4.)

Deadlines for State Actions:

Several State commenters complained that the timeframes for State actions are unreasonably short. (See State #52, p. 10; #63, p. 3; #73, p. 2; #83, p. 1; #89, p. 4.) Specifically, these commenters referenced the the time for the recipient's response to a complaint (see State #63, p. 3), the 14 days to submit additional information (see State #52, p. 10; #83, p. 1; #89, p. 4), and the 10 days to comply after a finding of noncompliance (see State #63,p. 3; #83, p. 1; #89, p. 4; #2L, p. 2-3.) A State and an industry commenter noted that a recipient found to be in violation has 10 days to achieve compliance, but 30 days to request a hearing on the determination of noncompliance. They suggested EPA make the timeframe for complying and appealing identical. (See Industry #4, p. 6; State #2L, p. 2-3.) The State also suggested EPA: a) allow appeals to stay the compliance requirement, and b) indicate the recipient must take significant steps toward compliance, rather than achieve full compliance, within 10 days. (See State #2L, p. 2-3.) Finally, the industry commenter suggested that parties be given only 30 days to file written statements, rather than a "reasonable opportunity" to do so, if the Administrator elects to review an administrative law judge's determination. (See Industry #4, p. 6.)

Timing of Consideration of Title VI Issues Generally:

Several commenters were troubled that the Title VI process is appended to, rather than integrated into, the permitting process. These commenters urged EPA to explore ways that Title VI concerns can be fully examined during the permit process. (See Local #25, p. 3; State #18, p. 6; #67, p. 2; Industry #6, p. 3; #12, p. 4; #24, p. 4.) One noted that an early notice mechanism would not need to foreclose the filing of a complaint after permit issuance. (See State #18, p. 6.) Another urged justification occur before an initial finding is made. (See Industry #12, p. 4.)

TRIBAL ISSUES:

Avoidance of Delay on Tribal Guidance:

One Tribal commenter expressed concern that the deferral of tribal guidance will cause undue delays in the implementation of Title VI for Tribal entities. (See Tribal #85, p. 1.)

Lack of Consultation with Tribal Governments:

One commenter disagreed that EPA had conducted tribal consultation and requested EPA to establish a Tribal technical advisory group for risk-based disparity analysis. (See Tribal #85, p. 1.)

Crucial Elements of Tribal Guidance:

One commenter observed that Tribal guidance on complying with Title VI should include the following elements:

- increased emphasis on cumulative multi-stressor impacts,
- emphasis on the fact that affected people must also receive direct benefits from the permit holder,
- consideration of cultural risk,
- risk analysis based on spatial data (resource definition and location), not statistical data (demographics), and
- reworking of the definition of sustainable development and the concept of justification. (See Tribal #85, p. 2.)

UNINTENDED POTENTIAL CONSEQUENCES OF THE GUIDANCE:

Shifting Pollution to Other Communities:

One industry asserted that EPA needs to assure that its guidance does not have the unintended effect of shifting adverse impacts from minority populations to more diverse populations. (See Industry #5, p. 4.) Another argued that the guidance promotes sprawl, encouraging companies to build in "greenfields" locations instead of urban areas. (See Industry #16, p. 32.)

Inhibiting Growth in Low-Income and Minority Communities:

State and industry commenters worried that the guidance may cause business and economic development disparate impacts on minority communities, including reduced economic growth. (See State #39, p. 8, 9; Industry #37, p. 2, 6, 12-13; #71, p. 3.) (See also the related comments in the "Area-Specific Agreements: Consequences" section of this report.) One commenter thought EPA's resources would be better spent providing communities with the resources to negotiate the best possible deal regarding the siting of locally undesirable land uses (LULUs) in their communities. (See State #39, p. 8, 9.) Another urged EPA to coordinate its Title VI and Brownfields activities. (See State #73, p. 2.)

WHO MAY FILE A COMPLAINT:

Standing to File:

Many industry, State, and local government commenters urged EPA to remove the statement in the guidance allowing a party without a direct interest in the recipient's jurisdiction to file a complaint simply by being a member of a class of people allegedly affected by discrimination. (See Industry #5, p. 6; #12, p. 4; #16, p. 2, 21-22, 38; #72, p. 1-2; #3L, p. 2; State #58, p. 10; #89, p. 4; #2L, p. 2; Local #25, p. 2.) Some commenters argued that the jurisdictional criteria should grant standing only to someone who is truly negatively impacted. (See State #52, p. 15; #58, p. 10; Industry #12, p. 4.) Another concluded that EPA's broad language invites outsiders to make mischief without consideration for the concerns or support of the host community. (See Local #25, p. 2.) Others argued that the criteria were too narrow and that the complainant did not need to be a member of the class suffering discrimination. (See Non-governmental organization #22, p. 15; Task Force #61, p. 9.) One commenter proposed that complaints from outside the potentially affected community should not have the same weight as those from within the community. (See Industry #60, p. 3.)

Representation of Others:

Some industry commenters urged EPA to clarify that authorization for a party to represent another in filing a complaint is not intended to open the door to individuals or groups outside of the affected population unless representation has been specifically requested from someone within the affected population. (See Industry #5, p. 6; #51, p. 3.) One advised EPA to outline criteria for a representative. (See Industry #51, p. 3.) Another thought EPA should clarify what it means to be "authorized to represent" others and justify granting standing to a person who has not suffered discrimination. (See Industry #24, p. 5.)

Single vs. Multiple Complainants:

An industry commenter proposed that EPA give greater weight to complaints supported by a quorum of adults (i.e. 8 to 10) from the affected community to discourage the filing of potential nuisance complaints from a single individual. (See Industry #5, p. 6.) Another said EPA should reject complaints filed on the same issues as those previously resolved unless significant new issues are raised. (See Industry #51, p. 4.)

Exhaustion of Administrative Remedies as a Prerequisite to a Complaint:

State and industry commenters and a non-governmental organization asserted that EPA should require, not just encourage, complainants to seek

relief in the recipient's administrative process prior to filing a Title VI complaint. (See State #18, p. 10; #63, p. 1-2; Industry #5, p. 7; #12, p. 4; #16, p. 2, 3, 21, 24-26, 37; #51, p. 2; Non-governmental organization #93, p. 14.) (See also Industry #60, p. 4-5, urging EPA to give "due weight" only to such complainants.) Proponents of this approach suggested it has multiple benefits:

a) providing an incentive for recipients to adopt Title VI policies,
b) allowing environmental justice concerns to be addressed in the course of project review, when there is more flexibility to make modifications,
c) allowing Title VI concerns to be resolved in the permit process or to proceed to EPA for review accompanied by a well-developed factual record,
d) affording applicants certainty in the permit outcome,
e) encouraging applicants to be more responsive to Title VI concerns in the permit process, and
f) providing communities with better remedies than assistance withdrawal to the recipient.

(See State #63, p. 1-2; Industry #16, p. 2, 21, 24-26; #51, p. 2; #60, p. 4-5.) [A related requirement would be to insist that complainants document their role in the administrative process and state the Title VI issues raised in that process. (See State #63, p. 2.)]

An alternative to outright dismissal of the complaint would be for EPA at least to give additional deference to the results of the recipient's process where a complainant reasonably knew about the recipient's administrative process and chose not to participate or did not surface all relevant issues. (See Industry #5, p. 7; #51, p. 2.)

Several commenters would make an exception to any requirement to exhaust administrative remedies where there was inadequate public notice or insufficient opportunity to participate. (See Industry #5, p. 7; State #18, p. 10; Industry #51, p. 2.)

One commenter criticized EPA's logic for not requiring exhaustion of state remedies. According to this commenter, EPA misconstrues Title VI law when EPA claims that plaintiffs may sue in federal court without exhausting federal administrative remedies; the law is still developing on this point. In addition, unlike the federal agency, which can only terminate

federal funding, the State permit agency can afford relief directly to the complainant. (See Industry #16, p. 26.)

One commenter criticized the guidance language on exhaustion of administrative remedies for not recognizing complainants' efforts to resolve problems and not acknowledging EPA's inaction during permit appeals. (See Non-governmental organization #23, p. 2-3.)

Verifying Allegations:

One State commented that complainants should have to attest to the accuracy of allegations and be subject to a penalty if the allegations are exaggerated or untrue. This commenter argued that the absence of such a requirement invites frivolous claims since complainants do not have the burden of proving their allegations. (See State #58, p. 10.)

MISCELLANEOUS ISSUES:

One industry commenter recommended clarifying that all prime contractors, whether MBE/WBE or not, are required to make good faith efforts to meet the goals. In addition, the quarterly report form should have a separate section to capture the MBE quarterly payments, WBE quarterly payments, MBE subcontracts and WBE subcontracts for both the CWSRF and DWSRF programs. (See Industry #66.)

One State commenter advised EPA to be more inclusive of the regions. (See State #53, p. 1.)

One industry commenter suggested ensuring that definitions in the guidance documents are consistent with those used in the underlying permitting provisions. (The commenter did not provide any examples of inconsistency.) (See Industry #5, p. 12.)

One industry commenter endorsed the objective of refining and streamlining the procedures for determining whether State or local environmental permits meet the requirements of Title VI. (See Industry #2.)

One industry commenter recommended that early steps to prevent Title VI violations are best undertaken through voluntary initiatives by industry rather than through government compulsion. (See Industry #16, p. 4.)

One commenter recommended that reducing mobile source emissions be a key part of any Title VI strategy since these sources are major contributors to air toxics exposure. Toward that end, EPA should encourage measures like monetary incentives and credit trading rules. (See Local #82, p. 10-11.)

One commenter stressed EPA should be willing to dismiss a complaint if the permit relied on “banked emissions” to achieve reductions. This commenter saw banked emissions as producing significant, quicker emission reductions, which have the potential to become permanent reductions if the credits are not used. (See Industry #51, p. 4.)

Two commenters said EPA should change its Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analysis, 44/98, to embody certain recommended changes in the application of environmental justice concepts to permitting/siting. (See Industry #4, p. 1, 2; #71, p. 3.) Another made the same comment regarding EPA’s Clean Air Act Section 309 Guidance. (See Industry #4, p. 1.)

One commenter said EPA should remove statements from the guidance that EPA expects to find "“similar" levels of risk everywhere in a State and that where EPA finds significant, adverse, disparate impacts, they can be considered evidence of unlawful discrimination. (See Industry #60, p. 6.)

One commenter suggested that the reference in footnote 63 on page 39670 be replaced with the actual criteria. (See Industry #4, p. 6.) This same commenter also suggested that EPA change the title of subsection VI.B.4 on page 39680 to “Significant Adverse Impact Decision” (see Industry #4, p. 7), and delete the parenthetical referring to landfill capacity on page 39690. (See Industry #4, p. 8-9.)

One commenter asked that the Shintech company name not be referenced until final resolution or rejection of the complaint involving its operating permit. (See Industry #80, p. 12.)

APPENDIX A

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January 8, 2001

Ms. Karen D. Higginbotham, Project Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dear Ms. Higginbotham:

Enclosed please find the final report summarizing key stakeholder comments on EPA's Title VI guidance.

Per your purchase order, multiple signatories to an individual document were considered a single "commenter." Also, in accordance with the purchase order, stakeholders were grouped into categories such as "State," "Industry," etc. EPA may wish to note the following decisions on how comments were grouped:

- EPA received three anonymous comments. Since the comments appeared to express individual opinions, these were counted as private citizen comments. (See Private citizens #8, #9, and #10.)
- [redacted] did not indicate whether the comments expressed an individual opinion or that of the North American Water Office. Therefore, these comments were categorized as those of a private citizen. (See Private citizen #69.)

- Mary Russo indicated her comments were both her own and that of the Maryland Waste Coalition. Therefore, these comments were categorized as those of a non-governmental organization. (See Non-governmental organization #55.)
- Because of his involvement with the Environmental Justice Resource Center (referenced in the address of the comments), Dr. Robert Bullard's comments were categorized as those of a non-governmental organization, rather than an academician or private citizen. (See Non-governmental organization #78.)
- The Solid Waste Association of North America was identified as an industry association because it identified its members as private as well as public sector professionals. (See Industry #3L.)

EPA had also requested information on duplicate comments. The New York State Department of Environmental Conservation letter of 8/30/00 appears to be a duplicate of their letter of 8/28/00. (See State #63.) The Bay Area Air Quality Management District's letter of August 23, 2000 appears to duplicate their letter of August 28, 2000. (See Local #14.) The Southwest Network for Environmental and Economic Justice submitted two sets of comments, which are not duplicates. (See Non-governmental organization #84 and #5L.)

Because the purchase order was restricted to comments pertaining to areas where EPA has policy discretion, this report does not summarize comments to the effect that Title VI of the Civil Rights Act itself must be changed.

Finally, in some cases where pages on comments were misnumbered, this report refers to the actual, rather than the typed, page number.

Sincerely,

Frances A. Dubrowski

ECOS Comments on Environmental Justice Guidance

Revised August 13, 2000

When U.S. EPA issued its "Draft Interim Guidance for Investigating Title VI Administrative Complaints" in February 1998, the Environmental Council of the States ("ECOS") responded quickly in March 1998 with Resolution Number 98-2 ("Resolution"), declaring the Interim Guidance was unworkable and should be withdrawn. In addition, the Resolution set out principles that should be embraced in any policy or guidance addressing Title VI complaints. The Resolution is included as Attachment #1 to this document.

U.S. EPA issued revised guidance in two documents published in the Federal Register on June 27, 2000. Those are entitled "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" ("External Guidance") and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" ("Internal Guidance").

After U.S. EPA issued the two guidance documents in June 2000, ECOS members discussed during conference calls how the External and Internal Guidances compared to the seven fundamental principles set out in its Resolution. Further, all ECOS members were invited to submit comments on the guidance. These comments were developed as a result of those efforts and finalized at the ECOS annual meeting in August 2000. They are divided into comments pertaining to Both Guidances, then to the Internal Guidance, then to the External Guidance.

Comments Pertinent to Both Guidances Published June 27, 2000

- Nothing is more important to the regulatory process than clearly defined terms and requirements, so that a person subject to a particular law can take specified actions with the knowledge and certainty that if properly implemented or undertaken, compliance is achieved. This is true of a permit applicant seeking to comply with environmental laws and it is true of a federal grant recipient seeking to comply with Title VI. We cannot hit a moving target, which is what these guidances represent. The guidances fail to lay out a clear process that if followed, will satisfy Title VI concerns. There are so many judgments left to U.S. EPA to be made, that the process described therein is completely devoid of the clarity and certainty that are fundamental requirements of a sound regulatory process.

- Notwithstanding U.S. EPA's attempt to describe a process that might be undertaken, it stresses in the External Guidance that such a process is completely voluntary and then comments in the Internal Guidance that "EPA may decide to follow the guidance provided, or to act a: variance with this guidance, based on its analysis of the specific facts presented." Further, if a state voluntarily implements approaches to Title VI compliance, the External Guidance states those efforts will only be afforded "due weight" in gauging whether Title VI concerns have been satisfied, which is another judgment by U.S. EPA. Therefore, both guidances provide virtually no certainty.

- In its Resolution, ECOS stated that terms needed to be defined. Key terms are still not adequately defined in the two guidances. There is no single definition of adverse disparate impact. Similarly, terms such as "adequate justification" or "comparison populations" are not specifically defined.

- The standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, still lack specificity and assurance that sound peer-reviewed science will be used as called for in the ECOS Resolution.

- The guidances fail to define clearly how to select a comparison population, which is a key component of determining whether disparate impact exists.

- Neither guidance does much to help states avoid Title VI complaints as called for in the ECOS Resolution. Even if the state has an Environmental Justice (EJ) program, a complaint could be filed by someone whether or not he or she participated in the EJ program or public participation activities of the state.

- To fully implement the objectives of the Title VI guidance, EPA must engage in an open debate with the Congress to clearly establish the boundaries of federal executive branch authority and provide an avenue for all levels of government to obtain adequate resources to implement agreed upon objectives.

- The choice of issuing guidance rather than regulation means that neither guidance document is binding on the states.

Comments on External Guidance

- There are aspects of the External Guidance that appear to respond to the Resolution. The variety of options provided in the External Guidance clearly address the need for states to have flexibility in designing their EJ programs. In addition, the External Guidance clearly represents an attempt to educate

states on what types of factors are to be considered in evaluating whether a violation of Title VI has occurred.

- The resource intensity of operating state EJ programs is recognized in the External Guidance, but then dismissed because the guidance is voluntary. This misses the mark. ECOS members question whether U.S. EPA has plans to furnish federal funding to offset this resource burden, or at a minimum, to identify where those resources can be obtained. Can state EJ programs be funded for existing federal grants with a related reduction in other activities under those grants? As written, the External Guidance does not adequately address the concern expressed in the ECOS resolution to avoid unfunded mandates and unnecessary burdens.

- The External Guidance does not allow the states to develop environmental equity programs that if implemented properly, automatically satisfy Title VI requirements, as called for in the Resolution. U.S. EPA wants the states to do so, but it won't tell us how much is enough. No matter what a state does in implementing an environmental equity program, U.S. EPA reserves the right to perform a *de novo* investigation and determine whether the state effort is good enough.

- The External Guidance declares states' approaches to Title VI compliance will be given "due weight" if a complaint is filed. The refusal by U.S. EPA to define its requirements specifically enough for a recipient or a permit applicant to be able to rely on the results of those approaches contributes further to the uncertainty. U.S. EPA claims it cannot delegate its responsibility to assure compliance with Title VI. That does not preclude U.S. EPA from defining a process that either provides greater assurance that robust state approaches will be given greater weight or heightens the threshold for a Title VI complaint to be accepted. U.S. EPA prefers to leave itself complete discretion, which only further contributes to the uncertainty and potential arbitrariness of its review. In the end, such uncertainty raises doubt that the External Guidance will actually assist the states in complying with Title VI.

Comments on the Internal Guidance

- The Internal Guidance makes it clear that permit decision making is not shifted from the states to the federal government as called for in the Resolution. The revised guidance clearly states that a Title VI complaint does not nullify or even stay a permit and elaborates that the interest of the Federal Government is in ensuring nondiscrimination by its recipients.

- The guidance also addresses the concern in the Resolution that investigating and resolving Title VI complaints must not create unnecessary delays in the

environmental permitting process. The guidance clearly states that acceptance of complaint does not stay the permit at issue.

- Another change that appears positive is that the Internal Guidance states that U.S. EPA "generally expects to consider only those types of impacts affected by factors within the recipient's authority under applicable law," which is consistent with U.S. EPA's ruling in the Select Steel case, and an important acknowledgment of a recipient's limitations in achieving resolution of the issues raised. References to state constitutional authorities and other general laws that allow U.S. EPA to broadly define the recipient's authorities should be deleted.

- The revised guidance does not specifically recognize the precedential value of the Select Steel ruling, which is the only Title VI complaint that U.S. EPA has adjudicated. The guidance seems to be stating that fundamental concepts in the Select Steel ruling may at times apply and at other times they may be overcome. This appears to be inappropriate treatment of an administrative ruling. U.S. EPA should clarify how this guidance will be implemented to ensure consistency with Select Steel, as legal principles require.

- The Internal Guidance does not provide adequate and definite timeframes as requested by the Resolution. The timeframes for various state actions in the revised guidance is unreasonably short. Fourteen (14) calendar days are allowed to submit additional information the state would like U.S. EPA to consider. Only 10 calendar days are allowed for a recipient to voluntarily comply after a formal determination of noncompliance. At the same time, in discussing the viability of Title VI complaints received, the guidance states that certain timeframes may be waived for good cause or that some steps should "generally" be done within a certain time period Untimely complaints may be rejected, but U.S. EPA retains the right to waive the timeframe. No certainty or enforceability is provided for any of the timeframes. Experience to date suggests U.S. EPA cannot meet these timeframes. The process should contain incentives for timeframes to be met and consequences if they are not.

- The thresholds for who can file a complaint and for the acceptance of complaints are too low. The person filing the complaint does not have to be directly impacted by the issue but rather simply a member of the class of people, or a representative of a person or class of people. Further, there is no minimum level of support that must be provided with the complaint for U.S. EPA to accept it. In fact the guidance only states that complaints will be rejected if they are "so incoherent they can not be considered grounded in fact or those that fail to provide an avenue for contacting the complainant." Further, the statement in the guidance that "Complainants do not have the burden of proving their allegations are true" only invites frivolous complaints.

Before accepting a complaint, U.S. EPA needs to determine the veracity of the complaint and that the complaint broadly reflects the concerns of the impacted community. Acceptance determinations should be made within 20 days of receiving the complaint. Better defined threshold requirements will avoid wasting resources of U.S. EPA and the recipient.

- U.S. EPA attempts to reduce the number of permit decisions on which a Title VI complaint will be continued through the investigation process. The guidance states that where the complaint was triggered by a permit that significantly decreases overall emission or emissions of pollutants of concern, U.S. EPA will likely close its investigation. Unfortunately, the guidance goes on to say that while a specific complaint may be dismissed on the basis of decreased emissions, U.S. EPA may choose to conduct a compliance review of the recipient's relevant permit program either at that point in time or at some future date. Once more, the guidance fails to provide certainty. Similarly, the guidance states that complaints involving permit modifications other than emissions will "generally" not be investigated, but provides no assurance.

- The role of local governments along with their authority is still substantially ignored in the revised guidance. The discussion of Area Specific Agreements implies their participation, yet no reference is made nor is there any effort to address limitations on legal authority. The Internal Guidance also does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, brownfield redevelopment, or greenspace preservation initiatives as called for in the Resolution.

- The emphasis placed on the informal resolution process is likely to be resource intensive and place unnecessary burdens on states without a clear picture of what will constitute success. The ability of the recipient to justify a disparate impact is a positive element of the revised guidance. However, U.S. EPA claims the right to rebut a justification if it determines that a less discriminatory alternative exists. Once again, standards for this determination are lacking, which causes uncertainty.

Conclusion

The draft guidances published on June 27, 2000 did address some of the concerns identified in the previous ECOS resolution; however, the preceding specific comments also identify fundamental flaws in these draft documents. Accordingly, ECOS calls for U.S. EPA to revise the documents substantially prior to issuing either guidance in final form. Any final guidance must provide certainty, set out explicit steps that can be taken, use the tools and science available to us today, and avoid unnecessary burdens/unfunded mandates. The current guidances fall short on each of these issues. Further revision to the current draft guidances must also focus on providing certainty - in terms of

process and outcome - to the parties involved, by clarifying legal authority, by defining all terms, and by assuring U.S. EPA's commitment to be bound by it. ECOS strongly urges U.S. EPA to address the aforementioned issues in finalizing the guidance documents.

Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building
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August 28, 2000

The Secretary **717-787-2814**

Ann E. Goode, Director
Office of Civil Rights (1201 A)
U.S. Environmental Protection Agency
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Washington, D.C. 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

Dear Ann:

The Pennsylvania Department of Environmental Protection (DEP) appreciates this opportunity to comment on the two draft Title VI guidance documents. Like EPA, Pennsylvania has used the last year to work with various external stakeholders in examining the complex issues related to Title VI of the Civil Rights Act and environmental justice.[1]

Pennsylvania has taken special steps to address environmental justice issues by creating an external and internal work group and hosting an all-states meeting. We are submitting the following comments based on recent insights from the work group as well as our experience in administering environmental protection programs. Our suggestions are focused on how your agency can assist states in complying with their obligations under Title VI. We hope that you will incorporate our suggestions in your final draft guidance.

EPA Approval of State Environmental Justice Programs

Pennsylvania is currently in the process of working with various stakeholders to develop recommendations that would more fully incorporate environmental justice principles into our environmental protection programs. This effort has been underway for more than a year, and is expected to produce some very specific recommendations. Pennsylvania DEP has committed to implementing these recommendations to the greatest extent possible. We believe that other states are also taking similar paths. We suggest that EPA take the next step and agree to formally approve such state environmental justice programs if they are adequately protective of Title VI principles.

As presently drafted, the guidelines promise to give "due weight" to state programs; however, it also suggests that EPA will conduct a *de novo* review of state actions. Rather than broadening your review outside of predictable boundaries, we suggest that for those states with approved EJ programs, EPA's investigation be limited to whether the state followed the procedures established within its

[1] The external work group consists of representatives of environmental and community advocacy groups, industry, academia, as well as state and local government agencies.

program. If the state is not in compliance with the approved program, EPA should exercise its enforcement authority as currently defined in the guidance documents with extended timeframes.[2]

It is critical for EPA to support states for voluntarily adopting comprehensive programs that meet or even exceed federal standards. EPA should consider each state or tribal program within the context of its unique circumstances. Clearly, although the principles of environmental justice are universal, there is not a single "right" approach to meeting the obligations of Title VI.

This recommendation does not suggest that EPA should relinquish or delegate its oversight authority to grant recipients. On the contrary, this concept reinforces EPA's role in environmental and civil rights law by considering EPA and other stakeholders' feedback throughout the program development process. We are confident that this approach will provide the clarity and certainty needed by communities, applicants, local government and state permitting agencies. Give us a reasonable standard to meet and we can work in concert to assure timely disposition of EJ issues.

EPA Authorization of Reallocating Federal Funds

In order to continue this level of effort and successfully implement the recommendations from the stakeholders group, Pennsylvania needs flexibility in reallocating existing federal funds. More specifically, EPA must recognize that implementation of a state environmental justice program is a grant fundable activity.

The Department strongly suggests that EPA re-establish and expand the State and Tribal Environmental Justice Grants Program. Programs of that nature help states comply with federal requirements.

EPA Acknowledgement of State and Local Government Roles

Local zoning plays a significant role in the siting of facilities. Many municipalities are also recipients of federal funding, and are themselves subject to Title VI. As you know, Pennsylvania has a unique local government structure and we depend heavily upon its sole authority for local land use regulations. The revised guidance and the new external guidance should recognize the respective roles of state and local government.[3]

EPA Coordination of Title VI and Brownfields Issues

Pennsylvania supports EPA's successful implementation of its Brownfields Program. It is worth noting, however, that our efforts to improve the economic viability of American cities must continue to consider environmental justice issues. If it becomes too difficult to redevelop abandoned industrial sites that are located in neighborhoods with minority-dominated populations, there is little prospect of ever achieving the ultimate goals of the civil rights movement.

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[2] Pennsylvania echoes ECOS' comments regarding the unreasonable timeframes in the guidance document. See ECOS' letter dated August 13, 2000.

[3] Refer to Pennsylvania's enclosed 1998 comments on the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.

EPA Needs to Better Define "Significant Adverse Impact"

We recommend that EPA better define a test for determining a significant adverse impact. The current examples of adverse impact significance are such that it appears that disparate impact analysis may not be triggered.

For example, typically, the incremental inhalation carcinogen risk from a new project is limited to one in a million. U.S. EPA's acceptable target risk levels for hazardous waste burning facilities (cumulative multi-media) are 10^{-5} for cancer and a hazard index of 0.25 for non-cancer effects. The guidance suggests the range of 10^{-6} to 10^{-4} for cancer and a hazard index of 1 for non-cancer. If the hazard index exceeds 1, the permit would not be issued at any location and thus the requirement of disparate impact analysis becomes a moot point. Furthermore, since the multi-media cumulative assessment is not mandated in all cases, these suggested levels could be applied to single media individual source assessments.

Based on discussions with our external work group, we are interested in more clarification on: 1) the appropriate trigger levels for disparate impact analysis, 2) the necessity for conducting cumulative impact assessments and disparate impact analyses, and 3) the appropriate methodology for conducting risk assessments.

EPA Guidance on Cumulative Impact Analysis

The Department welcomes the opportunity to review, comment upon and implement an EPA protocol for cumulative impact analysis that has been accepted by the academic and scientific community.

In conclusion, a national EJ program is a complex, resource intensive, and somewhat state dependent effort. Much like the media specific programs authorized to carry out the federal mandate, a working state EJ program which meets threshold criteria established by EPA should be recognized and approved to carry out the key investigatory aspects of the federal law.

Pennsylvania applauds your efforts and approach to improving the 1998 guidance. Acknowledging that no federal guidance document will provide all of the answers, we believe that our suggestions will minimize future complaints. Furthermore, we endorse the enclosed comments from the Environmental Council of States.

DEP will continue to build upon the productive working relationship with EPA's Region III as well as its Office of Civil Rights. We are also looking forward to developing a program that meets federal standards. Please direct any questions you may have about these comments to Alisa E. Harris, Environmental Equity Coordinator, or to me.

Sincerely,

James M. Seif
Secretary

Enclosures (w/hard copy)

cc: Pa. DEP's Environmental Justice External Work Group
Samantha Philip Fairchild, Director, OECEJ, USEPA

cc: David E. Hess, Executive Deputy Secretary
Donald S. Welsh, Deputy Secretary, State/Federal Relations
Alisa E. Harris, Environmental Equity Coordinator

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James T. Holcombe
Senior Envir. Engr.
Environmental Policy

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW.
Washington, DC, 20460

Pacific Gas and Electric Company appreciates the improvements that the US Environmental Protection Agency (EPA) has made to this draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance," published at 65 Fed. Reg. 39,650 (June 27, 2000). The draft guidance is now based upon generally sound guiding principles:

* All persons are entitled to a safe and healthful environment;
* Strong civil rights and environmental enforcement is essential; and
* Enforcement should be consistent with sustainable economic development.

However, we remain concerned that the guidance:

◊ allows complaint filing without impacted community involvement;
◊ doesn't provide for notice of pending complaints to impacted communities;
◊ focuses on demographics rather than impacts;
◊ focuses on reactive permit reviews rather than proactive planning;
◊ focuses on impact magnitude rather than impact distribution;
◊ does not adequately define an unacceptable impact or distribution; and
◊ provides no incentive for better land use planning.

We urge EPA to:

A. open the process to all impacted parties;
B. focus on disparate impacts, not disparate demographics;
C. address existing disparities via planning rather than permitting;
D. focus new permit reviews on distribution rather than magnitude;
E. reduce the uncertainty about what is or is not acceptable; and
F. ease reviews for areas incorporating EJ into land use planning.

A. OPEN THE PROCESS TO ALL IMPACTED PARTIES

EPA's draft Investigation Guidance allows "a person who is a member of a specific class of people that was allegedly discriminated against" to file a Title VI complaint

even if that person would not be directly impacted (see item III(A)4(b) on 65 FR 39672).

Persons concerned about potential issues should be required to communicate those concerns to the impacted community, and should be able to elevate those concerns to EPA only if they can persuade at least one member of the impacted community that this should be elevated. While EPA should stress that each individual member of the community is entitled to be protected, EPA should also stress that each individual member is also entitled to self determination of his or her best interest, and EPA will only intervene on behalf of at least one actually impacted person.

Section II-B of the Investigation Guidance, entitled "Roles and Opportunities to Participate," further discusses the role of the complainant and the role of the funding recipient, but it does not discuss the role of the community or facilities impacted (see 65 FR 39671-72). While EPA acknowledges that facilities could be contacted (see 65 FR 39693), there is no assurance that any facilities will be contacted. Nor is there any assurance that the community at large will be contacted. Upon elevation to EPA, **someone should be required to notify the community at large** (including not only the recipient agency, the permittee and other persons impacted by the permittee, but also other sources that might be contributing to a collectively disparate impact, and other parities likely to be impacted by efforts to eliminate that disparate impact). Logically, that burden should fall upon the complainant. EPA has already accepted the far more costly burden of investigating all complaints filed. If EPA does not discourage frivolous complaints by at least insisting upon notification, EPA could find itself dismissing valid complaints due to lack of resources to distinguish between under-documented versus unjustifiable complaints. In recognition that funds are tight within communities of demographic disparity, EPA should make it clear the all such notification costs will be reimbursed with interest, out of funds otherwise due to the recipient agency, if the complaint is found to be valid. If EPA does not have that reimbursement authority, it should seek it. But the community notification requirement should remain. Of course the greater the uncertainty about reimbursement, the more flexible EPA should be about the method of notification: e-mail, fliers, news reports... But EPA should not allow a single individual to file a complaint, and then allow that complaint to be evaluated in relative secrecy. That could freeze out the majority of the impacted community from the entire process.

Opening the process allows the impacted community to negotiate directly with the recipient agency, the permitted source, or other targeted existing sources – on how to most effectively and immediately eliminate the disparate impact. The earliest possible elimination of disparate impacts, not any formal finding of fault, should be the goal. EPA already acknowledges that informal complainant-recipient resolution will be acknowledged (see IV(A)(1) on 65 FR 39673). But resolution of one individual's complaint does not ensure that other individuals might not raise similar issues. EPA guidance should also preclude the dismissal of complaints until the community has had an opportunity to comment upon the proposed dismissal. EPA should apply the same

early, open, and inviting process towards input on its complaint reviews as it suggests in II(B)(2) that permit applicants follow in seeking to avoid such complaints.

B. FOCUS MORE ON DISPARATE IMPACTS THAN DISPERATE DEMOGRAPHICS

EPA suggests in 3(f) that:

> "Measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations" (see 65 FR 39661).

But EPA does not suggest a similar statistical standard for impact evaluation. EPA merely states that any significant impact could be disparate and that:

> "The determination of what level(s) of disparity that can be considered significant should take into account the nature of the decision being made (e.g., allocation of resources, triggering further action); the type of disparity comparison; the consistency of results between multiple comparisons; and underlying data quality. In many instances, you should consider both the degree of disparity of population composition with the degree of disparity of estimated level of adverse impact." (see 65 FR 39662).

EPA suggests any exceed of any standard could be significant. EPA also defines "statistical significance" in a way that could encompass impacts below standards:

> "A determination that an observed value is sufficiently large and meaningful to warrant some action." [see 65 FR 39667 and 65 FR 39686].

To the extent that statistical analysis is employed, we would urge that such analysis be used first to identify communities with statistically higher impacts, and only secondarily to confirm whether the impacted community might also have statistically different demographics. Average communities should not receive less protection than disparate communities. Even if EPA deemed its authority to act under Title VI limited to cases where demographic disparity can be demonstrated, EPA has other authority which could be employed. But if EPA wishes to measure demographic disparity, EPA ought not suggest that a different statistical criteria could be used for deeming impacts disparate.

EPA may be tempted to keep community demographics as an initial screening tool for completely new projects which are nominally free to choose their location. But most permits involve renewals or expansions where there is little choice of location. Other "new site" projects may have relatively few site options, because they are tied to specific resources only available at specific locations. For example, some projects may need to be located near impacted areas in order to find sufficient nearby mitigation. EPA could more effectively employ the degree of demographic disparity as an indicator of the level of EPA funded investigation warranted before complaint dismissal, than as an indicator of which impacts are acceptable or unacceptable.

C. ADDRESS EXISTING DISPARITIES VIA PLANNING RATHER THAN PERMITTING

Although EPA considers permit renewal to be an agency action of the same import as permit issuance, in areas like California where thousands of smaller sources are required to obtain permits, renewals are relatively routine events that may trigger emission reports and fee payments, but not typically permit reviews or revisions. The vast majority of decisions on the acceptability of existing impacts, or on what should be done to reduce unacceptable impacts, are made within the attainment planning context, not the permitting context.

Air and water quality attainment planning already requires the evaluation and reduction of cumulative impacts. The air quality process generally occurs over a fairly rapid three-year cycle. The corresponding water quality process just occurs over a longer cycle. Each of these processes provide more appropriate venues for cumulative impact identification and reduction, than would individual project permitting reviews. The attainment processes are also more likely than the new source permitting process to ensure that parties responsible for causing adverse impacts will pay for their elimination. EPA reviews and approves air quality attainment plans and water quality total maximum daily loading plans. EPA also has the authority to impose major sanctions, or to assert primary jurisdiction, if the state or local agencies do not act responsibly. EPA should revise its EJ guidance to distinguish between its review of new site permitting and its review of attainment planning.

Attainment planning typically identifies the point of maximum impact. But it does not typically analyze which areas receive below average, average, or above average impacts. EPA guidelines ought to suggest that every new attainment plan identify areas that receive impacts that are one, two or three standard deviations above the average. We would suggest that be done on an annual average, population weighted, exposure basis to concentrations above established acceptable levels, or to calculated cancer risks above established acceptable risks. That would ensure that no calculations would be required in areas where impacts are universally within allowable or accepted levels. It would also give EPA a measure of the relative severity of the annual average impact, which could be a consideration when evaluating where to place limited investigative resources. But most importantly, it would give potential applicants information helpful to site selection, and impacted communities information helpful to seeking relief. EPA should encourage such planning by adopting a higher threshold for review of EJ complaints relative to existing permit renewals and existing permitted source modifications, for areas that had an accepted attainment plan including an approved impact disparity analyses, and an approved plan for reasonable further progress in reducing existing disparities.

D. FOCUS NEW PERMIT REVIEWS ON DISTRIBUTION RATHER THAN MAGNITUDE

Where existing impacts are deemed "*unacceptable*," permitting processes expect the newest source to more than fully offset its incremental impact, but not to eliminate any pre-existing imbalance. Often sources are allowed to provide the mitigating reductions at remote sites. This approach facilitates facility modernization and expansion, and reflects the general concept that "a rising tide raises all boats." This approach is most reasonable when dealing with regional air or water pollutants, where maximum impacts are less likely to occur near the source. It is less defensible for hazardous air pollutants where maximum impacts will occur near the sites. EPA should clarify that its application of environmental justice to permit reviews will focus primarily on pollutants deemed to have localized impacts – and primarily upon how the distribution of those localized pollutant impacts for the facility compares to the distribution of the facility mitigation. Any EPA EJ investigation of what level the recipient agency considers acceptable, should focus more on whether the acceptable level is uniformly applied, than on whether a more stringent level should have been selected.

In urbanized areas, hazardous air pollutant impacts from cars, trucks and buses generally exceed those from permitted sources. Projects large enough to cause impacts of disparate magnitude should be large enough to ensure that the areas receiving the greater impacts should also receive greater net benefits from mitigation. Even projects merely contributing to existing disparate impacts should not find it difficult to obtain mitigation within the same disparately impacted zone. However, EPA should allow projects impacting areas of lesser impact to mitigate in areas of greater impact. Put simply, projects should be able to put the mitigation where it is needed the most. This would allow cleaner natural gas trucks and buses operating within more heavily impacted urban areas to mitigate emissions from a new facility operating in less impacted suburbs.

E. REDUCE THE UNCERTAINTY ABOUT WHAT IS OR IS NOT ACCEPTABLE

The guidance states that:

> "A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear. For example, where credible measures of both the demographic disparity and the disparity in rates of impact are at least a factor of 2 times higher in the affected population"

But that is given as an example, rather than a rule. The vagueness of the EPA guidance preserves agency flexibility, but creates uncertainty. Uncertainty hinders the

modernization and expansion of industry and infrastructure, and could retard progress towards both environmental and economic improvement. There is increasing concern about revitalizing disadvantaged neighborhoods through the cleanup and utilization of brownfields. There is also increasing recognition that the least fortunate members of our society are generally the first to be hurt whenever the economy slows down. We urge EPA to grant states the widest practical discretion to decide for themselves what is or is not the "acceptable" average impact. EPA's Title VI implementation should focus on "*variations*" in impacts above the average or acceptable level, and on the "*distribution*" of impacts versus mitigation. But EPA needs to clearly define for the project proponents, the impacted communities, and the reviewing agencies exactly what it considers to be an "*acceptable*" versus "*unjust*" impact level, variation or distribution. As Craig Arnold stated in *Land Use Regulation and Environmental Justice*, 30 Env'tl L. Rptr. (ELI) 10395, 10397-98 (June 2000):

> "The Interim Guidance adopts a reactive strategy that promotes uncertainty for all involved. Instead of defining clear standards about which facilities and operations will be allowed in which communities, the Interim Guidance encourages ad hoc challenges to proposed or existing environmental permits. The results are:
> (1) affected communities and other environmental justice advocates are always reacting to specific projects rather than proactively establishing clear standards to protect their communities;
> (2) the momentum of an existing or even proposed facility can be difficult to stop;
> (3) state permitting agencies and facility owners/operators face substantial uncertainty about whether a proposed activity will be found to have an impermissible disparate impact . . . and
> (4) a facility owner/operator can invest substantial amounts in a particular facility (including an established, long-permitted facility) and/or permit application only to have it unpredictably investigated and rejected."

F. EASE REVIEWS FOR AREAS INCORPORATING EJ INTO LAND USE PLANNING

To the extent that some impacts may be unavoidable, and someone will always have to be closest to those impacts, differences will remain. Populations of demographic disparity may have less education, less desirable jobs and hence fewer resources to devote to obtaining preferred housing or to opposing undesirable neighbors. In this era of relatively universal "not in my backyard" opposition, even the fairest local agency efforts to fairly implement their permitting programs may lead to demographically uneven outcomes. But an uneven outcome is not necessarily unjust. Where impacting facilities precede their surrounding communities, and land use rules require initial developers -- and subsequent sellers -- of properties expected to experience higher impacts to give notice of those impacts to prospective buyers, EPA should require

impacts to reach a greater level of disparity before becoming actionable.. While EPA cannot require land use planning, EPA can modify its guidance to encourage land use planning.

These comments are filed on behalf of Pacific Gas and Electric Company, an investor-owned gas and electric utility serving about 13 million people over 77,000 square miles of Northern and Central California. If you have any questions about them, please call me at 415-973-6910.

James Theodore Holcombe
James Theodore Holcombe

Government of Puerto Rico

Solid Waste Management Authority

Fax Muszynski
cc. D. White

Roxanna Longoria, P.E.
Executive Director

FYI

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To Jeanne Boodle	From Bill Muszynski
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NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

August 28, 2000

Mrs. Jeanne M. Fox
Regional Administrator
United States Environmental
Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Dear Mrs. Fox:

Recently, we received a request for comments on the draft guidance regarding Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal assistance from discriminating in their programs on the basis of race, color, or national origin.

Even though the Solid Waste Management Authority does not emit or establish permits, after revising the draft guidance, we conclude that the document is in accordance with the Public Policy of this authority.

Thanks for taking into consideration the comments of the Solid Waste Management Authority and for keeping us in your lists for document consultations.

Sincerely,

Roxanna Longoria

Roxanna Longoria, P.E.
Executive Director

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HQ ESD

(b) (6) - Privacy on 08/28/2000 11:09:08 AM

To: Group Civilrights@EPA
cc:

Subject: (b) (6) - Privacy comment on Rule

> EPA: I expect the EPA
> to live up to the civil rights statutes just as all
> other agencies of
> government have to. By living up to, I do not mean
> interpret the law so as
> to eviscerate such laws, but to abide by the spirit
> of justice and fair
> play. Certainly, citing dumps where they will
> impact minorities most
> heavily is not living up to the spirit of civil
> rights.
>
> (b) (6) - Privacy Ph.D.
>

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APPROPRIATIONS

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TRANSPORTATION AND RELATED AGENCIES

MEMBER, CONGRESSIONAL HISPANIC CAUCUS

MEMBER, CONGRESSIONAL BLACK CAUCUS

VICE CHAIR
DEMOCRATIC STEERING COMMITTEE

Comments of Congressman José E. Serrano on EPA's Draft Guidance on Title VI of the Civil Rights Act of 1964

August 23, 2000

In response to the solicitation by the Environmental Protection Agency (EPA), I submit this comment on EPA's Draft Guidance on Title VI of the Civil Rights Act of 1964. EPA has released two guidance documents - one for recipients of EPA funds that administer environmental permitting programs and one for administrative challenges to permits. Because I have submitted a complaint that was accepted under the Interim Title VI Guidance, my comments focus on the draft revised guidance for Investigating Title VI Administrative challenges to permits.

In December, 1998, a group of community organizations, residents of the congressional district I represent and myself filed a Title VI administrative complaint[1] with EPA's Office of Civil Rights (OCR), alleging that the New York City Department of Sanitation (DOS) and New York State Department of Environmental Conservation (DEC) engaged in a discriminatory pattern of siting waste facilities in our community. In March, 1999, EPA accepted for investigation the allegations against DEC, and in October, 1999 EPA accepted for investigation the allegations against DOS. To this date, this investigation is pending and no substantial inquiry

[1]See File No. 10R98R2.

has taken place, apparently due to a "backlog" of over two dozen cases filed with OCR.

Despite appropriations language by the House of Representatives directing EPA to deal with the South Bronx complaint "expeditiously,"[2] Over a year has passed without any movement on this matter. Although backlogs may explain why an agency cannot handle all of its caseload, it is troubling that, given the disparities in siting waste facilities throughout the country, EPA has not found one Title VI violation. Therefore, it becomes crucial for EPA to adopt procedures and standards that are reliable, simplify the review process and enable effective analysis.

The adverse disparate impact analysis of the proposed guidance, particularly the impact assessment, impact benchmarks and use of National Ambient Air Quality Standards is problematic. Although it is necessary to examine the context where a particular facility or facilities are proposed, and avoid examining the proposed facility and its impacts in a vacuum, EPA must not impose a cumulative impact analysis so unwieldy that it invites more speculation at its conclusion than when it began. Unfortunately, the proposed guidance sets up this kind of uncertainty.

In addition, the burdens on community residents seeking to file a complaint for investigation or support their complaint with analyses or studies are onerous. Most potential Title VI administrative complainants do not have the resources to provide the technical information and analyses that EPA would give "more weight to" in an investigation.[3] EPA must be careful not to set up standards that could eliminate a complaint essentially because the

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[2]See H.R. Rep. No. 105-769 at 273 (1998)

[3]See Draft Interim Guidance at 24.

complainant's data was not sophisticated or thorough enough.

In conclusion, I recommend that EPA work on streamlining the complaint process and simplifying the adverse impact analysis. Investigation of administrative Title VI complaints should be thorough and based on sound principles. However, it does not have to be rocket science.

Shintech Incorporated
Wesleyan Tower, Suite 811
#24 Greenway Plaza
Houston, TX 77046

August 25, 2000

Ann Goode
Director
Office of Civil Rights
US EPA (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Goode:

Please find enclosed the comments of Shintech Incorporated on EPA's Title VI Draft Investigative Guidance. We appreciate EPA's efforts in providing the opportunity for all interested stakeholders to review and comment on the Draft Guidance prior to final publication in the Federal Register.

COMMENTS OF SHINTECH INCORPORATED ON U.S. EPA's TITLE VI DRAFT INVESTIGATIVE GUIDANCE

These comments are being submitted to the U.S. Environmental Protection Agency (EPA) on behalf of Shintech Incorporated (Shintech) of Houston, TX. Shintech is a chemical manufacturing company which has been involved in and impacted by issues related to Title VI of the Civil Rights Act of 1964 and environmental justice while attempting to site proposed facilities in the State of Louisiana. As a result of its experiences in Louisiana, Shintech has a greater sensitivity to the issues of siting industrial facilities and state permitting decisions as they effect local communities and the environment.

NOTIFICATION AND TIMING CONCERNS

The Guidance should not involve excessive delays. Aggrieved parties may have a window of 180 days to file a Title VI complaint with EPA from the time of the aggrieved act. EPA then has 5 days to acknowledge receipt of the complaint, after which it has 20 days to determine whether to accept the complaint. If the complaint lacks sufficient information, EPA may request clarification from complainant by a date to be determined, presumably based on the amount of information that is requested. EPA would then have 20 days to determine whether to accept, reject, or refer the allegation based upon the clarifying information. EPA then has 180 days from commencement of the investigation phase to notify the recipient of its preliminary findings. (Discussed in Sections I-V).

EPA's proposed Title VI complaint process is a lengthy one. Additional hardships to the parties include the discretionary period of time given complainants to comply with EPA's clarification requests, the lack of notice to the parties indicating the commencement date of the investigation and the good faith waiver complainants may exercise to avoid the 180 day filing requirement. In its current form, the process causes uncertainty to the parties regarding final resolution of the issue. During this time period, the recipient may be forced to suspend operations to await final resolution of the issue. The issue could span over a year before EPA even reaches a preliminary finding. Additionally, EPA has a backlog of Title VI complaints. Thus, not resolving issues raised in a timely fashion would unfairly impose severe hardships on those facilities attempting to site new facilities or obtain permits.

1. **Response deadlines to EPA information requests should not be discretionary.**

   During the "Acceptance Phase" of the Complaint process, EPA would contact the complainant for clarification where the complaint lacked sufficient information to make an acceptance determination and include a discretionary deadline. (Discussed in Sections IIA(2) and IIIA).

<u>Issue</u>: Discretionary deadlines for complainant responses increases the uncertainty related to finite time frames for final resolution of complaints. In addition, the exercise of such discretion by the agency potentially causes lack of faith and confidence in the impartiality of the process.

<u>Recommendation</u>: The Guidance should include case-specific deadlines for receiving complainant's responses to EPA clarification requests. These pre-determined deadlines would be identified in the Guidance and would be determined by the nature and amount of information requested. EPA should also include a maximum time frame for response regardless of nature and amount of the request.

Additionally, EPA should also send copies of its information request to all parties involved in the complaint. Such procedural safeguards provide a greater indication to the parties and other stakeholders of an estimated time frame for complaint resolution. Published time frames also ensures the integrity of the entire process through pre-established time frames that are imposed on all parties.

2. EPA's rejection of complaints based on complainant's untimely response should not be discretionary.

During the "Acceptance Phase" of the Complaint process, EPA would have the option of rejecting those allegations for which complainant has failed to timely respond to clarification requests. [Discussed in Section IIA(2)].

<u>Issue</u>: The Title VI complaint process is a lengthy process which could span over a time period of up to a year or more to resolve. According to the Draft Guidance, complainants have six months from the date of the violation to file a complaint. EPA, must then make a determination of acceptance, after which the Agency has 180 days from commencement of the investigation to issue its preliminary findings. Late responses to EPA information requests have the effect of prolonging an already lengthy process causing uncertainty for the parties. It also has the effect of adversely impacting the economic interests of other stakeholders whose permitting plans may be delayed.

<u>Recommendation</u>: It is recommended that EPA impose a non-discretionary per se rule of rejecting complaints where complainants fail to provide timely response to EPA's requests. This will provide an incentive for complainants to file timely responses, thus ensuring that the time frame for resolving complaints is minimized. In consideration of the span of time required for processing complaints, EPA should ensure that the process for resolving complaints is swift and efficient while maintaining fairness to all parties involved. Discretionary time periods cause uncertainty in and prolong the process, thus reducing the confidence of the parties as well as other stakeholders in the time frame for complaint resolution and in the integrity of the process itself.

3. **EPA's process does not provide for notification of the parties upon commencement of the investigation.**

During the "Investigation Phase" EPA proposes to notify the recipient of its preliminary findings within 180 days of initiating its investigation. [Discussed briefly in Section IIA(3)].

Issue: Notwithstanding the length of the investigation period, the Draft Guidance provides no indication that the parties will be notified of the commencement date for the investigation period. Thus, although parties are notified of preliminary findings at the end of the investigation, without notification of its commencement, they are unable to independently monitor the amount of time required to complete the investigation.

Recommendation: In consideration of the total time required for processing complaints, EPA should ensure that the process for resolving complaints is swift and efficient while maintaining fairness to all parties involved. Failure to provide parties with notice of specific time frames prolongs the process, imposes a level of uncertainty due to the inability to estimate the conclusion of the process and reduces the confidence of the recipient as well as other stakeholders in the integrity of the process.

Thus, in addition to the notice of its preliminary findings, the Draft Guidance, EPA's process should also provide the parties with notice of the date of the commencement of the investigation.

ENSURING FINAL RESOLUTION OF COMPLAINTS THROUGH THE ADMINISTRATIVE PROCESS

The Guidance does not encourage complainants to resolve complaints through the administrative process. The failure of the draft guidance to provide a right of appeal, its failure to include all parties in the informal resolution discussions and its failure to include the permittee stakeholder in the complaint process provides little incentive for parties to pursue their claims through EPA's Office of Civil Rights. The rights of parties will receive inadequate protection, additionally, EPA may be unable to provide the type of relief sought by the parties. Thus, the parties may consider it more practicable and feasible to address their claims through the courts. This is not be in the best interests of EPA, the parties or other stakeholders in resolving equity issues in the environmental arena.

4. **The Draft Guidance does not provide a right of appeal for complainant in the Title VI regulatory process.**

"In addition, because the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant

built into EPA's Title VI regulatory process." [Discussed Draft Revised Investigative Guidance, Section IIB(2)].
Issue: The failure of the Draft Guidance to include a right of administrative appeal for complainants is a disincentive for complainants to resolve their claims through the Title VI administrative proceedings and makes resolution through the courts an attractive alternative for potential complainants.

As noted above, because complainants may view this process as lacking adequate procedures to protect their rights and interests, complainants may chose to resolve their claims in courts of law. Many community groups are turning to non-profit legal groups that are sophisticated in the issues to provide pro bono legal assistance, thus the financial bar to seeking relief in the courts has become less of a concern. Due to the lengthy time period involved in resolving disputes through the judicial system, and the litigation costs which are borne by all parties, the court system remains a costly alternative for the parties and other stakeholders.

Recommendation: Therefore, EPA should provide a right of appeal for complainants. First, complainants are afforded the same rights in the process as the recipient. Second, it ensures that disputes remain at the administrative level where the parties may avail themselves of the informal resolution process. Thus, the administrative process remains a viable alternative to the court system as the dispute may be resolved in less time than proceeding through the courts and yields a net savings to all parties (including EPA) in use of human and financial resources.

5. **The Guidance does not include all parties during informal resolution.**

EPA proposes to pursue informal resolution directly with the recipient as an alternative or in addition to resolving through the complaint process. (Discussed on Section IIB(2), IVA(2).

Issue: Notwithstanding EPA's position of neutrality in the complaint process, failure of EPA to include the complainant does not provide a completely open environment conducive to full airing of all issues and concerns. Thus, complainants may believe their concerns have been inadequately addressed and as a result, may seek to bring additional complaints for EPA resolution causing an additional drain on over-tasked EPA resources.

Additionally, complainants will undoubtedly view EPA's ex parte negotiations with recipient as inadequate protection of their rights. Thus, complainants may opt to pursue their claims in judicial courts which involve great expense and inevitably will result in long delays in resolving the issue, and also imposes the unnecessary adversarial element in the equation making resolution that much more difficult whether in the short term or in the long term after completion of any lawsuit. No stakeholder interests (including those

of the federal government) are served by excluding complainants from the informal resolution process.

<u>Recommendation</u>: Complainant should have a role in the informal resolution process. As noted above, through the Draft Guidance, EPA should ensure that the process for resolving complaints is swift and efficient while maintaining fairness to all parties involved. This result is not achieved if one party is excluded from the resolution process; nor is it served if complainants seek the court system as venue to have its claims resolved. Judicial remedies will result in time delays and potentially exorbitant litigation fees for all parties. In addition, it ensures that the issues and concerns of all parties to the process are explored and considered prior to any settlement agreement.

6. **The Guidance does not provide a formal role for the permittee stakeholder in the complaint process.**

EPA notes that permit denial may not necessarily be the appropriate solution. (Discussed Sections IVB and VIIA(3)).

EPA proposes a number of impact reduction measures during the informal resolution process to include additional pollution controls, offsets, and emergency planning and response. [Discussed in Section IVB].

<u>Issue</u>: EPA notes that the Draft Investigative Guidance primarily addresses permitting decisions and actions by recipients. It also notes that permit denial may not necessarily be the appropriate solution. Thus, it could be inferred that EPA could exercise such remedial action assuming it currently has the authority to institute it. Although EPA may ultimately decide to deny the permit, its complaint process fails to provide a formal role for the permittee stakeholder in the complaint process, effectively denying all stakeholders the opportunity to ensure adequate protection of their interests. This is an untenable result because EPA's actions could have an adverse impact on the permittee's ability to conduct its business.

Additionally, EPA could negotiate an informal resolution which would result in the imposition of any one or a number of impact reduction measures on the permittee stakeholder. As noted above, the permittee stakeholder has no formal role in the complaint process. None of the parties to the complaint can adequately protect its interests and legal rights. Therefore, punitive measures could be imposed without the permittee stakeholder ever having the opportunity to adequately protect its interests through negotiations with the appropriate parties.

Last, if Title VI complaints result in settlements or orders which may impair permitting interests including permit revocation or additional offset projects, permittees may seek redress in the courts.

<u>Recommendation</u>: Where the complaint either directly or indirectly involves the allegations against a permittee, the Draft Guidance should provide that the permittee shall become a party to the complaint process. This ensures where potential settlements affect permits or permit applications, the permittee is afforded the opportunity to protect its interests through notification of all administrative actions during the complaint process, through participation in any informal resolution discussions and being the afforded the same opportunities as recipients to respond upon preliminary findings of adverse disparate impacts.

Additionally, providing a formal role for permittees in the process provides great assurances that disputes may be settled through the administrative process and are not removed to the courts for resolution which results in additional time delays, expense, and may not result in a amicable resolution to the satisfaction of all parties.

INHERENT FAIRNESS OF THE PROCESS

There are various provisions within the Draft Investigative Guidance where administrative actions of EPA during the process which have unjust results. The Draft Guidance has a number of provisions which allow EPA to exercise discretion to reject complaints, yet continue to hold recipients potentially responsible for allegations in the complaint. In addition, the Draft Guidance would impose penalties and other punitive measures during the informal resolution process prior to any formal finding of noncompliance with Title VI. Next, the Draft Guidance proposes to consider unregulated sources as part of its cumulative adverse impact analysis, although recipients have no authority over these pollutant sources.

7. **Administrative action against the recipient should end once EPA rejects a complaint.**

EPA retains the right to investigate an allegation contained in an untimely filed complaint, notwithstanding its rejection by EPA. [Discussed Section IIIB(1)].

<u>Issue</u>: EPA, in effect, engages in a circular argument by exercising its authority to reject the complaint, yet reserving a right to investigate the issue raised in the complaint. This raises a number of issues. First, because EPA may consider complaints, notwithstanding their untimeliness, complainants will have no incentive to file complaints in a timely manner. Thus, complainants purposely may file their complaints well after becoming aware of an alleged violation, but would have no impetus to file a complaint within the statutory 180 day deadline with the understanding that EPA would investigate the matter notwithstanding.

Additionally, with the understanding that EPA retains the authority to investigate certain

allegations notwithstanding their untimeliness, potential unfounded complaints could be filed for purposes of forestalling permit-related actions of recipients and permittee stakeholders. Since the Acceptance phase does not determine whether the complainant has filed a meritorious allegation, EPA would not determine the sufficiency of the allegation until after an investigation or compliance review has been initiated. Thus, certain facilities could become the target of an EPA compliance review at any point in the future based on groundless and untimely claims filed by the complainant.
Recommendation: Thus, to ensure timely filing of complaints by complainants and to avoid unnecessary delays in the complaint process, the final Investigative Guidance should provide that EPA would not seek to investigate allegations from untimely complaints. It also injects the process with a greater degree of certainty of final resolution and helps to ensure that the impartial role of EPA during the complaint process is maintained.

8. **Administrative action against the recipient should end once EPA rejects a complaint.**

EPA retains the right to conduct a "compliance review" notwithstanding a decrease in stressor levels. [Discussed Section VIB(1)(a)].

Issue: In the Draft Guidance, EPA notes that evidence of decreases in stressor levels is potential grounds for dismissal of the complaint. EPA also reserves the right to conduct a "compliance review" at any point in the future. First, EPA currently maintains the regulatory authority to conduct compliance reviews regardless of whether a complaint has been filed. If what EPA proposes here is a restatement of that authority, then there is no issue.

However, as may be inferred by the Draft Guidance, it would seem EPA is grasping at a related, but different issue. It would seem that EPA is stating that notwithstanding the rejection of complaints due to decreases in stressor levels, those recipients who have been the subject of a complaint, will be placed on what amounts to "probationary status" and may be subject to compliance reviews to be conducted at the discretion of EPA. Despite EPA's own rejection of the complaint, the exonerated recipient (and potential industrial facility) retains the moniker of a suspect subject to one or more compliance reviews (or investigations).

In effect, the "vindicated recipient" would receive greater scrutiny than other recipients who are not the subject of complaints, tantamount to remaining under an air of suspicion. EPA continues to deal with a backlog of complaints, some of which remain unresolved several years after filing, EPA resources would be better utilized for resolving this backlog, rather than targeting for compliance reviews, those recipients for whom EPA has already formally determined are in compliance with Title VI requirement.

<u>Recommendation</u>: Thus, EPA should not seek to conduct compliance reviews where a complaint has been dismissed based on decrease stressor levels. EPA should only conduct such compliance reviews based on random checks of all permitted facilities and not based on a list of exonerated recipients of previously dismissed Title VI complaints. This ensures that recipients are not unfairly singled out solely on the basis of being party to dismissed Title VI complaints.

9. **Informal resolution resulting in settlement agreements should not include penalties.**

In implementing informal resolutions, EPA proposes that settlement agreements include the impact reduction measurers which would be monitored and enforced by EPA and also include penalties for noncompliance, including special conditions on future assistance grants. [Discussed in Section IVA(2)]

<u>Issue</u>: Through the Draft Guidance, EPA has wisely decided to pursue informal resolution between the parties prior to engaging in the lengthy and contentious investigation process. However, as proposed in the Draft Guidance, any settlement agreements reached pursuant to informal resolutions would potentially contain penalties, notwithstanding the fact that there has been no formal finding of a Title VI violation on the part of the recipient.

<u>Recommendation</u>: Thus, EPA should not include penalties when informally resolving complaints with recipients, especially where no investigation has been conducted that provides evidence that any adverse disparate impact exists. The complaint process already allows for EPA to reopen complaints for failure to comply with commitments in the settlement agreement.

10. **EPA should not act on its own to determine impacts or stressors where the complaint is unclear**.

EPA proposes to rely on the complaint to determine the nature of the impacts or stressors. However, if the complaint fails to identify them, EPA will rely on its expertise to determine them. [Discussed in VIB(2)(b)].

<u>Issue</u>: Relying on its expertise to determine applicable impacts or stressors could result in a fishing expedition by EPA requiring discovery of a irrelevant information. Potential complainants could use this loophole to present open-ended complaints that purposely contain insufficient supporting data, thus forcing EPA to conduct blind fishing expeditions in the hopes that it would uncover potential violations during the review.

Additionally, it is not the role of EPA's Office of Civil Rights to provide the parties with

technical assistance in an effort to establish a theoretical cause for a complaint, but rather to investigate and resolve allegations of Title VI violations. To exercise such responsibility where the complaint is unclear casts a cloud over the impartiality of EPA's role in the process. As has been previously noted, EPA's resources are currently overextended and this additional function would serve to further extend the backlog of Title VI complaints waiting to be resolved.

Recommendation: As a result, EPA should not act sua sponte to determine the stressors alleged in the complaint, but rather issue a formal letter to complainant requesting clarification of the potential stressors which are of potential concern. This allows EPA to accomplish its responsibilities in an independent and objective manner and allows the parties to continue to maintain confidence in the impartiality of the process.

11. **EPA should not consider unregulated sources in an adverse impact study.**

In defining the scope of its investigation, EPA proposes to consider the cumulative impacts of regulated and unregulated sources together to determine the cumulative level of potential adverse impacts. [Discussed in Section VIB(2)(b)].

Issue: EPA's consideration of cumulative impacts from regulated sources when evaluating adverse impacts is one issue that has recently received greater attention. However, EPA should not consider unregulated sources in the determination of whether an adverse impact exists. First, because recipients have no authority over unregulated sources of pollution, they should not be held responsible for any adverse effects that these sources may impose on receptors; therefore, unregulated sources should be excluded from consideration in determining adverse impacts. Title VI, through the equal protection clause, is limited to governmental actions, and does not extend to private actions. EPA cannot claim it needs to consider effects of unregulated health risks in order to fulfill its equal administration of the potential health risks its regulates. The government's responsibility - and the Title VI claim - can only reach to the end of the government's authority.

In addition, consideration of unregulated sources is very misleading because they are not always identifiable. The data necessary to conduct this assessment is not available and or fundamentally unknown. Collecting the available data is costly and time-consuming. Since some of the data necessary to perform this assessment is unknown, any assessment would be inherently biased.

Next, the government has no standard to weigh data and analyses of unregulated sources. To make decisions on permit information, the government has standards for data quality and best practices for risk assessments. These standards and practices are uniform to ensure fairness and public review. Data from unregulated sources is likely not to comport with these quality standards. If people are exposed to benzene from two

chemical plants, 45 nearby automobiles and charcoal grills, the best data is most likely to be from the chemical plants. The inherent bias discussed above inevitably goes against the source with the most data. Before preparing these assessments, the data quality and reliability must be calibrated.

Recommendation: The adverse impact determination of the final Guidance should not include a study and consideration of unregulated sources to determine whether a cumulative adverse impact exists.

OTHER ISSUES FOR CLARIFICATION

12. **EPA should not refer complaints to other agencies where it lacks jurisdiction over an allegation or issue contained therein.**

During the "Acceptance Phase" of the Complaint process, EPA would make a determination of whether to accept for investigation, reject, or refer the complaint to that federal agency with jurisdiction over or is better equipped to handle the issues and allegations raised in the complaint. [Discussed in Sections IIA(2) and IIIA].

The Issue: Referral of complaints directly to another agency poses concerns for both the complainant and recipient involving full and complete resolution of all issues in a timely manner. First, the receiving agency of the referred complaint may have unique authority for resolving related issues not contained in the original complaint. Complainant is precluded from ensuring that the complaint referred to the receiving agency contains those additional issues that may be resolved as well.

Second, recipients cannot be assured of timely resolution of all issues related to a complaint when complainant must wait for notification of acceptance by the receiving agency prior to potential amendment of the complaint to raise issues unique to that agency.

Recommendation: EPA should return without prejudice to complainant those allegations for which it lacks jurisdiction. First, complainant may have additional concerns or issues related to the allegation which can be appropriately considered and addressed by the federal agency, but which was inappropriate for consideration by EPA based on the limits of its authority. Thus, it ensures that all issues and concerns are completely explored and addressed early in the process and it avoids time delays resulting from amended complaints, information requests, etc.

Additionally, EPA returning complaints to complainant allows EPA to conserve resources and redirect them to investigation of the numerous other complaints that EPA has and continues to receive.

Thus, It would be in the best interest of the parties for EPA to reject without prejudice any allegation(s) for which EPA lacks jurisdiction with proper notification to the parties for its reason(s) and to inform them of the federal agency having proper jurisdiction over the matter.

6. **The Guidance does not clearly establish that the rebuttable presumption rule as applied to regulatory compliance is applicable to all media programs.**

EPA states that "compliance with environmental laws does not constitute per se compliance with Title VI," but could establish a rebuttable presumption. [Discussed in Sections VIB(4)]

Issue: During the Public Listening Sessions held in Washington, DC and Dallas, TX, the Director of EPA's Office of Civil Rights (Director), responding to public inquiry, stated that EPA's Select Steel decision did not establish that compliance with environmental laws and regulations established a per se rule of Title VI compliance, but rather established a rebuttable presumption of Title VI compliance. (Which presumption could be overcome through the presentation of sufficient countervailing evidence). This rebuttable presumption rule was not expressly discussed in the Select Steel decision, but rather implicit in that decision.

The Draft Guidance embarks on a discussion of the rebuttable presumption rule in the context of environmental compliance. The Draft Guidance discusses the rule mainly in the context of air quality issues; however, its application in other media programs remains unclear until the very end.

Recommendation: EPA should provide a clear statement in the beginning of its discussion on this topic declaring that the rebuttable presumption rule is applicable in the context of all multimedia programs. Thus, compliance with environmental laws and regulations in the respective media program(s) that are the subject of dispute in the complaint would establish a rebuttable presumption of Title VI compliance.

7. **The Guidance does not clarify the establishment of the rebuttable presumption upon a finding of compliance with pre-existing obligations under area specific agreements.**

EPA encourages the use of area specific agreements between recipients and impacted communities proactively to resolve disparate impact issues. EPA proposes, to grant due weight to these agreements under certain circumstances. However, EPA notes that it

may not accord due weight in certain circumstances where the recipient is complying with pre-existing legal obligations. [Discussed in Section IVB(5)b(2)].

Issue: As noted in the previous comment, EPA should find that where recipients are in compliance with environmental laws and regulations a rebuttable presumption has been established that no adverse disparate impact exists. However, the Draft Guidance is unclear whether the rebuttable presumption rule is applicable where EPA finds that the recipient has complied with pre-existing legal obligations, although no additional supplemental obligations have been undertaken under the area specific agreement.

Recommendation: The final Investigative Guidance should clarify that where recipients are in compliance with environmental laws and regulations a rebuttable presumption has been established that no adverse disparate impact exists.

8. **EPA should not use the Shintech demographic analyses as models for conducting disparity comparison assessments.**

EPA, in its disparity comparison assessments, proposes to use demographic information obtained from Shintech's Proposed Facility in St. James Parish, LA. [Discussed in the Draft Investigative Guidance, Section VIB(5)(b)].

Issue: The methodology used by EPA in the Shintech St. James Project provides inaccurate information when conducting demographic analyses. The data that EPA relied upon in its analyses were based on demographic figures from the 1990 census. Those figures fail to specifically identify where minorities reside within a given community. As a result, they figures can only provide approximations of an adverse environmental impact on a community or minority population. Shintech was able to obtain a more accurate data accounting for local demographics which was collected and used during the permitting process.

Additionally, EPA never resolved the Title VI complaint against the Louisiana Department of Environmental Quality involving Shintech's Part 70 Operating Permit for a new facility in St. James Parish, La. Because the complaint has not been resolved, the EPA demographic analysis in the Shintech case provides no precedential value as a model for future adverse impact analyses. Although an analysis may have been conducted, it was not utilized to resolve any Title VI issues in the St. James Project and therefore its acceptance and effectiveness has not withstood scrutiny by the various parties. A related concern, is reference to the Shintech name where the Title VI complaint remains unresolved. The company's name should not be referenced until final resolution or rejection of the complaint.

Recommendation: The Draft Guidance should not include reference EPA's demographic analysis involving the Shintech St. James Project. The methodology is the

not the most effective in determining demographic analysis in potentially impacted areas. Second, because the Title VI complaint against the Shintech Permit has not been resolved, the analysis conducted pursuant to the investigation is of no precedential value for use in future analysis.

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave., NW
Washington, DC, 20460
Via email: civilrights@epa.gov

August 28, 2000

The Sierra submits the following comments on the Title VI Draft Recipient Guidance and Draft Revised Investigation Guidance. The Sierra Club is a national environmental organization with more than 600,000 members nationwide. We appreciate this opportunity to provide feedback regarding your proposed policy.

The Sierra Club joins in the growing chorus of voices that finds the draft guidance documents to be flawed to the very core, and as such, an extraordinary disappointment. With the weak and ineffectual guidance, the EPA is squandering an opportunity to give direction and meaning to Title VI enforcement. A generous reading of the draft shows the agency confirming that Title VI remedies for impacted communities shall remain, at most, theoretical in nature. More critically, the drafts fail to achieve their intended goals: to find a way for the EPA to enforce civil rights laws and to comply with the President's Executive Order 12898.

In our view, the guidance gives every benefit of the doubt to the recipient, and offers sparse means of recourse to the complainant. Indeed, the guidance practically guarantees that no Title VI claim will ever be successful. The processes described by the drafts remain laborious and burdensome for the complainant, the guidance provides irrationally wide latitude for complaints to be dismissed, and the guidance has no real mechanism for EPA enforcement power over recipients.

We share many of the concerns of others commenting, including Title VI complainants, NEJAC, and numerous voices from the environmental justice community. In particular:

- We share the concerns that so-called “area-specific agreements” and the “due weight” they would be afforded seem to be, in actuality, merely unenforceable constructions devised by the agency primarily to facilitate the dismissal of claims.
- We share the dismay that a claim might be dismissed if, under a contested permit, reductions of emissions occur, even though the emissions could continue to compound the disparate impacts in a community.
- We share the frustration with EPA’s view that a permit denial is practically impossible under the guidelines, because rarely will a single permit be the “solely” responsible for adverse impacts, regardless of how substantial the permit’s contribution might be.
- We share the concern that EPA’s views as to the scope of a Title VI investigation are so narrow as to avoid taking into account the social, cultural, and economic harms that a project might have on an impacted community.
- We share in the frustration that under the guidelines, a complainant in the “non-adversarial” proceeding has no right to appeal a finding but a recipient does.

- We share in the skepticism that EPA will ever perform independent compliance reviews given current and anticipated resources for the Office of Civil Rights.
- We share in the frustration that a complaint does not ripen until a permit is issued, yet the investigation time lag and backlog guarantee that even in the most flagrant of violations, communities may suffer for years before relief can be granted.
- We share the concerns regarding the 180-day clock measuring timelines of a complaint and how the inflexibility works to frustrate complainants. In no case should the clock start ticking until the affected parties become aware of the violation. To start the clock at the time of violation encourages both state permitting agencies and those seeking permits to cloak the permitting process from public scrutiny in order to avoid detection for the 180 day period.
- We share the concerns regarding alternative dispute resolution (ADR), and how ADR procedures might not be as well suited for complainants as for recipients.
- We share the concerns that EPA fails to use other measures of localized environmental harm such as recognized toxic hotspots, chemical accidents and upsets, and data on facility compliance.
- We share in the frustration that the recipient guidance does little to require genuinely meaningful public participation given the institutional and functional barriers in most participation processes and the fundamental and persistent limitations on a typical impacted community's ability to participate with adequate technical and legal expertise.
- We are concerned that the Office of Civil Rights' (OCR) methodology for quantifying disparity supports disparate impact. Basing the quantification of disparate impact upon the size of the affected population, for example, would result in apparently smaller impacts for smaller populations. Thus, in the agency's computation of "impact", minority populations would have to face many times the risk to make up for their smaller numbers. Thus, this methodology constitutes procedural discrimination against minority populations. We recommend that it be completely reviewed and revised to uncover and remedy any other discriminatory elements of the methodology.

In sum, the two drafts for Title VI guidance signal an undeniable setback for citizens and communities battling environmental injustice. The Sierra Club urges a complete re-working of the guidance that will respect the important principles underlying Title VI, and that will provide for efficient and effective enforcement of civil rights law at EPA.

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tjharris@abs.net on 08/28/2000 01:26:57 PM

To: Group Civilrights
cc:

Subject: title VI comments

Please find the Sierra Club's comments on Title VI guidance attached as a MS Word document and text below. If you require more information please feel free to contact me, at this email address or at 410-625-0559.

Thank you,

Terry J. Harris

Title VI Guidance Comments

U.S. Environmental Protection Agency

Office of Civil Rights (1201A)

1200 Pennsylvania Ave., NW

Washington, DC, 20460

Via email: civilrights@epa.gov

August 28, 2000

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- Title-VI-Guidance-Comments.doc

(b) (6) - Privacy on 08/28/2000 06:16:42 PM

To: Group Civilrights@EPA
cc:

Subject:

I am Attorney (b) (6) - Privacy with the Mississippi Workers Center for Human Rights and the Southern Regional Office of the Center for Constitutional Rights. Unfortunately, I recently returned from a conference in Zimbabwe and only received this notice of the deadline for comments today, August 28th. However, I could not let this important opportunity go by to remind those who have the power to provide more protection for embattled communities across the country to use that power to do just that. title VI is one of the only statutory remedies available to individuals who have been exposed to toxic substances and been victims of illegal and disproportionate dumping in their communities. People of color cannot hope to gain proper redress if the laws are not there to provide such coverage. Title VI must be strengthened, no diluted. It must continue to be a vehicle for bringing forward charges against unscrupulous chemical companies who receive subsidies from the Federal Government and use those fund to discriminate against people of color in communities already suffering from poverty and systemic neglect.
I urge you the officials of EPA to abandon all thoughts of whittling down Title VI. Let it continue to be the weapon used by people of color and the poor in their efforts to rebuild their communities and protect their families for discriminatory dumping and racist facility sitings. thanks for the opportunity to submit these comments.

_____
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Share information about yourself, create your own public profile at http://profiles.msn.com.

Office of the Executive Officer
(909) 396-2100
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August 18, 2000

Via U.S. Mail & Electronic Mail
United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
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[civilrights@epa.gov]

RE: *South Coast Air Quality Management District's Comments on Draft Title VI Guidance for EPA Recipients Administering Environmental Permit Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (65 Fed.Reg. 39650 *et seq.* [June 27, 2000])

The South Coast Air Quality Management District (AQMD)[1] appreciates the opportunity to comment on EPA's Draft Recipient Guidance and Draft Revised Investigation Guidance.[2] Environmental Justice is very important to the AQMD. In October 1997, the AQMD Board adopted a series of 10 Environmental Justice Initiatives to assure equitable environmental policymaking and enforcement to protect all AQMD residents from the health effects of air pollution.[3] All of these initiatives have now been implemented, and AQMD continues to implement additional programs to further environmental justice goals. Key accomplishments in implementing environmental justice include:

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[1] The AQMD is the regional air pollution control agency for the Los Angeles area having primary responsibility for control of air pollution from all sources except motor vehicles. (California Health & Safety Code section 39002) It encompasses the Los Angeles metropolitan region, including the non-desert portions of Los Angeles, Riverside and San Bernardino counties, Orange County, and the Palm Springs/Indio area. It includes over 15 million residents. Southern California's economy constitutes about one-half of the California economy, which ranks seventh in the world in terms of goods and services provided. It is classified as an "extreme" nonattainment area for ozone and a "serious" area for PM_{10} and carbon monoxide.

[2] In preparing these comments, AQMD worked closely with the environmental justice subcommittee of its Home Rule Advisory Group. The advisory group consists of representatives from EPA, California Air Resources Board, local government, industry, and environmental groups. The mission of the advisory group is to "seek consolidation of overlapping federal, state, and local regulations to streamline regulatory compliance" while attaining clean air goals. These comments are consistent with that mission.

[3] A copy of the 10 Initiatives and Four Guiding Principles is attached.

1) holding monthly town hall meetings held throughout the District where Board members and executive staff listen to and respond to community concerns, and follow up on these concerns;
2) completing the most comprehensive air toxics exposure study ever performed [Multiple Air Toxics Exposure Study (MATES II) 1998-99] to identify the sources of toxic exposure and relative levels of exposure in different communities;
3) amending the District's air toxics rules to add additional compounds, including non-carcinogenic toxic compounds, establish allowable "cancer burden" for permitted facilities, and reduce the target risk level existing facilities must seek to meet;
4) adopting an Air Toxics Control Plan which describes measures the District plans to take over the next decade to further reduce air toxics; and
5) adopting motor vehicle fleet rules to reduce exposure to diesel emissions, which contribute over 70% of airborne toxic risk throughout the District.

The AQMD appreciates EPA's publication of the draft recipient guidance, which contains numerous helpful suggestions. AQMD agrees with EPA that a "comprehensive approach" to address environmental justice concerns, rather than a case-specific or area-specific approach, offers "the greatest likelihood of adequately addressing Title VI concerns." (p 39657) AQMD is actively implementing such a comprehensive approach, as described in part above.

AQMD also supports EPA's concept of "due weight." EPA states that a program that over a reasonable period of time eliminates or reduces adverse disparate impacts, to the extent required by Title VI, and is supported by sufficient underlying analysis, can form the basis for expedited review of complaints. EPA would dismiss complaints regarding actions taken under such a program, where EPA finds the program adequate. (p. 39675) However, EPA has limited its discussion of such programs to so-called "area-specific agreements." Such agreements would be made between "recipients, affected residents, and stakeholders" respecting a specific geographic area of concern. (*Id.*) AQMD believes EPA should expand this concept to accord "due weight" to recipient programs which meet EPA's criteria, whether or not they are the result of such "agreements."[4] The key point is whether the program adequately addresses adverse impact. In making that decision, it is important that EPA establish practical, objective criteria for a program that should be given due weight. The criteria need to be objective in order to assure consistent treatment between different areas. AQMD would like to work with EPA in developing such criteria. As a starting point AQMD suggests the program include the following elements:

1) public participation in development and implementation of the program;
2) identification of areas of greatest concern for relevant stressors or use of methods to evaluate cumulative impacts;

[4] At EPA's public listening session in Carson, California, on August 2, 2000, speakers expressed concern that recipients would enter agreements with community groups that are not representative and may be funded by polluting industry. By the same token, permitting agencies should be able to have effective programs approved by EPA even if a particular community group does not agree.

3) measures to significantly reduce existing levels of relevant stressors; and
4) measures to ensure that new or modified permits do not cause significant adverse impacts.

AQMD's Environmental Justice Initiatives, together with other existing programs to reduce adverse impacts, go a long way toward achieving an approvable "comprehensive program."[5] AQMD would like to work with EPA to determine what enhancements, if any, are needed to make its program approvable and entitled to "due weight" as discussed in the draft guidance. AQMD would like to volunteer to help develop a model program to implement this concept.

We note that EPA's draft recipient guidance suggests that permitting agencies receiving funds develop their programs with the involvement of all agencies and parties that may contribute to potential problems and solutions. EPA specifically encourages involving other government agencies such as local governments having authority over land use and those agencies controlling decisions that affect traffic patterns. AQMD fully supports this approach. However, EPA has an important role to play in this process. AQMD urges EPA to conduct extensive outreach and training for local government officials so that they may become aware of the potential environmental justice implications of their decisions. AQMD would like to work with EPA in these efforts. Also, EPA should revise its complaint investigation process to give local governments the opportunity to participate. Since local governments may have an important role in developing the most effective remedial measures, they should be included in the process at all stages, including informal resolution.

AQMD is grateful for EPA's efforts to publish recipient guidance, and believes that the draft revised Title VI investigation guidance provides significant clarification as compared to the 1998 Interim Guidance. However, there are still some areas that require clarification, and some areas in which AQMD disagrees with the draft guidance or suggests improvements to it. AQMD's detailed technical comments are attached. They are organized according to whether they support EPA's draft guidance, disagree/suggest improvements, or seek clarification. Each comment identifies whether it refers to the Draft Recipient Guidance or Draft Investigation Guidance. AQMD urges EPA to publish a document summarizing and responding to comments prior to issuing any final guidance documents.

In conclusion, AQMD supports EPA's continuing efforts to effectively and fairly implement Title VI and to provide useful guidance. AQMD especially appreciates the draft recipient guidance provided by EPA. AQMD's comments are intended to help achieve environmental justice goals, which the AQMD fully supports, and to do so in a practical manner with clear, objective criteria that will help all stakeholders understand and implement their respective obligations.

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[5] AQMD's MATES II study demonstrated that cancer risks due to air toxics have declined significantly at all monitoring stations since 1990, ranging from 43% to 63% decreases. (MATES II, p. 2-1)

Please contact me at (909) 396-2100 or Lupe Valdez, Deputy Executive Officer for Public Affairs and Transportation, at (909) 396-3780 to discuss how AQMD can work with EPA to develop and implement an Environmental Justice program which can be accorded due weight and minimize Title VI complaints, and expedite EPA investigation of any complaints that are filed.

Thank you for the opportunity to comment. AQMD looks forward to working with EPA and other interested parties in the future on these important issues.

Sincerely,

Barry R. Wallerstein, D.Env.
Executive Officer

BBB:vmr
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South Coast Air Quality Management District's Technical Comments on Draft Title VI Guidance for EPA Recipients Administering Environmental Permit Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (65 Fed.Reg. 39650 *et seq.* [June 27, 2000])

A. *Comments Supporting Aspects of EPA's Draft Guidance*

1. AQMD Supports EPA's Position That the Filing of a Complaint Does Not Invalidate a Permit (Investigation Guidance, p. 39676)

EPA's guidance states:

> "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." (p. 39676)

EPA should adhere to this principle. Otherwise, even complaints that are ultimately dismissed as lacking merit could easily derail a valuable project, by imposing unreasonable delays in the process. However, in order to assure that cases of discriminatory impact are promptly addressed, EPA needs to develop a means to process complaints and conduct its investigations more quickly. AQMD believes that establishing practical, objective criteria for recipient programs to reduce or eliminate impact, which programs will be given due weight, will greatly assist in expediting investigations.

2. AQMD Supports EPA's Position that Adverse Impacts Must Be Significant to Support a Finding of Violation (Recipient Guidance, p. 39660; Investigation Guidance, p. 39680)

EPA's draft recipient guidance states that as part of conducting an adverse disparate impact analysis, the recipient should "Determine whether the impact[s] are sufficiently adverse to be considered significant." (p. 39660) The Draft Investigation Guidance, page 39680, states:

> "If the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance . . . ."

AQMD supports EPA's position that an adverse impact must be significant in order to support a finding of violation. This position is consistent with existing Title VI case law holding that disparate impact must be more than insignificant and minor. (*NAACP v. Medical Center, Inc.* (3rd Cir. 1981) 657 F.2d 1322, 1332). The reason it is important to focus on "significant" impact is that virtually every permit allows <u>some</u> pollution and therefore could be argued to have <u>some</u> impact. EPA Investigations Guidance needs to make it clear that the impact must be significant, otherwise EPA may well be inundated with complaints which will inevitably be dismissed, after consuming substantial EPA and recipient resources which would be better spent on addressing significant adverse impacts.

3. AQMD Supports EPA's Position that Both Demographic Disparity and Disparity in Rates of Impact Should Be Statistically Significant (Investigations Guidance, p. 39682; Recipient Guidance, p. 39661)

EPA states in its Draft Revised Investigations Guidance that demographic disparity between an affected population and a comparison population should be evaluated to determine if the differences are statistically significant to 2 to 3 standard deviations. (p. 39682) EPA's Investigation Guidance also states that a finding of disparate impact is "somewhat" less likely where both the disparity of impact and demographics are not statistically significant. (p. 39682) The AQMD believes that disparity needs to be significant to establish disparate impact in the normal case. This is consistent with existing case law concerning employment discrimination. (*Sanchez v. City of Santa Ana* (C.D. Cal. 1995) 928 F.Supp. 1494, 1500) However, there may be an unusual case where disparate impact exists although disparity in one factor is not large (e.g., demographics), if the disparity in the other factor is sufficiently large (e.g., impact).

4. AQMD Supports EPA's Recognition of the Relevance of Regulatory "Benchmarks" of Significance (Recipient Guidance, p. 39661; Investigation Guidance, p. 39680)

EPA states in its Draft Revised Investigation Guidance, page 39680, that in determining whether an impact is adverse, it would "first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy." The AQMD supports this approach but believes that locally adopted levels of significance should also be considered. In the recipient guidance, page 39661, the reference is to all relevant benchmarks, not just those identified in EPA regulations or policies. EPA should explicitly recognize the relevance of locally adopted levels of significance.

5. AQMD Supports EPA's Determination that Remedies Emphasizing All Contributions to Impact, Not Just a Particular Permit, Are Most Appropriate (Recipient Guidance, page 39662; Investigations Guidance, pp. 39674, 39683)

In suggesting ways for recipients to reduce the likelihood of Title VI complaints, EPA states "Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions." (p. 39662) In the Draft Revised Investigation Guidance, EPA states: " . . . denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." (p. 39683) AQMD strongly supports these concepts, at least in areas where the recipient has a program to assure individual permits do not cause significant adverse impacts. AQMD believes its stringent toxics and new source review rules constitute such a program. AQMD, thus, urges EPA to develop criteria for such programs (which recipients can adopt) to avoid or remedy any disparate impact. AQMD believes this approach more fully addresses any actual disparate impact than would an approach focusing on an individual permit. It also avoids an individual permit holder suffering the severe penalty of permit denial as a result of impacts it did not cause. However, recipients should develop programs to assure that individual permits do not themselves cause significant adverse impact, otherwise denial or modification of each individual permit may be considered.

6. AQMD Supports the Concept that EPA Should Give "Due Weight" to Local Agency Analysis and Programs to Avoid or Reduce Disparate Adverse Impact (Recipient Guidance, p. 39663 *et seq.*; Investigations Guidance, p. 39674 *et seq.*)

AQMD understands EPA's position that it cannot delegate its responsibility to enforce Title VI to recipients, page 39674, and appreciates EPA's efforts to provide incentives to recipients to implement proactive programs to reduce the likelihood of Title VI complaints. EPA characterizes this approach as granting "due weight" to information submitted by recipients and to "area-specific agreements." (p. 39675) AQMD believes EPA must always give the appropriate weight that is due to information submitted by recipients. AQMD strongly supports the concept that EPA should also give due weight to programs implemented by recipients which are designed to avoid or reduce disparate adverse impacts.[6] AQMD supports the concept that such programs would allow EPA to promptly evaluate a complaint and to dismiss it if it is covered by a recipient program which "will eliminate or reduce, to the extent required by Title VI, existing adverse disparate impacts." (p. 39675) Such a program should also expedite dismissal of later complaints in the same area. (p. 39675)

7. AQMD Supports EPA's Recognition of Cost and Technical Feasibility in Evaluating Mitigation and Less-Discriminatory Alternatives (Investigation Guidance, p. 39683)

In its Investigation Guidance, page 39683, EPA states that it "will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives [and mitigation measures]." AQMD agrees that these factors need to be considered, and supports EPA's determination to evaluate these factors as part of its assessment.

B. Comments Disagreeing With or Suggesting Improvements to Aspects of EPA's Draft Guidance

1. Permit Renewals or Decisions that Merely "Allow Existing Conditions to Continue" Should Not Be the Basis for Complaint at Least in the Normal Case (Investigations Guidance, p. 39677)

In its Investigations Guidance, page 39677, EPA states that the following types of permit actions could form the basis for initiating a Title VI investigation:

> "Permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged."

AQMD believes that in the normal case, these actions should not serve as the sole basis for a complaint. It also seems questionable whether permit renewals, or other actions that merely allow conditions to "remain unchanged," can constitute an action having an adverse disparate impact such as to support a complaint under EPA's Title VI regulation.[7] In its responses to comments, page 39697, EPA indicates that examining renewals may be proper because the

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[6] However, as discussed in Comment B 2, AQMD believes EPA should not rely on the possibility of agreements with self-identified community representatives, but rather should develop and publish realistic, objective criteria for recipient programs which would be entitled to due weight.

[7] A complaint must allege a "discriminatory act" under EPA's regulation. (40 CFR §7.120(b))

demographics may have changed since the original permit. However, in normal cases it would be unfair to subject the permit renewal to possible jeopardy because the surrounding population may have increased or changed, since this would not have been possible for either the permittee or the recipient to predict. The AQMD will, however, impose corrective conditions if any impact rises to the level of a public nuisance. Moreover, AQMD's rule requirements for existing sources, which require elimination of significant risk, and maximum feasible toxic reductions, will provide additional protection. EPA's response to comments, page 39697, states that "Even if environmental laws mandate different treatment for new permits, permit renewals, and permit modifications, EPA's Title VI regulations do not require different review of these actions." AQMD believes EPA can allow renewals to be treated differently from new permits. Renewals are fundamentally different from new permits. In the case of a renewal, the permittee has already constructed its facility and invested substantial resources in reliance on the permit. Realistic options for mitigation or alternatives (especially alternative siting) are considerably less than in the case of a new permit. Since EPA may seek compliance information from a recipient, independent of a complaint, whenever there is reason to believe discrimination may exist (40 CFR §7.85(b)), EPA has the ability to monitor compliance without making individual permit renewals the subject of an investigation. Thus, there is no need for permit renewals to cause initiation of a Title VI investigation, in the normal case.

2. EPA Should Not Rely on the Concept of Areawide Agreements But Instead Adopt Realistic, Objective Criteria for EPA Approval of Recipient Programs to Avoid or Reduce Disparate Adverse Impact (Recipient Guidance, p. 39657; Investigations Guidance, p. 39675 *et seq*.)

EPA's Draft Recipient Guidance suggests the concept of an areawide agreement as merely one among several Title VI approaches a recipient "may choose to develop." (p. 39657) However, in the Investigations Guidance the areawide agreement turns into something much more significant: if the permit at issue is covered by an area-wide agreement that EPA has approved, EPA will likely close the investigation. (p. 39676) AQMD agrees there is great need for a process which can help EPA focus on complaints in areas where adequate remedial action is not being taken, especially given the large and longstanding backlog in EPA handling of Title VI complaints. AQMD also supports EPA's efforts to encourage recipients, residents, and stakeholders to take action to reduce impacts. However, AQMD does not believe the concept of an areawide agreement is a practical – or even necessarily fair – way to reach these goals. Instead, EPA should issue realistic, objective criteria by which it will judge recipient programs to avoid or reduce disparate adverse impact. Once EPA approves such a program, the EPA would promptly act on complaints regarding permits covered by such a program, and in the normal case would dismiss such complaints. In many cases, it is impractical to accomplish such a result through an "area-wide agreement." How is the recipient to determine which community group or groups with which to form an agreement? Regardless of which group agrees, there is a potential for someone who does not agree to challenge the legitimacy of the "agreement." The agreement will not seem fair to such a person. Moreover, such a process is not fair to the recipient, whose agreement is subject to the veto power of whoever identifies themselves as a community "representative." Finally, EPA would not have adequate assurance that the agreement represented sufficient, but not unnecessary, measures. Instead, EPA should develop and publish realistic, objective criteria for approving a recipient's program. AQMD suggests that such criteria could include:

1) public participation in development and implementation of the program;
2) identification of areas of greatest concern for relevant stressors or use of methods to evaluate cumulative impacts;
3) measures to significantly reduce existing levels of relevant stressors; and
4) measures to ensure that new or modified permits do not cause significant adverse impacts.

The AQMD stands ready to assist EPA in developing such criteria and suggests that EPA work with AQMD to implement a Title VI environmental justice program which would serve as a model for other areas. Programs which meet the criteria EPA develops should be granted "due weight" such that EPA will in normal circumstances dismiss complaints regarding permits covered by such programs.

3. EPA Should Not Defer Investigation Merely Because a Permit is Not Yet Issued, or Because a Lawsuit is Pending (Investigation Guidance, p. 39673)

EPA plans to "dismiss without prejudice" complaints that are the subject of administrative appeals or litigation, or which are premature because the permit is not yet issued (p. 39673). The AQMD urges EPA to reconsider this position. Waiting until after appeals and litigation are complete subjects the complainant and the permit-holder to considerable uncertainty, which may last years beyond the conclusion of litigation. Moreover, while a complaint filed before the permit is issued may be technically "premature," EPA needs to develop a way to provide its expertise and input to the recipient whenever a Title VI issue is raised, even if it is premature. Otherwise, the recipient may proceed in good faith to a decision which might be different had EPA's input been received.

4. The Permit Holder and the Local Government Land Use Authority Having Jurisdiction Should Have the Right to Participate in the Investigation (Investigation Guidance, p. 39673)

EPA states that in exploring informal resolution of a complaint, it "may seek participation from the complainant, the permittee, or others." (p. 39673.) AQMD believes that the permittee, as well as the affected local government having land use jurisdiction, should have the right[8] to participate in investigations. While ultimately any remedy would be directed toward the recipient, the permittee can be directly affected by mitigation measures and proposed less discriminatory alternatives that are considered, and thus has a great stake in the proceedings. The local government having land use authority may play a crucial role both in establishing the justification for a permit, and in developing remedial programs where land-use patterns have contributed to any disparate impact. These parties deserve a right to be heard in the investigation process.

5. The Guidance Fails to Specify a Definitive Timeframe for Resolution of a Complaint (Investigations Guidance, Appendix B)

[8] Since these entities may not have the desire or the resources to fully participate, they should not have the obligation to be involved.

Unfortunately, extended delays in processing complaints have frustrated complainants, recipients, and permittees alike. EPA needs to specify a definitive timeframe for resolving complaints. While we acknowledge that the revised Investigation Guidance has attempted to attach specific deadlines to individual milestone events within the complaint investigation process to a much higher degree than did the Interim Guidance, there is still no overall timeframe by which a complaint must be resolved. Indeed, Appendix B to the Investigations Guidance (flowchart) makes the process seem endless. Even an allegation rejected by EPA may be referred to another federal agency (39670). Most rejections of allegations can be resubmitted at a later time without prejudice (39673). EPA can waive the 180-day limit on filing a complaint after the alleged discriminatory action takes place for "good cause."(39673). Complaints that are subject to ongoing administrative appeals or litigation in federal or state court would be likely candidates for delay depending on the outcome of those decisions (39673). While EPA would likely close such complaints, " EPA expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation" (39673). Furthermore, EPA is requiring little substantiation of claims by complainants, choosing instead to perform the underlying investigations itself which clearly can be a large and time-consuming task. While the April 1998 Shintech-related Draft Revised Demographic Information report might not be indicative of the level of effort that will ultimately go into all investigations, it represents a very considerable effort even if only a few such complaints are processed each year. This level of effort reinforces the need for adopting methods to help EPA focus on the significant and serious complaints.

A corollary concern has to do with allegations of discrimination in the public participation process (39672). Allegations concerning such discrimination should be filed within 180 days of the alleged action. EPA sets forth the example that if a complainant alleges that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing. However, EPA has not included public participation guidelines in the *Investigation Guidance* reserving the right ("as appropriate") to do so in the unspecified future (39669). It seems inconsistent for EPA to steer clear of public participation investigation guidance yet to invite such complaints on the same subject. We urge EPA to commit to draft the public participation guidance quickly since it is our understanding that failure to be heard is one of the biggest catalysts behind the environmental justice movement.

6. EPA Should Clarify that Merely Administrative Changes, or Projects that Reduce Pollution, Without A Collateral Increase, Are Not Normally a Basis for Complaint But Will Be Reviewed in Context Rather Than in Isolation (Investigation Guidance, p. 39677)

EPA states that administrative changes, such as name change or change in mailing address "generally" will not form the basis for a finding of noncompliance. (p. 39677) Similarly, EPA states it will "likely" close an investigation where the recipient demonstrates that the challenged action has a significant benefit in reducing stressors. (*Id.*) If there is uncertainty as to the significance of the benefit, EPA will normally proceed with the investigation. AQMD believes that EPA should clearly state that actions which are administrative will not be the basis of a finding of noncompliance. Moreover, beneficial actions should not normally be the basis of an investigation. A recipient should not have to establish "significant" benefit to justify closing a complaint. However, the benefit of an action needs to be judged in context. As pointed out at the public listening session on August 2, 2000, an action may be technically "beneficial" when reviewed in isolation, yet still part of a pattern of disparate impact if a minority community

receives a very small benefit, while non-minority communities receive significantly more benefit, without sufficient reason. EPA should clarify that beneficial actions will not be the basis of complaint except in such unusual circumstances, but that such actions will be reviewed in context to see if they are part of a pattern of disparate impact.

7. Justification Should Not Be Required to Be "Integral to the Recipient's Mission" (Investigations Guidance, p. 39683)

As stated in EPA's investigations guidance, a recipient may "justify" the issuance of a permit, despite adverse disparate impact, based on a substantial legitimate justification. (p. 39683) Generally, "justification" would be a showing that the challenged activity is reasonably necessary to meet a goal that is "legitimate, important and integral to the recipient's mission." (p. 39683) AQMD believes that the words "integral to the recipient's mission" are subject to potential misinterpretation. AQMD suggests this language be replaced by requiring justification to be based on a reason which "significantly furthers important social goals which the recipient's program is designed to support or allow." The reason for this suggestion is that many recipient permitting agencies have relatively narrow "missions," e.g. air or water quality. Yet they are expected to issue permits to facilities whose primary purpose is to further other social goals. Thus, for example, EPA's statement that a permit for a wastewater treatment plant is "integral to the recipient's mission" (p. 39683) might be interpreted as not true as applied to AQMD. Yet such a permit significantly furthers an important, legitimate social goal which the permit program is designed to support or allow. For the vast majority of permits issued by AQMD, while "they are integral to AQMD's mission" to the extent they control pollution, they arguably are not "integral to the AQMD's mission" to the extent they allow pollution. Few people would consider "economic development," as cited by EPA, p. 39683, to be integral to AQMD's mission. The language used in EPA's guidance regarding justification being integral to the agency's mission is only used in one of the three cases cited by EPA in footnote 149, and there it was actually used to broaden the scope of legitimate justification beyond the narrow focus urged by some. (*Ellston v. Talladega County Bd. of Educ*. (11th Cir. 1993) 997 F.2d 1394, 1412-13) EPA should not incorporate in its guidance such language which has the potential to unduly narrow the scope of legitimate justification. AQMD would like to work with EPA to develop a more relevant test, such as the language suggested above.

8. EPA Should Encourage Programs that Provide Collateral Toxic Benefits While Not Increasing Criteria Pollutants (Recipient Guidance, p. 39663)

EPA's guidance recognizes that recipients want and need incentives to develop proactive Title-VI related approaches. (p. 396637) As noted above, AQMD is volunteering to work with EPA to develop a model environmental justice – Title VI program which would be given "due weight" in any subsequent Title VI investigations. In addition, AQMD has identified mobile sources as the major contributor to air toxics exposure in most of the basin, even when diesel is not considered. (Multiple Air Toxics Exposure Study [MATES II], SCAQMD, March 2000, p. ES-31) When diesel is considered, mobile sources become the overwhelming contributor throughout the basin. (*Id*.) Reducing mobile source air toxics should be a key part of any environmental justice – Title VI strategy. Yet AQMD has relatively little regulatory authority

over such sources.[9] Therefore, AQMD believes it is important to create incentives for the voluntary reduction of such pollution. To that end, AQMD has offered monetary incentives as well as credit trading rules. AQMD believes EPA should encourage such measures, where they decrease toxic emissions, especially diesel, without allowing regional, or significant local, increases in criteria pollutants.

9. EPA Should Establish A Procedure for Promptly Disposing of Meritless Complaints (Investigation Guidance, p. 39672)

EPA's policy is to "investigate all administrative complaints concerning the conduct of recipient of EPA financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." (p. 39672) This means that there is no burden of producing evidence placed on complainant to trigger an investigation. As a result, EPA has accepted nearly 50 complaints for investigation. Only one has been decided. Some investigations have been open since 1994. During the entire investigation process, the recipient, the permittee, and the complainant, undergo enormous uncertainty. For the permittee, the uncertainty alone may be fatal, even if an ultimate decision would have been a finding of no violation. For the complainant, needed relief may be delayed in serious cases while EPA is tied up with meritless cases. Therefore, EPA needs a procedure for promptly disposing of meritless complaints that are accepted for initial investigation because they meet minimum jurisdictional requirements. This procedure need not place a burden on complainant. Instead, EPA could establish something like a summary judgment procedure whereby the burden is placed on the recipient who could obtain early dismissal of a complaint by making specified showings. The procedure could be designed to allow public participation, as well as the participation of complainant. AQMD would welcome the opportunity to assist EPA in developing criteria which would justify early dismissal of a complaint.

10. EPA Should Seek to Minimize Duplicative Court and Administrative Proceedings (Investigations Guidance, p. 39671)

EPA Draft Investigations Guidance, page 39671, states: "Moreover those who believe that they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA."

While a plaintiff may be able to sue without first filing a complaint with EPA, EPA should consider the effect of having two simultaneous proceedings based on similar facts and allegations. The available resources of all parties to process the complaints will be stretched thin, and will inevitably result in an inefficient use of governmental resources. EPA should take the necessary steps to assure the efficient use of agency resources, by seeking resolution of the complaint in one proceeding. These steps could include notifying the court where the Title VI complaint has been filed, that EPA has also received a similar complaint. EPA should notify the court of the steps EPA has taken and EPA's plans to resolve the complaint. Of course each case must be evaluated separately, but the flexibility afforded in an administrative proceeding may be

[9] AQMD is vigorously using the authority it does have, by adopting an unprecedented series of fleet vehicle rules to reduce toxic air pollution, and proposing a low-sulfur diesel rule to reduce SO2 and particulates, and to allow the use of particulate traps to further reduce toxics and particulates.

preferable to judicial determinations. For example, there are more opportunities for all parties to resort to informal resolution procedures in EPA's administrative proceeding. Therefore if the most efficient manner of resolving the complaint is through an administrative proceeding, EPA should request the court to take the necessary steps to allow that proceeding to resolve the issues.

C. Areas in Which AQMD Seeks Clarification

1. What is Meant by the Reference to "Cumulative" Impact in the Discussion of Benchmark Levels? (Investigations Guidance, p. 39680)

EPA's Investigations Guidance states that in determining significance of an impact, it will "evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy." (p. 39680) In giving examples, EPA states that "cumulative risks of less than 1 in 1 million (10^{-6}) . . . would be very unlikely to support a finding of adverse impact . . .", while EPA would be "more likely to issue an adversity finding . . . where the cumulative risk in the affected area was above 1 in 10,000 (10^{-4})." (p. 39680) It is unclear what is meant by "cumulative" in this context. If "cumulative risks" refers to <u>all</u> contributors to air toxics exposure, including mobile sources, area sources, and new and existing permitted sources, then EPA would be likely to issue an adversity finding in virtually every case in an urban area. In a recent comprehensive air toxics exposure study performed for the South Coast Air Basin, monitored levels of toxics at all 10 fixed monitoring sites exceeded 300 in a million (3×10^{-4}) (excluding diesel, which has been declared a toxic air contaminant in California). (Multiple Air Toxics Exposure Study [MATES II], SCAQMD, March 2000, p. 3-12.) Based on modeled estimated risk, virtually the entire basin exceeded 100 in a million, without diesel. (MATES II, p. 5-10)

The AQMD believes that other urban areas would likely show similar, if not higher, results. AQMD is unaware of any EPA regulation or policy setting levels this low as thresholds for overall exposure, including background emissions. Indeed, EPA's draft Residual Risk Report to Congress, pursuant to section 112 of the Clean Air Act, identifies risk levels of 10^{-4} action levels for individual facilities, not overall background exposures. (EPA-453/R-99-001, March 1999) These levels might be more appropriate possible benchmarks for "cumulative" risk if the term refers to overlapping exposure from two or three challenged facilities, not overall exposure levels, including background levels.

2. How Should a Recipient Determine Who Speaks for "The Community" in Establishing Areawide Agreements? (Investigations Guidance, p. 39675)

EPA suggests that permitting agencies that receive federal finding consider entering into "agreements with affected residents and stakeholders" to eliminate or reduce adverse impacts. The agreement is to be developed through collaboration with "communities and other affected stakeholders." (p. 39675) However, EPA's guidance does not explain how the permitting agency or EPA is to determine who represents "the community" or "affected residents," and whose agreement will be needed to constitute an areawide agreement which may be entitled to "due weight." Further clarification is needed on this issue.

3. What is the Effect of Impacts Outside the Recipient's Jurisdiction on a Recipient's Obligations? (Investigations Guidance, p. 39677)

EPA states that it will need to assess background levels of stressors which allegedly contribute to discriminatory effects, but that in determining whether a recipient permitting agency is in violation, EPA will account for those impacts "cognizable under the recipient's authority." (p. 39678) AQMD supports the concept that a permitting agency should only be held responsible for impacts within its authority. It is not clear exactly how other stressors outside the permitting agency's authority will be used to assess whether there are discriminatory impacts. For example, suppose there is an area which has a largely minority population and is located in a harbor area. In such case, a large percentage of emissions are likely from federally regulated sources such as ships, trains, or airplanes. Does EPA's approach mean that a permitting program which would be lawful in an area not affected by these federal sources might be unlawful in an area that does experience such effects?

4. What is Meant by Impacts Regarding Which the Recipient Permitting Agency Has "Some Obligation or Authority?" (Investigations Guidance, p. 39678)

EPA states that it will analyze those impacts regarding which a recipient permitting agency has "some obligation or authority." Thus, if an environmental statute requires an air pollution agency to consider "noise impacts," such impacts would be part of the disparate impact analysis. (p. 39678) It is unclear how such impacts would affect a recipient's obligations under Title VI. For example, in California the California Environmental Quality Act (CEQA) requires all lead agencies in conducting a CEQA analysis to "consider" all significant environmental impacts. But it does not provide new powers authorizing limited purpose agencies to mitigate such impacts. According to CEQA Guidelines section 15040(b): "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." Therefore, in determining liability under Title VI, EPA should only consider impacts the permitting agency has authority to regulate, not those it has authority to analyze or "consider."

5. How Will EPA Select a "Reference Area" For Analysis? (Investigations Guidance, p. 39681)

EPA's guidance states that in order to assess disparity it is necessary to compare the affected population to an appropriate comparison population. The comparison population will be drawn from those who live in a "reference area" which may be the recipient's jurisdiction, a political jurisdiction, or other area. (p. 39681) More guidance is needed as to how EPA will select the appropriate reference area. Also, AQMD believes it may be appropriate, in looking for a "reference area" to seek out areas that are zoned similarly to the affected area by the local government having land use authority over the area. Clean Air Act, section 131, provides that "Nothing in this Act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use." Accordingly, EPA's statement in the summary of comments, page 39691, that "The recipient's operation of its permitting program is independent of the local government zoning activities," is an oversimplification. Local land use patterns are controlled by local government not environmental permitting agencies. Environmental agencies have no authority to allow or require facilities to be located in areas not zoned for such uses. Therefore, only similarly zoned

areas should be comparison areas. This is another reason the affected local government should be involved in the EPA investigation proceedings.

6. Will EPA Conduct Staff Training For Permitting Agencies? (Recipient Guidance, p. 39657)

Among the activities EPA suggests for permitting agencies that receive federal funding is to train staff regarding Title VI issues, including technical issues, communication skills, and dispute resolution methods. (p. 39657-8) AQMD supports such training opportunities. However, EPA is in an excellent position to conduct training on these issues and assist permitting agencies in developing training programs. AQMD urges EPA to assist in training staff in Title VI issues. In addition, EPA should offer outreach and training to local government planning officials to assist them in understanding possible Title VI impacts of local government decisions.

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August 24, 2000

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1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

Dear Administrator Browner and Ms. Goode:

On behalf of the Southwest Network for Environmental and Economic Justice's (SNEEJ) EPA Accountability Campaign we demand that EPA revoke the Title VI Guidance (Guidance) and begin again. SNEEJ has offered EPA our input for many years on civil rights in general and on the Guidance but the Guidance does not reflect our input.

Title VI of the Civil Rights Act of 1964 has been the law of the land for almost 36 years; EPA's regulations implementing Title VI are more than 25 years old. Title VI is not a new requirement that EPA is imposing on grant recipients; recipients of EPA financial assistance have always been required to comply with Title VI.

In the Draft Revised Guidance, EPA has made the policy decision to hurt the civil rights complainant and help the civil rights violator. First, EPA acts as though benefits and burdens are not systematically distributed in unequal fashion. It sets up an extremely burdensome process to determine whether, in any particular case, a community of color is being adversely affected by an environmental, social, cultural, or economic insult- when in most cases, these facilities are not present in hundreds of white communities.

Second, EPA acts as if "benefits" can somehow "justify" discrimination. We must not allow EPA to justify a decision that has a discriminatory impact by pointing to the polluter's economic benefit to the local community. Our communities have endured agency decisions to trade away our health for "economic benefits" for years, with disastrous consequences.

Third, EPA proposes to approve discriminatory effects it finds if recipients come up with plans to "mitigate" but not eliminate, those effects. EPA must acknowledge that Civil Rights enforcement must have as its goal the prevention and elimination of discrimination.

The Guidance is a testament to the lack of commitment to civil rights enforcement at EPA. There is not credible civil rights enforcement threat in this Guidance, which makes it meaningless.

Again, the Guidance is fatally flawed in so many ways, each of which penalizes the communities suffering civil rights violations and benefits the civil rights violators, we request that the Guidance be withdrawn and discarded. We request that EPA begin again the process of formulating a Guidance, this time with the goal of enforcing civil rights.

Sincerely

Susana Almanza
Co-Chair
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August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating
Title VI Administrative Complaints Challenging Permits
Comments of
The Solid Waste Association of North America (SWANA)

Dear Ladies and Gentlemen:

The Solid Waste Association of North America appreciates the opportunity to submit the following comments on the above referenced draft guidance documents. SWANA is composed of over 6700 public and private sector solid waste management professionals throughout North America dedicated to the development and advancement of environmentally and economically sound practices and policies for the integrated management of municipal solid waste. SWANA submits these comments because the guidance documents are intended to address environmental justice issues during the state and local permitting process. Certain types of solid waste management facilities require environmental permits to operate issued by appropriate state and local regulatory agencies pursuant to EPA delegated programs

Members of SWANA fully support the implementation of environmental programs to protect the health of all citizens and the environment in a manner that fully complies with Title VI of the Civil Rights Act and does not subject any person to discrimination on the grounds of race, color, or national origin. SWANA also believes, however, that it is essential to maintain certainty in the state and local permitting process to allow permit holders to finance, construct, operate and maintain solid waste management facilities. Without such certainty, the essential public service these facilities provide cannot be relied upon by a community, potentially disrupting long term economic development, other environmental programs and over-all community planning.

General Comments on the Title VI Review Process Set Forth in the Guidance Documents

received 8/29/00

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The process laid out in the two guidance documents to ensure that state and local permitting agencies receiving EPA funding comply with EPA's Title VI implementing regulations significantly undermines the certainty of the permitting process required to deliver dependable solid waste management services. The lack of certainty created is a result of several factors:

- the criteria as to who may raise a claim of environmental discrimination are permissive and easily exploitable;
- the process to be followed by the state and local agencies is not clear;
- the process fails to address legal limitations on the state and local agencies' respective authorities;
- the financial ability of state and local agencies to carry out the various elements of the process without federal assistance is doubtful; and even if the state or local agency adopts the approaches for dealing with environmental equity issues set forth in the guidance documents, there is no guarantee that EPA will not step in and perform a *de novo* investigation.

Raising an Environmental Equity Claim

Under the guidance documents it is very simple for a particular permitting action to be charged with responding to a claim of environmental discrimination. Although a written complaint is required to "describe the alleged discriminatory acts that violates EPA's Title VI regulations," the guidance documents do not define what constitutes a "description." The complainant is not required to provide any information to support the allegation of discrimination, need not recommend less discriminatory alternatives, and does not have the burden to prove that the allegation is true. In addition, the complainant can be "any person who is a member of the specific class of people that was allegedly discriminated against" and does not have to be directly impacted by the alleged discriminatory action. Finally, even though the guidance stipulates that a complaint must be filed within 180 days of the alleged discriminatory act, the complainant has the option of a later filing if he alleges that there is a "continual violation" of Title VI. Clearly, these criteria provide no protection to the stability of the permitting process, nor insure that state or local agency's resources will be focused on legitimate circumstances of environmental discrimination.

Clarity of the Recommended Process

The lack of clarity of the recommended process for addressing environmental justice issues by the state and local permitting process in the guidance documents is in part based on the lack of definitions, clear definitions or examples of key terms used. Although a glossary is provided in the guidance documents, the furnished definitions themselves create confusion. For example, and of considerable importance, the guidance requires a determination of "adverse impact" and then stipulates that if an "impact is not significantly adverse" EPA is not expected to make a finding of non-

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compliance with its Title VI regulations. Yet the term "adverse impact" is itself defined to be an impact that EPA finds to be "significant." Further, the term "significant" is cryptically defined as "*sufficiently* large and meaningful to warrant some action." Thus, the meaning of one of the most pivotal terms - "significant adverse impact" - is internally inconsistent and circular under the provided definitions. Other key terms which are not clearly defined, or for which the guidance fails to provide adequate direction on how it is to be determined, is "comparison population" and "disparate impact." In fact, the glossary defines the terms, respectively, as "a population selected for comparison ...," and "a measurement of a degree of difference...", begging the question on how such a selection is to be accomplished or what "degree" would be considered disparate. In the discussion on how a state or local agency might

be able to justify the disparate impact, neither the term "substantial" or "legitimate" in the phrase "substantial, legitimate justification" are defined.

A second reason the recommended process lacks clarity is that EPA hedges almost all of its recommendations or policy positions with phrases such as "will *generally* be considered protective;" "will be provided *due weight;*" "will *likely* be recognized;" "OCR *may* rely on it;" "EPA *expects* to provide;" and " the action will *not necessarily* be appropriate." The italicized words remove any ability of a state or local agency to rely on use of the approaches recommended in the guidance to comply with Title VI.

Limitations of State and Local Permitting Agencies

The two guidance documents fail to adequately address the financial ability or the limits of authority of state and local permitting agencies in carrying out a significant number of the recommended approaches. At the same time, EPA provides no assurance that it will assess the approaches taken by an agency, in its attempt to comply with Title VI, in terms of implementation considerations such as cost and technical feasibility. Disconcertingly, the permitting agency's resources are surely to be stressed to a greater degree as a result of the lack of clarity of the recommended process as described above, and the lead role EPA expects the agency to play in encouraging enforceable agreements among all stakeholders, including intergovernmental involvement, to resolve disparate impacts. Even if the agency takes a permit-specific approach, the potential still exists that the permitting agency will have to deal with several federal agencies at one time since EPA may refer some allegations in a complaint to other federal agencies. Notwithstanding, EPA declares that it has no option but to suspend or terminate financial assistance if the steps taken by the agency do not result in such compliance.

The impact and demographic analysis suggested in the guidance documents are complex and resource intensive. EPA admits in the guidance that there is no single place to obtain access to data sources and tools needed to address these concerns, and

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that some are incomplete, outdated or have other limitations, and some are still under development. It places the burden of finding the sources that exist and collecting the data, and the burden of developing analytical tools or modifying existing tools, on the state and local permitting agency while emphasizing that any analysis and evaluation done by the agency must conform to "accepted scientific approaches." A sense of the extent of resources a permitting agency will have to dedicate is the description of the scope of the adverse disparate impact investigation EPA would undertake. EPA states that its investigation would involve "formation of a project team; assessing data availability, relevance and reliability; and reviewing the availability of assessment tools, such as appropriate mathematical models and exposure scenarios," and a "discussion of uncertainties in the impact assessment."

The limits of a permitting agency's legal authority are also given little consideration in the recommendations for actions to comply with Title VI. The guidance urges the permitting agency to focus on all contributions to the disparate impact, not just the permit issue, as well as cumulative impacts, in order to develop the "most effective long-term" and "comprehensive resolution." EPA encourages the agency to develop enforceable agreements among all

stakeholders, including intergovernmental involvement, to resolve disparate impacts of pollution. EPA states in the guidance that the agreement need not be limited to one environmental media. Importantly, EPA expects the adverse disparate impact analysis to involve not only the stress and impacts that are within an agency's permitting authority, but also the stress and impacts that are not explicitly covered by the permitting program but for which the agency has "some obligation" to address under "broader, cross-cutting" laws and regulations. (Neither of the quoted phrases are defined.) The EPA in assessing an agency's compliance with its Title VI regulations, and in potentially finding a legitimate justification for the permit action at issue, is willing to not only consider the permit action in the context of the agency's institutional mission, but also broader interests, such as economic development. However, EPA makes clear in the *Summary of Key Stakeholder Issues* that it will not consider factors bearing on a finding of adverse disparate impact outside the legal authority of the permitting agency, such as market forces and zoning and other land use laws, whether or not those factors exist or were created to further a community's economic development plans.

Lack of EPA Deference to Responsive Actions Taken by State and Local Agencies

If the state or local agency adopts the approaches for dealing with environmental equity issues set forth in the guidance documents, there is no guarantee that EPA will accept the actions of the agency as sufficient to comply with its Title VI regulations. The guidance states that EPA retains the ability to supplement a state or local agency's analysis or to investigate the issues *de novo*, to approve any proposed solution, and to initiate its own enforcement actions and compliance reviews. EPA

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may also choose to proceed with a complaint investigation even if the allegations in the complaint were actually litigated and substantially decided by a court of law.

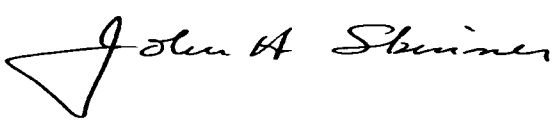
Even if a particular state or local agency adopts an activity described in the guidance and EPA finds that the activity ensures non-discrimination, EPA may choose not to rely on this finding and may not dismiss future allegations related to the issues covered by the activity. EPA states it will ignore its prior findings if it unilaterally determines that circumstances had "changed substantially" so that the activity is "no longer adequate." (Neither of the quoted phrases are defined.) In addition, any evidence that a state or local agency has adopted an activity described in the guidance will only be given "due weight" in EPA's compliance assessment. Finally, the guidance documents indicate that once a Title VI complaint is filed, EPA could use the event, even if the permit is abandoned, to undertake a comprehensive review of the agency's permitting program or of other "allegations" that are not specific to the permit at issue. Consequently, since the guidance documents provide no assurance that EPA will not "second-guess" state or local agency actions taken pursuant to the documents, these agencies are likely to limit or avoid their use, undermining their intended value.

Conclusion

The guidance documents present an ambiguous and vulnerable process for state and local regulatory agencies to follow in the hope of complying with EPA's Title VI regulations. The lack of clear requirements and measures of compliance, the complexity and cost of the necessary

analysis, and the insufficiency of the necessary data bases has forced EPA to take a role with wide discretion to intervene or supplant the actions taken by state and local permitting agencies to resolve environmental equity issues. In short, the guidance documents fail to maintain the certainty of the state and local permitting process needed for investment in, and long-term reliance on, a community's solid waste management facilities. SWANA urges EPA to provide a clearer and more structured process which can give the assurance to the states and local regulatory agencies that, if adopt and faithfully carried out, their permitting actions will comply with Title VI of the Civil Rights Act.

Sincerely,



John H. Skinner, Ph.D.
Executive Director and CEO

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THE DRAFT TITLE VI RECIPIENT AND REVISED INVESTIGATION GUIDANCES: TOO MUCH DISCRETION FOR EPA AND A MORE DIFFICULT STANDARD FOR COMPLAINANTS?

by Bradford C. Mank

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Title VI of the 1964 Civil Rights Act prohibits federal agencies from providing financial assistance to recipients that commit discrimination. The U.S. Environmental Protection Agency's (EPA's) Title VI regulations prohibit both intentional and unintentional discrimination by state and local agencies receiving Agency funds. However, these regulations were written before the question of environmental inequities became a serious public concern and do not explain how the Agency will define or measure adverse disparate impacts that result from a recipient's permitting decisions. In 1998, EPA released its Interim Guidance on Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance) to address these issues. [FN1] A wide range of groups criticized the Interim Guidance for using vague definitions, failing to elucidate the crucial term "adverse disparate impact," and not suggesting how recipients might avoid Title VI complaints.

After promising for over two years to revise its policies, finally, on June 27, 2000, EPA published two draft guidances on Title VI in the Federal Register. [FN2] First, prepared at the request of state and local officials seeking to avoid complaints and violations, the Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance) discusses a range of possible approaches to minimize the likelihood that a complaint will be filed against a recipient. [FN3] Second, the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Revised Investigation Guidance) clarifies how the Agency's Office of Civil Rights (OCR) will process complaints, conduct its investigations, determine whether a permit decision creates unacceptable adverse impacts, and weigh efforts by the recipient to reduce or eliminate adverse disparate impacts. [FN4] These guidances deal only with permitting decisions. Later guidances will address other issues, including allegedly disproportionate enforcement. [FN5]

EPA argues that the new guidances provide more detailed explanations of key terms and of the steps in the Title VI process than the Interim Guidance. [FN6] In particular, the Agency contends that the guidances provide more clarity about how the Agency will conduct an adverse disparate impact analysis and how the OCR will weigh efforts by a recipient to reduce such impacts. Anne Goode, director of the OCR, has tried to reassure state officials that EPA will give "due weight" to a state's good-faith efforts to reduce disparate impacts and to incorporate public participation in its permit decisions.

However, a wide range of industry, state officials, and advocates argue that the guidances are still too vague, lack important definitions, are nonbinding, and leave too much discretion to EPA in deciding what is an adverse disparate impact and when a state program is in compliance with Title VI. [FN7] The guidances do provide more definite answers for some questions than the Interim Guidance, but many criticize the Agency for retaining too much discretion over key procedural and substantive issues. EPA's insistence on retaining discretion over so many important issues undermines the Agency's stated goal of minimizing uncertainties about the Title VI process. States and business interests seeking permits want EPA to establish definite "safe harbors" that provideguarantees that they can avoid Title VI liability if they follow specific guidelines. [FN8] They argue that establishing "safe harbor" standards for states would make it easier for recipients to comply with the statute and, accordingly, would help eliminate problems that would otherwise result in complaints. On the other hand, civil rights advocates are generally even more critical of the guidances because EPA's emphasis on whether the recipient has made "good-faith" efforts suggests the Agency will rarely revoke a challenged permit or impose sanctions against a recipient even if the Agency finds evidence that a permit causes adverse disparate impacts. [FN9]

There has been somewhat more positive reaction to the Recipient Guidance than to the Revised Investigation Guidance. According to Anne Goode, a wide range of interested parties, including state and local environmental agencies, are pleased with the Recipient Guidance because it offers a number of practical steps that recipients can take to meet their Title VI responsibilities. [FN10] However, while praising EPA for providing flexibility for states, the Environmental Council of States (ECOS), an organization of state environmental officials, is concerned that the Recipient Guidance does not provide guarantees that the Agency's suggested options for improving Title VI programs will safeguard recipients from Title VI liability, that the Agency's suggested guidelines will pressure states to adopt expensive unfunded mandates, and that the Recipient Guidance does not allow states to assume authority to enforce Title VI programs. [FN11] Furthermore, by failing to establish a clear standard for when a recipient's programs are in compliance with Title VI, the Agency undermines its goals of providing guidance to recipients about how they should improve their permit programs, encouraging recipients to adopt voluntary agreements to reduce or eliminate adverse disparate impacts, and achieving progress that eliminates the need for

Title VI complaints. Conversely, groups argue that EPA's encouragement of voluntary recipient efforts implies that the Agency is unwilling to impose real sanctions if a recipient makes any effort to reduce adverse disparate impacts. [FN12] A wide range of groups agree that the Agency should provide a clearer definition of what constitutes "good-faith" efforts by a recipient.

There has been more criticism of the Revised Investigation Guidance because it addresses a number of difficult procedural and substantive issues. To conclude that a permit decision caused adverse disparate impacts, the Agency must generally find scientifically valid and statistically significant evidence that a minority group suffers disproportionate adverse effects that are at least twice as large as a relevant comparison group. [FN13] State officials would prefer an even more rigorous standard of peer-reviewed scientific proof to establish a Title VI violation and complain that the Agency retains too much discretion in deciding what is an adverse disparate impact. [FN14] A more stringent standard of proof would likely reduce the number of Title VI complaints. Conversely, advocates argue that requiring clear scientific proof of harm is inappropriate in light of the great uncertainties about the risks of many chemicals. Instead, they argue that the Agency should consider any plausible evidence of harm to minority groups.

State and industry representatives are cautiously pleased that the Revised Investigation Guidance limits the scope of investigations to areas where the recipient has legal authority. [FN15] Furthermore, even if EPA finds that a recipient has caused adverse disparate impacts and is not in compliance with Title VI, the Agency will probably not require the revocation of the disputed permit. [FN16] Instead, the guidance emphasize voluntary compliance efforts by recipients to reduce pollution and disparate impacts. However, state officials are concerned that EPA has too much discretion in defining key terms such as "affected population" and "comparison population." [FN17]

Environmental and civil rights groups are generally disappointed with both draft guidances and especially with the Revised Investigation Guidance. First, even if EPA accepts a complaint for investigation, the Agency normally will not seek to stay the challenged permit. [FN18] Accordingly, a permittee may be able to build and even operate a challenged facility while an investigation takes place. Second, the Revised Investigation Guidance limits a recipient's Title VI responsibilities to issues within its legal authority, and thus avoids cultural, social, or even economic impacts that transcend that authority. [FN19] Finally, even if the OCR finds a Title VI violation, EPA generally will not suspend the permit or impose sanctions on the recipient, but instead will collaborate with the recipient to reduce adverse disparate impacts in the future. [FN20] Civil rights advocates are especially concerned that the guidances suggest that recipient efforts to reduce adverse disparate impacts may be enough to satisfy Title VI and that the Agency will not necessarily require the elimination of all such impacts. Nevertheless, the guidances do show some commitment to promoting environmental equity by emphasizing that the Agency will evaluate and seek to reduce the cumulative impacts from a number of sources in an area rather than just the impact of the challenged permit. [FN21]

The Agency collected public comments on the draft guidances for 60 days until August 28, 2000. EPA also conducted seven national public listening sessions in major cities to receive additional feedback on the draft guidances. [FN22] After reviewing the public comments, EPA plans to revise the draft guidances and publish them in "final" form. [FN23] However, the Agency has resisted arguments that it should issue the guidances as binding "rules."

This Article critiques the two guidances. After discussing EPA's Title VI regulations, the Article examines the Interim Guidance and the Agency's next steps to address various concerns about its Title VI policies. The heart of the Article analyzes the Recipient Guidance and the Revised Investigation Guidance. Because EPA wanted to retain discretion about most important procedural and substantive issues, both guidances fail to provide the level of certainty that most stakeholders would desire. These uncertainties undermine the Agency's goals of providing guidance to recipients about how to improve their permit programs, expediting the investigation of complaints, and achieving solutions that make complaints unnecessary. While they are disappointed that both guidances fail to provide clear "safe harbor" standards that would guarantee that recipients are in compliance with the statute, states and industry are generally pleased that the Revised Investigation Guidance clarifies that a permit is not suspended during an investigation, that a recipient is only responsible for actions within its legal authority, and that the Agency prefers that any finding of adverse disparate impacts be based on credible and statistically significant scientific evidence. Furthermore, both guidances suggest that the Agency is unlikely to find a recipient in noncompliance as

long as a state or local government has made "good-faith" efforts to reduce adverse disparate impacts. On the other hand, advocates are disappointed that the guidances do not stay a permit during its investigation, consider broad social impacts outside the recipient's legal authority, or fully address the limitations of scientific knowledge about the effect of cumulative pollution impacts on minority communities. Most importantly, advocates are unhappy that even if EPA makes a finding that a recipient's permit decision has caused adverse disparate impacts, the Agency will usually avoid imposing sanctions or revoking a permit if the recipient adopts an agreement to reduce those impacts. If voluntary area-specific agreements to reduce or eliminate adverse disparate impacts are the Agency's primary strategy for resolving Title VI complaints, EPA needs to establish transparent criteria for what level of reductions are sufficient to comply with the statute.

I. Background to EPA's Title VI Policy

On February 11, 1994, President Clinton issued Executive Order No. 12898, which directs all federal agencies to promote "[t] o the greatest extent practicable and permitted by law." [FN24] Additionally, President Clinton simultaneously published a Presidential Memorandum to accompany Executive Order No. 12898 that requires federal agencies "providing funding to programs affecting human health or the environment to ensure that their grant recipients comply with Title VI of the Civil Rights Act of 1964." [FN25] The Presidential Memorandum was significant because it alerted federal agencies that they needed to review their Title VI programs to make sure that recipients' programs or activities affecting the environment or public health were not causing intentional or disparate impacts against minority groups.

Title VI of the Civil Rights Act of 1964 forbids intentional discrimination by programs or activities receiving federal financial assistance. [FN26] Section 602 of Title VI requires federal funding agencies to adopt and enforce regulations that prohibit recipients from engaging in discrimination and that establish a process for investigating possible violations by recipients. [FN27] Since 1964, all federal agencies have consistently interpreted s602 to prohibit recipients from engaging not only in intentional discrimination, but also in practices having discriminatory effects. [FN28] After the Civil Rights Restoration Act of 1987, Title VI and its regulations apply to "all of the operations" of a state or local government agency that receives any federal assistance. [FN29]

First promulgated in 1973 and then revised in 1984, the EPA's Title VI regulations prohibit recipients of Agency funding, which include almost all state environmental agencies, from engaging in actions that either intentionally discriminate or cause disparate impacts. [FN30] Additionally, EPA's Title VI regulations require state recipients to create a compliance scheme to prevent discrimination by both the state and any beneficiaries of state-administered funds. [FN31] Furthermore, the Agency's Title VI regulations define procedures for investigating possible violations by recipients. [FN32]

Before 1993, EPA was reluctant to enforce its Title VI regulations against state or local recipients because Agency officials believed that reducing or terminating federal aid to a discriminating recipient was contrary to the Agency's main focus of providing assistance to reduce pollution or enhance the environment. [FN33] However, in 1993, EPA shifted its policy to more vigorous enforcement of Title VI because such an approach could further its new emphasis on promoting environmental equity. [FN34] In 1994, EPA established the OCR to address Title VI and other discrimination issues, including internal employment discrimination cases. [FN35]

As of June 29, 2000, EPA had received 97 Title VI complaints. [FN36] The Agency has rejected 47 complaints. Most, 43, were rejected because the Agency lacked jurisdiction for various reasons, and 4 were dismissed after an Agency investigation had begun. Only one case--the Select Steel case, discussed below--was dismissed on the merits after an Agency investigation found no evidence of adverse disparate impacts.

By June 29, 2000, EPA had a backlog of 50 pending complaints. [FN37] Of these, 29 were under review for possible investigation and 21 were accepted for investigation. Although the Agency's regulations normally require it to issue preliminary findings within 180 days from the start of an investigation, several pending accepted cases were filed in 1993 or 1994. [FN38] Since 1998, the Agency has doubled its staff resources and contract dollars to try to reduce this backlog. [FN39] ECOS has passed a resolution calling on the Agency to resolve this backlog even before the draft guidance documents are finalized. [FN40]

II. A Brief Description of EPA's Title VI Regulations

The Agency's Title VI regulations provide a basic framework for processing Title VI complaints but do not address the difficult substantive questions relating to what is a disparate impact and do not completely answer some procedural issues. To initiate a Title VI investigation, a complainant must file a short written statement alleging that a recipient has engaged in discriminatory actions within the last 180 days. [FN41] Within 21 days of receiving a complaint, EPA must conduct a preliminary investigation to determine such questions as whether the complaint's allegations, if true, would state an appropriate claim of discrimination, whether the Agency has jurisdiction, whether another agency might have jurisdiction, or whether the complaint is premature because the recipient is still considering whether to grant or deny a pending permit. [FN42] If EPA accepts a complaint for investigation, the Agency normally seeks to resolve it through an informal settlement before conducting a formal investigation of the alleged conduct. [FN43]

During an EPA investigation of a recipient, the complainant has no formal right to intervene, testify, or present evidence. [FN44] Informally, the Agency seeks comments from the complainant, permit applicant, and recipient about various factual issues before making a preliminary finding about the presence of disparate impacts or discrimination. [FN45] As discussed below, the Revised Investigation Guidance clarifies the roles of the parties in providing information during the Agency's investigation. [FN46]

Under its Title VI regulations, EPA may terminate or reduce funding to a recipient found in violation of the statute. [FN47] If the Agency seeks to terminate funding, the recipient has elaborate rights to both internal Agency review and judicial review. [FN48] Furthermore, the Administrator of EPA must make a full report to the appropriate congressional committees and give Congress 30 days to raise objections. [FN49] As a result of these extensive procedural protections for recipients, EPA almost always tries to reach a settlement in which the recipient agrees to eliminate any allegedly discriminatory practices rather than terminate a recipient's funding. [FN50] As discussed below, the draft guidances continue EPA's practice of encouraging voluntary compliance from its recipients rather than imposing the draconian penalty of funding termination. [FN51]

By contrast, complainants have very limited rights to internal agency or judicial review under either Title VI or the Administrative Procedure Act if EPA decides to dismiss an administrative complaint for lack of evidence. [FN52] However, some courts have recognized that citizens have a private right of action under s602 of Title VI to enforce EPA's regulations even if they do not exhaust their administrative remedies with the Agency. [FN53] If they do recognize a private right of action to enforce the Agency's regulations, courts would not be bound by the Agency's Title VI guidances, which lack the generally binding effect of a properly promulgated agency rule, but the guidances might influence judicial reasoning. [FN54]

III. Interim Guidance

In February 1998, EPA issued its Interim Guidance to help the Agency's OCR evaluate Title VI complaints. The Interim Guidance addressed the procedural process for filing complaints, and set forth a five-step process for assessing whether a decision causes disparate impacts. [FN55] If the Agency found adverse disparate impacts, the Interim Guidance provided recipients with the opportunity to justify its action by either: (1) rebutting EPA's findings; (2) mitigating any disparate impacts; or (3) showing that the benefits of the project outweigh its adverse impacts. [FN56]

Although EPA solicited public comment for 90 days after releasing the Interim Guidance, it did not publish the guidance in the Federal Register. Many critics argued that EPA should have published the Interim Guidance in the Federal Register and some contended that it should have been issued pursuant to notice- and-comment rulemaking. [FN57] Despite these procedural limitations, EPA received over 120 written comments. On June 27, 2000, the Agency published in the Federal Register, along with the draft guidance, a Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance that summarizes and responds to these comments. [FN58]

A wide range of individuals and organizations agreed that the Interim Guidance was too vague in defining essential terms such as "disparate impact." [FN59] State officials and industry representatives were concerned that uncertainties about how EPA would implement the Interim Guidance would delay state permit decisions and

discourage economic development. [FN60] In particular, industry representatives, state officials, and mayors worried that the Agency's uncertain standards would discourage development in minority areas because of the risk that state-issued permits could be challenged and delayed as a result. [FN61] Additionally, states complained that the Interim Guidance did not address or suggest how recipients might avoid Title VI complaints. [FN62] By contrast, most environmentalists, civil rights groups, and members of the Congressional Black Caucus maintained that EPA could adopt an expansive Title VI policy that protected the health of minority groups without sacrificing development in minority neighborhoods. [FN63]

Because of the hostile reaction of industry representatives, state officials, and mayors, republicans in Congress have attached riders to the last three EPA appropriation bills that prohibit the Agency from conducting investigations using the Interim Guidance for complaints received since the date of the initial bill, October 21, 1998, until the Agency issues a final Title VI policy. [FN64] The legislation does not affect complaints that had already been accepted for investigation prior to that date. [FN65]

IV. Steps After the Interim Guidance

In light of substantial public criticism of the Interim Guidance, EPA took several steps to improve and revise its methodology for assessing disparate impacts and processing Title VI complaints. For example, in 1998, EPA's Science Advisory Board (SAB) made several recommendations about improving the Agency's methodology for determining whether the issuance of a permit causes a disproportionate impact on minorities. [FN66]

Additionally, the Agency engaged in an extensive consultation process with a wide range of state, industry, and civil rights representatives. [FN67] For instance, EPA met with the National League of Cities in September 1998, the National Association of Attorneys General in June 1999, and members of the Local Government Advisory Committee and Small Communities Advisory Subcommittee in September 1999. [FN68]

In March 1998, EPA Administrator Carol Browner established a Title VI Implementation Advisory Committee in conjunction with the Agency's National Advisory Council on Policy and Technology that included Elliott Laws as chair and 25 representatives from a wide range of groups. [FN69] On March 1, 1999, the Title VI Advisory Committee issued an extensive report that identified a number of consensus principles such as encouraging early and meaningful public participation throughout state decisionmaking processes, [FN70] using informal resolution techniques to avoid disputes, and promoting research concerning the cumulative harm of multiple chemicals. [FN71] However, the Title VI Advisory Committee could not reach agreement on the central issue of what constitutes unacceptable disparate impacts. [FN72] Nevertheless, both guidances, especially the Recipient Guidance, rely heavily on the work of the Title VI Advisory Committee. [FN73] In particular, the report of the Title VI Advisory Committee strongly influenced the discussion of mitigation issues. [FN74] However, advocates complain that EPA failed to address the substantive questions posed by the workgroup and declined to adopt their recommendation that mitigation be closely tailored to any impacts.

V. The Shintech and Select Steel Cases

Initially, the intense controversy generated by the Interim Guidance seemed to make EPA very reluctant to decide its pending Title VI complaints. During the spring and summer of 1998, EPA repeatedly delayed deciding a Title VI complaint involving Shintech's proposed $700 million plastics facility in a predominantly African American area of St. James Parish, Louisiana, because there was strong disagreement about how to measure the total cumulative amount of pollution and the relevant demographic comparison groups. [FN75] The Agency never decided the Title VI complaint, but it did find a flaw in the state air permit for the proposed facility. [FN76] To avoid further delays, Shintech canceled the project and decided to build a smaller facility in a more integrated community. [FN77] Ironically, EPA in its draft guidance refers to the statistical analyses it performed in the Shintech case as a model for the future. [FN78]

In November 1998, EPA for the first and so far only time decided a Title VI complaint on the merits. It rejected a complaint challenging Select Steel's proposed construction of a steel plant in Flint, Michigan, because the

facility was in compliance with the Clean Air Act's (CAA's) health-based national ambient air quality standards (NAAQS) for ozone and lead. [FN79] In its Select Steel decision, EPA stated that unless the complainant could present evidence that the standards were insufficient to protect a particular minority in a specific area, a recipient's compliance with the Agency's health-based NAAQS created a presumption that there were no significant adverse effects to minority groups. [FN80] As discussed below, the Revised Investigation Guidance implicitly adopts Select Steel's approach that NAAQS are generally protective of human health and that a recipient is presumptively in compliance with Title VI if it meets them unless a minority group can show that the national standards fail to protect them in a particular case. State officials argue that the Agency should explicitly adopt Select Steel's approach as precedent for future cases. [FN81]

VI. The Two Draft Guidances

The two draft guidances, the Revised Investigation Guidance and the Recipient Guidance, were written in conjunction with each other, use a common glossary of terms, and share common goals that the Agency derived, in part, from the consensus principles identified by the Title VI Advisory Committee. [FN82] The Recipient Guidance provides a series of alternative strategies for achieving compliance and minimizing complaints under the Revised Investigation Guidance. By providing more detailed standards and procedures than the Interim Guidance, the Revised Investigation Guidance attempts to give recipients a better idea of both what they should and should not do. [FN83] However, while the draft guidances provide more clarity than the Interim Guidance, a wide range of critics argue that EPA must provide more precise definitions and firm standards applicable in every case.

VII. The Recipient Guidance

The Recipient Guidance complements the Revised Investigation Guidance by suggesting voluntary approaches that recipients may adopt to avoid Title VI complaints altogether or to reduce the likelihood that the Agency will find a violation. [FN84] The Recipient Guidance is somewhat broader and more flexible than the Revised InvestigationGuidance because it provides a framework to improve recipients' existing programs or activities. The Recipient Guidance seeks to reduce the number of Title VI complaints alleging either discriminatory impacts from permit decisions or discrimination in public participation processes associated with permitting. [FN85] The Recipient Guidance was written by EPA at the request of state and local recipients seeking to develop programs that would assure their compliance with Title VI. [FN86] However, the Recipient Guidance does not provide a guaranteed answer for avoiding Title VI complaints, but rather suggests a number of possible strategies for minimizing the chances of a complaint and reducing any possible sanctions for unintentional noncompliance. Many state officials are unhappy that the Recipient Guidance fails to offer clear rules that will automatically bring recipients into compliance with the statute and leaves considerable discretion in the hands of the OCR. Because of these uncertainties, the Recipient Guidance may fail to achieve its stated goals of helping recipients to improve their programs, facilitating the investigation of existing complaints, and eliminating any adverse disparate impacts that would otherwise lead to future Title VI complaints.

A. Title VI Approaches

After extensive consultation with a wide range of state and local officials, EPA contends that there is not a single "one-size-fits-all" way to address Title VI issues because recipients vary widely in their organizational structures, resources, and types of permits that they issue. [FN87] The Recipient Guidance offers a range of possible approaches and techniques to avoid potential Title VI problems, but also encourages recipients to develop other appropriate methods. [FN88] In section II.A, the Recipient Guidance describes three general approaches recipients could adopt to identify and resolve the type of issues that are most likely to lead to Title VI complaints: (1) a Comprehensive Approach; (2) an Area-Specific Approach; and (3) a Case-by-Case Approach. [FN89]

1. A Comprehensive Approach

EPA suggested that recipients consider adopting a comprehensive approach that includes all or most of the ways of enhancing Title VI actions described in the Recipient Guidance. [FN90] For example, section II.B describes

seven steps a recipient may take to improve its Title VI programs. EPA stated that it expected that "such comprehensive approaches will offer recipients the greatest likelihood of adequately addressing Title VI concerns, thereby minimizing the likelihood of complaints." [FN91]

State officials are unhappy that a recipient's compliance with most or all of these steps does not guarantee conformity with Title VI. [FN92] They would prefer a "safe harbor" system in which EPA would automatically reject a complaint if a state or local recipient's Title VI program achieves explicit substantive and procedural criteria. They are also concerned with the cost of complying with these steps. While technically "voluntary," many state officials believe that the Agency will pressure them to follow the recommended steps and, hence, that the steps constitute an "unfunded" mandate that will impose heavy financial burdens on states unless the federal government provides funding.

2. An Area-Specific Approach

Another possible way to reduce Title VI complaints is for recipients to adopt an area-specific approach in which they identify geographic areas where adverse disparate impacts may exist and then create an "area-specific" plan to reduce or eliminate pollutants that are causing those harms. [FN93] First, the Recipient Guidance emphasizes the need to collaborate with communities and other appropriate stakeholders to develop the relevant criteria to identify geographic areas where adverse disparate impacts may exist. [FN94] Furthermore, after identifying high-risk geographic areas, recipients are encouraged to work with these affected communities and other appropriate stakeholders to reduce and eliminate adverse disparate impacts or other issues that raise Title VI concerns. [FN95] For example, a recipient could create a comprehensive and multifaceted plan to reduce a wide range of lead sources that affect a particular minority community, which is discussed in more detail below. [FN96] EPA encouraged recipients to consider plans that address adverse disparate impacts in several media: air, water, and land. [FN97] However, EPA is likely to give less weight to a plan if it simply fulfills preexisting obligations under a statute, such as "reasonable further progress" under CAA s171(1), and more weight to voluntary plans that go beyond minimum requirements to reduce or avoid adverse disparate impacts. [FN98]

State and industry officials are concerned that the Agency's promise to give "due weight" to area-specific plans does not guarantee that they will be in compliance with Title VI. On the other hand, advocates are disturbed that these plans may not fully rectify all adverse disparate impacts. As discussed below, the Agency needs to clarify how area- specific plans work.

3. A Case-by-Case Approach

Another possible strategy is for recipients to adopt a case-by-case methodology or permit-specific approach in which a recipient develops criteria to assess which types of permit actions have the greatest potential to raise Title VI problems. [FN99] Additionally, a recipient might focus on cases where initial public comment suggests that adverse disparate impacts are likely. [FN100] Alternatively, a recipient could use alternative dispute resolution (ADR) techniques to resolve actual conflicts. [FN101]

B. Title VI Activities

Section II.B of the Recipient Guidance suggests that recipients consider adopting seven specific activities to avoid Title VI problems in their permitting programs: (1) improving staff training; (2) encouraging effective and early public participation and outreach; (3) conducting adverse impact and demographic analyses; (4) encouraging intergovernmental involvement; (5) participating in ADR; (6) reducing or eliminating alleged disparate impacts; and (7) evaluating the progress of Title VI activities and identifying areas in need of improvement. [FN102] The Recipient Guidance implies that the Agency will consider these seven activities in determining whether a recipient is in compliance with Title VI or in assessing sanctions if a violation does occur, but it does not specify how much weight each step will count toward compliance with Title VI.

1. Staff Training

The Recipient Guidance suggests several ways recipients can improve their staff training in Title VI responsibilities to reduce the likelihood of complaints. An effective staff training program could include instruction in the following areas: (1) a review of the recipient's Title VI responsibilities, its Title VI programs, and its environmental permitting programs; (2) a program of cultural and community relations sensitization designed to create greater trust between the recipient's staff and the diverse communities it serves; (3) training in skills that enhance the recipient's staff ability to communicate effectively with these diverse communities; (4) training in risk assessment, exposure measurement, cumulative impact assessment, and demographic analysis techniques that will enable the staff to conduct disparate impact analyses; and (5) training in ADR techniques that will help staff to resolve Title VI concerns. [FN103]

2. Effective Public Participation and Outreach

The Title VI Advisory Committee reached a consensus that states should encourage early, inclusive, and meaningful public participation throughout their decisionmaking processes to avoid Title VI complaints. [FN104] Early involvement by a diverse range ofstakeholders can often avert problems because participants can suggest modifications during the planning of proposed projects that prevent adverse disparate impacts and increase their benefits to affected communities. Accordingly, the Recipient Guidance strongly endorses the goals of early, inclusive, and meaningful participation as a way to reduce the number of Title VI complaints. [FN105]

Furthermore, despite the fact that the Recipient Guidance is supposed to be voluntary and does not bind recipients, EPA added a "stick" to the issue of whether a recipient has an effective public participation process by stating that discrimination in procedural processes alone, including public participation practices, may be enough to establish a Title VI violation. [FN106] Thus, recipients have an incentive to develop effective public participation processes both because of its potential benefits in developing public support for projects and to avoid committing discrimination in violation of Title VI.

In particular, the Recipient Guidance provides a number of criteria for evaluating whether a recipient has an effective public participation process. It encourages recipients to reach as broad a spectrum of the population as possible and to involve them meaningfully early in the public participation process. Recipients can improve their process by: including the public during the pre-permitting process, as well as during the permitting process, if possible, so that a community can have more effective influence on the scope and design of a proposal; including community participants that represent a wide range of views; using nontraditional ways of outreach such as inserting information with utility bills, placing public service announcements in local media, or posting notices on bulletin boards in public and private buildings; and scheduling meetings at times and places that are convenient for residents who work, those who use public transportation, and the disabled. [FN107] Additionally, the Recipient Guidance recommends that recipients foster a "meaningful" public participation process by using open and transparent procedures, providing understandable information necessary for effective community participation, including disseminating documents in languages other than English where there are significant populations whose primary language is not English, and offering clear explanations for their permit decisions. [FN108] The Recipient Guidance warns that a recipient's failure to take reasonable steps to reach limited English speaking individuals may constitute discrimination under Title VI. [FN109] In addition, after the draft guidances were published, EPA's Office of Solid Waste and Emergency Response published Public Involvement in Environmental Permits: A Reference Guide, which may provide further assistance to recipients. [FN110]

Despite the Agency's best efforts, a wide range of commenters are concerned by the Recipient Guidance's vague definition of "meaningful" participation. States would prefer automatic deference from the Agency as long as a recipient follows certain guidelines for including public participation. On the other hand, advocates would like to see a more rigorous review of whether members of the poor and minority groups have an effective opportunity to participate in the early and more meaningful stages of the decisionmaking process. [FN111] It is not easy to provide guidelines for public participation that guarantee meaningful participation because different substantive issues raise different types of public participation questions, and what works in one community may not work in another.

3. Conducting Adverse Impact and Demographic Analyses

The Recipient Guidance discusses how recipients can conduct adverse impact and demographic analyses and then use them as a tool to identify and address potential problem areas where there may be disparities on the basis of race, color, or national origin. [FN112] The first step is to collect demographic and pollution data. The Recipient Guidance lists a wide range of websites that contain data sources and tools for such analyses. [FN113] However, these sources may be incomplete and address only certain categories of demographic or pollution data. [FN114] Accordingly, the Recipient Guidance emphasizes that recipients should examine data from a wide range of sources and carefully assess its accuracy and relevance. [FN115] Furthermore, the recipient should consider the need to collect additional local data if existing sources are inadequate. [FN116]

The Recipient Guidance provides a short but important discussion of how recipients might conduct an adverse disparate impact analysis to identify areas of concern where there may be disparities on the basis of race, color, or national origin. [FN117] It refers recipients to section VI of the Revised Investigation Guidance for a detailed discussion of several steps for conducting a thorough adverse disparate impact analysis. [FN118] In some cases, a recipient may be able to use a less sophisticated and cheaper approach to identify potential high-risk areas than would be otherwise required to make an actual determination of whether disparate impacts exist. [FN119] For example, because ambient risks are often directly proportional to the amount and toxicity of pollutants released, a recipient may identify potential high-risk areas based solely on releases without conducting a more detailed risk assessment. [FN120]

While compliance with existing environmental standards does not guarantee that a recipient is in compliance with Title VI, the Recipient Guidance suggests that recipients begin their assessment of the significance of impacts in light of health and risk standards used in existing environmental statutes and regulations. [FN121] If these impacts exceed current legal standards, then the OCR would likely treat them as adverse under Title VI. [FN122] However, in considering cumulative risks from multiple sources of pollution, the Recipient Guidance recognizes that existing laws may not adequately address such risks and, therefore, recipients may need to evaluate whether any scientific or technical information suggests that these impacts may be significantly adverse. [FN123]

Finally, a recipient should consider conducting a disparity analysis that compares the affected population to an appropriate comparison population. [FN124] Section VI of the Revised Investigation Guidance contains a full discussion of different approaches for conducting disparity analyses. [FN125]

While the Recipient Guidance seeks to minimize the complexity of conducting an adverse disparate impact analysis, EPA's approach to such analyses remains complex and potentially costly for states. [FN126] There is some disagreement about whether less sophisticated methods such as using public health statistics alone are sufficient to identify high-risk populations. [FN127] For example, the Public Interest Law Center of Philadelphia has proposed the use of public health data to identify the worst census tracts. [FN128] However, in its Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance, EPA responded that while this approach might identify public health "hot spots," it fails to address whether there was a link between the recipient's actions and the adverse health effects or whether there was any disparity on the basis of race, color, or national origin. [FN129] Thus, the Agency implied that a recipient needs to at least consider the more complex disparity analyses discussed in the Revised Investigation Guidance.

4. Encouraging Intergovernmental Involvement

The Recipient Guidance suggests that recipients consider collaborating with other government agencies in developing strategies to reduce adverse disparate impacts. [FN130] This is especially true if the recipient does not have jurisdiction over some crucial issues. For example, a state environmental agency may not have authority over zoning or traffic issues. The Recipient Guidance encourages early efforts to consult with other agencies because there is a greater chance to achieve consensus while more options are still open at the beginning of a decisionmaking process. [FN131] While collaboration is a good idea, state officials point out that the draft guidances fail to address the problem of whether other laws, programs, or policies, especially local land use regulations or ordinances, may conflict with or limit the legal authority of recipients to take actions that promote environmental equity. [FN132]

5. Promoting ADR Techniques

Because the resolution of Title VI claims is often lengthy and expensive, the Recipient Guidance encourages recipients to use ADR techniques to avoid potential conflicts. [FN133] According to EPA, recipients are most likely to be successful with ADR if they develop a process that is acceptable to both affected communities and permit applicants. An experienced third party (a "neutral") can assist recipients in developing acceptable procedures. Additionally, the Recipient Guidance suggests that recipients combine the ADR process with early, inclusive, and meaningful public participation. There are several possible approaches including: (1) facilitated dialogue between relevant parties that is assisted by a third-party neutral; (2) consensus- building through structured processes designed to bring parties together; or (3) mediation with a third-party neutral. [FN134]

Some civil rights advocates have questioned whether ADR procedures adequately protect poor minorities who may lack the expertise and resources to bargain effectively with recipients and, indirectly, with permit applicants that have far greater resources. [FN135] For example, a mediator may not be able to address the differences in resources between parties and create a level playing field. [FN136] These inequalities are especially likely to result in unfair agreements because the confidential nature of most ADR negotiations usually prevents public comment until after a deal is reached. [FN137] Accordingly, these critics are concerned that EPA's push to resolve as many complaints as possible by using ADR techniques may harm minority interests. On the other hand, state officials are concerned that informal resolution techniques will not only be expensive and time consuming, but may not achieve success. [FN138]

6. Reduce or Eliminate Alleged Adverse Disparate Impact

The Recipient Guidance strongly encourages recipients to reduce or eliminate alleged adverse disparate impacts, especially those that cause disparities on the basis of race, color, or national origin. [FN139] Because Title VI complaints often reflect broad dissatisfaction with a series of permit decisions rather than just the one at issue, the Agency argued that recipients should look beyond individual permits and instead develop cooperative efforts with affected communities to reduce disparities wherever possible. The Recipient Guidance suggests a series of remedial measures that may reduce or eliminate alleged disparate impacts including: pollution prevention; environmental remediation of existing contaminants; emission offsets or caps in geographic areas of concern; developing better emergency planning and response measures; and measures to achieve and promote more equitable monitoring and enforcement by the recipient. [FN140] Section IV.B of the Revised Investigation Guidance discusses these measures in more detail.

A wide range of commenters are concerned about the lack of clarity with respect to how much of a reduction is required. Many advocates believe that Title VI requires recipients to eliminate all significant adverse disparate impacts.

Additionally, environmentalists are concerned that the guidances' vague language about remedial efforts or mitigation will allow recipients to adopt off-site mitigation measures that do not reduce impacts at the specific site where adverse impacts are affecting a community. [FN141] Instead, EPA should require that remedial or mitigative measures directly address the same type of adverse impacts in the same geographical area.

7. Evaluating Title VI Activities

Finally, the Recipient Guidance encourages recipients to evaluate their current Title VI policies and activities to identify areas in need of improvement. [FN142] For instance, a recipient could collect and analyze feedback from communities and businesses about its public participation program. The Agency suggested that recipients carefully consider the quality of the information when they evaluate feedback about their programs.

C. Due Weight: EPA Will Not Give Complete Deference to State Programs

In section II.C of the Recipient Guidance, EPA provides an initial discussion of how much "due weight" the Agency will give to proactive efforts by recipients to reduce or eliminate pollution or to assure effective public participation. Section V.B of the Revised Investigation Guidance provides further explanation of under what circumstances EPA will give "due weight" to either information submitted by the recipient and to area-specific agreements. [FN143] However, if a recipient implements proactive public participation or pollution reduction

measures, a difficult question arises: how much credit or deference should EPA give to the recipient? This was a contentious issue for EPA's Title VI Advisory Committee. State and industry members of the Title VI Advisory Committee argued that EPA should defer to state decisions that include proactive public participation efforts or efforts to reduce pollution in minority areas, but civil rights advocates contended that the Agency may not abdicate its responsibility for ensuring that recipients protect minority groups from discrimination. [FN144] In 1999, EPA initially suggested that it favored giving greater deference to states with programs designed to enhance public participation or reduce disparate impacts, but that suggestion was strongly criticized by civil rights groups. [FN145]

In the draft guidances, the Agency concluded that Title VI requires the Agency to assure compliance with the statute and, therefore, the Agency may not completely defer to a recipient's own assessment of whether it has violated the civil rights of minority groups protected by the statute. [FN146] However, in evaluating Title VI complaints, the Agency stated that it would give "due weight" to a recipient's efforts to reduce discrimination and would carefully consider evidence or information submitted by a recipient in deciding whether a permit decision causes disparate impacts. [FN147] While recipients might submit a wide range of relevant information, the Agency expects that such evidence "should at a minimum generally conform to accepted scientific approaches." [FN148] In determining whether a recipient's efforts bring it into compliance with Title VI, the Agency will evaluate the appropriateness of the recipient's proposed or implemented solutions. [FN149]

In particular, the Recipient Guidance encourages recipients to identify geographic areas where adverse disparate impacts may exist and to enter into agreements with residents and polluters to reduce pollution and disparities. [FN150] To create a successful areawide agreement that is likely to receive deference from EPA, the recipient should encourage collaboration with communities and other appropriate stakeholders, including permittees. [FN151] If a recipient meets the criteria for area-specific agreements set forth in the Revised Investigation Guidance, then EPA will likely give the results of that agreement "due weight" and rely on it to the extent warranted in determining whether or not the recipient is in compliance with the Agency's Title VI regulations. [FN152] The amount of deference that EPA will give to an area-specific plan depends on the persuasiveness of the recipient's evidence that the plan will in fact eliminate or reduce adverse disparate impacts. [FN153]

A wide range of commenters are critical of the Agency's failure to define the term "due weight" and its decision to retain ultimate discretion over what type of recipient efforts are acceptable. First, it is not clear how much a recipient must do to receive "due weight" from EPA. Second, it is unclear what effect a finding of "due weight" by the Agency will have on the ultimate decision of whether the recipient is in compliance with Title VI. Does a finding of "due weight" simply constitute favorable evidence for a recipient, a rebuttable presumption of innocence, or an absolute finding of compliance? [FN154]

Environmental justice advocates are concerned that area-specific plans will not fully address all disparate impacts in an area because the guidance appear to allow plans that merely "reduce" rather than eliminate all significant disparate impacts. [FN155] Some civil rights proponents argue that any area- specific plan should be adopted only after public notice and an opportunity for comment. [FN156] Furthermore, they are concerned that the guidances do not clearly address how EPA will ensure that recipients comply with such agreements or modify them to address changing conditions. [FN157]

On the other hand, state officials are concerned that EPA does not provide a "safe harbor" guarantee that an area-specific plan will protect a recipient from Title VI liability, and instead only offers vague assurance that such plans will receive "due weight" from the Agency. [FN158] Additionally, the Agency's discussion of area-specific agreements implies that local governments will participate in these plans, but the guidances fail to explain the role of local governments or whether local governments have the legal authority to enforce these plans. [FN159]

The Recipient Guidance also states that the Agency is likely to give "due weight" to recipients that develop a "nondiscriminatory public participation process" and dismiss allegations of discriminatory public participation if a recipient meets certain criteria for a nondiscriminatory public participation process. [FN160] Step Two of the Recipient Guidance includes a number of specific suggestions for developing effective public participation programs. [FN161] If a recipient follows most of the suggestions in Step Two, it is likely that the OCR will find that the recipient has a nondiscriminatory public participation process. Additionally, EPA has developed public participation guidelines for its Brownfields Assessment Demonstration Projects that emphasize community-based

planning and involvement that could serve as a model for recipients in developing an effective public participation process. [FN162] Nevertheless, while a recipient that follows these steps is presumed to be in compliance with Title VI, a complainant could still present allegations that a recipient's public participation program in fact failed to provide reasonable opportunities for minority participation or is improperly implemented. [FN163]

While the Agency clearly encourages recipients to develop effective public participation programs, the Agency's criteria on whether to give due weight to a recipient's public participation efforts are vague. [FN164] For example, while EPA encourages recipients to collaborate with residents in developing area-specific plans, it is not clear how the extent of public participation will affect the due weight determination. Furthermore, it is not clear how the OCR's finding that a recipient's public participation process deserves "due weight" will affect EPA's ultimate decision about whether the recipient is in compliance with Title VI. It is possible to imagine that a recipient could have a good public participation program and still make permit decisions that create unacceptable adverse disparate impacts. [FN165]

VIII. The Revised Investigation Guidance

In the light of numerous public comments criticizing the Interim Guidance, the Revised Investigation Guidance seeks to clarify how the Agency will process and investigate complaints alleging discriminatory effects from environmental permitting. [FN166] Additionally, the Revised Investigation Guidance discusses tools that the Agency will use in determining whether a permit decision creates unacceptable adverse impacts, and how the Agency will weigh efforts by the recipient to reduce or eliminate adverse disparate impacts. [FN167] However, a wide range of critics argue that the new guidelines are still too vague and leave far too many decisions to the Agency's discretion.

The Revised Investigation Guidance addresses only how the Agency will evaluate Title VI complaints alleging adverse disparate impacts from permitting decisions. It does not deal with complaints alleging unequal enforcement of environmental laws or other types of discrimination by a recipient. Nor does it discuss complaints that allege intentional discrimination. In addition, the Agency will issue separate guidance on the unique problems associated with federally recognized Indian tribes. [FN168] Some advocates are disappointed that the Revised Investigation Guidance is limited to permitting issues, and argue that the Revised Investigation Guidance should be applied to other areas, such as allegations of discriminatory enforcement. [FN169]

When its 60-day comment period expires and EPA issues a final version, the Revised Investigation Guidance will replace the Interim Guidance. EPA emphasized that the Revised Investigation Guidance is intended solely as guidance for the OCR and does not create any binding rights, but clearly recipients would be ill-advised to ignore its definitions or process for evaluating complaints. [FN170]

Additionally, while Title VI does not apply to EPA because it is a federal agency and not a recipient of federal financial assistance, the Agency pledged to comply with the statute and the Agency's regulations. [FN171] However, any suit against EPA alleging discriminatory practices would likely have to be brought under the Equal Protection Clause, which requires proof of intentional discrimination--a very difficult standard for plaintiffs to meet. [FN172]

A. Framework for Processing Complaints

1. Summary of Steps

The Revised Investigation Guidance summarizes the steps that the OCR will take in processing a Title VI complaint. [FN173] These steps follow the Agency's Title VI implementing regulations, but often provide more details. Based on its past history of consistently failing to investigate Title VI cases in a timely fashion, a major potential problem is that EPA will not in fact meet its own deadlines. [FN174] EPA claims to be working to reduce these delays and eliminate its backlog, but only time will tell if it will be successful.

[ ] s1-2. Acknowledgment of Complaint; Acceptance for Investigation, Rejection, or Referral. The OCR will acknowledge receipt of the complaint by notifying the complainant and the recipient in writing within five

calendar days. [FN175] Business interests argue that the permittee should be notified as well. [FN176] Within 30 days of receiving notice, the recipient may respond in writing to the allegations in the complaint. advocates complain that the Agency frequently extends this deadline and accepts responses from recipients months later but often rigidly applies deadlines to complainants. [FN177]

EPA will determine whether to accept each allegation in a complaint for investigation within 20 days of acknowledgment of its receipt. In determining whether to accept or reject a complaint for investigation, EPA relies on the jurisdictional criteria in its Title VI implementing regulations, which are discussed in section III.A of the guidance. [FN178] The OCR will refer a complaint to another agency if it has a better claim to jurisdiction. [FN179]

The OCR may ask a complainant to clarify an allegation if it is unclear or the Agency lacks sufficient information to determine if jurisdiction exists. In the past, according to civil rights advocates, the Agency did not always ask for such clarification and sometimes simply dismissed complaints without giving the complainant a chance to clarify or amend a complaint. [FN180] By asking for clarification, the Agency will likely increase the odds that a complainant who lacks legal or technical expertise will have a reasonable opportunity to present its allegations.

The acceptance of a complaint does not mean that the Agency believes that the recipient has committed a violation, but merely indicates that the Agency has jurisdiction. [FN181] Both state and industry representatives have argued that EPA should set a threshold based on whether a complaint has some substantive merit before initiating an investigation to avoid wasting the resources of recipients by investigating complaints with little merit. [FN182] However, the Agency implies that it has a duty under Title VI to investigate any coherent complaint where there is jurisdiction, and that it is only after an investigation that the Agency should decide whether the complaint is meritorious.

During an investigation, any permits issued by the recipient remain in effect. The Revised Investigation Guidance clarifies that neither the filing of a complaint nor the acceptance of one for investigation by the OCR stays the permit challenged in the complaint. [FN183] EPA indicates that it is inappropriate to automatically suspend a challenged permit because individual permits are rarely the sole cause of adverse disparate impacts and the optimal solution to reduce such impacts is often a broader reform of the recipient's practices rather than termination of the permit. [FN184] State and industry representatives have praised EPA for making it clear that a Title VI complaint does not stay a permit application because they were concerned that a stay policy could delay projects for an extended period, especially if the Agency failed to complete its investigation within 180 days. [FN185] On the other hand, civil rights proponents generally believe that permits should be suspended pending the outcome of a Title VI investigation. [FN186] If a project is substantially completed during the course of an investigation, EPA is unlikely to prohibit its operation.

The Revised Investigation Guidance also fixes some technical problems in the Interim Guidance's discussion of the acceptance of complaints. The Interim Guidance's discussion of the acceptance of complaints was confusing because it skipped some of the steps in the Agency's Title VI regulations and lead some commenters to believe that EPA had dropped those steps and time frames. [FN187] The Revised Investigation Guidance clarifies that all of the steps and time lines in the Agency's Title VI regulations are still valid. [FN188] The Revised Investigation Guidance eliminates the Interim Guidance's reference to a "complete or properly pleaded complaint" because the definition of those terms was unnecessarily confusing. [FN189]

[ ] s3.-7. Preliminary Finding of Noncompliance; Formal Finding of Noncompliance; Voluntary Compliance; Hearing/Appeal Process. If there is jurisdiction, the OCR will first seek to informally resolve the complaint before beginning an investigation. [FN190] The OCR encourages informal resolution of Title VI complaints because "informal resolution will often lead to the most expeditious and effective outcome for all parties." [FN191] One unanswered question, however, is how long the Agency may take in pursuing informal resolution before initiating an investigation? The 180-day clock for completing an investigation apparently does not start until aftereffors for informal resolution fail, and, therefore, these efforts could extend the time for completing an investigation. [FN192]

If informal resolution fails, the OCR will promptly investigate the complaint to determine if there are adverse disparate impacts to persons based on race, color, or national origin. Within 180 calendar days, the OCR will

notify the recipient of its preliminary findings. In the past, EPA has often failed to meet the 180-day deadline for investigations, except in the Select Steel case where civil rights advocates accused the Agency of a rush to judgment. [FN193] In light of the OCR's past record of delays, one must remain skeptical of any claim that the Agency will meet its deadlines for completing investigations.

If the OCR finds no discriminatory effects, i.e., "no unjustified adverse disparate impact," the Agency will dismiss the complaint. Some advocates have questioned the Agency's reference to justification at this stage. [FN194] As discussed below, Title VI cases generally allow defendants to present a legitimate justification for any disparate impacts.

In determining whether there is a violation of Title VI or the Agency's regulations, the OCR will consider whether the adverse disparate impacts result from factors within the recipient's legal authority to control. As discussed below, state officials are generally pleased that violations may not be based on factors beyond their legal control, but advocates want a broader definition that includes socioeconomic or cultural impacts even if these issues are not technically within the recipient's legal authority. [FN195]

If it concludes that unjustified adverse disparate impacts on the basis of race, color, or national origin are present, the OCR will make a preliminary finding of noncompliance. EPA will then notify the recipient and complainants as well as Agency grant officials and the U.S. Department of Justice. The OCR will normally offer recommendations on how the recipient can achieve voluntary compliance and suggest that the recipient enter into voluntary compliance negotiations. [FN196]

The recipient then has 50 days to respond to these preliminary findings. After this 50-day response period, the OCR may issue a formal written finding of noncompliance within 14 calendar days. [FN197] As discussed below, the Agency will normally seek to reach a voluntary compliance agreement with the recipient rather than imposing sanctions such as terminating funding. [FN198] And as discussed above, if the Agency seeks to terminate funding, a recipient has elaborate procedural rights to challenge a funding termination decision, and EPA must give 30 calendar days of notice to Congress before taking that action. [FN199]

2. Roles of Parties and Opportunities to Participate

The Revised Investigation Guidance clarifies the Agency's Title VI regulations by explaining how the OCR will treat complainants and recipients during the investigation process. The Revised Investigation Guidance states that the OCR will work closely with recipients to ensure that the Agency has a complete record and will give the recipient "ample opportunity" to provide information that addresses the allegations in the complaint. [FN200] Similarly, the Revised Investigation Guidance maintains that the OCR will offer complainants the opportunity to provide information relevant to the complaint. Furthermore, the Agency will encourage the recipient and complainants to reach an informal resolution of the issues. [FN201]

Some advocates have suggested that the Agency is more lenient about giving extra time to recipients. [FN202] Yet the ECOS has argued that the guidance often do not give enough time to states and that there is too much uncertainty about when the OCR will grant an extension of its time frames. [FN203]

The Revised Investigation Guidance states that EPA does not represent the complainants, but instead the interests of the federal government. [FN204] The investigation of a Title VI complaint is not an adversarial process, and, thus, complainants do not have the burden of proof. The Agency will use its resources to investigate allegations of discrimination in a complaint and will determine whether a recipient is in compliance with Title VI. However, the Revised Investigation Guidance acknowledges that the Agency is more likely to conduct a thorough investigation if the complainants clearly articulate their allegations in the complaint and provide relevant information concerning alleged adverse impacts. [FN205] Furthermore, because the guidance indicate that the Agency may give "due weight" to appropriate recipient analyses, [FN206] in many cases the OCR may place an implicit burden of proof on complainants to disprove recipient evidence that suggests no disparate effects.

While the Revised Investigation Guidance does not address this issue, complainants are more likely to ensure that EPA conducts a satisfactory investigation if they have access to legal and technical resources. [FN207]

For example, the Tulane environmental law clinic played a major role in presenting evidence for the complainants in the Shintech case. [FN208]

Finally, because the investigation of a Title VI complaint is not an adversarial process between the recipient and complainants, there are no appeals rights for the complainants in the Agency's regulatory process. [FN209] As discussed above, recipients have far greater appeals rights than complainants. [FN210] However, some courts have recognized a private right of action under Title VI's disparate impact regulations, which may offer complainants another avenue of redress if EPA dismisses a complaint. [FN211]

B. Accepting or Rejecting Complaints

1. Criteria

The OCR will investigate all administrative complaints that make clear and coherent allegations of discrimination against a recipient of EPA financial assistance and satisfy the jurisdictional criteria in EPA's implementing regulations. [FN212] States are disappointed that there is not a higher standard for accepting complaints for investigation and argue that EPA should summarily dismiss complaints with a weak factual basis, but EPA is not willing to make such distinctions before completing an investigation. There are four basic jurisdictional criteria in the Agency's regulations for the OCR to accept a complaint for investigation:

(1) a complaint must be in writing [FN213];

(2) it must identify a recipient of EPA funding as the entity that allegedly performed the discriminatory act [FN214] and must allege either an act of intentional discrimination or one that has disparate effects on the basis of race, color, or national origin in violation of the agency's Title VI regulations [FN215];

(3) it must be filed within 180 calendar days of the alleged discriminatory act(s) [FN216]; and

(4) it must be filed by an individual or by a member or authorized representative of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations. [FN217]

If a complaint does not meet these criteria, the OCR will not initiate an investigation. If another federal agency provides such funding or is more appropriately responsible for certain issues, the OCR may refer the entire complaint or a particular allegation to that agency. [FN218] Additionally, the OCR might use any information submitted in a complaint that does not satisfy these criteria to determine whether to perform a compliance review of the recipient. [FN219] While state officials are concerned that EPA may use compliance reviews to conduct a quasi-investigation even where a complaint does not meet the Agency's jurisdictional criteria, one must be skeptical that the Agency will have time to conduct such reviews when it has a such huge backlog of pending complaints. [FN220]

State and business representatives have criticized the Revised Investigation Guidance for setting too low a threshold regarding who can file a complaint and for the acceptance of a complaint. For example, the person filing a complaint does not have to be directly impacted by the permit, but merely a member of the class of people or their representative. [FN221] Instead, state and business representatives want the Agency to limit complainants to those who are directly affected by a significant level of adverse disparate impacts. By contrast, advocates argue that the Revised Investigation Guidance improperly limits complainants to those who are members of a specific class that was allegedly discriminated against instead of adhering to EPA's Title VI implementing regulations, which apply a broader standard that allows "[a] person who believes that he or she or a specific class of persons has been discriminated against" to file a complaint. [FN222]

Additionally, some critics argue that the Revised Investigation Guidance does not clearly explain when jurisdictional issues may preclude a complaint. For example, a common reason for rejecting a complaint is that EPA does not provide funding to the state or local agency, but the Revised Investigation Guidance does not clearly explain that problem. [FN223]

If there is jurisdiction, the OCR will seek to investigate all complaints that make coherent and plausible allegations of fact against a recipient of EPA funding. [FN224] While recipients would like to avoid having the OCR conduct an investigation if the recipient is making good-faith efforts to reduce pollution or disparities, the OCR's threshold decision about whether to accept a complaint for investigation is based solely on the Agency's jurisdictional criteria. It is only later in the process that the Agency will decide how much weight to give recipient efforts and whether they are enough to outweigh otherwise unacceptable disparate impacts. [FN225]

2. Timeliness of Complaints

[ ] Start of the 180-Day "Clock." The Revised Investigation Guidance provides a better explanation than the Interim Guidance of how the Agency defines the 180 calendar day time limit for filing a complaint, but there are still complaints that the Agency retains too much discretion in deciding when to grant a "good cause" waiver of the time limit. [FN226] An appropriate complainant who is a member or authorized representative of a qualified minority group must file the complaint within 180 days of the alleged acts by the recipient. For complaints challenging a permit, the complaint must be filed within 180 days of the issuance of that permit. For complaints alleging continuing violations, there must have been at least one discriminatory act within the last 180 days. For alleged procedural violations, the complaint must normally be filed within 180 days of the alleged procedural violation. The OCR considers a complaint "filed" on the date it arrives at the Agency and not when it was mailed.

Because the Revised Investigation Guidance deletes the term "final" permit as used in the Interim Guidance, some advocates read the Revised Investigation Guidance to require a complaint to be filed within 180 days of the initial as opposed to final permit. [FN227] They argue that the deadline should be 180 days after the issuance of a final permit as opposed to an initial permit to allow issues to be resolved within the permitting process and because the Agency in other areas generally starts the statute of limitations to run only after a final permit is issued. [FN228]

For "good cause," the OCR may waive the 180-day time limit on a case-by-case basis, especially if the delay results from the complainants exhausting their administrative remedies with the recipient. [FN229] A wide range of commenters have criticized the Revised Investigation Guidance for failing to provide a clear explanation of when the Agency will grant a "good cause" waiver of the 180-day requirement. [FN230]

[ ] Ongoing Permit Appeals. The Revised Investigation Guidance encourages potential complainants to first pursue their concerns through the recipient's permit appeals process. [FN231] After a complainant exhausts its administrative remedies with the recipient, the OCR may waive the 180-day filing limit if the complaint is filed within a reasonable time, generally within 60 calendar days after the conclusion of the administrative appeal process.

Some civil rights advocates have criticized this provision because it does not guarantee that complainants will receive a waiver if they pursue a recipient's administrative appeals process. Instead, some suggest that a complainant should be entitled to file a complaint during the recipient's internal appeals process and that EPA should stay the complaint until that appeals process is resolved to ensure that a complainant's pursuit of that process does not result in its failure to meet the 180-day deadline. [FN232] On the other hand, business interests would prefer that EPA require complainants to first exhaust their administrative remedies with recipients, which are usually state agencies, as a way to reduce the number of Title VI complaints even though most courts have not required exhaustion of federal administrative remedies before allowing a Title VI suit. [FN233]

[ ] Litigation. If a complainant is simultaneously pursuing similar allegations of discrimination in state or federal court, the OCR will normally notify the complainant to re-file its complaint within 60 days of the conclusion of the litigation. [FN234] If an issue raised in a Title VI complaint has already been litigated and substantively decided in either state or federal court, the Revised Investigation Guidance states that the OCR may choose not to proceed with an investigation. [FN235] The Revised Investigation Guidance treats decisions by federal courts differently from those of state courts. The Revised Investigation Guidance implies that the OCR will probably not even investigate issues already decided by a federal court but would independently investigate questions decided by a state court to see if the court decided them correctly. If a federal court reviews the evidence presented by both parties and issues a decision finding the allegations were not true, "OCR may choose not to investigate allegations in

the complaint that deal with those same issues." [FN236] On the other hand, if a state court resolves factual issues, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process. The Revised Investigation Guidance also appears to treat federal and state courts differently in discussing what happens if a complainant brings litigation related to a complaint, but some issues are not decided by the courts. If some issues were not actually litigated or substantively decided by a federal court, or if a complaint raises unique and important legal or policy issues, the OCR may choose to investigate it. [FN237] The Revised Investigation Guidance suggests that the Agency will not even investigate issues either actually litigated or substantially decided by a federal court unless they raise unique and important legal or policy issues, but may well investigate issues either actually litigated or substantially decided by a state court and then consider the state court's decision in reaching the Agency's final conclusion.

EPA's policy of treating federal court decisions with more deference makes sense because federal courts generally have far more experience with addressing Title VI and related civil rights issues than most state courts. [FN238] However, some proponents believe that EPA ought to make an independent examination of a complaint even if a federal court has rejected a suit based on related facts and issues because the Agency has a duty under Title VI to make its own evaluation of its recipients under Title VI. [FN239]

[ ] Premature Complaints. EPA will not accept a Title VI complaint before a state issues a permit. [FN240] The Agency will normally dismiss a complaint without prejudice if it is premature because the permit at issue has not yet been issued by the recipient. [FN241] The complainant may then re-file its complaint if the permit is actually issued. EPA will notify the recipient that a premature complaint was filed so it may address any concerns during its permitting process. This is consistent with the Recipient Guidance's central philosophy of encouraging recipients to solve or avoid problems before they become the subject of a Title VI complaint. However, some advocates would prefer that the Agency accept a complaint even before a pending permit is granted and begin its investigation as soon as possible if it is likely that the recipient will issue a permit. [FN242] If EPA dismisses a premature complaint, the complainant must be careful to re-file the complaint within the 180-day time limit.

C. Resolving Complaints

1. Reaching Informal Resolution

EPA's Title VI regulations encourage the Agency to seek informal resolution of administrative complaints whenever practicable. [FN243] The Revised Investigation Guidance provides a more detailed discussion of how recipients might attempt to resolve a complaint than the Interim Guidance. Section IV.A encourages recipients to informally resolve Title VI complaints with either the complainants or the OCR.

First, the Agency encourages the recipients and complainants to resolve the issues themselves. If they reach an agreement, the OCR will normally dismiss the complaint. They may wish to consider using ADR techniques, including mediation by a third-party neutral or a structured shared learning and problem- solving process.

However, civil rights advocates have raised concerns that informal resolution techniques may fail to protect poor minorities that lack the resources and expertise to bargain effectively. [FN244] These inequities are exacerbated because mediation is typically conducted through confidential negotiations that exclude the opportunity for public scrutiny or comment that could counterbalance the greater resources and expertise of recipients and permit applicants. [FN245]

Conversely, state officials worry that the use of informal resolution techniques will require significant resources without necessarily achieving better results. [FN246] Furthermore, business interests are concerned that EPA will pressure states to reach informal settlements to dispose of complaints, but that permittees will often bear the cost of those settlements. [FN247] Instead, states and business interests want EPA to screen out meritless claims so that there is no pressure to settle them, but the Agency is unwilling to screen out cases before conducting a full investigation. [FN248]

A second approach is for the OCR to reach an agreement with the recipient. [FN249] In appropriate cases, the OCR may use ADR techniques. There is a difference between an informal resolution reached by the parties alone and the second approach, where the OCR is involved in the informal resolution of a complaint. Because of the

Agency's responsibilities under Title VI, the Agency may need to conduct an investigation to make sure that any informal resolution between it and the recipient includes appropriate relief or corrective action needed to reduce or eliminate adverse disparate impacts. Accordingly, if it wishes to avoid the possibility of an investigation, a recipient should try to reach an informal resolution with the complainant first before negotiating with the OCR.

2. Implementing Informal Resolutions

To reach an informal resolution agreement, section IV.B recommends that recipients consider taking measures to reduce or eliminate adverse disparate impacts that harm minority communities. [FN250] In many cases, the Agency argues that it will not be necessary for a recipient to deny the permit at issue to solve the discrimination problem because the Agency believes that Title VI complaints often reflect broader concerns about pollution than just the permit named in the complaint. Accordingly, a recipient should consider ways to reduce the cumulative pollution impact of its permitting decisions as the most likely way to resolve the actual complaint. [FN251] Additionally, the Recipient Guidance recognizes that such measures may often resolve concerns in minority communities before a complaint is filed. [FN252]

The Revised Investigation Guidance suggests that recipients consider the use of broader pollution reduction measures that are outside the normal permitting process to reduce or eliminate adverse disparate impacts and thereby achieve compliance with Title VI. [FN253] For example, the recipient could impose additional pollution controls on the source at issue, encourage the permittee or other permittees to use pollution prevention techniques, or use emissions offsets from other sources to avoid objectionable levels of pollution. [FN254] Both draft guidances offer the example of a hypothetical recipient that creates a plan to reduce airborne lead emissions from the facility at issue as well as other facilities and also works with other agencies to establish a household lead abatement program that further reduces the facility's impact. [FN255]

Both draft guidances encourage recipients to identify geographic areas where disparate impacts may exist and to enter into area-specific agreements with the affected communities and polluters to reduce pollution impacts over a period of time. [FN256] Similarly, EPA's Title VI Advisory Committee had encouraged states to adopt preventative "Track 1" mapping programs to identify areas at high risk. [FN257] The Revised Investigation Guidance observes that, while a recipient may develop such a plan on its own, the Agency believes that informal resolution will be more successful if recipients collaborate with the OCR, complainants, and other appropriate stakeholders in developing a plan to eliminate or reduce adverse disparate impacts. [FN258] As discussed above, in section II.C of the Recipient Guidance and again in section V.B of the Revised Investigation Guidance, EPA will decide how much "due weight" an area-specific plan is entitled to depending on the persuasiveness of the recipient's evidence that it will in fact eliminate or reduce adverse disparate impacts. [FN259] If the OCR believes that a proposed plan will eliminate or reduce adverse disparate impacts to the extent required by Title VI, the Agency will notify the parties. [FN260] Even after the Agency makes a formal finding of noncompliance against the recipient, it may consider a proposal by a recipient to adopt pollution reduction efforts. [FN261]

In some cases, a recipient's plan might resolve some, but not all of the allegations that the OCR has accepted for investigation. In those cases, the Agency may settle these issues and continue its investigation of the remaining problems. [FN262]

If a recipient can provide sufficient assurance that a plan to eliminate or reduce adverse disparate impacts will be effectively implemented, the Agency would likely sign a settlement agreement to resolve and close the complaint. The Agency would monitor compliance with the agreement, and the settlement would likely contain special conditions regarding what would happen to future grants if the recipient fails to comply. [FN263] The OCR might also reopen a complaint if the recipient fails to meet its commitments. [FN264]

Environmental justice advocates are concerned that informal resolution agreements may only reduce but not totally eliminate significant adverse disparate impacts and that such agreements may include off-site mitigation measures that do not address all of the harms in the affected community. [FN265] Furthermore, they are concerned about how closely the Agency will monitor a recipient's compliance with the agreement and argue that the Agency should establish specific administrative procedures to allow a community to comment on whether mitigation

measures are in fact working. [FN266] On the other hand, state officials worry that EPA has too much discretion to decide when a recipient's efforts to reduce pollution are enough.

D. Investigative Procedures

The Agency observed that the process for investigating Title VI complaints is different from a judicial proceeding in which the plaintiffs and defendants each present evidence and argue for a particular verdict. In investigating a formal Title VI complaint, EPA has the sole legal responsibility for investigating all factual issues and reaching a conclusion. However, the Agency acknowledged that its investigation would often benefit from and proceed more quickly if the complainants and recipients submitted information. [FN267] In section V.E, the OCR clarifies that neither the filing of a Title VI complaint nor its acceptance for investigation stays the permit at issue. [FN268]

1. Submission of Additional Information

Section II.B.1 gives recipients 30 days to respond in writing after receiving notification of a complaint. Section V.A states that either the recipients or complainants may submit additional relevant information during the investigation, but that the Agency will likely set time limits so it may complete the investigation within a reasonable time. [FN269] After finishing its interviews with the recipients, complainants, and other witnesses, the OCR will likely ask each to submit any additional information within 14 days. [FN270]

Some groups argue that recipients should be limited to the 30-day deadline in section II.B.1. [FN271] On the other hand, the ECOS has complained that 14 days is not enough time for states to provide additional information in many cases. [FN272] Likewise, many complainants may need more time to submit additional comments. It is unclear how strictly the Agency will enforce the 14-day time limit. If, as in the past, EPA is not going to meet its own deadlines for completing an investigation, perhaps the best approach is to give both recipients or complainants additional time to submit information as long as such submissions do not unnecessarily delay the Agency's actual ability to complete the investigation. EPA should not impose artificial deadlines that the Agency knows are unrealistic.

2. Due Weight

Section V.B addresses under what circumstances EPA will give "due weight" to information submitted by the recipient and to area-specific agreements. [FN273] It provides further explanation of the material on "due weight" in section II.C of the Recipient Guidance, which is discussed above. [FN274] How much "due weight" the Agency will give to analyses or studies submitted by a recipient depends on the quality, relevance, and certainty of the data provided.

Section V.B.2 addresses how much "due weight" the Agency will give to recipients if they develop an "area-specific agreement" to reduce or eliminate adverse disparate impacts. [FN275] If the OCR finds that reliable information shows that a recipient's proposed "area-specific agreement" would reduce adverse disparate impacts "to the extent required by Title VI," then the Agency would likely close the complaint. [FN276] Furthermore, "[i]f a later-filed complaint raises allegations regarding other permitting actions by the recipient that are covered by the same area-specific agreement, OCR would generally rely upon its earlier finding and dismiss the allegations." [FN277] However, "[a]n exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented." [FN278]

A wide range of commenters have complained that the Agency retains too much discretion to decide when an "area-specific agreement" would reduce adverse disparate impacts "to the extent required by Title VI." [FN279] Additionally, it is unclear to what extent an "area-specific agreement" precludes future complaints. For example, how will the Agency evaluate whether a new permit is covered by an agreement or constitutes changed circumstances?

Some advocates would require any new emissions to be offset or mitigated by a reduction within the same impacted area of a greater amount of existing pollutants. [FN280]

3. Submission of Additional or Amended Complaints

If a complainant submits additional allegations after the initial complaint, the Agency will consider whether to treat them as amendments to the existing complaint or as a new and separate complaint. [FN281] The OCR would evaluate how long it would likely take to consider these new allegations, the progress of its existing investigation, and how closely related they are to the existing allegations. Generally, the OCR will treat the additional allegations as a new and separate complaint unless it can more easily incorporate them into the existing investigation.

On its face, EPA's policy of evaluating whether it is convenient to add additional allegations to an existing complaint is reasonable. In making its evaluation, the Agency needs to apply realistic standards about how quickly it is likely to complete an investigation rather than rely on paper standards that it cannot meet.

4. Discontinued Operations/Mootness

The OCR will likely dismiss a complaint if the underlying permit at issue is withdrawn or revoked before any activities have commenced and the OCR has not completed its investigation. [FN282] If the permittee decides not to operate under the permit, the OCR has not completed its investigation, and the permittee has not begun operations, then the Agency will likely dismiss the complaint. [FN283] If the permittee began operations before permanently halting them for any reason and the OCR has not finished its investigation, then the Agency may continue its investigation to determine whether any disparate impacts resulted before the shutdown. The Agency would consider the current closed status of the source in its decision, but a remedy might be appropriate, for example, if the discontinued permit is part of a broader pattern of discrimination. [FN284]

E. Disparate Impact Analysis

The Revised Investigation Guidance provides a more detailed explanation than the Interim Guidance of how the Agency will assess whether an impact is both adverse and borne disproportionately by a protected minority community. [FN285] However, a wide variety of critics are unhappy that the Revised Investigation Guidance retains some of the broad discretionary language in the Interim Guidance. For example, in addressing the crucial issue of what constitutes an adverse disparate impact under Title VI, the Revised Investigation Guidance repeats the Interim Guidance's approach that the Agency will look at the totality of circumstances in each case and will use several different evaluative techniques. [FN286] As a result, EPA can arguably reach whatever result it wants in any given case.

While giving the OCR broad discretion, the Revised Investigation Guidance provides a more detailed discussion regarding what types of impacts may constitute adverse disparate impacts on the basis of race, color, or national origin under Title VI. The Interim Guidance merely addressed the question of how the Agency might conduct a disparity analysis without reaching the final issue of when a disparity would likely violate Title VI. [FN287] By contrast, the Revised Investigation Guidance reaches the crucial ultimate issue of what is an adverse disparate impact on the basis of race, color, or national origin by stating that the OCR would usually find adverse disparate impact under Title VI if reliable tests of both demographic disparity and disparities in the amount of impact are at least a factor of two times higher in the affected population than in an appropriate comparison population. [FN288] Nevertheless, there are many remaining questions about how EPA will define crucial terms such as "affected population" or "an appropriate comparison population." In section VI.A, the Revised Investigation Guidance summarizes a six-step framework for adverse disparate impact analysis, described below. [FN289] Section VI.B then provides a detailed description of each step.

1. Step 1: Assess Applicability

First, the OCR will examine what type of permit action is at issue: a new permit, the renewal of existing permits, or the modification of existing permits. [FN290] For any type of permit, the Revised Investigation Guidance states that the OCR must normally investigate every Title VI complaint where the Agency has jurisdiction. [FN291] However, a modification such as a change in name or change in mailing address that does not involve pollutants named in the complaint will "generally" not trigger an investigation. Nevertheless, the Revised Investigation Guidance's vague discretionary language leaves open the absurd possibility that a change in name or mailing address could serve as the basis for initiating an investigation. [FN292] This is another instance where EPA's concern about allowing itself some discretion to address an unusual case leaves the impression that the guidances do not provide any clear rules.

EPA will usually investigate a complaint involving new permits, renewals, and modifications if the permit causes a net increase or the same level of pollutants, predicted risks, or measures of impact. [FN293] If a complaint involving a permit modification is accepted for investigation, the Agency will likely assess only the modification and its effects rather than any preexisting impacts that are not affected by the requested modification. [FN294]

The Revised Investigation Guidance distinguishes between a decrease in emissions at a particular facility and an area-specific agreement that eliminates adverse disparate impacts as discussed in section V.B.2. First, if a permit action that is the subject of the complaint will significantly decrease either overall emissions or pollutants of concern at the facility named in the complaint, the Agency usually would not initiate an investigation of allegations regarding cumulative impacts. [FN295] A recipient has the burden of demonstrating that the decrease at a particular facility is actual and significant. [FN296] The decreases should be in the same media and from the same facility that is alleged in the complaint. [FN297] Thus, a decrease in discharges to water may not form the basis for closing an investigation into allegations of cumulative air impacts. [FN298] The recipient must present evidence of the decreases at the facility named in the complaint based on measurements of actual, contemporaneous emissions from the facility being permitted. [FN299] If there is substantial uncertainty about whether there will be a decrease in fact, the OCR will err on the side of conducting an investigation. [FN300] If there will be an increase in any type of emission at the facility named in the complaint, the Agency will usually investigate. [FN301] Even if it dismisses a particular complaint on the basis of a decrease at the facility named in the complaint, the OCR may still choose to conduct a compliance review of the recipient's relevant permit program. [FN302] Furthermore, the dismissal of a complaint involving a single facility would not affect the Agency's investigation of other facilities in the same geographic area.

ECOS has complained thatthe possibility of a compliance review even if a recipient decreases emissions undermines any incentive a recipient would have to achieve such decreases. [FN303] However, it is questionable whether EPA is likely to conduct such reviews in light of existing backlog of actual complaints. Furthermore, some industry commenters would go beyond EPA's approach to exempt all permits from investigation unless they produce significant net increases. [FN304] On the other hand, civil rights advocates argue that the Agency should tighten the circumstances in which a decrease precludes an investigation by requiring that the decreases occur not only in the same media and facility, but involve a diminution in the same pollutant because not all air pollutants, for example, cause the same harms. [FN305]

A dismissal involving decreases at a single facility should be distinguished from a complaint challenging permits in a geographic area with an approved areawide plan. [FN306] If the permit is part of an areawide plan that the OCR has concluded will likely reduce or eliminate adverse disparate impacts to the extent required by Title VI, EPA will likely reject any complaint challenging a permit in that area as long as the plan is in compliance. [FN307] Thus, an approved areawide plan carries broader protection for the recipient than evidence that there are decreases in pollution at a single facility. [FN308] While areawide plans and decreases at a single permit are analytically distinct, both reflect the principle that the Agency does not want to waste its Title VI enforcement efforts on recipients that are in the process of substantially reducing or eliminating adverse disparities.

Environmental justice proponents are strongly critical of the Revised Investigation Guidance's encouragement of area-specific agreements as a way to preclude Title VI complaints. They argue that the use of such agreements to preclude Title VI complaints is contrary to the Agency's regulations because recipients have a duty to eliminate all significant adverse disparate impacts. [FN309] Additionally, the Agency should require public participation when these agreements are adopted and monitor their implementation. [FN310]

Furthermore, a wide range of commenters are concerned that EPA has too much discretion to decide when decreases or area-specific agreements are enough to close an investigation. Both state officials and civil rights advocates want EPA to provide a better explanation of when "area-specific agreements" are entitled to "due weight."

2. Step 2: Define Scope of Investigation

The Agency will carefully review which pollutants and impacts are appropriately within the scope of the investigation and develop a plan for analyzing them. [FN311] In defining the scope of an investigation, the OCR will examine four types of information: (1) the complaint's allegations; (2) the recipient's data; (3) the Agency's evaluation of relevant scientific information; (4) and the Agency's assessment of all other pertinent data. [FN312]

EPA may evaluate background sources of pollution that are not within the recipient's jurisdiction such as mobile source air emissions or nonpoint source runoff to assist the Agency in determining whether an adverse disparate impact exists. However, in determining whether a recipient has violated Title VI, the Agency will consider only impacts that are within the recipient's legal authority to regulate. [FN313] In defining the recipient's legal authority to regulate, the OCR will consider not just the laws and regulations that directly control the permit decision, but also all state and federal laws that could affect the facility. [FN314] EPA will consider any legal authority that the recipient could use even if it has not actually exercised such authority. [FN315]

By generally limiting its Title VI investigations to any health and environmental impacts within a recipient's legal authority to regulate, EPA is trying to avoid controversial issues involving the possible social impacts of facilities on minority areas, including potential decreases in property values or harm to cultural resources. [FN316] groups are generally unhappy with the Revised Investigation Guidance's narrow legalistic interpretation of Title VI issues because it ignores impacts or effects that result from a recipient's actions even if they are not technically within its legal authority and, accordingly, generally exclude important cultural, social, and even economic impacts, such as declining property values. [FN317] Civil rights proponents argue that Title VI forbids recipients from engaging in actions that cause adverse disparate impacts even if the discrimination results from a factor beyond its legal authority, such as local zoning laws. [FN318] If a recipient's liability under Title VI is limited to its legal authority, they would prefer a broad interpretation of which issues are within a recipient's statutory or regulatory power.

Conversely, state officials are mostly pleased that the guidances will usually exclude broad social, cultural, or economic issues, in part because there are no clear standards for what would constitute a violation. However, state and industry representatives are concerned about the Revised Investigation Guidance's references to state constitutional authority and other general laws that have not usually been applied to state environmental programs because the Agency could use them to "broadly define" the authority of recipients to include broader cultural, social, or economic issues. [FN319] Furthermore, state officials point out that the guidances fail to address the problem of whether other laws, programs, or policies, especially local land use regulations or ordinances, may conflict with or limit the legal authority of recipients to take actions that promote environmental equity. [FN320]

In assessing possible adverse disparate impacts on the basis of race, color, or national origin, the OCR may consider other relevant or nearby sources of similar pollutants for its investigation. [FN321] The Agency has considerable discretion in defining what is the appropriate universe(s) of additional sources. The Agency may include in the universe(s), if appropriate, background sources such as mobile source air emissions or nonpoint source runoff that are not within the recipient's legal authority. For instance, in the case of lead, EPA may consider impacts from both a permitted source and household lead paint exposures in determining whether additional emissions of lead are adverse. Accordingly, cumulative impacts of both regulated and unregulated sources can be considered to determine the cumulative level of potential adverse impacts. [FN322] However, as discussed above, EPA will consider only impacts that are within the recipient's legal authority to regulate in determining whether a recipient has violated Title VI. [FN323]

If the nature of the sources of pollutants or their impact is not clear from the complaint, such as allegations of multiple, unidentified types of pollutants, the OCR will exercise its best professional judgment in defining what are the most likely sources of harm. [FN324] While the Agency has a good argument that it needs some discretion in

evaluating complex pollution issues on the frontiers of science, it is not surprising that a wide range of commenters are concerned by the lack of definite standards.

The Revised Investigation Guidance presumes that the universe of sources will fall into three main categories. First, a complaint may allege that a facility seeking a permit is part of a larger number of similar sources in a geographic area that create cumulative adverse disparate impacts, perhaps in conjunction with unregulated background sources. [FN325] In the first category, the OCR will probably evaluate the cumulative impacts of pollution from a broad universe of regulated and permitted sources; regulated but usually unpermitted sources such as some paint stripping or metal finishing operations, mobile sources, or sources of surface water runoff; and unregulated sources. [FN326] The OCR would attempt to evaluate the relative contribution of various source categories. [FN327]

A second category or universe of sources includes only those that are regulated or permitted. For example, a complaint may allege that the permitting of sanitary landfills throughout the state results in discriminatory human health effects for African Americans. If the complaint does not contain an allegation of cumulative impacts from multiple sources, then the OCR would just investigate the impacts from the regulated sources, for example, the sanitary landfills, presented in the complaint. [FN328]

Third, a single permitted facility alone may support an adverse disparate impact claim, but probably only if it handles unique or extremely toxic materials. [FN329] For example, a permit to store or dispose of radioactive materials or pathogens could pose sufficient adverse disparate impacts to establish a Title VI violation. In category three, EPA would consider in its adverse disparate impact analysis only pollutants or risks from the specific individual entity that was the focus of the complaint and probably would not include information from background sources in the analysis. [FN330]

After identifying the relevant universe(s) of sources and pollutants, the OCR would then initiate an adverse disparate impact investigation that examines the exposure pathways by which pollutants of concern could potentially carry from the permitted facility and other sources to human receptors. EPA would likely evaluate the quality of the data and use assessment tools, such as appropriate mathematical models and exposure scenarios. [FN331] The Agency would inevitably exercise considerable discretion in evaluating such evidence.

3. Step 3: Conduct Impact Assessment

The OCR will then determine whether the activities of the facility, by itself or in combination with other relevant sources, are likely to result in an impact. The OCR has developed a hierarchy of data types to use in weighing the quality and reliability of the available information. [FN332]

In its December 1998 report, EPA's SAB identified several approaches for conducting impact assessments. [FN333] The OCR will use its professional judgment to select one or more of these approaches, as appropriate, for each investigation. In most cases, the OCR will have to use risk estimates about the potential harmful effects of a pollutant or combination of pollutants because direct causal evidence is usually unavailable. For each complaint, the report will likely include a discussion of various uncertainties in the scientific methodologies used in the Agency's impact assessment. In Step Five, the OCR will weigh the uncertainties about the data and its assessment methods in reaching a decision. [FN334]

Because the quality and reliability of scientific evidence varies significantly, the Agency inevitably has to use its professional judgment in evaluating such evidence and reaching a final conclusion about whether adverse disparate impacts harm a minority community. Many commentators are concerned that the guidances fail to set forth any clear standards for how the Agency will make such evaluations. [FN335] Business interests and some state officials would prefer a requirement that only scientifically reliable evidence should be used by the Agency. [FN336] They are concerned that EPA will try to reach a decision or settle a complaint even if the available data is inadequate to determine whether there are adverse disparate impacts. They fear the Agency will pressure recipients or permittees to adopt costly changes even if there is no clear evidence of harm. If the Agency makes a discrimination finding

based on arguably inadequate information, a recipient or possibly a disappointed permit applicant might seek judicial review to challenge the Agency's conclusions.

However, there are often no clear scientific standards for evaluating many chemicals, especially the cumulative impact of different pollutants on minority communities. Accordingly, proponents have argued that EPA should consider evidence suggesting serious risks even if there is not yet a scientific consensus. [FN337] Because there is often scientific uncertainty about the risks of many chemicals, EPA's policy of considering "all readily available relevant data in conducting its assessments" is reasonable. Nevertheless, in reaching the ultimate adverse disparate impact decision or encouraging a settlement, the Agency must consider whether the information and conclusion in its impact assessment could withstand judicial scrutiny.

4. Step 4: Make Adverse Impact Decision

The OCR will evaluate whether the proposed permit is likely to create significant adverse disparate impacts. [FN338] If the impact is not significantly adverse, the Agency will likely reject the complaint. To evaluate the risk or measure of impact, the OCR would initially compare data regarding the proposal to benchmarks for significance established under any relevant environmental statute, Agency regulation, or policy. [FN339] If the potential impacts meet or exceed a significance level, the OCR would usually find an adverse impact under Title VI.

However, advocates argue that adverse impacts can still occur even where a significance level is not exceeded, especially because of the potentially synergistic impact of multiple cumulative chemicals or the unusual sensitivity of some minority subpopulations. [FN340] To address these concerns, the Revised Investigation Guidance recognizes that in evaluating cumulative risks from multiple sources of pollution there are in some cases no established benchmarks and that the Agency would have to make a judgment based on the best available scientific evidence. [FN341] Nevertheless, some civil rights proponents remain concerned that the Revised Investigation Guidance does not clearly address the problem that certain subpopulations, such as children, the elderly, asthmatics, and many others may be more sensitive to particular pollutants than the general population. [FN342]

The Revised Investigation Guidance provides several examples of how the OCR will probably use adverse impact benchmarks. For instance, a cumulative lifetime risk of developing cancer that is less than one in one million is "very unlikely" to support a finding of adverse impact, but a risk greater than one in ten thousand is "more likely" to lead to a finding of adverse impact. [FN343] EPA will use its judgment based on all the evidence if the risk is between one in one million and one in ten thousand. While benchmarks for noncancer health effects are less established, the Agency would try to use a hazard index to measure such risks where a value of less than "one" would be "very unlikely" to result in a finding of adverse impact. [FN344] Although there is no established value for when noncancer effects are likely to be adverse, the higher the hazard index is above "one," the more likely the Agency will be to find an adverse impact.

Despite its adverse impact benchmark examples, the Revised Investigation Guidance's use of terms such as "very unlikely" or "more likely" still gives the Agency far more discretion than many would prefer. Environmentalists would prefer a more definite standard that any cancer risk greater than one in one million is unacceptable. [FN345] Many state and industry representatives would prefer using a firm one-in-ten-thousand risk test. The Agency's in-between, discretionary approach inevitably displeases both sides to some extent.

The Revised Investigation Guidance warns recipients that complying with existing environmental laws does not guarantee that they are in compliance with Title VI. [FN346] In many cases, a policy or practice that is neutral on its face may have disproportionate discriminatory effects on a minority group. An environmental law may fail to prevent the excessive concentration of certain sources or address disproportionate impacts on particular subpopulations. For instance, an air pollution regulation may fail to control adverse impacts on asthmatics, and that subpopulation may be disproportionately composed of minorities. [FN347] Thus, in some instances, a recipient may have to exceed existing environmental standards to protect a minority subpopulation and thereby comply with Title VI. State officials are unhappy with EPA's uncertain standards and the possibility that they may have to exceed existing standards on a case-by-case basis.

Nevertheless, the Revised Investigation Guidance suggests that a recipient is less likely to be found in violation of Title VI if it complies with the Agency's health standards for a particular pollutant. While not directly mentioning the Select Steel case, the Revised Investigation Guidance specifically addressed whether compliance with NAAQS established under the CAA would protect a recipient against a Title VI complaint. The Agency observed that:

> [b]y establishing an ambient, public health threshold, the primary NAAQS contemplate multiple source contributions and establish a protective limit on cumulative pollution levels that should ordinarily prevent an adverse air quality impact on public health. Air quality that adheres to such standards (e.g., air quality in an attainment area) is presumptively protective of public health in the general population. [FN348]

ECOS has called on EPA to explicitly adopt Select Steel as a precedential standard. [FN349] By contrast, many advocates believe that Select Steel was wrongly decided because minority areas may be adversely affected even if an air region is in compliance with NAAQS. [FN350] Furthermore, they argue that a recipient's compliance with technology-based standards should not carry the same presumption as compliance with health-based standards such as NAAQS. [FN351]

However, EPA stated that there could be exceptions to the general rule that compliance with the health-based ambient standards is presumptively protective of the public health. If the Agency's investigation produces evidence that significant adverse impacts are in fact taking place, then "this presumption of no adverse impact may be overcome." [FN352] For example, the lead NAAQS would normally be protective of a wide range of lead exposure because the standard takes into account harms resulting from both inhalation of airborne lead and exposures to non-air sources such as the ingestion of lead contained in paint, soil, or water. [FN353] However, an area may be in attainment with the lead NAAQS, but in some cases residents could still suffer adverse effects from lead if there are unusually high levels of lead in paint, soil, or water in that particular area. In that example, the Agency might find adverse impacts despite the presumption of no adverse impacts when an area is in compliance with NAAQS for lead. [FN354] Furthermore, "even if an area is in compliance with the NAAQS for a criteria pollutant, there still may be Title VI concerns related to other criteria pollutants, to toxic hot-spots associated with hazardous air pollutants under 112 of the [CAA], or to pollutants from other media." [FN355] States would prefer that EPA treat Select Steel as a firm rule that compliance with NAAQS and other environmental standards is enough to protect a recipient from Title VI liability. [FN356]

If the permit action clearly leads to a decrease in adverse disparate impacts, the OCR is likely to find no violation of the Agency's Title VI regulations and will close the case. [FN357] As discussed above, state officials are disappointed that the guidances do not guarantee that a substantial reduction is enough to achieve compliance with the statute. Conversely, advocates contend that the Agency must ensure that recipients eliminate all significant adverse disparate impacts.

5. Step 5: Characterize Populations and Conduct Comparisons

While a complaint may roughly identify the population group that is allegedly adversely harmed by the recipient's actions, the Revised Investigation Guidance addresses how the Agency will precisely identify and determine the characteristics of the "affected population." [FN358] After identifying the affected population, the OCR will analyze whether a disparity exists between the affected population and an appropriate comparison population in terms of adverse impact and race, color, or national origin. [FN359] A wide range of critics have argued the Revised Investigation Guidance does not adequately define such terms as "affected population" and "an appropriate comparison population." [FN360]

[ ] Identifying and Characterizing Affected Populations. First, EPA will identify the affected population. The affected population might be defined as those likely to suffer adverse impacts above a certain threshold or those who live near particular sources or pathways generating adverse impacts. [FN361] If different populations may be disproportionately affected by different pollutants or exposure pathways, the Agency may identify separate affected populations. [FN362] The OCR will likely use mathematical models, when possible, to estimate the location and size of the affected populations because an area of adverse impacts may be irregularly shaped as a result of environmental factors or other conditions such as wind direction, stream direction, or topography. [FN363] Accordingly, depending

on the location of a plume or pathway of impact, the affected population may or may not include those people with residences in closest proximity to a source. [FN364]

However, if mathematical models are impractical, the Agency may use simpler approaches based primarily on proximity to the environmental medium and impacts of concern in that case. [FN365] For example, because air releases generally decrease based on an inverse relationship with distance, the Agency might simply place an imaginary circle around the source to determine the potential degree of impact to a population. For surface water releases, the OCR might identify the most likely downstream receptor populations.

A wide range of commenters have raised concerns about EPA's discretion in defining affected populations. Additionally, some have criticized the use of simple proximity models that may not capture the full impact of pollutants on minority communities, although others have supported their use. [FN366]

Furthermore, the OCR's analysis would also seek to measure the race, color, or national origin of the affected population(s) using available demographic data, including the currently available U.S. Census Bureau information. [FN367] The OCR would use standard demographic analysis methods, such as geographic information systems, to produce data estimating the race, color, or national origin and density of populations within a certain proximity from a facility, and would try to estimate the affected population based on scientific models. [FN368] The OCR would attempt to use the smallest geographic area possible for the demographic data, such as census blocks, when conducting disparity assessments. [FN369]

[ ] Comparing Affected Populations to Comparison Populations and Assessing Disparity. After identifying the affected population, EPA will undertake a disparity analysis that compares the affected population to an appropriate comparison population to determine whether disparity exists that may violate EPA's Title VI regulations. [FN370] Following its evaluation of the allegations and facts in each case, the OCR will usually define a relevant comparison population from those who live within one of the three following categories: (1) a "reference area" such as the recipient's jurisdiction, which may range from an air district to an entire state; (2) a political jurisdiction such as a town, county, or state; or (3) an area defined by environmental criteria, such as an airshed or watershed. [FN371] The OCR will usually select comparison populations that are larger than the affected population. For example, if a complaint alleges that Asian Americans throughout a state bear adverse disparate impacts from permitted sources of water pollution, the OCR would likely choose the entire state as the appropriate reference area. [FN372] The OCR may either include or exclude the affected population from the comparison population, including the general population of a state. [FN373]

Because there is no one formula or analysis to be applied in every single case, the OCR will use its professional judgment in deciding which comparison tests are most appropriate for each complaint. The Agency may evaluate whether there is a disparity by using comparisons both of the different prevalence of race, color, or national origin in the two populations, and of the level of risk of adverse impacts experienced by each population. [FN374] As part of the OCR's assessment, the Agency will generally apply at least one and usually more of the following comparisons of demographic characteristics: (1) the demographic characteristics of an affected population in relationship to the demographic characteristics of a nonaffected population or the general population [FN375] ; (2) the demographic characteristics of those most likely affected, for example, the highest 5% of risk, to those least likely affected, such as the lowest 5% [FN376] ; or (3) the probability of different demographic groups such as African Americans, Hispanics, and Caucasians in a surrounding jurisdiction being in an affected population or a highly affected subpopulation. [FN377]

The OCR also expects to compare the level of risk of potential adverse impacts between the affected population and comparison population by evaluating either: (1) the average risk of adverse impacts by demographic groups within the general population or within an affected population [FN378] ; or (2) the range of risk of adverse impacts by demographic groups within the general population or within an affected population. [FN379]

A wide range of commenters have raised concerns about EPA's broad discretion in defining comparison populations, including its apparently total discretion to include or exclude the affected population from the comparison population. [FN380] Business representatives argue that it is often inappropriate to compare an affected population living in a highly urban or industrial area with a statewide population that is largely suburban or rural.

According to the Business Network for Environmental Justice, the Revised Investigation Guidance falsely assumes that the affected population should not never be significantly different from the statewide population, but Title VI requires only that there not be discrimination between similar populations. Instead, they argue that EPA should compare the affected population to a comparison population that lives in an area with a similar range of residential, industrial and commercial uses. [FN381] By contrast, advocates often believe that EPA should find a *prima facie* case of adverse disparate impacts if, for example, an urban area with a high minority population has a significantly greater level of pollution than surrounding suburban or rural areas that are predominantly white in racial composition.

6. Step 6: The Adverse Impact Decision

In making an adverse disparate impact decision, the OCR will usually evaluate the issue of disparity both in terms of the demographic characteristics of the affected community and by the level of risk presented by potential oractual impacts. The Agency is most likely to find adverse disparate impact if there is a significant disparity in both risk and demographic characteristics. If the disparity is not significant, the Agency will likely find no violation of its Title VI regulations and close its investigation. [FN382]

First, EPA will examine whether the measure of the demographic disparity between an affected population and a comparison population is statistically significant to at least two to three standard deviations. [FN383] By applying a test of statistical significance, the Agency seeks to reduce the possibility of a false measurement of difference because of random chance. However, some advocates claim that the choice of two or three standard deviations is arbitrary and that the Agency instead should apply a more flexible standard depending on how much data is available. [FN384]

The Agency is most likely to find an adverse disparate impact if significant disparities are found in multiple measurements of risk, including both adverse impacts and demographic comparisons. For example, if reliable tests of both demographic disparity and disparities in the amount of impact are at least a factor of two times higher in the affected population than in an appropriate comparison population, the OCR would usually find adverse disparate impact under Title VI. [FN385] On the other hand, in cases where both the disparity of impact and demographics are not statistically significant, the Agency "is somewhat less likely" to find adverse disparate impact.

The more difficult cases are where there is a significant disparity in one measure and not in the other. In those cases, EPA will ordinarily attempt to balance the two factors in light of all circumstances. "For instance, where a large disparity (e.g., a factor of 10 times higher) exists with regard to a significant adverse impact, the OCR might find disparate impact even though the demographic disparity is relatively slight (e.g., under 20%)." [FN386] The Revised Investigation Guidance emphasizes that for both demographic disparity and disparity of impact, there is no fixed formula or analysis that may be applied in every case. [FN387] For example, because there is great variability in the proportion of racial subgroups in each state, from 4% to 50% of different states' populations, the factor of two disparity tests may work better in some states than others. [FN388]

Some advocates suggest that the Agency apply a less rigorous statistical analysis of disparity if either the pollutants are unusually dangerous or there is a very high incidence of a disease in a community such as asthma. [FN389] By contrast, state officials want more definite standards for defining adverse disparate impacts. [FN390]

F. Determining Whether a Finding of Noncompliance Is Warranted

To find a recipient in violation of the Agency's Title VI implementing regulations, the OCR must determine whether the recipient's programs or activities have resulted in an adverse disparate impact that is unjustified. [FN391] Accordingly, if it determines that an impact is both adverse and borne disproportionately by a minority group protected by Title VI, the OCR will next determine whether that impact is justified.

If the OCR concludes that unjustified adverse disparate impacts are present, it will make a preliminary finding of noncompliance. [FN392] Within 50 days, the recipient may challenge the preliminary finding, agree to the OCR's recommendations for voluntary compliance, or propose its own methods of compliance. [FN393]

1. Justification

Under Title VI, a recipient may "justify" a decision that creates adverse disparate impacts if it can demonstrate a substantial, legitimate justification. [FN394] A recipient may offer its justification following the Agency's notification of the complaint [FN395] or after EPA makes a preliminary finding of noncompliance with Title VI. [FN396]

[ ] Types of Justification. The Revised Investigation Guidance provides a more thorough explanation of when a recipient may provide a substantial legitimate justification for a permit that results in adverse disparate impacts than the Interim Guidance. The Interim Guidance had stated that a recipient could justify a project notwithstanding its adverse disparate impacts if the recipient could proffer an "articulable value" for granting the permit, such as a substantial benefit to the community. [FN397] The Revised Investigation Guidance eliminates the confusing term "articulable value" and instead offers a list of specific factors, including public health, environmental, or economic benefits that may provide a sufficiently strong legitimate justification. [FN398] Citing Title VI cases, the Revised Investigation Guidance states that to demonstrate an acceptable justification despite adverse disparate impacts, a recipient should generally "show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." [FN399]

For example, if a permit for a wastewater plant provided important health or environmental benefits to the affected population, granting such a permit might well be justified because the benefits are central to the recipient's statutory goals. [FN400] Additionally, the OCR will consider whether the economic benefits of a challenged activity are an acceptable justification, but only if those economic benefits "are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." [FN401] In determining to what extent direct economic benefits will be realized by the affected community, the Agency will consider not just the recipient's views, but also the views of the affected community. [FN402] Even if a recipient provides an apparently legitimate justification, that justification may be rebutted if EPA determines that a less discriminatory alternative exists, as discussed below.

A variety of commentators have criticized the justification standard, especially the "integral" requirement, as being unclear. Business commenters have complained that this standard, especially the requirement that the justification be integral to the recipient's mission, is more stringent than most Title VII decisions. [FN403] advocates are particularly concerned about how the Agency will apply the standard in addressing a project's economic benefits. For example, are a private project's economic benefits ever integral to a state environmental agency's mission? [FN404]

Many advocates are uncomfortable with the use of any justification for outweighing significant adverse health or environmental impacts, [FN405] but Title VI cases have generally followed Title VII decisions in allowing a defendant to use a legitimate economic or social benefit to overcome a prima facie case of disparate impact discrimination. [FN406] If justification is used at all, proponents want a stronger burden of proof requiring that a substantial proportion of the benefits go to the affected communities rather than to other communities that do not bear most of the burdens and risks. Conversely, business commenters have complained that the requirement that the benefits must go directly to the affected community is more stringent than Title VI or VII case law and that EPA should consider economic benefits to a broader range of interests. [FN407]

[ ] Less Discriminatory Alternatives. The Revised Investigation Guidance cites Title VI case law for the principle that a recipient's otherwise legitimate justification is not valid if a less discriminatory alternative exists that could achieve the benefits sought by the recipient. [FN408] The Revised Investigation Guidance states that "[c]ourts have defined the term less discriminatory alternative'to be an approach that causes less disparate impact than the challenged practice, but is practicable and comparably effective in meeting the needs addressed by the challenged practice." [FN409] The Interim Guidance had required a less discriminatory alternative to be "practicable" and "equally effective in meeting the needs addressed by the challenged practice." [FN410] The "comparably effective" standard is potentially better because that test is more likely to focus on whether an alternative achieves essential business objectives. By contrast, the "equally effective" standard could be misused to focus on minor differences between the facility at issue and a less discriminatory alternative that do not matter. [FN411] This is one example where the Revised Investigation Guidance is possibly more favorable to complainants than the Interim Guidance.

Business commenters have complained that the Revised Investigation Guidance inappropriately places the burden of proof about whether a less discriminatory alternative exists on the recipient. [FN412] In Title VI and VII cases, the ultimate burden of showing that a less discriminatory alternative exists remains with the plaintiff. [FN413] However, because Title VI administrative complaints are not an adversarial process and recipients typically possess more information about the possibility of alternatives than either EPA or the complainants, there is a good argument for placing an effective burden of at least production on the recipient. [FN414]

Courts have usually allowed defendants in Title VI or VII cases to introduce evidence that a less discriminatory alternative is impracticable because of cost, safety, or other legitimate business reasons. [FN415] The Revised Investigation Guidance states that the "OCR will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives." [FN416] Many advocates are opposed in principle to using cost as a justification to exclude a less discriminatory alternative because many minority groups are poorer on average than the general population and are more likely to live where land is cheap, but courts have allowed consideration of cost both because economic discrimination is acceptable in American society and the exclusion of cost as a factor might discourage economic development. [FN417] Additionally, civil rights proponents are concerned that the Revised Investigation Guidance does not adequately explain how the Agency will weigh "cost and technical feasibility." [FN418] Is a small increase in cost enough to reject an alternative that will significantly reduce disparate impacts? EPA could interpret the terms "practicable" and "comparably effective" to require recipients to consider any less discriminatory alternative that is roughly comparable in price and to exclude alternatives only if they are significantly more expensive. [FN419]

Furthermore, the Revised Investigation Guidance states that "[p]racticable mitigation measures associated with the permitting action could be considered as less discriminatory alternatives, including, in some cases, modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impacts." advocates are concerned that the Revised Investigation Guidance does not require on-site mitigation measures and that recipients may propose off-site mitigation measures that do not address all of the harms in the affected community. [FN420] Also, while the Revised Investigation Guidance' s use of the term "practicable" suggests that the Agency will approve only measures that should work in theory, a potential problem with EPA's approach is that there is no discussion of how the Agency will monitor whether mitigation measures are actually working. [FN421] Accordingly, they argue that the Agency should establish specific administrative procedures to allowa community to comment on whether mitigation measures are in fact working. [FN422]

Elsewhere, the Revised Investigation Guidance does discuss the possibility of imposing sanctions or reopening a complaint if the recipient fails to meet its proposed compliance plans or settlement agreement with the Agency. [FN423] Nevertheless, the Agency should spell out more clearly that it will make sure that any mitigation measures used to justify a project actually work reasonably well in practice. The Title VI Advisory Committee's report discussed the possibilities of incorporating mitigation measures into the permit itself, or, if that is not feasible, of creating a contract between the community and the permittee to allow the community to monitor compliance. [FN424]

[ ] Voluntary Compliance. The Revised Investigation Guidance states that the OCR will consider a range of possible actions by the recipient to achieve voluntary compliance. [FN425] In some cases, the OCR may be satisfied with a narrow solution that eliminates or reduces unjustified adverse disparate impacts only from the permitted activities that triggered a complaint. In other cases, a recipient might propose broader remedial efforts that address the combined impacts of several contributing sources. In determining what types of voluntary compliance measures are necessary, the Agency will normally examine only adverse disparate impacts resulting from actions within the recipient's authority. Additionally, the Agency will consider implementation issues such as cost and technical feasibility in determining what actions the recipient must take to achieve compliance with Title VI. [FN426]

Significantly, the Revised Investigation Guidance indicates that EPA will not necessarily demand that the recipient revoke or deny the permit that is the focus of the complaint "because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." [FN427] The Agency's focus is on the recipient's overall record rather than the permit that may have triggered the complaint and investigation. [FN428] Additionally, Anne Goode has suggested that EPA may not have the legal authority under Title VI to force permit revocations by a recipient, presumably because the Agency's regulations refer only to the termination of funding as a sanction. [FN429]

However, as in the Shintech case, EPA might veto or remand a permit that violates another statutory or regulatory requirement.

While the authority to terminate funding is the main explicit sanction available under Title VI, [FN430] EPA normally will impose that draconian sanction only if the recipient refuses to make changes to reduce adverse disparate impacts. Instead, the Agency will likely encourage the recipient to consider how possible changes in its permitting policies with regard to a wider range of permitted sources than the challenged permit could lead to sufficient reductions in adverse disparate impacts sufficient to comply with Title VI. [FN431]

Environmental justice advocates generally support EPA's policy of encouraging recipients to examine ways to reduce adverse disparate impacts from a wide range of sources rather than just the challenged permit. [FN432] However, they are angry about the reluctance of EPA to require revocation of an offending permit or to impose sanctions against recipients found to have caused adverse disparate impacts. [FN433] While the Agency is correct that a challenged permit is rarely the "sole" cause of adverse disparate impacts within a minority community, they argue it is appropriate to deny or revoke a permit if it increases those impacts because denying a permit is the most powerful sanction to prevent adverse impacts. [FN434]

On the other hand, state officials are generally pleased that the Agency prefers reaching a voluntary compliance agreement with a recipient rather than imposing sanctions. [FN435] However, ECOS has complained that recipients have only 10 days to voluntarily comply after a formal finding of noncompliance. [FN436] This 10-calendar-day time period is established in the Agency's Title VI regulations and is not changed by the Revised Investigation Guidance. [FN437] While 10 days may seem like a short time, in most cases, EPA will give recipients advance warning that there may be a finding of noncompliance, and the Agency normally will allow states a reasonable amount of time to actually implement a plan. So the 10-day time frame is not as short as it may appear at first.

2. Hearing/Appeal Process

If the recipient and Agency cannot reach a voluntary compliance agreement, then EPA will make a formal finding of noncompliance. [FN438] The Revised Investigation Guidance concludes by reviewing the Agency's procedures for a recipient to challenge a finding of noncompliance. A recipient has a right to a hearing before an EPA administrative law judge (ALJ) to challenge a finding of noncompliance and to appeal an adverse decision by the ALJ to the Administrator of EPA. [FN439] If the EPA Administrator decides to terminate financial assistance to the recipient, the Agency must submit a written report to the appropriate congressional committees 30 days before the decision becomes effective. [FN440] The Revised Investigation Guidance does not change any of these appeals procedures.

IX. Conclusion

While the draft guidances are an improvement compared to the Interim Guidance, a wide range of groups are disappointed that each fails to provide clear standards in many important areas. Most criticism of the draft guidances stems from the Agency's insistence on retaining discretion over a wide range of crucial issues. Despite the difficult scientific and legal issues involved, EPA must develop more certain procedural rules and substantive standards for its Title VI program. If the Agency establishes clear rules specifying what states or local agencies should do to comply with Title VI, recipients are more likely to adopt changes that reduce or eliminate adverse disparate impacts that lead to complaints. Furthermore, by reducing uncertainties about what constitutes a violation, the Agency will have a better chance of reducing both the number of complaints and the time it takes to process any remaining complaints.

State officials and industry representatives have criticized the guidance for not establishing clear standards for when a recipient is in compliance with Title VI, but they are likely to win most cases in the end. They are disappointed that the Agency will not automatically defer to recipients that have strong Title VI programs. Additionally, they are unhappy that the Agency is unwilling to dismiss weak complaints without first conducting an

investigation. They are concerned that EPA may pressure recipients to make concessions to complainants as a way to informally settle cases and avoid an Agency investigation.

Nevertheless, even though the guidances do not provide the absolute certainty they would prefer, state and industry officials should be satisfied that the Agency will not suspend a permit during the course of its investigation. Moreover, EPA will generally not conduct an investigation if a challenged permit will decrease the overall amount of pollutants of concern. Furthermore, an area-specific agreement generally precludes investigations into any permits covered by its terms. Additionally, EPA reduces potential uncertainties for state officials and industry by not holding a recipient accountable if an issue is beyond its legal authority. [FN441] While there is some uncertainty about how the Agency will evaluate evidence of adverse impacts, the guidances' emphasis on scientifically reliable evidence should usually favor state and industry interests. [FN442]

Moreover, state and industry representatives should be assuaged that the Agency is unlikely to revoke or veto a permit even if the OCR finds discrimination. Instead the guidances emphasize that discrimination usually results from a broader source of problems than the challenged permit. The Agency encourages recipients to make voluntary improvements in their overall programs rather than singling out the challenged permit for revocation. [FN443] As a result, industry has little reason to fear that a challenged permit could be later revoked for Title VI reasons. [FN444]

Environmental justice and civil rights advocates have the most reason to be disappointed with the two draft guidances. They are upset that the Agency is unlikely to suspend permits during the investigation process. [FN445] Additionally, advocates are concerned that the narrow focus on issues within the recipient's legal authority generally leaves out broader quality-of-life issues or falling property values. [FN446] Furthermore, the Revised Investigation Guidance establishes a high standard of proof by generally requiring scientifically reliable and statistically significant evidence that a minority group experiences adverse disparate impacts at a rate at least two times as high as a relevant comparison group. [FN447] Moreover, they are disappointed that the Agency is unlikely to force recipients to revoke a permit even if EPA finds the recipient in noncompliance.

Nevertheless, the guidances give complainants a reasonable opportunity to present allegations of discrimination and assure that EPA will conduct an investigation of those allegations. If a permit causes significant adverse disparate impacts, the Agency will probably pressure the recipient to make changes to reduce such impacts. While the facts were disputed, the proposed Shintech facility arguably would have met the standard of proof set forth in the Revised Investigation Guidance. [FN448] Accordingly, while **environmental justice** advocates might prefer a broader and less difficult standard, the Revised Investigation Guidance's proposed standard of proof provides them with a reasonable opportunity to prove a violation.

In light of EPA's reluctance to suspend a challenged permit or to terminate funding to a recipient, the primary impact of the guidances will likely be to encourage voluntary efforts by recipients to reduce adverse disparate impacts. [FN449] In particular, areawide agreements to reduce or eliminate adverse disparate impacts could bring substantial reductions in adverse disparate impacts. Unfortunately, the guidances do not provide clear answers about to what extent recipients need to make reductions. [FN450] While EPA should give states considerable discretion in how they achieve reductions, the Agency should ensure that recipients aggressively eliminate any significant adverse disparate impacts. If area-specific agreements are the Agency's primary vehicle for reducing or eliminating discrimination, EPA needs to develop better criteria for what these plans require, when a recipient needs to modify a plan, and how an agreement affects the filing of new Title VI complaints. EPA should answer these questions when it promulgates its "final" Title VI guidance. By providing clear standards, EPA can reduce uncertainties for both complainants and recipients, improve its investigative processes, and achieve significant reductions in adverse disparate impacts.

FN* Professor of Law, University of Cincinnati College of Law. I wish to thank Eileen Gauna and Josh Sarnoff for their perceptive comments. Any errors or omissions are my responsibility.

FN1. U.S. EPA, Interim Guidance on Investigating Title VI Administrative Complaints Challenging Permits (Feb. 1998) (available from the ELR Document Service, ELR Order No. AD-3660) [hereinafter Interim Guidance].

FN2. U.S. EPA, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39650 (June 27, 2000) (available from the ELR Document Service, ELR Order Nos. AD- 4517 (Draft Recipient Guidance) and AD-4516 (Draft Revised Investigation Guidance)) [hereinafter Guidances].

FN3. Id. at 39651-52, 39655.

FN4. Id. at 39651-54.

FN5. Id. at 39650-51.

FN6. Id. at 39651-52; Michael Bologna,: Expanded Version of Civil Rights Guidance Enjoys Broad Support, EPA Official Reports, 31 Env't Rep. (BNA) 1581, 1581-82 (July 28, 2000).

FN7. See the Business Network for Environmental Justice (BNEJ), Comments on "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Aug. 28, 2000) [hereinafter BNEJ]; ECOS, Comments on Guidance (as approved by the Cross Media Committee on Aug. 14, 2000); Sheila R. Foster, Meeting the Challenge: Evolving Norms in Environmental Decisionmaking, 30 ELR 10992 (Nov. 2000); Robert R. Kuehn, A Taxonomy of, 30 ELR 10681 (Sept. 2000); Bologna, supra note 6, at 1581-82; Steve Cook, States Fault EPA Civil Rights Guidance as Vague, Lacking Definitions, Nonbinding, 31 Env't Rep. (BNA) 1778 (Aug. 25, 2000); States Agree to Condemn EPA's Draft Civil Rights Guidances, Envtl. Pol'y Alert 36, 36-37 (Aug. 23, 2000); accord Jerome Balter, Public Interest Law Center of Philadelphia, The U.S. Environmental Protection Agency Draft Revised (EPA) Guidance and Draft Recipient Guidance 4 (July 21, 2000) (arguing that the Draft Revised Guidance "is essentially the same as the Interim Guidance") [hereinafter Balter]; Our View, Two Years After Promising Fixes, EPA Continues to Stumble, USA Today, Aug. 29, 2000, at A14 (editorial criticizing EPA's draft guidance on Title VI).

FN8. See ECOS, supra note 7, at 1-3; States Agree to Condemn EPA's Draft Civil Rights Guidances, supra note 7, at 36-37.

FN9. See National Advisory Council, Title VI Task Force, Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Aug. 26, 2000), at 3 & passim [hereinafter NEJAC]. The Center on Race, Poverty, & the Environment (CRPE) of the California Rural Legal Assistance Foundation filed a brief similar to NEJAC's that was signed by 63 current or past Title VI complainants and on behalf of more 125 groups. Luke Cole, chair of NEJAC's Title VI Task Force, is also director of CPRE. This Article will only cite to the NEJAC brief.

FN10. See Bologna, supra note 6, at 1581-82 (reporting comments of Anne Goode, director of OCR); accord Balter, supra note 7, at 4 (arguing that the Draft Recipient Guidance is more helpful to environmental civil rights than the Revised Investigation Guidance).

FN11. See ECOS, supra note 7, at 3; Cook, supra note 7, at 1778 (reporting ECOS' criticisms of the Draft Recipient Guidance); States Agree to Condemn EPA's Draft Civil Rights Guidances, supra note 7, at 37.

FN12. See NEJAC, supra note 9, at 4.

FN13. See John McQuaid, Revisited in EPA Plan, New Orleans Times-Picayune, June 20, 2000, at A1;: Hostility, Skepticism Meet EPA Interim Title VI Guidance at Initial Comment Session, Daily Env't Rep. (BNA) June 27, 2000, at A-9 (reporting that Anne Goode stated at a public comment session in Washington, D.C., that a causal link must be established scientifically between permit action challenged in Title VI complaint and a harmful effect using best available data).

FN14. See ECOS, supra note 7, at 2.

FN15. See McQuaid, supra note 13, at A1; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, Envtl. Pol'y Alert, June 28, 2000, at 30-31; infra notes 314-16 and accompanying text.

FN16. See McQuaid, supra note 13, at A1; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31; infra notes 426-32 and accompanying text.

FN17. See ECOS, supra note 7, at 1-6.

FN18. See Guidances, supra note 2, at 39651; Balter, supra note 7, at 3-4; infra notes 184-86 and accompanying text.

FN19. See McQuaid, supra note 13, at A1; Hostility, Skepticism Meet EPA Interim Title VI Guidance at Initial Comment Session, supra note 13, at A-9 (reporting negative comments of Jerome Balter, an attorney with the Public Interest Law Center of Philadelphia, at a public comment session in Washington, D.C.); New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31; infra notes 317-19 and accompanying text.

FN20. See Balter, supra note 7, at 4; McQuaid, supra note 13, at A1; Hostility, Skepticism Meet EPA Interim Title VI Guidance at Initial Comment Session, supra note 13, at A-9 (reporting negative comments of Jerome Balter, an attorney with the Public Interest Law Center of Philadelphia, at a public comment session in Washington, D.C.); New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31; infra notes 426-32 and accompanying text.

FN21. See Kenneth J. Warren, EPA Addresses, Legal Intelligencer, Aug. 17, 2000, at 5.

FN22. See Guidances, supra note 2, at 39650, 39654 (listing six locations for public listening sessions: Washington, D.C.; Dallas; Chicago; New York City; Los Angeles; and Oakland); see also Office of Civil Rights, U.S. EPA, What's New? (last modified July 27, 2000) <http://www.epa.gov/civilrights/new htm> (observing that EPA added Philadelphia as seventh public listening location).

FN23. See Guidances, supra note 2, at 39650; Bologna, supra note 6, at 1581- 82 (reporting comments of Anne Goode, director of OCR); Office of Civil Rights, U.S. EPA, Draft Title VI Guidance Documents: Questions and Answers 3 (June 2000) (available at <http://www.epa.gov/civilrights> under the "what's new" icon).

FN24. Federal Actions to Address in Minority Populations and Low-Income Populations, Exec. Order No. 12898, s1-101, 3 C.F.R. s859 (1995), reprinted in 42 U.S.C. s4321, Admin. Mat. 45075; see generally Bradford C. Mank, Executive Order 12898, in The Law of 103 (Michael Gerrard ed. 1999).

FN25. See Presidential Memorandum Accompanying Executive Order 12898, 30 Weekly Comp. Pres. Doc. 279, 280 (Feb. 11, 1994); Mank, Executive Order 12898, supra note 24, at 107.

FN26. Section 601 of the statute provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88-352, ss601-605, 78 Stat. 241, 252-53, 42 U.S.C. s2000d; Bradford C. Mank, Title VI, in The Law of 23-25 (Michael Gerrard ed. 1999) [hereinafter Mank, Title VI].

FN27. 42 U.S.C. s2000d-1; Mank, Title VI, supra note 26, at 25; Bradford C. Mank, Is There a Private Cause of Action Under EPA's Title VI Regulations?, 24 Colum. J. Envtl. L. 1, 12 (1999) [hereinafter Mank, Private Cause of Action].

FN28. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J.) (recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination"' (quoting 45 C.F.R. s80.3(b)(2) (1964)); Guardians, 463 U.S. at 592 n.13 (White, J.) (observing "every Cabinet department and about forty agencies adopted Title VI regulations prohibiting disparate-impact discrimination."); see Mank, Private Cause of Action, supra note 27, at 13; Mank, Title VI, supra note 26, at 25; Paul K. Sonn, Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy, 101 Yale L.J. 1577, 1581 n.25 (1992) (listing Title VI regulations for several federal agencies).

FN29. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), ss2(2), 6 (codified at 20 U.S.C. s1687(2)(A), 42 U.S.C. s2000d-4a) (overruling Grove City College v. Bell, 465 U.S. 555 (1984)).

FN30. "A recipient [of federal funds] shall not use criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin." 40 C.F.R s7.35(b); see generally 38 Fed. Reg. 17968 (July 5, 1973), as amended 49 Fed. Reg. 1656 (Jan. 12, 1984) (codified at 40 C.F.R. pt. 7)); Mank, Private Cause of Action, supra note 27, at 17; Mank, Title VI, supra note 26, at 25-26.

FN31. See 28 C.F.R. s42.410; Mank, Private Cause of Action, supra note 27, at 17; Mank, Title VI, supra note 26, at 26.

FN32. See 40 C.F.R. s7; James H. Colopy, The Road Less Traveled: Pursuing Through Title VI of the Civil Rights Act of 1964, 13 Stan. Envtl. L.J. 125, 128 (1994); Mank, Title VI, supra note 26, at 27-29.

FN33. See Mank, Private Cause of Action, supra note 27, at 17; Mank, Title VI, supra note 26, at 26.

FN34. See Mank, Private Cause of Action, supra note 27, at 18; Mank, Title VI, supra note 26, at 26.

FN35. See Mank, Private Cause of Action, supra note 27, at 18; Mank, Title VI, supra note 26, at 26.

FN36. See U.S. EPA, Status Summary Table of EPA Administrative Complaints (06/29/00) (available at <http://www.epa.gov/civilrights/t6complnt.htm> under "Summary Information on Title VI Complaints Filed With EPA").

FN37. See id.; see generally 40 CFR s7.115(c)(1) (stating that EPA will issue preliminary findings within 180 days from start of complaint).

FN38. See U.S. EPA, Title VI Complaints Filed With EPA (available at <http:// www.epa.gov/civilrights/t6complnt htm> under "List of Title VI Complaints Filed With EPA").

FN39. Draft Title VI Guidance Documents: Questions and Answers, supra note 23, at 6 (Question 20).

FN40. ECOS, supra note 7, Resolution (as approved by the Cross Media Committee on Aug. 14, 2000).

FN41. See 40 C.F.R. s7.120; Luke W. Cole, Civil Rights, and the EPA: A Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964, 9 J. Envtl. L. & Litig. 309, 314-15, 319 (1994); Mank, Private Cause of Action, supra note 27, at 20; Mank, Title VI, supra note 26, at 27.

FN42. See 40 C.F.R. s7.120(d)(1); Cole, supra note 41, at 316-17; Mank, Private Cause of Action, supra note 27, at 20-21; Mank, Title VI, supra note 26, at 27.

FN43. See 40 C.F.R. s7.120(d)(2); Cole, supra note 41, at 316-17; Mank, Private Cause of Action, supra note 27, at 21; Mank, Title VI, supra note 26, at 27.

FN44. See 40 C.F.R. s7.115(a) (authorizing EPA's OCR to conduct compliance reviews, including the request of information and on-site reviews); Cole, supra note 41, at 321; Julie Domike & Arthur W. Ray, EPA, Courts Focus on Title VI Issues in Locating Industrial Plants in Low-Income Areas, Nat'l L.J., Dec. 1, 1997, at C1; Mank, Private Cause of Action, supra note 27, at 22; Mank, Title VI, supra note 26, at 28.

FN45. Mank, Title VI, supra note 26, at 27-28.

FN46. See infra notes 270-71 and accompanying text.

FN47. See 40 C.F.R. s7.130(a); Guidances, supra note 2, at 39669.

FN48. See 40 C.F.R.s7.130(b)(1)-(3); Cole, supra note 41, at 317-18; Mank, Private Cause of Action, supra note 27, at 21; Mank, Title VI, supra note 26, at 28; Colopy, supra note 32, at 129, 155.

FN49. See 40 C.F.R. s7.130(b)(3)(iii); 42 U.S.C. s2000d-1; Cole, supra note 41, at 317-18; Mank, Private Cause of Action, supra note 27, at 21; Mank, Title VI, supra note 26, at 28; Colopy, supra note 32, at 129, 155.

FN50. See Guidances, supra note 2, at 39668; Mank, Private Cause of Action, supra note 27, at 21-22; Mank, Title VI, supra note 26, at 28; Colopy, supra note 32, at 155.

FN51. See Guidances, supra note 2, at 39669; infra notes 426-32 and accompanying text.

FN52. See Cannon v. University of Chicago, 441 U.S. 677, 715 (1979) (suggesting that Title VI generally does not allow private suits against the federal government); Mank, Private Cause of Action, supra note 27, at 22; Mank, Title VI, supra note 26, at 29; Colopy, supra note 32, at 168-71.

FN53. See generally Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999) (holding private right-of-action under disparate impact regulations issued pursuant to s602 of Title VI), cert. granted, Alexander v. Sandoval, 2000 WL 718812, 2000 LEXIS 4860 (U.S. Sept. 26, 2000); Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (same), cert. denied, No. 99-574, 1999 WL 812341 (U.S. Dec. 6, 1999); Mank, Private Cause of Action, supra note 27, at passim; Guidances, supra note 2, at 39671 n.77 (raising issue of private right-of-action).

FN54. See generally Balter, supra note 7, at 7 (arguing EPA guidance will make it more difficult for plaintiffs to bring private enforcement actions because of complexity of proof).

FN55. The Agency set forth a five-step process for evaluating whether a recipient's approval or renewal of a permit will create disparate impacts: (1) identifying the affected population, especially those in close proximity to the facility; (2) determining the demographics of the affected population through mapping technology such as geographic information systems (GIS); (3) determining the universe(s) of facilities and total affected population(s), especially the cumulative pollution burden of neighboring facilities; (4) conducting a disparate impact analysis by both examining the racial or ethnic composition within the affected population and by comparing that composition to non-affected populations in other relevant areas; and (5) determining the significance of the disparity through the use of standard statistical methods. See Interim Guidance, supra note 1, at 9-12; Mank, Title VI, supra note 26, at 40-45; Bradford C. Mank, and Title VI: Making Recipient Agencies Justify Their Siting Decisions, 73 Tul. L. Rev. 787, 795-98 (1999) [hereinafter Mank, Recipient Agencies].

FN56. See Interim Guidance, supra note 2, at 11-12; Mank, Title VI, supra note 26, at 43-44.

FN57. See, e.g., Gerald H. Yamada, "Guidelines" Avoid Due Process Safeguards, 9 Wash. Legal Found. Legal Opinion Letter No. 17, (May 28, 1999) (available in LEXIS News Group File, n.p.).

FN58. See generally Guidances, supra note 2, at 39688-758.

FN59. See Guidances, supra note 2, at 39651, 39692; Cheryl Hogue, Comments on Title VI Guidance Seek Clearer Definitions, Input From More Parties, 29 Env't Rep. (BNA) 234, 234 (May 22, 1998) [hereinafter Hogue, Comments on Title VI Guidance]; Mank, Title VI, supra note 26, at 44; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30.

FN60. See: Draft Revised Civil Rights Guidance Clarifies Definitions, Addresses State Issues, 31 Env't Rep. (BNA) 1331 (June 23, 2000).

FN61. Paul Connolly,: Mayors RAP EPA at Meeting With Browner for Failure to Consult on Interim Guidance, 29 Env't Rep. (BNA) 658 (July 24, 1998); Jeffrey B. Gracer, Taking Claims Seriously, 28 ELR 10373, 10375 (July 1998); Mank, Title VI, supra note 26, at 44.

FN62. See New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30.

FN63. See Angela M. Baggetta,: Black Caucus, EPA to Meet on Shintech; Dispute May Be Test Case on Title VI Suits, Daily Env't Rep. (BNA), July 21, 1998, at A-1; Luke W. Cole & Richard Moore, Attacks on EPA Unfair, USA Today, July 20, 1998, at 14A; Bradford C. Mank, Reforming State Brownfield Programs to Comply With Title VI, 24 Harv. Envtl. L. Rev. 115, 143- 45, 153 (2000) [hereinafter Mank, Reforming State Brownfield Programs]; Mank, Title VI, supra note 26, at 38, 40, 44.

FN64. See Draft Title VI Guidance Documents: Questions and Answers, supra note 23, at 6 (Question 19); Appropriations Act for Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies for Fiscal Year Ending September 30, 1999, Pub. L. No. 105-276, 112 Stat. 2461, tit. III (1998).

FN65. See Mank, Recipient Agencies, supra note 55, at 810.

FN66. See Science Advisory Board, No. EPA-SAB-IHEC-99-007, An SAB Report: Review of Disproportionate Impact Methodologies; A Review by the Integrated Human Exposure Committee (IHEC) of the Science Advisory Board (SAB) 3 (Dec. 1998) (available at <http://www.epa.gov/civilrights/investig.htm>) [hereinafter SAB Report]; see also Cheryl Hogue, SAB Recommends Steps for EPA in Analyses of Disproportionate Impacts, 29 Env't Rep. (BNA) 1310, 1310-11 (Oct. 30, 1998).

FN67. See Guidances, supra note 2, at 39651.

FN68. Id.

FN69. See Title VI Implementation Advisory Committee Report of the Title VI Implementation Advisory Committee, Next Steps for EPA, State, and Local Programs (1999) [hereinafter Report of the Title VI Advisory Committee]; Guidances, supra note 2, at 39652.

FN70. Report of the Title VI Advisory Committee, supra note 69, at 11-13, 33 ("early intervention reduces the possibility that delays will cost industry time, money, and even a competitive advantage in the siting of new and existing facilities."); Mank, Reforming State Brownfield Programs, supra note 63, at 172, 176-78.

FN71. See Report of the Title VI Advisory Committee, supra note 69, at 21, 43-44; Mank, Reforming State Brownfield Programs, supra note 63, at 141-42 (discussing EPA's growing efforts to address risk of cumulative and multiple sources of pollution).

FN72. Report of the Title VI Advisory Committee, supra note 69, at 5-10; Cheryl Hogue,: Title VI Advisory Panel Sets Out Issues, Gives No Recommendations, 29 Env't Rep. (BNA) 2188 (Mar. 5, 1999).

FN73. Guidances, supra note 2, at 39651.

FN74. Id.

FN75. See Mank, Title VI, supra note 26, at 45-48.

FN76. See id. at 47.

FN77. See id. at 48.

FN78. See infra notes 376, 378 and accompanying text.

FN79. See Letter from Ann E. Goode, Director, EPA's Office of Civil Rights, RE: EPA File No. 5R-98-R5 (Select Steel Complaint) to St. Francis Prayer Center [Complainant] and Michigan Department of Environmental Quality [Recipient] (Oct. 30, 1998) (dismissing Title VI complaint against Michigan Department of Environmental Quality); Luke W. Cole, Wrong on the Facts, Wrong on the Law, 29 ELR 10775 (Dec. 1999) (criticizing EPA's dismissal of Select Steel complaint); Mank, Title VI, supra note 26, at 48-50.

FN80. See Cheryl Hogue, Draft Revision of Guidance for Processing Civil Rights Complaints Expected Mid-1999, 29 Env't Rep. (BNA) 1807 (Jan. 15, 1999) (reporting opinion of Prof. Richard Lazarus, a member of EPA's Title VI Implementation Advisory Committee, that Select Steel suggests that compliance with appropriate health-based standards will usually defeat a Title VI claim); Mank, Title VI, supra note 26, at 47-48; but see Cole, Wrong on the Facts, Wrong on the Law, supra note 79 (arguing Michigan was not actually in compliance with NAAQS and that even if it were in compliance then it was inappropriate to assume such compliance necessarily precluded Title VI claim).

FN81. See ECOS, supra note 7, at 4; Cook, supra note 7, at 1778 (reporting ECOS' criticisms of the draft guidance).

FN82.

All persons regardless of race, color, or national origin are entitled to a safe and healthful environment; Strong civil rights enforcement is essential; Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development; Potential adverse cumulative impacts from stressors should be assessed, and reduced or eliminated wherever possible; Research efforts by EPA and state and local environmental agencies into the nature and magnitude of exposures, stressor hazards, and risks are important and should be continued; Decreases in environmental impacts through applied pollution prevention and technological innovation should be encouraged to prevent, reduce, or eliminate adverse disparate impacts; Meaningful public participation early and throughout the decision-making process is critical to identify and resolve issues, and to assure proper consideration of public concerns; Early, preventive steps, whether under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, are strongly encouraged to prevent potential Title VI violations and complaints; Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved. Intergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints.
See Guidances, supra note 2, at 39656, 39669.

FN83. See id. at 39669.

FN84. See id. at 39655-56.

FN85. See id. at 39656.

FN86. See id. at 39651.

FN87. See id. at 39652, 39656.

FN88. Id. at 39656.

FN89. See id. at 39656-57.

FN90. Id. at 39657.

FN91. Id.

FN92. See ECOS, supra note 7, at 3; Cook, supra note 7, at 1778 (reporting ECOS' criticisms of Draft Recipient Guidance); States Agree to Condemn EPA's Draft Civil Rights Guidances, supra note 7, at 37.

FN93. Guidances, supra note 2, at 39657.

FN94. Id.

FN95. Id.

FN96. Id.

FN97. Id.; see generally Bradford C. Mank, The EPA's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization, 25 Ecology L.Q. 1, 7-9 (1998) (discussing advantages of multimedia pollution control).

FN98. Guidances, supra note 2, at 39657.

FN99. Id.

FN100. Id.

FN101. Id.

FN102. Id.

FN103. Id. at 39657-58.

FN104. Report of the Title VI Advisory Committee, supra note 69, at 11-13, 33 ("early intervention reduces the possibility that delays will cost industry time, money, and even a competitive advantage in the siting of new and existing facilities."); Mank, Reforming State Brownfield Programs, supra note 63, at 172, 176-78.

FN105. Guidances, supra note 2, at 39658.

FN106. Id.

FN107. Id.

FN108. EPA noted that the U.S. Department of Justice (DOJ) has published a regulation discussing the factors recipients should consider when determining whether translation for limited English speaking populations is necessary. See Guidances, supra note 2, at 39658 n.12 (citing "Coordination of Enforcement of Non-Discrimination in Federally Assisted Programs," 28 C.F.R. subpt. F, specifically, s42.405(d)(1)).

FN109. Guidances, supra note 2, at 39658 (citing Lau v. Nichols, 414 U.S. 563 (1974); 40 C.F.R. s7.35(b) ("[a] recipient shall not use criteria or methods of administering its program which ... have the effect of defeating or substantially impairing accomplishment of the objective of the program with respect to individuals of a particular race, color, [or] national origin."). After the guidances were published, President Clinton issued Executive Order No. 13166, which requires federal agencies to ensure that recipients of federal assistance provide "meaningful access" to persons with limited English proficiency, and the DOJ issued a policy guidance document clarifying the duty of recipients to provide such access under Title VI. See generally, Improving Access to Services for Persons With Limited English Proficiency, Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000); U.S. DOJ, Enforcement

of Title VI of the Civil Rights Act of 1964--National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50123 (Aug. 16, 2000).

FN110. See Office of Solid Waste and Emergency Response, U.S. EPA, No. EPA- 500-R-00-007, Public Involvement in Environmental Permits: A Reference Guide (Aug. 2000) (available at <http://www.epa.gov/permits>).

FN111. See NEJAC, supra note 9, at 60-66.

FN112. Guidances, supra note 2, at 39659.

FN113. Id. at 39659-60.

FN114. Id. at 39659.

FN115. Id.

FN116. Id.

FN117. Id. at 39660-61.

FN118. See infra notes 290-394 and accompanying text.

FN119. Guidances, supra note 2, at 39660; see generally Mank, Reforming State Brownfield Programs, supra note 63, at 159-71 (discussing a range of less expensive approaches to identify potential high risk areas).

FN120. Guidances, supra note 2, at 39660.

FN121. Id. at 39661.

FN122. Id.

FN123. Id.; see generally Mank, Project XL, supra note 97, at 7-9 (discussing limitations of current single-medium statutes and arguing advantages of multimedia pollution control).

FN124. Guidances, supra note 2, at 39661.

FN125. See infra notes 339-91 and accompanying text.
FN126. See Balter, supra note 7, at 7.

FN127. See generally Mank, Reforming State Brownfield Programs, supra note 63, at 159-71 (discussing a range of less expensive approaches to identify potential high risk areas).

FN128. See Balter, supra note 7, at 8-10.

FN129. Guidances, supra note 2, at 39699.

FN130. Id. at 39662.

FN131. Id.

FN132. See ECOS, supra note 7, at 5.

FN133. Guidances, supra note 2, at 39662.

FN134. Id.

FN135. See NEJAC, supra note 9, at 20-27; Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545, 1549-1550 (1991) (informal methods of dispute resolution often harm women because it disfavors those who are more willing to consider interests of the other party); Bradford C. Mank, The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Sites: Can Economic Incentives or Mediation Slay the Monster, 19 B.C. Envtl. Aff. L. Rev. 239, 280-81 (1991) (arguing that those with greater resources and expertise have an advantage in the mediation process) [hereinafter Mank, Two-Headed Dragon].

FN136. See NEJAC, supra note 9, at 25; Mank, Two-Headed Dragon, supra note 135, at 280-81.

FN137. See NEJAC, supra note 9, at 24-25; Mank, Two-Headed Dragon, supra note 135, at 280-81.

FN138. See ECOS, supra note 7, at 5.

FN139. Guidances, supra note 2, at 39662-63.

FN140. Id. at 39662.

FN141. See NEJAC, supra note 9, at 29-30; infra notes 421-23 and accompanying text.

FN142. Guidances, supra note 2, at 39663.

FN143. See id. at 39674-75.

FN144. See Guidances, supra note 2, at 39663; Report of the Title VI Advisory Committee, supra note 69, at 26-29; Mank, Reforming State Brownfield Programs, supra note 63, at 181-84 (discussing proposals by state government officials for EPA to give greater deference in Title VI disputes to state agencies with programs that encourage public involvement in permitting process and arguing that only limited deference is appropriate).

FN145. See EPA Plans Strong Deference to State Programs, Envtl. Pol'y Alert, Oct. 20, 1999, at 31-32; Mank, Reforming State Brownfield Programs, supra note 63, at 180.

FN146. See Guidances, supra note 2, at 39653, 39663 (citing 28 C.F.R. s50.3(b) ("Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."); Memorandum from Bill Lann Lee, Acting Assistant Attorney General, U.S. Department of Justice, to Executive Agency Civil Rights Directors (Jan. 28, 1999) (titled Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs) ("It is important to remember that Federal agencies are responsible for enforcing the nondiscrimination requirements that apply to recipients of assistance under their programs.").

FN147. See Guidances, supra note 2, at 39653, 39663.

FN148. See id. at 39663.

FN149. See id. at 39653, 39663-64, 39675-76.

FN150. See id. at 39653.

FN151. See id.

FN152. See id. at 39653, 39663-64.

FN153. See id. at 39663-64, 39675-76.

FN154. See Eileen Gauna, Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, July 27, 2000, at 3-4; NEJAC, supra note 9, at 36.

FN155. Institute for Public Representation, Georgetown University Law Center, Widener University Environmental and Natural Resources Law Clinic & Mid- Atlantic Environmental Law Center, Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, Aug. 28, 2000, at 7-9 [hereinafter Institute for Public Representation].

FN156. See Golden Gate University School of Law, Environmental Law & Justice Clinic, Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, Aug. 28, 2000, at 7 [hereinafter Golden Gate]; Institute for Public Representation, supra note 155, at 8-9; NEJAC, supra note 9, at 37.

FN157. See Golden Gate, supra note 156, at 6-7; NEJAC, supra note 9, at 37.

FN158. See ECOS, supra note 7, at 2-3.

FN159. See id. at 5.

FN160. See Guidances, supra note 2, at 39663-64.

FN161. See supra notes 108-09 and accompanying text.

FN162. See Guidances, supra note 2, at 39663-64 (citing U.S. EPA, Proposal Guidelines for Brownfields Assessment Demonstration Projects (Oct. 1999).

FN163. See Guidances, supra note 2, at 39664; see generally Mank, Reforming State Brownfield Programs, supra note 63, at 183-84 (arguing EPA should give limited deference to states with good public participation programs).

FN164. See generally ECOS, supra note 7, at 2-3.

FN165. See NEJAC, supra note 9, at 60-61; Mank, Reforming State Brownfield Programs, supra note 63, at 181-83 (arguing public participation does not guarantee fairness).

FN166. See Guidances, supra note 2, at 39650-51, 39668-69. The Revised Investigation Guidance contains the same Glossary of Terms found in the Recipient Guidance. See Guidances, supra note 2, at 39684-86 (Appendix A). In addition, the Revised Investigation Guidance includes a flowchart that delineates the steps of the Title VI process in 40 C.F.R. part 7. See id. at 39686-88 (Appendix B).

FN167. See id.

FN168. See id. at 39669; Anne E. Goode, director of OCR, & Kathy Gorospe, director of American Indian Environmental Office, Letter to Tribal Leaders Consulting With Tribes About Title VI (Mar. 11, 1999).

FN169. See NEJAC, supra note 9, at 6.

FN170. See Guidances, supra note 2, at 39650-51, 39668-69.

FN171. See id. at 39669.

FN172. See Philip Weinberg, Equal Protection, in The Law of 3-22 (Michael Gerrard ed. 1999). However, EPA's administrative appellate court has required the Agency as a matter of policy under Executive Order No. 12898 to use its discretionary statutory authority to consider arguments, and, thus, the Agency's internal review processes may in some cases address whether EPA itself is in compliance with Title VI. See generally In re Chemical Waste Management, Inc., 6 E.A.D. 66, ELR Admin. Mat. 40392 (EPA EAB June 29, 1995) (holding that EPA as a matter of policy should exercise its discretion under the Resource Conservation and Recovery Act's omnibus clause to

address issues); Richard J. Lazarus & Stephanie Tai, Integrating in EPA Permitting Authority, 26 Ecology L.Q. 617 (1999) (discussing Executive Order No. 12898 and several federal environmental statutes containing broad discretionary terms that EPA could use to address issues).

FN173. See Guidances, supra note 2, at 39670-71.

FN174. See NEJAC, supra note 9, at 7-8.

FN175. See Guidances, supra note 2, at 39670.

FN176. See BNEJ, supra note 7, at 2, 22-24.

FN177. NEJAC, supra note 9, at 9.

FN178. See Guidances, supra note 2, at 39652, 39670; see generally 40 C.F.R. ss7.120(a)-(b) (discussing basic requirements for acceptable complaint) and 7.125 (defining term "recipient").

FN179. See Guidances, supra note 2, at 39670; see generally 40 C.F.R. s7.125 (defining term "recipient")

FN180. See NEJAC, supra note 9, at 9.

FN181. See Guidances, supra note 2, at 39652, 39670.

FN182. See ECOS, supra note 7, at 4-5; see generally BNEJ, supra note 7, at 11-14 (arguing that EPA should not examine individual permits at all, or, alternatively, should only examine permits that cause significant net increases).

FN183. See Guidances, supra note 2, at 39653, 39676; Draft Title VI Guidance Documents: Questions and Answers, supra note 23, at 6 (Question 18).

FN184. See Guidances, supra note 2, at 39669, 39683.

FN185. See ECOS, supra note 7, at 3-4; Cook, supra note 7, at 1778 (reporting ECOS' criticisms of the draft guidance).

FN186. See NEJAC, supra note 9, at 27-29.

FN187. See Guidances, supra note 2, at 39652.

FN188. See id.

FN189. See id.

FN190. See id. at 39670.

FN191. See id.

FN192. See NEJAC, supra note 9, at 9.

FN193. See Cole, Wrong on the Facts, Wrong on the Law, supra note 79; supra notes 38-41 and accompanying text (discussing Agency's backlog of cases dating to 1993 and 1994).

FN194. See NEJAC, supra note 9, at 9.

FN195. See infra notes 317-19 and accompanying text.

FN196. See Guidances, supra note 2, at 39671.

FN197. See id.; 40 C.F.R. s7.115(c).

FN198. See Guidances, supra note 2, at 39671; 40 C.F.R. ss7.115(c)-(e), 7.130(b).

FN199. See Guidances, supra note 2, at 39671; 40 C.F.R. ss7.115(d), 7.130(b).

FN200. See Guidances, supra note 2, at 39671; 40 C.F.R. ss7.85(b), (f).

FN201. See Guidances, supra note 2, at 39671-74.

FN202. See NEJAC, supra note 9, at 9.

FN203. See ECOS, supra note 7, at 4.

FN204. See Guidances, supra note 2, at 39672.

FN205. See id.

FN206. See id. at 39663.

FN207. See Balter, supra note 7, at 5-6 (arguing complexity of proving adverse disparate impact Title VI complaint would require expert and legal assistance rarely available to minority communities); Mank, Recipient Agencies, supra note 55, at 834-39 (arguing EPA or states should provide Title VI complainants with technical assistance grants); NEJAC, supra note 9, at 61-62 (same).

FN208. See Mank, Title VI, supra note 26, at 47.

FN209. See Guidances, supra note 2, at 39672.

FN210. See supra notes 49-51 and accompanying text.

FN211. See supra note 54 and accompanying text.

FN212. See Guidances, supra note 2, at 39672; 40 C.F.R. ss7.15, 7.120, 7.125.

FN213. 40 C.F.R. s7.120(b)(1).

FN214. Within 20 days, the OCR will determine whether the entity that made the alleged discriminatory act is in fact an EPA recipient. See Guidances, supra note 2, at 39672 n.87; 40 C.F.R. s7.25.

FN215. See Guidances, supra note 2, at 39672; 40 C.F.R. s7.120(b)(1).

FN216. See Guidances, supra note 2, at 39672; 40 C.F.R. s7.120(b)(2); see also section III.B. (discussing timeliness of complaints).

FN217. See Guidances, supra note 2, at 39672 n.90; 40 C.F.R. s7.120(a).

FN218. See Guidances, supra note 2, at 39670, 39672; see generally 40 C.F.R. s7.125 (defining term "recipient").

FN219. See Guidances, supra note 2, at 39672; 40 C.F.R. ss7.110, 7.115.

FN220. See NEJAC, supra note 9, at 34.

FN221. See BNEJ, supra note 7, at 22; ECOS, supra note 7, at 4.

FN222. See 40 C.F.R. s7.120(a) (emphasis added); NEJAC, supra note 9, at 12.

FN223. NEJAC, supra note 9, at 11 (18 of 43 complaints were rejected because EPA did not provide financial assistance).

FN224. See Guidances, supra note 2, at 39671.

FN225. See id.

FN226. See id. at 39672.

FN227. See NEJAC, supra note 9, at 13-14.

FN228. See id. at 13-16.

FN229. See Guidances, supra note 2, at 39673.

FN230. See, e.g., ECOS, supra note 7, at 4; NEJAC, supra note 9, at 16-17.

FN231. See Guidances, supra note 2, at 39673.

FN232. See Institute for Public Representation, supra note 155, at 6-7; NEJAC, supra note 9, at 17-18.

FN233. See BNEJ, supra note 7, at 24-26. Several decisions have held that a Title VI plaintiff need not first exhaust its administrative remedies. See Cannon v. University of Chicago, 441 U.S. 677, 707 n.41 (1979) ("[W]e are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies."); Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989) ("[Courts] squarely hold that litigants need not exhaust their administrative remedies prior to bringing a Title VI claim in federal court."); Chowdbury v. Reading Hosp. & Medical Ctr., 677 F.2d 317, 322-23 (3d Cir. 1982) (exhaustion of agency funding termination procedures not a necessary prerequisite to private action for injunctive relief); Mank, Private Cause of Action, supra note 26, at 56-57 & nn.330-331 (1999); but see Wrenn v. Kansas, 561 F. Supp. 1216, 1222 (D. Kan. 1983) (requiring Title VI plaintiffs to exhaust administrative remedies before seeking redress in federal court).

FN234. See Guidances, supra note 2, at 39673.

FN235. See id.

FN236. See id.

FN237. See id. at 39652, 39673 (emphasis added).

FN238. See generally Mank, Recipient Agencies, supra note 55, at 798-809 (discussing federal court case law on Title VI and VII).

FN239. See NEJAC, supra note 9, at 18-19.

FN240. See Guidances, supra note 2, at 39652, 39673.

FN241. See id.

FN242. See Institute for Public Representation, supra note 155, at 5; NEJAC, supra note 9, at 19-20.

FN243. See Guidances, supra note 2, at 39673.

FN244. See Golden Gate, supra note 156, at 5-6; NEJAC, supra note 9, at 20- 23; Mank, Two-Head Dragon, supra note 135, at 280-81.

FN245. See NEJAC, supra note 9, at 24-25; Mank, Two-Head Dragon, supra note 135, at 280-81.

FN246. See ECOS, supra note 7, at 5.

FN247. See BNEJ, supra note 7, at 34-35.

FN248. See supra note 183 and accompanying text.

FN249. See Guidances, supra note 2, at 39673.

FN250. See id. at 39653, 39674.

FN251. See id.

FN252. See id. at 39653; supra notes 140-41 and accompanying text.

FN253. See Guidances, supra note 2, at 39653, 39674.

FN254. See id. at 39653.

FN255. Id. at 39657, 39674-75.

FN256. See id. at 39651, 39653, 39657, 39662, 39674; supra notes 94-99, 151- 54, and accompanying text.

FN257. See Report of the Title VI Advisory Committee, supra note 69, at 30- 31, 43-44; Mank, Reforming State Brownfield Programs, supra note 63, at 159-61.

FN258. See Guidances, supra note 2, at 39674.

FN259. See id. at 39663-64, 39675-76; supra note 154 and accompanying text.

FN260. See Guidances, supra note 2, at 39674.

FN261. See id. at 39653.

FN262. See id. at 39674.

FN263. See id.

FN264. See id.

FN265. See NEJAC, supra note 9, at 29-30; supra notes 142, 156, and infra notes 421-23 and accompanying text.

FN266. See NEJAC, supra note 9, at 32-34; supra notes 157-58, and infra notes 422-23 and accompanying text.

FN267. See Guidances, supra note 2, at 39674.

FN268. See id. at 39676.

FN269. See id. at 39653, 39674.

FN270. See id. at 39674.

FN271. See NEJAC, supra note 9, at 34.

FN272. See ECOS, supra note 7, at 4.

FN273. See Guidances, supra note 2, at 39674-75.

FN274. See supra notes 144-66 and accompanying text.

FN275. See Guidances, supra note 2, at 39675-76.

FN276. See id.

FN277. See id. at 39675.

FN278. See id. at 39675-76.

FN279. See supra notes 155-60, 165-66, and accompanying text.

FN280. See Gauna, supra note 154, at 4-5.
FN281. See Guidances, supra note 2, at 39653, 39676.

FN282. See id. at 39652-53, 39676.

FN283. See id.

FN284. See id.

FN285. See id. at 39654.

FN286. Compare id. at 39676 (using "totality of circumstances" test) with Interim Guidance, supra note 1, at 9 (using "totality of circumstances" test); Mank, Title VI, supra note 26, at 42 (discussing Interim Guidance's "totality of circumstances" test).

FN287. See Guidances, supra note 2, at 39654.

FN288. See id. at 39682.

FN289. See id. at 39654, 39676-77.

FN290. See id. at 39676-77.

FN291. See id. at 39677 & n.114 (citing 40 C.F.R. s7.120).

FN292. Our View, Two Years After Promising Fixes, EPA Continues to Stumble, USA Today, Aug. 29, 2000, at A14 (editorial criticizing EPA's draft guidance on Title VI) [hereinafter Two Years After Promising Fixes].

FN293. See Guidances, supra note 2, at 39677.

FN294. See id.

FN295. See id. at 39654, 39676-77.

FN296. See id. at 39677.

FN297. See id.

FN298. See id.

FN299. See id.

FN300. See id.

FN301. See id.

FN302. See id. (citing 40 C.F.R. ss7.110, 7.115).

FN303. See ECOS, supra note 7, at 5.

FN304. See BNEJ, supra note 7, at 11-14.

FN305. See Institute for Public Representation, supra note 155, at 9; NEJAC, supra note 9, at 42.

FN306. See Guidances, supra note 2, at 39677 (discussing criteria for area- specific agreements that would receive due weight).

FN307. See id. at 39654, 39676-77.

FN308. See id. at 39677 n.117.

FN309. See NEJAC, supra note 9, at 36-38.

FN310. See id. at 37.

FN311. See Guidances, supra note 2, at 39676-78.

FN312. See id. at 39678.

FN313. See id. at 39654, 39678.

FN314. See id. at 39678.

FN315. These could include laws and regulations that concern permitting programs and laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts. For example, a state statute might require all major state actions (including the issuance of certain air pollution control permits) to take into consideration impacts resulting from noise and odors associated with the action. Even if these were not explicitly covered by the permitting program, they would appropriately be considered as part of the adverse disparate impact analysis, since the recipient has some obligation or authority regarding them. A recipient need not have exercised this authority for the stressor or impact to be deemed within the recipient's authority to consider. See id.

FN316. See Golden Gate, supra note 156, at 9; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 31.

FN317. See NEJAC, supra note 9, at 44-47.

FN318. See, e.g., Institute for Public Representation, supra note 155, at 5- 6; NEJAC, supra note 9, at 43-44.

FN319. See BNEJ, supra note 7, at 15-16; ECOS, supra note 7, at 4; Two Years After Promising Fixes, supra note 292.

FN320. See ECOS, supra note 7, at 5.

FN321. See Guidances, supra note 2, at 39678.

FN322. See id.

FN323. See id. at 39654, 39678.

FN324. See id. at 39678.

FN325. See id.

FN326. EPA defines "regulated or permitted' sources [to] include those with permits, as well as those subject to Federal or state requirements for reporting of waste generation or emissions (e.g., Toxics Release Inventory reporters, Resource Conservation and Recovery Act hazardous waste generator sites)." See id. at 39678.

FN327. See id.
FN328. See id.

FN329. See id.

FN330. See id.

FN331. See id. at 39679.

FN332. The OCR is likely to give preference to data categories in the following approximate descending order: (1) ambient monitoring data; (2) modeled exposure concentrations or surrogates in various environmental media; (3) known releases of pollutants or stressors into the environment; (4) the manufacture, use, or storage of quantities of pollutants, and their potential for release; and (5) the existence of sources or activities associated with potential exposures to stressors (e.g., facilities that are generally likely to use significant quantities of toxic chemicals that could be routinely or catastrophically released; types of agricultural production usually associated with chemical application). See Guidances, supra note 2, at 39679. NEJAC's Title VI Task Force argues that the Agency "should move known releases of pollutants or stressors into the environment' into the top position on the hierarchy, certainly above modeled exposure concentrations." NEJAC, supra note 9, at 47.

FN333. See Guidances, supra note 2, at 39679; SAB Report, supra note 66.

FN334. See Guidances, supra note 2, at 39679.

FN335. See Balter, supra note 7, at 5-6.

FN336. See BNEJ, supra note 7, at 27; ECOS, supra note 7, at 2.

FN337. See Robert R. Kuehn, The Implications of Quantitative Risk Assessment, 1996 U. Ill. L. Rev. 103, 117-23, 151-53; Mank, Reforming State Brownfield Programs, supra note 63, at 139-43.

FN338. See Guidances, supra note 2, at 39680.

FN339. See id.

FN340. See Institute for Public Representation, supra note 155, at 10; Kuehn, supra note 337, at 117-23, 151-53; Mank, Reforming State Brownfield Programs, supra note 63, at 139-43.

FN341. See Guidances, supra note 2, at 39680.

FN342. See Golden Gate, supra note 156, at 9-10.

FN343. See Guidances, supra note 2, at 39680.

FN344. See id.

FN345. See NEJAC, supra note 9, at 48.

FN346. See Guidances, supra note 2, at 39680.

FN347. See id.

FN348. See id.

FN349. See ECOS, supra note 7, at 4; Cook, supra note 7, at 1778 (reporting ECOS' criticisms of the draft guidance).

FN350. See Cole, Wrong on the Facts, Wrong on the Law, supra note 79; Golden Gate, supra note 156, at 10-11; Institute for Public Representation, supra note 155, at 11; NEJAC, supra note 9, at 48-53.

FN351. See Institute for Public Representation, supra note 155, at 11.

FN352. See Guidances, supra note 2, at 39681.

FN353. See id.

FN354. See id.

FN355. See id. at 39681 n.130.

FN356. See ECOS, supra note 7, at 4; Cook, supra note 7, at 1778 (reporting ECOS' criticisms of the draft guidance).

FN357. See Guidances, supra note 2, at 39654, 39681.

FN358. See id. at 39681-82.

FN359. See id. at 39654, 39681-82.

FN360. See ECOS, supra note 7, at 4.

FN361. See Guidances, supra note 2, at 39681.

FN362. See id. at 39681 n.132.

FN363. See id. at 39681.

FN364. See id.

FN365. See id.

FN366. See BNEJ, supra note 7, at 17 (criticizing the Revised Investigation Guidance's use of a proximity model for defining "affected population"); see generally Mank, Reforming State Brownfield Programs, supra note 63, at 159-60 (discussing strength and weaknesses of different approaches to measuring disparate impacts, including proximity or radius approaches); but see Public Interest Law Center of Philadelphia, Protocol, (proposed Oct. 1, 1998) (proposing radius approach for measuring affected population).

FN367. See Guidances, supra note 2, at 39681.

FN368. See id.

FN369. See id.

FN370. See id.

FN371. See id.

FN372. See id.

FN373. See id.

FN374. See id.

FN375. See id. at 39681 n.134 (citing Draft Revised Demographic Information, Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/Permit for Proposed Shintech Facility, April 1998(Shintech Demographic Information, April 1998) (Facility Distribution Charts Dl through D40 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>)).

FN376. These values approximate the outlying portions (sometimes called the "tails") of a distribution of risk that are beyond two standard deviations of the mean value. See Guidances, supra note 2, at 39681-82 n.135.

FN377. See id. at 39682 n.136 (citing Shintech Demographic Information, April 1998, the last column in Tables Al through B7, found at <http:// www.epa.gov/civilrights/shinfileapr98 htm>).

FN378. See Guidances, supra note 2, at 39682 n.137 (citing Shintech Demographic Information, April 1998, last column in Tables C I through C5 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>).

FN379. See Guidances, supra note 2, at 39682.

FN380. See ECOS, supra note 7, at 2; Institute for Public Representation, supra note 155, at 12.

FN381. See BNEJ, supra note 7 at 19-20.

FN382. See Guidances, supra note 2, at 39682-83.

FN383. See id. at 39682.

FN384. See Golden Gate, supra note 156, at 13.

FN385. See Guidances, supra note 2, at 39682.

FN386. See id.

FN387. See id.

FN388. For example, using a factor of two tests in two different states with a minority population of 4% and 50%, respectively, would mean that a presumption of disparity would exist in the first state if less than 10% of an affected population were minority, but in the latter state, the percentage would have to reach 100%. See Guidances, supra note 2, at 39682 n.138.

FN389. See Gauna, supra note 154, at 6.

FN390. See ECOS, supra note 7, at 1-2.

FN391. See Guidances, supra note 2, at 39682-83.

FN392. Id.

FN393. See id.

FN394. See Mank, Recipient Agencies, supra note 55, at 801-07.

FN395. See Guidances, supra note 2, at 39683 n.147 (citing 40 C.F.R. s7.120(d)(1)(ii)).

FN396. See Guidances, supra note 2, at 39683 n.148 (citing 40 C.F.R. s7.115(d)(2)).

FN397. See Interim Guidance, supra note 1, at 12.

FN398. See Guidances, supra note 2, at 39654, 39683.

FN399. See id. at 39683 (emphasis added) & n.149 (citing Donnelly v. Rhode Island Bd. of Governor for Higher Educ., 929 F. Supp. 583, 593 (D.R.I. 1996), aff'd on other grounds, 110 F.3d 2 (1st Cir. 1997); Elston v. Talladega County Bd. of Educ., 997 F. 2d 13 94, 1412-13 (11th Cir. 1993); see also NAACP v. Medical Center, Inc., 657 F.2d 1322, 1328 (3d Cir. 1981); Mank, Recipient Agencies, supra note 55, at 803-07.

FN400. See Guidances, supra note 2, at 39654, 39683.

FN401. See id.

FN402. See id.

FN403. See BNEJ, supra note 7, at 30-33. Title VII of the Civil Rights Act generally prohibits discrimination in employment on the basis of gender.

FN404. See Institute for Public Representation, supra note 155, at 13-14; NEJAC, supra note 9, at 54-55.

FN405. See NEJAC, supra note 9, at 54 (criticizing justification as contrary to goal of eliminating adverse disparate impacts).

FN406. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n. 14, 1412-13 (11th Cir. 1993); NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1334 (3d Cir. 1981) (en banc) (stating "challenged practice must not only affect disproportionately, it must do so unnecessarily."); Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 127 (S.D. Ohio 1984) ("[d] efendants are not per se prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification."); Mank, Recipient Agencies, supra note 55, at 801-07.

FN407. See BNEJ, supra note 7, at 30-33.

FN408. See Guidances, supra note 2, at 39654, 39683; see generally Mank, Recipient Agencies, supra note 55, at 808-09; infra note 410 and accompanying text.

FN409. See Guidances, supra note 2, at 39683 n.150 (emphasis added) (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Elston, 997 F.2d at 1413).

FN410. Interim Guidance, supra note 1, at 12 (emphasis added); See Mank, Recipient Agencies, supra note 55, at 814-23.

FN411. See Mank, Recipient Agencies, supra note 55, at 814-23; Institute for Public Representation, supra note 155, at 15.

FN412. See BNEJ, supra note 7, at 33-34.

FN413. Mank, Recipient Agencies, supra note 55, at 808-09

FN414. See id., supra note 55, at 814-23; Institute for Public Representation, supra note 155, at 14.

FN415. See Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 661 (1989); Mank, Recipient Agencies, supra note 55, at 804-09, 822-29. An exception is that increased cost or reproductive safety do not justify sex discrimination. See International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 197-211 (1991).

FN416. See Guidances, supra note 2, at 39683.

FN417. See Mank, Recipient Agencies, supra note 55, at 823-26.

FN418. See NEJAC, supra note 9, at 57.

FN419. See Mank, Recipient Agencies, supra note 55, at 823-26.

FN420. See Guidances, supra note 2, at 39683; Mank, Recipient Agencies, supra note 55, at 831 (arguing that EPA should require site-specific mitigation measures because off-site mitigation may fail to address adverse impacts); NEJAC, supra note 9, at 29-30; supra note 142 and accompanying text.

FN421. See Mank, Recipient Agencies, supra note 55, at 830-34 (arguing that the Interim Guidance fails to require effective mitigation measures and monitoring of success); Golden Gate, supra note 156, at 14-15; see generally Michael G. LeDesma, A Sound of Thunder: Problems and Prospects in Wetland Mitigation Banking, 19 Colum. J. Envtl. L. 497, 500-01 (1994) (discussing problem of ineffective monitoring of wetland banking mitigation programs).

FN422. See NEJAC, supra note 9, at 32-34; supra note 158 and accompanying text.

FN423. See Guidances, supra note 2, at 39674; supra notes 264-65 and accompanying text.

FN424. See Title VI Advisory Committee Report, supra note 69, at 90.

FN425. See Guidances, supra note 2, at 39683.

FN426. See id.

FN427. See id.

FN428. See id. at 39651.

FN429. See 40 C.F.R. s7.130(a)-(b) (discussing EPA's authority to terminate funding to a recipient); New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30.

FN430. See 40 C.F.R. s7.130(a)-(b) (discussing EPA's authority to terminate funding to a recipient).

FN431. See Guidances, supra note 2, at 39683.

FN432. See NEJAC, supra note 9, at 57.

FN433. See id. at 27-29; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15 , at 30.

FN434. See NEJAC, supra note 9, at 27-29.

FN435. See New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30.

FN436. See ECOS, supra note 7, at 4.

FN437. See 40 C.F.R. s7.115(e).

FN438. See Guidances, supra note 2, at 39683 n.153 (citing 40 C.F.R. ss7.115(e), 7.130(b)(1)).

FN439. See id. at 39683-84 nn.154-58 (citing 40 C.F.R. ss7.130(b)(2)(I), (ii), 7.130(b)(3)); Mank, Title VI, supra note 26, at 28; see supra note 49 and accompanying text.

FN440. See Guidances, supra note 2, at 39683-84 n.159 (citing 40 C.F.R. s7.130(b)(3)(iii)); Mank, Title VI, supra note 26, at 28; see supra note 50 and accompanying text.

FN441. See New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31.

FN442.: Draft Revised Civil Rights Guidance Clarifies Definitions, Addresses State Issues, supra note 60, at 1331.

FN443. See McQuaid, supra note 13, at A1; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31.

FN444. See New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31.

FN445. See McQuaid, supra note 13, at A1; see also Draft Title VI Guidance Documents: Questions and Answers, supra note 23, at 6 (Question 18) (indicating that a Title VI complaint does not suspend or reverse an issued permit because the Agency's "Title VI process is focused on the actions of recipients, not of permit applicants.").

FN446. See McQuaid, supra note 13, at A1.

FN447. See id.; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31.

FN448. See McQuaid, supra note 13, at A1.

FN449. See Joan McKinney, "Justice" EPA Rules Released--Changes Could Help Minority Communities, Baton Rouge State Times/Morning Advoc., June 17, 2000, at 1A; New EPA Draft Civil Rights Policy Pleases States, Angers Activists, supra note 15, at 30-31.

FN450. See McKinney, supra note 449, at 1A; supra notes 155-59, 266-67, 280- 81, and accompanying text.

(1)

To whom it may concern,
I'm writing you in regard to the Draft Title VI, I'm just answering the best way I know how., In Concern to this Site Purity Oil in Malaga Ca. In the San Joaquin Valley. This Site was allowed to expose people to there toxic's. And this goes Back to the 1970's when the State Knew what was buried in those grounds and did nothing to remove the Families in Tall Tree Trailer Courts that set next to this site, in fact right under there homes, it leaked in there yards and there children played on this Killing Field of Nuclear By Products with No Knowlege that it would affect them for the rest of there lifes. This Concerned me for this Mexican Family's that first set on this site in the 80's when they came in on this Super Fund and started to clean this mess, digging 11,800 truck loads of this Nuclear dirt By Products and exposing us all to there air Borne Dust and those Families to this night mare and they Knew nothing. They Knew

received 9/3/98

(2)

no English and were told nothing to the danger, to me it made no sence, When in the 80's the Engineer on this site Said to move these Familys it was to dangerous for them, And they did nothing, Knowing this Familys were getting ill, And did nothing, and now its the year "2000" and now they have Indians on this site. I came to H.B.L.A. in "1996" and Blew a whistle at them about this site. and how could they still have more Familys Being exposed and they don't even Know it, Again more Familys who Can't Speak or even Read For that matter in English and our town allowing it. Fresno and they Knew to cause there the ones who allowed P.G.E to Dump there Irans former Oil in there with no permitto. along with our town's leftover's in there ours Back yards and allowing everyone's Elers to Buried there to, They now have a Water Injection Tower on this site to Clean the tanks that sit under the store that sits on this site and it sells Food to this Poor Mexican and Indians on this site. and this tanks are Volatory

3. This is not right. They have had some Fires out there that has Burned for days and was toxic Fumes they had to Evacuate the whole town of Malaga until the Fire was out. This happened more than once, They have alarms on the Fence lines around the trailer's for high toxic warning And some where on this Site they have a Incinerator Burning this stuff. which I know its Better not to transport this toxic around to other sites its to much exposure too other's, But this Family's are exposed Daily to it how can they let this happen to this Indians who can't even under stand Spanish or English, there Language is different it's in there back yards, and they didn't know it, Until a few year's ago when H. R. L. A. listen to my plea's and now have a promise to move them Trailer's off this Site and relocate the Family my writing to you is to ask you to watch that this happens. Yes the Family in the 80's its to late most have moved or

(4)

passed on and I mean Died
This Site was allowed to Kill off
alot of Mexicans in this town
with Cancer's my Step Uncled lived
on this Side he died with Cancer
of the Heart, Rare he's a white man
though Cancer has no Rare, I'm
Sure if you check the town out you
will see the high Cancer Rate for this
town, along with all the Retards,
They have there own school Just
for what the Site Created after 25 yr's of
ignoring this Family on this Site
I often Believed they were the
States Junior P. of Just watching
this Family Die, Strong Huh I'm
Sorry, I have alot of hate For this
Site, I got ill, from some
of there nuclear waste it Cut my
life in half and my generation,
my Daughter also, and I've Buried
a Grand daughter for this Site,
So if you See fit I would like
to see that they Follow Through
They've lied For year's, So there's no
promises Kept for this Family
They need to Ful Fill it and get
on to there water Trouble, For

(3)

this leaked into our Water tables for years, They need to stop putting this in to our major Canals that water this Valley's Crop's its Killing our lands and soon Every Family in this Valley will Be affected it already has But it will never Be admitted So if you can Invesigate on this Site and watch to see they Ful Fill this God will Smile Down on you and so will this Fam (b) (6) - Privacy

A Voice from
The
San Joqin

Don't allow them to ruin mother Earth and Kill off This Familys Generation's

Our water in this town of Fresno is bad is your's.
Worm Wood

This also Concerns the Family's who live on down the Road From this dump another 1000 Family's of Mexicans.

EPA

Purity Oil Superfund Site

United States Environmental Protection Agency, Region 9, San Francisco

MALAGA, CA

MARCH 1993

PURITY OIL SALES SUPERFUND SITE
EPA SELECTS CLEAN-UP PLAN FOR SOIL

The United States Environmental Protection Agency (EPA), has approved a plan to clean up contaminated soil at the Purity Oil Sales Superfund site in Malaga, California. (Figure 1). On September 30, 1992, EPA signed a Record of Decision (ROD) selecting treatment of soil from a depth of 14 feet to the water table with Soil Vapor Extraction (SVE), excavating a 25-foot trench around the site and filling the trench with bentonite and soil to form a slurry wall, and covering the site with a multi-layer cap.

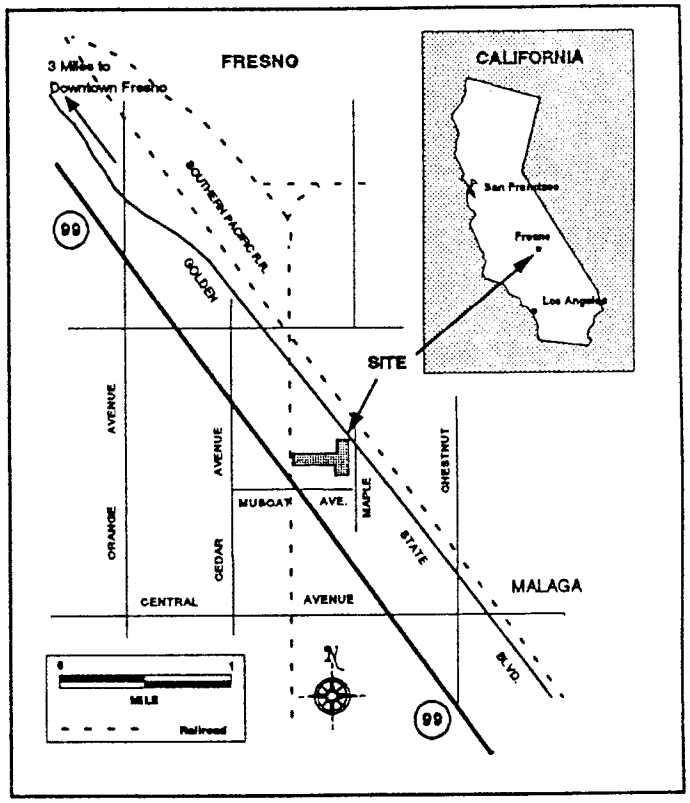

Figure 1: Site Location Map

SITE BACKGROUND

The seven-acre Purity Oil Sales site is located approximately one-half mile south of the Fresno city limits, in the township of Malaga. From 1934 until 1975, used oil was taken to the site for re-refining from entities such as service stations, automobile dealers, truck stops, manufacturers, utilities, military facilities, and state and local governments. The oil and refining process by-products were stored in ponds and storage tanks and were disposed of on-site in sludge pits. The facility ceased operation in the mid-1970s and the waste pits were filled with demolition debris.

State and federal investigations, conducted during the early 1980s, indicated that on-site soil and groundwater contained compounds that might pose a threat to human health and the environment. EPA included the site on the National Priorities List in December 1982, making it eligible for further investigation and cleanup under the federal Superfund program.

Between 1984 and 1986, the California Department of Toxic Substances Control (formerly the Department of Health Services) investigated the site. In 1986, EPA became the lead agency for the site and conducted additional investigative work from 1986 to 1992.

EPA issued a Remedial Investigation Report in October 1988. A Feasibility Study and a Proposed Plan for Soil and Groundwater were issued in April 1989. The Regional Administrator signed a Record of Decision for the Groundwater and Tanks Operable Unit on September 26, 1989.

EPA conducted two remedial actions in accor-

dance with the ROD. In October 1991, seven large above-ground steel tanks and their contents were removed from the site. In March 1992, private well users downgradient of the site were connected to either the Malaga County Water District or the City of Fresno water system.

EPA issued a Unilateral Administrative Order on September 30, 1991 to nine potentially responsible parties (PRPs) for design and construction of a groundwater extraction, treatment and disposal system.

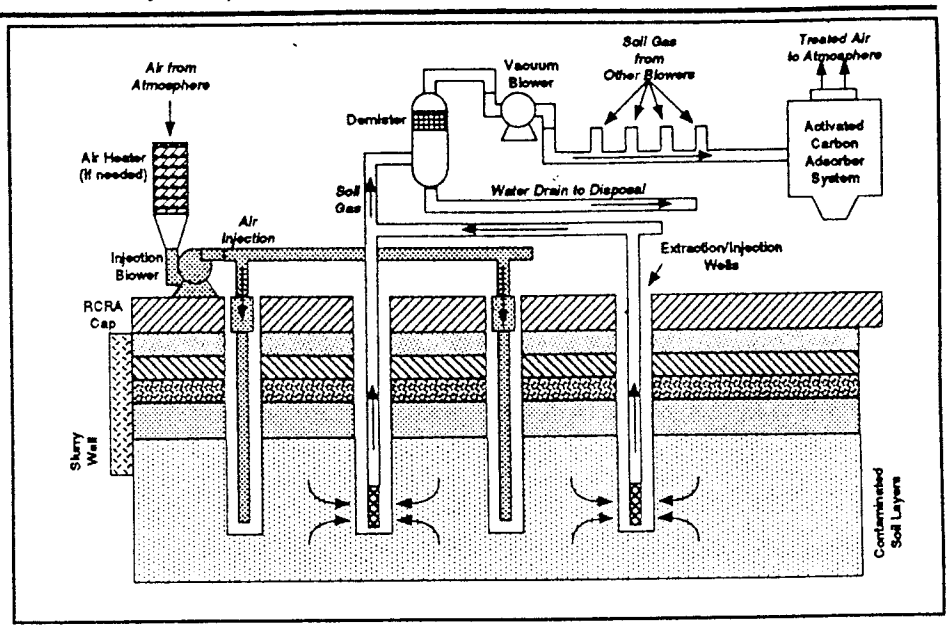

Figure 2: Soil Vapor Extraction System

A Revised Proposed Plan for Soil, including EPA's preferred alternative, was issued in June 1992. A public comment period was held from June 8, 1992 through July 10, 1992. A request for an extension to the comment period was granted, extending the comment period to August 10, 1992.

Groundwater Contaminants

Groundwater at the site is contaminated with volatile organic compounds (VOCs), semi-volatile organic compounds, iron and manganese. Nine VOCs including trichloroethylene, 1,2-Dichloroethane, 1,1-Dichloroethane, 1,1-Dichloroethene, benzene, vinyl chloride, carbon tetrachloride, cis-1,2-DCE and trans-1,2-DCE exceed federal and state drinking water standards. Iron and manganese exceed federal standards. The contaminated groundwater plume extends approximately 2,800 feet northwest of the site and is 800 feet wide and over 100 feet deep (ranging from 50 feet to 150 feet below the surface).

Soil Contaminants

The soil at the site contains high levels of lead and certain organic compounds. The buried waste contains benzene, toluene, polyaromatic hydrocarbons (PAHs), methylene chloride, phthalates, acetone, numerous solvents, metals, and other compounds. pour Research water on the crops nuclear By Products

The North Central Canal flows along the southern boundary of the site. Sediments along the slopes of the canal are contaminated with high concentrations of lead.

THE SELECTED CLEANUP PLAN

The selected plan to address soil contamination includes:

- Treat soils from 14 feet to the water table with SVE
- Excavate a trench 25 feet deep around the site and fill with bentonite and soil to form a slurry wall
- Cover the site with a multi-layer cap
- Construct a retaining wall to support the cap
- Enclose the North Central Canal in a reinforced concrete pipe

The remedy is estimated to take nine years to design, construct and operate. The total project cost is estimated to be $36 million.

Soil Vapor Extraction (Figure 2) is a process in which organic contaminants are volatilized from the soil, using a series of on-site air injection and extraction wells. The extracted Volatile Organic Compounds (VOCs) are then treated by carbon

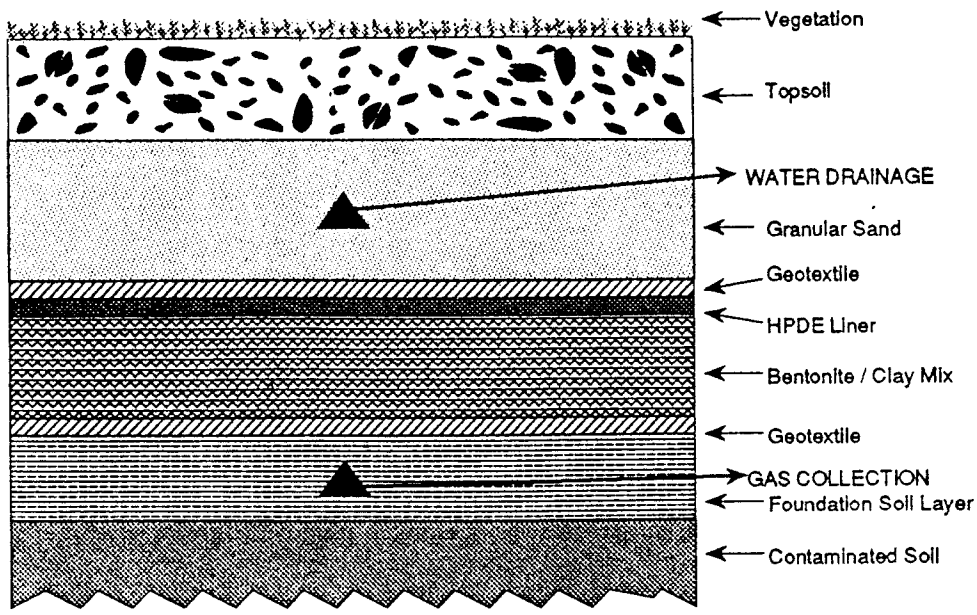

Figure 3: RCRA Equivalent CAP

adsorption prior to discharge to the air. Carbon adsorption is a treatment process where volatilized contaminants are forced through tanks containing activated carbon, a specially treated material that attracts the contaminants. The contaminants cling to the carbon, and the air leaving the system will meet air quality standards.

A RCRA equivalent cap (Figure 3) satisfies the requirements under the Resource Conservation and Recovery Act (RCRA) for closure of a hazardous waste landfill. Capping prevents direct human contact with the contaminants and also prevents continued leaching of soil contaminants into groundwater.

A slurry wall acts as an underground barrier, surrounding the contaminated soil. The North Central Canal will be enclosed in a reinforced concrete pipe to prevent leaching of canal water into the soil.

Soil from 0-14 feet is contaminated with oil and grease, which would greatly inhibit the effectiveness of SVE wells. Therefore, SVE wells will treat soil from 14 feet to the water table. EPA anticipates that approximately 25% of the VOCs from the upper layers of soil will be drawn down to the lower layers by the action of the SVE system and be treated. EPA estimates that 58 wells would be required to cover the site.

HOW EPA SELECTED THE CLEAN-UP PLAN

EPA selected the methods for addressing soil contamination based on nine criteria, or standards, including overall protection of human health and the environment, compliance with federal and state environmental laws and regulations, long and short-term effectiveness, reduction of toxicity, mobility and volume through treatment, cost, implementability, and state and community acceptance.

EIR
628.114
Purity
EPA
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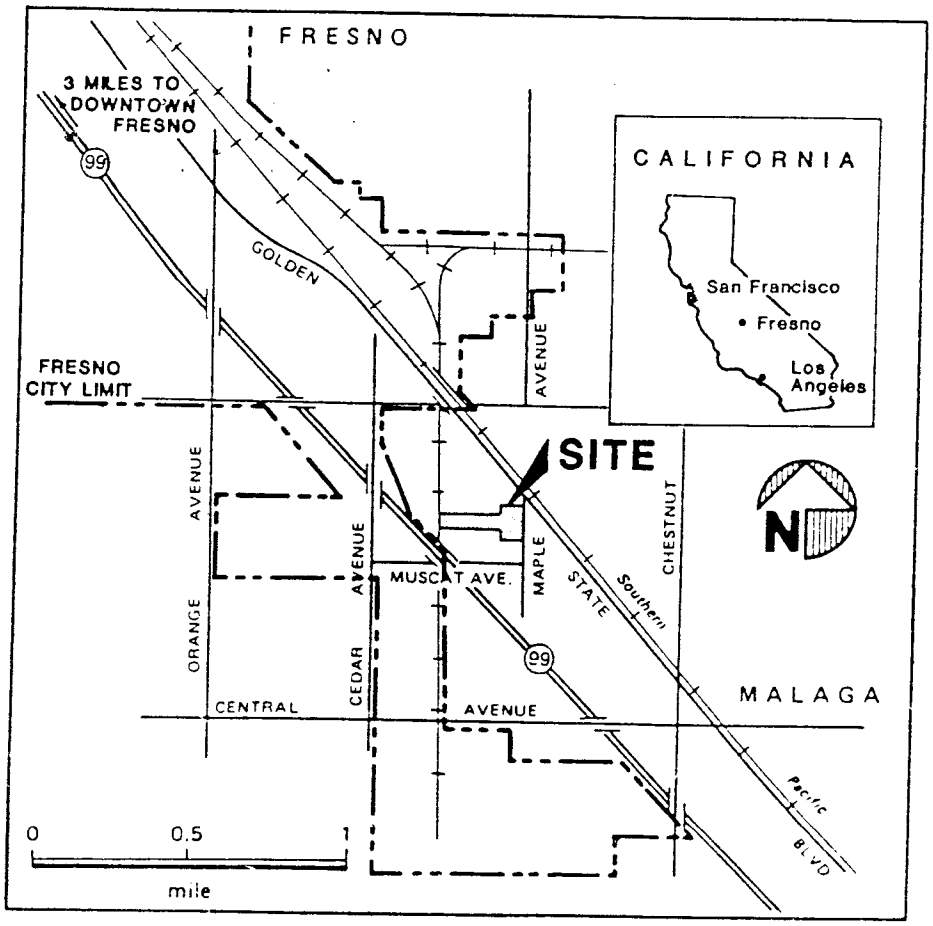
PURITY OIL SALES SUPERFUND SITE

EPA TO COMPLETE ENVIRONMENTAL INVESTIGATION

FRESNO, CALIFORNIA JUNE 1987

In the coming months, the U.S. Environmental Protection Agency (EPA) will be completing in-depth investigations of soil and ***ground-water**** *contamination at the Purity Oil Sales Superfund site in Fresno. The investigation will lead to a decision on what further measures are needed to protect public health and the environment. This fact sheet describes the work EPA plans to conduct this summer, and discusses the Federal* ***Superfund*** *program under which this site investigation and cleanup effort is being performed.*



Site History

From 1934 until the mid-1970's, the Purity Oil Sales Company reprocessed waste oil from gas stations, car dealerships, and other sources. The oily sludges from this reprocessing activity were disposed in pits that covered a large part of the 6.86 acre site. Investigations conducted so far by state and federal agencies have shown that the soil at the site is contaminated with **polychlorinated biphenyls** (PCB), lead, copper, zinc, and various **volatile organic chemicals**. Ground water beneath the site is contaminated with organic and **inorganic chemicals** including lead, copper, chromium, arsenic, mercury, and benzene.

The State of California discovered and had primary responsibility for investigating site contamination from 1980 to 1986. In 1980, the **California Department of Health Services (DHS)** discovered lead and PCB contamination of soil at the site. Also in 1980, the **Central Valley Regional Water Quality Control Board (Regional Board)** sampled surface water from the North Central Canal, which runs along the south border of the site. The canal was not contaminated at that time, nor has it shown contamination in more recent testing. In 1981, the Regional Board sampled ground water north of the site and found low levels of organic compounds. No drinking water wells in the area are contaminated. In February 1982, EPA and DHS installed **monitoring wells** on the site to further test for ground-water contamination. The air near the site also was tested for contamination. In July 1982, DHS collected air samples which indicated that the air was not contaminated.

In 1984, DHS released a draft Remedial Investigation report. The report made public DHS' findings that open oil ponds at the Purity site were leaking and causing contamination of soil and ground water beneath the site. From February to May 1985, EPA removed contaminated soil from these open ponds and covered them.

* Boldface words are defined in more detail in the glossary on page 4

County of FRESNO

Inter Office Memo

F1C

Date: December 22, 1981

To: Robert P. Withrow, M.D., M.P.H.
Director of Health

From: Clayton Auernheimer, R.S., Associate Director
Environmental Health System

Subject: Purity Oil

Dr. Jim Stratten, State Department of Health Services, called on December 18 to talk about the Malaga Community meeting which was held on December 5. Jim had been one of the speakers at the meeting, and as a result of the meeting, he feels that some type of study should be conducted. The study should have three phases: 1. The development of the control base so that they have a logical populas and area for the control group; 2. A census of the area around Purity Oil where they would ask open ended questions; 3. Possible physical examinations and additional questions very likely aimed at the mobile home park residents. He is thinking in terms of blood and urinary analyses of all the children in the park.

We talked about a number of other items, such as who was in control of the mobile home park. One of the immediate actions the State/County could take would be to excercise their power of emminent domain and vacate the mobile home park. We may want to think in terms of the mobile home park and whether or not it meets the minimum standards of the Mobile Home Park Act.

Since there were quite a few complaints about the site, including what Jim described as illness to two of the State workers who had been on the site mid-July, as well as the medical survey that Sequoia Health Clinic did all lead to an interesting problem which could be addressed by a health/medical survey as described above.

At the meeting in Malaga Jim Stahler from Hazardous Materials Division of the State Health Department indicated that it was a State problem. Jim asked who would be our medical contact, and I referred him to Donn Cobb Since Larry Oberti will be presenting the information from the Malaga meeting at our January 6 Director's Staff meeting at 10:30 a.m., we may want to touch briefly on the concerns of Dr. Stratten.

CA:nl

cc: Associate Directors
Norm Covell
Clint Jones
Larry Oberti

1 From your plan -- before we have all
2 this for long time, we had a committee here,
3 this is person right here and I'm the member.
4 And sometime we have a meeting here, promise
5 to us, we want to clean up right away, you
6 know, and take a long time to clean up.
7 And then after you say you wanted to
8 do some investigation and all this here, and
9 you say that some federal funds to some -- you
10 know, some type of thing, this cleanup here.
11 And take a long time. We no hear for long
12 time and now, you know, what going on here?
13 Because I can't understand some of the places,
14 you know. You own the property, the
15 government say, "you clean up this or else."
16 If you don't, go to jail or something.
17 Now, the government has all this
18 problem here and look like you no do nothing,
19 take a long time, say, years and years and
20 years, and look like they don't care if people
21 die or not. To me, I'm too old right now,
22 some of the young kids, you know, I have a lot
23 of grandkids and all the families here and
24 everything, you know. And I think anybody up
25 high, you know, like president or some

But this Family in Trailer's couldn't even read Just what were told They've gone to School/well

Fresno Bee 7/30/87

Jun '1.

Malaga cleanup will resume after study

By RUSSELL CLEMINGS
Bee staff writer

After more than two years of delays, the cleanup of the Purity Oil Sales hazardous waste site in Malaga is scheduled to move into a second phase as soon as the federal Environmental Protection Agency begins a new series of tests for soil and ground water contamination.

EPA officials said the new tests are needed because an earlier study, on which the state Department of Health Services spent $749,500, failed to determine adequately the extent of the pollution at Purity, a former waste-oil recycling plant at Maple Avenue and Golden State Boulevard.

The budget for the new EPA tests is nearly $1.2 million, money that will come primarily from the federal government's $9.5 billion Superfund program for cleaning up abandoned hazardous waste sites.

EPA's plans signal a resumption of work on the Purity site. It was stalled from early 1985, when EPA workers scooped up and hauled away contaminated dirt from several parts of the site, until early this year.

The delay was partly because of the controversy following an EPA audit that sharply criticized state actions at Purity and two other sites, and partly because Congress took a year to give the Superfund program a new supply of cash after its original funding ran out in October 1985.

EPA spokesman Terry Wilson said agency officials are making some last-minute revisions in their test plans for the Purity site, a process that will take at least a month. Wilson said he cannot predict when testing will actually begin at the site.

From 1934 until about 1975, the Purity site was used to recycle waste oil from service stations, car dealerships, military bases and other sources. It was closed after a fire in 1975 and sat unused until it was sold at auction in 1979 for back taxes.

After learning of the contamination at the site in 1980, the buyer sued to have the sale voided, and in 1982 a Superior Court judge ordered the state to reclaim ownership.

In late 1983 and early 1984, a state contractor visited the site to take samples of the soil and ground water, and later compiled the first study of the site, which was released in draft form in November 1984.

See Malaga, Page B4

Malaga

Continued from Page B1

The following spring, an EPA emergency response team went to the site. The workers carted away several barrels of contaminated soil and water left by the state contractor, and dug out 10 areas of contaminated soil, some of them to a depth of six feet.

EPA officials note in their plans for the new tests, however, that the emergency workers said they left behind heavily contaminated soil at greater depths.

In addition, both the state contractor and the EPA workers noted that wastes from the site appeared to have seeped or spilled over onto neighboring properties in several places, including the North Central irrigation canal, which borders the Purity site on the south. Tests of the canal water showed no dangerous chemical concentrations, however.

Although the Purity site is in an industrial area and is surrounded mainly by junkyards, it is bordered on the north by the small Tall Trees mobile home park, where dozens of children live. A chain link fence topped with barbed wire was erected around the Purity site in 1984 to keep the children out.

Past testing, including samples taken by the EPA emergency team, has shown high levels of several toxic metals and organic chemicals in the soil and ground water at the Purity site.

In one place near Maple Avenue, tests showed benzene at 388 parts per billion in the ground water. Benzene is a known cause of cancer in humans, and the state's "action level" for that chemical in drinking water is 0.7 ppb.

EPA officials said their new investigation is designed to determine the precise size of the underground plumes of contaminated ground water so that plans can be made to clean it up.

Tests also will be done on the remaining contaminated soil at the Purity site to determine how much of it there is and what chemicals it contains. The EPA work plan notes that the earlier state study did not even determine whether the soil was polluted enough to be classified as a hazardous waste, which would require special disposal procedures.

In addition, tests are planned on the contents of several large steel tanks that remain on the site. They contain unknown solids and liquids.

The LAB made mistakes and lied in there testing

There trying not to let us see But under Pick-A-Port

There's more tanks more toxics, They do be awhame

through Cause the water tables ~~on~~ ~~the~~ under these Rotten

grounds - Leaking In Sine - Purity

0312

PARA TODAS LAS FAMILIAS
DE MALAGA

PELIGRO

LES VOY A DECIR EN POCAS PALABRAS DE LOS PELIGROS DEL FIL TOXICOEN MALAGA. AL EMPEZAR DE LOS 80'S, TOXICOS SE METIERON EN SU AGUA. Y AHORA LA GENTE ESTAN QUEMADO LOS TOXICO EN INCENODOR. SI LOS MIEMBROS DE SU FAMILIA TIENEN CANCER DE CUALQUIER TIPO O SU NINOS DEBES, O NIETO SE HAN MUERTO. Y SI USTED TIENE DIFICULTAD RESPIRANDO, TAMBIEN HAY MUCHO MAS GEN COMO USTED QUE SUFREN DE ESTOS SYMPTOMAS DESDE LOS EMPEZAR DE LOS 80'S. Y YO DESCUBRI DE ESTOS 3 ANOS DE LOS PELIGROS DE LOS TOXICOS. POR FAVOR HAMAME CON SU HISTORIA. YO TENGO ABOGADOS QUE LO ASEN BIEN YA NO VA VER MAS MUERTES.

[redacted]

POR FAVOR NO TOME LA AGUA
LLAVE. SOLAMENTE DE BOTELLAS

I delived to Every House
trailer in Malaga "1996"

Hola, mi nombre es [redacted] a traer a usted y su familia un mensaje muy importante. Estos cortes de traileros, y arboles estan sobre terrenos peligrosos. Estos terrenos junto de usted dejan salia venenos peligrosos en el aire. El aire que usted y su familia respiran. No los puede ver, pero los respiran. Son peligrosos, no deje que sus hijos juegen en los terrenos. Si deja a sus niños jugar en los terrenos, se enfermaran. Yo tengo una historia en esto. Pero hay tismpo para explicar. Si usted o su familia andan enfermos piense en el piso que usted anda, si usted sufre de, Vomito, Sangre de la nariz, se le esta callendo el pelo, Bolas sobre el piel, Pnemonia, problemas con la vista, corazon, tumores, cancers, o debe enfermos, usted puede morir. Por favor, hable con sus vecinos y con los ninos; yo se que esta es su casa pero la ciudad no te va decir la verdad, tampoco los doctores pero yo encontre esperansa, [redacted] junto la frontera de mexico; Alli mi doctor te limpiara tu cuerpo de estos Pesticidos y otros toxicos en la sangre. Si usted comprende de los platico. Por favor hable con su vecinos. Su ciudad de Malaga es una ciudad de toxicos. Llamame si tiene preguntas [redacted]

TOME AGUA EN JARRO DE LA TIENDA

CUBRE SUS VENTANAS CON PLASTICO

Chemical Weapons Working Group

PO Box 467 Berea, KY 40403
(859) 986-7565 fax: (859) 986-2695
www.cwwg.org

Alabama
Burn Busters
Coosa River Basin Initiative
Families Concerned About Nerve Gas Incineration
SAFE

Arkansas
Arkansas CWWG
Arkansas Public Policy Panel
Pine Bluff for Safe Disposal
WAND

Colorado
Citizens for Safe Weapons Disposal
Sangre de Cristo Group of the Sierra Club

Indiana
Citizens Against Incineration at Newport
Newport Study Group

Kentucky
Common Ground
Concerned Citizens of Madison County

Maryland
APG Superfund Citizens Coalition
Coalition for Safe Disposal
Concerned Citizens for Maryland's Environment

Oregon
GASP
Oregon Clearinghouse for Pollution Reduction
Oregon Sierra Club
Oregon Wildlife Federation

Utah
Families Against Incinerator Risk
Utah Sierra Club
West Desert HEAL

Pacific
Pacific Asia Council of Indigenous Peoples
Pacific Friends Service Committee

Russia
Rainbow Keepers
Third Way Party
Union on Chemical Safety

(partial list)

Honorable Carol Browner
Administrator
U.S. EPA
401 M St.
Washington, DC 20460

Ms. Anne Goode
Director, Office of Civil Rights (1201A)
U.S. EPA
1200 Pennsylvania Ave. NW
Washington, DC 20460

August 28, 2000

Dear Ms. Browner and Ms. Goode,

I am submitting comments on behalf of the Chemical Weapons Working Group (CWWG) regarding the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits.*

The CWWG is a grassroots coalition working for the safe disposal of chemical weapons stored in the Pacific and the U.S. We are opposed to the U.S. Army's chemical weapons incineration program and instead promote safer, non-incineration technologies for disposal of these weapons of mass destruction. Each of the communities in which incinerators are currently operating or are being constructed is a community of color (either African-American, Native American, or indigenous Pacific) and is being disproportionately impacted by the facility. On the other hand, more affluent, Anglo communities are benefiting, or are likely to benefit, from non-incineration disposal technologies generally more favorable to the public.

CWWG member groups and individuals at two chemical weapons sites, Anniston, Alabama and Pine Bluff, Arkansas filed Title VI complaints. Experiences with these complaints provide the context for our comments.

1. The Anniston citizens' complaint was rejected by the Office of Civil Rights (OCR) because it arrived a day late. Upon filing an appeal to the complaint rejection, we found out that OCR had misplaced the complaint. Despite OCR's own error the appeal was denied. Construction of the incinerator is now near completion. In the time since OCR denied the appeal, the chemical weapons incinerator in Utah -- on which all other incinerators are modeled -- has experienced numerous near catastrophic events, including the repeated release of chemical warfare agent out of the smokestack and chronic worker exposures. At the same time, PCB contamination in Anniston's people of color and low-income communities has been found to be extensive. PCB levels for young Anniston children are some of the highest on record. The Alabama Department of Environmental Management (ADEM) is being challenged statewide for its inadequate attention paid to contamination levels in Anniston.

Environmental injustice runs rampant in Anniston; and EPA's OCR determined that the Title VI complaint was not worth its time because it arrived days late.

2. The complaint filed by CWWG member groups and individuals in Pine Bluff, Arkansas is pending review. In the years since that complaint was filed, the chemical weapons incinerator in the African-American city of Pine Bluff continues to be constructed. The Pine Bluff community is home to more than 20 industries which report toxic releases, and several paper mills known to release dioxins into the air. PCB contamination from Lake Pine Bluff remains a contamination source.

Environmental justice has not yet been served in Pine Bluff. Given OCR's track record, Pine Bluff residents have little reason to believe that justice will be served through the Title VI complaint process.

In this context, and by the principles of environmental justice, precautionary action and pollution prevention, following are our general comments on the Draft Guidance.

1. In general, we are disappointed in the overall nature of the Draft Guidance, and urge OCR to go "back to the drawing board." Determining complaints based on this Guidance will not serve the intent of civil rights legislation or President Clinton's Executive Order on Environmental Justice.

2. A great deal of ink is devoted to the discussion of "informal resolution" between affected citizen complainants and permit recipients. It is our experience that by the time a permit for a polluting facility has been issued, citizens have tried innumerable ways to resolve their problems. For these citizens and groups, to file a Title VI complaint is sometimes their <u>last</u> reasonable effort to gain the attention of EPA and other decision makers. The "informal resolution" language in the Draft Guidance does not reflect the serious nature of environmental injustice, and is insulting to individuals and groups who have worked for years attempting to protect their community members from continued contamination.

3. Regarding Timeliness of Complaints, the statement "OCR may waive the 180-day time limit for good cause" is so vague to be meaningless. We agree that complainants should strive to meet Title VI complaint guidelines. However rejecting a complaint for a barely-missed deadline, without spending even a minute's time reviewing the merits of the complaint, is itself unjust. Until OCR defines "good cause" in part by the merits of the complaint, or the logistical difficulty some citizens and groups have in filing a Title VI complaint; and until OCR can show that it has waived the deadline for such "good cause," the statement of deadline waiver will remain meaningless.

   Furthermore, OCR should practice what it preaches. Until OCR becomes accountable for its years upon years of complaint backlog, and itself meets its stated intent to act promptly to these complaints, it should not reject a complaint submitted shortly after the 180-day deadline.

4. Regarding Ongoing Permit Appeals or Litigation, OCR's "sit back and wait" approach to a complaint regarding an issue already being appealed in court does nothing to serve environmental justice. Further, the section's statement "encourag[ing] complainants to exhaust administrative remedies available under the recipient's permit appeal process and foster early resolution of Title VI issues" again implies that complainants may simply not be trying hard enough to resolve our problems. This paternalistic language,

and OCR's positioning itself for inaction during permit appeal cases, perpetuate the cycle of discrimination and injustice so pervasive in our federal agencies and courts.

5. We appreciate the section on Resolving Complaints in that it reflects the principles by which our groups function: consensus building, conflict resolution, etc. However, while OCR's offer to help with mediation, alternative dispute resolution, and other forms of informal resolution may be helpful to some, we suspect that the vast majority of complainants own offers to resolve the environmental injustices in their communities have already been flatly refused by permit recipients; OCR's emphasis in this area may therefore be a waste of time. For example, a complainant calling for the denial of an operating permit, or in our case, retrofitting of an unsafe technology with a new disposal process, complainants will not be interested in cracking a compromise if such an agreement would compromise the health of the local community.

   The approach outlined in this section seems to give more regulatory wiggle-room to permit recipients and less protective action to polluted communities.

6. Regarding the sections on Investigative Procedures and Adverse Disparate Impact Analysis, we strongly urge that EPA and OCR emphasize the Precautionary Principle, Pollution Prevention models and methods of Alternative Assessments. As long as citizens are burdened with proving harm from polluting industry; as long as industry is allowed to hide behind the shield of scientific uncertainty; as long as our federal agencies refuse to take action to prevent pollution rather than manage it; our children and future generations will continue to suffer needlessly from environmental injustice. OCR's stated reliance on "scientifically sound" analyses and studies, impact assessment factors and characterization of affected populations and comparison populations is more busy work and less action on blatant environmental injustices. Putting so much weight on these factors disempowers the same community members OCR is tasked with serving. The time sifting through this technical data could better be spent forcing polluting industry into clean production and safe waste disposal.

   Alternately, a Draft Guidance which emphasized the above mentioned principles, and which used Alternatives Assessment as a way to determine safe waste disposal solutions would truly foster environmental justice.

Respectfully submitted,

Elizabeth Crowe

Elizabeth Crowe
Chemical Weapons Working Group

CITY HALL
LOS ANGELES, CALIFORNIA 90012

August 28, 2000

Ann E. Goode, Director
Office of Civil Rights
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1201A)
Washington, DC 20460

Dear Ms. Goode:

The City of Los Angeles appreciates the opportunity to review and comment on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" (Recipient Guidance) and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Complaint Investigation Guidance) printed in the Federal Register June 27, 2000 (65 FR 39650). The City supports Title VI and programs to ensure that disparate impacts to low-income and minority groups are avoided and/or addressed. The City continues to develop policies and strategies to address environmental justice issues on a local level.

The draft Recipient Guidance and Complaint Investigation Guidance are substantial improvements over the previously released "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits." However, the proposed guidance must be further clarified and modified to ensure timely resolution of complaints to avoid unintended consequences. Detailed comments and recommended changes to the proposed Recipient Guidance and Complaint Investigation Guidance are attached. The key issues of concerns that remain to be addressed in the guidance include:

- Development of a more detailed methodology to assist recipient agencies in avoiding and addressing potential disparate impacts through integration of civil rights concerns into existing environmental and regulatory programs; and

- Development of a more efficient, predictable, consistent, and timely Title VI Complaint resolution process; and

received
9/20/00

- Ensuring full and open participation of all key stakeholders throughout the Title VI complaint evaluation and resolution process; and

- Placing greater emphasis on a recipient agency's underlying permitting processes and on cumulative impacts rather than on the issuance of individual permits and on impacts from individual facilities; and

- Addressing potential effects on local land use planning and decision-making authority.

The City of Los Angeles looks forward to working with the U.S. Environmental Protection Agency (EPA) to resolve these issues so that the communities, recipient agencies, and the permitted facilities can proactively avoid and/or address potential disparate impacts. The City appreciates EPA's attention to our concerns and staff is available to meet with EPA to further discuss our comments as appropriate.

Sincerely,

John Ferraro
President
Los Angeles City Council

County of Bernalillo

State of New Mexico

BOARD OF COUNTY COMMISSIONERS
BARBARA J. SEWARD, CHAIR
DISTRICT 4
TOM RUTHERFORD, VICE CHAIR
DISTRICT 3
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DISTRICT 1
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DISTRICT 2
LES HOUSTON, MEMBER
DISTRICT 5
JUAN R. VIGIL, COUNTY MANAGER

ONE CIVIC PLAZA, N.W.
ALBUQUERQUE, NEW MEXICO 87102
ADMINISTRATION (505) 768-4000
COMMISSION (505) 768-4217
FAX (505) 768-4329

MARK CARRILLO, ASSESSOR
JUDY D. WOODWARD, CLERK
IRA ROBINSON, PROBATE JUDGE
JOE BOWDICH, SHERIFF
ORLANDO VIGIL, TREASURER

July 14, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear EPA:

RE: Guidance Regarding Title VI of the Civil Rights Act of 1964

Bernalillo County has received information from the US Environmental Protection Agency about Title VI and recipient guidance. The Department of Justice coordinates the Title VI work and issued regulations requiring federal agencies to publish Title VI guidelines for program financial assistance. The County has previously received requests for information from the Department of Justice on its policies regarding Title VI. As a result, Bernalillo County has been proactive in ensuring full Title VI compliance. All federal grants applied for and received by Bernalillo County are administered with the provisions of Title VI. Also, the County has published "Bernalillo County Employment Relations Rules & Regulations" and these regulations address equal employment opportunity.

The information contained in the *Draft Recipient Guidance* will be useful for considering alternative approaches or activities the County may use when utilizing federal, state, or county funds. With particular regard to the Brownfields Program administered by the Environmental Protection Agency, the County will inform staff about the Web site address for obtaining information about Title VI.

Sincerely,

Thaddeus P. Lucero
Division Director Community Services

cc: Juan R. Vigil, County Manager
Richard Brusuelas, Director, County Environmental Health
Renetta Torres, County Human Resources Department

received
7/24/00

County of Bernalillo
One Civic Plaza, N.W.
Albuquerque, New Mexico 87102

ALBUQUERQUE
07-21-00

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

received
7/24/00

COMBUSTION ENVIRONMENTAL JUSTICE COMMITTE

RE: TO PROPOSED CHANGES BY THE E.P.A. ENVIRONMENTAL JUSTICE GUIDELINES WITH THE 60 DAY COMMENT

O.C.R.
OFFICE OF CIVIL RIGHTS
TITLE VI GUIDANCE COMMENTS, US ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF CIVIL RIGHTS (1201A), 1200 PENNSYLVANIA AVENUE NW, WASHINGTON, DC, 20460

O.C.R.
OFFICE OF CIVIL RIGHTS

RE: To proposed changes by the E.P.A. environmental justice guidelines with the 60 day comment:

On behalf of the COMBUSTION ENVIRONMENTAL JUSTICE COMMITTEE

A. It is our finding, through experience, that in cases of ongoing discrimination that 180 days are insufficient under EPA guidelines. There are also two additional categories that in the interest of justice we feel should be added.

1.

ABUSE OF THE PUBLICS TRUST BY STATE AGENCIES AND OFFICIALS AND FEDERAL AGENCIES AND OFFICIALS REGUARDING THE RELATIONSHIPS WITH THE PEOPLE.

2.

VIOLATIONS OF THE PUBLICS TRUST BY STATE AGENCIES AND OFFICIALS AND FEDERAL AGENCIES AND OFFICIALS .(we are not including the E.P.A. in this formal complaint.)

B. In the case of COMBUSTION INC. (MDL4000) in the Federal Court system, We believe that our case was and is a case of ongoing discrimination due to gag-Orders, deceit and misrepresentation that brought us from 1976 to present. We would like to lodge a complaint against the Louisiana State Department of Environmental Quality (D.E.Q.) and the Federal District court for the Western District of Louisiana, which we believe violated our civil rights and abused it's relationship with the people. We have attempted to include a clear view of the facts through the enclosed record excerpts of what happened at the COMBUSTION INC. HAZARDOUS WASTE SITE.

For an account of why we consider this to be an ongoing case Of discrimination by the State and Federal Government we have provided our version of events.

1. Violation of our rights began in 1976 on MAY 17th wherein the state issued a discharge Permit through the Wildlife and Fisheries (now D.E.Q.) to COMBUSTION INC.(there was very little or no notification of the discharge permit hearing provided to area residents .....SEE EXHIBIT 1.)

A. The D.E.Q. failed to adequately monitor the discharge coming from the site.
B. The D.E.Q. failed to test sediments downstream and or offsite.
C. The D.E.Q. failed to complete the testing of fish as requested by the dept. of Public Health as well as other flora and fauna those hazardous chemicals can Accumulate in.....(SEE MERCURY EXHIBIT 2.)
D. In seventeen years the D.E.Q. only tested the small fish one time and that was on AUGUST 19th and 20th of 1986. The larger fish downstream of the

COMBUSTION site were never collected , sampled or tested for MERCURY contamination. "MERCURY BIO-ACCUMULATES IN FISH."

We believe that this was done to protect the State from liability concerning the discharge permit that was issued on MAY 17th, 1976. We further feel this was a violation of the "public trust of the people."

E. There was a court gag order imposed and class members were not allowed to view the evidence at QUALITY LITIGATION SUPPORT - (Q.L.S.) as Q.L.S. was for attorneys only.

Without being an attorney our only way to get to review evidence at Q.L.S. was to file pro-se and represent ourselves in an appeal....(SEE EXHIBIT 3- KAREN HOLMES TRANSCRIPT DEC.9TH 1997)

2.In the rulings of the Federal District Court of JUDGE RICHARD HAIK, of the Western Court of Louisiana, the court discriminated against all the females in the class action litigation by not providing a GYNOCOLOGIST as an expert witness as the GYNOCOLOGIST Provided had altered credentials (SEE EXHIBIT 4.) There was discrimination against all the children of the class action litigation by not providing a PEDIATRICIAN as an expert witness.(We feel these were violations of our civil rights – by violation of the" public trust of the people".)

3.There were numerous conflicts of interest, lack of expert testimonies, incorrect data and misrepresentation as well as discrimination .We attempted to bring forth these deficiencies .The Federal Judge, in this case however provided a "war chest" totaling over 3 million dollars to legal counsel for plaintiff and defendant attorneys, as we could not obtain counsel to go up against such a huge legal "war chest". We feel this act constituted a violation of our civil rights and should be considered "abuse of the trust of the people" (SEE EXHIBIT 5.)

A. By awarding the bulk of the 130 million dollar class action lawsuit (70) million to the attorneys and court costs to the detriment of the classes of "women and children". We feel this was a violation of our civil rights and also an "abuse of the trust of the people" (SEE EXHIBIT 5 .)

B. I n the District Court ruling the judge, by giving our attorneys the "war chest" deterred all outside help and left us unable to procure outside legal counsel, leaving us in a pro-se position as our only choice.

C. The fire that was set FEB. 19th 1992 at the COMBUSTION site was depicted as arson, but the objective was reached as the fire contaminated all the evidence reducing our 13-billon lawsuit to 130 million, for the class of 10,000 plus.(SEE EXHIBIT 6.)

D.

Bellow is an abbreviated version of our discrimination timeline giving an

Overview of how long it can take to prove ongoing discrimination under TITLE VI.

TIME LINE:

1. **1973 pits began to be dug onsite. "EDWARDS ADMIN. IN OFFICE"**
2. **1976 MAY 17th, discharge permit granted. "EDWARDS ADMIN. IN OFFICE".**
3. **1970's the site began to build and numerous residential complaints started to be logged ranging from foul smells, spillages, fish kills to sick and dead animals. "EDWARDS ADMIN. IN OFFICE".....(SEE EXHIBIT 7.)**
4. **1980 high levels of MERCURY were found onsite. And the high levels of MERCURY significantly declined after the defense contractor ERM SOUTHWEST was allowed to perform sampling and testing of the site in 1986 "EDWARDS ADMIN. IN OFFICE".**
5. **1986 class action hazardous waste lawsuit was filed, ERM SOUTHWEST defense contractor was appointed to take samples onsite as well as do other methods of testing "EDWARDS ADMIN. IN OFFICE".(SEE EXHIBIT 8.)**
6. **1988 – 1992 COMBUSTION site put on superfund list for clean up.**
   A. **The E.P.A. region 6 needed remediation investigation completed by the defense contractor ERM SOUTHWEST as prior remediation was inadequate, and no split samples were taken.**

   1992 JAN. 19th

   "EDWARDS ADMIN. IN OFFICE —(see region 6 file Kathy Gilmore 89-92)

   B. **1992 FEB. 13th Region 6 notification to the D.E.Q. that the E.P.A. (Environmental Protection Agency) would be taking the lead in the remedial investigation (R.I.) clean up, due to D.E.Q. inaction.**

   C. **1992 FEB. 19th Fire was reported as a suspected arson, starting in the pit area destroying evidence to be tested during the new R.I. for levels of contamination; as a result of the fire the 13 billion dollar lawsuit became 130 million to be split among the class of 10,000 plus. This brings into question the real worth to someone who could have profited considerably for starting this fire. (SEE EXHIBIT 5 .)**

   D. **We, THE COMBUSTION ENVIRONMENTAL JUSTICE COMMITTEE have tried to get a copy of the complete arson report from the State Fire Marshals Office (file # 32-20-12-04-92) to see who was responsible for setting the fire on FEB. 19th 1992, to no avail. We feel this was a(Violation of the public trust of the people by State Agencies and Officials.)**

   E. **The full ramification of the fire that destroyed the combustion site And its evidence became clear during the courts "pre-conference"**

FAIRNESS HEARING of AUGUST 1st - 15th of 1997 in which the Class Members were pitted against their own attorneys for the available funds left. (SEE EXHIBIT 9. REBECCA SMITH)

F. THERE ARE NUMEROUS OTHER DOCUMENTS SHOWING THAT THE ENTIRE COMBUSTION ERA FROM ITS INCEPTION TO ITS CONCLUSION WAS PLAGUED WITH CONFLICTS OF INTEREST AND CIVIL RIGHTS VIOLATIONS.

G. FURTHERMORE, WE FEEL THAT OUR APPEALS :

1. **HOLMES # (97-31206)**
2. **TALLEY # (97-31041)**

TO THE 5TH C.C.O.A. (CIRCUIT COURT OF APPEALS)WERE DISMISSED DUE TO A CONFLICT OF INTEREST AND A VIOLATION OF OUR CIVIL RIGHTS.

We have decided to take our appeal to the highest court from which there is no appeal "THE AMERICAN PEOPLE" through the Office of Civil Rights we hereby appeal for CHANGE, FAIRNESS, TRUTH AND REAL ENVIRONMENTAL JUSTICE, That cannot occur without a full and complete investigation about who was responsible for setting the fire of FEB. 19th 1992 at the COMBUSTION INC. Site. The fire destroyed the evidence and the class action lawsuit to the detriment of over 10,000 class members. We do ask that the investigation be performed by the E.P.A. CIVIL RIGHTS DIVISION or deferred to the F.B.I. In light of the current events and our time line(SEE EXHIBIT 10) we need to know if the administration of "EDWIN EDWARDS" has any knowledge about who started the fire of FEB. 19th 1992, since that administration was in office during the investigation of the fire.

It is the desire of the COMBUSTION ENVIRONMENTAL JUSTICE COMMITTEE that this comment contained herein, be deemed true to the best of our knowledge and be recognized in the proposed changes by the E.P.A. guidelines With the 60 day comment period and filed as a formal written complaint and be forwarded to the proper office.

SINCERELY;

PRESIDENT

KAREN V. HOLMES

Karen V. Holmes

VICE PRESIDENT

JOLE E. TALLEY

Joel E. Talley

DATE: 8/06/2000

August 9, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington DC 20460

Gentlemen:

Please attach this address list to the "COMBUSTION ENVIRONMENTAL JUSTICE COMMITTEE" proposed changes to the E.P.A environmental justice guidelines with the 60 day comment.

The enclosed list of addresses was inadvertantly left out of our package that was mailed by Priority Mail on August 8, 2000, with a delivery confirmation which was numbered as 03006000000272107970.

Thank you for taking the time to add this list to our package.

Sincerely,

COMBUSTION ENVIRONMENTAL JUSTICE COMMITTEE

Karen V. Holmes, President
[redacted]
Denham Springs, LA 70726
[redacted]

Joel E. Talley, Vice-Pres.
[redacted]
Denham Springs, LA 70726
[redacted]

pt
Enclosure: as stated

received 8/15/00

ADDRESS LIST:

1. KAREN V. HOLMES
[redacted]
DENHAM SPRINGS, LA. 70726
[redacted]

2. JOEL E. TALLEY
[redacted]
DENHAM SPRINGS, LA. 70726
[redacted]

3. FEDERAL DISTRICT COURT
WESTERN DISTRICT
CLERK OF COURT
ATTENTION:
HONORABLE JUDGE
RICHARD T. HAIK
800 LAFAYETTE STREET
LAFAYETTE, LA. 70501

4. LA. DEPARTMENT OF ENVIRONMENTAL QUALITY (D.E.Q.)
P.O. BOX 82178 BATON ROUGE, LA.
ATTENTION: J. DALE GIVENS SECT.
(225) 765-0370 LEGAL AFFAIRS

5. LOUISIANA FIRE MARSHAL OFFICE
5150 FLORIDA BLVD.
BATON ROUGE , LA. 70806
(225) 925-4911

Hazardous Substances Public Health
Volume 6, Number 1 • Winter/Spring 1996
Protecting the Public Health

States Issue a Record Number of Health Advisories

Fish Contaminated with Mercury Is a Rising Health Concern

Forty-six states issued public health warnings in 1994 advising citizens to avoid or limit fish consumption because of chemical contamination in thousands of water bodies across the country—a 20% increase from the previous year. Sixty percent of the health warnings against fish consumption are related to mercury contamination of the fish, reports the US Environmental Protection Agency (EPA).

"Forty percent of the nation's rivers, lakes, and streams are not suitable for fishing and swimming because of pollution—this is an alarming health concern," said EPA's administrator Carol Browner. During 1994, large portions of the nation's coastal areas and all of the Great Lakes had fish advisories in effect. Most of the fish advisories applied to noncommercial fishing. Of the 46 states, 7 (Maine, Massachusetts, Michigan, Missouri, New Jersey, New York, and Florida) issued statewide advisories in 1994 against eating fish from state waters because of chemical pollutants such as mercury, PCBs (polychlorinated biphenyls, a now-banned electrical insulator), the pesticide chlordane, dioxins, and the banned pesticide DDT. In 1995 New Hampshire and Vermont issued similar statewide fish advisories.

Fish advisories are recommendations to limit consumption of certain

Sixty percent of health warnings against fish consumption are related to mercury contamination.

species of fish taken from waters where chemical contaminants are present. Each advisory is different: an advisory may recommend no consumption or limited consumption. Women who are pregnant or who are breastfeeding their infants are at greater risk from eating contaminated fish. Other groups are at risk because they consume large quantities of fish: Native Americans, some segments of the Asian-American community, and [illegible]

fishing to provide food for their families.

The largest sources of mercury contamination are air emissions fro power plants that burn coal and incinerate wastes containing mercu or mercury-containing products an industrial facilities that use mercury in their processes. Once released in the atmosphere, mercury can be deposited in water directly or throu runoff (eliminated waste products from manufacturing processes). On in the water, the mercury can be converted by bacteria to a carbon-containing or organic form of mercur called methylmercury. Methylmercu is highly toxic and accumulates in fi flesh. Long-term exposure of humar to organic mercury can permanentl damage the brain, kidneys, and developing fetuses. (Also see related article on the impact of inorganic mercury, "An Old Danger in Need o New Public Education Efforts," page 4).

The general public can call state government agencies (in most cases the state health department) for information about state fish advisories. EPA also offers the "National Listing of Fish Consumption Advisories" to the public free of charge on five computer (PC-based, 3.5-inch) diskettes. The database contains information on each body of water fo which an advisory has been issued, including the type of advisory (such as restricted consumption bans), fis species, contaminating chemicals, population segments affected, issue dates, and state government agency contacts and phone numbers. The database may be used to generate maps for specific geographic location to help monitor fish contamination.

For copies of the diskettes, request document number 823-C-95 001 from EPA's National Center for Environmental Publications and Information, 11029 Kenwood Road, Cincinnati, Ohio 45242; telephone [illegible]

LOUISIANA WILD LIFE AND FISHERIES COMMISSION
DIVISION OF WATER POLLUTION CONTROL
DRAWER FC, UNIVERSITY STATION
BATON ROUGE, LOUISIANA 70803

December 30, 1975

To: Robert A. Lafleur, Chief

From: M. B. Watson, Biologist

Subject: Fish Kill
West Colyell Creek and Dubose Trucking Company

On December 17, 1975, an inspection was made of Dubose Trucking Company to determine what action had been taken in response to a Notice of Determination issued to this company. The drainage canal from the pit storage area was inspected at the Milton Road Bridge. There was still a considerable amount of oil in the canal and some was flowing through the culvert.

The drainage canal recrosses Milton Road south of the company and flows in to Beaver Branch of West Colyell Creek. Oil was found in the canal at the point of the recrossing of Milton Road and also in Beaver Branch at the Milton Road Bridge. The water in Beaver Branch had a highly organic smell and was dark grey-green. Obstructions in the branch above the bridge has caused some pooling and the pooled areas were covered with oil. Bubbles were also present on the surface, possibly from gas generation in the septic water.

Under the bridge, the stream is restricted and should be aerating due to the turbulent flow, however, below the bridge the dissolved oxygen content of the water was zero, the pH was 6.9 and the temperature was 12°C. Saturation for 12°C is 10.8 ppm. A sample of this stream was collected for oil and grease content and for BOD analysis.

After the inspection of Beaver Branch, West Colyell Creek was examined at the bridge on Louisiana Highway 1027. At this point, dead fish were found and catfish were seen piping. There was an oil sheen on the surface, the water looked similar to that seen in Beaver Branch and, where the water was flowing over submerged obstructions, a white foam was forming. A water sample was collected here for BOD analysis, the dissolved oxygen content was zero, the pH was 6.9 and the temperature was 13°C.

To determine the extent of the septic water, samples were collected at bridges over West Colyell Creek at U.S. Highway 190 and I-12. At U.S. 190, the temperature was 13°C, the pH was still 6.9 and the D.O. was zero. An oil sheen

EXHIBIT
#10 Watson
mwk 3/15/91

CERTIFIED COPY
D. Jacobs
4.14

STATE OF LOUISIANA
REAM CONTROL COMM! ION
P. O. DRAWER FC
UNIVERSITY STATION
BATON ROUGE, LOUISIANA ~~xxxx~~ Zip 70893

00018

May 17, 1976

Dubose Oil Products
Route 1, Box 428
Denham Springs, Louisiana 70726

Attention: Mr. Earl G. Dubose

Gentlemen:

This is to officially inform you that the Louisiana Stream Control Commission, at its meeting held on April 22, 1976, granted your permit to discharge treated waste, as characterized in presentation to the Commission, from existing waste oil reclamation facility via natural drainage ditch to Beaver Branch of West Colyell Creek. BOD_5 and Oil and Grease are to be monitored a minimum of once per month by grab sample and reported quarterly to this office. The required monitoring frequency of these two parameters is increased to at least biweekly during periods of above normal pump down of treatment ponds due to excessive rainfall or otherwise.

Federal regulations require a Spill Prevention Control and Countermeasures Plan for this type facility. Information on these requirements can be obtained from the United States Environmental Protection Agency, Region VI, 1600 Patterson, Dallas, Texas 75201.

You are also advised that any change in either the quality or quantity of the effluent will require the submission of a new discharge application.

The Commission in approving these waste treatment facilities is of the opinion that the discharges will not violate water quality standards of the State of Louisiana. Therefore, in accordance with provisions of Louisiana Revised Statutes of 1950, Title 56, Section 1439(5), this is your letter of certification from the Stream Control Commission that the installation complies with Section 21(b) of the Federal Water Quality Act of 1970, and Sections 401 and 402 of Public Law 92-500, the Water Pollution Control Act Amendemnts of 1972.

Louisiana statutory authorization for this letter is contained in Title 56, Chapter 3, Part 1 of Section 1439(5).

Dubose Oil Products
May 17, 1976

Enclosed is copy of a public notice to be run by you one (1) time in the official state journal, the BATON ROUGE STATE TIMES, at your expense.

Very truly yours,

Robert A. Lafleur

Robert A. Lafleur, Executive Secretary
Louisiana Stream Control Commission

fbr

cc: Simmons J. Barry & Associates
Post Office Box 1708
Baton Rouge, Louisiana 70821
Attention: Mr. E. R. Cox, Jr.

Denham Springs News 11/20/97

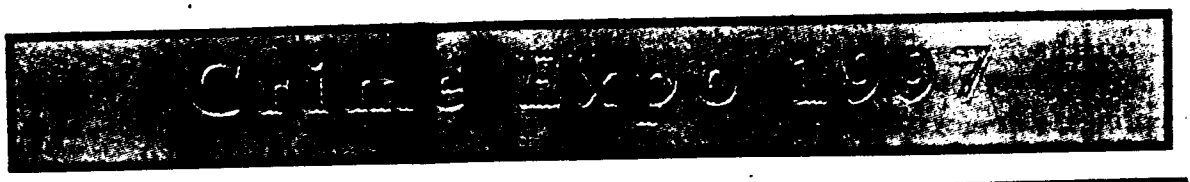
Combustion plaintiffs complain over lack of access to settlement papers

Alice Dowty

WALKER — Two Combustion class action plaintiffs say they were not allowed to view the evidence relating to a proposed $3.5 million settlement with Chevron and Cooper Gilder Chemical, Inc.

A notice sent out to all 10,000 class members by the court states that "the full details of the proposed settlement" are available at the Plaintiffs Steering Committee office in Baton Rouge, but plaintiffs Joel Talley and Karen Holmes said employ-

COMBUSTION
Continued on Page 4A



Priscilla Williams (above), a nurse at the Denham Springs Health Unit, gives Ruby Walock a flu shot at the Crime Expo at North Park Friday. In addition to free flu shots, the expo featured a free lunch, free seminars and over 20 vendors offering free publications. Senior citizens listen to Sheriff Willie Graves (right) as he discusses security issues.

News photos by David Normand

the whole story behind
call."

Kinchen said she was m
able beyond words when
realized that the money
not in her purse, "but it's
return of the money that
always remember," she s
"This will always be
Thanksgiving that reinfo
our faith in the goodnes
people."

Out of the $8,000
which was lost, $7,400
returned.

"We don't know whe
our caller kept $600
whether there is more to
story than that," Kinchen
"We would like him to k
how grateful we are. He
read this newspaper, so
hope he reads this. Thank
thank you very much."

Kinchen spent a mise
five days between the tim
discovered the loss of
money and the time it
returned.

"There was this initial
belief," Kinchen said, "
any minute I'd remem
where the money wa
looked and looked; I
over in my mind every
I'd taken. Then I had to
my husband the money
gone and that made it rea
husband never lost his te
never lectured me. I sup
he saw how up miserabl
upset I was.

Searching for the m
became an automatic, o
sive part of her life for
days.

"I cried for three da
couldn't eat. I kept remi
myself that money is
money. And I thought
people who lose the r
important things in
Kinchen said. "I th
about parents who lose a
and how unbearable the
must be. I couldn't
myself from searchin
hoping that I'd find w
was looking for. Pa
would never stop lookin
a child. It must become

$8
Continued on Pag

Combustion

(From Page 1A)

ees at that office said they could not hand over the documents.

A hearing is scheduled in federal court Dec. 9 to decide whether to accept the proposed $3.5 million settlement. Plaintiffs who wish to object must mail written comments in advance and must appear in court Dec. 9, according to the court notice. Objections and the reasons for those objections must be mailed no later than Dec. 1 to Clerk of Federal Court, 106 J.D. Waggonner Jr. Federal Building, 500 Fannin Street, Shreveport, Louisiana, 71101.

"We cannot evaluate this final settlement if we are not allowed to view the documents," Talley said. "This is the end of an 11-year-old case and the end of our hopes for a jury trial," Talley said.

Talley and Holmes say they were interested in reviewing the documents because they had heard that Chevron was probably the single largest contributor of waste oil to the Combustion site.

"I have been told that 45 percent of the Combustion oil might have come from Chevron," Talley said.

"I don't believe we have anything to lose by objecting," Holmes said, "because I do not believe we will ever see a penny of this final settlement. The judge is already getting suggestions from the lawyers about other ways to spend it, along with the money left over from the reserve funds."

Sludges from the unlined pits at Combustion "contained extremely high levels of volatile organic solvents, both of the aromatic type such as benzene and toluene, and of the halogenated type such as tetrachloroethylene and chlorobenzene," according to a written report by plaintiffs' expert witness Dr. Donald Rosebrook.

The high zinc content "would indicate that some client of the operation has one or more zinc compounds in the waste. Such a client could be Chevron's Belle Chase Additives Plant," Rosebrook wrote.

Samples of leached sludge showed minimal zinc, suggesting that it was "tied up in organic compounds such as the zinc diorganodithiophosphates produced by Chevron," Rosebrook wrote.

"We found technical documents like this at the Department of Environmental Quality, but we still have no way of getting the complete array of evidence concerning Chevron without the cooperation from officers of the court," Holmes said. "Without those documents, I don't see how we can make an informed decision about the fairness of a $3.5 million settlement."

Previous settlements with other defendants resulted in a total of over $127 million, according to court records.

About $58 million out of $127 million is now being disbursed to about 10,000 plaintiffs, most of whom never lived or worked near the site, but were eligible to enroll because they were parish residents.

"That does not seem fair to those of us who did live near the site while it was active," Talley said. "The hearing Dec. 9 is our last opportunity to address fairness issues before this court."

U.S. District Judge Richard Haik has written about standards for class settlements.

"The cardinal rule that a court must follow when considering final approval of a proposed class settlement," Haik wrote, "is to ensure that the proposed settlement is 'fair, reasonable, and adequate.' More particularly, the Fifth Circuit has described the court's duty as ensuring that the settlement is in the interest of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression."

Concerning the complexity of the case, Haik wrote that he had been told that if all the files from the Plaintiffs Steering Committee and from the defendants' offices were combined in the courtroom, the entire room would be filled.

"It is the estimate of this Court that paper would flow into the Courthouse corridors as well," Haik wrote.

More than 2,300 party-defendants have been involved in the case and about 530 attorneys filed and argued motions, according to court records.

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED

JAN - 9 1998

ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.	*	ACTION NO: 94MDL4000
	*	ALL CASES
	*	JUDGE HAIK
	*	MAGISTRATE JUDGE TYNES

****

REPORTER'S OFFICIAL TRANSCRIPT OF THE FAIRNESS HEARING PERTAINING TO THE SIX SUPPLEMENTAL SETTLEMENT AGREEMENT BEFORE THE HONORABLE RICHARD T. HAIK UNITED STATES DISTRICT JUDGE

December 9, 1997

ORIGINAL

MARY V. THOMPSON
OFFICIAL COURT REPORTER
161 FEDERAL BUILDING
705 JEFFERSON STREET
LAFAYETTE, LOUISIANA 70501

Proceedings Recorded By Mechanical Stenography; Transcript Produced By Computer

1 correct?

2 MS. HOLMES: Yes, sir, you are. I was here for

3 the April 18th hearing, but at that time I did not really

4 know enough -- I didn't have the forthwith (sic) and I was

5 not informed by any of my PSC attorneys as to what was

6 actually going on.

7 THE COURT: Nor did you make yourself available to

8 those things prior to that date; am I correct?

9 MS. HOLMES: I was always available.

10 THE COURT: No, no. By that I mean, you didn't go

11 and do the research that you've done at this point?

12 MS. HOLMES: I had no idea it existed and the

13 depository wasn't open to us at this time. QLS was not

14 available to us then.

15 THE COURT: So the answer to my question is you

16 did not file any type of objection to the first five?

17 MS. HOLMES: No, sir, I did not.

18 THE COURT: Thank you very much.

19 **MS. HOLMES: (CONTINUING)**

20 Q. And if I may proceed, we have a thing that is

21 called Exhibit K, and it comes out of Exhibit A in the

22 preliminary settlement agreement. And one of our major

23 beefs was because everything was sealed in envelopes for

24 in camera review before the Court, we didn't really know

25 enough on just the merits of Chevron really to be standing

1 THE COURT: Well, 12,300 and something claimants.
2 MR. TALLEY: Exactly. And it said you can review
3 that by coming to the office on Third Street and you'll be
4 able to see it in its entirety.
5 THE COURT: See what?
6 MR. TALLEY: The Sixth SPSA. So we got there and
7 it was not there. It was not available. So then we had to
8 go to the claims office. You know, where they were issuing
9 the checks. Now, if there was 12,300 and whatever you
10 quoted people that went there, they would have left there
11 empty handed. They would not have been able to see them.
12 THE COURT: Well, the number of people who went
13 there to file -- to pick up their checks, is that what you
14 are talking about?
15 MR. TALLEY: No, sir. I was talking about to see
16 the -- it says you can see the complete -- for a complete
17 copy of the sixth SPSA come to the office at Third Street,
18 downtown Baton Rouge.
19 THE COURT: Okay. Are you telling me it was not
20 there?
21 MR. TALLEY: Yes, sir, exactly. And I have a
22 letter here we signed. Ms. Holmes and I went there to
23 review it.
24 THE COURT: Well, I think it was there. But
25 anyway from there they sent you somewhere else, you said?

1 MS. SMITH: Rebecca Smith.
2 THE COURT: All right.
3 MS. SMITH: Okay. And I just want to know how
4 this can be a fairness hearing when I have proof right
5 here -- and I have a copy of Mr. Talley's letter that came
6 back with the stamp on it. He didn't lose the stamp. And I
7 have --
8 MR. UNGLESBY: I'll get it from you, ma'am.
9 MS. SMITH: Over 12,000 people were sent the wrong
10 address.
11 MR. UNGLESBY: What part do you want me to see?
12 MS. SMITH: This is the address for the Federal
13 Clerk of Court. This is the one Mr. Talley sent it to.
14 This is the correct address for the federal court.
15 MR. UNGLESBY: Okay.
16 MS. SMITH: So 12,000 people were sent the wrong
17 information.
18 THE COURT: All right.
19 MR. UNGLESBY: Help me, here.
20 THE COURT: This is off the record.
21 (Off-the-record discussion.)
22 THE COURT: Let's go back on the record. The
23 question is?
24 MR. UNGLESBY: Let me show you this stuff. She is
25 right -- or something is wrong.

COPY

SUMMARY OF PLAINTIFFS' EXPERT REPORTS AND DEPOSITIONS

A brief summary of each report is attached

1. Donald D. Rosebrook, Ph.D. - Environmental Chemistry
   a) main report, dated April 21, 1995, four (4) binders.
   b) report regarding specific defendants (MacKenzie Chemical Works and Monsanto Chemical Company), dated April 20, 1995, one (1) binder.
   c) report regarding specific defendants (Ashland Chemical Company, Kaiser Aluminum and Chemical Company and Union Carbide Corporation), dated April 20, 1995, one (1) binder.
   d) Deposition Dates: 1) July 11, 1990; 2) November 14, 1990; 3) February 12, 13, 14 (proceedings) & 15, March 4, 5, 19 & 20, April 16, May 29 & 31, 1996 (Volumes I-X)

2. Larry Bankston - General Real Estate Appraiser
   a) main report, undated, one (1) binder.
   b) supplemental report, dated May 31, 1995, one (1) binder.
   c) Deposition Date: June 7, 1996

3. Dr. Isaiah Warner - Environmental Chemistry
   a) report dated May 1, 1995, one (1) binder.
   b) Deposition Date: April 24, 1996

4. Dr. John Bolter - Neuropsychology
   a) report dated May 1, 1995, one (1) binder.
   b) Bolter Deposition Date: June 14, 1996

5. Dr. Patricia M. Williams - Anatomy/Occupational Toxicology
   a) main report, dated May 5, 1995, one (1) binder.
   b) supplemental report, dated June 1, 1995, six (6) binders.
   c) supplemental report, dated December 5, 1995, one (1) binder.
   d) Williams Deposition Dates: April 10, June 6, 1996

6. Dr. Richard A. Parent - Toxicology
   a) report dated May 25, 1995, two (2) binders.
   b) Deposition Dates: 1) November 9, 1990; 2) April 25, 1996

7. Dr. Frank Gardner - Hematology and Oncology
   a) report dated April 25, 1995, one (1) binder.
   b) Deposition Dates: March 4 & 5, June 18, 1996

8. Karl Dicke, M.D., Ph.D. - Hematology and Oncology
   a) report dated May 5, 1995, one (1) binder.
   b) Deposition Date: June 12, 1996

94-md-4000
(CASE NO.)
U. S. DISTRICT COURT
WESTERN DISTRICT OF LA.
FILED IN EVIDENCE
8-15-97
(DATE)
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

PLAINTIFF'S EXHIBIT
USDC [redacted]
[redacted] NO.
EXHIBIT NO. DH-33

page 12.1

9. Stanton Coerr - Air Modeling
   a) report dated May 1, 1995, one (1) binder.
   b) Deposition Dates: 1) November 14, 1990; 2) April 3 & 15, 1996

10. Dr. George Worm - Statistician
   a) report dated May 25, 1995, one (1) binder.
   b) Deposition Date: No Deposition

11. Alan R. Hirsch, M.D., F.A.C.P. - Neurology
   a) report dated June 20, 1995, three (3) binders.
   b) Deposition Date: April 14, 18 & 19, 1996

12. Dr. Norman Lewis - Chemical Engineering
   a) report dated April 17, 1995, one (1) binder.
   b) Deposition Date: No Deposition

13. Lisa A. Morrow, Ph.D. - Neurology
   a) report dated June 18, 1995, one (1) binder.
   b) Deposition Dates: April 20, 1995; May 9, 1995

14. Christopher M. Ryan, Ph.D. - Neurology
   a) report dated May 18, 1995, one (1) binder.
   b) Deposition Date: No Deposition

15. Marvin Legator, Ph.D. - Environmental Toxicology
   a) report undated, two (2) binders.
   b) Deposition Date: April 8, 1996

16. Dr. Ed Ekholm - Chemical Engineering
   a) report dated May 17, 1995, three (3) binders.
   b) Deposition Date: March 25 & 26, April 22 & 23, 1996

17. Myron A. Mehlman, Ph.D. - Toxicology
   a) report dated April 27, 1995, three (3) binders.
   b) Deposition Date: March 21, 1996

18. Dr. Kaye Kilburn -
   a) Deposition Dates: 1) November 16, 1990; 2) January 10, 1991; 3) March 8, 1991; 4) October 12 & 13, 1994; 5) March 27 & 28, 1995

19. Alex Theriot, Jr. - Appraiser
   a) Deposition Date: December 5, 1990

20. Harlee S. Strauss, Ph.D. - Risk Assessment
   a) report dated May 12, 1997

DEFENSE EXPERTS

		Area of Expertise
1)	James W. Albers, M.D., Ph.D.	Neurology/IME
2)	William C. Bailey, M.D.	General Medicine/ Pulmonary Disease/IME
3)	Elissa P. Benedek, M.D.	Psychiatry/IME
4)	Stanley Berent, Ph.D.	Neuropsychology/IME
5)	William J. Blot, Ph.D.	Statistics/Epidemiology
6)	Thomas J. Boll, Ph.D.	Gynecology/Oncology/IME
7)	Patricia S. Braly, M.D.	Epidemiology
8)	Patricia Buffler, Ph.D., M.P.H.	Epidemiology
9)	Harris Busch, M.D., Ph.D.	Pharmacology
10)	Norman Carnahan	Chemical Engineering
11)	David Drachmann, M.D.	Neurologist
12)	Patrick J. Egan, C.R.E. Paula Claverie Hogan, M.A.I.	Real Estate
13)	Bruce J. Fisch, M.D.	Electrocephalography/ Neurology/IME
14)	Davis L. Ford, Ph.D., P.E.	Environmental Engineering
15)	Harold A. Fuselier, Jr., M.D.	Urology/IME
16)	David Garabrant, M.D., M.P.H.	Epidemiologist
17)	Wayne Grip	Aerial Photographer

		Area of Expertise
18)	Philip S. Guzelian, M.D.	Toxicology
19)	Gale F. Hoffnagle	Air Modeling
20)	Dr. Raymond Loehr	Superfund Site
21)	Charles Nemeroff, M.D., M.P.H.	Psychiatry/ Behavioral Sciences/IME
22)	Philip T. Ninan, M.D.	Psychiatry/IME
23)	Dr. Edward Beardslee Overton	Environmental Engineer
24)	Michael Pisani, P.E.	Environmental Engineer
25)	Wade R. Ragas, Ph.D.	Real Estate
26)	Neil H. Raskin, M.D.	Psychiatry/IME
27)	John H. Rodgers, Jr.	Biology/Water
28)	John E. Salvaggio, M.D.	Immunology/IME
29)	Peter S. Spencer, Ph.D., F.R.C.Path.	Neurologist
30)	Peter M. Stonebraker	Chemistry
31)	Austin J. Sumner, M.D.	Neurology/IME
32)	Louis Joseph Thibodeaux, Ph.D.	Chemical Engineering
33)	Daniel K. Winstead, M.D.	Psychiatry/IME

(1)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.

ACTION NO. 94 MDL 4000
ALL CASES

JUDGE HAIK

MAGISTRATE JUDGE TYNES

Certain Defendants'

Medical Expert Report

Of

THOMAS J. BOLL, PH.D.

0004487
QI S JDD
page 13.1

difficulties. Rather she is distressed, uncomfortable, upset, and unhappy by the pain and other potential limitations and difficulties that this produces for her and in her relationship with her husband when she is feeling poorly. This does not appear in any way to be an abnormal psychological reaction, but a very normal one to a set of conditions which are reportedly uncomfortable, painful, distressing, somewhat limiting, despite the fact that she is able to carry out a substantial number of important and useful activities and gain considerable pleasure from her marriage, her work, and her pursuits such as her new home. It probably would be appropriate for Mrs. Booty to obtain some help with regard to additional efforts at pain management although very possibly her difficulties with pain are sufficiently specifically related to her medical condition that little may be offered in that regard and I would defer opinions on that to her other doctors in conjunction with pain experts. In any case, I see no evidence for neurological disorder, decline, disability or dysfunction, and nothing about her psychological condition rises to the level of an emotional disturbance or disability or requires a psychological diagnosis.

Thank you very much for the opportunity to see this woman. Please let me know if I can provide additional information or be of any further help.

Sincerely,

Thomas J. Boll, Ph.D.
Professor of Psychology
Pediatrics and Neurological Surgery

Director, Comprehensive Head Injury Center

/sj

cc: Larry Riff

CURRICULUM VITAE

Thomas Jeffrey Boll, Ph.D.

Medical (Clinical) Psychology Program
1300 University Boulevard, Room 231
Birmingham, Alabama 35294
205-934-8723

The Neuropsychological Laboratory
1521 11th Avenue South
Birmingham, AL 35205
205-934-3537

EDUCATION:

Marquette University, B.A., 1963

University of Wisconsin - Milwaukee, M.S., 1966

Marquette University, Ph.D., 1967

Military Service: Major - U.S. Army MSC Reserve - Honorable Discharge

Predoctoral Training:

Milwaukee County Mental Health Center, Milwaukee, Wisconsin 1964-1965.

Veterans Administration Hospital, Wood, Wisconsin, 1966.

Postdoctoral Training:

USPHS Post-Doctoral Fellow in Clinical Psychology; Department of Psychiatry, Indiana University Medical Center, Indianapolis, Indiana, 1968-1970.

PRESENT POSITION:

Professor, Department of Psychology, Pediatrics and Neurological Surgery, (1982-present) University of Alabama at Birmingham, Birmingham, Alabama 35294.

Director, Medical Psychology Program, (1982-present) University of Alabama at Birmingham, Birmingham, Alabama 35294.

Director, Comprehensive Head Injury Center, (1986-present) University of Alabama at Birmingham.

Senior Scholar, Center for Health Risk Assessment and Disease Prevention, (1986-present) University of Alabama at Birmingham.

PRESENT POSITION: (continued)

Senior Scientist, Accident Research Center, (1986-present) University of Alabama at Birmingham.

Senior Scholar, Center for Aging, (1985-present) University of Alabama at Birmingham.

TEACHING AND PROFESSIONAL EXPERIENCE:

Professor and Chairman, Department of Psychology, (1980-1982) University of Health Sciences/The Chicago Medical School, North Chicago, Illinois.

Professor, Department of Behavioral Medicine, Psychiatry, and Pediatrics (1979-1980), University of Virginia School of Medicine, Charlottesville, Virginia; Professor of Psychology (1979-1980), University of Virginia, Charlottesville, Virginia.

Head, Division of Clinical Psychology (1975-1980), Department of Behavioral Medicine and Psychiatry; Chief Psychologist, Division of Child and Family Psychiatry and Director, Psychological Assessment Service (1973-1980), University of Virginia Medical Center, Charlottesville, Virginia.

Associate Professor, Departments of Psychiatry, Pediatrics and Psychology (1973-1979), University of Virginia Medical Center, Charlottesville, Virginia.

Research Assistant Professor; Department of Neurological Surgery, University of Washington School of Medicine and Child Development and Mental Retardation Center, Seattle, Washington, 1970 to 1973.

Chief Psychologist; Kiwanis Children's Center, Milwaukee, Wisconsin, 1967-1968.

Lecturer; Marquette University Graduate School, 1967-1968.

BOARD CERTIFICATION:

American Board of Professional Psychology
- Diplomate in Clinical Psychology, 1973
- Diplomate in Clinical Neuropsychology, 1983
- Diplomate in Health Psychology, 1993

LICENSURE:

State of Virginia - 1974
State of Alabama - 1982

Pay
13:4

(3)

9/23/97

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE - OPELOUSAS DIVISION

IN RE COMBUSTION, INC. OBJECTION

JUDGMENT APPEAL
motion to unseal colloquy's for pre-hearing conferences with the Special master, Mr. Juneau.

CIVIL ACTION NO.: 94MDL4000

ALL CASES

JUDGE HAIK Karen Holmes #3454-2

MAGISTRATE JUDGE TYNES

JUDGE HAIK;

- Witness, to be exact; #6 of Exhibit-A, of Document #7274, States THOMAS J. Boll, PH.D., is filed most incorrectly as he is A Professor of Psychology, Pediatrics, and Neurological Surgery.

Mr. Talley and I, Asked Vanessa of the P.S.C. Office on Sept. 19, 1997 at 1:30 pm About the Credentials of Dr. Boll and Vanessa Said he was "more than Likely" an Expert for the Defense, a witness for Adams & Reese. the Defendant's Atty.'s. Upon Calling them I (Ms. Holmes) (on Sept. 23 @ 3:00pm) with Mr. Talley witnessing; came in contact with Mrs. Donie Seniac, a paralegal of Adams + Reese who had worked on Combustion, Inc., per her conversation she Indicated she never heard of Dr. Boll... Neither Vanessa of P.S.C. or Donie of Adams & Reese Know who was the Expert of Gynecology + oncology As it was filed incorrectly under Dr. Thomas J. Boll. At this time I Request Your Honor to bring this matter to the P.S.C.'s Attention to correct this error and to Disclose

Physician team to monitor health at Livingston facility

BY ALICE DOWTY
THE NEWS

LIVINGSTON — A team of physicians will soon arrive here to monitor the health effects of Combustion Inc. on plaintiffs. The money for the operation comes from $1.5 million of the massive class action settlement.

The doctors will give the Intergovernemtnal Commission which manages the Livingston Community Medical Center an annual report on their findings. State health officials will also be notified if the physical exams collectively show a significant deviation from normal in terms of disease or mortality rates.

The physicians coming to Livingston will include Dr. Edward Jeffries, Dr. Trenton James, Dr. Alan Hanley, Dr. Jeffrey Donohue, Dr. David Carver, Dr. Robert St. Amant, Dr. Anne Robinson and Dr. Louis Minsky. These eight primary care physicians are affiliated with the Baton Rouge General Medical Center and the Baton Rouge General Health Center.

The Combustion site included waste oil in unlined pits and tanks and buried drums with other chemical contents. It was cleaned up between November 1992 and September 1993 at a cost to defendants in the case of about $15 million, according to court records.

Judge Richard Haik approved the last settlement in the Combustion class action in December 1997-$3.5 million from Chevron and Cooper Gilder Chemical, bringing the total settlement amount to over $130 million. Haik has not yet ruled on how the final $3.5 million will be disbursed. Additional funds might also be left over.

The Chevron settlement came after most plaintiffs had already received a portion of the previous settlements. Plaintiffs in the Combustion class action began picking up settlement checks ranging from $250 to $805,148 in November 1997. About $58 million of the Combustion money was disbursed to about 10,000 plaintiffs and about $70 million was being divided among the state, the plaintiffs' attorneys, and various funds and reserves, according to special master Patrick Juneau, court-appointed architect of the disbursement plan.

Funds and reserves included a $1 million liability fund set aside for the Plaintiffs' Steering Committee, 10 attorneys who conducted most of the settlement negotiations and courtroom work. A $2 million indemnity fund was also set aside for defendants until all litigation was complete and for 13 months after that. After the 13-month waiting period, the $2 million, if not used, "will be disbursed at the court's discretion for the benefit of the class," according to a court document.

About $62 million (48 percent of the total) was set aside to pay the plaintiffs' attorneys' fees and costs. Fees took about 36 percent of the settlement; litigation costs took about 6 percent and administrative costs took another 6 percent, according to court documents.

More than 2,300 defendants and third party-defendants were involved in the case and about 530 attorneys filed and argued motions, according to court records.

Denham gets clean bill in audit

BY KELA CHIASSON
THE NEWS

Denham Springs received a "clean opinion" during its most recent financial audit for the fiscal year ending June 30, 1998.

"As past years, we have a clean [illegible]nion. There were no

DENHAM SPRINGS FISCAL YEAR 1998

GENERAL FUND REVENUES

Taxes	$4,166,264
Licenses & permits	$543,224
Fines & forfeits	$191,915
911 service fees	$165,314
Miscellaneous	$537,735
Total	**$5,604,452**

GENERAL FUND EXPENDITURES

ROAD WORK: *Reflectors going down now on finished roads*

FROM PAGE A1

Doyle Road is complete. The remaining roads in phase one are Forrest Delatte,1 mile; Wax, 1.86 miles; Clinton Allen, 1.85 miles and Caraway, 1.6 miles.

Parish President Dewey Ratcliff said reflectors are being put down on the finished roads now.

The total 1998 contract price is $5,405,589. The estimate[illegible] ost of the 1999 contract is $6, [illegible],232, about $1.5 million more than the 1998 program.

The 1999 program includes work on 52 streets, many in subdivisions, but has 2.49 fewer total miles than the 1998 program, which had only 25 roads.

Out of the 52 roads on the 1999 list, only 16 roads are at least 1 mile long. Only 5 roads on the list are over 3 miles long-Pea Ridge Road (5.35 miles); Brown Road (4.08 miles); Miller Road (3.5 miles); Lod Stafford Road (3.1 miles) and Palmer Road (3.1 miles).

The 1-cent parishwide sales tax paying for the road work is expected to generate about $30 million over 5 years. The first 12 months of sales taxes for road improvements brought in about $5,743,000, a monthly average of about $478,600.

The roads on the 1999 list were taken from the complete 5-year list which has about 435 roads covering about 285 miles. The total parish road count is about 1,575 covering abou[illegible] 575 miles, not including stat[illegible] municipal roads.

The sales tax for the parish overlay program is also collected in municipalities and some municipal road work has been included in the parish capital outlay budget.

The 1998 road contractor, Coastal Bridge Company, Inc., subcontracted with Barber Brothers to supply the asphalt for roads in the northern half of the parish, since Barber Brothers' asphalt plant is closer to the northern Livingston Parish than Coastal's source, Ratcliff said.

Hazardous waste site fire being investigated as arson

By CHRIS FRINK
Florida Parishes bureau

WALKER — A fire at a hazardous waste site near here that briefly chased 100 people from their homes Wednesday and sent nine people to a Baton Rouge emergency room is being investigated as arson.

"There isn't any way combustion could have occurred without outside help," said Sgt. Dale Hall of the Louisiana State Police Hazardous Materials and Transportation unit.

Investigators found signs that someone had scaled the chain-link fence that surrounds the site, he said.

Wednesday night's fire was quickly smothered by volunteers from Fire Protection District 4. The evacuation lasted an hour and the nine taken to the hospital were treated for respiratory problems and released.

Officials from the state police, Department of Environmental Quality and the state Fire Marshal's office inspected the fire site Thursday morning at Combustion Inc., an abandoned complex of 14 waste oil pits, Hall said.

The fire was confined to half of a 100-foot by 225-foot waste oil pit with four inches to a foot of sludge floating on top of an unknown depth of water, he said. "The samples we took were like molasses."

"We took samples to get first-hand data on what was burning," said Tim Knight of DEQ's Inactive and Abandoned Sites Division. "We asked (the lab) for quick turn-around time . . . about 2 to 4 weeks."

"We're also running some ignitability tests to see at what temperatures the sludge will burn," he said.

Hall said officials have results of 3-year-old tests on the waste-oil sludge in "Pit H," the pit that burned. "There are some transformer oils, so there are some PCBs (polychlorinated biphenyls, a carcinogen) in that pit," he said.

"The levels (of PCBs) were not that high three years ago" and probably have decreased, Hall said.

Hall said only four of the 14 pits at Combustion have visible oil on the surface — finding one on a dark night would not have been easy. "For somebody to find a pit with oil . . . they knew what they were looking for."

Any volatile — or easy-to-ignite — chemicals have long ago evaporated out of the pits, he said. Anyone who started the fire must have really wanted to do it, Hall said.

Hall said investigators found fresh mud high up on one of the site's gates and a scorched spot in the grass not far from the pit that burned.

Two more arrested in waste case

By CHRIS FRINK
Florida Parishes bureau

GREENSBURG — State police arrested two more men Thursday — including the man they allege ran an illegal hazardous waste storage operation — in the continuing investigation into three waste dumps in St. Helena and Tangipahoa parishes.

Investigators expect to make two more arrests soon, said state police Lt. Kenny Williams. The first suspect arrested also was rebooked on four new counts, he said.

Police had been seeking Bill Crawford, the head of a waste-hauling company, for almost two weeks in connection with two hazardous waste sites reported earlier this month in St. Helena Parish. A third site, a warehouse just outside of Amite, was discovered Monday.

Crawford, 49, of 4802 Tartan Drive in Baton Rouge, was arrested Thursday and booked into the St. Helena Parish jail here on one count each of reckless handling of hazardous materials, illegal disposal of hazardous waste and criminal conspiracy. He was booked earlier Thursday on identical counts in Tangipahoa Parish.

Crawford was released on $50,000 bail set by 21st Judicial District Judge Bruce Bennett soon after being booked in Greensburg. The bail also covered the Tangipahoa counts.

Robert "Butch" Newell, a St. Helena Parish truck driver who state police say worked for Crawford's Southern Environmental Services

Advocate staff photo by John Ross

Southern Environmental Services Inc. owner Bill Crawford is escorted from the Tangipahoa Parish Courthouse in Amite by state police officers Thursday.

illegal handling of hazardous materials and criminal conspiracy, Williams said. He was also booked on the same three counts in Tangipahoa Parish.

Police on Thursday also booked Donald Doughty, 35, of Rt. 4, Hillsdale, for illegal storage and disposal of hazardous waste. He was a laborer working for Crawford, Williams alleged. Doughty was released on his own recognizance.

Crawford was arrested at the

Crawford maintained his innocence on the way into the Sheriff's Office. "I have done nothing wrong," he said. "We have no hazardous waste and never have."

Crawford had said in a telephone interview on Monday that he met with two state Department of Environmental Quality officials Dec. 31 about his operation, which he said is recycling and not disposal. He said he was told it was legal and would not be

found at the site included laboratory waste, experimental pesticides, drums of waste from an asbestos abatement project and hospital waste.

One family was evacuated from near one of the sites and other residents who live near the two St. Helena sites said they had experienced medical problems since the materials appeared.

"We acquire chemicals and resell chemicals," he said. "It's a reuse program

Jury indicts police chief for extortion

By JOE GYAN JR.
New Orleans bureau

NEW ORLEANS — A federal grand jury indicted Napoleonville Police Chief Lawrence "Sam" Williams on one count of extortion Thursday for allegedly promising to influence a Napoleonville man's sentence if the man paid Williams $10,000.

The grand jury accused Williams, 60, of attempting to "obtain payments of money that were not due him or his office and to which neither he nor his office was entitled" by "wrongful use of fear of economic loss" and "threatened violence."

First Assistant U.S. Attorney Al Winters Jr. said the police chief will be arraigned late next week in New Orleans by U.S. Magistrate Michaelle Wynne.

Napoleonville lawyer Marty Triche, who — along with his father, Risley "Pappy" Triche — is representing Williams, declined to comment on the indictment.

Williams, a former mayor of Napoleonville, was the city's first black mayor.

Williams was arrested Jan. 23 by FBI agents after they allegedly videotaped him receiving a partial payment of $5,000 from Louis Joseph Comeaux Jr. of Napoleonville, who was acting as an intermediary between the police chief and Donald Bourg of Napoleonville. Winters told U.S.

an aggravated battery charge if Bourg paid him (Williams) $10,000, according to an FBI affidavit.

An Assumption Parish grand jury indicted Bourg on the battery charge following a confrontation April 5 with Williams that left the police chief, Bourg and Bourg's brother with bullet wounds. Bourg's trial has been postponed until completion of the federal case.

Williams, who responded to a "burglary in progress" at Bourg's residence, mistook Bourg and his brother for burglars and fired several shots, injuring the Bourg brothers, the FBI affidavit stated. Bourg, believing he was being fired at by a burglar, returned fire, striking Williams in the leg, the affidavit added.

The alleged extortion scheme indirectly stemmed from Bourg's purchase of a mechanics shop from Comeaux for $25,000 — a $5,000 down payment and a $20,000 promissory note. Bourg was formerly employed by Comeaux.

Williams first talked to Comeaux on Dec. 26 about the possibility of Bourg going to jail and said he didn't want Comeaux to "get burned," according to the FBI affidavit. Williams allegedly told Comeaux to tell Bourg that he (Williams) could see to it that Bourg received a suspended jail sentence if Bourg paid Williams $10,000, the affidavit stated.

GOVERNOR OFFICE

APR 18 1985

April 15, 1985

(b) (6) - Privacy

[redacted]

Denham Springs, La. 70726

Dear Governor Edwards,

Sir, this may not be an appropriate time to write you with my problems, however after more than 14 years, I believe its time for some type of positive approach by your office.

It has to do with a waste oil reclamation site out from Denham Springs. This is not a site that was discovered by accident. It is a site that has been allowed to operate despite years of reporting spills and odors so bad you could not open the doors of our homes at times. It has burned twice.

Through the years, every State Department, Agency or however identified, having to do with health environment, fire and law enforcement were contacted many times. The Federal Department of EPA also was contacted.

We attended meetings of the Department of Wildlife and Fisheries only to be mostly laughed at and to hear how State Engineers had assisted in the construction of this Facility. Also, how that Department had aided with the acquirement of a loan for the initial owner.

For a year or more, I was naive enough to believe this just could not go on. The spills and odors were so bad, we were certain the Health Department, Fire Marshall, (after the 2nd burning), Department of Rivers and Streams, EPA or The Attorney Generals Office would step in and stop this operation. Nothing was done. Everyone contacted said they could do nothing. Is there a possibility someone was being protected?

Some time in the early 1970 s the initial owner acquired some land away from the Facility in a powerline right-of-way. There they dug numerous pits, settling ponds, or some type of separaters. Aided by someone with the State obtained a discharge permit. These pits discharged into a canal some 200 feet on the east side of my house. The facility being some 200 feet on the west side of my house put me in the middle. They were discharging via the road ditch, Facility and canal, which, with any rain and many times with no rain whatever type of materials they were using flooded me from 3 sides.

Having often wondered why the Utilities Company would permit these pits, I have to ask, did the Utilities Company have the people operating this site dumping transformer oils in these pits?

After a few years, the itital owner spread out a little too far and seemed to have

gotten into financial trouble and had to sell.

The new owners came in trying to operate the Facility at a rate too great for the used and what seemed to be obsolete equipment. The odors were still there. The spills were not as large or as frequent, but the noise, smoke and smell from some type of cooking devise was terrible. There was a question at one time, about them handling a material called "bar wash". I am not sure of the exact chemical name.

In 1979 and 1980, they began to slow their operation down. There was talk about them starting another operation in Enterprise Mississippi. The Facility here almost stopped and finally did about 2 years ago.

In mid 1984, I decided to sell my home and listed it with a Real Estate Company. In late August or September, they had a party that was interested in the house. Interested enough for a second look because it fit their needs. The weekend of their return, they Denham Springs News had a picture of the Facility on the front page, stating its contamination of PCB cancer causing chemicals. Naturally the people lost all interest. The site seemed to termed abandoned and recommended for the superfund list. The paper also stated that the location had changed hands many times. Not true, there have only been 2 owners.

I was out of State at the printing of this article. The news came to me a week or so later. Having being a little more than upset about the article, I phoned the State Official giving out the information. He conveyed his sympathy for me. But, when asked what could be done, he said his Department was broke and had no money. Finally, I called the Secretary of EQC and got the same response, Broke. I asked about soil sampes on my property and they had no money for sampling. After constant calling and bickering, they found the money for the sampling. The samples turned out positive. I asked what could be done and got the same answer, nothing. The only help would have to be through the EPA Superfund because the EQC is broke. The EPA evidently said no, although I understand, they got a grant for some sampling at this site a while ago. Some sampling at the pits, but not the Facility.

How about the initial and current owners? According to one State source, they are both bankrupt. Not true. The initial owner operates a waste and contaminated oil products Company in Biloxi, Mississippi. There are possible records of him being in trouble with the EPA. The EQC shold have or can obtain such records.

The current owner claims now the site is not abandoned but inactive. There seems

be some of materials stored in these tanks. No one will say what and if there is something stored in the stanks. In the early 1980's word is the current owner obtained two million dollars from the SBA and has constructed another facility in Enterprise and is still receiving SBA money. Some of this could be going toward location in Texas. They have filed for Chapter II Bankruptucy in Miss..

The Department of EQC seems to be trying to conduct business for the current owners. One EQC representative said current owners say they had a possible buyer. Seems now their proposed buyer is in financial trouble, with cleanup estimates at two million dollars who would consider buying it.

Mr. Governor, something bad wrong somewhere. Here is some questions that need to be answered by someone.

1. Why wasn't this place stopped years ago before it became so bad?

2. Why does the SBA continue to finance and continue to give money for these dangerous locations?

3. Is the Enterprise Mississippi location operating?

4. If not, are they really getting more money for a Texas location?

5. Isn't dumping hazardous waste on private property criminal?

6. How does a company file for Chapter II Bankruptcy and avoid prosecution for these sites?

7. Why does the EQC protect these people involved with hazardous waste sites?

8. Why is the taxpayers money used to finance, protect and then clean up these sites?

9. Do they pay any taxes of any type even when operating?

10. I've heard the current owners owe the State for permits. When I asked EQC Representatives about if he said they don;t have any permits they have to pay for. What is correct?

11. Who is going to compensate me and my family for all the years of dispair and anguish?

12. Who is going to clean the contamination from my property?

13. After living in the contamination all these years, who will pay for doctors and medical examination and test, if my health has been injured?

14. Why should we have to suffer for mismanagement, fraud and waste that has occurred in all levels of Government?

15. Why pay independent Laboratories huge prices (From estimates EQC quotes) for sample analysis? Why not LSU?

16. Why pay huge prices for drilling rigs for core samples? With the water table being so high. Why not a good post hole digger? (Bought from a local hardware store, please)

I could go on with questions forever. But would it be worthwhile?

Mr. Governor Sir, I have almost a lifetime of work and money invested in my house and land. The maintenance and upkeep, which is done in a civilized manner requires lots of work, without the hazardous waste. Now under the present conditions, I cannot sell it.

Sir, after watching this being allowed to continue after all these years. There are four responsible parties, The State Dept. of EQC and the Federal EPA.. Seems between the four, somewhere money could be found to clean up this site and surrounding area.

Mr. Governor, I have been pleading and almost begging someone to help me with this for years. Now again, I am begging you or any concerned persons for help in cleaning up this site.

In a TV interview, Vice President Bush, said don't worry about it, but I live in it and have to worry about it.

Sometimes I get the feeling of being punished by the State of Louisiana for living in Livingston Parish and by the Federal Government for living in the State of Louisiana.

Thank You,

Denham Springs, La. 70726

cc: Vice President Bush-Sec. EPA , Lee Thomas
US Senators-Russell B. Long
J. Bennett Johnston
US Representative: W. Henson Moore
Kathy Long
State Senators-Joseph A. Sevario III
State Representative-Julius Bloung

METRO/STATE

MORNING ADVOCATE Baton Rouge, Louisiana Tuesday, July 22, 1986

Suit filed in hazardous waste case

Florida parishes bureau

LIVINGSTON — More than 50 defendants have been identified in a $10 billion lawsuit filed Monday morning against individuals and companies who allegedly dumped hazardous wastes at the Combustion Inc. site.

Springfield attorney Hobart Pardue filed the suit in 21st Judicial District Court on behalf of more than 450 Walker residents. Last week, a $1 billion class-action suit was filed by Denham Springs attorney Calvin Fayard in connection with the site.

The Combustion Inc. site is an abandoned hazardous-waste dump that has been recommended for placement on the federal Superfund cleanup list, according to the U.S. Environmental Protection Agency.

The state's Department of Environmental Quality has identified contaminants at the site that include PCBs, or polychlorinated biphenyls, as well as lead, mercury and styrene.

Pardue said the suit also names the Livingston Parish Police Jury as a

SEE LAWSUIT, 2B

Lawsuit

CONTINUED FROM 1B

defendant because "they've known about it since 1976 and they haven't done anything to stop it."

He said that while the Police Jury is a plaintiff in last week's lawsuit, "my clients do not want the Police Jury to represent them in this matter. My clients feel the jury should have done something years ago and did not do anything.

"This is a group of concerned people who live in the area and who feel that their property has been damaged because of the site. I've had a number of people tell me they've lost animals and that they've had vegetable gardens where they can't get anything to grow," Pardue said.

"We also feel there's a good possibility the ground water is messed up," he said.

The site drains into Beaver Bayou, which flows into West Colyell Creek and then into the Amite River, "so the pollution could reach all the way to French Settlement," Pardue said.

The defendants in the $10 billion lawsuit include Earl G. Dubose, the original owner and operator of the site, as well as more than 50 companies or individuals suspected of dumping at the site.

The $1 billion class-action suit also names Dubo[illegible] major corporations such as Browning-Ferris Industries, BASF Wyandotte, Dow Chemical Co., Gulf States Utilities and Louisiana Power & Light Co.

The plaintiffs in the class-action suit include the Police Jury and George Lockhart, the juror for the Walker area.

Testimony

1

(b) (6) - Privacy [redacted]

In the late sixties to the early eighties an oil recycling co. known as Dubose trucking was receiving wastes from over 100 companies at a site on Milton road in Walker, La. These wastes were dumped over the ground, injected into the ground, stored in pits and tanks, and burried in barrels all around the site.

In 1986 a class action lawsuit was started for the purpose of recovery of monetary awards for any and all damages including, but not limited to personal injury, fear of future illness, property damage, and punitive damages against the companies involved.

The lawyers listed on a seperate sheet were hired to represent the class in the matter of "Combustion Inc."

Early this year a settlement in the amount of $125 million dollars was reached.

12 catagories of illnesses were used to get this settlement.

Judge Richard Haik appointed (b) (6) - Privacy [redacted] as Special Master to come up with a formula and

distribute the money. In June we received a letter from the Special Master with an allocation amount. The letter stated that we could file an objection to the allocation amount with the Special Master. This letter stated that Judge Richard Haik would rule on the objections on August 15, 1997. About 1600 people filed objections.

We were also told that we could retain personal counsel to represent us in these matters.

Since our allocation amount did not even cover one hospital stay, we filed an objection. We felt that since we had at least 10 lawyers representing us that we were well represented and would not need to hire outside counsel.

Many other people involved in filing objections hired a lawyer by the name of Glenn Smith to help them with their objection.

We received a letter from the Special Master's office with an appointment to meet with him on July 30 at 1:00 p.m. to attempt to resolve our objection. The letter said to bring records to back up

our objection.

When we arrived at the Federal Courthouse in Baton Rouge, there were people who had been standing in extreme heat all morning. They had appointments at 9:00 A.M. We were told stories of People who stood in the heat for hours the day before, only to be treated extremely inhuman when they finally got into the Courthouse. W.A.F.B. T.V. 9 News has footage on this.

We were allowed into the Courthouse at about 1:30 p.m when someone mentioned calling the News. We waited in a room with very few chairs in a group of about 30 people for 2 hours. We were then told that Judge Haik would speak to us and then we would meet with the Special Master. We were brought into a Courtroom. After 2 more hours, during which we were entertained by "Court Jesters" who spoke of Judge Haik and the Special Master as if they were "Gods"!, Judge Haik came into the Courtroom.

He told us that the only way we would get more money was if there was a clerical mistake. He said "Anyone can make a mistake." He stated that even he had made a mistate "Once." He said that the Special Master would throw out our objection and that he would stand behind the Special Master because they were good friends and that's why he had appointed him to distribute the funds. He stated that if we did not withdraw our objection at this time, on the 15th of August when we came before him, he would throw out our objection as a "Frivolous Objection." He stated that we had the right to appeal his decision, but that it would do us no good to do so because "He" has enough influence on the Appellate Court to have our appeal overturned. He Then said. "I understand that some of you have retained Glenn Smith to represent you and some of you are planning to hire lawyers. I have issued an injunction against all outside lawyers in

this case. You can't even pay them out of your own pocket and they won't work for nothing." He then said, "Anyone who wishes to withdraw their objection can leave now." "Otherwise you can wait to see the Special Master" We waited to see the Special Master.

About an hour later our family was brought into a room. Two men who did not give their names came in with us. One of the men pointed to the other and said "He's here to represent you." Later into this session, judging from the horror stories from the day before we realized that the arrogant one must be Tom, the Special Master's assistant. My daughter said, "You must be Tom. We heard about you." He said "Yes I'm Tom. It was all good, I hope." We later asked around and found out that his name was Tom McClone. We never found out the name of the one who was suppose to represent us.

They did not ask to see the

records to back up our objection. We were told that the only thing we were being paid on was "How close we lived to the site and how long we lived there. They said that all medical except 3 rare forms of cancer had been thrown out. I asked about the 12 catagories of illness. Mr. McClone said. "Who started that rumor?" I said, "It's no rumor "Sir" It was written down in black and white and sent to us in a letter. The paper also printed it." He said, "Well I'm the one who drafted the 12 catagories, but I didn't think they had sent it out in a letter. We have dropped the 12 catagories. We later talked to a lady whose daughter had the 3 rare forms of cancer. She was allotted $250.00 (Not a mistake Two-hundred and fifty dollars) She was told that a docter would have to stake his medical license on the fact that the cancer came from that site. We also talked to a woman who was told that minor medical had been thrown out. People were lied to and told

whatever they thought would get them to withdraw their objection.

My daughter, (b) (6) - Privacy [redacted] noticed a map with our location near the site. She noticed that the marked spot on the map was not the place where we lived near the site. She called (b) (6) - Privacy [redacted] (b) (6) - Privacy [redacted] attention to this. He said that this could make a difference since we actually lived closer to the site then the spot marked on the map. Then he said, "I can calculate the difference, but I tell you it won't make any difference because we are giving you $1,000 more then you were suppose to get. You were only suppossed to get $1,500, but we uped it to $2,500.

We then asked (b) (6) - Privacy [redacted] "If they were only paying for how close you lived to the site and for how long" why was a woman we knew who never lived within the 2 mile radians getting twice as much money as people who lived right by the site? He said that he would take her name, but they would give her our name and

we had better be able to prove what we were saying or we would be turned in to the F.B.I. My daughter said that we could prove it, but she feared for her life if this woman knew we turned her in.

Then I told [redacted] (b) (6) - Privacy that I did not think that I could release these chemical companies for $2,500 because of a real fear of future illness. The man who was suppose to be representing us had been agreeing with [redacted] (b) (6) - Privacy all the way. He then said that releasing the chemical companies now would not interfere with future illinesses. We could sue them again if we got sick in the future. I said "Let me get this straight! We can't collect NOW for medecine, hospitals or illinesses that we already have, but if we develope more illinesses later on, we can sue and collect." Then [redacted] (b) (6) - Privacy jumpted up, got extremely red in the face and very angry. He said, "If you do not withdraw

your objection now, you will wait to see the Special Master no matter how long it takes and I can tell you it won't do you any good since I have already talked to you, He will throw your objection out as a "Frivolous Objection." It would be to your advantage to be satisfied with what you are getting, If you do not want it, there are a lot of Churches who would be glad to have it.

Since (b) (6) - Privacy [redacted] tone and demeaner were so threatening and we had been without food or anything to drink for the 8 hours we had been there, we agreed to withdraw our objection.

I must state here that (b) (6) - Privacy [redacted] treated us like criminals who were trying to steal his money. He used "Gustepo" tactics to strong-arm, threaten, and intimidate us into withdrawing our objection.

They weren't through with us yet. They herded us like criminals past the door that led to the outside like maybe

we would try to escape. There were armed agents gaurding this door. We were brought into a small room where we waited for anoter hour to sign a paper withdrawing our objection.

There were claiments in this room who were crying like they had just been through the biggest humiliation of their lives. There was a lady clearly in her 70's who you could tell had cancer and all she wanted was a place to take a nap. There was a lady with breast cancer who was allotted only $250.00 and she was put through this humiliation [redacted] was one of the claiments who hired Glenn Smith to represent him with his objection. His appointment was August 5th. He met with [redacted] and Judge Hair. He asked where was his lawyer Glenn Smith? He was told that he had no lawyer. That if Glenn Smith came anywhere near the courthouse

he would be arrested. [redacted] (b) (6) - Privacy
gave Glenn Smith an affidavitt as did we and several others as to what went on in the meetings. When [redacted] (b) (6) - Privacy
went before Judge Hair on the 15th of August the judge pulled out the affidavitt that [redacted] (b) (6) - Privacy had given Glenn Smith and proceded to read him out and call him a lie about what was said. [redacted] (b) (6) - Privacy
Objection was not mentioned.

Glenn Smith was brought to court and sanctioned. He still doesn't know why. [redacted] (b) (6) - Privacy
[redacted] (b) (6) - Privacy and [redacted] (b) (6) - Privacy
would know more about Glenn Smith since they hired him to represent them.

Every right we had as Americans as well as human beings was violated by the justice system sworn to protect our rights. The worst part of all this is that they enjoyed every minute of it. Otherwise Lawyers who were hired to represent us would not have snickered when women who could not have children

were up before the Judge in an American courtroom, having their Objection thrown out.

(11)

August 16, 2000

Ann Goode
EPA Office of Civil Rights (MC 1201 A)
1200 Pennsylvania Ave NW
Washington D.C. 20460

I am very concerned about stopping discrimination by state environmental departments that issue permits to industries that continue to pollute our communities and harm our health particularly in low income communities.

The new Title 6 of the Civil Rights Act must be changed. It ignores existing civil rights law and policy and seems to be leaning towards protecting industries rather than communities. The new EPA Guidance will allow facilities to increase the pollution that is concentrated in communities of color by requiring scientific proof that the pollution causes a "substantial" increase in cancer risks and other health problems. NO increase in these diseases is acceptable.

Also promises that the company will create jobs should not be a defense to a Title 6 civil rights complaint. Also, why is there no appeal's process for Title 6 complaints? We need stronger protections of our civil rights. This is an example of Environmental Racism and should be stopped.

Sincerely,

(b) (6) - Privacy
[redacted]

Carson City, NV 89704
(b) (6) - Privacy
[redacted]

received
8/21/00

Ann Goode
EPA Office of Civil Rights
MC1201A
1200 Pennsylvania Ave NW
Washington DC 20460

Comments Received on the Title VI Draft Guidance Documents

08/26/00

Commentor	Date Received	Affiliation
1. Thaddeus Lucero	07/24/00	County of Bernalillo, State of New Mexico
2. Curtis Seyfried	07/24/00	Nos Quedamos
3. Jerome Balter	07/25/00	Public Interest Law Center of Philadelphia
4. Eileen Gauna	08/02/00	Southwestern University School of Law
5. Joseph Minott	08/04/00	Clean Air Council
6. Mary Rosso	08/08/00	Maryland Waste Coalition (?)
7. Barbara Olshansky	08/08/00	Center for Constitutional Rights
8. Karen V. Holmes Jole E. Talley	08/11/00	Combustion Environmental Justice Committee
9. Roger Clegg Nancie Marzulla Clint Bolick	08/15/00	Center for Equal Opportunity; Defenders of Property Rights; Institute for Justice
10. Molly Singer	08/15/00	International City/County Management Association
11. [redacted]	08/21/00	
12. [redacted]	08/21/00	Michigan Education Association
13. Rudy Peone	08/22/00	Spokane Tribal Natural Resources
14. Barry Wallerstein	08/22/00	South Coast Air Quality Management District
15. Michael J. Steinbrecher	08/24/00	Chevron Corporation
16. Roger Ward	08/25/00	Louisiana Department of Environmental Quality (LDEQ)
17. J. Rollins	08/25/00	Shintech Incorporated
18. Gregory Adams	08/25/00	L.A. County Sanitation Districts
19. Rahman Shabazz	08/26/00	Community Coalition for Change
20. T. Peter Ruane	08/26/00	American Road and Transportation Builders Association (ARTBA)

Comments Received on the Title VI Draft Guidance Documents

08/26/00

Commentor	Date Received	Affiliation
21. NEJAC Title VI Task Force	08/26/00	National Environmental Justice Advisory Council (NEJAC)

Comments Received on the Title VI Draft Guidance Documents

08/28/00

ID	Commentor	Date First Received	Affiliation
1	Thaddeus Lucero	07/24/00	County of Bernalillo, State of New Mexico
2	Curtis Seyfried	07/24/00	Nos Quedamos
3	Jerome Balter	07/25/00	Public Interest Law Center of Philadelphia
4	Eileen Gauna	08/02/00	Southwestern University School of Law
5	Joseph Minott	08/04/00	Clean Air Council
6	Mary Rosso	08/08/00	Maryland Waste Coalition (?)
7	Barbara Olshansky	08/08/00	Center for Constitutional Rights
8	Karen V. Holmes, Jole E. Talley	08/11/00	Combustion Environmental Justice Committee
9	Roger Clegg, Nancie Marzulla, Clint Bolick	08/15/00	Center for Equal Opportunity; Defenders of Property Rights; Institute for Justice
10	Molly Singer	08/15/00	International City/County Management Association
11	[redacted]	08/21/00	
12	[redacted]	08/21/00	Michigan Education Association
13	Rudy Peone	08/22/00	Spokane Tribal Natural Resources
14	Barry Wallerstein	08/22/00	South Coast Air Quality Management District
15	Michael J. Steinbrecher	08/24/00	Chevron Corporation
16	Roger Ward	08/25/00	Louisiana Department of Environmental Quality (LDEQ)
17	J. Rollins	08/25/00	Shintech Incorporated
18	Gregory Adams	08/25/00	L.A. County Sanitation Districts
19	Rahman Shabazz	08/26/00	Community Coalition for Change
20	T. Peter Ruane	08/26/00	American Road and Transportation Builders Association (ARTBA)

Comments Received on the Title VI Draft Guidance Documents

08/28/00

ID	**Commentor**	**Date First Received**	**Affiliation**
21	NEJAC Title VI Task Force	08/26/00	National Environmental Justice Advisory Council (NEJAC)
22	(b) (6) - Privacy [redacted]	08/28/00	
23	(b) (6) - Privacy [redacted]	08/28/00	
24	(b) (6) - Privacy [redacted]	08/28/00	
25	(b) (6) - Privacy [redacted]	08/28/00	
26	(b) (6) - Privacy [redacted]	08/28/00	
27	(b) (6) - Privacy [redacted]	08/28/00	
28	(b) (6) - Privacy [redacted]	08/28/00	Member, US Civil Rights Commission Louisiana Advisory Board
29	(b) (6) - Privacy [redacted]	08/28/00	
30	Pamela Lyons	08/28/00	New Jersey Department of Environmental Protection

Comments Received on the Title VI Draft Guidance Documents

08/28/00

ID	**Commentor**	**Date First Received**	**Affiliation**	**Affil. Type***
1	Thaddeus Lucero	07/24/00	County of Bernalillo, State of New Mexico	L
2	Curtis Seyfried	07/24/00	Nos Quedamos	NGO
3	Jerome Balter	07/25/00	Public Interest Law Center of Philadelphia	NGO
4	Eileen Gauna	08/02/00	Southwestern University School of Law	A
5	Joseph Minott	08/04/00	Clean Air Council	E
6	Mary Rosso	08/08/00	Maryland Waste Coalition (?)	E
7	Barbara Olshansky	08/08/00	Center for Constitutional Rights	NGO
8	Karen V. Holmes, Jole E. Talley	08/11/00	Combustion Environmental Justice Committee	E
9	Roger Clegg, Nancie Marzulla, Clint Bolick	08/15/00	Center for Equal Opportunity; Defenders of Property Rights; Institute for Justice	NGO
10	Molly Singer	08/15/00	International City/County Management Association	S_A
11	[redacted]	08/21/00		C
12	[redacted]	08/21/00	Michigan Education Association	
13	Rudy Peone	08/22/00	Spokane Tribal Natural Resources	
14	Barry Wallerstein	08/22/00	South Coast Air Quality Management District	
15	Michael J. Steinbrecher	08/24/00	Chevron Corporation	I
16	Roger Ward	08/25/00	Louisiana Department of Environmental Quality (LDEQ)	S
17	J. Rollins	08/25/00	Shintech Incorporated	I
18	Gregory Adams	08/25/00	L.A. County Sanitation Districts	L
19	Rahman Shabazz	08/26/00	Community Coalition for Change	E
			American Road and Transportation Builders	

Comments Received on the Title VI Draft Guidance Documents

08/28/00

ID	Commentor	Date First Received	Affiliation	Affil. Type*
20	T. Peter Ruane	08/26/00	Association (ARTBA)	I_A
21	NEJAC Title VI Task Force	08/26/00	National Environmental Justice Advisory Council (NEJAC)	E
22	(b) (6) - Privacy	08/28/00		C
23	(b) (6) - Privacy	08/28/00		C
24	(b) (6) - Privacy	08/28/00		C
25	(b) (6) - Privacy	08/28/00		C
26	(b) (6) - Privacy	08/28/00		C
27	(b) (6) - Privacy	08/28/00		C
28	(b) (6) - Privacy	08/28/00	Member, US Civil Rights Commission Louisiana Advisory Board	C
29	(b) (6) - Privacy	08/28/00		C
30	Pamela Lyons	08/28/00	New Jersey Department of Environmental Protection	S

* Key to affiliation type:

C	Citizen
E	Environmental organization
I	Industry
I_A	Industry trade association
L	Local government agency
NGO	Non-governmental organization
S	State government agency
S_A	State agency association

Comments Received on the Title VI Draft Guidance Documents

08/28/00

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1	Thaddeus Lucero	07/24/00	County of Bernalillo, State of New Mexico	L
2	Curtis Seyfried	07/24/00	Nos Quedamos	NGO
3	Jerome Balter	07/25/00	Public Interest Law Center of Philadelphia	NGO
4	Eileen Gauna	08/02/00	Southwestern University School of Law	A
5	Joseph Minott	08/04/00	Clean Air Council	E
6	Mary Rosso	08/08/00	Maryland Waste Coalition (?)	E
7	Barbara Olshansky	08/08/00	Center for Constitutional Rights	NGO
8	Karen V. Holmes, Jole E. Talley	08/11/00	Combustion Environmental Justice Committee	E
9	Roger Clegg, Nancie Marzulla, Clint Bolick	08/15/00	Center for Equal Opportunity; Defenders of Property Rights; Institute for Justice	NGO
10	Molly Singer	08/15/00	International City/County Management Association	S_A
11	[redacted]	08/21/00		C
12	[redacted]	08/21/00	Michigan Education Association	
13	Rudy Peone	08/22/00	Spokane Tribal Natural Resources	
14	Barry Wallerstein	08/22/00	South Coast Air Quality Management District	S
15	Michael J. Steinbrecher	08/24/00	Chevron Corporation	I
16	Roger Ward	08/25/00	Louisiana Department of Environmental Quality (LDEQ)	S
17	J. Rollins	08/25/00	Shintech Incorporated	I
18	Gregory Adams	08/25/00	L.A. County Sanitation Districts	L
19	Rahman Shabazz	08/26/00	Community Coalition for Change	E
			American Road and Transportation Builders	

Comments Received on the Title VI Draft Guidance Documents

08/28/00

ID	Commentor	Date First Received	Affiliation	Affil. Type*
20	T. Peter Ruane	08/26/00	Association (ARTBA)	I_A
21	NEJAC Title VI Task Force	08/26/00	National Environmental Justice Advisory Council (NEJAC)	E
22	(b) (6) - Privacy	08/28/00		C
23	(b) (6) - Privacy	08/28/00		C
24	(b) (6) - Privacy	08/28/00		C
25	(b) (6) - Privacy	08/28/00		C
26	(b) (6) - Privacy	08/28/00		C
27	(b) (6) - Privacy	08/28/00		C
28	(b) (6) - Privacy	08/28/00	Member, US Civil Rights Commission Louisiana Advisory Board	C
29	(b) (6) - Privacy	08/28/00		C
30	Pamela Lyons	08/28/00	New Jersey Department of Environmental Protection	S
31	Russell J. Harding	08/28/00	Michigan Department of Environmental Quality	S
32	Ellen Garvey	08/28/00	Bay Area Air Quality Management District	S
33	Clifford Rechtschaffen	08/28/00	Golden Gate University's Environmental Law & Justic Clinic	A
34	(b) (6) - Privacy	08/28/00	North American Water Office	
35	Thomas Ewing	08/28/00	Greater Cincinnati Chamber of Commerce	I_A
36	T. Peter Ruane	08/28/00	American Road and Transportation Builders Association (ARTBA)	I_A
37	Thomas Kelly	08/28/00	NYS Environmental Facilities Corp	I
38	Terry J. Harris, Kirstin L. Replogle	08/28/00	Sierra Club Committee on Environmental Justice	E

Comments Received on the Title VI Draft Guidance Documents

08/28/00

ID	**Commentor**	**Date First Received**	**Affiliation**	**Affil. Type***
39	Illinois Environmental Protection Agency	08/28/00	Illinois Environmental Protection Agency	S
40	(b) (6) - Privacy [redacted]	08/28/00		C
41	Martha G. Kirkpatrick et al	8/13/00	Maine Department of Environmental Protection et al.	S
42	Congressman Jose E. Serrano	8/23/00	Congress of the United States	
43	Robert E. Roberts	8/25/00	The Environmental Council of States	S_A
44	William L. Kovacs	8/25/00	Chamber of Commerce of the USA	I_A
45	Susana Almanza, Sylvia Herrera	8/28/00	People Organized in Defense of Earth and her Resources (PODER)	E
46	Norbert Dee	8/28/00	National Petrochemical & Refiners Association	
47	Nancy Sutley Deborah Barnes	8/28/00	California Environmental Protection Agency	S
48				
49				

* Key to affiliation type:

C	Citizen
E	Environmental organization
I	Industry
I_A	Industry trade association
L	Local government agency
NGO	Non-governmental organization
S	State government agency
S_A	State agency association

Comments Received on the Title VI Draft Guidance Documents

As of 10/10/00

Comment Number	Commenter	Post-mark Date	Mode
1.	(b) (6) - Privacy	08/24/00	USPS
2.	AES Corporation	08/28/00	USPS
3.	Alice Kaswan, Associate Professor of Law	08/28/00	e-mail
4.	American Road and Transportation Builders Association	08/26/00	e-mail
5.	American Petroleum Institute	08/28/00	courier
6.	American Association of Airport Executives	08/28/00	e-mail
7.	(b) (6) - Privacy	08/28/00	e-mail
8.	Anonymous #3	08/28/00	e-mail
9.	Anonymous #2	08/28/00	e-mail
10.	Anonymous #1	08/28/00	e-mail
11.	Arizona Center for Law in the Public Interest	08/28/00	USPS
12.	Associated Builders and Contractors	08/28/00	e-mail
13.	Association of State and Territorial Solid Waste Management Officials	08/25/00	USPS
14.	Bay Area Air Quality Management District	08/26/00	Fed-Ex
15.	(b) (6) - Privacy	08/28/00	e-mail
16.	Business Network for Environmental Justice	08/28/00	courier
17.	California Council for Environmental and Economic Balance	08/28/00	USPS
18.	California Environmental Protection Agency	08/28/00	fax
19.	Carlton Waterhouse, Adj. Professor of Law	08/28/00	e-mail
20.	Center for Equal Opportunity, Defenders of Property Rights, Institute for Justice	08/15/00	e-mail, USPS

Comments Received on the Title VI Draft Guidance Documents

As of 10/10/00

Comment Number	Commenter	Post-mark Date	Mode
21.	Center for Constitutional Rights	08/02/00	USPS
22.	Center on Race, Poverty, & the Environment, et. al.	08/28/00	Fed-Ex
23.	Chemical Weapons Working Group	08/28/00	fax, USPS
24.	Chevron Corporation	08/24/00	e-mail, Fed-Ex
25.	City of Detroit	08/28/00	e-mail
26.	(b) (6) - Privacy [redacted]	08/28/00	USPS
27.	Clean Air Council	08/01/00	USPS
28.	Coastal Corporation	08/25/00	Fed-Ex
29.	Combustion Environmental Justice Committee	08/08/00	USPS priority mail
30.	Community Coalition for Change	08/26/00	e-mail
31.	County of Bernalillo, State of New Mexico	07/21/00	USPS
32.	(b) (6) - Privacy [redacted]	08/28/00	USPS
33.	Eileen Gauna, Professor of Law	07/28/00	USPS
34.	Environmental Defense	08/28/00	fax, USPS
35.	(b) (6) - Privacy [redacted]	08/28/00	USPS
36.	Golden Gate University School of Law's Environmental Law & Justice Clinic	08/28/00	e-mail
37.	Greater Cincinnati Chamber of Commerce Air Quality Committee, Hispanic Chamber of Commerce of Greater Cincinnati	08/28/00	USPS

Comments Received on the Title VI Draft Guidance Documents

As of 10/10/00

Comment Number	Commenter	Post-mark Date	Mode
38.	(b) (6) - Privacy	08/17/00	USPS
39.	Illinois Environmental Protection Agency	08/28/00	e-mail
40.	Institute for Public Representation, Widener University Environmental and Natural Resources Law Clinic, The Mid-Atlantic Environmental Law Center, Delaware Chapter of the Sierra Club, Wilmington Waterfront Watch	08/28/00	fax
41.	International City/County Management Association	08/04/00	USPS
42.	(b) (6) - Privacy	08/28/00	USPS
43.	(b) (6) - Privacy	08/16/00	USPS
44.	(b) (6) - Privacy	08/28/00	e-mail
45.	Jose Serrano, Congressman	08/23/00	fax
46.	(b) (6) - Privacy	08/22/00	fax
47.	Lawyers Committee for Civil Rights Under Law, N.A.A.C.P. Legal Defense & Educational Fund, Inc.	08/28/00	Fed-Ex
48.	(b) (6) - Privacy	08/28/00	e-mail
49.	(b) (6) - Privacy	08/28/00	e-mail
50.	Lone Star Chapter of Sierra Club, Galveston-Houston Association for Smog Prevention	08/28/00	USPS
51.	Los Angeles County Sanitation Districts	08/25/00	Fed-Ex
52.	Louisiana Mid-Continent Oil and Gas Association	08/28/00	e-mail
53.	Louisiana Department of Environmental	08/25/00	Fed-Ex

Comments Received on the Title VI Draft Guidance Documents

As of 10/10/00

Comment Number	Commenter	Post-mark Date	Mode
	Quality		
54.	Maine Department of Environmental Protection, New Hampshire Dept. of Environmental Services, Vermont Agency of Natural Resources, Mass. Executive Office of Environmental Affairs, Rhode Island Dept. of Environmental Management, Connecticut Dept. of Environmental Protection	08/18/00	USPS
55.	(b) (6) - Privacy	08/28/00	USPS
56.	(b) (6) - Privacy	08/08/00	e-mail
57.	(b) (6) - Privacy	08/24/00	USPS
58.	(b) (6) - Privacy	08/28/00	e-mail
59.	Michigan Department of Environmental Quality	08/28/00	e-mail
60.	Mothers Organized to Stop Environmental Sins	08/28/00	e-mail
61.	National Petrochemical and Refiners Association	08/28/00	courier
62.	National Environmental Justice Advisory Council Title VI Task Force	08/26/00	e-mail
63.	Natural Resources Defense Council	08/28/00	e-mail
64.	New York State Department of Environmental Conservation	08/28/00	fax
65.	New York Lawyers for the Public Interest	08/28/00	e-mail
66.	New York City Environmental Justice Alliance	08/28/00	e-mail

Comments Received on the Title VI Draft Guidance Documents

As of 10/10/00

Comment Number	Commenter	Post-mark Date	Mode
67.	New York State Environmental Facilities Corporation	08/28/00	USPS
68.	New Jersey Department of Environmental Protection	08/23/00	USPS
69.	North Baton Rouge Environmental Association	08/26/00	USPS
70.	North American Water Office	08/28/00	e-mail
71.	Nos Quedamos	07/24/00	e-mail
72.	Nuclear Energy Institute	08/28/00	e-mail, USPS
73.	Pacific Gas and Electric Company	08/28/00	USPS
74.	Pennsylvania Department of Environmental Protection	08/28/00	e-mail
75.	People Organized in Defense of Earth and her Resources	08/28/00	fax, USPS
76.	Public Interest Law Center of Philadelphia	07/21/00	USPS
77.	(b) (6) - Privacy [redacted]	08/28/00	e-mail
78.	(b) (6) - Privacy [redacted]	08/22/00	USPS
79.	Robert Bullard, Ph.D.	08/28/00	e-mail
80.	(b) (6) - Privacy [redacted]	08/28/00	e-mail
81.	Shintech Incorporated	08/25/00	e-mail
82.	Sierra Club	08/28/00	e-mail
83.	South Coast Air Quality Management District	08/24/00	Fed-Ex
84.	South Dakota Department of Environment and Natural Resources	08/28/00	fax, USPS
85.	Southwest Network for Environmental and	08/25/00	fax,

Comments Received on the Title VI Draft Guidance Documents

As of 10/10/00

Comment Number	**Commenter**	**Post-mark Date**	**Mode**
	Economic Justice's EPA Accountability Campaign		USPS
86.	Spokane Tribal Natural Resources	08/15/00	USPS
87.	(b) (6) - Privacy	08/28/00	USPS
88.	(b) (6) - Privacy	08/28/00	e-mail
89.	Texas Natural Resource Conservation Commission	08/28/00	fax
90.	The Environmental Council of States	08/25/00	courier
91.	(b) (6) - Privacy	08/28/00	USPS
92.	U.S. Chamber of Commerce	08/25/00	courier
93.	(b) (6) - Privacy	08/28/00	USPS
94.	Washington Legal Foundation	08/28/00	fax, e-mail

(b) (6) - Privacy

Waimanalo, Hawaii 96795

August 22, 2000

US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave NW
Washington, DC 20460

(202) 501-1836 (fax)

RE: Draft Revised Guidelines for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)

Dear Ms. Browner;

I formally request the deadline for comments re: Draft Revised Guidelines for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance) be extended to permit further review. The basis for this request is information that I have received that informs me that my community is being discriminated against by the EPA. I have been informed that "all" Title VI complainants were to have received copies of the draft for review and comment purposes. If that information is true then the Waimanalo Citizens for a Healthy Future was to have received a copy for review during the 60 day open period for public comment. Only after several phone calls to Washington, D.C. was a copy mailed to my organization. The copy I received is postmarked August 18, 2000 and was received on August 21, 2000. The comment period is over on August 28, 2000. It appears that my community was singled out to be ignored.

I further comment that a review of the investigatory guidelines fails to include the real life situation of a state administered program that is not conducted according to guidelines that are equal to or more stringent than federal law and rules. The OCR rules do not allow for referral to any EPA internal investigatory capability. In the Waimanalo, Hawaii complaint, EPA Region 9 conducted a parallel administrative review of Hawaii NPDES. EPA 9 found that state law and rules conflicted with federal law and rules as part of its February 2000 report. The Hawaii program was not annulled, suspended, or withdrawn and has been allowed to continue. The result is that EPA knowingly and intentionally allows the State of Hawaii to administer a program that does not equal or exceed federal law. Hawaii Courts have ruled that Congress did not allow *De Minimis* violations of the Clean Water Act, therefore the EPA is violating the Clean Water Act in Hawaii by allowing state issued NPDES permits to remain in force while knowing the permits are not enforceable to federal CWA standards.

I reserve the right to make further comments as time permits.

(b) (6) - Privacy

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*
Jeffrey A. Saitas, *Executive Director*

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

August 28, 2000

Ann Goode, Director
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Comments on June 27, 2000 Draft Revised Guidance for Investigating Title VI Complaints Challenging Permits

Dear Ms. Goode:

I am pleased to provide the following comments on the referenced Draft Guidance, and look forward to working with you and your staff to craft acceptable approaches to addressing the issue of Title VI compliance.

The first concern with the Draft Guidance is with the issue of the scope of EPA's review. At several points in the Guidance, EPA states that it will limit its inquiry to matters "within the recipient's authority to consider." 65 Fed. Reg. 39671, 39678. By contrast, the Guidance also states that "A recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program." Id. at 39680. The inconsistency of these statements could lead to contradictory and confusing interpretations by EPA staff. EPA should clarify this issue, and should limit its inquiries to matters within the recipient's authority.

The Guidance contains an apparent inconsistency regarding the timing of the recipient's "written submission responding to, rebutting, or denying" the allegations set forth in a complaint filed with EPA. The Guidance places the time for this response immediately following EPA's receipt and acknowledgment of a complaint. Id. at 39670. The rules governing processing of Title VI complaints at 40 CFR §7.120(d)(1)(ii) clearly place this response after EPA accepts all or part of the complaint for processing. The Title VI Complaint Process Flowchart, found at 65 Fed. Reg. 39687, also places the recipient's response after EPA's acceptance of a complaint (citing 40 CFR §7.115 as its basis). Requiring recipients to respond after the mere receipt of a complaint by EPA may result in wasteful use of resources, as recipients could be required to respond to untimely, moot, or unsubstantiated claims of violation. The timing mandated by EPA's rules is more logical and will result in better use of limited public resources. If EPA desires to change the timing of the recipient's response, it must do so through a rule promulgation under the Administrative Procedures Act.

received
9/5/00

The Guidance fails to give sufficient detail on the selection of a "comparison population" for assessing disparate impact. Although a fairly detailed description is provided for characterizing the "affected population", EPA spends only a few sentences on comparison populations, an equally if not more important step in evaluating disparate impact. Id. at 39681.

Finally, TNRCC concurs with the Guidance where it states that "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." This statement lends certainty and predictability to the permitting processes of the recipients and EPA, and clarifies this issue for permit holders. EPA could further clarify this issue by stating its opinion regarding the effect of a preliminary finding of noncompliance on an issued permit.

We appreciate the opportunity to comment on these Draft Guidance documents.

Sincerely,

Duncan C. Norton
General Counsel

(b) (6) - Privacy on 08/28/2000 10:53:01 AM

To: Group Civilrights@EPA
cc:

Subject: Comments

>
> Dear Environmental Protection Agency:
>
> I am writing to express my opposition to the new
> Title 6
> Guidance which will weaken our environment
> protection
> enforcement. The name of your agency implies that
> it exist to
> protect the environment. This is no time to go back
> on that
> commitment in favor of corporate profits. We need
> to be going
> forward not backward in the protection of our
> environment.
>
> Sincerely,
>
>
> (b) (6) - Privacy
>
>
>
>

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CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
VICE PRESIDENT
ENVIRONMENT &
REGULATORY AFFAIRS

1615 H STREET, N W
WASHINGTON, D C 20062
(202) 463-5533

August 25, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201-A)
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

Dear Sir or Madam:

These comments are being filed on behalf of the U.S. Chamber of Commerce ("U.S. Chamber"), the world's largest business federation, representing more than three million businesses of every size, sector, and region. The U.S. Chamber serves as the principal voice of the American business community.

The U.S. Chamber's members are subject to environmental requirements established and enforced by the U.S. Environmental Protection Agency ("EPA" or "the Agency"), and are therefore potentially affected by two guidance documents published for public comment on June 27, 2000 in the *Federal Register*: the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits."[1]

The U.S. Chamber strongly endorses and supports anti-discrimination measures, particularly the concepts included in Title VI of the Civil Rights Act of 1964 ("Title VI," "the Act," or "Civil Rights Act"). Title VI is explicit – the U.S. government will not tolerate discrimination in programs it funds:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[2]

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[1] *See* 65 Fed. Reg. 39682 (June 27, 2000). In this correspondence, the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" is referred to as "Recipient Guidance" and the "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" is referred to as "Investigation Guidance." References to both documents are identified as the "Recipient and Investigation guidance documents" or "guidance documents."

[2] 42 U.S.C. § 2000d.

However, the U.S. Chamber strongly asserts that EPA's guidance documents are fundamentally flawed for three key reasons.

1. Rather than providing needed guidance to states to ensure that federally-funded environmental *programs* comply with Title VI, EPA unfairly targets the environmental *permits* of lawfully compliant businesses and whether the operations of the business impact the states ability to secure environmental justice. The Agency's approach is radically inconsistent with Title VI, U.S. Department of Justice ("DOJ") and EPA Title VI implementing regulations, and recent case law.

2. The Agency has ignored the important, substantive recommendations of the U.S. Civil Rights Commission ("the Commission") to improve Title VI implementation.

3. EPA's approach also fails to provide states that administer EPA-delegated permit programs with the guidance necessary to eradicate unintentional discrimination resulting from facially-neutral policies as required by Title VI and recommended by the Commission.

Due to critical flaws, EPA must abandon all efforts to implement these guidance documents and immediately initiate efforts to develop environmental justice regulations and guidelines that conform to the Title VI, DOJ and EPA regulations, and the Commission's recommendations.

I. Title VI and regulations implemented by DOJ and EPA prohibit discrimination in state programs, but the guidance documents target only state-issued permits.

Provisions of Title VI and DOJ and EPA regulations provide the Agency with clear authority to redress discriminatory practices in federally assisted programs. EPA is empowered to terminate federal assistance to state environmental programs that engage in discriminatory practices. EPA should exercise this authority whenever states are found to operate intentionally or unintentionally discriminatory programs. EPA's focus, however, must be on the state program rather than any specific permit.

A. Title VI mandates that state programs do not discriminate.

Pursuant to Title VI, each federal agency is required to promulgate rules, regulations, or orders to implement Title VI. States that receive federal funds and do not comply with Title VI and implementing regulations face:

- Termination of or refusal to continue assistance under such program or activity;[3] or
- Civil or criminal prosecution as authorized by law.[4]

Termination of funding is the ultimate Title VI remedy. The Act, however, encourages negotiation between a federal agency and recipient to remedy Title VI violations on a voluntary or negotiated basis.

Since the Act is directed against discriminatory state and local government programs or activities receiving federal assistance, Congress withdrew state immunity from lawsuits in federal court under the Eleventh Amendment of the Constitution.

B. DOJ leads and coordinates federal Title VI compliance.

The President is required to implement Title VI. Under Executive Order 12250, the President delegated coordination of implementation and enforcement of nondiscrimination laws to the Attorney General of the United States. Therefore, the Attorney General, who heads DOJ, is required to develop standards and procedures for Title VI enforcement, as well as for undertaking investigations and compliance reviews. DOJ-promulgated regulations and guidance mandate that each federal agency responsible for implementing Title VI issue appropriate implementing directives that are consistent with DOJ requirements and describe the nature of Title VI coverage, methods of enforcement, examples of prohibited programmatic conduct, and suggested remedial actions.[5]

1. Regulations require continuing Title VI compliance.

DOJ procedures require federal agencies that distribute financial assistance to determine whether recipients comply with Title VI. This review process includes several necessary safeguards to ensure that funding is not made to programs that discriminate.

- *Application review* – Before awarding financial assistance, a federal agency must make a written determination that the recipient complies with Title VI. This determination is based on an assurance of compliance and data submitted by the applicant in accordance with DOJ guidelines.[6]

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[3] 42 U.S.C. § 2000d-1.
[4] *Id.*
[5] 28 C.F.R. §§ 42.401 – 42.415.
[6] 28 C.F.R. § 42.407(b). *See also* 28 C.F.R. 50.3.

- *Post-approval review* – Federal agencies must establish and maintain effective compliance review procedures to ensure that recipients, including those seeking continuing or renewal of assistance, administer federally-assisted programs in compliance with Title VI. Federal agency personnel are required to implement policies that establish appropriate review procedures and standards after the grant has been awarded. The regulations encourage federal agencies to integrate Title VI into general program reviews and audits. Also, federal agencies must prepare compliance status reviews that include specific findings and recommendations.[7]

- *Continuing state programs* – State agencies administering programs receiving continuing assistance must establish Title VI compliance programs for the agency and other sub-recipients receiving federal funds through it.[8]

2. Sanctions for noncompliance are severe.

DOJ's regulations require agencies to take prompt action to address non-compliance. Consistent with Title VI, the rules encourage voluntary compliance, but specify sanctions if compliance cannot be voluntarily achieved:[9]

- *Ultimate sanctions* – As a last resort, a federal agency may terminate or refuse to grant assistance. Before this can occur, the agency must determine that compliance cannot be secured by voluntary means, consider alternative ways to achieve compliance, and afford the applicant a hearing.[10]

- *Court enforcement* – A federal agency may sue a recipient or applicant for federal assistance to obtain specific enforcement of assurances filed with the application for financial assistance or to enforce compliance with Title VI or other constitutional or statutory provisions.[11]

- *Administrative action* – Other sanctions include cooperation among federal agencies or state and local governments to enforce nondiscrimination requirements, or bypassing a recipient that is violating Title VI to provide assistance directly to an ultimate beneficiary.[12]

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[7] 28 C.F.R. § 42.407(c).
[8] 28 C.F.R. § 42.410.
[9] *See* 28 C.F.R. § 50.3.
[10] 28 C.F.R. § 50.3(I)(A).
[11] 28 C.F.R. § 50.3(I)(B)(1).
[12] 28 C.F.R. § 50.3(I)(B)(2).

C. Environmental Protection Agency regulations follow DOJ rules.

In 1984, EPA promulgated its regulations to implement Title VI and DOJ regulations.[13]

1. Congress authorizes states to administer federal environmental programs.

The Agency's "recipients" typically are states that administer federally-funded environmental programs. States are authorized to apply to EPA to administer federal environmental programs pursuant to the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act and other environmental statutes. If EPA authorizes the state to administer the federal environmental program, it also provides federal financial assistance to the state.

EPA can deny the award of assistance to any state program that does not comply with Title VI or it can terminate financial assistance to that state at a later date if the state fails to properly implement Title VI.

2. EPA's regulations specify pre- and post-application Title VI compliance.

Pursuant to DOJ regulations, EPA promulgated regulations to implement Title VI that are consistent with DOJ provisions:

- *Preaward compliance reviews* – EPA will review information provided by applicants for federal financial assistance to determine Title VI compliance. EPA is to conduct an on-site review if the Agency believes discrimination may be occurring in a program or activity that is the subject of the application. A written agreement between a state agency and EPA must be signed before EPA can make any award. These agreements are not indefinite; they must be renewed after a specified period of time.[14]
- *Postaward compliance* – EPA's regulations require it to periodically request information from recipients regarding the programs for which federal financial assistance is provided. On-site reviews may be conducted if the Agency believes discrimination is occurring. As part of the process, EPA is to provide recipients with notice of Title VI violation allegations and provide an opportunity for states to respond. To address noncompliance,

[13] 40 C.F.R. § 7.
[14] 40 C.F.R. § 7.110(a).

voluntary efforts to achieve compliance are encouraged. If voluntary compliance cannot be achieved, EPA may initiate formal enforcement procedures.[15]

- *Complaint investigations* – Once EPA selects a recipient for a Title VI compliance review, the Agency must follow certain administrative procedures. EPA can also conduct investigations upon complaints from people who are part of a class that they believe has been discriminated against in violation of Title VI.[16]
- *Enforcement* – Informal resolution of Title VI violations is encouraged, but if informal resolution cannot be achieved, EPA may terminate, suspend, or annul assistance or employ any other means authorized by law to achieve compliance, including a referral of the matter to DOJ. If EPA terminates, suspends or annuls financial assistance, a formal hearing procedure before an administrative law judge is required. However, termination of assistance does not become effective until 30 days after EPA has provided a report describing the circumstances of such action to committees of Congress with appropriate jurisdiction.[17]
- *Reinstatement* – If the recipient satisfies the terms of eligibility contained in the termination order and provides reasonable assurances that it will comply with Title VI in the future, assistance can be reinstated.[18]

D. Recent case law clarifies the application of Title VI.

On December 22, 1999, the U.S. Court of Appeals for the Third Circuit clarified key Title VI concepts in the *Cureton v. National Collegiate Athletic Association* decision.[19] The Third Circuit concluded that the scope of disparate impact regulations under Title VI is limited to "recipients" of federal financial assistance, not others that have a mere relationship with entities receiving assistance.

The case dealt with a challenge to minimum scholastic aptitude test score requirements for freshman year varsity intercollegiate athletic participation and an allegation of a disparate impact. The Third Circuit found:

> [A] court should be circumspect in imposing Title VI obligations on an entity which is not a direct recipient of federal financial assistance.[20]

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[15] 40 C.F.R. § 7.115.
[16] 40 C.F.R. § 7.120.
[17] 40 C.F.R. § 7.130.
[18] 40 C.F.R. § 7.135.
[19] Cureton *v.* National Collegiate Athletic Association, No. 99-1222 (3rd Cir., December 22, 1999).
[20] *Id* at 19.

This decision confirms that Title VI regulations are "only related to programs or activities receiving Federal financial assistance."[21] The Third Circuit continued:

> [W]e emphasize that under the applicable regulations only "recipients" of Federal financial assistance are subject to the disparate impact regulations, not merely organizations which have some relationship with entities receiving such assistance or organizations which benefit from such assistance.[22]

Furthermore, the Third Circuit went on to determine that the requirements of Title VI are similar to the Rehabilitation Act of 1973 that described the relationship between a federal agency and a recipient of federal funds as "contractual." This contractual relationship limits Title VI coverage to recipients because only recipients of federal financial assistance can accept or reject Title VI obligations.[23]

II. <u>The Commission on Civil Rights provides scores of recommendations to improve EPA's Title VI procedures that the Agency has failed to implement.</u>

The Civil Rights Act of 1964 was established at a point in American history when racism and discrimination were prevalent, obvious and often state-sanctioned. The Act has been an extremely powerful tool to reduce discrimination in activities that receive federal funds. The U.S. Chamber is a strong supporter of these efforts.

A. Commission report critical of EPA Title VI implementation.

In 1996, the Commission undertook a review of federal departments and agencies responsible for implementing Title VI. In its report entitled "Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs,"[24] the Commission concluded that "The Federal Government has a moral imperative to ensure that its programs are operated and administered without discrimination… This report contains numerous, *detailed recommendations that must be implemented*…to ensure uniform, comprehensive, and meaningful enforcement of Title VI [emphasis added]."[25]

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[21] *Id.*, at 14
[22] *Id.*, at 18
[23] *Id.*, at 19. *See also* 29 U.S.C. §794
[24] *See* U.S. Commission on Civil Rights, "Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs," June, 1996. Chapter 11 focuses on EPA.
[25] *Id.*, Letter of Transmittal.

With respect to EPA, the Commission expressed "serious concern" at the Agency's lack of sufficient Title VI regulations, guidelines, and procedures for delegated state programs. As an example, it cited an EPA official who conceded the Agency, "has never effectively examined the Title VI compliance activities of continuing State programs."[26] Also, the Commission found EPA's Title VI implementation regulations and procedures deficient and confusing.[27]

B. Report offers 29 recommendations to improve EPA Title VI implementation.

From regulations and guidelines, to budget and staff training, the report's recommendations include many facets of EPA's Title VI and environmental justice programs. EPA is attempting to implement some of the recommendations. However, with respect to assistance to states administering EPA-delegated programs, which is the most critical aspect of EPA's Title VI program, representing 80 percent of all EPA-administered funds, the Agency completely ignores the Commission's recommendations with the issuance of the guidance documents.[28]

C. Findings and Recommendations of the Civil Rights Commission on EPA's Implementation of its Title VI Program.

Some of the findings and recommendations of the Civil Rights Commission Report ignored by EPA:

- EPA's Title VI activities do not follow the DOJ Title VI regulations which set forth the appropriate process for implementing Title VI and which are followed by most other federal agencies;[29]
- EPA's regulations do not explicitly prohibit discrimination in activities conducted in a facility built with federal funds such as wastewater treatment plants;[30]
- EPA has not issued guidelines for any of its federally assisted programs as required by DOJ; therefore, EPA does not provide the guidance necessary for states to comply with Title VI;[31]
- EPA only performs pre-award reviews of the applications for funds in the State Revolving Fund program but does not conduct a pre-award review for other

[26] *Id.*, at 435.
[27] *Id.*, at 426, 428.
[28] For individual findings and recommendations, *see id.*, at 439-452.
[29] *Id.*, at 426.
[30] *Id.*, at 427.
[31] *Id.*, at 428.

grant programs such as the federally delegated environmental programs authorized by specific statutes;[32]

- EPA conducts virtually no post-award reviews of its recipients;[33]
- For the time period of the Civil Rights Commission Report (1976-1993), there is no EPA federal assistance case that resulted in deferral, suspension, or termination of federal funds to a state environmental program;[34]
- Although 80 percent of all of the funds administered by EPA go to continuing state environmental programs, EPA has failed to issue regulations, guidelines, policies, or procedures that instruct a state as to how to comply with Title VI;[35]
- EPA does not require states to submit methods of administration showing how they intend to ensure compliance with Title VI;[36]
- An EPA official admitted that the Agency: "has never effectively examined the Title VI compliance activities of continuing State programs;"[37]
- EPA does not review state Title VI compliance criteria as part of its compliance reviews;[38]
- EPA admits that its failures to implement its Title VI program in compliance with DOJ guidelines raises the issue of whether it is legally liable for failure to enforce Title VI;[39]
- EPA does not demand Title VI compliance assurance statements from states as required by DOJ regulations and guidance;[40]
- EPA does not even have a system to review state environmental assurances of compliance with Title VI, nor does the Agency monitor state compliance with Title VI;[41]
- EPA's Title VI implementation plans: "do not fulfill the purposes envisioned by the Department of Justice" and its plan is "superficial;"[42] and

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[32] *Id.*, at 429-430.
[33] *Id.*, at 430.
[34] *Id.*, at 432.
[35] *Id.*, at 435.
[36] *Id.*
[37] *Id.*
[38] *Id*
[39] *Id.*
[40] *Id.*, at 446.
[41] *Id.*, at 436.
[42] *Id.*, at 437.

- EPA does not provide states with any examples of the types of activities that would ensure compliance with Title VI.[43]

The Civil Rights Commission Report sets forth many other findings and recommendations for EPA to implement Title VI and the DOJ regulations and guidelines. EPA ignores this very thoughtful and comprehensive report and instead travels its own path into regulating permit holders. In addition, EPA avoids its primary task to ensure that state programs and activities receiving federal financial assistance are in compliance with Title VI before funding is awarded and that that the recipients' program remains in compliance after funding is awarded.

III. EPA even fails to achieve its stated goal to provide a framework for states to identify and eradicate unintended discrimination in the administration of federally delegated environmental permit programs.

Instead of following the Commission's blueprint for implementing Title VI in a manner consistent with Congressional intent, EPA is pursuing a radically different approach. In the guidance documents, EPA proposes to establish a Rube Goldberg scheme, which completely avoids Title VI review of state plans and assurances before providing financial assistance and the post-award review process. Instead, EPA focuses on attempting to uncover discrimination on a permit-by-permit basis by reviewing a permit in light of the accumulated impact of all permits issued in a particular area. This approach is not only inconsistent with Title VI and DOJ regulations, but it utterly fails to recognize the many real factors (i.e. historic operations, proximity to transportation, available workforce, taxes, location of customers) that impact the reasons for a company operating in a particular area.

A. EPA's Guidance Documents.

1. EPA's Recipient Guidance provides little assistance for states to eliminate discrimination.

According to EPA, its Recipient Guidance provides states with strategies for addressing Title VI issues arising solely from environmental permitting:

- *Comprehensive Approach* – Through this approach, states would adopt a broad approach to improve existing processes by integrating Title VI

[43] *Id.*, at 443.

activities described in the guidance documents into existing permit-processing procedures.[44]

- *Area-Specific Approaches* – EPA envisions that through implementation of area-specific reviews, states will identify geographic areas with adverse disparate health impacts or other Title VI concerns. In this way, trends among communities with different racial makeup can be compared to determine if minority communities suffer adverse disparate impacts.[45]

- *Case-by-Case Approach* – This approach would require states to develop permit-specific approaches if circumstances warrant. One example described by EPA asserts that states could develop general criteria to evaluate permit actions likely to cause Title VI concerns.[46]

However, EPA in effect demands that states utilize Area-Specific Approaches since the guidance documents only provide one-paragraph descriptions of the Comprehensive and Case-by-case approaches.[47]

Moreover, the Agency asserts it will usually end Title VI investigations when EPA determines that a permit triggering an allegation is in an area covered by an EPA-approved area-specific agreement. States that choose different approaches – including states that eradicate discrimination – could face Title VI reviews and interference in permitting if Area-Specific Approaches are not implemented.[48]

2. EPA's Investigation Guidance describes EPA procedures.

Complaints alleging Title VI violations will be processed through the framework proscribed by the Investigation Guidance. These allegations will be either discriminatory human health or environmental effects resulting from the issuance of permits, or discrimination during the public participation process associated with the permit.

The Investigation Guidance does not include specific remedies for violations of Title VI or EPA regulations. It does, however, provide options that EPA can employ depending on case specific information by specifying procedures the Agency will use to process Title VI complaints, resolve them when possible through formal or informal measures, and terminate funding when resolution

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[44] *Id.*, at 39657.
[45] *Id.*
[46] *Id.*
[47] *See id.* In contrast, there are 40 specific references to Area-Specific Approaches in the *Federal Register* notice.
[48] *Id.*, at 39676.

cannot be achieved. The Investigation Guidance specifies that, consistent with Title VI, informal resolution is preferred.[49]

3. Adverse Disparate Impact Analysis review is the key to Investigation Guidance.

EPA has developed procedures to evaluate alleged violations of Title VI through the Adverse Disparate Impacts Analysis process. This portion of the Investigation Guidance is described as an analytical framework that will be adapted to address the particular characteristics of each complaint. At the end of this review, EPA will determine appropriate remedies which could include restrictions on environmental permits that are in addition to the factors typically considered by state agencies evaluating new environmental permits, permit renewals, or modifications.

As a clear example of a condition that may be imposed on a company that exceeds EPA's authority under environmental statutes, EPA asserts that as part of an area-specific agreement it could require:

> [C]eiling[s] on pollutant releases with a steady reduction in those pollutants over time. The period of time over which those reductions should occur will likely vary with a number of factors, including the magnitude of the adverse disparate impact, the number and types of sources involved, the scale of the geographic area, the pathways of exposure, and the number of people in the affected population. It is worth nothing, however, that pre-existing obligations to reduce impacts by environmental laws (*e.g.*, "reasonable further progress" as defined in the Clean Air Act section 171 (1)) might not be sufficient to constitute an agreement meriting due weight.[50]

As a result, EPA, through the system established with these guidance documents, would establish discharge ceilings or force states to implement other restrictions for the discharge of substances specified in the agreement that exceed the authorities granted it under the environmental statutes and which are based on problems caused throughout the area rather than by the facility which is the subject of the environmental justice complaint.

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[49] *Id.*, at 39669.
[50] Id., 39657.

4. Permit holders are subject to EPA enforcement due to state discrimination.

The Investigation Guidance process focuses on remedies to redress discrimination arising from the long term operations of a facially-neutral state environmental permitting decision. EPA's guidance attempts to reduce discrimination by focusing on facilities that operate in areas that may not be in attainment with all environmental laws. To achieve what EPA believes to be environmental justice, it will subject companies operating in these areas to:

- Denial of permits;
- Limitations on operations or facility size and scope; and
- Imposition of measures beyond "matters ordinarily considered in the permitting process" on permit holders and applicants.[51]

Pursuant to the guidance documents, the permit holder becomes the entity that must atone for a state's discriminatory practices or the historical pollution within a community – even though the permit holder is in full compliance with all applicable environmental laws and regulations and no way responsible for a state's discrimination. Neither EPA, which has failed to provide guidance to states to eradicate facially-neutral discrimination, nor state governments, which may have unintentionally allowed discrimination in their programs, suffer consequences. Under the guidance documents, states that have allowed discrimination will not even be required to amend their procedures to prevent discrimination in the future.

B. EPA's approach is legally and fatally flawed.

EPA's approach to implementing Title VI is legally and fatally flawed because it focuses on permits and the accumulated impact of environmental permits issued in a specific geographic area rather than on the difficult task of reviewing grant applications and monitoring the use of federal funds by state environmental programs. This fatal flaw transfers the focus of EPA's attention to the permit holder and away from the recipient of federal financial assistance. Moreover, it drastically minimizes the expertise of DOJ and the Commission on matters within their fields of expertise. EPA's focus on the permit holder and its avoidance of DOJ and the Commission's guidance highlights and makes particularly relevant the severe criticisms of the Agency in the Commission's Civil Rights Report.

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[51] *Id.*, at 39674 (June 27, 2000).

1. Permit holders are not recipients of federal financial assistance.

Permit holders cannot be considered recipients of federal financial assistance because neither EPA nor the state has provided the permit holder with any direct or indirect financial assistance.[52] Instead, when a state approves a permit, the permit holder receives a legal right to operate in accordance with the permit conditions. Therefore, by applying Title VI provisions directly to permit holders or applicants, EPA avoids its legal obligation to ensure that federally-funded state programs do not discriminate on the basis of race, color, or national origin. Such legal obligations can be most easily met by implementing the intent of Title VI, the regulations and guidance of DOJ, and the recommendations of the Commission.

2. Guidance documents cannot modify the EPA-state relationship established by Title VI and DOJ.

The guidance documents radically alter the relationship between EPA and state agencies that administer federal environmental programs by:

- Rendering the preaward and post-approval review procedures proscribed in DOJ and EPA regulations effectively moot;
- Requiring EPA and states to implement procedures to review of areas where state facially-neutral permitting programs may potentially discriminate in lieu of the ongoing compliance review procedures specified in DOJ and EPA regulations; and
- Mandating that states include conditions in specific permits that exceed statutory and regulatory environmental requirements.

Although the guidance documents are not legally binding, EPA threatens that unless states comply with the provisions of the guidance documents, states will not be accorded "due weight" when assessing Title VI.[53] Therefore, states that do not follow the guidance documents to the letter – even states that administer discrimination-free programs – face enforcement by EPA under the guidance documents and loss of financial assistance.

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[52] *See* Cureton *v* National Collegiate Athletic Association, *infra* at 6.
[53] 65 Fed. Reg. 39663 (June 27, 2000)

3. Area-Specific provisions parallel the Interim Guidance, which was prohibited by Congress from being implemented.

The concepts included in the guidance documents are not new; they draw heavily from EPA's February 1998 "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits ('Interim Guidance')." Although much less detailed than the Recipient and Investigation guidance documents, the Interim Guidance required states to identify specific geographic areas with alleged adverse disparate health impacts. [54]

The Interim Guidance was severely criticized by governors, mayors, other state and local government officials, community leaders, business, small businesses and interest groups such as the National Black Chamber of Commerce, National Association of Black County Officials, and Environmental Council of the States. The U.S. Chamber, too, was highly critical of the Interim Guidance, arguing that it undercut a decade of efforts to bring business into low income and minority areas and to provide job training to citizens in those depressed areas.

EPA's policies would have encouraged lawsuits against local businesses, while attempting to remedy conditions that may not have been in any way caused by businesses then-operating in those areas. Such policies would cause existing businesses to flee low income and minority communities because they would have been subject to conditions far more adverse than businesses operating in other locations.[55]

Responding to these concerns, Congress imposed restrictions that ultimately became law barring EPA from using appropriated funds to implement or administer the Interim Guidance. The restrictions, however, allowed EPA to develop final Title VI guidance.[56]

Rather than using DOJ regulations and guidance and the Commission's recommendations as a blueprint for the Investigation and Recipient guidance

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[54] U.S. Environmental Protection Agency, "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits," January 23, 1998.

[55] On May 1, 1998, the U.S. Chamber appealed directly to the President to request that EPA withdraw the guidance documents because of the impacts on the significant adverse impact that the Interim Guidance would have had on American prosperity and our common commitment to spurring economic growth and job opportunities in low-income and minority communities.

[56] *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276 (1998) *and* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000, Pub. L. No. 106-74 (1999).

documents, the Agency has attempted to re-impose using different words the Interim Guidance that Congress found so deeply flawed.

IV. Not only are EPA's guidance documents inconsistent with Title VI and DOJ regulations, but the approach will have disincentives for economic development in minority communities.

If the guidance documents are implemented by EPA, businesses in minority and low-income communities could be forced to close. Jobs and prospects for improved economic prosperity in these areas will be lost. Such a loss would be unfortunate after the many decades of federal effort to bring jobs and worker training to these areas through empowerment zones, enterprise communities, and job training activities.

Environmental laws and regulations often require facilities to modernize their equipment to meet new pollution control requirements. EPA alone issues approximately 500 new regulations annually and these new mandates require new permits or permit modifications that, under the guidance documents, will subject the facility to an environmental justice inquiry. Every attack alleging violations of EPA's environmental justice guidelines subjects the facility to the risk of loss of permit or to permit conditions that exceed what can be imposed by environmental regulations. As such, facilities will be less likely to operate in areas where their permits can be attacked on a routine basis.

Instead of providing guidance to states to eliminate unintended discrimination, EPA's reliance on the Area-Specific Approaches will force states to identify locations that may be in non-attainment with an environmental law or regulation. The guidance documents will create a disincentive for facilities to locate or expand in non-attainment areas - many of which have large minority or low-income populations. The disincentives are:

- *Uncertainties for permit holders* – The certainty statutes, regulations, guidance documents and permit conditions provide permit holders and applicants will be lost because the guidance documents focus on individual permit decisions. Virtually any permit action could trigger an adverse disparate impact review and any such review could result in the loss of an environmental permit.

- *Environmental compliance* – Compliance with environmental statutes or regulations does not guarantee Title VI compliance.[57] This means that even a

[57] *Id.*, at 39680, 39690.

facility that is in compliance with all environmental statutes could lose its right to operate.

- *No permittee role* – A permit holder (the company) has no formal role in the Title VI compliance process even though permittees may be forced to alter or suspend operations following the Title VI review. Simply, the impacted permittee does not even have the right to defend itself against charges of environmental racism.

- *Local planning, existing uses and market forces are ignored* – The reliance on the Area-Specific Approaches ignores local considerations that may be beyond the scope of state environmental permitting agencies. For example, zoning and existing patterns of development will have significant influences on other types of development; certain types of businesses may cluster because of availability of skilled workers, proximity to markets, or access to highway, rail, port, air, education or telecommunications infrastructure; and property values may also preclude certain types of development in certain communities. Under the guise of the Civil Rights Act, the guidance documents would establish EPA as a *de facto* national zoning and planning board capable of determining the types of businesses that could locate in a particular area. Title VI does not sanction EPA efforts to commandeer the land use planning authority of local governments.

- *EPA regulatory databases do not prove discrimination* – The Recipient Guidance specifies that states should use information from EPA databases such as Aerometric Information Retrieval System, Toxic Release Inventory, Total Maximum Daily Load, and Superfund National Priority List data to determine stressors that potentially contribute to disparate impacts on certain demographic groups. Using this approach, literally any area of the nation in non-attainment with any environmental program would trigger environmental justice actions for each permit reviewed by a state agency. Environmental justice would swallow up all environmental requirements.

- *Poor data quality* – The guidance documents specify that states identify areas where potential Title VI concerns may exist. Although technically rigorous geographic studies of alleged adverse disparate impacts that include ambient monitoring data, modeled ambient concentrations, and identification of known emissions incorporated are suggested, they are not required. Only "readily available and relevant data" is required for adverse impact assessments since "significant resources" are required to generate more detailed geographic estimates and measures. Furthermore, when "more detailed (*e.g.*, modeled)

estimates" are unavailable, EPA will allow "simpler approaches."[58] Therefore, it will be a common practice for environmental justice advocates to file claims using "simpler approaches," i.e. claims based upon data that is inaccurate; that has not been peer-reviewed and at worst is extremely out of date.

- *The disparity process can be exploited* – Intervenors, as long as they are members of a group discriminated against, can seek to stall projects and frustrate state permitting actions merely by filing claims with EPA. State project review will likely be suspended as EPA conducts an investigation – even if allegations are not substantiated. The guidance documents include few restrictions on individuals or groups that can file allegations of Title VI violations. Groups or individuals will use the environmental justice process to stop or delay projects, even those supported by the community, for many political, ideological or economic competitiveness reasons.[59] Moreover, since there is no minimum level of support that must be provided with a complaint for EPA to accept it, EPA is opening the floodgates, which will allow so many attacks on the environmental permitting system that the system will be rendered useless.

IV. Conclusion

Since EPA's guidance documents are so radically inconsistent with Title VI, DOJ and EPA regulations, and U.S. Commission on Civil Rights findings and recommendations, the U.S. Chamber strongly urges EPA to abandon all efforts to finalize the guidance documents. Instead, the Agency must expeditiously amend its existing regulations and subsequently issue appropriate guidance to implement the recommendations of the Commission's report in accordance with the regulations and guidance of DOJ. The clear focus of EPA's Title VI initiative should be to ensure that state environmental programs comply with the Title VI before it awards financial assistance to the states.

The U.S. Chamber thanks the Agency for soliciting the opinion of the U.S. business community concerning the draft guidance documents.

Sincerely,

William L. Kovacs

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[58] *Id.*, at 39660, 39681.
[59] *Id.*, at 39672, 39696.

Alice Kaswan, Associate Professor
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August 28, 2000

Honorable Carol Browner, Administrator
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401 M Street
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Anne Goode, Director
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U.S. Environmental Protection Agency
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Re: Comments on:

Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance) and

Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Investigation Guidance).

Dear Administrator Browner and Ms. Goode:

In recognizing the implications of Title VI for recipient environmental permitting agencies, EPA has courageously recognized the potential of our civil rights laws to protect communities of color from some of the most important threats to their well-being. My comments therefore begin by emphasizing the importance and the potential inherent in the path EPA has taken. The question, then, is whether EPA's guidance documents will, in reality, fully implement what Title VI requires. While EPA's guidance documents reflect a recognition of the importance of disparate effects on the communities impacted by recipient agencies' permitting decisions, some aspects of the guidance documents risk seriously undermining the goal of eliminating such disparate consequences. The comments therefore proceed to identify some of the most important ways in which the draft guidances may fail to redress the inequities proscribed by Title VI.

I. General Comments in Support of the Draft Guidance Documents

Comment #1: EPA's Interpretation of Title VI Helps Address the Shortcomings in the Existing Implementation of Environmental Laws. My first general comment is to emphasize that EPA's interpretation of Title VI, and its applicability to environmental

permitting, presents a major step forward in responsibly addressing the distributional implications of environmental laws. As anyone familiar with environmental laws is aware, our environmental laws have not been implemented in a way that systematically considers the distribution – and concentration – of polluting facilities. Pollution controls imposed by regulations and then incorporated into environmental permits generally focus on single sources, they focus on technological feasibility, they focus on economic feasibility. Even where health considerations factor into the regulatory structure, the analysis rarely considers the actual impact of a given facility in a particular location. The environmental permitting process has thus failed to consider the fairness of the distribution of multiple facilities. Nor has the environmental permitting process been effective at dealing with the cumulative impacts of multiple facilities or their impacts in combination with other types of sources. Through EPA's interpretation of Title VI, the federal government has had the courage to address the deficiencies in our environmental permitting programs and to confront the real-life implications of the permits issued by the state and local agencies wielding EPA funding and authority.

Comment #2: The Title VI Regulations' and the Guidances' Focus on Disparate Impacts Rather than Discriminatory Intent Appropriately Focuses Attention on the Harm Suffered Rather than the Motives of the Permitting Agencies. Some might imply that little "harm" is done if an agency does not act with discriminatory intent. That approach ignores the real-life experience of those on whom polluting facilities are concentrated. The fact that EPA's Title VI regulations, like the implementing regulations of most federal agencies, address the disparate effects of recipient agency decisions means that regulatory attention is properly focused on the extent to which communities are protected by the permitting process. Were Title VI to apply only where discriminatory motives could be demonstrated, it would fail to address the many circumstances in which environmental pollution might be concentrated in minority neighborhoods for non-discriminatory reasons. Industries and local governments might concentrate – and have concentrated – in particular areas for any number of reasons, such as cheaper land prices and the presence of available infrastructure. Existing inequities may be traceable, in part, to a legacy of historic segregation and discrimination. Because of the myriad factors that cause existing inequities, environmental permitting agencies may very well make decisions that adversely and disparately impact minority neighborhoods even if environmental permitting agencies themselves do not intentionally discriminate. If the law were to apply only to decisions tainted by direct discrimination, the law would "miss" the distributional inequities minority communities confront.

Comment #3: It Is Appropriate for Recipient Agencies To Be Accountable for the Disparate Effects of Their Permitting Decisions Even if They Were Not Responsible for Preexisting Inequities. As suggested by Comment #2, environmental permitting agencies may not be the direct or even the indirect cause of many of the disparate impacts communities experience. However, environmental permitting agencies do have the power, the opportunity, and the obligation to keep from exacerbating existing inequities. Undesirable land uses may have been concentrated in certain neighborhoods for a whole host of reasons, many beyond the control of a particular permitting agency. EPA's Title VI regulations indicate that, when a

polluting facility applies for a permit for that neighborhood, the agency should deny the permit if it will exacerbate the existing inequity, regardless of the agency's role, or lack of a role, in creating the underlying inequity. While the agency might not be the cause of the disparities, it could provide one of the few mechanisms for improving them.

Comment #4: EPA's Draft Recipient Guidance Appropriately Directs Our Focus to the Permitting Process Itself. EPA's guidance on Title VI is most important for what it tells us about how the permitting process should work. State and local agencies must come to terms with the fact that, under Title VI, they must consider the distributional implications of the permits they issue. The message is positive, not negative. While the original 1998 draft investigation guidance might have seemed negative given its sole focus on the processing of complaints against recipient agencies, the Recipient Guidance explains how an agency might be expected to execute the responsibilities EPA has identified. The primary issue is that permitting agencies must now consider distributional issues. They now have the opportunity to address issues that were previously considered outside of their expertise. The opportunity is an exciting one. In time, the mission of protecting communities equally will hopefully become as important as the basic underlying mission of protecting the environment. Ideally, changes in the permitting process will preclude the need for subsequent complaints.

Comment #5: The Proposal for Area-Specific Approaches and Agreements Could Allow the Recipient Agencies to Serve as Catalysts for a More Comprehensive and Far-Reaching Resolution to Distributional Inequities than the Agencies Could Accomplish Pursuant to Their Own Jurisdictional Powers. To the extent the Recipient Guidance encourages agencies to assess the disparate impacts within their geographical jurisdiction, regardless of pending permit applications, the Guidance will promote a much-needed assessment of distributional equity. More importantly, to the extent that Title VI, and the Guidance, prompt recipient agencies to begin working with other entities that play a role in existing disparities, one increases the potential for a more comprehensive and far-reaching resolution than a single agency, such as an air permitting agency, could accomplish on its own. In that case, the recipient agencies could be serving as a catalyst that will remedy distributional inequities, even in the absence of a specific permitting application and/or a particular complaint.

In addition, the area-specific approach suggests that existing sources might have to assume greater responsibility for existing inequities than would be the case if Title VI were to apply only to prospective permit applicants. If Title VI were to apply only to new facilities, the new facilities might argue that they should not bear the burden of the existing cumulative burdens created by other sources and facilities. The area-specific approach would allow for an assessment of existing sources as well as new sources, and could lead to measures that would reduce existing inequities. Arguably, Title VI could be read to *require* that such an approach be taken, whether or not a recipient agency is considering proposals for new facilities. The area-specific approach is not just a "good idea." It is one that deserves development and amplification in its own right.

As discussed below, however, the area-specific approach, and the potential for effective and meaningful area-specific agreements, may be undermined by a number of the guidances' provisions. The approach thus has an enormous potential, but one that may not be realized under the guidances.

Comment #6: **The Flexibility to Consider a Wide Range of Solutions in Informally Resolving Complaints Has the Potential to Facilitate Broad Improvements in Disparate Impacts.** Like area-specific approaches and agreements, the voluntary compliance process provides recipient agencies with an incentive to take a wide variety of actions to reduce disparate impacts. One permit application might trigger a resolution process that would expand the universe of activities subject to regulation or to more rigorous regulation. As with the area-specific approaches, existing sources, as well as new sources, might find themselves subject to more stringent regulation. While existing sources might not greet this prospect with anticipation, the burden of reducing a legacy of unequal impacts might, through such settlements, distribute the burden of reducing impacts to existing contributors as well as proposed new contributors. As is discussed below, however, it is not clear how willing agencies would be to re-open existing permits. The draft guidances may be insufficient to promote their own suggestions.

II. Comments Critical of the Draft Guidance Documents

A. Consideration of Disparate Impacts

Comment #7: The definition of disparate impact fails to account for social, economic, and cultural impacts. According to the glossary, an impact is an effect resulting from exposure to a stressor. A stressor is defined as a factor that could adversely affect receptors, such as chemicals, physical effects (like noise), and biological effects, or as any substance "that adversely affects the health of humans, animals, or ecosystems." Thus, the guidances seem to recognize only physical and health-related impacts. Facilities seeking permits from recipient agencies may, however, result in a host of negative impacts not covered by the guidances, such as negative impacts on the social, cultural, or economic life of a community. These impacts are considered relevant under other laws considering environmental effects, such as NEPA. The Title VI regulations should cover impacts at least as broadly as other statutes. If anything, the term "impacts" should have an even broader interpretation under Title VI than under environmental statutes, since Title VI was passed to guarantee "civil" rights, not just "environmental" rights. Finally, the placement of environmentally significant facilities can have stigmatic impacts in addition to tangible impacts. For example, the placement of a sewage facility is not a neutral. Taking serious account of stigmatic and symbolic impacts is an important part of addressing the racial disparities that are the target of EPA's Title VI regulations.

Comment #8: The frequently-repeated assertion that the OCR, in determining compliance, will consider only disparate impacts resulting from stressors "cognizable

under the recipient's authority" is ambiguous and, under at least one reading, could undermine the guidances' commitment to recognizing and redressing cumulative impacts. The guidances' strength is in requiring consideration of the real cumulative impacts faced by real people in a particular location. To the extent a permitting or other decision could create a disparity or exacerbate an existing disparity, it violates the Title VI regulations. This understanding of the regulations is reflected in the Recipient Guidance's reference to President Kennedy's statement that "[s]imple justice requires that public funds ... not be spent in any fashion which ... entrenches ... racial discrimination." The agency does not have to be the sole cause of the discrimination; it is enough if the agency makes a decision that "entrenches" or exacerbates disparities caused by other sources.

The guidances' oblique comment that, when it comes to the critical question of compliance or violation it will consider only those impacts associated with the agency, seems to cut directly against the tenor of the guidances and the regulations they implement. Does this mean that OCR will consider only the impacts associated with the agency in determining whether a decision having a disparate impact violates the regulations? Does this mean that OCR will ignore existing disparities that the agency's decision might exacerbate? What, then, is the purpose of considering the cumulative impact in the first place?

If the interpretation I critique is, in fact, the interpretation OCR has adopted, then it fails to prevent recipient agencies from exacerbating and/or "entrenching" existing disparities. That significantly undercuts Title VI. The virtue of the Title VI regulations is that they look to effects, not just intent, as discussed above in Comment #2. The regulations focus on what people experience, not on the state of mind of decisionmakers. If the purpose of the Title VI regulations were to punish a bad agency for treating people badly, then, at least for argument's sake, it might be appropriate to evaluate only that agency's actions to determine if it behaved wrongly. But the Title VI regulations are not about punishing agencies for having a "bad" state of mind. They are about requiring agencies to make sure that their actions do not have bad consequences. Agencies' actions could have bad consequences even if the agencies' decisions were not the sole cause of those consequences. If the focus is on the impact of agencies' decisions, not on their state of mind, then an agency's decision to exacerbate an existing disparity, even if it did not cause the underlying disparity, would violate the Title VI regulations.

As discussed in Comment #3, above, the Title VI regulations present an opportunity. They provide agencies with a mission: to factor distributional consequences into permitting decisions. Title VI is not about fault, it is about the opportunity to improve conditions for those who have suffered inequities. Agencies should be required to improve, not worsen, conditions. Agencies who do not do so, and who exacerbate existing inequities, should be found in violation of the law, even if they are not the sole cause of the disparities of concern.

If the foregoing interpretation of the Guidance is mistaken, then the Guidance needs to be clarified. Perhaps the proper interpretation is that an agency will not be found to have violated Title VI if there is nothing it can do about an identified disparate impact. But it is unclear what

would have prompted the complaint if the impact is something entirely outside of an agency's control. Presumably, a complaint is filed against an agency because it has made a decision having an impact on a community. If its action will not have a particular impact on a community, then there would not be an adverse impact at issue and this stage of the analysis would not have been reached.

Comment #9: Permit modifications should receive the same disparity analysis as other permit applications. The Investigation Guidance states that allegations addressing permit modifications would analyze only the modification and its effects, suggesting that OCR would not consider cumulative impacts from a variety of sources in determining whether to grant a request for a modification. With all due respect to the political difficulties raised by modifications, OCR appears to be creating an unjustified loophole for modifications. For the community experiencing the disparate impact, an increase in impacts is equally detrimental whether it is caused by a modification or by a new source. An existing source does not have a vested right to a modification that impacts the surrounding community. The guidances' important focus on cumulative impacts, from all stressors, should be applied to modifications as well as applications for new permits.

Comment #10: In assessing the "adversity" of a disparate impact, the Guidances place too much weight on the "benchmarks" provided by environmental laws, including the NAAQS. One of the virtues of the guidances is their emphasis on collecting area-specific information. Many of the benchmarks established by environmental laws, in contrast, are considered in isolation, without full consideration of cumulative and symbiotic impacts. Existing benchmarks, including the NAAQS, provide a tempting but potentially misleading picture of the cumulative impacts a community may face. If the problem of cumulative impacts resulting from the inequitable distribution of facilities is to be taken seriously, each setting should be evaluated on its own terms. The data that has gone into the creation of various benchmarks will, of course, be relevant to determining the degree of adversity presented by a particular confluence of facilities. But the potential for variation presented by unique circumstances suggests that presumptions based upon the benchmarks would be flawed. In addition, given the scientific uncertainties that are frequently present, and the limited resources of many complainants, presumptions could be inappropriately difficult to overcome. Presumptions, or overreliance on benchmarks, could create a false sense of certainty and impede the full exploration of site-specific cumulative impacts.

B. <u>Complaint Investigation and Consideration</u>

Comment 11#: OCR should accept complaints filed prior to the issuance of a final permit and assist recipient agencies in avoiding disparate impacts. One of the critical benefits provided by the guidances is that they encourage incorporation of consideration of disparate impacts in the permitting process. If a complainant files a complaint prior to the issuance of the permit, the OCR is on notice that a permitting process may not be proceeding in an appropriate fashion. Intervention early, to prevent the disparate impact, would be highly preferable to waiting until the permit is actually issued. Early intervention is appropriate for all

parties: for the recipient agencies, who could thereby avoid subsequent litigation; for the permittee, who could avoid the uncertainty associated with having its permit challenged; and for the complainant, who would be spared the period of impact that could occur between issuance of the permit and a subsequent finding of its disparate impact. As a matter of institutional structure, OCR could develop a "compliance counselling" function in addition to its enforcement functions. If a complaint is filed prior to the issuance of a permit, it could be referred to the compliance staff who could begin to intervene in the permitting process to assure that disparate impacts are not created.

Comment 12 #: OCR should investigate, not dismiss, complaints that require additional clarification. The Investigation Guidance suggests that, if a complaint lacks sufficient information to determine whether its allegations should be accepted for investigation, it will send a letter requesting clarification to the complainant and that a complainant's failure to respond within 20 days could result in a rejection of the complaint. As OCR suggests throughout the guidances, it is OCR's duty to investigate and resolve potential violations of the Title VI regulations. OCR should be grateful when a complainant comes forward to alert it to a potential violation of Title VI. Once alerted, the burden should be on OCR, not the complainant, to determine whether the allegation is worth investigating.

Comment 13#: The OCR should maintain a strong role in investigating complaints; the "due weight" provisions of the Guidances suggest that OCR might be tempted to rely too heavily on recipient agencies' own studies. It is understandable that OCR would want to encourage agencies to conduct disparate impact analyses, and that one mechanism for encouraging such studies is to indicate that the results of proper studies will be respected by OCR. However, in providing this inducement to recipient agencies, OCR risks abdicating its own responsibilities.

Recipient agencies essentially have a duty, under Title VI, to conduct whatever studies may be necessary to ensure that their decisions do not have disparate impacts. No additional inducement should be expected; no *quid pro quo* for performing a function that is already required should be provided. Furthermore, the methodology for conducting disparate impact analyses varies, and there is a strong likelihood that the outcome of an analysis could depend significantly upon how the study was conducted. OCR might have one view of how it should be conducted; the recipient agencies might have another view. The recipient agencies are likely to follow whatever approach is least likely to show a violation. While the agency's study might conform to accepted scientific approaches, it might not conform to what OCR, the agency responsible for enforcing Title VI, would find. OCR, the agency responsible for enforcing Title VI, should have the last word, not the recipient agency. Deference to the recipient agency is likely to encourage reliance on methodologies that are least likely to show a violation, and that undermines OCR's authority to determine the methodology and approach that best meets the requirements of Title VI.

Comment #14: The OCR should not base its findings upon a proposed activity's

conformance to an area-specific agreement. As discussed in Comment #5, the area-specific agreement process appears to present a very positive opportunity to address distributional inequities. The Guidance's "due weight" provisions suggest that an agency action contemplated by an area-specific agreement will be considered in compliance with Title VI (presumably notwithstanding the action's individual disparate impact). As with the "due weight" accorded an agency's own studies, OCR appears to be attempting to create an inducement, this time for the area-wide approach.

In this case, the need for an inducement is particularly understandable. Unlike the disparate impact studies, discussed above, most recipient agencies would not be considered required to take an area-wide approach. Here, there may be little to incline an agency to undertake the approach without some sort of inducement. However, the inducement may simply generate poor area-wide agreements that do not provide a sufficient level of protection. OCR may be under considerable pressure to accept area-wide agreements, even if they do not go as far as OCR might like. Future complainants might be unlikely to become involved in the creation of an area-wide agreement since the stakes, at that point in time, may be relatively low. If an agency can come up with an agreement that allows for new facilities or modifications, and can get the agreement accepted by OCR, then the Guidance suggests that any subsequent complaints challenging facilities contemplated by the agreement would be dismissed.

Each complaint should receive more attention than that; the area-wide agreement should not have such preclusive effect. When an individual application is under consideration, its effects, and the concerns of the complainants challenging the application, should receive full attention. The area-wide agreement may still be of value to the recipient agency if it can show how the agreement is being implemented and how, in the individual case, it is working to decrease impacts. If it turns out that the application is connected to other activities that will decrease impacts, then that can be determined on the merits, after full consideration. To simply dismiss the complaint, without considering the individual case and without giving a full hearing to the individual complainants, who might not have participated in the area-wide agreement, would be to cut short the analysis Title VI requires and to give too much deference to the area-wide agreements.

Comment #15: The absence of appeal rights for complainants undercuts their ability to seek the protection Title VI requires. The Title VI regulations are intended to protect complainants from disparate impacts. By denying complainants the right to appeal, OCR is undercutting the ability of affected communities to enforce the rights the regulations are designed to serve. The Guidance documents should be facilitating the enforcement of complainant rights, not cutting off their ability to pursue them.

Furthermore, as a pragmatic matter, EPA and recipient agencies have a long history of working together in administering environmental programs. The Title VI Guidances create new responsibilities that will undoubtedly be challenging for both EPA and recipient agencies to undertake. Complainants will thus be requesting relief that runs counter to the status quo and

counter to what the agencies – federal and state – are accustomed to providing. In recognition of the possible reluctance recipient agencies and EPA may feel, the complainants' ability to challenge agency action should not be hampered.

C. Remedy

Comment #16: The Guidance fails to establish an effective remedy, thus undermining the likelihood of recipient agency compliance. The Guidances frequently states that permit denial is an unlikely consequence of a Title VI dispute since, in many instances, the permit application at issue is not the sole cause of the disparate impact at issue. As the Guidance also notes, however, many communities experience disparate impacts from a multitude of sources. The only way in which a recipient agency may be able to avoid "entrenching" or exacerbating that disparate impact is by denying a permit application. As noted in Comment #3, above, the recipient agency should be required to take measures, such as permit denial, that are necessary to protect the impacted community, regardless of whether the permit is the sole cause of the identified disparity.

The alternatives to permit denial, such as area-wide agreements and informal voluntary compliance measures, are all well and good. But they may not present a feasible alternative to permit denial. A recipient agency may have difficulty convincing other sources, outside of their control, to reduce impacts. Additional legislative measures may be necessary before there is a sufficient incentive for local, state, and federal agencies to enter into such agreements and approach reductions in disparate impacts in the comprehensive way envisioned.

And a recipient agency might prefer to deny a new permit if the alternative is re-opening an existing permit to require additional controls that would enable the new applicant to start up. Informal compliance might be achieved if the permit applicant agrees to finance reductions of the stressor of concern by other entities, but such agreements would likely be complex to negotiate. Similarly, it is unlikely that OCR would take the drastic step of terminating a recipient agency's funding. Without a credible threat that an agency's funding could be terminated or that a new permit could be denied if the requisite reductions in impact are not achieved, it appears unlikely that the significant efforts necessary to reduce impacts from other sources would be undertaken.

D. Justifications

Comment #17: Arguably, economic benefits should not justify a disparate impact. By indicating that a disparate impact could be justified if the activity in question provides economic benefits to the affected community, the Investigation Guidance creates the possibility that community residents could be subject to "environmental blackmail." A community could be convinced that it must accept environmental degradation, and risks to health and happiness, as a necessary tradeoff to accomplish economic development. Especially given the high threshold

for establishing an adverse disparate impact established by the Guidance, it is morally questionable whether the law should allow a community to trade its environmental and physical well-being for economic growth.

Such an approach also suggests that industries will have little incentive to minimize their impacts. An entity seeking a permit might look for the most economically desperate community on the expectation that economic need will allow it to pollute without having to consider its adverse disparate impact. The Guidance contains much promise as a mechanism for ameliorating the legacy of disparate impacts that some communities have endured. OCR should be highly reluctant to accept justifications that could undermine the progress that is possible.

Comment #18: Even if OCR retains the "economic benefits" justification, the confirmed existence of economic benefits to a community should not be sufficient to justify a disparate impact unless there is clear evidence that the community not only recognizes the benefits, but chooses to accept them notwithstanding the permitted activity's adverse consequences. The Investigation Guidance appropriately states that it will consider the community's, not just the recipient's, view as to the likelihood that a permitted activity would provide direct economic benefits to the affected community. However, a community may recognize the possibility of direct economic benefits but choose to reject those benefits in light of the disparate impact associated with the activity. The community may be seeking environmentally benign forms of economic development. From a community's perspective, the presence of economic benefits does not necessarily justify the activity in question. To the extent the Guidance permits economic benefits to be a justification for a disparate impact, it should require an assessment not only of the community's recognition of the benefits, but its desire for them as well.

E. Less Discriminatory Alternatives

Comment #19: OCR's consideration of "cost" in determining the feasibility of alternatives is likely to perpetuate concentrations of disparate impacts in minority communities. Property owned by minorities is typically valued less than comparable property that is not owned by minorities. Thus, land in minority neighborhoods tends, overall, to be cheaper than land elsewhere. Sites in white neighborhoods will generally be more expensive than sites in minority neighborhoods. Under the Guidance's approach, a comparable site in a white neighborhood that cost more than the site in a minority neighborhood would not be considered a viable alternative, even if it was less discriminatory, because of the additional cost. As long as "cost" is considered a variable, it will, overall, tend to limit the number of alternatives that do not result in disparate impacts.

Comment #20: A permit applicant's economic gain should not be valued more than protecting a community from disparate impacts. A disparate impact should be permitted simply because it is more costly for a company to locate in an area where it will not cause a disparate impact. This variable suggests that it is more important for a company to be able to

meet its cost projections than it is for a community to be spared inequitable impacts.

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In sum, the Draft Recipient and Investigation Guidances present a major step forward in recognizing the problem of disparate impacts and the necessity of addressing them. However, many aspects of the Guidance may dilute EPA's capacity to accomplish real change. Notwithstanding the political pressure associated with the significant requirements Title VI imposes, I hope that EPA will have the courage to turn the Guidance into a roadmap for improving the quality of life of communities who have suffered disparate impacts for too long.

Respectfully Submitted,

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BEFORE THE ENVIRONMENTAL PROTECTION AGENCY

COMMENTS OF THE WASHINGTON LEGAL FOUNDATION ON THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

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COMMENTS OF THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF) hereby submits these comments to express its opposition to the Environmental Protection Agency's (EPA) Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, published at 65 Fed. Reg. 39,650 (June 27, 2000). WLF believes that the draft guidance is legally flawed, procedurally improper, unwise and unworkable as a matter of policy, and that the guidance should be withdrawn. At a minimum, it behooves the agency to hold additional public hearings on the draft guidance; the hearings held earlier this summer shortly after the draft was published did not give the public ample time to analyze the guidance and provide meaningful comments.

I. INTERESTS OF WLF

WLF is a non-profit public interest law and policy center with supporters nationwide. WLF regularly appears before federal and state courts and regulatory agencies to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before federal and state courts in numerous cases involving excessive and unlawful government regulation, particularly environmental regulation.

More pertinently, WLF was the only organization to file a brief with the U.S. Supreme Court urging it to grant review of the environmental justice case, *Seif v. Chester Residents Concerned For Quality Living*, No. 97-1620, *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998). WLF also filed briefs supporting the petitions in *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999), and in *Alexander v. Sandoval*, No. 99-1908, (*cert. pending*). In the *Seif*, *Powell*, and *Sandoval* cases, WLF argued that the "disparate impact" theory of discrimination was invalid inasmuch as Title VI only forbids intentional discrimination.

WLF also submitted formal comments to the EPA on May 6, 1998, opposing EPA's earlier version of this guidance, *i.e.*, EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits. In addition, WLF representatives have attended meetings and/or monitored the work of at least three different advisory committees that EPA had established to advise it on what EPA's Environmental Justice policy should be. WLF also filed motions with the EPA on October 28, 1998, to intervene in all the pending Title VI complaints, urging the EPA to dismiss the complaints for legal and policy reasons.[1]

WLF's Legal Studies Division has also published numerous educational materials and has sponsored public briefings on the subject of Environmental Justice. See, e.g., Gerald H. Yamada, *Unanswered Questions in EPA's Environmental Justice "Guidance"* (WLF LEGAL OPINION LETTER April 3, 1998); Gregg T. Schultz, *Activist Agencies Lack Authority To Impose Environmental Justice* (WLF LEGAL BACKGROUNDER Dec. 5, 1997); WLF Environmental Justice Briefing, Dec. 16, 1997 (featuring Robert Knox, EPA's Office of Environmental Justice, and attorneys David Graham and Julie Domike). WLF sponsored another briefing on Environmental Justice on November 11, 1998, featuring James Seif, Secretary of Pennsylvania's Department of Environmental Protection, Harry C. Alford, President of the National Black Chamber of Commerce, and Rafael DeLeon, EPA's then-Acting Associate General Counsel, Office of Civil

[1] Shortly thereafter, the EPA, to its credit, dismissed one of the Title VI complaints against Select Steel Company in Michigan, finding that there was no valid Title VI claim because there were no adverse effects from any pollution, regardless of the racial composition of the population in the area. *See* Letter from Ann E. Goode, Director, Office of Civil Rights, to St. Francis Prayer Center and Michigan Dep't of Environmental Quality, EPA File No. 5R-98-R5 (October 30, 1998).

Rights. The briefing was moderated by Dick Thornburgh, former Attorney General of the United States.

II. BACKGROUND

On June 27, 2000, EPA issued its "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (draft guidance or guidance), ostensibly to provide a framework for processing complaints filed under EPA's discriminatory effect regulations. *See* 40 C.F.R. Part 7. EPA's discriminatory effect regulations invoke Title VI of the Civil Rights Act of 1964, which provides, in pertinent part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. EPA's regulations prohibit any covered program receiving federal assistance from using criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin, or sex. 40 C.F.R. § 7.35(b). The draft guidance also cites Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" as authority for its issuance.

The draft guidance proposes a framework for processing Title VI complaints and modifies EPA's Interim Guidance on the same subject issued on February 5, 1998. While the draft guidance is in some respects an improvement over the earlier Interim Guidance, they both suffer from the same fatal flaw by purporting to base Title VI complaints on disparate impacts rather than on intentional discrimination.

III. DISCUSSION

A. The Draft Guidance Is Based Upon Discriminatory Effect Regulations Which Are Legally Invalid

The entire concept of enforcing "environmental justice" under EPA's Title VI regulations is legally flawed because Title VI prohibits only instances of intentional discrimination, rather than unintentional "disparate impacts" that allegedly affect minority communities.[2] While WLF recognizes that the EPA and other federal agencies have promulgated regulations prohibiting criteria or methods of administration which produce discriminatory effects, purportedly under the authority of Title VI, WLF submits that EPA is not free to go beyond the clear intent of Congress in enacting Title VI.

As authority for the draft guidance, EPA cites a 1994 memorandum from the Attorney General admonishing agencies to enforce discriminatory effect regulations. *See* Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964 (July 14, 1994). This terse and superficial memorandum, in turn, cites the Supreme Court's decisions in the cases of *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), as alleged authority for issuing disparate impact regulations. While WLF recognizes that numerous federal agencies and some lower federal courts have assumed the validity of discriminatory effect regulations on the basis of those decisions, as will be seen, the

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[2] WLF's objections to the legal underpinnings of EPA's disparate impact regulations apply with equal force to EPA's contemporaneously issued Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs. 65 Fed. Reg. 39650 (June 27, 2000).

Supreme Court did not "hold" in those cases that such regulations are valid. In fact, a recent decision of the Court has cast this proposition into considerable doubt. Moreover, the Supreme Court currently has pending before it a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, *Alexander v. Sandoval*, No. 99-1908, which may lead to the Court's review of the validity of these regulations.

Both constitutional and statutory constraints limit EPA's regulatory authority to prohibiting instances of intentional discrimination. The Supreme Court has held that the Fourteenth Amendment to the Constitution prohibits only instances of intentional discrimination, and does not prohibit instances of discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). In turn, the Court has likewise determined that Title VI's protection extends no further than the Fourteenth Amendment, and thus, Title VI itself does not prohibit instances of discriminatory effect.[3] *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Guardians*, 463 U.S. at 608, n.1 (Powell, J., concurring); *Regents of Univ. of California v. Bakke*, 438 U.S. 281,

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[3] Section 601 of Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

Section 602 of Title VI provides, in pertinent part, that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1.

284-87 (1978). Thus, both the Constitution and Title VI itself, which provided the authority for the EPA regulations at issue, protect only against instances of discriminatory intent.

The Attorney General's memorandum states that the Court's decisions in *Guardians* and *Alexander* held that an agency's discriminatory effect regulation under section 602 is a valid exercise of its authority. However, properly read, neither of these decisions encompass such a broad and erroneous holding.

Guardians involved an allegation that a last hired-first fired policy for lay-offs of police officers had a disproportionate effect on black and Hispanic police officers because officers were hired in order of their examination scores, and the examinations allegedly discriminated against minorities. *Guardians*, 463 U.S. at 584-85. The plaintiffs alleged that the policy violated Titles VI and VII of the Civil Rights Act, as well as the Fourteenth Amendment and other laws. *Id.* at 586. As to the claim for relief under Title VI, the Second Circuit had denied relief on the grounds that proof of discriminatory intent was required. *Id.* at 588. The Supreme Court rendered a deeply divided decision which affirmed the Second Circuit's denial of relief under Title VI.

Guardians should not be misread as "holding" that discriminatory effect regulations are valid exercises of an agency's authority. To the contrary, a plurality of four justices in *Guardians* stated that discriminatory effect regulations were *not* a valid exercise of agency power. *Id.* at 611, n.5 (Powell, J., concurring in judgment); *id.* at 612 (Rehnquist, J., concurring in judgment and joining in Part II of Justice Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). Three justices stated that discriminatory effect regulations were valid even though Title VI itself required discriminatory intent. *Id.* at 644-45 (Stevens, J, dissenting). Justice Marshall stated that a discriminatory effect standard was permissible under either Title VI or the

agency regulations. *Id.* at 623-24 (Marshall, J., dissenting). Justice White stated that only noncompensatory, prospective relief was available under either Title VI or its regulations, and thus that the Second Circuit's denial of compensatory relief should be affirmed. *Id.* at 592-94. Justice White proceeded in *dictum* to state that a discriminatory effect standard was permissible under Title VI, but that *dictum* played no part in the Court's holding. *Id.* Properly read, the holding of *Guardians* is that there is no cause of action for compensatory damages for allegations of discriminatory effect under either Title VI or agency Title VI regulations, and any suggestion of a broader holding is simply incorrect.

Because five Justices in *Guardians* (the four dissenters plus Justice White) stated that the Title VI disparate impact regulations were valid, some courts and observers might conclude that *Guardians* "held" that those regulations were valid. But as the Supreme Court emphasized once again just this past term, "This is simply not the way that reasoned constitutional adjudication proceeds." *United States v. Morrison*, 120 S. Ct. 1740, 1757 (2000). One cannot glean the Court's "holding" in a case by adding together the views of concurring and dissenting Justices, even when the sum is five or greater. Rather, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting from *Marks v. United States*, 430 U.S. 188, 193 (1977)). Thus, in *Morrison* the Court rejected the argument that a view joined in by three concurring Justices and three dissenting Justices constituted a "holding" of the Court in *United States v. Guest*, 383 U.S. 745 (1966). *Morrison*, 120 S. Ct. at 1757.

The Attorney General memorandum also cites the Court's decision in *Alexander*, but, again, *Alexander* likewise contains no such holding, nor could it alter the limited holding of *Guardians* after the fact. *Alexander* did not involve Title VI, but rather the Rehabilitation Act. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a state's reduction in the number of inpatient hospital days that the state's Medicaid program would pay on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the state's reduction had a discriminatory effect on the handicapped and violated section 504 of the federal Rehabilitation Act and its implementing regulations.

The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Attorney General's memorandum read *Alexander* far more broadly, apparently based upon the following passage from the Court's opinion, which stated:

> In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964 . . . which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *In essence*, then, we held that Title VI had delegated to the agencies *in the first instance* the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 292-94 (emphasis added) (citation omitted).

Of course, as is made clear by the previous discussion of *Guardians*, that case did not "hold" that a disparate impact claim could be pursued through agency regulations under Title VI, and any discussion of that subject in *Guardians* was *dicta*. Moreover, this after-the-fact explanation of *Guardians* in *Alexander* was *dicta* twice over, as *Alexander* did not even involve a Title VI claim and the discussion was irrelevant to the result in that case. Indeed, the *Alexander* Court reversed the lower court's ruling that the plaintiffs had established a prima facie violation of section 504.

Thus, it is error to read the Court's decisions in *Guardians* and *Alexander* as a holding on the validity of agency discriminatory effect regulations. Further, since the time those decisions were rendered, the Court has not held that such regulations are valid. To the contrary, the Court's more recent statement in *Fordice* raises the question which the Court may address in the *Sandoval* case, specifically, whether such discriminatory effect regulations are valid to the extent they purport to reach conduct not proscribed by Title VI and the Fourteenth Amendment.

In *Fordice*, the Court addressed the correct legal standard for evaluating a state's compliance with the Equal Protection Clause in the context of school desegregation. In particular, the Court considered the standard to be applied to determine if a state had eradicated policies and practices traceable to a history of *de jure* segregation in a public university system. *Fordice*, 505 U.S. at 723-24, 727-28.

In its opinion, the Court made the following statement with regard to the private plaintiffs' Title VI claim:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases*

> *make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

As the Third Circuit recognized in *Chester Residents*, "[h]idden within the Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." *Chester Residents*, 132 F.3d at 931 n. 9. However, the court dodged the statement's implications, which are assuredly not hidden, by stating, "we do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner." *Id.* Of course, as is clear from the previous discussion, there was no such holding in *Guardians* and *Alexander* which needed overturning. The Third Circuit simply misread the breadth of the Supreme Court's decisions in *Guardians* and *Alexander*, and failed to heed an obvious warning sign from the Court in *Fordice*.

Just as the Court has held that Title VI extends no further than the Fourteenth Amendment, similarly, an agency regulation can extend no further. An administrative agency should not be free to proscribe otherwise lawful conduct through a regulation simply because it can be said that the regulation arguably furthers one of the purposes of an enabling statute. Such policy judgments are for the Congress to decide, and when the Congress decides that a purpose of the statute will be accomplished by proscribing certain conduct, a federal agency is not free to upset the congressional compromise by proscribing even more conduct in the name of furthering one of the statute's purposes. Given that § 601 does *not* incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to

"effectuate" the provisions of § 601. As Justice O'Connor stated in her concurring opinion in *Guardians*:

> Such regulations do not simply "further" the purpose of Title VII; they go well *beyond* that purpose. . . . An administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute . . . we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 614-15 (O'Connor, J., concurring).

Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and discriminatory effect represents precisely the type of broad public policy decision which rests in the hands of our elected legislatures, and not administrative agencies.

Moreover, the President's Executive Order 12,898 provides no legal basis for the draft guidance. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994). While the draft guidance identifies the executive order as the authority for the proposed process for assessing Title VI complaints, the guidance concedes that Title VI is inapplicable to EPA actions. Further, an executive order cannot contravene existing statutory law, nor can it be issued without constitutional or statutory authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

Thus, the Executive Order cannot overcome the statutory and constitutional deficiencies outlined above.

The EPA should not compound an erroneous expansion of regulatory power by embarking on a far-reaching application of Title VI without congressional authorization. Congress has not authorized the EPA to attempt to regulate all manner of allegedly discriminatory effects caused by environmental permitting.

B. The Draft Guidance Embodies A Flawed View of Legal Causation

Even assuming *arguendo* that the EPA has the authority under Title VI to prohibit methods or criteria which cause discriminatory effects, EPA's view of environmental justice as embodied by the draft guidance is flawed because EPA cannot show that environmental permitting causes the discriminatory effects in question. Causation is undeniably a basic tenet of a discriminatory effects or disparate impact claim. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (racial imbalance amounts to constitutional violation only if it results from state action and *not* other factors, such as residential housing patterns); *Elston v. Talledaga Co. Bd. of Educ.*, 997 F.2d 1394, 1407, 1415 (11th Cir. 1993) (plaintiff had burden to show that School Board's siting of school caused allegedly disparate impact).

Thus, a plaintiff pursuing an environmental justice claim under Title VI must do more than simply show a statistical demographic disparity according to race. Moreover, a permitting agency or permittee is not required under Title VI to affirmatively prevent or counteract disparate impacts which it did not cause.

EPA has not demonstrated that environmental permitting as such *causes* an inequitable distribution of facilities, or that it even influences their distribution at all. Where some racial

disparity is shown, a host of factors may be present which have caused that disparity, including housing patterns, economic factors, local land use decisions unrelated to environmental permitting, and the like. The EPA certainly cannot assume that criteria or methods of administration used for environmental permitting caused such disparities. Nor can EPA legally hold permitting agencies and permittees responsible for redressing disparities caused by other factors.

Indeed, it is difficult to believe that EPA or any complainants have any evidence that facilities have been distributed differently since environmental permitting was instituted, as opposed to the distribution of facilities *before* environmental permitting. One may also ask whether minority and low-income groups would suffer more negative environmental consequences in the absence of a scheme of environmental permitting.

EPA's description of what is required in a Title VI complaint does not appear to even require a complainant to plead causation, when that should be a core element of a *prima facie* case of disparate impact discrimination. Further, EPA's framework for conducting the disparate impact analysis does not appear to address this critical issue. Because of the likelihood that the alleged disparity resulted from factors other than environmental permitting, any complainant should be required to allege causation with particularity, and EPA should require complainants to demonstrate causation before there is any attempt to require permitting agencies and permittees to mitigate or justify their criteria or methods.

C. The Guidance Should Require Complainants to Exhaust Administrative Remedies Before Filing A Title VI Complaint.

Even if the EPA determines that Title VI permits the promulgation of disparate impact regulations, WLF submits that it should require complainants to exhaust their administrative remedies with the state permitting agencies before filing a Title VI complaint with the EPA. While it is true that some lower courts have held that Title VI does implicitly provide for a private right of action, that does not mean that agencies are precluded from requiring complainants to exhaust available administrative remedies before filing a Title VI complaint with the agency.

IV. CONCLUSION

For the foregoing reasons, WLF respectfully requests that the EPA consider the above comments and withdraw the draft guidance.

Respectfully submitted,

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August 28, 2000

Comments of Carlton Waterhouse
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EPA's Office of Civil Rights should be commended for its development of the Draft Recipient Guidance and the Draft Revised Investigation Guidance. A review of these documents makes the thoughtful deliberation employed in their development apparent to a consciences reader. As news articles regarding EPA's Title VI program have shown over the past two years, EPA has developed this guidance despite significant political pressure applied by elected officials at the local, state and federal level. In light of most federal agency's failure to promulgate any Title VI guidance, EPA's efforts warrant special recognition.

The following comments will focus on the Draft Revised Investigation Guidance and the framework it presents for assessing "Adverse Impacts." Generally, the revised guidance presents a sound approach for conducting complaint investigations and determining if Title VI has been violated. However, EPA's exclusive dependance on health related stressors to establish adversity threaten EPA's ability to address other discriminatory effects which may result from its recipients permitting program. As noted in footnote 38 on page 39668 of the June 27, 2000 federal register notice, the Supreme Court ruled in Alexander v. Choate, 469 U.S. 287, 292-294 (1985) that Title VI "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable to warrant altering the practices of federal grantees that had produced those impacts." In this ruling, the Court recognized that each federal agency responsible for implementing Title VI also had the responsibility to determine the types of disparate impacts that its program would address. As such, EPA now bears the burden of deciding the types of disparities produced by its recipients that it wants to address.

In accordance with the Court's decision, EPA's Title VI program should address disparate impacts upon minorities constituting significantly sufficient social problems that are readily enough remediable to warrant altering the practices of federal grantees that produced those impacts. In short, EPA should recognize as the Court in Alexander v. Choate that discrimination is a social problem not an epidemiological problem. And while sickness and disease may result from racial discrimination they represent only a limited subset of the effects that flow from discrimination. The decision to redefine discriminatory effects based solely on sickness and disease resulting from a permits issuance betrays the manifest intent of Title VI, deviates from the conduct of other federal agencies, unreasonable interprets 40 C.F.R. 7.35b and fails to address social problems associated with discrimination in environmental permitting.

Unless modified the approach to assessing impacts and their adversity presented in the revised guidance will steer EPA's Office of Civil Rights away from the direction of the Court and the intent of Title VI into a restricted understanding of discrimination which can only be proven through risk assessments and extensive health studies. Specifically, the approach proposed in the draft revised guidance ignores the onus of Title VI to address the "social phenomenon" of racial

discrimination manifested in social impacts on minorities. EPA's proposed approach is extremely expensive, time consuming and labor intensive. Additionally, because of its complexity and technical dependance the methodology is beyond the kin of most citizens it protects and grant recipients it regulates. The result being that persons protected by Title VI will be unable to assess whether discrimination against them has occurred under EPA's severely restrained definition. In fact since EPA intends to limit the scope of its investigation to the allegations in the complaint, complainants will have to employ technical experts to craft meaningful allegations that fit within EPA's definition.

Moreover, EPA's approach effectively reduces its discrimination investigation to a probability analysis for obtaining cancer or some other ailment. This narrowed approach to discrimination deviates from that followed by other federal agencies and the courts. Examples of this can be found in the Department of Health and Human Services (HHS) Title VI enforcement, a number of cases exists regarding disparate impacts in access to hospitals, health care or other benefits. Neither HHS nor the courts required that complainants and plaintiffs show that cancer or some other grave illness result from the disparity in access.[1] Likewise, in EPA's own history the disparate provision of municipal services in using EPA grant funds has constituted an adversity without showing some health based harm or injury. In those cases racial disparities in accessing municipal sewage facilities were adequate to constitute a violation of Title VI.

Some academics and others have rationalized the discrepancy between the federal governments treatment of the two scenarios above and environmental permitting based on a dichotomy of benefits and harms, however, EPA's Title VI regulations make no such distinction. They simply provide that recipients shall not use criteria or methods of administering their program that have the effect of discriminating based on race, color or national origin. In most cases the effects of discrimination are felt by its victims long before cancer risks and other health effects are known. EPA has an obligation to deal with discriminatory effects resulting from its recipients program that transcends cancer risks and health studies.

Therefore, EPA should establish an approach to discrimination that considers the social impacts of the recipients behavior beyond those related to human health. These impacts would still be based on the activities permitted by the recipient and would therefore be within the recipients authority to address. One example of this would be the concentration of landfills in African American communities as discussed in the case of R.I.S.E. v. Kaye, Inc., 768 F. Supp. 1144 (E.D. Virginia 1991). In that case four permits were issued in King and Queens County for solid waste landfills, three of those were in African American communities while the fourth was in a white community but closed after operating a short time. A number of negative or adverse effects were associated with these landfills operations: decreased property values, lowered asthethic quality (e.g., garbage mountains) increased disease vectors, truck traffic and the racial polarization that results from permitting pollution sources in racially identifiable location patterns. These social realities evince discrimination, yet under EPA's proposed methodology for assessing adversity they are invisible.

Another worthwhile example of discrimination which EPA's approach ignores occurred in

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[1] NAACP v.Medical Center, Inc.,657 F.2d 1322 (3d Cir.1981).

Chester, Pennsylvania. In that matter, Chester, Pennsylvania became the location of multiple facilities permitted to handle the overwhelming majority of trash for the entire county. In this instance the majority population of African Americans residing in Chester suffered the disamenities associated with these facilities while the benefit accrued to the majority white population throughout the county. While in that case health studies were conducted to exemplify one aspect of the harm associated with discrimination, the intuitive harms associated with singling out this predominantly minority community for managing the county's trash are apparent. Just as in the case when access to a municipal sewage treatment facility is disproportionately distributed based on race. Plaintiffs under those circumstances will not have to demonstrate that they suffer from some actual or potential human health harm because of the disparity. Unjustified racial disparity in the distribution of access to a publically owned treatment works constructed with federal dollars would arguably violate Title VI without a risk assessment or other health studies. To require such an approach for environmental permitting creates an artificial distinction that ignores the harms associated with the operations of many permitted facilities.

To accomplish this EPA's revised guidance should establish a category for analysis that addresses social inequities resulting from recipients conduct. Specifically, the revised guidance should address patterns of permitting waste facilities based on the race of nearby residents. In those circumstances, investigations should focus on the adversity associated with residing in proximity to those facilities. Beyond that an assessment of stressors and risk should not be required unless the complaint specifically alleges health related harms. Such an approach would save money, decrease OCR labor requirements and expedite complaint resolution.

BEFORE THE ENVIRONMENTAL PROTECTION AGENCY

COMMENTS OF THE WASHINGTON LEGAL FOUNDATION ON THE ENVIRONMENTAL PROTECTION AGENCY'S DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

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August 28, 2000

COMMENTS OF THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF) hereby submits these comments to express its opposition to the Environmental Protection Agency's (EPA) Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, published at 65 Fed. Reg. 39,650 (June 27, 2000). WLF believes that the draft guidance is legally flawed, procedurally improper, unwise and unworkable as a matter of policy, and that the guidance should be withdrawn. At a minimum, it behooves the agency to hold additional public hearings on the draft guidance; the hearings held earlier this summer shortly after the draft was published did not give the public ample time to analyze the guidance and provide meaningful comments.

I. INTERESTS OF WLF

WLF is a non-profit public interest law and policy center with supporters nationwide. WLF regularly appears before federal and state courts and regulatory agencies to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before federal and state courts in numerous cases involving excessive and unlawful government regulation, particularly environmental regulation.

More pertinently, WLF was the only organization to file a brief with the U.S. Supreme Court urging it to grant review of the environmental justice case, *Seif v. Chester Residents Concerned For Quality Living*, No. 97-1620, *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998). WLF also filed briefs supporting the petitions in *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999), and in *Alexander v. Sandoval*, No. 99-1908, (*cert. pending*). In the *Seif*, *Powell*, and *Sandoval* cases, WLF argued that the "disparate impact" theory of discrimination was invalid inasmuch as Title VI only forbids intentional discrimination.

WLF also submitted formal comments to the EPA on May 6, 1998, opposing EPA's earlier version of this guidance, *i.e.*, EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits. In addition, WLF representatives have attended meetings and/or monitored the work of at least three different advisory committees that EPA had established to advise it on what EPA's Environmental Justice policy should be. WLF also filed motions with the EPA on October 28, 1998, to intervene in all the pending Title VI complaints, urging the EPA to dismiss the complaints for legal and policy reasons.[1]

WLF's Legal Studies Division has also published numerous educational materials and has sponsored public briefings on the subject of Environmental Justice. See, e.g., Gerald H. Yamada, *Unanswered Questions in EPA's Environmental Justice "Guidance"* (WLF LEGAL OPINION LETTER April 3, 1998); Gregg T. Schultz, *Activist Agencies Lack Authority To Impose Environmental Justice* (WLF LEGAL BACKGROUNDER Dec. 5, 1997); WLF Environmental Justice Briefing, Dec. 16, 1997 (featuring Robert Knox, EPA's Office of Environmental Justice, and attorneys David Graham and Julie Domike). WLF sponsored another briefing on Environmental Justice on November 11, 1998, featuring James Seif, Secretary of Pennsylvania's Department of Environmental Protection, Harry C. Alford, President of the National Black Chamber of Commerce, and Rafael DeLeon, EPA's then-Acting Associate General Counsel, Office of Civil Rights. The briefing was moderated by Dick Thornburgh, former Attorney General of the

[1] Shortly thereafter, the EPA, to its credit, dismissed one of the Title VI complaints against Select Steel Company in Michigan, finding that there was no valid Title VI claim because there were no adverse effects from any pollution, regardless of the racial composition of the population in the area. *See* Letter from Ann E. Goode, Director, Office of Civil Rights, to St. Francis Prayer Center and Michigan Dep't of Environmental Quality, EPA File No. 5R-98-R5 (October 30, 1998).

United States.

II. BACKGROUND

On June 27, 2000, EPA issued its "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (draft guidance or guidance), ostensibly to provide a framework for processing complaints filed under EPA's discriminatory effect regulations. *See* 40 C.F.R. Part 7. EPA's discriminatory effect regulations invoke Title VI of the Civil Rights Act of 1964, which provides, in pertinent part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. EPA's regulations prohibit any covered program receiving federal assistance from using criteria or methods of administration which have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin, or sex. 40 C.F.R. § 7.35(b). The draft guidance also cites Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" as authority for its issuance.

The draft guidance proposes a framework for processing Title VI complaints and modifies EPA's Interim Guidance on the same subject issued on February 5, 1998. While the draft guidance is in some respects an improvement over the earlier Interim Guidance, they both suffer from the same fatal flaw by purporting to base Title VI complaints on disparate impacts rather than on intentional discrimination.

III. DISCUSSION

A. The Draft Guidance Is Based Upon Discriminatory Effect Regulations Which Are Legally Invalid

The entire concept of enforcing "environmental justice" under EPA's Title VI regulations is legally flawed because Title VI prohibits only instances of intentional discrimination, rather than unintentional "disparate impacts" that allegedly affect minority communities.[2] While WLF recognizes that the EPA and other federal agencies have promulgated regulations prohibiting criteria or methods of administration which produce discriminatory effects, purportedly under the authority of Title VI, WLF submits that EPA is not free to go beyond the clear intent of Congress in enacting Title VI.

As authority for the draft guidance, EPA cites a 1994 memorandum from the Attorney General admonishing agencies to enforce discriminatory effect regulations. *See* Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964 (July 14, 1994). This terse and superficial memorandum, in turn, cites the Supreme Court's decisions in the cases of *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), as alleged authority for issuing disparate impact regulations. While WLF recognizes that numerous federal agencies and some lower federal courts have assumed the validity of discriminatory effect regulations on the basis of those decisions, as will be seen, the Supreme Court did not "hold" in those cases that such regulations are valid. In fact,

[2] WLF's objections to the legal underpinnings of EPA's disparate impact regulations apply with equal force to EPA's contemporaneously issued Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs. 65 Fed. Reg. 39650 (June 27, 2000).

a recent decision of the Court has cast this proposition into considerable doubt. Moreover, the Supreme Court currently has pending before it a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, *Alexander v. Sandoval*, No. 99-1908, which may lead to the Court's review of the validity of these regulations.

Both constitutional and statutory constraints limit EPA's regulatory authority to prohibiting instances of intentional discrimination. The Supreme Court has held that the Fourteenth Amendment to the Constitution prohibits only instances of intentional discrimination, and does not prohibit instances of discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). In turn, the Court has likewise determined that Title VI's protection extends no further than the Fourteenth Amendment, and thus, Title VI itself does not prohibit instances of discriminatory effect.[3] *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Guardians*, 463 U.S. at 608, n.1 (Powell, J., concurring); *Regents of Univ. of California v. Bakke*, 438 U.S. 281, 284-87 (1978). Thus, both the Constitution and Title VI itself, which provided the

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[3] Section 601 of Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

Section 602 of Title VI provides, in pertinent part, that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1.

authority for the EPA regulations at issue, protect only against instances of discriminatory intent.

The Attorney General's memorandum states that the Court's decisions in *Guardians* and *Alexander* held that an agency's discriminatory effect regulation under section 602 is a valid exercise of its authority. However, properly read, neither of these decisions encompass such a broad and erroneous holding.

Guardians involved an allegation that a last hired-first fired policy for lay-offs of police officers had a disproportionate effect on black and Hispanic police officers because officers were hired in order of their examination scores, and the examinations allegedly discriminated against minorities. *Guardians*, 463 U.S. at 584-85. The plaintiffs alleged that the policy violated Titles VI and VII of the Civil Rights Act, as well as the Fourteenth Amendment and other laws. *Id.* at 586. As to the claim for relief under Title VI, the Second Circuit had denied relief on the grounds that proof of discriminatory intent was required. *Id.* at 588. The Supreme Court rendered a deeply divided decision which affirmed the Second Circuit's denial of relief under Title VI.

Guardians should not be misread as "holding" that discriminatory effect regulations are valid exercises of an agency's authority. To the contrary, a plurality of four justices in *Guardians* stated that discriminatory effect regulations were *not* a valid exercise of agency power. *Id.* at 611, n.5 (Powell, J., concurring in judgment); *id.* at 612 (Rehnquist, J., concurring in judgment and joining in Part II of Justice Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). Three justices stated that discriminatory effect regulations were valid even though Title VI itself required discriminatory intent. *Id.* at 644-45 (Stevens, J, dissenting). Justice Marshall stated that a discriminatory effect standard was

permissible under either Title VI or the agency regulations. *Id.* at 623-24 (Marshall, J., dissenting). Justice White stated that only noncompensatory, prospective relief was available under either Title VI or its regulations, and thus that the Second Circuit's denial of compensatory relief should be affirmed. *Id.* at 592-94. Justice White proceeded in *dictum* to state that a discriminatory effect standard was permissible under Title VI, but that *dictum* played no part in the Court's holding. *Id.* Properly read, the holding of *Guardians* is that there is no cause of action for compensatory damages for allegations of discriminatory effect under either Title VI or agency Title VI regulations, and any suggestion of a broader holding is simply incorrect.

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The Attorney General memorandum also cites the Court's decision in *Alexander*, but, again, *Alexander* likewise contains no such holding, nor could it alter the limited holding of *Guardians* after the fact. *Alexander* did not involve Title VI, but rather the Rehabilitation Act. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a state's reduction in the number of inpatient hospital days that the state's Medicaid program would pay on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the state's reduction had a discriminatory effect on the handicapped and violated section 504 of the federal Rehabilitation Act and its implementing regulations.

The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Attorney General's memorandum read *Alexander* far more broadly, apparently based upon the following passage from the Court's opinion, which stated:

> In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964 . . . which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *In essence*, then, we held that Title VI had delegated to the agencies *in the first instance* the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 292-94 (emphasis added) (citation omitted).

Of course, as is made clear by the previous discussion of *Guardians*, that case did not

"hold" that a disparate impact claim could be pursued through agency regulations under Title VI, and any discussion of that subject in *Guardians* was *dicta*. Moreover, this after-the-fact explanation of *Guardians* in *Alexander* was *dicta* twice over, as *Alexander* did not even involve a Title VI claim and the discussion was irrelevant to the result in that case. Indeed, the *Alexander* Court reversed the lower court's ruling that the plaintiffs had established a prima facie violation of section 504.

Thus, it is error to read the Court's decisions in *Guardians* and *Alexander* as a holding on the validity of agency discriminatory effect regulations. Further, since the time those decisions were rendered, the Court has not held that such regulations are valid. To the contrary, the Court's more recent statement in *Fordice* raises the question which the Court may address in the *Sandoval* case, specifically, whether such discriminatory effect regulations are valid to the extent they purport to reach conduct not proscribed by Title VI and the Fourteenth Amendment.

In *Fordice*, the Court addressed the correct legal standard for evaluating a state's compliance with the Equal Protection Clause in the context of school desegregation. In particular, the Court considered the standard to be applied to determine if a state had eradicated policies and practices traceable to a history of *de jure* segregation in a public university system. *Fordice*, 505 U.S. at 723-24, 727-28.

In its opinion, the Court made the following statement with regard to the private plaintiffs' Title VI claim:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.* We thus treat the issues in

these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

As the Third Circuit recognized in *Chester Residents*, "[h]idden within the Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." *Chester Residents*, 132 F.3d at 931 n. 9. However, the court dodged the statement's implications, which are assuredly not hidden, by stating, "we do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner." *Id.* Of course, as is clear from the previous discussion, there was no such holding in *Guardians* and *Alexander* which needed overturning. The Third Circuit simply misread the breadth of the Supreme Court's decisions in *Guardians* and *Alexander*, and failed to heed an obvious warning sign from the Court in *Fordice*.

Just as the Court has held that Title VI extends no further than the Fourteenth Amendment, similarly, an agency regulation can extend no further. An administrative agency should not be free to proscribe otherwise lawful conduct through a regulation simply because it can be said that the regulation arguably furthers one of the purposes of an enabling statute. Such policy judgments are for the Congress to decide, and when the Congress decides that a purpose of the statute will be accomplished by proscribing certain conduct, a federal agency is not free to upset the congressional compromise by proscribing even more conduct in the name of furthering one of the statute's purposes. Given that § 601 does *not* incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to "effectuate" the provisions of § 601. As Justice O'Connor stated in her concurring opinion in

Guardians:

> Such regulations do not simply "further" the purpose of Title VII; they go well *beyond* that purpose. . . . An administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute . . . we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 614-15 (O'Connor, J., concurring).

Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and discriminatory effect represents precisely the type of broad public policy decision which rests in the hands of our elected legislatures, and not administrative agencies.

Moreover, the President's Executive Order 12,898 provides no legal basis for the draft guidance. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994). While the draft guidance identifies the executive order as the authority for the proposed process for assessing Title VI complaints, the guidance concedes that Title VI is inapplicable to EPA actions. Further, an executive order cannot contravene existing statutory law, nor can it be issued without constitutional or statutory authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). Thus, the Executive Order cannot overcome the statutory and constitutional deficiencies outlined

above.

The EPA should not compound an erroneous expansion of regulatory power by embarking on a far-reaching application of Title VI without congressional authorization. Congress has not authorized the EPA to attempt to regulate all manner of allegedly discriminatory effects caused by environmental permitting.

B. The Draft Guidance Embodies A Flawed View of Legal Causation

Even assuming *arguendo* that the EPA has the authority under Title VI to prohibit methods or criteria which cause discriminatory effects, EPA's view of environmental justice as embodied by the draft guidance is flawed because EPA cannot show that environmental permitting causes the discriminatory effects in question. Causation is undeniably a basic tenet of a discriminatory effects or disparate impact claim. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (racial imbalance amounts to constitutional violation only if it results from state action and *not* other factors, such as residential housing patterns); *Elston v. Talledaga Co. Bd. of Educ.*, 997 F.2d 1394, 1407, 1415 (11th Cir. 1993) (plaintiff had burden to show that School Board's siting of school caused allegedly disparate impact).

Thus, a plaintiff pursuing an environmental justice claim under Title VI must do more than simply show a statistical demographic disparity according to race. Moreover, a permitting agency or permittee is not required under Title VI to affirmatively prevent or counteract disparate impacts which it did not cause.

EPA has not demonstrated that environmental permitting as such *causes* an inequitable distribution of facilities, or that it even influences their distribution at all. Where some racial disparity is shown, a host of factors may be present which have caused that disparity, including

housing patterns, economic factors, local land use decisions unrelated to environmental permitting, and the like. The EPA certainly cannot assume that criteria or methods of administration used for environmental permitting caused such disparities. Nor can EPA legally hold permitting agencies and permittees responsible for redressing disparities caused by other factors.

Indeed, it is difficult to believe that EPA or any complainants have any evidence that facilities have been distributed differently since environmental permitting was instituted, as opposed to the distribution of facilities *before* environmental permitting. One may also ask whether minority and low-income groups would suffer more negative environmental consequences in the absence of a scheme of environmental permitting.

EPA's description of what is required in a Title VI complaint does not appear to even require a complainant to plead causation, when that should be a core element of a *prima facie* case of disparate impact discrimination. Further, EPA's framework for conducting the disparate impact analysis does not appear to address this critical issue. Because of the likelihood that the alleged disparity resulted from factors other than environmental permitting, any complainant should be required to allege causation with particularity, and EPA should require complainants to demonstrate causation before there is any attempt to require permitting agencies and permittees to mitigate or justify their criteria or methods.

C. The Guidance Should Require Complainants to Exhaust Administrative Remedies Before Filing A Title VI Complaint.

Even if the EPA determines that Title VI permits the promulgation of disparate impact regulations, WLF submits that it should require complainants to exhaust their administrative

remedies with the state permitting agencies before filing a Title VI complaint with the EPA. While it is true that some lower courts have held that Title VI does implicitly provide for a private right of action, that does not mean that agencies are precluded from requiring complainants to exhaust available administrative remedies before filing a Title VI complaint with the agency.

IV. CONCLUSION

For the foregoing reasons, WLF respectfully requests that the EPA consider the above comments and withdraw the draft guidance.

Respectfully submitted,

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