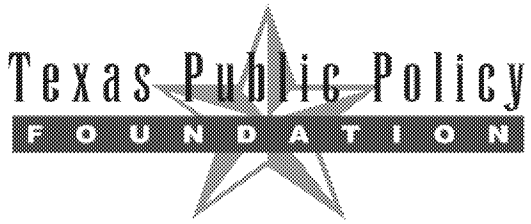

Comments on the Environmental Protection Agency's Draft Policy Paper "Adversity and Compliance with Environmental Health-Based Thresholds."

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The Texas Public Policy Foundation opposes the draft guidance's proposal to alter the effect that attainment of National Ambient Air-Quality Standards (NAAQS) has in certain disparate impact challenges under Title VI. Under current policy, local attainment of NAAQS creates a "rebuttable presumption" that the specific permitting action at issue in a disparate impact challenge has not had an adverse health impact.

EPA's current policy is sensible given the legal requirements surrounding the NAAQS. The Clean Air Act mandates that the Environmental Protection Agency (EPA) set National Ambient Air Quality Standards (NAAQS) for certain pollutants. The Clean Air Act further mandates that EPA set the NAAQS at a level "requisite to protect the public health," and with "an adequate margin of safety." 40 U.S.C. 7409(b)(1). If EPA has set the NAAQS according to the legal requirements of the Clean Air Act, then properly approved permits will not have any adverse health impacts. The rebuttable presumption that the EPA currently applies is thus simply a presumption that the EPA has followed the requirements of the Clean Air Act.

By contrast, abandoning this rebuttable presumption is favor of a discretionary standard creates the potential for arbitrary action and abuse of authority by the agency. The new policy would effectively replace a bright-line rule with a murky, ad hoc approach. Adopting a discretionary standard creates a risk of inconsistent decisions, could lead to different environmental standards based on the racial makeup of a given area, and would increase regulatory uncertainty.

In addition, it is not clear why a change of policy is desirable. As noted in the draft guidance, EPA has never had occasion to apply the current policy, and there is no evidence that the policy has or would be unworkable, or that it has produced flawed outcomes. The current policy is consonant with the requirements of Title VI and the Clean Air Act, and given the potential for the proposed policy to increase uncertainty and the risk of a miscarriage of justice, the current policy should be retained.