LAW OFFICE OF
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Delivered Via Electronic Mail (civil.rights@epa.gov)
Ms. Helena Wooden-Aguilar, Assistant Director
External Complaints and Compliance Program
Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: **Title VI Policy Papers**

Dear Ms. Wooden-Aguilar:

On January 30, 2013, the U.S. Environmental Protection Agency released two draft policy papers for public comment. One draft policy paper discusses EPA's thinking about how to expand the roles of complainants and financial assistance recipients in the Title VI complaint process. The second draft paper proposes to change the way EPA assesses "adversity" by having the Agency refrain from applying a "rebuttable presumption" in certain Title VI investigations. These comments are offered for your consideration.

General Observation

The EPA and Office of Civil Rights have been engaged in a process to improve effective implementation of Title VI for some time. The two draft policy papers announced on January 30, 2013 represent small, but significant improvements. It is however, disheartening that the pace of "change" is so slow.

Enhanced Role for Complainants

In the first policy paper, EPA proposes (1) that it provide, in appropriate cases, for alternative dispute resolution before its commences an investigation of an accepted complaint; (2) that it notify complainants of any preliminary finding of non-compliance with Title VI; and (3) that it will engage with complainants who want to provide input on potential remedies that might be included in a voluntary compliance agreement between EPA and the financial assistance recipient. While each of these changes offer enhanced roles for complainants, I am particularly concerned that the policy implies that EPA will rely *heavily* on alternative dispute resolution to avoid making a preliminary finding of non-compliance. This could result in less Title VI compliance because recipients will rely on the alternative dispute resolution process to define their obligations rather than on the mandated obligations of Title VI. With that caveat, however, I support the proposed changes.

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Elimination of Rebuttable Presumption

In the second policy paper, EPA proposes to eliminate the rebuttable presumption that compliance with environmental health-based standards means that no adverse impacts can result. The rationale provided in support of this change is sound. Accordingly, I support this policy change.

However, the discussion of this policy change raises two related issues of concern.

The first issue is whether OCR's repeated reliance on the 2000 *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39650-39687, to describe EPA's existing policy is appropriate. The *Draft Guidance* states that "[o]nce the *Draft Revised Guidance for Investigating Title VI Administrative Complaints* is final, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Interim Guidance*) issued in February 1998." 65 Fed. Reg. at 39650. The *Draft Guidance* has never been made final. Thus, it is not appropriate to describe the *Draft Guidance* as the existing policy.

The second issue is whether the scope of potential "adverse impacts" cognizable under Title VI include non-health impacts and impacts beyond the statutory authority of the recipient to regulate. For example, might safety and noise impacts from increased vehicular traffic or offensive odors associated with the operation of a landfill granted a permit by the recipient be an "adverse impact" cognizable under Title VI even though such impacts are not subject to regulation under environmental laws? I suggest that the scope of "adverse impacts" cognizable under Title VI is governed by Title VI ("discrimination"), not by federal or state environmental laws. If that were not the case, Congress and State legislatures could limit the scope of Title VI merely by passing environmental protection laws which seek to protect against a narrow set of adverse health impacts. EPA should address this issue forthrightly.

Conclusion

The proposed policy changes reflected in *Adversity and Compliance with Environmental Health-based Thresholds* and *Role of Complainants and Recipients in the Title VI Complaints and Resolution Process* are warranted enhancements to EPA's existing Title VI policies. Accordingly, I support them.

Sincerely,

David A. Ludder