STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

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March 7, 2013

Ms. Helena Wooden-Aguilar, Assistant Director,
External Civil Rights
United States Environmental Protection Agency
Office of Civil Rights (Mail Code 1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Wooden-Aguilar:

This letter provides comments of the Michigan Department of Environmental Quality (MDEQ), Air Quality Division (AQD), on the Title VI draft policy paper, "Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds" (http://www.epa.gov/ocr/title6policy.htm). The comment period ends on March 8, 2013. The draft policy paper proposes to change the way the U.S. Environmental Protection Agency (USEPA) assesses "adversity" by having the USEPA refrain from applying a *"rebuttable presumption"* in Title VI investigations.

The MDEQ is opposed to the proposed policy change because the USEPA has not provided sufficient justification for the change, and because the change would result in further delays and lack of clarity in a program that is already fraught with long delays and substantial methodological uncertainties. The following paragraphs detail the MDEQ AQD's reasons for opposing this policy change.

As described in the draft policy paper, the policy shift would affect the significance of a finding that a permit's impacts comply with environmental health-based thresholds. Under the current approach, such a finding creates a *rebuttable presumption* that no adverse impacts are caused by the permit at issue. The USEPA can consider and weigh other factors that may demonstrate significant adverse impacts might occur despite compliance with environmental health-based thresholds. Those other factors could conceivably include the existence of hot spots, cumulative impacts, the presence of particularly sensitive populations that were not considered in the establishment of the health-based threshold, and other site-specific data.

The proposed policy change is that the USEPA would *consider* the compliance with health-based thresholds, but would not *presume* an absence of adversity. The USEPA would also consider other relevant information, such as the types noted above, in making the adversity determination.

The rationale for this proposed policy shift is unclear. In the draft policy paper, the USEPA notes that the current policy was applied in deciding the Select Steel case in Michigan. In that case, the permitted facility emissions would not cause or contribute to any National Ambient Air Quality Standard (NAAQS) exceedance. Furthermore, the children's blood-lead modeling and other air toxics risk assessments did not suggest other concerns. The USEPA's decision to dismiss the complaint was correct, and it was made efficient by the rebuttable presumption approach that avoided conducting a disparity analysis and the other potential steps of the analytical framework.

The draft policy paper (p. 2) states that a criticism arose from the 1998 Select Steel decision and the *rebuttable presumption* policy. The USEPA does not state the source or the nature of that criticism; such discussion would seem to be an essential element in support of a proposed policy shift. Further, the USEPA states (p. 4) that they have had, "little or no opportunity to apply the rebuttable presumption (that is, this issue has not been applied to any particular case following issuance of the *2000 Draft Guidance*)..." This very limited explanation by the USEPA does not constitute a meaningful rationale for the policy change.

In the draft policy paper (p. 4), the USEPA concludes about the proposal: "While no presumption is established, compliance with a health-based threshold would be considered, along with other information, **to enable the Agency to focus on the most significant cases** (i.e., those representing the highest environmental and public health risk) and to determine whether adversity exists." (Emphasis added). Here, the USEPA seems to be saying that the proposed policy change will make the USEPA more "focused" and efficient. In fact, eliminating the *rebuttable presumption* policy reduces efficiency and increases the likelihood that the EPA will expend substantial resources on cases that are less significant. By contrast, the current policy promotes efficiency by relying more on the protectiveness of health-based thresholds in reaching decisions about the potential adversity of project impacts.

The USEPA has done a very poor job of processing Title VI complaints in a timely manner, and this does a disservice to state agencies, the regulated community, and the public and complainants. The EPA-OCR has yet to render a decision regarding Complaint #01R-94-R5, which was filed in July 1994 against the MDEQ regarding the Genesee Power Station air permit decision. To us, it is beyond reason to expect that the proposed policy change will somehow improve the efficiency of the EPA-OCR in completing the first step of adversity assessment in the analytical framework for assessing significant adverse disparate impact claims.

Permitting agencies and the regulated community desire greater certainty in regard to the USEPA's enforcement of the Title VI requirements. When there is a NAAQS or other valid, health-based benchmark established, and a permitted project's impacts will comply with those benchmarks, the rebuttable presumption policy provides some certainty that a project will not result in a viable Title VI complaint. The proposed policy change will reduce that level of assuredness and increase the uncertainty involved in permitting.

The NAAQS are subjected to a tremendous amount of review and are supported by a detailed and thorough administrative record. They are designed to be protective of sensitive subgroups, with a margin of safety, as required by the Clean Air Act. Other environmental health-based thresholds, such as the USEPA's reference concentrations (RfCs) are also designed to be protective, including sensitive subpopulations. Regulatory agencies and the regulated community rely upon these standards and criteria to develop appropriate permit limits that are protective of public health, and the USEPA's current *rebuttable presumption* policy appropriately relies on these thresholds.

The USEPA's draft policy paper (p. 1) states that, "The Agency has encountered a number of complex and unique issues of law and policy in the course of Title VI complaint investigations, especially allegations concerning the protectiveness of environmental permits issued by state and local agencies that receive EPA financial assistance. These challenges have been the

consequence of the **need to merge the objectives and requirements** of Title VI with the objectives and requirements of the environmental laws that the Agency implements." (Emphasis added). To improve the USEPA's civil rights program, it is our belief that this "merging" of objectives and requirements should move in the direction of relying *more* on the health protectiveness of the NAAQS and other valid standards and criteria to improve certainty and the EPA-OCR efficiency, not further away from them as this proposed policy subscribes.

For these reasons, the MDEQ urges the USEPA not to adopt the proposed policy change. If you have any questions or wish to discuss this further, please contact Mr. Robert Sills, AQD, Toxics Unit Supervisor at sillsr@michigan.gov, or at 517-335-6973, or you may contact me.

Sincerely,

G. Vinson Hellwig, Chief
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Michigan Department of Environmental Quality
517-373-7069

Enclosure
cc/enclosure: Ms. Lara Lasky, USEPA, Region 5
Mr. Dan Wyant, Director, MDEQ
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