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DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY
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Rafael DeLeon, Esq.
Director
EPA-Office of the Administrator
Office of Civil Rights
Mail Code 1201A
1200 Pennsylvania Ave., N.W.
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RE: Comments to EPA Draft White Paper Addressing Compliance with Environmental Health-Based Thresholds

Dear Mr. DeLeon,

The Louisiana Department of Environmental Quality ("LDEQ") submits the following comments in response to the draft white paper titled "*Title VI of the Civil Rights Act of 1964; Adversity and Compliance with Environmental Health-Based Thresholds*," issued for public comment on January 23, 2013, by the United States Environmental Protection Agency ("EPA"). EPA states that this draft white paper, if adopted, is intended to supersede EPA's *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39677, 39,678, 39,680-81(2000).

Based on its understanding of EPA's proposal, LDEQ believes that the white paper, if adopted, will interject an entirely new layer of subjectivity into the administrative review of Title VI complaints. Further, by abandoning the rebuttable presumption of its 1998 *Select Steel* decision, EPA proposes to shift to recipient agencies the burden of defending their reliance on health-based standards, including those standards promulgated by EPA. EPA proposes to do so without providing any real guidance concerning how far beyond the standards agencies must look to ensure that their actions will not be found to have violated Title VI and EPA's implementing regulations. As a result, recipient agencies will be placed in the unenviable position of having to make decisions with no quantifiable standard to define what level of emissions EPA's Office of Civil Rights ("EPA-OCR") will find non-discriminatory. The failure to incorporate guidance while abandoning *Select Steel* will result in needless delays in the permitting process and considerable uncertainty in determining whether permit actions will be viewed as compliant with Title VI.

LDEQ understands that rigid adherence to health-based standards does not, under *Select Steel*, result in an action that is immune from Title VI challenges. However, the rebuttable presumption of *Select Steel* recognizes the environmental protections inherent in the development and use of promulgated health-based standards. These standards serve a

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purpose. Very few activities are free from all risk and have no adverse consequences. Health-based standards define the levels of risk of exposure that are acceptable and protective of human health. The standards allow agencies to perform their functions without engaging in a de novo, case-by-case evaluation of the findings already embodied by the standard with every decision made. EPA's proposal fails to recognize this very basic premise.

The explicit purpose of a health-based standard is to establish a level of exposure that is presumed to be an acceptable risk to the general population, including "at risk" individuals (e.g., the young, the old, the medically infirm). It is both reasonable and rational to impose the burden on the complainant to demonstrate how and why these standards are not sufficient to prevent an adverse consequence in the particular circumstances in question. Requiring that the permitting agency perform its own "de novo" analysis of "adverse impact" outside of the health-based standard essentially requires the agency to read every potential complainant's mind and/or anticipate every possibility for adverse impact, no matter how remote.

Elimination of the rebuttable presumption also results in a twofold impact on state permitting agencies during the permit application review process. First, without the presumption of no adverse impact, those commenting on a proposed permit action need only make the allegation of disparate impact without identifying the nature of the alleged disparity. In the face of such comments, the permitting agency will then be required to devote precious agency resources on a fishing expedition to gather information regarding any possible disparity that a complainant could raise to rebut the *Select Steel* presumption. Even if the agency "covers the waterfront" of every possible disparate impact it can identify, those opposed to the permit then get a "second bite" by filing a Title VI complaint with the EPA-OCR. The EPA-OCR will then have free rein to mount its own fishing expedition into disparate impacts, and the permitting agency will be forced to defend it decision against a set of arguments and standards that were not presented to it at the time of its permit decision.

Indeed, EPA proposes to reduce promulgated health-based standards to nothing more than starting points from which agencies must begin their review. Recipient agencies will then have to examine the standards against an undefined set of criteria and simply hope that what they have done satisfies EPA-OCR. Along with its inherent uncertainty, such review will be both labor and resource intensive. In a world of ever-shrinking government budgets, it is unclear how EPA believes recipient agencies will be able to fund the army of toxicologists, engineers, etc., needed to review each permit decision under the microscope required to defend against potential Title VI complaints. However, the only alternative to permitting agencies will be continued reliance on health-based standards at the risk of EPA sanctions.

Further, under EPA's proposal, the mere assertion that the use of a heath-based standard has resulted in disparate impact will be enough to create a *prima facie* case of discrimination. No evidence of adverse impact need be demonstrated. As a result, agencies will necessarily be required to devote already scarce resources to defend their actions in the face of investigations based on nothing more than unsupported speculation. And, the ability to so easily establish a *prima facie* case and trigger a full-blown investigation is rife for abuse by those who would use the Title VI process as vehicle to challenge agency actions for reasons entirely unrelated to environmental justice. As a result, if EPA adopts the approach outlined in January 23, 2013, proposal, the EPA-OCR can also expect to see its own resources taxed as individuals and

groups opposed to permit actions for any reason whatsoever realize that unsubstantiated allegations of discrimination can lead to full-blown Title VI investigations.

In addition to abandoning the rebuttable presumption of *Select Steel,* EPA seeks to allow itself unfettered authority to consider whatever it believes appropriate to determine if an adverse impact exists. The proposal also allows EPA-OCR to deflect any negative attention that might fall on EPA's own promulgated standards. Under *Select Steel*, an EPA-OCR finding of adverse impact may well carry with it an acknowledgment, tacit or otherwise, that EPA's standards are somehow flawed. If adopted, the January 23, 2013, proposal will allow EPA-OCR to avoid such conclusions when making a finding of adverse impact. The focus will be shifted to the recipient agencies' reliance on health-based standards measured against a backdrop of unsupported allegations. EPA-OCR will be free to make its findings based on whatever criteria it desires and in a way that will not reflect negatively on EPA itself. As a result, recipient agencies will not only be faced with having to somehow foretell whether reliance on EPA's standards is appropriate for any given action, they will then be required to endure second-guessing on the part of EPA based on wholly undefined criteria. Objective standards will be replaced with Justice Stewart's "I know it when I see it" test[1] applied by EPA at its own whim.

The LDEQ also finds noteworthy that EPA-OCR has routinely viewed its own Title VI implementing rules as little more than suggestions, especially with respect to time limitations, and currently operates under "draft" guidance that is over ten years old. Given its treatment of its own black-letter regulations and continued use of "draft" guidance, the LDEQ is particularly uncomfortable with EPA's desire to abandon even the pretext of reliance on objective standards during its review of Title VI complaints. Such complaints and their outcomes have real-world impacts on recipient agencies, as well as the complainants themselves, and should not result in arbitrary outcomes based on entirely subjective criteria, "draft" guidance, and largely ignored rules.

Finally, EPA's proposal also fails to recognize that imposition of conditions than go beyond promulgated standards may well exceed the authority of permitting agencies. EPA must also recognize that members of the regulated community will ultimately bear the costs resulting from the elimination of the *Select Steel* rebuttable presumption. It is axiomatic that the regulated community will view with displeasure any attempt to impose on them limitations that go beyond promulgated health-based standards. In the absence of actual objective criteria on which to support their actions, agencies will be faced with legal challenges that may prove difficult to win. And, while EPA analogizes a Title VI complainant to a "tipster" rather than a "plaintiff in court,"[2] the imposition of un-promulgated limits on the regulated community will likely be subject to real court challenges by actual "plaintiffs." Accordingly, requiring agencies to go beyond health-based standards to ensure Title VI compliance will result in increased litigation, the cost of which must again be borne by the recipient agencies. This consequence of EPA's proposal is not addressed anywhere in the white paper.

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[1] See Justice Potter Stewart's concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
[2] See: *Title VI of the Civil Rights Act of 1964: Role of Complaints and Recipients in the Title VI Complaint and Resolution Process*, issued by EPA on January 25, 2013.

Based on the aforementioned concerns, LDEQ objects to EPA's proposal to eliminate the *Select Steel* rebuttable presumption. Reliance on promulgated health-based standards should continue to be viewed as non-discriminatory absent hard evidence to the contrary.

For the Louisiana Department of Environmental Quality,

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