COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

DRAFT POLICY PAPER ON TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: "ADVERSITY AND COMPLIANCE WITH ENVIRONMENTAL HEALTH-BASED THRESHOLDS"

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Submitted Electronically (civil.rights@epa.gov)
Environmental Protection Agency
Office of Civil Rights
1200 Pennsylvania Avenue, N.W.
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Re: Request for Comments on Draft Policy Paper on Title VI of the Civil Rights Act of 1964: "Adversity and Compliance with Environmental Health-Based Thresholds"

Dear Sir or Madam:

The Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the Environmental Protection Agency (EPA) in connection with EPA's draft policy paper on "Adversity and Compliance with Environmental Health-Based Thresholds." WLF is a non-profit public interest law and policy center based in Washington, D.C. with supporters nationwide. WLF promotes free-market policies through litigation, administrative proceedings, publications, and advocacy before state and federal government agencies, including EPA.

WLF has serious concerns regarding both the wisdom and propriety of the draft policy paper (the "Paper") and urges its withdrawal. The proposed change in the method by which EPA will measure "adversity" is highly significant, yet the Paper fails to provide any meaningful explanation regarding why the change is being proposed. A persistent criticism among stakeholders regarding EPA enforcement of its Title VI regulations has been the agency's failure to provide clear guidance regarding how it intends to carry out its enforcement responsibilities. Such guidance is necessary so that fund recipients and regulated industries can take steps to ensure that they conform to the regulations. The Paper is a proposed step in the wrong direction.

It eliminates a bright-line rule that has been followed by EPA for 13 years, and replaces the rule with nothing more than a vague promise that EPA will consider "compliance with an environmental health-based threshold" in conjunction numerous other factors in determining whether a complainant has established "adversity."

Moreover, the Paper is drafted in a manner suggesting that EPA has altered its definition of what constitutes a *prima facie* showing of adverse disparate impact. Past EPA writings have stated that one element of a *prima facie* case is a showing that the federal-fund recipient's challenged actions have a "significant" or "substantial" adverse impact on an identified racial or national-origin group. In contrast, the Paper refers repeatedly simply to "adversity" and "adverse impact"; the Paper never uses the word "substantial" in connection with the word "adverse."

WLF finds it highly troubling that EPA has seen fit to propose this substantial change in its enforcement policy without even publishing the Paper in the Federal Register. The new policies outlined in the Paper undoubtedly affect the rights of fund recipients, regulated entities, and affected populations. Accordingly, federal law requires EPA to comply with a variety of procedural rules (including, as an initial step, publication in the Federal Register) before putting those policies into practice. WLF finds it ironic that EPA has issued a draft policy paper for the purpose of encouraging increased participation by stakeholders in environmental justice proceedings[1] yet has failed to undertake minimum steps necessary to ensure stakeholder

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[1] *See* "Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process" (draft for public review released January 24, 2013).

participation in its proposed policy changes.

More fundamentally, WLF is concerned that the Paper is based on a misreading of the agency's Title VI regulations and on its failure to account for the sea change in Title VI law since EPA's release of its Draft Investigation Guidance in 2000. The Paper focuses solely on a small subset of federal fund recipients: state and local government agencies that have been delegated responsibility for issuing pollution control permits. The provision in the regulations most relevant to such agencies, 40 C.F.R. § 7.35(7)(b), states that a recipient of EPA funding "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." (Emphasis added.) Yet, the Paper does not address a fund recipient's "criteria or methods" used in deciding whether to grant a permit; rather, it focuses solely on the recipient's actual decision to issue a permit. That focus in a misreading of § 7.35(b)(7). EPA's Office of Civil Rights has not been designated a "super" appeal board, authorized to second-guess the decision of other government agencies to grant an environmental permit. Rather, its role is to ensure that fund recipients are not using "criteria or methods" that subject identified racial communities to substantial and disparate adverse environmental effects. Unless the Office of Civil Rights specifically identifies objectionable criteria and methods used by the fund recipient in making its permit decisions, it should not be second-guessing decisions to grant permits.

One obviously objectionable criterion is the intentional use of race in a permitting decision – *e.g.*, approval of an environmental permit for operation of an industrial facility precisely because it has been sited in a community inhabited primarily by members of a

disfavored racial group. Other criteria and methods to which the Office of Civil Rights could object might include a recipient's policy of not testing lead levels in surrounding neighborhoods before deciding whether to grant an environmental permit to a facility that will emit lead. Such a policy might cause the recipient to overlook evidence that granting the permit would exacerbate health concerns by increasing already-high levels of lead in the blood of residents of nearby racially-identifiable neighborhoods. But instead of focusing on the identification of potentially improper criteria and methods employed by a fund recipients, the Paper focuses solely on the recipient's decision to issue an environmental permit.

The Paper also fails to appreciate the substantial changes in judicial understanding of Title VI (and implementing regulations) since EPA's release of its Draft Investigation Guidance in 2000. The Draft Guidance was based on EPA's conclusion that the Supreme Court had upheld the validity of Title VI regulations that prohibit federal-fund recipients not only from engaging in intentional racial discrimination but also from engaging in conduct that has a disparate impact on the basis of race, color, or national origin. The Supreme Court's subsequent decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), showed otherwise. *Sandoval* held not only that the Court had never approved Title VI disparate impact regulations, but also that such regulations "are in considerable tension" with well-established case law holding that Title VI itself "forbids only intentional discrimination." 532 U.S. at 282. In light of that tension (and the resulting possibility that EPA's disparate impact regulations could be struck down if ever challenged in a federal court), it would behoove EPA to narrow the scope of its 2000 Draft Investigation Guidance by limiting the regulations' applicability to those situations in which

both the adverse effects and the disparate racial impacts are particularly severe. But instead of heeding *Sandoval*'s warning, EPA appears to be moving to expand the scope of potential liability under its disparate impact regulations.

The Paper suggests that EPA's hands are tied, and that the steps to be undertaken in analyzing claims asserted under EPA's Title VI regulations have been established by federal court decisions. That suggestion is incorrect. The case law cited by the Paper had nothing to do with EPA's Title VI regulations. Indeed, WLF is unaware of *any* case law setting forth the order of proof in cases raising claims arising under those regulations. Instead, the order of proof is entirely of EPA's own creation. The order of proof set forth in the Paper is even more pro-claimant than the one set forth in the 2000 Draft Investigation Guidance, a document that itself was subject to considerable criticism for its pro-claimant slant. WLF respectfully suggests that EPA reconsider its entire approach to enforcing its Title VI regulations, an approach that is inconsistent with federal civil rights law, that creates uncertainty regarding future enforcement, and that risks harming the very minority communities that EPA is called upon to assist.

I. *Interests of the Washington Legal Foundation*

The Washington Legal Foundation is a public interest law and policy center based in Washington, D.C., with members and supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly appears before federal and State courts and administrative agencies to oppose excessive government incursions on civil rights.

In particular, WLF has appeared frequently as *amicus curiae* in the federal courts in cases

raising issues arising under Title VI of the Civil Rights Act of 1964. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001); *Seif v. Chester Residents Concerned for Quality Living, cert. dismissed,* 524 U.S. 974 (1998); *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001). WLF also filed formal comments with EPA in connection with its *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* ("2000 Draft Investigation Guidance"), 65 Fed. Reg. 39650 (June 27, 2000); and its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* ("1998 Interim Guidance"), issued in February 1998. WLF and its attorneys have also published numerous articles on Title VI and its relevance to the environmental justice movement. 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); Richard A. Samp, *Symposium Environmental Justice: the Merging of Civil Rights and Environmental Activism*, 9 ST. JOHN'S J. OF LEGAL COMM. 503 (1994).

WLF is highly skeptical that Congress intended to authorize federal agencies to issue Title VI regulations purporting to restrict federal-fund recipients from engaging in activities that are not motivated by an intent to discriminate on the basis of race, color, or national origin. WLF has, accordingly, sought to reduce the scope of Title VI regulations that seek to restrict activities based solely on their racially disparate impact. WLF has no direct interest in this matter – it is not a federal fund recipient, nor is it regulated by any such entity. WLF is filing

these comments due solely to its interest in promoting environmental justice – a concept that WLF understands to mean "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and environmental law, regulations, and policies." *See* EPA, *Plan EJ 2014* (Sept. 2011) at 3.

II. EPA's Statutory and Regulatory Authority

As EPA recognizes, Title VI plays but one small part in the agency's overall effort to ensure that environmental laws are enforced in a manner that is fair to all citizens. The numerous enforcement tools available to EPA for promoting the "fairness" goals of the environmental justice movement are described in detail in a 108-page EPA report entitled, *Plan EJ 2014: EJ Legal Tools* (Dec. 2011). EPA has a responsibility to ensure that its funding recipients comply with Title VI, but WLF urges the agency to avoid placing unwarranted reliance on Title VI as its principal means of promoting environmental justice, and thereby creating a risk that it will distort the statute beyond anything intended by Congress.

Title VI of the Civil Rights Act of 1964 provides in relevant part, "No person in the United States shall on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI Sec. 601, 42 U.S.C. § 2000d. Importantly, Title VI addresses *only* intentionally discriminatory activity; it does not address conduct that has a disparate effect on the basis of race, color, or national origin, so long as the fund recipient engaging in such conduct did not act for the purpose of creating the disparate

impact. *Alexander v. Sandoval*, 532 U.S. 275 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992).

Title VI also authorizes federal agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate the provisions of section 601." Title VI Sec. 602, 42 U.S.C. § 2000d-1. EPA issued its implementing regulations in 1973 and revised them in 1984. *See* 38 Fed. Reg. 17968 (1973), as amended by 49 Fed. Reg. 1656 (1984). Those regulations, codified at 40 C.F.R. Part 7, purport to prohibit not only intentional discrimination but also at least some conduct by fund recipients that imposes disparate impacts on the basis of race, color, or national origin. For purposes of these comments, the most relevant regulatory provision is 40 C.F.R. § 7.30(b), which states:

> A recipient [of EPA funding] 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.[2]

Section 7.30 sets forth a "general prohibition" against discrimination by recipients on the basis of race, color, or national origin, but it includes no "effects" language. Section 7.35 sets forth several other "specific prohibitions," but none of the other eight "specific prohibitions" is directed to the issue covered by the Paper: a state or local government agency with authority to

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[2] Title VI does not address discrimination on the basis of sex. Sex discrimination is included in EPA's Title VI regulations because they were also intended to assist with EPA's enforcement responsibilities under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

grant environmental permits and that is a recipient of EPA funding.[3]

The regulations establish a procedure whereby individuals who believe that they (or a "specific class of persons") have been discriminated against in violation of EPA's Title VI regulations may file a formal complaint with EPA. 40 C.F.R. § 7.120. If EPA's Office of Civil Rights concludes that the recipient being investigated has violated the regulations and that compliance cannot be assured by informal means, "EPA may terminate or refuse to award or to continue assistance. EPA may also use any other means authorized by law to get compliance, including referral of the matter to the Department of Justice." 40 C.F.R. § 7.130. The regulations do not grant authority to the Office of Civil Rights or any other branch of EPA to revoke a permit issued by the fund recipient as a tool for assuring the fund recipient's compliance.

In actual practice, many of the Part 7 complaints received by EPA have focused on a state agency's decision to grant specific environmental permits. Precisely when the "criteria or methods" underlying a permitting decision can be deemed to have "the effect of subjecting individuals to discrimination" of the sort contemplated by § 7.35(b) is far from self-evident. The issue took on increased importance after 1994, when President Clinton issued an Executive Order directing that "each Federal agency shall make achieving environmental justice part of its

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[3] Moreover, only one of the other eight "specific prohibitions" includes "effects" language. That prohibition, set forth in 40 C.F.R. § 7.30(c), addresses facility-siting decisions by an EPA-funded entity. The prohibition is largely irrelevant here because state and local government agencies generally do not become directly involved in siting decisions. Rather, their role is generally limited to considering permit applications from facilities at previously-determined locations.

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." Executive Order 12898 (Feb. 11, 1994). Although the Executive Order (EO) did not mention Title VI by name, EPA concluded that its Title VI regulations provided it with one tool for carrying out its responsibilities under the EO.

The 1998 Interim Guidance was EPA's initial effort to provide guidance to stakeholders regarding how it intended to handle administrative complaints alleging a violation of its Title VI regulations by a fund recipient in connection with the recipient's grant of an environmental permit. In response to criticism from WLF and others that the Interim Guidance failed to provide sufficient detail regarding the circumstances under which EPA would deem its "effects" regulations to have been violated, EPA in June 2000 released a revised set of rules – the 2000 Draft Investigation Guidance. Although that document remains in draft form, EPA for the past 13 years has generally adhered to its provisions.

Among other things, the Draft Guidance explains the order of proof that EPA will apply in evaluating environmental justice disparate-impact complaints filed pursuant to the Title VI regulations against state agencies with authority to grant environmental permits. It states that EPA will initially determine whether the grant of the challenged permit had both an "adverse" and a "disparate" impact. 65 Fed. Reg. at 39676. While cautioning that every case must be evaluated based on its unique facts, the document states generally that the effects of granting an environmental permit are deemed "adverse" if the facility in question creates "significantly adverse" health risks by creating exposures that "exceed established environmental or human

health benchmarks." *Id.* at 39680. Disparity is deemed to exist if a "significant" disparity exists with respect to the adverse impact "between the affected population and an appropriate *comparison population* in terms of race, color, or national origin." *Id.* at 39677 (emphasis in original).

The 2000 Draft Investigation Guidance provides few specific examples of impacts that either are or are not deemed to create "significantly adverse" health risks. One of the very few examples provided involve National Ambient Air Quality Standards (NAAQSs), air quality standards that impose limits on cumulative pollution levels in a locality. As the Draft Guidance explains, NAAQSs are established at a level "that should ordinarily prevent an adverse air quality impact on public health"; accordingly, "[a]ir quality that adheres to [NAAQS] standards (*e.g.*, air quality in an *attainment area*) is presumptively protective of public health in the general population." *Id.* at 39680 (emphasis in original). Based on that understanding of NAAQSs, the Draft Guidance created a *rebuttable* presumption that a new facility's release of a pollutant covered by a NAAQS will not cause an "adverse" impact on air quality (for Title VI purposes) so long as the area's air quality is expected to continue to attain the NAAQS standard. *Id.* The Draft Guidance explained, however, that the presumption could be overcome by appropriate rebuttal evidence: "if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome." *Id.*

If the complainant demonstrates that the impact caused by approval of the environmental permit is both significantly adverse and significantly disparate, the 2000 Draft Investigation Guidance then shifts the burden of proof to the fund recipient to demonstrate a "substantial,

legitimate justification" for its actions. *Id.* at 39683. Among the types of evidence that the Draft Guidance states might constitute a sufficient justification are health benefits and economic development that are likely to flow to the affected community as a result of the permitted activity. *Id.* Even if the fund recipient carries its burden of persuasion, EPA will still determine that the Title VI regulations have been violated if the complainant demonstrates the feasibility of a "less discriminatory alternative" – that is, "an approach that causes less disparate impact than the challenged practice." *Id.*

EPA has not adopted any "final" guidance document that would explain how it handles investigations of alleged violations of the Title VI regulations. Several court decisions released following issuance of the 2000 Draft Investigation Guidance – in particular, the U.S. Supreme Court's *Sandoval* decision – have called into question several of the legal assumptions that undergird the Draft Guidance. WLF is unaware of any effort by the Office of Civil Rights to explain it views regarding *Sandaoval*'s impact on its environmental justice activities.

III. *The Draft Policy Paper on Adversity Is a Step in the Wrong Direction*

EPA surely appreciates the uncertainties created among state agencies with environmental permitting authority, as well as among other environmental justice stakeholders (including those within the business community), by EPA's 13-year delay in issuing "final" rules governing its Title VI investigation and enforcement policy. A principal criticism of the 2000 Draft Investigation Guidance, voiced by WLF and others, is that it fails to provide sufficiently clear standards regarding what constitutes "significant adverse impact" and "significant disparate impact." One would have hoped that the Office of Civil Rights (OCR) would be focusing its

attentions on responding to those criticisms and attempting to put the Draft Guidance into final form.

Instead, with very little notice EPA has issued a draft policy paper that proposes to alter rules established by the Draft Guidance regarding proof of adversity. The Paper proposes to eliminate the Draft Guidance's rebuttable presumption that no Title VI "adversity" is created by the granting of an environmental permit with respect to relevant NAAQS pollutants so long as the NAAQS standard is being met. Paper at 4-5. In place of the rebuttable presumption, the Paper proposes that while compliance with the NAAQS standard should be deemed relevant, it should not be given any overriding significance in the "adversity" determination. *Id.*

The proposed change has nothing to recommend it, and WLF urges that it not be adopted. As noted above, the 2000 Draft Investigation Guidance provides little guidance regarding when it deems a fund recipient's permitting decision to have "significant adverse impact." One of the rare exceptions to that deficiency is the NAAQS rebuttable presumption; it provides a relatively bright-line rule that assists state permitting agencies in avoiding violations of EPA's Title VI regulations. By proposing to eliminate the rebuttable presumption, the Paper increases uncertainty by depriving stakeholders of the ability to predict in advance when environmental effects will be deemed "adverse" for Title VI purposes.

The Paper proposes to replace the rebuttable presumption with no rule of decision whatsoever. It acknowledges the relevance of NAAQS compliance to the "adversity" issue, but then concludes that such compliance should be just one of many factors to be considered by EPA in determining adversity:

> [T]his proposal acknowledges the relative significance of compliance with an environmental health-based threshold, while also evaluating a number of other factors, as appropriate, including the existence of hot spots, cumulative impacts, the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health-based threshold.

Id. at 4. The proposal is a step in the wrong direction; it reduces the level of guidance when what is actually needed is more predictability.

The proposed changed is particularly mystifying because EPA has provided no reasoned explanation for the change. The Paper notes that there might be circumstances in which increased levels of a NAAQS pollutant are cause for health concern even though the NAAQS standard is being met. But the 2000 Proposed Investigation Guidance recognized that possibility as well, and that is why it specified that the presumption is rebuttable.[4] The Paper does not explain why the existence of the rebuttable presumption interferes in any way with EPA's ability to reach an accurate determination regarding adverse impacts that might be associated with the

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[4] The Proposed Guidance explained:

> For example, one situation whether the presumption could be overcome is the following: An area may be in attainment with the lead NAAQS, but in some cases residents could still suffer adverse effects from lead. The lead standard was designed to take into account both exposures from inhalation of airborne lead (subject to the standard) and exposures resulting from non-air pathways such as ingestion of lead contained in paint, soil, or water (not subject to the standard). Contributions to total exposure from non-air sources, however, can vary widely, and unusually high level of lead in paint, soil, or water might cause residents of some areas to experience adverse effects even if the standard is met. In such cases, the presumption of no adverse impacts from lead could be overcome.

Draft Guidance, 65 Fed. Reg. at 39680-81.

grant of an environmental permit. Each of the factors identified by the Paper as grounds for finding adversity despite NAAQS attainment can easily be accommodated within the existing rebuttable presumption framework. Indeed, the Paper essentially admits that no impediment to accurate decision-making has been encountered, because the Draft Guidance's rebuttable presumption *has never been applied in 13 years*: "EPA has had little or no opportunity to apply the rebuttable presumption (that is, this issue has been discussed in the abstract, and has not been applied to any particular case following issuance of the *2000 Draft Guidance*)." Paper at 4.[5]

The Paper does not take issue with the Draft Guidance's explanation regarding why a rebuttable presumption is justified. The Draft Guidance explained that the rationale for setting NAAQSs is to "establish a protective limit on cumulative pollution levels that should *ordinarily* prevent an adverse air quality impact on public health." 65 Fed. Reg. at 39680 (emphasis added). It is eminently reasonable to presume, therefore, that in the great majority of cases there

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[5] As the Paper notes, the Draft Guidance's rebuttable presumption originated with OCR's 1998 *Select Steel* decision. Paper at 2 & n.4. That decision dismissed a Title VI complaint against the Michigan Department of Environmental Quality for having approved an environmental permit for a new steel mini-mill in Genesee Township, Michigan. The decision applied a rebuttable presumption that the locality's expected compliance with NAAQSs for lead and ozone meant that permitting release of those pollutants from the mini-mill would not have a significant adverse effect on the local community. The OCR determined that the voluminous evidence submitted to it regarding the local community provided no reason to question the presumption's correctness in that case. It determined that the NAAQSs provided "adequate protection for group(s) identified as being sensitive to the adverse effects of the NAAQS pollutants." OCR, *Investigative Report for Title VI Admin. Complaint File No. 5R-98-R5* (*Select Steel Complaint*) 14 (1998). The Paper provides no reason to doubt the propriety of *Select Steel*'s application of the rebuttable presumption; for example, it does not suggest that evidence collected during the past 15 years has demonstrated that Michigan residents living near the mini-mill suffered a significant adverse, disparate health impact as a result of permitted emissions from the mini-mill.

is no adverse health impact when the atmospheric level of a pollutant rises, so long as the NAAQS continues to be attained. "Air quality that adheres to [NAAQS] standards (*e.g.*, air quality in an *attainment area*) is presumptively protective of public health in the general population." *Id.* (emphasis added). In the absence of any explanation from EPA regarding why the Draft Guidance's rationale is no longer valid, the proposed change in the rebuttable presumption lacks a rational basis.

Moreover, WLF questions the propriety of several of the factors cited by the Paper as possible grounds for finding adversity despite NAAQS attainment. The Paper asserts that the adversity issue should take into account the fund recipient's "misapplication of environmental standards" in deciding whether the permit holder's emission of a NAAQS pollutant creates an adverse impact. Paper at 4. That assertion is nonsensical. A fund recipient's misapplication of environmental standards bears no necessary logical relationship to adversity; the presumption that air quality does not adversely affect public health when the NAAQS threshold is attained is not weakened simply because the fund recipient committed some error of law in granting the environmental permit. The OCR has not been designated to serve as a "super" appeal board, authorized to review the propriety of all environmental permitting decisions under the guise of an adversity finding.

Nor is it appropriate, in the majority of cases, for OCR to be examining "the presence of particularly sensitive populations that were not considered in the establishment of health-based standards." *Id.* NAAQSs and other health-based standards are established with the general population in mind; they nonetheless recognize that there will always be a few people whose

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individualized health sensitivities cause them to be adversely affected by environmental conditions that have no impact on the great majority of people. But unless there exist a substantial number of such people in the vicinity of the permitted facility, there can be no basis for a "substantially" adverse impact finding. And if there are a substantial number of such people within a racially identifiable community in the vicinity of the facility, EPA has not explained why their sensitivities cannot be addressed within the "rebuttable presumption" framework.

Under these circumstances, the only plausible explanation for the Paper's proposed change is a desire by some at OCR to place a thumb on the scale, in order to favor those raising Title VI challenges to permitting decisions. That suspicion is strengthened by the Paper's subtle alteration of the definition of what constitutes a *prima facie* showing of adverse disparate impact. Past EPA writings have stated that one element of a *prima facie* case is a showing that the federal-fund recipient's challenged actions have a "significant" or "substantial" adverse impact on an identified racial or national-origin group. *2000 Draft Investigation Guidance* at 65 Fed. Reg. at 39680, 39684. In contrast, the Paper refers repeatedly simply to "adversity" and "adverse impact"; the Paper does not use the word "substantial" in connection with the word "adverse." That omission is unlikely the result of mere inadvertence. WLF notes, for example, that when discussing a fund recipient's burden of proof in rebutting a *prima facie* case of adverse disparate impact, the Paper contends that the fund recipient must offer a "*substantial legitimate* justification" for its action. Paper at 3 (emphasis added). EPA should not be attempting to effect changes in its order of proof in this surreptitious manner. Nor should it be picking favorites in Title VI disputes.

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IV. *The Draft Policy Paper Is Inconsistent with the Title VI Regulations*

The Paper focuses solely on a small subset of federal fund recipients: state and local government agencies that have been delegated responsibility for issuing pollution control permits. It also focuses solely on disparate impact claims. Paper at 1 ("This paper does not address allegations about intentional discrimination, most non-permitting facts patterns, or technology- and cost-based standards; it is focused on discriminatory effects allegations that relate to the health protectiveness of pollution control permits issued by recipient agencies."). The provision in EPA's Title VI regulations most relevant to the subjects addressed by the Paper, 40 C.F.R. § 7.35(7), states that a recipient of EPA funding "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." (Emphasis added.) One would expect, therefore, that the Paper would focus on "criteria or methods" employed by recipient agencies when reviewing applications for environmental permits, to ensure that their criteria/methods do not have any disparate impact on identifiable racial or national-origin groups.

The Paper does not do so, however; it does not even mention the phrase "criteria or methods." Instead, it focuses solely on the recipient's actual decision to issue a permit. *See, e.g.*, Paper at 2 (addressing how to handle "administrative complaints alleging adverse disparate impacts from the issuance of an environmental permit"). That focus is a misreading of § 7.35(b). It is possible, of course, that a permit will be issued as a direct result of a fund recipient's use of criteria or methods that have an adverse disparate impact on the basis of race. But even in those instances, the Title VI regulations require EPA to focus on the allegedly improper criteria and

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methods, not the permitting decision. Because the Paper adopts an analytic approach that is inconsistent with § 7.35(b), EPA should withdraw the Paper.

Some supporters of the environmental justice movement might respond that adhering to the letter of the Title VI regulations is unacceptable if the result is environmental permitting decisions that could have disparate impacts on racially identifiable communities. WLF's answer: Title VI itself has nothing to do with disparate impact claims, and EPA's Title VI regulations apply a disparate impact analysis in only two limited situations, neither of which apply directly to permitting decisions. If some stakeholders would like to see OCR given authority to review permit decisions for potential disparate racial effects, they ought to lobby for changes to either Title VI or EPA's implementing regulations.

Moreover, the review of "criteria or methods" authorized by § 7.35(b) provides OCR with all the tools it needs to ensure that the goals of the environmental justice movement are being fulfilled. First and foremost, OCR can use its investigative powers to ensure that state agencies do not intentionally use the race or national origin of local residents as a criterion in their environmental permit decisions. OCR can also ensure that state agencies are using approval criteria that minimize the likelihood that permits will have an unintended but nonetheless substantial adverse impact on an identified racial or national-origin group. For example, OCR might well object to a recipient's policy of not testing lead levels in surrounding neighborhoods before deciding whether to grant an environmental permit to a facility that will emit lead. Such a policy might cause the recipient to overlook evidence that granting the permit would exacerbate health concerns by increasing already-high levels of lead in the blood of

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residents of nearby racially-identifiable neighborhoods. Indeed, in *Select Steel*, EPA's dismissal of the Title VI complaint against the Michigan Department of Environmental Quality relied to a substantial degree on the fact that the Department had carefully monitored non-airborne lead levels in nearby minority communities to assure itself that NAAQS-compliant lead emissions from the new mini-mill would not pose health risks. *See also* 2000 Draft Investigation Guidance at 39680-81. Examining a fund recipient's "criteria and methods" in this manner for potential adverse disparate impacts is what the agency appears to have had in mind when it adopted § 7.35(b). The language of the regulations does not contemplate, however, the second-guessing of specific permitting decisions of the sort outlined in the Paper.

V. *EPA Has Not Adhered to the APA's Notice-and-Comment Requirements*

The Paper proposes to adopt a new legal standard for determining whether EPA fund recipients have violated the Title VI regulations. EPA quite clearly is doing so without following the notice-and-comment procedures set forth in the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553(b) & (c). Indeed, the Paper has not even been published in the Federal Register.[6] Because the Paper qualifies as a proposed "rule" within the meaning of the APA and does not qualify as a mere "interpretive rule," 5 U.S.C. § 553(b)(3)(A), it may not be put into effect until after EPA complies with the APA's notice-and-comment requirements.

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[6] Due in no small part to the absence of publication in the Federal Register, WLF did not become aware of the Paper until late February 2013, barely more than a week before the initial March 8 filing deadline for comments. WLF has been an active player in environmental justice issues for two decades; if even we were in the dark about EPA's plans until the last minute, WLF strongly suspects that many other interested parties are still unaware of the Paper.

In relevant part, the APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of any agency." 5 U.S.C. § 551(4). There can be little doubt that what the Paper proposes to adopt meets that definition of a "rule." The proposal is "designed to implement, interpret, or prescribe law or policy": it sets forth the order of proof that is applicable to adjudication of complaints filed under EPA's Title VI regulations, and defines (in part) what a complaint must show in order to establish a *prima facie* case of adverse disparate impact. The proposal also "describe[s]" EPA's "procedure or practice requirements": it explains how EPA intends to handle such complaints, including changes in the way it handles cases in which the complainant challenges issuance of an environmental permit that will not cause the local community to fall out of compliance with applicable NAAQSs.

WLF notes that the GAO determined, in a legal opinion issued in 1999, that the 1998 Interim Guidance, which addressed many of the same issues addressed by the Paper, qualified as a "rule" within the meaning of the APA. *See* Robert P. Murphy, General Counsel of GAO, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, Opinion B-281575 (1999).[7] The proposal set forth in the Paper qualifies as a "rule" for precisely

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[7] The GAO explained that the Interim Guidance qualified as a "rule" because it would "affect the rights and duties of the recipient, the complainant, and the affected population." *Id.* It concluded that because the Interim Guidance was a "rule" for purposes of the APA, it was also a "rule" for purposes of the Congressional Review Act portion of the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. § 801 *et seq.*, and thus that EPA was required to present the Interim Guidance to Congress in compliance with the provisions of SBREFA.

the same reasons that the 1998 Interim Guidance so qualified.

Even though the proposal is clearly a "rule," adoption of the proposal would not require EPA to follow APA notice-and-comment requirements if it could demonstrate that its proposed rule is an "interpretive rule, general statement of policy, or rule of agency organization, procedure or practice." 5 U.S.C. § 553(b)(A). While the distinction between an interpretive rule and a substantive rule is not always clear, in this instance it is clear that EPA is not merely proposing an "interpretive rule."[8] Indeed, at no point does the Paper suggest that it is offering any sort of "interpretation" of an existing statute or regulation.

EPA's Title VI regulations prohibit fund recipients from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin." 40 C.F.R. § 7.35(b). The Paper proposes that a fund recipient be deemed to have violated the Title VI regulations if it approves a pollution control permit that has the effect of imposing an adverse disparate impact on identifiable racial communities. It further proposes that if the complainant establishes what the Paper has defined as a *prima facie* case of adverse disparate impact, the fund recipient can avoid a finding that it violated the regulations only by demonstrating that there exists a "substantial legitimate justification for its action." Paper at 3. The Paper further proposes to eliminate an EPA rule

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Interestingly, the Interim Guidance was yet another rule that EPA never published in the Federal Register.

[8] Given that the Paper sets forth several proposed rules of decision for Title VI complaints filed with EPA, the agency cannot plausibly argue that its proposal is a mere "general statement of policy, or rule of agency organization, procedure or practice."

governing cases in which the issuance of the environmental permit will not cause the local community to fall out of compliance with applicable NAAQSs. The current rule creates a rebuttable presumption that issuance of a permit in such situations does not create an "adverse" impact on the community; the new rule would allow NAAQS compliance to be considered as merely one factor among many in determining Title VI adversity.

The APA provides that any such new agency position may be adopted only pursuant to the APA's notice-and-comment procedures. A rule is substantive (and thus subject to notice-and-comment procedures) if the rule "effectively amends a prior legislative rule." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). As the D.C. Circuit has explained, unless an agency action that modifies its prior interpretation of a formal regulation is subject to notice-and comment rulemaking requirements, "the agency could evade its notice and comment obligation by 'modifying' a substantive rule that was promulgated by notice and comment rulemaking." *Syncor Intel Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (citing *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)).

The Paper "effectively amends" § 7.35(b) by adding a third item to the list of actions by a state regulatory agency that are subject to a disparate impact standard. While § 7.35(b) covers a state agency's "use" of either "criteria" or "methods" of "administering its program," the Paper proposes that the disparate impact regulation be broadened so as to also include "approval of a pollution control permit." Moreover, although EPA in 2000 proposed (but never adopted in final form) legal standards that would have spelled out how a complainant could establish a *prima*

facie case of adverse disparate impact and thereby shift the burden of proof to the fund recipient, the Paper proposes amending that legal standard in order to make it easier for the complainant to establish a *prima facie* case. Thus, even assuming that the 2000 Draft Investigation Guidance qualified as an "interpretive rule" (based on a contention that it did no more than interpret EPA's Title VI regulations), *Syncor* mandates a finding that the Paper's proposal to amend the Draft Guidance qualifies as a "substantive rule" that is subject to the APA's notice-and-comment requirements. As *Syncor* explained, unless EPA's efforts to modify its prior interpretation of the Title VI regulations are made subject to notice-and-comment rulemaking, EPA "could evade its notice and comment obligation by 'modifying' [§ 7.35(b),] a substantive rule that was promulgated by notice and comment rulemaking." *Id.* at 94-95.

A rule characterized by an agency's effort to expand its regulatory footprint has long been deemed the hallmark of a "legislative" or "substantive" rule that is subject to APA notice-and-comment requirements. The Paper proposes a rule that would unquestionably expand EPA's footprint: the proposed rule would increase the range of recipient conduct that would be subject to EPA's Title VI disparate impact regulations. Accordingly, if EPA is intent on following through with its rule changes, it should start from scratch and propose its changes in accordance with the APA's notice-and-comment procedures.

VI. *The Invalidity of Disparate Impact Regulations*

Title VI prohibits federal-fund recipients from discriminating on the basis of race, color, or national origin by excluding individuals "from participating in," denying them "the benefits of," or subjecting them "to discrimination under" the fund recipient's programs. 42 U.S.C.

§ 2000d. It is well established that Title VI addresses *only* intentionally discriminatory activity; it does not address conduct that has a disparate effect on the basis of race, color, or national origin, so long as the fund recipient engaging in such conduct did not act for the purpose of creating the disparate impact. *Alexander v. Sandoval*, 532 U.S. 275 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992).

Despite the limitation on Title VI's reach, EPA has long taken the position that it is authorized to issue Title VI regulations that prohibit at least some conduct by fund recipients that, while not intentionally discriminatory, imposes disparate impacts on the basis of race, color, or national origin. As the source for such authority, EPA points to Title VI Sec. 602, 42 U.S.C. § 2000d-1, which authorizes federal agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate the provisions of section 601." Title VI, Sec. 602, 42 U.S.C. § 2000d-1. EPA's 2000 Draft Investigation Guidance was written with the understanding that EPA possessed broad statutory authority to regulate the conduct of fund recipients based solely on a finding that the conduct created a disparate impact on the basis of race, color, or national origin.

The Supreme Court's 2000 *Sandoval* decision called that understanding into question. *Sandoval* held that the Title VI disparate impact regulations do not create private rights of action on behalf of individuals. 532 U.S. at 293. Moreover, the Court raised serious questions regarding the validity of Title VI regulations.[9] The Court stated that assertions that Section 602

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[9] *Sandoval* declined to decide the validity of the regulations because the issue was not directly raised by the parties and because its no-private-right-of-action holding allowed the Court

authorizes regulations that proscribe activities "that have a disparate impact on racial groups, even though such activities are permissible under § 601 . . . are in considerable tension with the rule of [prior case law] that § 601 forbids only intentional discrimination." *Id.* at 281-82.

At least as importantly, the Court made clear that the validity of Title VI disparate impact regulations was still an open question that had never previously been decided by the Court. EPA's 2000 Draft Investigation Guidance assumed that two earlier Supreme Court decisions – *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983); and *Alexander v. Choate*, 469 U.S. 287 (1985) – had held that Section 602 authorizes federal agencies to issue disparate impact regulations. *See, e.g.*, 65 Fed. Reg. at 39668 & n.35. *Sandoval* explained that there never had been such a holding. It noted that the relevant language in *Alexander v. Choate* was mere *dicta*, and that *Guardians*'s expressions of support for Title VI disparate impact are set forth primarily in the dissenting opinions. *Sandoval*, 532 U.S. at 281-82.[10]

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to decide the case on narrower grounds. *Id.* at 281-82. Instead, the Court simply assumed the validity of Title VI disparate impact regulations for "purposes of deciding this case" only. *Id.* at 281.

[10] *Guardians* rejected a disparate impact challenge to New York City's last-hired/ first-fired policy for lay-offs of police officers. Proponents of Title VI disparate impact regulations point to statements made by four dissenting justices plus statements made by Justice White in his opinion concurring in the judgment – *i.e.*, five of nine justices expressed support for disparate impact regulations. But Supreme Court holdings are not constructed in that manner. 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. *United States v. Morrison*, 529 U.S. 598, 623-24 (2000) (rejecting 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); and explaining, "This is simply not the way that reasoned constitutional adjudication proceeds."). 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

In light of *Sandoval*'s statements calling into question the validity of Title VI disparate impact regulations (and the resulting possibility that EPA's disparate impact regulations could be struck down if ever challenged in a federal court), it would behoove EPA to narrow the scope of its 2000 Draft Investigation Guidance by limiting the regulations' applicability to those situations in which both the adverse effects and the disparate racial impacts are particularly severe. But instead of heeding *Sandoval*'s warning, EPA appears to be moving to expand the scope of potential liability under its disparate impact regulations.

WLF suggests that EPA begin by re-examining its order of proof in disparate impact cases. According to the Paper, a party that files a disparate impact complainant under EPA's Title VI regulations bears the initial burden of demonstrating "a *prima facie* case" of discrimination. That burden requires three showings regarding the challenged conduct: (1) it has "an adverse impact"; (2) the adverse impact is "suffered disparately" on the basis of race, color, or national origin; and (3) there is a causal connection between the fund recipient's challenged conduct and the adverse impact. Paper at 3. If the complainant establishes a *prima facie* case,

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by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994). As *Sandoval* recognized, *Guardians*'s holding was limited to a finding that without evidence of discriminatory intent, there is no cause of action for damages based on violation of either Title VI or its implementing regulations. *Sandoval*, 532 U.S. at 281.

The Draft Guidance was on even shakier ground in relying on *Alexander v. Choate* as support for EPA's authority to issue Title VI disparate impact regulations. *Alexander* had nothing to do with Title VI but rather involved claims filed under the Rehabilitation Act of 1973. The unanimous and limited holding of the Court was that the plaintiffs' disability discrimination claims were not cognizable under either the Rehabilitation Act or its implementing regulations. 469 U.S. at 309. Accordingly, statements in *Alexander* regarding Title VI were mere *dicta*.

the burden then shifts to the fund recipient to establish " a substantial legitimate justification for its action." *Id.* Even if the fund recipient meets that burden, the complaint can still prevail by demonstrating that there exists "a less discriminatory alternative" that would still accomplish the fund recipient's goals. *Id.*

This framework for adjudicating alleged violation of EPA's Title VI disparate impact regulations is not set out in the regulations themselves. The Paper states that the framework was "established by the courts," *id.*, but that statement is incorrect. Indeed, WLF is unaware of *any* court decisions that have discussed the order of proof in cases raising claims under EPA's regulations.[11] Moreover, it is up to EPA, not the federal courts, to determine how it will adjudicate claims arising under the agency's own regulations; the courts' function is limited to attempting to discern EPA's intent in drafting its regulations and determining whether that intent is consistent with the agency's legislative mandate. In other words, the order of proof used by EPA is one the agency itself has created.

EPA has never set out its order of proof in a document labeled "final." WLF suggests that doing so should be the first order of business for the agency. It further suggests, in light of *Sandoval*, that EPA create a framework that: (1) limits findings of liability to those cases in

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[11] The Paper cites two federal appeals court decisions, but neither had anything to do with EPA's Title VI regulations. They both addressed regulations issued by the U.S. Department of Education, not EPA; and the claims at issue were ones initially filed by private parties in federal court, not before an administrative agency. *See Elston v. Talladega County Bd. Of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1994). In any event, both decisions are now largely anachronistic in light of the Supreme Court's subsequent holding in *Sandoval* that there is no private right of action to enforce Title VI disparate impact regulations issued by federal agencies.

which both the adverse effects and the disparate racial impacts are particularly strong; (2) places the burden of proof at all times on the complainant (that is, the complaint must establish not only that the fund recipient's actions have a significant adverse disparate impact, but also that the actions are not justified on other grounds).

EPA apparently borrowed the *prima facie* case model for adjudicating disparate impact claims arising under its Title VI regulations from employment discrimination case law decided under Title VII of the Civil Rights Act of 1964. In Title VII cases, an employee alleging a disparate impact violation of Title VII must initially establish a *prima facie* case of employment discrimination by demonstrating that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." *Id.* Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available employment practice that has less disparate impact and serves the employer's legitimate needs. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) & (C).

WLF urges EPA to act with extreme caution before looking to Title VII disparate impact case law for guidance in crafting a framework for enforcing the Title VI disparate impact regulations. We note initially that the fact patterns typically encountered in the employment context do not readily translate to decisions granting environmental permits. It can be quite difficult in the employment context to determine whether an employer has demonstrated that its challenged practice is job-related and consistent with business necessity; but at least courts can

assume that the employer's ultimate goal is to maximize profits, and job-relatedness and business necessity can be measured based on whether a practice significantly advances profitability.[12]

Title VI permitting cases, on the other hand, arise in a wholly different context and lack any guideposts that would allow for objective determinations regarding whether a challenged practice is really necessary or has a "substantial legitimate justification." Paper at 3. The 2000 Draft Investigation Guidance states that a fund recipient can establish such a justification by demonstrating that its permitting decision serves some "broader interests" such as "economic development" within the community adversely affected by pollution from a new industrial facility. 65 Fed. Reg. at 39683. But how is EPA supposed to compare the magnitude of adverse health impacts to the job-creation value of a new industrial facility? That is an apples-to-oranges comparison, and the Draft Guidance provides no hint regarding how EPA intends to conduct the exercise.

A Third Circuit case well illustrates the dilemma. *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001), involved a challenge under EPA's Title VI regulations to the issuance of an air quality permit to operate a cement-supply facility in a low-income area of Camden, New Jersey. Although the fund recipient and the facility owner (which intervened in the action) argued that the facility would

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[12] For example, if a requirement that all job applicants pass an employment test is shown to increase productivity of the labor force, then the requirement is deemed job-related; but if no increase in productivity is demonstrated, then the employer has not met its evidentiary burden.

spur economic development in a community heavily populated by members of racial minority groups, the district court issued an injunction against the permit, stating (without explanation) that such evidence was insufficient to carry their burden of demonstrating a "substantial legitimate justification" for granting a permit that created an adverse disparate impact on the community. 145 F. Supp. 2d 446, 496-97 (D.N.J. 2001). The absence of an explanation was hardly surprising; the district judge admitted that there were no existing standards for making the "justification" determination, nor are there any neutral criteria that the court could have used to compare the benefits of economic development to the costs of adverse disparate environmental impacts.[13] In light of those insurmountable difficulties, WLF urges EPA to determine that it will not apply its Title VI disparate impact regulations to permitting decisions, but instead will confine its disparate impact regulations to subject matters (*e.g.*, the employment practices of EPA fund recipients) where more readily manageable standards exist. Such a limiting construction is particularly warranted in light of the language of § 7.35(b) noted above, language that cannot readily be applied to permitting decisions.

EPA should heed the concern expressed by Justice Sandra Day O'Connor regarding indiscriminate use of disparate impact analysis. In *Hernandez v. United States*, she cogently explained why concern over the disruptive impact of a disparate impact standard has led the Court to reject use of that standard in its equal protection analysis:

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[13] The Third Circuit ultimately vacated the injunction. It determined (in light of *Sandoval*) that the plaintiffs lacked a private right of action to enforce the Title VI disparate impact regulations, and thus it did not need to address the "justification" issue. 274 F.3d at 791.

> In *Washington v. Davis*, we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges:
>
> > A rule that [state action] designed to serve neutral ends is nonetheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Hernandez v. United States, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring in the judgment) (quoting *Washington v. Davis*, 426 U.S. 229, 248 (1976)).

At the very least, EPA should impose an extremely high evidentiary burden on complainants seeking to establish that the impact of a permitting decision is both adverse and disparate. Indeed, when the Supreme Court first introduced the disparate impact concept into Title VII employment discrimination litigation in 1971,[14] it did so with the understanding that the plaintiff could not establish a *prima facie* case of discrimination without demonstrating that the disparate impact of the challenged employment practice was particularly severe. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (stating that "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."). The Court suggested that disparate impact analysis was most appropriate in cases in which the

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[14] As initially enacted in 1964, Title VII contained no language expressly adopting a disparate impact standard. *Ricci v. DeStaffano*, 557 U.S. 557, 577 (2009). But in 1971, the Court (in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), interpreted Title VII "to prohibit, in some cases, employers' facially neutral practices that, in fact, are discriminatory in operation." *Id.* at 577-78.

disparate impact was so large that intentional racial discrimination was suspected even though it could not necessarily be proven. For example, the employment practice challenged in *Griggs* (a high-school diploma requirement for job applicants) eliminated 88% of all potential blacks applicants in the relevant labor pool (an area of North Carolina in which blacks had long been subjected to inferior and segregated public education), even though the evidence suggested that nongraduates could perform the work in question just as well as graduates. *Id.* at 853 n.6. Similarly, EPA should limit the focus of its Title VI permitting-decision investigations to those instances in which the impact is so adverse and so disparate as to give rise at least to a suggestion that the permitting decision may have been based on intentional racial discrimination.

WLF also suggests that the burden of proof should remain with the complainant at all times in Title VI proceedings filed with EPA. The Paper states that, once a *prima facie* case is established, the burden of proof switches to the fund recipient to provide a "substantial legitimate justification" for its decision to grant a permit. Paper at 3. EPA provides no justification for that reversal of the burden of proof (other than its unsupported and erroneous contention that the framework for handling administrative complaints filed under EPA's Title VI regulations was somehow mandated by the federal courts). Such a reversal is inconsistent with the normal rules of evidence in judicial and administrative proceedings, in which the burden of proof generally remains with the plaintiff at all times. Indeed, until it was amended in 1991, Title VII of the Civil Rights Act of 1964 imposed the burden of proof at all times on an employee raising a disparate impact claim, even after the employee established a *prima facie*

case of disparate impact. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989).[15] Given the inherent difficulties in comparing the economic benefits of a permitted facility with its adverse environmental impacts, fairness dictates that the burden ought to fall on the complainant to demonstrate why the economic benefits proffered by the fund recipient do not constitute a sufficient justification for granting the permit. WLF also notes that case law involving efforts to enforce Title VI disparate impact regulations issued by other agencies often has not adopted the burden-shifting order of proof advocated by the Paper. *See, e.g., Elston*, 997 F.2d at 1407 n.14.

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[15] *Wards Cove* explained that once a Title VII plaintiff established a *prima facie* case that a challenged employment practice caused a disparate impact, the employer bore only a burden of producing evidence that the practice was job-related, not a burden of persuasion. *Id.*

CONCLUSION

The Supreme Court's *Sandoval* decision throws into considerable doubt the validity of EPA's Title VI disparate impact regulations. In light of that doubt, now is not the time for EPA to be issuing a new rule that seeks to expand the scope of those regulations. Moreover, the Paper recommends adoption of a rule that is inconsistent with EPA's interpretation of its existing Title VI regulations, and EPA has made no effort to follow the notice-and comment requirements imposed by the APA on agencies seeking to adopt new substantive regulations. Nor has EPA provided any reasoned explanation for amending the Draft Guidance's rule governing NAAQSs. For all of those reasons, WLF requests that EPA withdraw the Paper and direct the OCR not to surreptitiously enforce the rule while allowing the Paper to remain indefinitely in draft form.

Sincerely,

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/s/ Cory L. Andrews
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