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August 28, 2000

Honorable Carol Browner, Administrator
U.S. Environmental Protection Agency
401 M Street
Washington, DC 20460

Anne Goode, Director
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigations Guidance")

Dear Administrator Browner and Ms. Goode,

We send the enclosed comments on the Title VI Draft Revised Investigations Guidance as a hard copy to follow up on our facsimile and email transmissions of the same document on August 28, 2000.

Thank you for your consideration of these comments. Please address any questions about them to Lawrence Levine at 202-662-9549.

Sincerely,

Lawrence M. Levine
Graduate Fellow/Staff Attorney, IPR

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Re: Comments on the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Revised Investigations Guidance")

Dear Administrator Browner and Ms. Goode,

The Institute for Public Representation (IPR), the Widener University Environmental and Natural Resources Law Clinic, and the Mid-Atlantic Environmental Law Center, each on its own behalf, and on behalf of the Delaware Chapter of the Sierra Club and the Wilmington Waterfront Watch, submit the following comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Guidance"), noticed for public comment on June 27, 2000 (65 F.R. 39649) by the Environmental Protection Agency (EPA).

IPR is a nonprofit, public interest law firm located at Georgetown University Law Center. IPR has been working on issues of broad public concern for over twenty years. Since 1991, IPR has represented individuals and groups concerned about environmental threats to public health, safety and natural resources, often dealing with issues of

"environmental justice." On June 16, 1998, IPR filed a Title VI administrative complaint with EPA on behalf of the Mattaponi Indian Tribe of Virginia.[1]

The Widener Environmental and Natural Resources Law Clinic has provided legal services to local, state and national not-for-profit environmental organizations since 1989. Since 1994, the Clinic and its students have focused on ascertaining and monitoring disparate impacts of enforcement and implementation of environmental laws in Delaware.

The Mid-Atlantic Environmental Law Center is a regional not-for-profit public interest law firm with offices located on the campus of Widener University School of Law in Wilmington, DE. The Center's Environmental Justice Initiative provides legal representation to individuals, and grassroots and national organizations in environmental justice matters throughout the mid-Atlantic region.

The Sierra Club is a not-for-profit corporation that works on behalf of the public interest. The Delaware Chapter of the Sierra Club is dedicated to the equal enforcement and implementation of environmental laws for all citizens in Delaware. The Club has 1,550 members in the State. The Chapter presently serves on the State's only Environmental Justice committee, styled the "Community Involvement Advisory Committee," and its members have published several scholarly articles on environmental racism.

Wilmington Waterfront Watch provides information to the people of Wilmington, DE, and aims to strengthen ties within the City's economically disadvantaged and minority communities. The group focuses on a variety of associated issues affecting urban residents, including water quality, combined sewer overflows, and leaking underground storage tanks.

While there are some encouraging signs in the Guidance, such as the strong verbal formulation of the justification standard, many provisions of the Guidance fall well short of the mark. First, the Guidance often misconstrues EPA's own Title VI regulations and ignores established Title VI precedent, resulting in policies unduly favoring recipients of federal funding ("recipients"). Second, the Guidance fails to uphold core legal values of due process and procedural fairness. Third, the Guidance fails to take prudent measures to ensure the enforceability of consensual compliance agreements. Fourth, the Guidance erects arbitrary barriers to the acceptance of complaints. Fifth, the Guidance is, in several places, so vague as to be of little use to either recipients or prospective complainants.

This letter discusses all of these shortcomings (as well as several bright spots in the Guidance) in detail in the section-by-section comments below and makes numeous recommendations for improving the Guidance. Please note that the following citations to the Guidance refer first to the internal section number of the Guidance, followed by the page number in the Federal Register, Volume 65, in parentheses.

[1] EPA File No. 8R-98-R3.

Scope of Guidance: *§ I.C. (39668-69)*

The Guidance sketches out a typology of three types of allegations that might be made in a complaint: (1) allegations focused narrowly on the impacts from a single permitted activity or facility; (2) allegations focused on groups of similar facilities or the combined impacts of facilities and other sources in a particular area; and (3) allegations of a discriminatory pattern of decision-making for certain types of facilities. In all cases, it appears that the Guidance treats the granting (or renewal or modification)[2] of the challenged permit (or its terms and conditions) as the "criteri[on] or method[] of administration"[3] that is alleged to cause a disparate impact.

The Guidance should also reflect the possibility that complainants may allege that a recipient's permitting ***regulations*** and/or governing state and local ***statutes and ordinances***[4] are the "criteria or methods of administration" that cause unjustified disparate impacts, *e.g.*, the granting of the challenged permit.[5] In particular, a permit challenge focused on the permitting regulations could be made in at least three different ways: (1) a facial challenge to the regulations, arising from a single permit that causes or contributes to a disparate impact; (2) an as applied challenge to the regulations, arising from a single permit that causes or contributes to a disparate impact; or (3) an as-applied challenge to the regulations arising from a pattern of granting permits, each of which causes or contributes to a disparate impact. The exact focus of the inquiry at the justification and less discriminatory alternative stages may differ slightly depending on the nature of the claim.

In the first scenario, the complainant would allege that the regulations (i.e., the *criteria* of administration) are written in such a way that their application *inevitably* resulted in[6] or will result in[7] the approval of the challenged permit. In such a "facial

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[2] Hereinafter, the words "grant" or "approval" (of a permit) will be used to refer not only to granting a new permit, but also to renewal or modification of a pre-existing permit.

[3] 40 C.F.R. § 7.35(b) (West 2000).

[4] Hereinafter, in this section, "regulations" will be used to refer to all state and local regulations, statutes, and ordinances governing the recipient's permitting process.

[5] We applaud EPA for also recognizing that "it is possible to have a violation of Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the permitting process (*e.g.*, public hearings, translation of documents) . . . ." Guidance at § II, introductory para. (39670). Although this section of our comments is written in terms of disparate impacts in the substantive outcome of the permitting process, the same concept of filing a complaint focused on a recipients' regulations applies equally to claims of disparate impact in the permitting *procedure*. In such cases, the complainant would allege that the recipient's procedural regulations are the root cause of a procedural disparate impact. The complaint would be analyzed as discussed in the text, *mutates mutandis.*

[6] *Cf. El Cortez Height Residents and Property Owners Ass' v. Tuscon Housing Authority*, 457 P.2d 294, 296 (1969) (holding that use of site selection criteria that had effect of discriminatory siting of public housing facility constituted Title VI violation).

challenge," the recipient would have to justify *the regulations themselves* under the appropriate legal standard (see discussion of justification, below), and, if justified, the inquiry would be whether there are any comparably effective, less discriminatory alternative regulations (e.g., regulations that take into account cumulative and synergistic impacts, vulnerable subpopulations, etc.).

In the second scenario, a complainant would allege that the *application of the regulations* to this particular permit application (i.e., the *method* of administration), with all of the discretionary decisions by the agency inherent in considering the permit application, resulted in the approval of the challenged permit. In this case, the complainant might challenge specific agency findings or conditions (or lack of conditions) placed on the permit, which resulted in the approval of a permit that causes or contributes to a disparate impact. In such an "as applied challenge," the recipient would have to justify its *findings and/or failure to impose additional conditions*, and, if justified, the inquiry would be whether there are any alternative, and legally supportable, alternative findings and/or permit conditions that are comparably effective and less discriminatory in effect.

In the third scenario, the complainant would allege that the standards are written or applied in such a way that they have a *systematic tendency to result in the approval of permits for facilities (plural)* that, individually or cumulatively, cause or contribute to a disparate impact,[8] and that the standards themselves are therefore a Title VI violation. In such a scenario, as in the first scenario, the recipient would have to justify its *regulations*, under the appropriate legal standard, and, if justified, the inquiry would be whether there are any comparably effective, less discriminatory alternative regulations (e.g., regulations that take into account of cumulative and synergistic impacts, vulnerable subpopulations, etc.).[9]

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[7] For example, an administrative complaint regarding the potential siting of two hazardous waste facilities in Noxubee County, MS, made such an allegation. *See* Letter from Robert Wiygul, Sierra Club Legal Defense Fund, to U.S. Comm'n on Civil Rights (Sept. 2, 1993) (alleging that agency's siting criteria "guarantee[d]" t hat permits would be approved) (*cited in* Vicki Been, *Environmental Justice and Equity Issues*, in 4 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS at § 25D.04[2]).

[8] *See, e.g.*, Plaintiff's Complaint, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960, ¶¶ 46 (E.D. Pa., 1996) (alleging State's regulatory regime resulted in pattern of approving waste facilities disproportionately located in communities of color); EPA Title VI Complaint # 10R-97-R9 (July 1997) (alleging air emission trading regime of South Coast air Quality District in Southern Califirnia imposes disparate impact on protected groups; Richard Toshiyuki Drury, *et al.*, *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 Duke Envtl. L. & Pol'y F. 231 (1999) (discussing in detail the distributional effects of Los Angeles' air emissions trading regime underlying aforementioned complaint). *Cf. Scesla v. City Univ. of New York*, 806 F.Supp. 1126, 1141 (1992) (holding that overall "employment regime," which over nearly two decades has failed to hire Italian-Americans proportionately, is proper object of a Title VI disparate impact challenge).

[9] The cognizability of all three types of allegations is linked to the fact, elaborated below, that the proper scope of impacts cognizable under Title VI includes those *not* currently "within the recipient's authority to consider." Thus, a recipient can, and should, be found in violation of Title VI if its regulations bar it from considering types or combinations of impacts that may result in an adverse disparate impact. Moreover,

When a complainant's allegations focus on the permitting regulations as the cause of discriminatory permit approvals, EPA should accept a complaint for Title VI compliance review even before a pending permit is actually granted if the complainant alleges that the faulty regulations will inevitably lead to the permit approval. Such might be the case, for example, if it is undisputed that a permit application meets all of the applicable regulatory criteria (or at least undisputed that the recipient agency will make such a finding), but that such regulations fail to account for, *inter alia*, cumulative impacts, and will therefore result in a Title VI violation when the permit is inevitably granted. In such a case, the regulations, not the as-yet-unapproved permit, are the object of the challenge, so there would be no ripeness issue to preclude EPA review.

This proposal for review of recipient agencies' regulations would not expand EPA's Title VI review into a boundless inquiry. Indeed, review of state and local regulations for compliance with the requirements of federal (environmental) law is a common practice for EPA; the Agency reviews the regulations of states with delegated authority to enforce federal statutes such as the Clean Air Act and Clean Water Act for conformity with those statutes. Similarly, in the case of Title VI, EPA has both the institutional expertise and the obligation to review recipients' permitting regulations for conformity with the federal statutory requirements of Title VI. Review of recipients' actions at the policy level of permitting-regulations may, in fact, be a more efficient way for EPA to achieve programmatic change in recipients' practices to ensure compliance with Title VI, both with regards to the challenged permit and into the future.

Preliminary Finding of Noncompliance / Defining Scope of Investigation / Determining Nature of Stressors and Impacts Considered : *§ II.A.4. (39671);* § *VI.A. step(2) (39676); § VI.B.2.a. (39678)*

The Guidance takes a far too narrow view of the scope of cognizable impacts due to its mistaken insistence that the scope of Title VI is limited by the pre-existing jurisdiction of recipient permitting-agencies (*i.e.*, EPA will only consider "stressors and impacts . . . within the recipient's authority to consider, as defined by applicable laws and regulations."). EPA's position on this matter is directly at odds with its position elsewhere in the Guidance that "[a] recipient's Title VI obligation exists ***in addition to*** the Federal or state environmental laws governing its environmental permitting program." § VI.B.4.a. (39680) (emphasis added). We applaud EPA for recognizing, in the preceding passage at least, that recipients' Title VI obligations are independent of – and are not limited by -- their authority under Federal or state environmental laws. The Guidance, however, fails to abide by this core principle in the areas where it is most crucial.

The Guidance view that only stressors and impacts within the pre-existing jurisdiction of the recipient are cognizable under Title VI is incorrect as a matter of Title

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this is the case even if state statutes currently prevent the recipient agency from broadening the scope of its regulations to encompass such impacts.

VI case law and under EPA's Title VI regulations. That Title VI may force a state or local agency, as a pre-condition of receiving federal funds, to act beyond its pre-existing authority should not be controversial. For example, in the context of school desegregation, the primary context to which Title VI was intended to apply,[10] a local school district receiving federal funds could not have claimed an exemption from Title VI compliance on the basis that state law mandated segregated public schools. If state law required segregation, then the local school district would have been ineligible for funds until such time as it acquired the authority to desegregate schools and exercised that authority.[11]

Thus, as a legal matter, Title VI may force a state or local agency, as a condition of receipt of federal funds, to take action on a permit that would be otherwise beyond the agency's authority as established by state law. State environmental agencies often claim that disparate impacts arising from the location of a facility are beyond their authority to address, since the siting decision is made by the facility owner and local land use officials, and/or because state law does not allow the agency to consider disparate impacts. But these recipient state agencies can no more wash their hands of Title VI obligations by claiming "the zoning board made me do it" or "the state Legislature made me do it" than local school districts were able to wash their hands of Title VI obligations by claiming "the state Legislature made me do it."

Accepting or Rejecting Complaints: Timeliness: *§ III.B. (39672-73)*

Without restating the arguments made by numerous other commenters, IPR concurs in the extensive comments on this section submitted by the Center on Race, Poverty and the Environment, along with a coalition of scores of other community groups, environmental justice organizations, and individuals from across the country and incorporates those comments by reference. In short, the process should be as simple, transparent, and predictable as possible for prospective complainants. Unnecessary hurdles and burdens should not be placed upon complainants. For example, rather than dismissing a jurisdictionally proper complaint if there are other pending administrative or judicial appeals -- as EPA did in the case of our client, the Mattaponi Indian Tribe[12] --

[10] *See* Stephen C. Halpern, ON THE LIMITS OF THE LAW 5 (1995).

[11] *Cf. Bd. of Ed. of the City of New York v. Califano*, 584 F.2d 576 (2d Cir 1978), *aff'd by Bd. of Ed. of the City of New York v. Harris*, 444 U.S. 130 (1979). In this case, the school board sued to enjoin a finding by the Dept. of Health, Education and Welfare (HEW) that it had violated disparate impact regulations that made it ineligible for funding under the Emergency School Act. One of the justifications for racially disparate teacher assignments proffered by the school board was that the disparate assignments "resulted from the state education law." *Id.* at 587. The Court apparently held that this justification was one of several that were not "supported by adduced facts appearing on the record" and did not pass on the legal sufficiency of this justification. *Id.* at 589. (The district court opinion is unpublished, so the ruling below regarding this particular justification is unavailable.)

[12] Letter from Anne E. Goode, Director, USEPA Office of Civil Rights to Hope M. Babcock, Attorney, Institute for Public Representation (July 18, 1999) (EPA File No. 8R-98-R3).

and then requiring a complainant to re-file after the conclusion of the pending appeals and hope for EPA's indulgence in waiving the 180-day time limit, EPA should simply stay any enforcement action pending the resolution of the other appeals and then resume its enforcement process should those appeals fail to conclusively resolve the issue.

Furthermore, EPA should replace the rule that "OCR [EPA's Office of Civil Rights] generally considers a complaint to be 'filed' on the date that it arrives at EPA" with a "mailbox rule," *i.e.*, that complaints should be deemed filed on the date on which they are mailed by the complainant. Such a rule would provide certainty for complainants that they have satisfied the statute of limitations without having to worry about when postal or other delivery actually occurs or is accepted.

Implementing Informal Resolutions: *§ IV.B. (39674)*

The Guidance states that a satisfactory informal resolution would "eliminate or reduce [adverse disparate impacts] *to the extent required by Title VI"* (emphasis added), but fails to elaborate on the meaning of this standard. The Guidance should make explicit that any informal resolution must, at a minimum, reduce any disparate impacts to the level at which they are no longer "significant" enough to be considered "adverse" or "disparate" under Title VI, i.e., to the extent that, after implementation of the informal agreement, the complainant's allegations would no longer constitute a violation of Title VI. This same requirement should also be made explicit in § VII.A.3, with regard to standards for voluntary compliance after EPA has made a finding of non-compliance.

The Guidance should make clear that a legally sufficient informal resolution (or voluntary compliance) must include adequate enforcement provisions, including, but not limited to, a schedule of compliance and automatic penalties for noncompliance. A settlement agreement is only as good as its enforcement provisions. The Guidance should require that informal resolutions between EPA and the recipient or between the recipient and the complainant, as well as voluntary compliance agreements, grant authority to EPA to enforce their provisions. Absent EPA enforcement authority, EPA has no adequate assurance that the violation will, in fact, be remedied. Thus, EPA should not close any investigation on the basis of an informal resolution or voluntary compliance agreement that lacks an EPA-enforcement mechanism.

Due Weight: Analyses or Studies *§ V.B.1. (39674-75)*

This section is too vague to be of any use to prospective complainants, recipients, or OCR investigators. How much weight does EPA intend to give to recipients' analyses or studies? *Chevron*-like deference would be clearly insufficient to ensure Title VI compliance.[13] The recipient agencies are comparable to a regulated entity and should not be trusted to guard the proverbial "hen-house." The Guidance should state clearly that EPA will engage in a searching review of any analysis or studies submitted by recipients,

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[13] *See Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

and grant no "due weight" when these analyses or studies are not commensurate with EPA's own analytic work. In the case in which the state agency analysis is based on industry-supplied data and analyses, it should be discounted heavily, or given no weight at all. The Guidance should also provide that complainants will be given free and open access to any analyses or studies submitted by the recipient, and the opportunity to critique such submissions and offer counter-analyses.

Due Weight: Area Specific Agreements: *§ V.B.2. (39675-76)*

The Guidance gives claim-preclusive effect to "area-specific agreements" reached between community stakeholders and recipients, such that future complaints by *any party* addressing the same issues covered by the agreement may be dismissed. If EPA intends to apply this form of claim preclusion, there must be some independent investigation by EPA to ensure that the parties that entered into the agreement were similarly situated to and fairly and adequately representative of the affected community; and such parties had competent legal representation (and access to scientific experts) to enter into an agreement with adequate knowledge of their rights and remedies and of the salient scientific data and facts. (*Cf.* Federal Rules of Civil Procedure R. 23(a)(4) requiring fair and adequate representation of the class by the class representative and competent representation by the class representative's counsel.) Furthermore, If EPA proposes to make a finding that the parties are fairly and adequately representative and competently represented, and that an area-specific agreement will therefore be deemed to satisfy the requirements of Title VI, EPA should first provide notice and an opportunity for comment by all interested persons to challenge the proposed finding. (*Cf.* F.R.C.P. R. 23(e), providing for opportunity for interested parties to be heard pending court approval of proposed class action settlement.)

The above proposals are a matter of basic due process and procedural fairness, principles that are both inherently valued by our legal system and necessary to maintain the legitimacy of the process. Applying procedural due process requirements in this context is also especially appropriate, since the Guidance treats the complaint process in some respects as quasi-litigative, by imposing standing requirements (i.e., complainant himself or herself must suffer an injury-in-fact), limited pleading requirements, and filing deadlines. If the universe of possible complainants is limited to those who are actual members of the affected community and therefore suffer an injury-in-fact, the Guidance should also ensure that the rights of such complainants to submit a complaint are not compromised by the agreements of third parties that do not satisfy basic due process.

If the parties to the area-wide agreement were not adequately representative (or adequately represented) – especially as indicated by the presence of other community organizations opposing the area-wide agreement, whether or not such groups have filed a Title VI complaint – then EPA should not use the area-wide agreement as grounds to dismiss any pending or future complaint on the same or related issues. Similarly, if a complainant is not adequately representative (or adequately represented), an informal resolution between the complainant and the recipient should not be given any preclusive effect as to future Title VI complaints. Moreover, EPA should not dismiss the pending

complaint, but rather should continue its investigation, despite complainant's attempt to withdraw the complaint. (*Cf.* F.R.C.P. R. 23(e), requiring court approval of settlements in class actions to ensure that the interests of absent class members are adequately protected.)

Additionally, in reviewing an area-wide agreement on its merits, EPA should consider the adequacy of the enforcement mechanisms provided for by the agreement. Absent adequate guarantees of implementation of the agreement, it should be given no "due weight." In fact, the Guidance might recommend that proponents of area-wide agreements seeking "due weight" include enforcement provisions allowing for enforcement by EPA directly. As an incentive, the Guidance might provide that, in the "due weight" analysis, provisions for enforcement by EPA will create a presumption of adequate enforceability.

Adverse Disparate Impact Analysis: Assess Applicability: Determine Type of Permit: *§ VI.B.1.a. ¶ 4 (39667)*

Again, without restating the arguments made by numerous other commenters, IPR wholeheartedly concurs in the extensive comments on this section submitted by the Center on Race, Poverty and the Environment, *et al.*, and incorporates them by reference. EPA's proposal to dismiss complaints when a challenged permit "significantly decreases overall emissions at a facility" is inherently flawed and should be deleted for the following reasons.

By aggregating pollutants into "overall emissions," the Guidance ignores the fact that there can be an increase in emissions of a particular pollutant despite a decrease in overall emissions.[14] Thus, a significant decrease in overall emissions is no guarantee of a decrease in adverse impacts upon environmental justice communities.

More fundamentally, the touchstone of a Title VI violation is *disparity*, not simply impact. Even if emissions of all pollutants are reduced, they might not be reduced to the same extent they are reduced in other, non-minority communities whose permits become due for renewal or modification. As the line of Title VI cases dealing with unequal provision of municipal services demonstrates, failure to improve the status quo at an equal rate in neighborhoods of color can be a cognizable injury under Title VI, just as can the imposition of new burdens that worsen the status quo.[15] The Guidance should recognize that failure of recipients to reduce emission in communities of color by an amount equal to that of other communities may constitute a Title VI violation, even if the challenged permit results in a net decrease in emissions.

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[14] *Cf.* 40 C.F.R. § 1508.27 (West 2000) ("A significant effect may exist even if the [ ] Agency believes that on balance the effect will be beneficial.") (National Environmental Policy Act (NEPA) regulations promulgated by Council on Environmental Quality).

[15] *See, e.g,, Johnson v. City of Arcadia, Fla.*, 450 F.Supp. 1363, (M.D.Fla. 1978). *See also, Hawkins v. Town of Shaw*, 303 F.Supp. 1162 (N.D.Miss. 1969), *rev'd*, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) (14th Amendment claim).

Finally, in cases where a disputed facility is solely responsible for the alleged disparate impact, the EPA's "net decrease" approach is especially inappropriate. Where a single "unique" facility – perhaps the only one of its kind in a jurisdiction – imposes disparate impacts on environmental justice communities, a permit renewal or modification that results in a net decrease in emissions should be a proper subject of a Title VI complaint. Even if emission are reduced, unless they are reduced to the point at that no adverse impact is imposed on the affected community, a disparate impact in violation of Title VI will remain. Especially given EPA's failure to enforce Title VI in the past thirty-six years, "unique" facilities should not, by implication, be grandfathered-in and immunized from future Title VI enforcement, if otherwise warranted, simply because all future permit renewals and modifications may result in a net decrease in emissions. Thus, the "net decrease" rule proposed by the Guidance – though, perhaps, superficially appealing – is entirely inappropriate and should be deleted.

Adverse Disparate Impact Analysis: Define Scope of Investigation: Determine Universe of Sources: *§ VI.B.2.b. (39678)*

Following the model of regulations and case law developed under the National Environmental Policy Act (NEPA),[16] the Guidance should make clear that "cumulative" impacts to be considered include "reasonably foreseeable" future impacts,[17] such as those from soon-to-be permitted facilities that are not yet in operation.

Also following the NEPA model, whenever the Guidance refers to cumulative impacts, "indirect impacts" (e.g., impacts from related developments foreseeably spawned by the newly permitted facility) should also be included.[18]

Furthermore, in this section especially, and wherever the Guidance refers to cumulative effects, synergistic effects (i.e., multiple pollutants combining to have a different or heightened health impact) should also be included. Although scientific knowledge about such effects remains limited, the appropriate response is not, therefore, to ignore such effects. Rather, EPA should pledge to apply the available science, where relevant, and to take steps to expand the knowledge base regarding synergistic impacts so that such impacts can be more fully considered in the future. Moreover, the Guidance should apply the "precautionary principle," and treat suspected synergistic impacts as cognizable impacts, even if they have not been conclusively scientifically established. Although the exact nature of many synergistic impacts is unknown, the basic phenomenon is well-enough established, and the risk sufficiently great, that EPA should err on the side of caution and provided protection against suspected as well as established synergistic impacts.

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[16] 42 U.S.C. § 4321, *et. seq.* (West 2000).

[17] *See* 40 C.F.R. § 1508.7 (West 2000).

[18] *See* 40 C.F.R. § 1508.8 (West 2000).

Adverse Disparate Impact Analysis: Impact Assessment: *§ VI.B.3. (39670)*

This section of the Guidance could be read to suggest that where the "ideal" form of evidence about impacts is not available, a finding of disparate adverse impacts may be less likely. The Guidance should make explicit that the unavailability of perfect data on "direct links to impacts" will not in any way prejudice a Title VI complaint. It should clearly state that the best *available* form of evidence is adequate, and will be given no less weight by EPA than any other more "ideal" type evidence would have received.

The Guidance hints at our suggested approach (§ VI. B.5., (39681)) where it states that "simpler approaches based primarily on proximity may also be used where more detailed (e.g., modeled) estimated cannot be developed. . . ." EPA should expand this language to make clear that a proximity analysis is *always* appropriate where other forms of analysis are unavailable due to lack of data, methodological difficulties, or other reasons.

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Adverse Disparate Impact Analysis: Adverse Impact Decision: Examples of Adverse Impact Benchmarks: *§ VI.B.4.a. (39680)*

The Guidance properly recognizes that "[c]ompliance with environmental laws does not constitute per se compliance with Title VI. . . . A recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program." We commend EPA for taking this position and, because of its importance, suggest that it should be emphasized in the Introduction to the Guidance.

The examples given by the Guidance of situations where pre-existing environmental standards may be insufficient are good ones. However, this list should be expanded to include, for example, not only cumulative impacts, but also synergistic as well as indirect impacts.

Furthermore, the Guidance should state that, as a rule, no consideration at all will be given to compliance with "technology-based standards" (such as the BAT standard under NPDES), as opposed to "health- or environmental quality-based standards" (such as National Ambient Air Quality Standards (NAAQS) or Water Quality Standards (WQS)). Even in the case of health-based standards, such as NAAQS, these standards do not typically account for "hot spots," cumulative or synergistic impacts, or sensitive subpopulations. Thus, compliance with such health-based standards should not be deemed sufficient as a defense to a Title VI complaint. The "rebuttable presumption" formulation used in the Guidance suggests a degree of deference to the recipient when NAAQS are satisfied, which is unacceptable given the inability of NAAQS compliance determinations to account for adverse disparate impacts in environmental justice communities.[19]

[19] Moreover, many federal environmental statutes have some sort of "omnibus clause" requiring protection of human health and the environment, above and beyond any specifically promulgated standards.[19] Thus,

Adverse Disparate Impact Analysis: Characterizing Populations and Conducting Comparisons: *§ VI.B.5 (39681)*

The section on determining the "disparity" of the impact is confusing, and perhaps confused. This section, along with the prior section on determining the existence of "adverse" impacts (see comments on adverse impact benchmarks, above), deals with the most important – and one of the most methodologically difficult and controversial – element required to make a finding of "disparate impact." Yet, the Guidance does little to clarify the meaning of "disparity." The Guidance takes no position as to whether the appropriate comparison is between the "affected population" and the "general population" (i.e., including the "affected population"); or the "affected population" and the "non-affected population" (i.e., the "general population" excluding the "affected population"). This is an important methodological choice that could determine the outcome of a complaint investigation by altering the statistical degree of significance of the disparity. Second, the Guidance is also silent as to whether disparity should be assessed by comparisons of the different prevalence of race, color, or national origin of the two populations; the level of risk of adverse impacts experienced by each population; or both. Again, this is a highly important, and potentially outcome-determinative methodological choices since each of these comparisons may yield different degrees of statistical significance of the dispratity. Third, the Guidance expresses no preference as to which of five potential "comparisons of demographic characteristics" will be conducted. What happens, for example, when some of these measures show a disparity while others do not?

The Guidance allows EPA to choose the "appropriate comparisons . . . depending on the facts and circumstances of the complaint." This is insufficient. While case-specific methodological decisions may be necessary to some extent, this degree of vagueness in the Guidance amounts to a dodge by EPA of some of the most critical methodological issues in this entire field of law. EPA should invite all stakeholders to engage in further discussion, with the aid of experts in statistical methodology, to clarify these issues.

Adverse Disparate Impact Analysis: Adverse Disparate Impact Decision: *§ VI.B.6. (39682)*

The Guidance states that in determining whether there is an adverse disparate impact in a given case, EPA will consider whether the adverse impact is "a little or a lot above a threshold of significance." This approach should be abandoned. If an impact is

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compliance with pre-existing health-based standards (such as NAAQS) does not necessarily even constitute compliance with federal environmental law mandates, and should, therefore, be given only minimal weight, if any weight at all, in the analysis of a Title VI claim. *See* Richard J. Lazarus and Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999).

above a threshold of significance, it constitutes an adverse disparate impact, regardless of the degree by which it exceeds the threshold. That is the meaning of a *threshold* of significance.

Determining Whether a Finding of Noncompliance is Warranted: *§ VII (39683)*

The Guidance states that if the recipient does not voluntarily comply after the receipt of a formal determination of noncompliance, EPA *must* start proceedings to deny, annul, suspend, or terminate EPA assistance. This is very positive and strong language and should be retained. The certain threat of funding termination proceedings is the hammer necessary to get state and local agencies to comply with Title VI, hopefully in a pro-active manner.

However, the Guidance also vaguely states that OCR, after starting such funding termination proceedings, "may postpone" them. This language should be deleted. By this point in the process, OCR review will have been ongoing for many months, providing the recipient with more than sufficient notice to develop methods to achieve compliance in the event of a finding of noncompliance. Further delay at this point only invites indefinite postponement, which threatens the efficacy of the entire enforcement scheme.

Justification: *§ VII.A.1. (39683)*

The issue of "justification" receives almost no attention in the Guidance, despite the length of the overall document. What little there is on the topic deserves some praise, but also much criticism. EPA is to be commended for choosing the strongest – and the most doctrinally supported – standard of justification from among many enunciations of the justification test in Title VI case law and Title VII statutory and case law. The Guidance adopts the very well-reasoned and strong standard of *Elston v. Talladega County Bd. of Education,*[20] which requires that the recipient's challenged practice be "necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." Inexplicably, however, the Draft Guidance also cites *NAACP v. Med. Ctr.*[21] in support of the same standard. The *Med. Ctr.* case, however, adopted a much weaker standard of justification that has been largely superseded by the Civil Rights Act of 1991 and should not under any circumstances be adopted by EPA. This citation should be removed to avoid any confusion.

While EPA's choice of the *Elston* standard is to be commended, the Guidance's *application* of the *Elston* standard is more problematic. After stating that the justificatory purpose must be "integral to the recipient's institutional mission," the Guidance nonetheless states that EPA "would likely consider broader interests [than the 'provision of public health or environmental benefits'], such as economic development . . . if the

[20] 997 F.2d 1394, 1412-13 (11th Cir, 1993).

[21] 657 F.2d 1322 (3d Cir. 1981).

benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." The Guidance seems to be written as though the justification is made with respect to the *permittee's* institutional mission, which would, naturally, include economic justifications. Clearly, however, it is not the permittee, but rather the recipient permitting agency that is charged with justifying the challenged action, *vis-à-vis* the recipient's institutional mission. Thus, in the vast majority of environmental permitting challenges, *economic development* (and other government interests not related to protection of human health and the environment) cannot, by definition, be "integral to the recipient's mission." The institutional missions of recipient environmental permitting agencies – as those recipients have repeatedly sought to remind EPA in the context of the "authority/jurisdiction" issue – does *not* integrally include economic development, or any other similar justificatory purpose (such as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc.).[22] Such "justifications" should generally be disallowed because they are inconsistent with the *Elston* standard.

Additionally, the Guidance, at times, suggests that the recipient faces a burden of production regarding the issue of justification once a preliminary finding of noncompliance has been made by OCR.[23] Other passages, however, suggest that EPA will inquire on its own into justifications, even prior to a preliminary finding of non-compliance.[24] The Guidance should be consistent in placing a burden of production on the recipient regarding the issue of justification, and this burden should attach after a preliminary finding of noncompliance. As in a private right of action, a finding of disparate adverse impact should create a presumption of a Title VI violation. This presumption should come in the form of a preliminary finding of noncompliance. The presumption can be rebutted – and a formal finding of noncompliance forestalled -- by the existence of a legally sufficient justification. If the recipient cannot produce evidence of a plausible justification worthy of EPA's further investigation, then there is no reason for EPA to seek out and consider justifications on the recipient's behalf.[25]

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[22] For cases not within the vast majority, such as permits for public works facilities, and permits for siting of – as opposed to emissions from – privately-owned facilities, it may well be that the permitting agency's core institutional mission is multifold. Even in such cases, however, economic justifications should be given a weight commensurate only with the degree of importance of economic goals in the permitting agency's governing regulations, statutes, and/or ordinances.

[23] *See* § VII.A., introductory paragraph.

[24] *See* § II.A.3., importing the justification analysis into the initial investigation stage. ("If, based on its investigation, OCR concludes that there is no discriminatory effect (i.e., no *unjustified* adverse disparate impact), the complaint will be dismissed.) (Emphasis added.)

[25] Similarly, in the Title VI and Title VII statutory and case law, once a prima facie case of disparate impact has been established, both the burdens of production and persuasion shift to the defendant on the issue of justification. *See, e.g., New York Urban League Inc. v. State of New York,* 71 F.3d 1031 (2d Cir., 1995) (Title VI); *Elston v. Talladega,* 997 F.2d 1394 (11th Cir, 1993) (Title VI); *Georgia State Conf. of Branches of NAACP v. State of Georgia,* 775 F.2d 1403 (11th Cir. 1985) (Title VI); 42 U.S.C. § 2000e2(k)(1)(A)(i) (Civil Rights Act of 1991 (Title VII)); *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1117, n. 5 (11th Cir. 1993) (Title VII). While we recognize that OCR investigations are not adversarial in the same sense as a

The section on justification should include illustrative examples -- such as those discussed under § I.C. -- addressing complaints focused on recipients' *regulations*.

Less Discriminatory Alternatives: *§ VII.A.2. (39683)*

The discussion of "less discriminatory alternatives" (LDAs) is even more cursory than that of "justification." EPA should be commended for using the *Elston* standard of "comparably effective" alternatives as opposed to "equally effective" alternatives that has been used in some of the older case law,[26] as this standard allows for consideration of a broader range of potential LDAs. The Guidance's consideration of cost in assessing the practicability of alternatives suggests, however, that such factors as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, and availability of pre-existing infrastructure, may come into play here despite their manifest irrelevance, as described above in the discussion of justification.[27] The Guidance should be explicit that costs incurred by the permit applicant will generally not be a consideration with respect to less discriminatory alternatives analyses.

The section on LDAs should include illustrative examples -- such as those discussed under § I.C. -- addressing complaints focused on recipients' *regulations*.

Glossary: Appendix A

The word "significant" or "significantly" appears several times in the Guidance but is not defined in the Glossary. The meaning of this word may be vitally important in many circumstances; it should be defined. EPA should consider looking to NEPA regulations for an operational definition of "significant."[28]

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judicial complaint, the basic principle of burden-shifting still should apply in this limited circumstance. As stated above, for EPA to imagine possible justifications that the recipient has not even advanced would be both a waste of EPA's time and undermine EPA's mission of strong enforcement of Title VI.

[26] *See, e.g., Georgia State Conf. of Branches of NAACP v. State of Georgia,* 775 F.2d 1403 (11th Cir. 1985). Note that *Ga. State Conf.*, like *Elston,* is from the 11th Circuit. Thus, the "equally effective" standard is no longer good law, even in the Circuit of its origin.

[27] Again, with the exception of those limited cases mentioned, *supra,* at note 22.

[28] *See* 40 C.F.R. § 1508.27 (West 2000).

Thank you for your consideration of these comments. Please address any questions about them to Lawrence Levine at 202-662-9549.

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