The City Project

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Robert Perciasepe
Acting Administrator and Deputy Administrator
United States Environmental Protection Agency
Office of Civil Rights (Mail Code 1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
civil.rights@epa.gov

Via First Class Mail and E-mail

Re: EPA should create and enforce a meaningful program under Title VI of the Civil Rights Act of 1964

Dear Acting Administrator Perciasepe and the Office of Civil Rights:

A diverse and growing alliance of committed advocates for environmental and social justice agrees that EPA should create and enforce a meaningful program under Title VI of the Civil Rights Act of 1964. The City Project joined the comments submitted by diverse allies on March 20, 2013. We submit the following additional public comments on four specific points.

1. EPA's compliance language is a best practice for all federal agency agreements with recipients and master agreements.

EPA has adopted the following language that explains the obligations of recipients of EPA financial assistance under Title VI of the Civil Rights Act of 1964 and its regulations. This is a best practice for all federal agencies to include in agreements with recipients and in master agreements. Agencies, recipients, beneficiaries, and the public often do not know their obligations and rights under Title VI and its regulations. The following language helps address those concerns.

> In accepting this assistance agreement, the recipient acknowledges it has an affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.

EPA, *Civil Rights Obligations* at 2, 1/25/13.

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In addition, we urge EPA to provide comprehensive guidance under Title VI and Executive Order No. 12898 to inform EPA staff, recipients of EPA financial assistance, beneficiaries of such assistance, and the public as to what their respective obligations and rights are. While EPA has released some documents addressing environmental justice issues, a piecemeal approach is generally not as effective as documents that address Title VI and environmental justice comprehensively. *See* Letter from diverse allies including The City Project to Lisa Jackson, Administrator, U.S. Environmental Protection Agency (July 3, 2012).

The Federal Transit Administration (FTA) has released circulars on Title VI and Executive Order No. 12898 that are best practice examples for EPA to follow. *See* FTA Title VI Circular FTA C 4702.1B, *available at* http://www.fta.dot.gov/legislation_law/12349_14792.html, and FTA Environmental Justice Circular FTA C 4703.1, *available at* http://www.fta.dot.gov/legislation_law/12349_14740.html.

3. EPA is correct: A recipient must consider disparate impacts based on race, color, or national origin when reviewing an application for a permit, in addition to any applicable health based environmental standards.

4. EPA correctly abandoned any "rebuttable presumption" regarding health based environmental standards because the rebuttable presumption language is not necessary or appropriate under the settled Title VI analytic framework.

EPA addresses Title VI compliance and health based environmental standards in the draft paper, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds* (1/24/13) (the "January 24 Draft").

EPA is correct: EPA must consider whether there are disparate impacts based on race, color, or national origin when reviewing an application for a permit, in addition to any applicable health based environmental standards. Language about a "rebuttable presumption" is not necessary or appropriate to analyze disparate impacts under the settled Title VI analytic framework and should be abandoned.

The proper question is this, and this question should be analyzed directly: Should disparate impacts under Title VI and its regulations be considered in the permitting context, apart from applicable health based environmental standards? The answer is yes.

A permitting agency has an obligation to consider disparate impacts under Title VI apart from health based environmental standards. The agency needs to consider if facilities are located disproportionately or exclusively in communities of color. It must consider the cumulative effects of permitting multiple polluters in a single community. Existing regulations may be inadequate to protect the public health. Environmental laws and regulations can take years or decades to catch up to what science reveals as the threat of pollutants on health.

An agency needs to consider discriminatory impacts when they are asked to approve pollution

permits that create the risk of causing a certain number of deaths or other health impacts. An agency needs to consider vulnerable populations and sensitive receptors, such as children, the elderly, fetuses, and persons with compromised health or immune systems. It needs to consider exposure in the community to more than one pollutant at a time. The permitting regime needs to factor in the increased chance of death or other health impacts when there are multiple pollution sources in or affecting a community. An array of pollutants can even interact with one another to magnify the health impacts of each. *See, e.g.,* Mike Ewall, *Legal Tools for Environmental Equity vs Environmental Justice* at 15-16 (Oct. 15, 2012) (on file with The City Project).

Discriminatory impacts of permitting decisions like those above are part of the facts and circumstances that are properly considered under a Title VI analysis to investigate both intentional discrimination, and unjustified discriminatory impacts for which there are less discriminatory alternatives.

A "rebuttable presumption" adds nothing to the analytic disparate impact framework that applies under settled Title VI law involving (1) disparate impact, (2) justification, and (3) less discriminatory alternatives. *See* January 24 Draft, at 1 and 4.

Thus, in federal court for example, the Title VI analytic disparate impact framework would generally provide as follows: Even if a proposed action by defendant were consistent with a specified health based environmental standard, (1) plaintiff could still show disparate impact; (2) defendant would then bear the burden of justification; and (3) plaintiff would nevertheless prevail if plaintiff showed a less discriminatory alternative. This is the framework without regard to the EPA "rebuttable presumption" language.[1] The analytic framework includes the assignment of burdens. The EPA "rebuttable presumption" adds nothing to that framework.

Moreover, the "rebuttable presumption" does not apply in EPA's administrative complaint procedure. According to the EPA, "EPA is not in an adjudicatory role, evaluating evidence produced by opposing sides, but instead investigates allegations about its recipient, and reaches a conclusion regarding whether a violation of Title VI has occurred." *Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaints and Resolution Process* (1/25/13) at 1. Thus even if a proposed action by recipient were consistent with a specified health based environmental standard, (1) EPA or complainant could still consider evidence of disparate impact. The "rebuttable presumption" does not bar such evidence. (2) EPA would then need to decide if the disparate impact were otherwise justified. (3) EPA could still find a less discriminatory alternative even if the disparate impact were otherwise justified. The EPA "rebuttable presumption" adds nothing to the analysis.

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[1] Federal Rules of Evidence Rule 301 cover presumptions: "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally." The analytic framework and Rule 301 are consistent with each other. EPA's "rebuttable presumption" language means only what Rule 301 says.

At the present time, EPA does not necessarily provide complainants a full and fair opportunity to present and refute evidence in administrative complaint procedures. A "rebuttable presumption" would not contribute to the analysis in the context of procedure where the complainant *did* have a full and fair opportunity to present and refute evidence. The framework would be the same as the framework in court described above.

In summary, in or out of court, a "rebuttable presumption" forms no part of the relevant analysis under the analytic framework. As EPA notes, "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." January 24 Draft, at 4. Of course there has been little or no opportunity to apply the presumption: it has no proper role in any context and should be abandoned. Indeed, EPA itself emphasizes the many contexts in which the presumption does not even arguably apply: "This paper does not address allegations about intentional discrimination, most non-permitting fact patterns, or technology- and cost-based standards." *Id.* at 1.

Thus, for example, in an application for federal financial assistance or the pre-award review process by EPA, the "burden" is on the applicant to persuade EPA to award assistance. EPA can and should require persuasive evidence showing that there is no disparate impact, or that there is a justification for any disparate impact, and that there are no less discriminatory alternatives. Similarly, in the permitting context, EPA should require from the applicant persuasive evidence showing the same.

Whether a project would otherwise satisfy environmental health standards does not resolve an intentional discrimination analysis under Title VI either. Evidence of intentional discrimination may include (1) discriminatory impact based on race, color or national origin; (2) a history of discrimination; (3) substantive irregularities in reaching a decision; (4) procedural irregularities; (5) knowledge of the impact; and (6) a pattern or practice of discriminatory impacts. *See, e.g.*, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-70 (1977); U.S. Department of Justice, Title VI Manual at 43-44 (Jan. 11, 2001). EPA's "rebuttable presumption" language plays no role in the intentional discrimination analysis.

EPA is properly abandoning the "rebuttable presumption" language. The "rebuttable presumption" does not apply under the disparate impact or intentional discrimination standards, it does not apply in court, in the pre-award process, in the administrative complaint process, most non-permitting fact patterns, under technology- and cost-based standards, in the permitting process, and in the intentional discrimination context. The presumption simply does not apply.

5. "Adversity" means adversity.

Finally, the January 24 Draft uses "adversity" to address the question of whether disparate impacts under Title VI should be considered in the permitting context, apart from applicable health based environmental standards. Adversity is a common sense, ordinary language concept that depends on all the facts and circumstances. FTA recognizes that adversity means adversity. *See* FTA Environmental Justice Circular FTA C 4703.1 at 45-46. EPA should too. Using

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"adversity" and the "rebuttable presumption" language to get at the question is like going around the world to get across the street. Adversity means just that, adversity.

Sincerely,

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cc:

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