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Air Quality Management District
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Office of the Executive Officer
Barry R. Wallerstein, D. Env.
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May 7, 2013

via U.S. Mail and e-mail at civil.rights@epa.gov

Rafael DeLeon, Esq., Director
U.S. EPA, Office of Civil Rights
(Mail Code 1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Comments of the South Coast Air Quality Management District staff on EPA's January 23, 2013 draft: "Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental and Health-Based Thresholds" and January 25, 2013 draft "Role of Complainants and Recipients in the Title VI Complaints and Resolution Process"

Dear Mr. De Leon:

The South Coast Air Quality Management District staff appreciates the opportunity to provide comment on EPA's draft proposals described above. We have reviewed the draft policy papers and wish to provide the following suggestions. First, it is unclear why EPA feels there is a need to change its guidance regarding the "presumption" that compliance with a NAAQS (or other environmental health-based thresholds) means there should normally not be a finding of adverse impact. EPA admits that it has not yet had occasion to apply the presumption set forth in its 2000 draft guidance. 65 Fed. Reg. 39650, et seq. We are assuming that EPA may be concerned that by characterizing its position as a "rebuttable presumption," it implies that there is some particular evidentiary burden of proof placed on the person trying to show that despite compliance with the NAAQS, the impact is nevertheless "adverse," which may be difficult for a complainant lacking resources.

We think this concern could be addressed by clarifying that the presumption is merely one affecting the burden of producing evidence, and not shifting the burden of proof. In other words, if the claim is that NO2 impacts are adverse from a particular permit, and the area is and will remain in compliance with the NO2 NAAQS, then EPA presumes that the impact is not adverse unless *some evidence* is presented that it is in fact adverse. This would allow EPA to readily dispose of cases for which there is no reason to think that there is an adverse impact, while still allowing for more detailed investigations in cases where there is some evidence that requires evaluation and possible further investigation. Without such a basis for disposing of meritless complaints, EPA resources may be overwhelmed and unable to concentrate on the truly significant cases.

We also wish to ensure that by making this change, EPA is not backing off from its June 2000 draft guidance that adverse impacts must be "significant" to support a finding of violation. 65 Fed. Reg. pp. 39660, 39680. This principle is consistent with existing law. *NAACP v. Medical Center, Inc.*, 657 F.2d. 1322, 1332 (3d Cir. 1981). We request EPA to include a statement to this effect in any final policy paper.

We also have two comments on EPA's draft "role of complainants and recipients" document. In that paper, EPA states: "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." We are very concerned about the tone of this comment. While EPA may not be technically in an "adjudicatory" role at this stage, we definitely think EPA needs to fairly and impartially evaluate the evidence submitted by each side. If EPA is going to reach a "conclusion," it must be based on an impartial and thorough investigation. Second, EPA states that it will notify the complainant about a "preliminary finding of noncompliance" and will also notify the public by posting its decision on its public access website. We object to this procedure. At the preliminary determination stage, the recipient agency has not even had the opportunity to provide its formal response to EPA's determination. We are concerned that because this is called a "determination of noncompliance," it would mislead the public into thinking that it is a final decision. We request EPA delete this section and not notify the public until at least after the administrative law judge stage of the proceedings.

Finally, we note that EPA has never finalized its 2000 draft guidance. 65 Fed. Reg. 39650, et seq. (June 27, 2000). When EPA proposed its guidance, we provided detailed comments, some of which requested clarification or disagreed with certain concepts in the draft guidance. We are including with these comments a copy of our comments filed in August 2000, so that EPA may address some of the areas needing clarification or changes as it continues to examine its environmental justice policies.

Thank you again for the opportunity to comment on these papers. Should you have any questions please contact me at bwallerstein@aqmd.gov or (909-296-2100) or Barbara Baird, District Counsel, at bbaird@aqmd.gov or (909-396-2302).

Sincerely,

Barry R. Wallerstein, D. Env.
Executive Officer

BRW:BB:pa
e/share/bb/Title VI/2013 Presumptions

Enclosure: Letter dated August 18, 2000 to U.S. EPA from SCAQMD

cc: Amy Royden-Bloom, National Association of Clean Air Agencies

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August 18, 2000

Via U.S. Mail & Electronic Mail
United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
[civilrights@epa.gov]

RE: *South Coast Air Quality Management District's Comments on Draft Title VI Guidance for EPA Recipients Administering Environmental Permit Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (65 Fed.Reg. 39650 *et seq.* [June 27, 2000])

The South Coast Air Quality Management District (AQMD)[1] appreciates the opportunity to comment on EPA's Draft Recipient Guidance and Draft Revised Investigation Guidance.[2] Environmental Justice is very important to the AQMD. In October 1997, the AQMD Board adopted a series of 10 Environmental Justice Initiatives to assure equitable environmental policymaking and enforcement to protect all AQMD residents from the health effects of air pollution.[3] All of these initiatives have now been implemented, and AQMD continues to implement additional programs to further environmental justice goals. Key accomplishments in implementing environmental justice include:

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[1] The AQMD is the regional air pollution control agency for the Los Angeles area having primary responsibility for control of air pollution from all sources except motor vehicles. (California Health & Safety Code section 39002) It encompasses the Los Angeles metropolitan region, including the non-desert portions of Los Angeles, Riverside and San Bernardino counties, Orange County, and the Palm Springs/Indio area. It includes over 15 million residents. Southern California's economy constitutes about one-half of the California economy, which ranks seventh in the world in terms of goods and services provided. It is classified as an "extreme" nonattainment area for ozone and a "serious" area for PM_{10} and carbon monoxide.

[2] In preparing these comments, AQMD worked closely with the environmental justice subcommittee of its Home Rule Advisory Group. The advisory group consists of representatives from EPA, California Air Resources Board, local government, industry, and environmental groups. The mission of the advisory group is to "seek consolidation of overlapping federal, state, and local regulations to streamline regulatory compliance" while attaining clean air goals. These comments are consistent with that mission.

[3] A copy of the 10 Initiatives and Four Guiding Principles is attached.

1) holding monthly town hall meetings held throughout the District where Board members and executive staff listen to and respond to community concerns, and follow up on these concerns;
2) completing the most comprehensive air toxics exposure study ever performed [Multiple Air Toxics Exposure Study (MATES II) 1998-99] to identify the sources of toxic exposure and relative levels of exposure in different communities;
3) amending the District's air toxics rules to add additional compounds, including non-carcinogenic toxic compounds, establish allowable "cancer burden" for permitted facilities, and reduce the target risk level existing facilities must seek to meet;
4) adopting an Air Toxics Control Plan which describes measures the District plans to take over the next decade to further reduce air toxics; and
5) adopting motor vehicle fleet rules to reduce exposure to diesel emissions, which contribute over 70% of airborne toxic risk throughout the District.

The AQMD appreciates EPA's publication of the draft recipient guidance, which contains numerous helpful suggestions. AQMD agrees with EPA that a "comprehensive approach" to address environmental justice concerns, rather than a case-specific or area-specific approach, offers "the greatest likelihood of adequately addressing Title VI concerns." (p 39657) AQMD is actively implementing such a comprehensive approach, as described in part above.

AQMD also supports EPA's concept of "due weight." EPA states that a program that over a reasonable period of time eliminates or reduces adverse disparate impacts, to the extent required by Title VI, and is supported by sufficient underlying analysis, can form the basis for expedited review of complaints. EPA would dismiss complaints regarding actions taken under such a program, where EPA finds the program adequate. (p. 39675) However, EPA has limited its discussion of such programs to so-called "area-specific agreements." Such agreements would be made between "recipients, affected residents, and stakeholders" respecting a specific geographic area of concern. (*Id.*) AQMD believes EPA should expand this concept to accord "due weight" to recipient programs which meet EPA's criteria, whether or not they are the result of such "agreements."[4] The key point is whether the program adequately addresses adverse impact. In making that decision, it is important that EPA establish practical, objective criteria for a program that should be given due weight. The criteria need to be objective in order to assure consistent treatment between different areas. AQMD would like to work with EPA in developing such criteria. As a starting point AQMD suggests the program include the following elements:

1) public participation in development and implementation of the program;
2) identification of areas of greatest concern for relevant stressors or use of methods to evaluate cumulative impacts;

[4] At EPA's public listening session in Carson, California, on August 2, 2000, speakers expressed concern that recipients would enter agreements with community groups that are not representative and may be funded by polluting industry. By the same token, permitting agencies should be able to have effective programs approved by EPA even if a particular community group does not agree.

3) measures to significantly reduce existing levels of relevant stressors; and
4) measures to ensure that new or modified permits do not cause significant adverse impacts.

AQMD's Environmental Justice Initiatives, together with other existing programs to reduce adverse impacts, go a long way toward achieving an approvable "comprehensive program."[5] AQMD would like to work with EPA to determine what enhancements, if any, are needed to make its program approvable and entitled to "due weight" as discussed in the draft guidance. AQMD would like to volunteer to help develop a model program to implement this concept.

We note that EPA's draft recipient guidance suggests that permitting agencies receiving funds develop their programs with the involvement of all agencies and parties that may contribute to potential problems and solutions. EPA specifically encourages involving other government agencies such as local governments having authority over land use and those agencies controlling decisions that affect traffic patterns. AQMD fully supports this approach. However, EPA has an important role to play in this process. AQMD urges EPA to conduct extensive outreach and training for local government officials so that they may become aware of the potential environmental justice implications of their decisions. AQMD would like to work with EPA in these efforts. Also, EPA should revise its complaint investigation process to give local governments the opportunity to participate. Since local governments may have an important role in developing the most effective remedial measures, they should be included in the process at all stages, including informal resolution.

AQMD is grateful for EPA's efforts to publish recipient guidance, and believes that the draft revised Title VI investigation guidance provides significant clarification as compared to the 1998 Interim Guidance. However, there are still some areas that require clarification, and some areas in which AQMD disagrees with the draft guidance or suggests improvements to it. AQMD's detailed technical comments are attached. They are organized according to whether they support EPA's draft guidance, disagree/suggest improvements, or seek clarification. Each comment identifies whether it refers to the Draft Recipient Guidance or Draft Investigation Guidance. AQMD urges EPA to publish a document summarizing and responding to comments prior to issuing any final guidance documents.

In conclusion, AQMD supports EPA's continuing efforts to effectively and fairly implement Title VI and to provide useful guidance. AQMD especially appreciates the draft recipient guidance provided by EPA. AQMD's comments are intended to help achieve environmental justice goals, which the AQMD fully supports, and to do so in a practical manner with clear, objective criteria that will help all stakeholders understand and implement their respective obligations.

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[5] AQMD's MATES II study demonstrated that cancer risks due to air toxics have declined significantly at all monitoring stations since 1990, ranging from 43% to 63% decreases. (MATES II, p. 2-1)

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Please contact me at (909) 396-2100 or Lupe Valdez, Deputy Executive Officer for Public Affairs and Transportation, at (909) 396-3780 to discuss how AQMD can work with EPA to develop and implement an Environmental Justice program which can be accorded due weight and minimize Title VI complaints, and expedite EPA investigation of any complaints that are filed.

Thank you for the opportunity to comment. AQMD looks forward to working with EPA and other interested parties in the future on these important issues.

Sincerely,

Barry R. Wallerstein, D.Env.
Executive Officer

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Attachment
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South Coast Air Quality Management District's Technical Comments on Draft Title VI Guidance for EPA Recipients Administering Environmental Permit Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (65 Fed.Reg. 39650 *et seq.* [June 27, 2000])

A. *Comments Supporting Aspects of EPA's Draft Guidance*

1. AQMD Supports EPA's Position That the Filing of a Complaint Does Not Invalidate a Permit (Investigation Guidance, p. 39676)

EPA's guidance states:

> "Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue." (p. 39676)

EPA should adhere to this principle. Otherwise, even complaints that are ultimately dismissed as lacking merit could easily derail a valuable project, by imposing unreasonable delays in the process. However, in order to assure that cases of discriminatory impact are promptly addressed, EPA needs to develop a means to process complaints and conduct its investigations more quickly. AQMD believes that establishing practical, objective criteria for recipient programs to reduce or eliminate impact, which programs will be given due weight, will greatly assist in expediting investigations.

2. AQMD Supports EPA's Position that Adverse Impacts Must Be Significant to Support a Finding of Violation (Recipient Guidance, p. 39660; Investigation Guidance, p. 39680)

EPA's draft recipient guidance states that as part of conducting an adverse disparate impact analysis, the recipient should "Determine whether the impact[s] are sufficiently adverse to be considered significant." (p. 39660) The Draft Investigation Guidance, page 39680, states:

> "If the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance . . . ."

AQMD supports EPA's position that an adverse impact must be significant in order to support a finding of violation. This position is consistent with existing Title VI case law holding that disparate impact must be more than insignificant and minor. (*NAACP v. Medical Center, Inc.* (3rd Cir. 1981) 657 F.2d 1322, 1332). The reason it is important to focus on "significant" impact is that virtually every permit allows <u>some</u> pollution and therefore could be argued to have <u>some</u> impact. EPA Investigations Guidance needs to make it clear that the impact must be significant, otherwise EPA may well be inundated with complaints which will inevitably be dismissed, after consuming substantial EPA and recipient resources which would be better spent on addressing significant adverse impacts.

3. AQMD Supports EPA's Position that Both Demographic Disparity and Disparity in Rates of Impact Should Be Statistically Significant (Investigations Guidance, p. 39682; Recipient Guidance, p. 39661)

EPA states in its Draft Revised Investigations Guidance that demographic disparity between an affected population and a comparison population should be evaluated to determine if the differences are statistically significant to 2 to 3 standard deviations. (p. 39682) EPA's Investigation Guidance also states that a finding of disparate impact is "somewhat" less likely where both the disparity of impact and demographics are not statistically significant. (p. 39682) The AQMD believes that disparity needs to be significant to establish disparate impact in the normal case. This is consistent with existing case law concerning employment discrimination. (*Sanchez v. City of Santa Ana* (C.D. Cal. 1995) 928 F.Supp. 1494, 1500) However, there may be an unusual case where disparate impact exists although disparity in one factor is not large (e.g., demographics), if the disparity in the other factor is sufficiently large (e.g., impact).

4. AQMD Supports EPA's Recognition of the Relevance of Regulatory "Benchmarks" of Significance (Recipient Guidance, p. 39661; Investigation Guidance, p. 39680)

EPA states in its Draft Revised Investigation Guidance, page 39680, that in determining whether an impact is adverse, it would "first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy." The AQMD supports this approach but believes that locally adopted levels of significance should also be considered. In the recipient guidance, page 39661, the reference is to all relevant benchmarks, not just those identified in EPA regulations or policies. EPA should explicitly recognize the relevance of locally adopted levels of significance.

5. AQMD Supports EPA's Determination that Remedies Emphasizing All Contributions to Impact, Not Just a Particular Permit, Are Most Appropriate (Recipient Guidance, page 39662; Investigations Guidance, pp. 39674, 39683)

In suggesting ways for recipients to reduce the likelihood of Title VI complaints, EPA states "Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions." (p. 39662) In the Draft Revised Investigation Guidance, EPA states: " . . . denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts." (p. 39683) AQMD strongly supports these concepts, at least in areas where the recipient has a program to assure individual permits do not cause significant adverse impacts. AQMD believes its stringent toxics and new source review rules constitute such a program. AQMD, thus, urges EPA to develop criteria for such programs (which recipients can adopt) to avoid or remedy any disparate impact. AQMD believes this approach more fully addresses any actual disparate impact than would an approach focusing on an individual permit. It also avoids an individual permit holder suffering the severe penalty of permit denial as a result of impacts it did not cause. However, recipients should develop programs to assure that individual permits do not themselves cause significant adverse impact, otherwise denial or modification of each individual permit may be considered.

6. AQMD Supports the Concept that EPA Should Give "Due Weight" to Local Agency Analysis and Programs to Avoid or Reduce Disparate Adverse Impact (Recipient Guidance, p. 39663 *et seq.*; Investigations Guidance, p. 39674 *et seq.*)

AQMD understands EPA's position that it cannot delegate its responsibility to enforce Title VI to recipients, page 39674, and appreciates EPA's efforts to provide incentives to recipients to implement proactive programs to reduce the likelihood of Title VI complaints. EPA characterizes this approach as granting "due weight" to information submitted by recipients and to "area-specific agreements." (p. 39675) AQMD believes EPA must always give the appropriate weight that is due to information submitted by recipients. AQMD strongly supports the concept that EPA should also give due weight to programs implemented by recipients which are designed to avoid or reduce disparate adverse impacts.[6] AQMD supports the concept that such programs would allow EPA to promptly evaluate a complaint and to dismiss it if it is covered by a recipient program which "will eliminate or reduce, to the extent required by Title VI, existing adverse disparate impacts." (p. 39675) Such a program should also expedite dismissal of later complaints in the same area. (p. 39675)

7. AQMD Supports EPA's Recognition of Cost and Technical Feasibility in Evaluating Mitigation and Less-Discriminatory Alternatives (Investigation Guidance, p. 39683)

In its Investigation Guidance, page 39683, EPA states that it "will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives [and mitigation measures]." AQMD agrees that these factors need to be considered, and supports EPA's determination to evaluate these factors as part of its assessment.

B. Comments Disagreeing With or Suggesting Improvements to Aspects of EPA's Draft Guidance

1. Permit Renewals or Decisions that Merely "Allow Existing Conditions to Continue" Should Not Be the Basis for Complaint at Least in the Normal Case (Investigations Guidance, p. 39677)

In its Investigations Guidance, page 39677, EPA states that the following types of permit actions could form the basis for initiating a Title VI investigation:

> "Permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged."

AQMD believes that in the normal case, these actions should not serve as the sole basis for a complaint. It also seems questionable whether permit renewals, or other actions that merely allow conditions to "remain unchanged," can constitute an action having an adverse disparate impact such as to support a complaint under EPA's Title VI regulation.[7] In its responses to comments, page 39697, EPA indicates that examining renewals may be proper because the

[6] However, as discussed in Comment B 2, AQMD believes EPA should not rely on the possibility of agreements with self-identified community representatives, but rather should develop and publish realistic, objective criteria for recipient programs which would be entitled to due weight.

[7] A complaint must allege a "discriminatory act" under EPA's regulation. (40 CFR §7.120(b))

demographics may have changed since the original permit. However, in normal cases it would be unfair to subject the permit renewal to possible jeopardy because the surrounding population may have increased or changed, since this would not have been possible for either the permittee or the recipient to predict. The AQMD will, however, impose corrective conditions if any impact rises to the level of a public nuisance. Moreover, AQMD's rule requirements for existing sources, which require elimination of significant risk, and maximum feasible toxic reductions, will provide additional protection. EPA's response to comments, page 39697, states that "Even if environmental laws mandate different treatment for new permits, permit renewals, and permit modifications, EPA's Title VI regulations do not require different review of these actions." AQMD believes EPA can allow renewals to be treated differently from new permits. Renewals are fundamentally different from new permits. In the case of a renewal, the permittee has already constructed its facility and invested substantial resources in reliance on the permit. Realistic options for mitigation or alternatives (especially alternative siting) are considerably less than in the case of a new permit. Since EPA may seek compliance information from a recipient, independent of a complaint, whenever there is reason to believe discrimination may exist (40 CFR §7.85(b)), EPA has the ability to monitor compliance without making individual permit renewals the subject of an investigation. Thus, there is no need for permit renewals to cause initiation of a Title VI investigation, in the normal case.

2. EPA Should Not Rely on the Concept of Areawide Agreements But Instead Adopt Realistic, Objective Criteria for EPA Approval of Recipient Programs to Avoid or Reduce Disparate Adverse Impact (Recipient Guidance, p. 39657; Investigations Guidance, p. 39675 *et seq.*)

EPA's Draft Recipient Guidance suggests the concept of an areawide agreement as merely one among several Title VI approaches a recipient "may choose to develop." (p. 39657) However, in the Investigations Guidance the areawide agreement turns into something much more significant: if the permit at issue is covered by an area-wide agreement that EPA has approved, EPA will likely close the investigation. (p. 39676) AQMD agrees there is great need for a process which can help EPA focus on complaints in areas where adequate remedial action is not being taken, especially given the large and longstanding backlog in EPA handling of Title VI complaints. AQMD also supports EPA's efforts to encourage recipients, residents, and stakeholders to take action to reduce impacts. However, AQMD does not believe the concept of an areawide agreement is a practical – or even necessarily fair – way to reach these goals. Instead, EPA should issue realistic, objective criteria by which it will judge recipient programs to avoid or reduce disparate adverse impact. Once EPA approves such a program, the EPA would promptly act on complaints regarding permits covered by such a program, and in the normal case would dismiss such complaints. In many cases, it is impractical to accomplish such a result through an "area-wide agreement." How is the recipient to determine which community group or groups with which to form an agreement? Regardless of which group agrees, there is a potential for someone who does not agree to challenge the legitimacy of the "agreement." The agreement will not seem fair to such a person. Moreover, such a process is not fair to the recipient, whose agreement is subject to the veto power of whoever identifies themselves as a community "representative." Finally, EPA would not have adequate assurance that the agreement represented sufficient, but not unnecessary, measures. Instead, EPA should develop and publish realistic, objective criteria for approving a recipient's program. AQMD suggests that such criteria could include:

1) public participation in development and implementation of the program;
2) identification of areas of greatest concern for relevant stressors or use of methods to evaluate cumulative impacts;
3) measures to significantly reduce existing levels of relevant stressors; and
4) measures to ensure that new or modified permits do not cause significant adverse impacts.

The AQMD stands ready to assist EPA in developing such criteria and suggests that EPA work with AQMD to implement a Title VI environmental justice program which would serve as a model for other areas. Programs which meet the criteria EPA develops should be granted "due weight" such that EPA will in normal circumstances dismiss complaints regarding permits covered by such programs.

3. EPA Should Not Defer Investigation Merely Because a Permit is Not Yet Issued, or Because a Lawsuit is Pending (Investigation Guidance, p. 39673)

EPA plans to "dismiss without prejudice" complaints that are the subject of administrative appeals or litigation, or which are premature because the permit is not yet issued (p. 39673). The AQMD urges EPA to reconsider this position. Waiting until after appeals and litigation are complete subjects the complainant and the permit-holder to considerable uncertainty, which may last years beyond the conclusion of litigation. Moreover, while a complaint filed before the permit is issued may be technically "premature," EPA needs to develop a way to provide its expertise and input to the recipient whenever a Title VI issue is raised, even if it is premature. Otherwise, the recipient may proceed in good faith to a decision which might be different had EPA's input been received.

4. The Permit Holder and the Local Government Land Use Authority Having Jurisdiction Should Have the Right to Participate in the Investigation (Investigation Guidance, p. 39673)

EPA states that in exploring informal resolution of a complaint, it "may seek participation from the complainant, the permittee, or others." (p. 39673.) AQMD believes that the permittee, as well as the affected local government having land use jurisdiction, should have the right[8] to participate in investigations. While ultimately any remedy would be directed toward the recipient, the permittee can be directly affected by mitigation measures and proposed less discriminatory alternatives that are considered, and thus has a great stake in the proceedings. The local government having land use authority may play a crucial role both in establishing the justification for a permit, and in developing remedial programs where land-use patterns have contributed to any disparate impact. These parties deserve a right to be heard in the investigation process.

5. The Guidance Fails to Specify a Definitive Timeframe for Resolution of a Complaint (Investigations Guidance, Appendix B)

[8] Since these entities may not have the desire or the resources to fully participate, they should not have the obligation to be involved.

Unfortunately, extended delays in processing complaints have frustrated complainants, recipients, and permittees alike. EPA needs to specify a definitive timeframe for resolving complaints. While we acknowledge that the revised Investigation Guidance has attempted to attach specific deadlines to individual milestone events within the complaint investigation process to a much higher degree than did the Interim Guidance, there is still no overall timeframe by which a complaint must be resolved. Indeed, Appendix B to the Investigations Guidance (flowchart) makes the process seem endless. Even an allegation rejected by EPA may be referred to another federal agency (39670). Most rejections of allegations can be resubmitted at a later time without prejudice (39673). EPA can waive the 180-day limit on filing a complaint after the alleged discriminatory action takes place for "good cause."(39673). Complaints that are subject to ongoing administrative appeals or litigation in federal or state court would be likely candidates for delay depending on the outcome of those decisions (39673). While EPA would likely close such complaints, " EPA expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation" (39673). Furthermore, EPA is requiring little substantiation of claims by complainants, choosing instead to perform the underlying investigations itself which clearly can be a large and time-consuming task. While the April 1998 Shintech-related Draft Revised Demographic Information report might not be indicative of the level of effort that will ultimately go into all investigations, it represents a very considerable effort even if only a few such complaints are processed each year. This level of effort reinforces the need for adopting methods to help EPA focus on the significant and serious complaints.

A corollary concern has to do with allegations of discrimination in the public participation process (39672). Allegations concerning such discrimination should be filed within 180 days of the alleged action. EPA sets forth the example that if a complainant alleges that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing. However, EPA has not included public participation guidelines in the *Investigation Guidance* reserving the right ("as appropriate") to do so in the unspecified future (39669). It seems inconsistent for EPA to steer clear of public participation investigation guidance yet to invite such complaints on the same subject. We urge EPA to commit to draft the public participation guidance quickly since it is our understanding that failure to be heard is one of the biggest catalysts behind the environmental justice movement.

6. EPA Should Clarify that Merely Administrative Changes, or Projects that Reduce Pollution, Without A Collateral Increase, Are Not Normally a Basis for Complaint But Will Be Reviewed in Context Rather Than in Isolation (Investigation Guidance, p. 39677)

EPA states that administrative changes, such as name change or change in mailing address "generally" will not form the basis for a finding of noncompliance. (p. 39677) Similarly, EPA states it will "likely" close an investigation where the recipient demonstrates that the challenged action has a significant benefit in reducing stressors. (*Id.*) If there is uncertainty as to the significance of the benefit, EPA will normally proceed with the investigation. AQMD believes that EPA should clearly state that actions which are administrative will not be the basis of a finding of noncompliance. Moreover, beneficial actions should not normally be the basis of an investigation. A recipient should not have to establish "significant" benefit to justify closing a complaint. However, the benefit of an action needs to be judged in context. As pointed out at the public listening session on August 2, 2000, an action may be technically "beneficial" when reviewed in isolation, yet still part of a pattern of disparate impact if a minority community

receives a very small benefit, while non-minority communities receive significantly more benefit, without sufficient reason. EPA should clarify that beneficial actions will not be the basis of complaint except in such unusual circumstances, but that such actions will be reviewed in context to see if they are part of a pattern of disparate impact.

7. Justification Should Not Be Required to Be "Integral to the Recipient's Mission" (Investigations Guidance, p. 39683)

As stated in EPA's investigations guidance, a recipient may "justify" the issuance of a permit, despite adverse disparate impact, based on a substantial legitimate justification. (p. 39683) Generally, "justification" would be a showing that the challenged activity is reasonably necessary to meet a goal that is "legitimate, important and integral to the recipient's mission." (p. 39683) AQMD believes that the words "integral to the recipient's mission" are subject to potential misinterpretation. AQMD suggests this language be replaced by requiring justification to be based on a reason which "significantly furthers important social goals which the recipient's program is designed to support or allow." The reason for this suggestion is that many recipient permitting agencies have relatively narrow "missions,". e.g. air or water quality. Yet they are expected to issue permits to facilities whose primary purpose is to further other social goals. Thus, for example, EPA's statement that a permit for a wastewater treatment plant is "integral to the recipient's mission" (p. 39683) might be interpreted as not true as applied to AQMD. Yet such a permit significantly furthers an important, legitimate social goal which the permit program is designed to support or allow. For the vast majority of permits issued by AQMD, while "they are integral to AQMD's mission" to the extent they control pollution, they arguably are not "integral to the AQMD's mission" to the extent they allow pollution. Few people would consider "economic development," as cited by EPA, p. 39683, to be integral to AQMD's mission. The language used in EPA's guidance regarding justification being integral to the agency's mission is only used in one of the three cases cited by EPA in footnote 149, and there it was actually used to broaden the scope of legitimate justification beyond the narrow focus urged by some. (*Ellston v. Talladega County Bd. of Educ.* (11th Cir. 1993) 997 F.2d 1394, 1412-13) EPA should not incorporate in its guidance such language which has the potential to unduly narrow the scope of legitimate justification. AQMD would like to work with EPA to develop a more relevant test, such as the language suggested above.

8. EPA Should Encourage Programs that Provide Collateral Toxic Benefits While Not Increasing Criteria Pollutants (Recipient Guidance, p. 39663)

EPA's guidance recognizes that recipients want and need incentives to develop proactive Title-VI related approaches. (p. 396637) As noted above, AQMD is volunteering to work with EPA to develop a model environmental justice – Title VI program which would be given "due weight" in any subsequent Title VI investigations. In addition, AQMD has identified mobile sources as the major contributor to air toxics exposure in most of the basin, even when diesel is not considered. (Multiple Air Toxics Exposure Study [MATES II], SCAQMD, March 2000, p. ES-31) When diesel is considered, mobile sources become the overwhelming contributor throughout the basin. (*Id.*) Reducing mobile source air toxics should be a key part of any environmental justice – Title VI strategy. Yet AQMD has relatively little regulatory authority

over such sources.[9] Therefore, AQMD believes it is important to create incentives for the voluntary reduction of such pollution. To that end, AQMD has offered monetary incentives as well as credit trading rules. AQMD believes EPA should encourage such measures, where they decrease toxic emissions, especially diesel, without allowing regional, or significant local, increases in criteria pollutants.

9. EPA Should Establish A Procedure for Promptly Disposing of Meritless Complaints (Investigation Guidance, p. 39672)

EPA's policy is to "investigate all administrative complaints concerning the conduct of recipient of EPA financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." (p. 39672) This means that there is no burden of producing evidence placed on complainant to trigger an investigation. As a result, EPA has accepted nearly 50 complaints for investigation. Only one has been decided. Some investigations have been open since 1994. During the entire investigation process, the recipient, the permittee, and the complainant, undergo enormous uncertainty. For the permittee, the uncertainty alone may be fatal, even if an ultimate decision would have been a finding of no violation. For the complainant, needed relief may be delayed in serious cases while EPA is tied up with meritless cases. Therefore, EPA needs a procedure for promptly disposing of meritless complaints that are accepted for initial investigation because they meet minimum jurisdictional requirements. This procedure need not place a burden on complainant. Instead, EPA could establish something like a summary judgment procedure whereby the burden is placed on the recipient who could obtain early dismissal of a complaint by making specified showings. The procedure could be designed to allow public participation, as well as the participation of complainant. AQMD would welcome the opportunity to assist EPA in developing criteria which would justify early dismissal of a complaint.

10. EPA Should Seek to Minimize Duplicative Court and Administrative Proceedings (Investigations Guidance, p. 39671)

EPA Draft Investigations Guidance, page 39671, states: "Moreover those who believe that they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA."

While a plaintiff may be able to sue without first filing a complaint with EPA, EPA should consider the effect of having two simultaneous proceedings based on similar facts and allegations. The available resources of all parties to process the complaints will be stretched thin, and will inevitably result in an inefficient use of governmental resources. EPA should take the necessary steps to assure the efficient use of agency resources, by seeking resolution of the complaint in one proceeding. These steps could include notifying the court where the Title VI complaint has been filed, that EPA has also received a similar complaint. EPA should notify the court of the steps EPA has taken and EPA's plans to resolve the complaint. Of course each case must be evaluated separately, but the flexibility afforded in an administrative proceeding may be

[9] AQMD is vigorously using the authority it does have, by adopting an unprecedented series of fleet vehicle rules to reduce toxic air pollution, and proposing a low-sulfur diesel rule to reduce SO2 and particulates, and to allow the use of particulate traps to further reduce toxics and particulates.

preferable to judicial determinations. For example, there are more opportunities for all parties to resort to informal resolution procedures in EPA's administrative proceeding. Therefore if the most efficient manner of resolving the complaint is through an administrative proceeding, EPA should request the court to take the necessary steps to allow that proceeding to resolve the issues.

C. Areas in Which AQMD Seeks Clarification

1. What is Meant by the Reference to "Cumulative" Impact in the Discussion of Benchmark Levels? (Investigations Guidance, p. 39680)

EPA's Investigations Guidance states that in determining significance of an impact, it will "evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy." (p. 39680) In giving examples, EPA states that "cumulative risks of less than 1 in 1 million (10^{-6}) . . . would be very unlikely to support a finding of adverse impact . . .", while EPA would be "more likely to issue an adversity finding . . . where the cumulative risk in the affected area was above 1 in 10,000 (10^{-4})." (p. 39680) It is unclear what is meant by "cumulative" in this context. If "cumulative risks" refers to <u>all</u> contributors to air toxics exposure, including mobile sources, area sources, and new and existing permitted sources, then EPA would be likely to issue an adversity finding in virtually every case in an urban area. In a recent comprehensive air toxics exposure study performed for the South Coast Air Basin, monitored levels of toxics at all 10 fixed monitoring sites exceeded 300 in a million (3×10^{-4}) (excluding diesel, which has been declared a toxic air contaminant in California). (Multiple Air Toxics Exposure Study [MATES II], SCAQMD, March 2000, p. 3-12.) Based on modeled estimated risk, virtually the entire basin exceeded 100 in a million, without diesel. (MATES II, p. 5-10)

The AQMD believes that other urban areas would likely show similar, if not higher, results. AQMD is unaware of any EPA regulation or policy setting levels this low as thresholds for overall exposure, including background emissions. Indeed, EPA's draft Residual Risk Report to Congress, pursuant to section 112 of the Clean Air Act, identifies risk levels of 10^{-4} action levels for individual facilities, not overall background exposures. (EPA-453/R-99-001, March 1999) These levels might be more appropriate possible benchmarks for "cumulative" risk if the term refers to overlapping exposure from two or three challenged facilities, not overall exposure levels, including background levels.

2. How Should a Recipient Determine Who Speaks for "The Community" in Establishing Areawide Agreements? (Investigations Guidance, p. 39675)

EPA suggests that permitting agencies that receive federal finding consider entering into "agreements with affected residents and stakeholders" to eliminate or reduce adverse impacts. The agreement is to be developed through collaboration with "communities and other affected stakeholders." (p. 39675) However, EPA's guidance does not explain how the permitting agency or EPA is to determine who represents "the community" or "affected residents," and whose agreement will be needed to constitute an areawide agreement which may be entitled to "due weight." Further clarification is needed on this issue.

3. What is the Effect of Impacts Outside the Recipient's Jurisdiction on a Recipient's Obligations? (Investigations Guidance, p. 39677)

EPA states that it will need to assess background levels of stressors which allegedly contribute to discriminatory effects, but that in determining whether a recipient permitting agency is in violation, EPA will account for those impacts "cognizable under the recipient's authority." (p. 39678) AQMD supports the concept that a permitting agency should only be held responsible for impacts within its authority. It is not clear exactly how other stressors outside the permitting agency's authority will be used to assess whether there are discriminatory impacts. For example, suppose there is an area which has a largely minority population and is located in a harbor area. In such case, a large percentage of emissions are likely from federally regulated sources such as ships, trains, or airplanes. Does EPA's approach mean that a permitting program which would be lawful in an area not affected by these federal sources might be unlawful in an area that does experience such effects?

4. What is Meant by Impacts Regarding Which the Recipient Permitting Agency Has "Some Obligation or Authority?" (Investigations Guidance, p. 39678)

EPA states that it will analyze those impacts regarding which a recipient permitting agency has "some obligation or authority." Thus, if an environmental statute requires an air pollution agency to consider "noise impacts," such impacts would be part of the disparate impact analysis. (p. 39678) It is unclear how such impacts would affect a recipient's obligations under Title VI. For example, in California the California Environmental Quality Act (CEQA) requires all lead agencies in conducting a CEQA analysis to "consider" all significant environmental impacts. But it does not provide new powers authorizing limited purpose agencies to mitigate such impacts. According to CEQA Guidelines section 15040(b): "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." Therefore, in determining liability under Title VI, EPA should only consider impacts the permitting agency has authority to regulate, not those it has authority to analyze or "consider."

5. How Will EPA Select a "Reference Area" For Analysis? (Investigations Guidance, p. 39681)

EPA's guidance states that in order to assess disparity it is necessary to compare the affected population to an appropriate comparison population. The comparison population will be drawn from those who live in a "reference area" which may be the recipient's jurisdiction, a political jurisdiction, or other area. (p. 39681) More guidance is needed as to how EPA will select the appropriate reference area. Also, AQMD believes it may be appropriate, in looking for a "reference area" to seek out areas that are zoned similarly to the affected area by the local government having land use authority over the area. Clean Air Act, section 131, provides that "Nothing in this Act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use." Accordingly, EPA's statement in the summary of comments, page 39691, that "The recipient's operation of its permitting program is independent of the local government zoning activities," is an oversimplification. Local land use patterns are controlled by local government not environmental permitting agencies. Environmental agencies have no authority to allow or require facilities to be located in areas not zoned for such uses. Therefore, only similarly zoned

areas should be comparison areas. This is another reason the affected local government should be involved in the EPA investigation proceedings.

6. Will EPA Conduct Staff Training For Permitting Agencies? (Recipient Guidance, p. 39657)

Among the activities EPA suggests for permitting agencies that receive federal funding is to train staff regarding Title VI issues, including technical issues, communication skills, and dispute resolution methods. (p. 39657-8) AQMD supports such training opportunities. However, EPA is in an excellent position to conduct training on these issues and assist permitting agencies in developing training programs. AQMD urges EPA to assist in training staff in Title VI issues. In addition, EPA should offer outreach and training to local government planning officials to assist them in understanding possible Title VI impacts of local government decisions.