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August 26, 2000

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

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

Re: **Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs***

Dear Administrator Browner and Ms. Goode:

We file these comments on behalf of more than 125 community groups, environmental justice organizations, coalitions, networks, individuals, and an Indian nation, from 33 states and Puerto Rico. The signatories include 63 complainants in 59 of the Title VI complaints filed with EPA since December 1992, 41 of which are under consideration or have been accepted for investigation and 18 of which have been rejected on procedural or other grounds. The signatories include all six environmental justice networks, as well as 16 current or former members of EPA's National Environmental Justice Advisory Council and eight members of EPA's Title VI Implementation Committee. These comments concern both the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (which we will call the "Guidance" throughout these comments) and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (which we will call the "Recipient Guidance" throughout these comments).

Those community groups which have Title VI complaints pending before EPA, and those whose complaints have been rejected by EPA for procedural reasons, have ample experience with EPA's failure to create and enforce a meaningful Title VI policy. Their comments here should carry particular weight, as they have the most expertise in how EPA's complaint processing

procedures work, or don't work.

We are disappointed, in EPA and in the Guidance. The combined Guidance document sets the tone on its very first, prefatory page: "The guidance strikes a fair and reasonable balance between EPA's strong commitment to civil rights enforcement and the practical aspects of operating permitting programs." This balancing act has no place in anti-discrimination law. Civil rights law exists to protect minority interests against just this sort of balancing, not to be part of the balancing itself.

At every opportunity, EPA has ignored the copious, informed input of community groups and environmental justice advocates, based on years of experience working with Title VI and EPA. Many of us who have spent countless hours over many years working to help EPA have a credible civil rights policy feel disillusioned. In almost every policy decision in the Guidance, EPA has chosen to hurt the civil rights complainant, and help the civil rights violator. In many situations EPA's new Guidance is in direct conflict with its own Title VI regulations, and in other cases it simply narrows the regulations' scope in a way which limits the rights of complainants and protects civil rights violators.

Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful, we request that EPA scrap the current Guidance and begin again. We offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

Before we address the two Guidances in our general comments and specific, section-by-section observations, we offer the following stories of frustration from communities which have appealed to EPA for help in resolving situations of racial discrimination, to no avail.

STORIES OF FRUSTRATION

A number of signatories of these comments have firsthand experience with EPA's Title VI enforcement record. Their communities – and many others – have been called "EPA's civil rights orphans" – communities facing significant civil rights violations abandoned by EPA. We set forth several examples of communities' experiences with EPA's Title VI enforcement to underscore the complete failure of EPA to have *any* Title VI presence whatsoever. EPA's history both makes its feeble promises in the Guidance simply not credible, and gives a context to EPA's complete abandonment of communities in the Guidance itself.

> *Padres has firsthand experience with the EPA on Title VI issues. Padres filed a Title VI complaint with EPA in December 1994, almost 6 years ago. Padres pointed out that all three of California's Class I toxic dumps are in or near Latino farmworker communities. Padres could be the poster child of EPA's civil rights enforcement orphans – the dozens of communities across the country facing massive civil rights violations that have been abandoned by EPA. In our community, as a direct result of EPA's failure to act, Laidlaw has secured all the permits it needs and is now expanding its toxic waste*

dump to double its former size, which will make it the largest capacity toxic dump in the entire United States.

– Rosa Solorio Garcia, Padres Hacia una Vida Mejor, Buttonwillow, CA

Our case has been pending for nearly eight (8) years. This continued lack of resolution is an injustice that our clients, Flint-Genesee United, the St. Francis Prayer Center and the residents of their community, face every day. We have been told repeatedly, for years, that a decision in this matter was imminent. As far back as November 1996, our clients were advised in writing that a decision had even been drafted. Yet, to date, we have no decision from EPA, and the facility in question is up and running, spewing pollutants into the community on a daily basis. Despite the numerous representations to us that an end was in sight, the "end" continues to be postponed. In one telephone conversation, well over a year ago, EPA indicated that it thought there would be a decision 45 days from the last week of March 1999. Again, in August 1999, we contacted EPA to inquire as to when a decision would be handed down and we were told, again, that a decision would be forthcoming within the next 45 days. Those 45 days have long since passed and we have not heard from EPA. As recently as November 1999, EPA indicated, in writing, to Congressman Dale Kildee that it hoped to make a decision within the coming months. Now, in August 2000, we still have no decision.

This facility has been at issue since 1992 and has been under supposedly active investigation by EPA since at least early 1995. We are now entering the new millennium, nearly eight years after the permit for Genesee Power Station was issued, and our clients are still uncertain whether or not EPA will enforce their civil rights. What is certain, however, is that during the pendency of this investigation, the Genesee Power Station has been built, is operating, has assumed a place on EPA's Significant Violators List, has been cited by the Michigan Department of Environmental Quality, has entered into a Consent Judgment based on those violations, and continues to adversely affect the health and welfare of the surrounding community. In fact, the incinerator has been in operation so long that the Title V Air Permit is now up for renewal.

– E. Quita Sullivan, Sugar Law Center, Detroit, MI

We filed a Title VI complaint in 1994, against California Department of Toxic Substances Control. Since that time, we have become one of the many EPA orphans across the United States, communities which EPA has abandoned to environmental racism. In the past 6 years we have had one visit from EPA's civil rights staff, but that is all. The dump continues to operate, and get new permits. The state continues to discriminate, with no sign of EPA.

– Maricela Alatorre, El Pueblo para el Aire y Agua Limpio, Kettleman City, CA

Mothers Organized to Stop Environmental Sins (MOSES) and thirty representatives of the African-American community in Winona, Texas, traveled to Washington, D.C. in June, 1994 and filed a Title VI complaint against the Texas Natural Resource Conservation Commission. Though accepted for investigation, EPA's Office of Civil Rights has apparently done nothing with this complaint, but let it gather dust. This is not due to a lack of effort on the part of the community to seek justice. Members of MOSES have traveled to Washington, D.C. numerous times to press their environmental justice complaint with the Office of Civil Rights at Federal Advisory Committee meetings, a Congressional Symposium and on one occasion in 1996 when 55 community members traveled from Texas to Washington, D.C. by bus. This past March the community staged a large march for environmental justice aired by CNN on April 16. In a state with an African-American population of around 12% the population surrounding a hazardous waste facility sited in rural Smith County near Winona is 33% both within a 2 mile and 6 mile radius using 1990 US Census data. The African-American population around the facility is also approximately three times the percentage found in other non-urban parts of Smith County, which is primarily a rural county. For fifteen years citizens of this rural community with a disproportionately large African-American population surrounding this facility suffered an ongoing barrage of horrific chemical odors accompanied by burning eyes, nose, and throat, nausea, dizziness, vomiting, shortness of breath and a host of other severe acute health effects. Citizens reported regular problems with harsh chemical odors from the facility at distances even greater than 6 miles. TNRCC failed to enforce basic environmental laws to stop this egregious assault on citizen's health and peace of mind.

Since we filed our complaint in 1994, no one from OCR has ever visited Winona. Whenever MOSES has contacted OCR regarding our complaint over the past several years we have been told that nothing is being done to investigate the complaint and that USEPA OCR does not anticipate doing any investigation of this complaint anytime soon. OCR staff have refused to speculate on a time frame, saying that an investigation of the Winona Title VI complaint is not even "on the horizon." Justice delayed is justice denied. The delay has reached the point of absurdity. OCR has suggested that communities like ours take our complaint to federal court. They must know that our community does not have the resources to do this. Also, our case may be dismissed for a failure to exhaust administrative remedies with OCR. (And they have been exhausting.) It appears the OCR just hopes that our complaint will go away along with those of us bringing the complaint.

We are not confident of USEPA's ability to objectively investigate our complaint, as USEPA itself appears on a list of generators that sent waste to this facility. We believe USEPA should recuse themselves and turn the investigation of this complaint over to the Department of Justice.

– Phyllis Glazer, Mothers Organized to Stop Environmental Sins, Winona, TX

CONTEXT

Before commenting on the Guidances, we feel it necessary to explain how EPA has arrived at this point. It is important to note that Title VI of the Civil Rights Act of 1964 has been the law of the land for almost 36 years; EPA's regulations implementing Title VI are more than 25 years old. Title VI is thus not a new requirement that EPA is imposing on grant recipients; recipients of EPA financial assistance have *always* been required to comply with Title VI.

The first administrative Title VI complaint concerning environmental justice was filed with EPA in December 1992; the agency lost this complaint, and did not begin investigating it until January 1995. The first administrative cases that EPA responded to were filed with EPA in September 1993, and between Fall 1993 and October 1996 about 30 complaints were filed. EPA rejected many of those complaints on procedural grounds, and did not appear to be moving toward resolving any of the complaints it had accepted. Thus, in October 1996, a coalition of community groups involved in 16 of the 20 then-pending cases before EPA sent a letter to Administrator Browner detailing the various violations of federal regulations that had occurred because of EPA's slow processing of their complaints. These groups also demanded that the EPA immediately enact a Title VI policy so that all complaints would be subject to the same standards and potential complainants would have a predictable process to look forward to.

In December 1996, Browner and Assistant EPA Administrator Fred Hansen responded, setting up a Title VI Task Force to develop EPA's policy and begin to resolve cases. The Task Force was to develop the policy and resolve five of the pending cases by February 28, 1997. EPA did not meet this deadline, failing to either issue a policy or resolve any of the cases (six) that the Task Force took on. We note that aside from one complaint which was dismissed by EPA because the complainants grew fed up with EPA and refused to respond to inquiries begun five years after their complaint was filed,[1] none of the other six "expedited" cases has been resolved to date, more than three-and-a-half years after EPA's promised deadline.

In the summer of 1997, a coalition of community groups in Louisiana filed a Title VI complaint with EPA trying to block the siting of a major plastics factory near Convent, the Shintech plant. The Shintech case was added to the six others the EPA's Title VI Task Force was considering; the other pending cases appeared to continue to languish without much attention from EPA.

More Title VI complaints have been filed between October 1996 and the present; EPA's current docket includes 21 complaints under investigation (that is, accepted by EPA) and 30 complaints under consideration (not yet accepted or rejected). This is a dramatic expansion of the docket from even two years ago, when there were just 15 complaints under investigation and six complaints under consideration. Additionally, EPA has dismissed four complaints and rejected 43

[1] *Northwest Civic Association v. Florida Department of Environmental Protection*, No. 09R-94-R4.

others on procedural or jurisdictional grounds.

The EPA finally issued its Interim Guidance in early February 1998. The Interim Guidance was deeply flawed in a number of respects, and many of the signatories of this letter urged EPA at the time to significantly rework it to address their concerns. Additionally, many of the signatories of this letter took part in informal meetings with EPA on the Interim Guidance, and several took part as members of the EPA's Title VI Implementation Subcommittee of the National Advisory Committee on Environmental Policy and Technology.

To come up with this new Guidance, EPA relied heavily on input from "stakeholders" in industry and state and local governments. Inviting such "stakeholders" – the objects of civil rights complaints and the industries accused of poisoning communities of color – to hammer out civil rights policy would be analogous to convening meetings of the KKK and segregationist southern governors to come up with an "acceptable" civil rights policy in 1960. The product in 2000 is no less offensive.

EPA attempts, in its introduction to the two Guidances, to make it appear that it encouraged and received significant community stakeholder input. For example, EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she specifically declined to endorse the Advisory Committee's final report to EPA.

Although we have offered EPA our input on civil rights in general and the Guidance in particular for many years, the Guidance does not reflect any of our input. We thus believe EPA should revoke the Guidance and begin again. Only a fresh approach, unburdened by fealty to "stakeholders" hostile to civil rights, can resuscitate EPA's dormant civil rights enforcement.

GENERAL COMMENTS

A. Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

The Guidance is a significant retreat from even the paltry protections proposed by the 1998 Interim Guidance. At every step, EPA has made the policy decision to hurt the civil rights complainant and help the civil rights violator. Some of these policy decisions are in direct conflict with EPA's own Title VI regulations:

• EPA limits its disparate impact analysis to those impacts which result "from factors within the recipient's authority to consider," a radically narrow reading of EPA's Title VI regulations.

• EPA limits its impact analysis to solely health impacts, and fails to consider economic, social and cultural impacts, another significant narrowing of the scope of Title VI not found in

EPA's regulation.

• EPA limits who may file a Title VI complaint, in a significant change from the language of EPA's Title VI regulations.

• EPA promises to dismiss complaints which meet all jurisdictional requirements simply because complainants raise similar issues in state or federal court, again conflicting with EPA's regulations, which contain no such limitation.

Other policy decisions which hurt the civil rights complainant and help the civil rights violator, which are explained in detail in these comments, include:

• Failing to work to prevent Title VI violations, but instead rejecting complaints filed before a final permit action.

• Using informal resolution techniques in environmental justice disputes.

• Construing the beginning of the 180-day statute of limitations narrowly.

• Never exercising its "good cause" waivers in any case to date.

• Adopting a policy that permit denial is not an appropriate solution to Title VI disputes.

• Making its "due weight" policy effectively a presumption of compliance with Title VI, introducing another hurdle for complainants.

• Implementing a presumption against complainants if an area is in compliance with the NAAQS, although EPA's own studies demonstrate that air quality in NAAQS-attainment areas is still unhealthy.

The Guidance inhabits a fantasy world in which discrimination is rare and hard to find, whereas in the real world, discrimination is quite common and often easy to see. This fantasy has many manifestations, but four of them are particularly important because they undermine the very concept of civil rights enforcement.

First, EPA acts as though benefits and burdens are not *systematically* distributed in unequal fashion. It sets up an extremely laborious process to determine whether, in any particular case, a community of color is being adversely affected by an environmental, social, cultural, or economic insult – when in most cases, one just has to look: at East St. Louis, at Lousiana's Cancer Alley, at East Los Angeles. The concentrations of environmentally questionable and downright harmful projects in those places, and hundreds of communities of color like them around the country, *are not present* in Beverly Hills, Grosse Pointe Farms, the Hamptons, or in hundreds of white communities like them.

Second, EPA acts as if "benefits" can somehow "justify" discrimination. Two examples

are illustrative of EPA's failed approach:

• In §VII.A.1, EPA gives the example of a sewage treatment plant, which it says benefits the community of color in which it is placed by treating that community's sewage. That is true, but not very relevant. The treatment plant also treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.

• Throughout the Guidance, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. § VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

Third, EPA proposes to approve discriminatory effects it finds if recipients come up with plans to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here instead to *institutionalize* discrimination, allowing recipients' actions to be approved of by EPA even when they have demonstrable discriminatory impact.

Finally, EPA also refuses to make the fundamental move of discrimination law: comparison of the impacts among different demographic groups. The Guidance appears to be setting up a super-permitting review process, not a civil rights enforcement process. From the point of view of civil rights law, it simply *does not matter* if the permitting process at issue might have some reasonable basis for the result it produced. If the impact is not felt by white people, or would be different in a white area, or would have been reduced or eliminated in a white area, a discriminatory effect has occurred in violation of the Title VI regulations.

An agency's power manifests itself not only by what it mandates, but by what it tacitly allows. Specifically, despite ample regulatory discretion to address environmental justice concerns under existing environmental laws, in the absence of an explicit legal duty many state agencies have consistently failed to address continuing disparities. This makes the EPA's regulations and administrative proceedings under Title VI a critical legal avenue for residents in environmentally devastated communities. In response to numerous Title VI complaints, EPA committed time and resources to devising the Guidance. However, a reading of the Guidance leads to the inescapable conclusion that – despite the effort expended – the EPA will not deliver on its promise to ensure compliance with civil rights laws, nor will it comply with President Clinton's executive order on environmental justice.

We are troubled by EPA's chosen terminology in its repeated references to "adverse disparate impact analysis." The implication in this choice of phrase is that there can be a "disparate impact" that is not an "adverse disparate impact," a semantic distinction that EPA seems bent on proving but which in the real world does not exist. If there is a disparate impact, it is an adverse impact. We find this odd construction through-out the Guidance, in §§ I.B, I.C, I.E,

II, II.A.3, IV.B, V.B, V.B.2, VI.A, VI.B.1.b, VI.B.4.c, VI.B.6. We discuss why EPA's analysis is actually not an "adverse disparate impacts analysis," but instead a "disparate adverse impact analysis," in our comments on §VI, below.

The Guidance is also written in technical language that is largely inaccessible to community groups which may look to it for an idea on how EPA would handle their complaints.

We urge EPA to scrap the current Guidance and begin again to include the many suggestions provided by community groups and environmental justice advocates on this Guidance and the Interim Guidance.

As noted above, we offer the bulk of our comments on the Guidance, because without a credible civil rights enforcement tool to back it up, the Recipient Guidance is meaningless.

B. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

A substantial part of the Recipient Guidance is devoted to the EPA imploring and cajoling recipients to do the right thing, to devise strategies to reduce pollutant levels in overburdened communities. Yet, just under the surface of this encouragement is a much stronger message: the regulated community is sure to understand from this guidance that the EPA will go to *extraordinary lengths* to avoid administering a Title VI remedy, either withdrawing funds or requesting the Department of Justice to seek injunctions. The EPA's trepidation is evident in the generous presumptions and ample procedural protections given the recipient in stark contrast to the lack of recourse available to the complainants. Although the Agency may not relish withdrawing funding, without a credible threat by the EPA to use Title VI, many recipients will continue to take actions that cause and contribute to oppressive environmental inequities.

The Recipient Guidance should be strengthened to actually force recipients to admit and address the disparate impact within their jurisdictions. We recommend that EPA require all recipients to:

- Meet with current Title VI complainants to resolve complaints.
- Compile relevant demographic information in the permitting process.
- Conduct a state-wide (or agency-wide) demographic analysis of current permits.
- Place a moratorium on granting permits until the above three recommendations are implemented.

SPECIFIC COMMENTS

Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

In these comments, we use the same numbering system as that used in the Guidance itself.

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964

As we noted above in our General Comments, we are disturbed by EPA's use of the term "adverse disparate impact." It is particularly galling, and misleading, as used in §I.B:

> In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects. This is often referred to as reaching actions that have an unjustified adverse disparate impact.

This construction implies that the Supreme Court endorses the "adverse disparate impact" concept, when in fact, the Supreme Court has never in its history used that tortured construction.

C. Scope of Guidance

The Guidance is very narrow in that it only covers complaints in the permitting context, and even there it does not cover complaints alleging intentional discrimination or complaints alleging discrimination in the public participation processes associated with permitting. Many other activities conducted by recipients of EPA federal financial assistance, both substantive and procedural, may implicate Title VI. For example, substantively, agencies are responsible for enforcement (or non-enforcement) of environmental laws, clean-up of contaminated sites, and awarding of sub-grants, among other duties; procedurally, agencies are also responsible for such things as the size of penalty awards and the length of time for remedial or enforcement action. Many current environmental injustices arise from selective enforcement of environmental laws by state agencies.[2] Additionally, there are at least several pending Title VI complaints outside the permitting context, such as *Chester Street Block Club Association v. Department of Toxic Substances Control*, No. 8R-97-R9 (refusal to require clean-up of toxic substances, including known carcinogens, prior to construction with potential to release toxic substances into community); *Hyde/Aragon Park Improvement Committee v. Georgia Department of Environmental Protection*, No. 8R-94-R4 (failure to investigate, monitor and correct environmental violations in a RCRA clean-up in black community as in white community); and *Mothers Organized to Stop Environmental Sins v. Texas Natural Resource Conservation Commission*, No. 5R-94-R6 (failure to enforce environmental violations which disproportionately affected blacks). The fact that EPA has taken seven years to produce this flawed Guidance, which covers only permitting outcomes, does not make us hopeful that it will ever get around to issuing any future guidances on permit processes, enforcement, clean-up, sub-granting, and other

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[2] *See, e.g., States Neglecting Pollution Rules, White House Says; Sanctions Threatened; Violations Are Underreported, EPA Officials Assert -- Full Review is Sought*, NEW YORK TIMES (December 15, 1996), at 1.

potential complaint areas, as well as a guidance for covering allegations of intentional discrimination.

We note that all of EPA's examples of permits in §I.C are of federal permits, and that since all of the recipients of EPA funding are going to be state and local actors, the vast majority of complaints are going to be about permits granted under state and local permit authority.

We are disappointed that EPA has chosen an avenue for Title VI enforcement – the Guidance – which by its own explicit terms is not "enforceable by any party in litigation." The fact that the Guidance itself is so weak, and EPA is not even committing to follow it, is testament to the lack of commitment to civil rights enforcement at EPA. By giving itself this enormous loophole, EPA is hurting the civil rights complainant and helping the civil rights violator.

Please see our comments in §VI.B.1 on the "sole cause" concept raised by EPA in §I.C.

D. Coordination with Recipient Guidance

We reiterate that without a credible civil rights enforcement threat in this Guidance -- which is wholly lacking in this version – the Recipient Guidance is meaningless.

E. Principles for Implementing Title VI at EPA

For our critique of EPA's misguided principle that "Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved," please see §IV.A. In fact, such informality hurts civil rights complainants and favors civil rights violators, as discussed in §VI.A.1.c.

F. EPA's Nondiscrimination Responsibilities and Commitment

Although EPA professes to be "committed to a policy of nondiscrimination in its own permitting programs," the repeated examples of policy choices made in this document to hurt the civil rights complainant and help the civil rights violator, summarized above in the "General Comments" section, give lie to this representation from the agency. If EPA is unable to have a policy of nondiscrimination in its own civil rights enforcement, it is unlikely to have a credible policy in its permitting programs.

II. FRAMEWORK FOR PROCESSING COMPLAINTS

EPA limits its determination of whether a recipient is in violation of Title VI and EPA's implementing regulations to sources of stressors, stressors, and/or impacts "within the recipient's authority." For a critique of this limitation on the types of impacts considered, please see our comments on §VI.B.2.a. For a critique of this limitation on the range of impacts considered to only those "within the recipient's authority," please see our comments at §VI.B.2.

EPA states here that "informal resolution will often lead to the most expeditious and

effective outcome for all parties." Please see our comments on §VI.A.1 which counter this mistaken assumption.

A. Summary of Steps

Section II.A sets forth a series of deadlines, taken from EPA's Title VI regulations, for EPA to accomplish certain milestones in the complaint processing framework. EPA's intent in establishing definite deadlines for acknowledgment, acceptance and investigation is laudable. By setting a maximum time period of 205 days for a complaint to be received, reviewed and investigated before a decision on the merits is made, EPA is apparently pledging once more to abide by its regulations.[3] There are three concerns with this scheme: that EPA will not follow its own deadlines, that the deadlines will be used as an excuse for substandard investigation of accepted complaints, and, as detailed below in §II.A.3, that EPA has opened a potential loophole with the introduction of informal dispute resolution into the process timeline.

We feel it unlikely that EPA has the self-discipline and resources to comply with the deadlines set forth in the Guidance. EPA has an abysmal history with regard to the deadlines that Congress or EPA itself has set for various environmental controls.[4] In addition, EPA has missed its regulatory deadlines in every single Title VI case accepted for investigation in the history of the agency, with one exception, and missed the regulatory deadlines for acknowledgment of complaints (the 20 days specified in §II.A.2) in almost every case. Given this history, there is reason to suspect that EPA will not always meet the deadlines imposed by the Guidance. EPA has few resources dedicated to investigating Title VI complaints, and it seems likely that OCR will have trouble investigating all of the complaints that will come through its door, in addition to the 51 complaints that are pending.[5]

Because of the lack of resources, there is also a distinct possibility of sub-standard investigation of complaints within the 180-day window. Many of the signatories of this letter have witnessed shoddy investigations of their own complaints, even when the EPA has taken

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[3]The Guidance states that EPA will acknowledge receipt of the complaint within five (5) days, accept the complaint for investigation, rejection or referral within twenty (20) days, and then spend a maximum of 180 days investigating an accepted complaint before making a finding on the merits of the complaint. §§ II.A.1, II.A.2, II.A.3. This makes for a total of 205 days from start to a preliminary finding.

[4]*See Natural Resources Defense Council, Inc., v. Train,* 510 F.2d 692 (D.C. Cir., 1974); *General Motors Corp. v. EPA,* 871 F.2d 495 (5th Cir., 1989); *Conservation Law Foundation of New England, Inc. v. Reilly,* 755 F.Supp. 475 (D.Mass., 1991); *Sierra Club v. Thomas,* 658 F.Supp. 165 (N.D.Cal., 1987).

[5]Indeed, some of these 51 complaints have been pending since 1993. Given that seven (7) years have passed since acceptance for investigation in some cases, and only one complaint has ever been resolved on the merits, there is little reason to believe OCR can turn around all complaints in 180 days.

years to undertake such work. Certainly OCR staff that are under pressure may spend less time than necessary to fully investigate a complaint, if they feel that they must have a decision on the complaint within 180 days. This creates obvious problems for communities at risk from environmental harm. Each complaint deserves a full hearing, and EPA should not tolerate any system that encourages sub-standard investigations of these complaints.

To remedy these problems, we suggest the following recommendations:

• The easiest solution to both of these problems is to ensure that OCR is adequately staffed to investigate all Title VI complaints in a manner that provides for a fair and timely investigation. This may require diverting resources from other parts of EPA, but EPA should recognize the seriousness and importance of civil rights enforcement generally, and specifically a Title VI investigatory program.

• In addition to adequate staffing, EPA should have certain oversight procedures in place to make sure that investigations are being handled properly. This could occur in a number of ways, from an internal annual report outlining the progress and success of complaint investigation to full public disclosure of such progress. At least some public oversight of OCR's process would be valuable to EPA, since there may be occasions where investigations do not include any contact with the community that filed the complaint, immediately raising suspicions that OCR is not conducting a thorough investigation. If there are good reasons for a short investigation that does not appear to fulfill lay expectations of a thorough investigation, then EPA should make those reasons known.

1. Acknowledgment of Complaint

This section allows a recipient to make a written submission to EPA responding to, rebutting or denying the complaint within 30 calendar days. What if the recipient misses the deadline? In our experience with numerous complaints, EPA has generously extended this deadline and often accepted such responses months after the deadline; this stands in marked contrast to EPA's treatment of complainants, whose complaints are rejected if they are even a few days late.

2. Acceptance for Investigation, Rejection, or Referral

We are gratified to see that EPA will request clarification if a complaint is unclear. In several cases to date,[6] EPA has simply denied the complaint rather than request clarification.

3. Investigation

[6]*See, e.g., Gulf Coast Tenants Organization v. Louisiana Department of Environmental Quality*, No. 04R-94-R6.

The timeline of EPA's investigation is not clear in the Guidance, leaving enough loopholes that EPA will not be bound by the times specified in its own Title VI regulations. Section II.A.3, on investigation, lays out the timeline and states that "OCR intends to promptly investigate all Title VI complaints." (Communities with experience with EPA know better, but that is not the point of these comments.) In that section, if a complaint is accepted for investigation, EPA will first try informal resolution. If that fails, only then will EPA conduct an investigation. The guidance next states that within 180 calendar days of the start of the investigation, EPA will make preliminary findings. The question is, when does that 180 day clock start to run? Under the present Guidance, it sounds like EPA can have as much time as it likes to try "informal resolution" before it even *starts* to investigate. This would be a disaster for communities, more of a disaster than EPA's current do-nothing policy.

This section of the Guidance conflicts with EPA's regulations, which say that 180 days after the acceptance of a complaint the EPA has to make a preliminary finding. Otherwise, EPA has an enormous loophole for not complying with the regulatory deadline of 180 days – it can just say it is trying to "informally resolve" the problem. That is our fear, and it is also a concrete way which the new Guidance will have a negative impact on communities of color.

EPA also introduces a subtle but difficult hurdle for complainants in stating, "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." By introducing *justification* into the investigation stage, EPA is giving recipients yet another chance to elude civil rights compliance. We urge EPA to remove justification from the investigation stage, and place it at the end of the process – in a post-finding-of-violation stage – where it belongs. This is yet another instance of EPA hurting the civil rights complainant by introducing hurdles into the Guidance not found in Title VI and EPA's regulations.

4. Preliminary Finding of Noncompliance

Please see our comments on §VI.B.2 on EPA's limitation of disparate impact analysis to those which result "from factors within the recipient's authority to consider[.]" This limitation hurts the civil rights complainant and helps the civil rights violator.

7. Hearing/Appeal Process

EPA should define the term "reasonable opportunity" in the context of filing written statements during the Administrator's review of an ALJ's determination.

B. Roles and Opportunities to Participate

1. Recipients

Please see our comments under §II.A.1 on recipients' ability to submit comments.

2. Complainants

In §II.B.2, EPA explains that the proceedings are not "adversarial" between the complainant and recipient and therefore the complainant has no right to appeal. However, EPA employs a different standard to the recipient, affording it substantial procedural protections, including the right of appeal after an adverse decision. As a consequence of this discrepancy, a governmental entity's monetary interest ironically is given far more protection than private citizens' constitutional interests. Here, again, EPA is hurting the civil rights complainant while helping the civil rights violator.

EPA's interpretation of Title VI administrative proceedings has far reaching consequences. In light of the current legal uncertainty pertaining to private rights of action under disparate impact regulations, and in the shadow of an increasingly hostile Congress, EPA has effectively made the complainants' civil rights contingent upon the political will of EPA from administration to administration. With a tentative legal, economic and political reality facing complainants, it is disingenuous for the Agency to state that those who believe they have been discriminated against may proceed in court. Even if the courts (correctly) confirm the complainants' private right of action, many community residents do not have the resources to prosecute these court cases, much less to undertake the kinds of studies and sophisticated computer-generated analysis that are likely to be required to prove a claim. Instead, they are completely dependent upon the EPA's obligation to ensure that its own recipients comply with civil rights laws.

Section II.B.2 states that "complainants do not have the burden of proving that their allegations are true," but given the "due weight" EPA promises to give recipients' data, it is apparent that complainants have the burden of *disproving* recipients' data, which is essentially the same thing as proving their allegations are true.

III. ACCEPTING OR REJECTING COMPLAINTS

A. Criteria

Although EPA relegates it to a footnote, federal financial assistance is a jurisdictional requirement for EPA's Title VI investigations and should be elevated to the text as #5 in the list of jurisdictional criteria. In fact, more complaints are rejected for failing to fulfill this jurisdictional criteria than any other – 18 of 43 complaints thus far rejected, or 42 percent, almost double the percentage of the closest other reasons for rejection. It is irresponsible for EPA not to make this requirement more obvious to the reader of the Guidance.

EPA should accept complaints that do not have a telephone number. The Guidance ambiguously states that it will not investigate complaints that fail to provide a way to contact the complainant, "*e.g.*, no phone number, no address." There are many potential complainants who have no phone, and thus the provision of a phone *or* an address should be sufficient for EPA to reach them.

In a footnote to this section, EPA asserts that it may use information presented by a complainant which it does not accept as a complaint to conduct a compliance review of the complained-of recipient. This statement is of little comfort to complainants and those similarly situated. As a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

1. EPA misleads the public as to when it will accept a complaint.

At the beginning of §III.A, EPA states that it "is the general policy of OCR to investigate *all* administrative complaints concerning the conduct of a recipient of EPA's financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations." §III.A (emphasis added). This assertion is repeated at the end of §III.A, as well.[7] This is fundamentally misleading because elsewhere in this very section of the Guidance EPA promises to *dismiss* complaints that "satisfy the jurisdictional criteria in EPA's implementing regulations" if complainants are attempting to exhaust their administrative remedies before the recipient agency (§III.B.3.a) or pursue their rights in court (§III.B.3.b). This contradiction in the Guidance is problematic, and creates situations where EPA can reject complaints based on factors outside the jurisdictional criteria, as outlined more fully at §§ III.B.3.a and III.B.3.b, below.

2. EPA illegally narrows who may file a complaint with it.

The Guidance will have a direct, negative impact on communities because EPA has narrowly limited who may file a Title VI complaint with the agency, in direct conflict with EPA's own regulations. In Section III.A, EPA has decreed new criteria for acceptance or rejecting complaints. That section states that the EPA will accept and investigate a complaint if it is filed by:

> A. A person who was allegedly discriminated against in violation of EPA's Title VI regulations;
>
> B. A person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or
>
> C. An authorized representative of such a person or class of people.

These new criteria conflict with EPA's Title VI implementing regulations. At 40 CFR § 7.120, entitled "complaint investigations," the regulations state:

> (A) *Who may file a complaint.* A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint.

[7] "OCR's threshold decision to accept a complaint for investigation or reject it is based on the jurisdictional criteria provided in EPA's Title VI regulations[.]"

The regulations do not make the limitation found in the Guidance in point B, that the person filing the complaint be "a member of a specific class of people that was allegedly discriminated against." Instead they state that a "person who believes that he or she *or* a specific class of persons has been discriminated against" may file a complaint -- a much broader standard. Here again EPA has made a policy decision which hurts the civil rights complainant, and helps the civil rights violator, without even noting that the regulations differ.

B. Timeliness of Complaints

EPA ignored comments on its Interim Guidance and continues with a statute of limitations policy which will have a detrimental impact on civil rights complainants. The language used in §III.B is vague and can easily confuse potential complainants regarding the appropriate time for filing a complaint, leading to premature, duplicative, or late complaints. Further, EPA's policy decision to take no action on complaints filed before a permit is issued is an abdication of responsibility for *preventing* civil rights violations.

1. Start of 180-day "Clock"

Although community groups and complainants pointed out in detail the flaws with EPA's approach to the start of the 180-day clock in comments on the Interim Guidance, the same approach is carried forward into the new Guidance in §III.B. Again, EPA narrowly construes the beginning of the statute of limitations in a way which hurts civil rights complainants and aids civil rights violators. Many of the comments in this section will appear familiar to EPA as they were made on the Interim Guidance, but ignored by the agency.

EPA has rejected many complaints on the grounds of timeliness, including a number that complainants have felt were timely, because of differing interpretations of when the statute of limitations begins to run. EPA has generally ruled that the statute begins to run when a permit is issued; many complainants have argued that it should begin to run when all administrative appeals are exhausted. Complainants should be encouraged to try to resolve the issues of disproportionate impact within the permitting process without having to file a civil rights complaint. Thus, they should not be penalized for exhausting their administrative remedies before an agency by having EPA construe the statute of limitations to have run on the complainants' Title VI claim. The Guidance ignores this principle, and forces complainants to file a complaint before exhausting their administrative remedies; as discussed below in §III.B.3, it then will *dismiss* that timely filed complaint, however, because the complainant is exhausting its administrative remedies! This policy of EPA's creates unworkable hurdles for the civil rights complainant, with the Catch-22 of complainants never being able to file a complaint which EPA will investigate.

EPA's Title VI regulations state that a complaint must be filed within 180 days of the action complained about, or allege an ongoing violation of Title VI. 40 C.F.R. § 7.120(b)(2). The Guidance states EPA's position as "Complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit." §III.B.1. This is a subtle change from the Interim Guidance, which required a complaint to be filed within

180 days of the issuance of the *final* permit. The change makes EPA's statute of limitations *more* confusing, not less. The implicit message in the removal of the word "final" is that complaints must be filed after the initial granting of a permit.

The Guidance's policy of requiring a complaint to be filed within 180 days of the *initial* – as opposed to the *final* – permit action is not supported by the law. Not only does the interpretation deviate from EPA's own policy and regulations, but it is contrary to state and federal law, which support the conclusion that the statute of limitations begins to run on the date which a permit became *legally final*. Moreover, EPA's interpretation creates an unworkable legal framework in which complainants must file an administrative Title VI complaint long before the agency action becomes final and is thus subject to judicial review. Federal EPA regulations, state regulations, and federal case law provide an established body of law defining "final agency action." The Guidance's interpretation conflicts with all of these well-settled authorities, and thus should be reversed.

The Guidance flatly contradicts EPA's own regulations defining "final agency action." EPA's regulations, at 40 C.F.R. § 124.19(f)(1), state that "[f]or purposes of judicial review under the Appropriate Act, final agency action occurs when a *final* RCRA, UIC, or PSD permit is issued or denied by EPA *and agency review procedures are exhausted*." (Emphasis added) In the Guidance, EPA makes little provision for the agency review procedures (see §III.B.3, below), even though the filing of an administrative appeal with an agency usually means that the permit in question is not legally enforceable. Further, an appeal might obviate or mitigate (or even exacerbate) the very impacts giving rise to a Title VI complaint; in the course of an appeal, a change in permit conditions could alleviate the impact on the surrounding community. Thus, there may not be a cognizable discriminatory effect until the appeal is resolved.[8] The Guidance's interpretation attempts to begin the statute of limitations before there is a final, reviewable agency action, as defined in EPA's own regulations, 40 C.F.R. § 124.19(f)(1), and, in the case of an administrative appeal, before there is actually even a discriminatory effect of an agency's action.

State law mirrors EPA's regulations concerning final agency action: California state law, to take but one example, establishes that the permit *becoming final* – through the expiration of the administrative review period -- is the final agency action, not the *issuance of the permit* as found in the Guidance. In language almost identical to EPA regulations,[9] the California Code of Regulations state that the agency action is final for judicial review when a final permit is issued *and* agency review procedures and the administrative adjudication procedures are exhausted. 22 Cal. Code Reg. § 66271.8(h).

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[8]The Guidance even recognizes this in §III.B.3, stating "The outcome of such permit appeals... could affect the circumstances surrounding the complaint[.]" Why EPA would resist the logical outcome of its own statements – beginning the statute of limitations *after* the administrative appeal process – eludes us, but is yet another example of EPA working to make the process confusing and difficult for complainants.

[9]40 C.F.R. § 124.19(f)(1).

Federal Court interpretations deciding analogous claims also contradict the Guidance's interpretation of when the statute of limitations should start to run. An agency action is final under the Administrative Procedures Act (APA) when the agency completes its decisionmaking process and the result of that process is one that will directly affect the parties. 5 U.S.C. § 704; *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992); *Dresser Industries, Inc. v. U.S.*, 596 F.2d 1231 (1979), *rehearing denied* 601 F.2d 586 (1979), *cert. denied* 100 S.Ct. 731 (1979) (finding that the core question in deciding whether the action is final is whether the agency has completed its decisionmaking process, and whether the litigation will expedite rather than delay or impede, effective enforcement by the agency).[10]

EPA's current interpretation would require parties to use a different definition of "final agency action" when seeking judicial review of the agency's action than when seeking EPA administrative review for a Title VI complaint. Federal law, state law, and EPA's own regulations are consistent in stating that the statute of limitations for requesting judicial review of a permit begins to run after issuance of the final permit and after exhaustion of all administrative agency review procedures. 22 Cal. Code Reg. § 66271.18(h); 40 C.F.R. § 124.19(f)(1); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992). The Guidance's different interpretation is an aberration that creates an inconsistent and incoherent legal framework for Title VI complainants. EPA's current interpretation places Title VI complainants in a confusing position: an agency action can simultaneously be "not final" and "final." Under state law and analogous federal authority, it is *not* a final agency action; under EPA's Guidance, it *is* a final agency action. This confusing and arbitrary outcome should be rejected.

The central flaw in EPA's current interpretation is that it begins the running of the statute of limitation before there is a legal "final agency action." A different and more constructive approach, which would allow complainants and federal financial aid recipients the opportunity to fully address disputes before having to file a complaint, would be for EPA to run the 180-day

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[10]Federal Courts have looked to five indicia of the finality of an administrative action: 1) the action is the definitive statement of agency's position; 2) the action has direct and immediate effect on day-to-day business of complaining party; 3) the action has status of law; 4) immediate compliance with the terms is expected; and 5) the question is a legal one. *Mt. Adams Veneer Co. v. U.S.*, 896 F.2d 339, 343 (9th Cir. 1989); *Boise Cascade Corp. v. F.T.C.*, 498 F. Supp 772 (1980), *stay denied*, 498 F.Supp. 782 (1980) (agency action not final until its effect had been felt in a concrete way and the administrative decision had been formalized). This case law directly contradicts the Guidance. For example, when a permit is first issued, but before appeals are exhausted -- the Guidance's starting point for the 180-day statute of limitation -- none of the five criteria set forth by the Federal Court in *Mt. Adams* are applicable: 1) the permit is not the definitive statement of the agency because it could still be altered significantly or even revoked during the consideration of an appeal; 2) the issuance of the permit does not have a direct effect on day-to-day business because it has not become effective; 3) the permit does not have the status of law; 4) immediate compliance with the permit is not expected because the permit is not yet enforceable; and 5) the possibility of administrative review provides a remaining opportunity to decide questions of fact. *Mt. Adams, supra,* 896 F.2d at 343.

statute of limitations from the *latest* of:

• the issuance of an unappealed permit;

• the completion of all agency (non-court) appeals of permit;

• the completion of any agency-mandated dispute resolution procedure; or

• the completion of any voluntary dispute resolution procedure, as long as it has included the complainants, the recipient and the applicant.

Such an approach would allow all stakeholders the opportunity to informally resolve the conditions giving rise to a potential complaint without the necessity of filing a complaint first.

In addition, the Guidance should recognize that complaints alleging continuing violations may be timely even if a particular action occurred more than 180 days before the filing of the complaint, expanding EPA's constricted view of timeliness. Professor Thelma Crivens identifies three categories of continuing violations which apply to actions under Title VI and which could be instructive to the EPA.[11] These categories are:

a. The "date of notification/injury" standard. A violation is considered to be a single act pursuant to a policy which affects a person and requires her to file charges within 180 days of that act.[12] This is the standard thus far used by EPA.

b. The "manifestation/enforcement" standard. A person can bring a civil rights action if she challenges an unlawful practice within 180 days of the enforcement or manifestation of the policy against her or someone in her protected class.[13] Under this theory, the statute of limitations should be interpreted in a manner consistent with eliminating the discriminatory policy. The Supreme Court embraced this standard in *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380 (1982):

> where a plaintiff... challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely filed within 180 days of the last asserted occurance of that practice.

c. The "ongoing policy" standard. An aggreived person may bring an action if she challenges an alleged policy, if she remains subject to the policy. "[T]he existence of the formal

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[11]Thelma Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing,* 41 VANDERBILT L. REV. 1171, 1196 (1988).

[12]*Id.* at 1172.

[13]*Id.* at 1192.

policy is proof of the existence of a present alleged violation. Because the policy *is* the present alleged violation, the only remaining issue is whether that policy is in fact discriminatory."[14]

EPA does make one useful clarificaton in §III.B.1, pointing out that complainants should file complaints alleging discriminatory permit processes within 180 days of the event during the process, rather than after the permit has been issued.

In §III.B.1, EPA again states that it may "choose to conduct a compliance review" of a program even if a complaint is rejected on the basis of timeliness. As we noted in §III.A, as a practical matter, EPA is incapable of timely investigating pending complaints, much less undertaking independent *sua sponte* compliance reviews.

2. Good Cause Waiver

Section III.B.2 states that good cause exceptions will be given to certain untimely complaints. Unfortunately, EPA does not specify what the conditions for these exceptions are. Instead, EPA simply states that they may be given. This is confusing. Without guidance from EPA on what "good cause" means, people may think they have a good cause while EPA may not agree. Although EPA has latitude to accept late-filed complaints "for good cause," EPA has thus far narrowly read the statute of limitations on complaints, and has never accepted a complaint which on its face alleged ongoing discrimination if the complaint was filed after what the EPA deemed to be the 180-day statute of limitations. Several signatories of this comment letter are familiar with the effects of EPA's "good cause" policy, which hurts the civil rights complainant while helping the civil rights violator.[15] A list of examples describing situations in which EPA believes "good cause" existed would clarify this seemingly random and arbitrary standard.

3. Ongoing Permit Appeals or Litigation

a. Permit Appeal Processes

EPA states that if a party submits a timely application while administrative proceedings are

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[14]*Id.* at 1200 (emphasis added).

[15]For example, in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6, the complaint was rejected because it was filed 181 days after the action; in *Midway Village Advisory Committee v. California Environmental Protection Agency*, No. 01R-99-R9, the complaint was rejected because it was filed 183 days after the permit issued. In *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9, and *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9, the complaints were rejected as untimely because the complainant groups had diligently appealed the permit to the administrative agency, trying unsuccessfully to resolve the civil rights issue before bringing it to EPA, and had filed within 180 days of the rejection of the permit appeal.

ongoing, then the complaint will be dismissed without prejudice, allowing for the complaint to be refiled later. This places the burden on the complainant to refile the complaint, even if it has been timely filed and meets all EPA's jurisdictional criteria. This is yet another example of EPA's policies hurting the civil rights complainant and aiding the civil rights violator.

EPA is creating a policy which will lead to the dismissing of complaints which meet all its jurisdictional criteria, simply because the complainants are trying to exhaust their administrative remedies. Such complainants could have their future complaints rejected by EPA, as well, as the agency only "expects" – but does not guarantee – to waive the statute of limitations. This is an astonishingly backward policy that penalizes civil rights complainants by imposing on them a new hurdle not found in Title VI or EPA regulations.

If EPA is not willing to alter its policy on when the 180-day clock begins – which would remove this ludicrous situation of dismissal of timely filed complaints – we urge EPA to establish a different policy for complaints filed during permit appeals processes. EPA should accept the complaint, but stay its investigation. If Title VI complaints were accepted and stayed during the pendency of the appeal process, EPA could then alert the recipient that an investigation will take place if the Title VI issues are not resolved during the appeal process. This would provide an incentive to the recipient to avoid the investigation by resolving the issues through changes in the application itself or through additional permit conditions.

The vagueness of the language in §III.B.3 creates further problems for potential complainants, and for EPA. Clarification is required regarding the ability to refile a complaint after appeals and litigation options have been exhausted. The Guidance fails to explain what happens to complaints that are not filed during administrative appeal proceedings but rather wait until such proceedings are exhausted. The Guidance also fails to address whether aggrieved parties must file a timely complaint while pursuing administrative appeals in order to receive the waiver. EPA's language is unclear in referring to complaints submitted and dismissed without prejudice, saying that such complainants will be able "to refile their complaints after the appeal or litigation." §III.B.3. This language appears to make the waiver conditional upon initial timely filing followed by a dismissal without prejudice. If this is indeed the case, then it is unfair. If EPA wishes to encourage potential complainants to exhaust administrative remedies, it should not penalize complainants who pursue remedies without filing a complaint during the appeals process. EPA should grant waivers to all parties who pursue administrative remedies, regardless of whether or not the complaint has been filed and dismissed. If indeed EPA intends to grant waivers to all complainants who go through administrative processes, then it needs to make this clear.

Secondly, EPA conditions the waivers by saying that EPA "may" grant waivers if the complainants go through the appeals process. Clearly this conditional waiver system will not encourage people to use the appeals process. If EPA wants people to try to resolve problems with recipients rather than file Title VI complaints, it should not make the decision to grant a waiver subject to administrative whim. Given the choice between filing a timely complaint within the 180 day window, or taking a chance with an appeals process that "may" result in an untimely complaint, many complainants will choose to file with the EPA before going through the appeals process if only to ensure the legitimacy of the complaint.

In order to reduce the filing of untimely complaints, EPA should make the waiver guaranteed – or, accept the complaint and stay the investigation, or start the 180-day clock at the end of the administrative appeals process, as recommended above. If EPA guarantees the waiver, it should allow complaints to be refiled within 180 days; the use of a 60-day clock in the permit appeals and litigation sections penalizes civil rights complainants, who should have the full 180-day clock guaranteed by EPA's Title VI regulations.

b. Litigation

EPA erects a new hurdle for civil rights complainants – one not found in Title VI itself or in the agency's regulations – when it states, in §III.B.3, that it will generally dismiss complaints if the issues raised in the complaint are the subject of "litigation in Federal or state court." This broad policy has the potential to significantly harm complainants who seek to challenge permit actions on environmental grounds in court, while challenging those same permit actions on civil rights grounds by filing an administrative complaint. Such complainants would have their civil rights complaint dismissed because they sought to force an agency to abide by environmental law – because the "issues raised in the complaint," say, air pollution, would be the same issues raised in the lawsuit. Such a policy once again hurts the civil rights complainant, and helps the civil rights violator. It also has no place in EPA's Title VI Guidance. EPA should investigate Title VI complaints that meet the agency's jurisdictional criteria, rather than erect new hurdles which are not found in Title VI or in EPA regulations.

While the Guidance notes that the complaints will be dismissed "without prejudice," there is also no guarantee that EPA will accept a complaint filed long after the 180-day statute of limitations has run. Based on EPA policy to date, EPA would certainly reject such a complaint, making its dismissal of the earlier "without prejudice" meaningless as a new complaint would never be accepted. If EPA is to retain this policy, it should guarantee a waiver of the statute of limitations to all parties who filed complaints within the original 180-day limitations period.

EPA also states that it will most likely not consider complaints based on permits judged upon by a court. This does not encourage use of the appeals system. By suggesting that all complaints are foreclosed if not heard at EPA first, EPA ensures that some complainants will dispense with those other channels, and go straight to the EPA to have their complaints heard. While barring complaints of this kind may save some resources of EPA, it will not help the agency fulfill its obligations to investigate possible violations of Title VI. Again, EPA should either accept the complaints and then stay investigation during the pendency of the litigation, or guarantee a waiver to encourage the use of non-EPA resources to resolve civil rights violations.

4. Premature Complaints

To ensure that discrimination does not take place, EPA must *prevent* industries from polluting areas where the pollution would result in discriminatory adverse effects. However, the Guidance states that a permit must be issued before a complaint can be considered ripe, otherwise

it will be dismissed as premature.[16] While this creates an easy marker for EPA to judge ripeness by, it hurts the communities that are supposed to be protected by Title VI. Using permit issuance as a ripeness test means that EPA misses its best chance to *prevent* discriminatory impacts – before they happen. If it is clear that a permit will be issued, and if a complaint is sent to EPA that meets the initial acceptance determination, then there seems to be little reason for EPA to delay investigation. Potential EPA investigation may also encourage agencies and polluters to negotiate with communities to revise the siting plans. Without a compelling reason for the delay in investigation, this seems to be a pointless ripeness test for EPA to use. It is irresponsible and a waste of time to put a community's health at risk by delaying investigation until a permit is issued when the investigation – or at least EPA's intervention – may commence as soon as a permit is in the works. EPA is abdicating a low-cost, efficient way of preventing civil rights violations.

IV. RESOLVING COMPLAINTS

A. Reaching Informal Resolution

EPA's Title VI regulations call for the Office of Civil Rights (OCR) to pursue informal resolutions of administrative complaints wherever practicable through alternative dispute resolution (ADR) techniques.[17] The Guidance, at §IV.A, notes that EPA will encourage informal resolution. EPA cites efficiency, time, and costs, among others, as reasons for employing ADR. In addition, EPA claims that ADR is helpful to "design and implement a process leading to an outcome acceptable to all parties."

EPA provides guidance for the use of ADR in two circumstances: in informal resolutions between recipients of federal funding ("recipients") and complainants, and informal resolutions between EPA and the recipients. In either setting, EPA lists dialogue, consensus building, and mediation as approaches to consider when developing an ADR process. For informal resolutions between recipients and complainants, EPA states that the goal is to have the parties resolve the dispute "between themselves." Specifically, EPA advocates the use of a third party acting as a mediator and a structured process through which the parties can participate in ADR approaches useful in resolving Title VI complaints. For informal resolutions between EPA and the recipients, EPA states its willingness to use ADR to reach informal resolutions at any point during the administrative process before a formal finding.

1. Informal Resolution Between Recipient and Complainant

a. EPA's preference for using ADR to reduce complaints deprives communities of the ability to exercise their civil rights.

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[16] "When complaints… are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice." Guidance at §III.B.4.

[17] 40 CFR 7.120(d)(2).

EPA's insistence on using ADR techniques may be in the interest of efficiency, cost and time for EPA and the recipients, but does not protect the civil rights or environmental interests of communities of color who actually have to face the environmental hazards. EPA's preference for using ADR is apparently to minimize the overall number of Title VI complaints it has to investigate and decide. Attempting to limit the number of Title VI complaints decided, however, deprives communities of the ability to use Title VI as a tool for achieving equality in civil rights. Furthermore, EPA also states a preference for granting permits, only denying them in "rare situations." As a result, EPA's use of ADR to "reduce" Title VI administrative complaints will not prevent discrimination, but instead may encourage recipients to move forward with potentially discriminatory and environmentally harmful permitting actions and then settle any disputes with a complainant later.

b. EPA's use of ADR creates a pre-ordained outcome unfavorable to complainant communities.

EPA's proposed use of ADR to resolve complaints creates an outcome that all parties are forced to accept, but an outcome that may not necessarily be acceptable to all parties. When a recipient of federal funds decides to issue a permit, the community cannot file a complaint until the permit is granted. In addition, once EPA begins an investigation into the complaint, the complainant has limited rights to participate in EPA's investigation, and no avenue to appeal a dismissal. With EPA's stated goal of using ADR to avoid Title VI complaints, a situation is set up where there is a preference towards granting the permit. As a result, the community, which often times does not want the permit to be granted at all, is forced to enter into an ADR negotiation that is aimed at granting the permit. Although EPA claims this process allows the complainant an opportunity to benefit from the entire permit review process, the reality is that the permit will inevitably be granted except, in EPA's own words, in "rare situations." EPA's ADR scheme does not realistically result in a resolution where a permit is withdrawn or rejected. Instead, EPA has set up a situation where a community is coerced into entering into a potentially binding negotiation that is not aimed at fulfilling its objective of not having a facility at all. This is contrary to EPA's stated reason of using ADR to "implement a process leading to an outcome acceptable to all parties."

c. ADR puts complainants in a position of unequal bargaining power with recipients in the negotiation process.

ADR fails to take into account the inherent inequalities in bargaining powers between the recipient and the complainant in the Title VI process. Unequal bargaining power in issues of negotiation often arise due to differences in education, culture, and training for negotiations. EPA's suggested use of ADR in Title VI complaints, however, does not address the problem of unequal bargaining power. To the contrary, ADR merely institutionalizes this inequality.

ADR places people of color in a disadvantage due to its focus on low cost, speed, and efficiency; it places little weight on creating open communication and an understanding of cultural, racial, and class issues. The formal adjudication process has built-in procedural safeguards and codes of evidence to minimize prejudice in the administrative process and, if

necessary, the courtroom. In the formal process, procedure and rules reinforce the idea that justice is blind to race, ethnicity, nation, and handicap.[18] The ADR process, however, takes the procedural safeguards and puts them aside in favor of informal negotiation between the disagreeing parties. This informal atmosphere may allow weaker parties to be coerced into settlements that they may not necessarily want to enter into.[19] In fact, research has shown that informality only allows for more unfairness and power inequality.[20] For example, if members of a low-income community of color are forced to informally negotiate with attorneys and highly-trained negotiation experts of a recipient without procedural safeguards to curb discriminatory actions, abuse of power, and refusals to cooperate, chances are the community residents will not leave the negotiation getting what they want. In other words, once the procedural safeguards that traditionally protect disadvantaged individuals and groups disappear, there is no guarantee that a negotiation will in fact be fair, inclusive, and non-judgmental.

ADR is also disadvantageous to complainants because they may lack the resources necessary to gather crucial data and facts to prove disparate impact. In any negotiation, knowledge is power. With a voluntary exchange of facts and data in the ADR process, the parties must do their own homework in order to increase their bargaining power and persuasiveness. Low-income communities of color, however, do not have the money or resources to hire legal and technical experts to gather facts and data to bolster their Title VI complaints. State agencies and industry, however, have enormous resources at their disposal, allowing them to use expert research and analysis to support their arguments. With vast resources, facts, and data, the state and industry representatives enter the ADR proceedings in a superior position to disadvantaged communities. The practical effect is that the community is left without much evidence to rebut the facts presented by the recipient, thus further handicapping its bargaining power.

d. Little research and data exists on whether ADR is an

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[18]Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEORGETOWN L.J. 667, 685-686 (1997)(formality in judicial processes remind and ensure everyone of the values of fairness and equal treatment).

[19] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-1550 (1991)(informal methods of dispute resolution can be destructive for participants because it requires them to speak in a setting that they have not chosen and often imposes rigid orthodoxy as to how they should speak, make decisions, and be); *See* Delgado, supra note 3 at 685-686 (informality increases power differentials and formality triggers a better, equal result); Luke W. Cole, *The Theory and Reality of Community-based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY LAW QUARTERLY 751 (1999)(informality of the local advisory committee process led to disenfranchisement of communities of color); Richard Delgado, *et al.*, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISCONSIN LAW REVIEW 1359 (1985).

[20]*See* Delgado, *The Problem of the Shanty*, *supra*, at 681, 685-686 ("Informality increases power differentials").

appropriate method of dispute resolution with low-income communities of color.

Little, if any, research and empirical analysis has been conducted on whether ADR is necessarily the most appropriate or effective method of resolving conflicts with traditionally disempowered groups of people, such as African Americans and the poor.[21] Specifically, there has been a lack of research and analysis on whether ADR is an appropriate method of resolving disputes regarding discrimination and racism.[22]

e. ADR does not address overall patterns and systems of discrimination that constitute significant social problems that may be practiced in the permitting of environmental hazards.

ADR poorly serves the larger goals of EPA's Title VI obligations because it focuses narrowly on the resolution of individual disputes as opposed to addressing larger patterns and systems of discrimination that recipients may practice in the permitting of environmental hazards. First, ADR looks at discrimination on a case-by-case basis. The disadvantage of this approach for communities is that communities can not rely on precedent-setting cases where courts have spoken on issues involving patterns or systems of discrimination, a sometimes-powerful tool for ensuring that the rights of the disadvantaged are not violated. Instead, ADR forces the community to negotiate their position on its own, without the benefit of judicial wisdom and experience. The recipient, on the other hand, has the advantage of negotiating on a case-by-case basis.

f. ADR, often conducted in a closed setting, presents little opportunity, if any, for public scrutiny, political accountability, or accessibility.

The ADR process is inadequate for protecting the civil rights of complainants because it does not result in a written opinion, is generally closed to the public, and is usually exclusive to the parties involved. As a result, none of the proceedings enter into the public record, creating little, if any, opportunity for public scrutiny, accountability, or accessibility. Environmental justice disputes, however, exist in a public arena. Since the disputes affect those in the public arena, the

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[21]Cherise D. Hairston, *African Americans in Mediation Literature: A Neglected Population*, 16 MEDIATION QUARTERLY 360, 370 (1999).

[22]Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L.REV. 1055, 1058-1060 (1996).

agreements reached in the ADR process must withstand public scrutiny.[23] In ADR, however, parties often want "off-the-record" discussions, although the public may have the right to know how the discussions are progressing and what is being said.[24] If discussions are not open to the public, then there is no guarantee that a group may not be taken advantage of in the ADR process.

Unlike ADR, the written decisions and opinions of judges and administrators are part of the public record, and thus create a level of public accountability and scrutiny – as well as precedent. In the 1980s, there was a great deal of public criticism of EPA's "sweetheart deals" between EPA and regulated firms.[25] EPA's use of ADR in the deals created little faith and great public distrust in its ADR process for environmental regulation.[26] As a result, improper deal-making in the ADR process is a real risk the EPA may take by implementing ADR for Title VI complaints. In addition, in certain cases, such as civil rights cases, ADR is inappropriate because of the high level of public interest and concern in the issues involved and its outcome.[27] If formally adjudicated in the administrative process, the public may have full access to all proceedings, decisions, and events of the case.

The reality is that the ADR process is, by nature, private and thus deprives complainants, who may be facing discrimination or racism, from the protection of the decision-making process occurring within the view of the public. Although ADR does have mechanisms to ensure fairness, such as a third-party neutral mediator, the negotiation is only as fair and reasonable to all the parties involved as the individual mediator allows. In addition, traditionally, ADR resolutions are viewed as contractual agreements. Therefore, there is little process or procedure that allows for appeals of agreements or decisions made on substance and procedure in the ADR process.

g. Neutral third-party mediators lack the authority and power of a judge to prevent unfair and discriminatory acts in the ADR process.

There is an assumption in the ADR process that a third-party neutral mediator serves the same equalizing purpose as a judge in a formal adjudicative process. In the ADR process,

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[23]Challenges that Arise for Mediators of Complex Public Policy Disputes, in COMPETENCIES FOR MEDIATORS OF COMPLEX PUBLIC DISPUTES (Society of Professionals in Dispute Resolution, 1992), pp. 2-5.

[24]*Id.* at 3.

[25]Edward Brunet, *The Cost of Environmental Dispute Resolution*, 18 ENVIRONMENTAL LAW REPORTER, 10515, 10517 (1988).

[26]*See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10517.

[27]Judge Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARVARD LAW REVIEW 668 (1986).

however, mediators are often relied upon to act only as informal "judges."[28] Unlike a judge, however, the neutral third-party mediator may not have the authority to force or demand a fair or voluntary party exchange of facts and data. This lack of authority further accentuates the potential for unfair and discriminatory acts in the ADR process. Formal adjudicative processes, however, have strict rules enforceable by a judge regarding discovery to prevent abuse by parties. The ADR mediator may not have the authority or force to compel actions on one party. In addition, although EPA states that a neutral third-party mediator may be appointed when necessary, there is not any procedure or guidance outlined on how and when a "neutral" third-party mediator is proper, may be selected, or agreed upon by the parties.

h. ADR's lack of formal discovery prevents a fair resolution of a dispute.

Without a formal discovery process, ADR fails to provide a fair resolution of a dispute due to its lack of a high quality and degree of accurately determined facts. Instead, ADR's focus on efficiency, cost, and speed only provides for a voluntary exchange of data that often results in facts that are incomplete, one-sided, and inaccurate. Without substantial and complete "facts" as weapons, communities are at a disadvantage when negotiating with recipients, who usually will have more resources to rely on.

i. ADR has no precedential value.

A unique feature of the common law system is that any legal command or decision becomes a part of the background data that constitutes our legal rules. A foundational principle of our legal system is that like cases should be treated alike, and different cases differently. Consequently, each legal order is of some value as a precedent for similar future situations. Some reasons for this system are the desires for uniformity, equality in treatment, and the ability to learn from lessons in the past.

In contrast, ADR schemes have no such internal structure of precedential value. The lack of precedent destroys the opportunity for the law to be applied uniformly, fairly, and equally. In issues of environmental justice, the lack of any precedential value in ADR not only prevents parties from utilizing past favorable (or adverse) court rulings, but also prevents any long-term growth and learning within the ADR processes. As a result, the ADR process in any specific area does not grow or evolve with any uniformity or equality. Practically, in an environmental justice context, two similar communities facing similar environmentally hazardous threats in similar areas can both enter into an ADR process and leave with completely different results. In addition, in cases where it is clear that the law has yet to address a problem, ADR fails to provide any precedential history or value.

j. Recommendations

[28] *See* Brunet, *The Cost of Environmental Dispute Resolution*, *supra*, at 10515.

The current draft guidance is vague on how, when, and in what manner ADR will be used as a method of resolving Title VI complaints. As it is in this guidance, the description of ADR does not address the needs of complainants – which is to prevent discriminatory impact of environmental hazards. ADR, as it is proposed by EPA in this policy, has a preference for granting permits and rejecting Title VI complaints. Therefore, the use of ADR as it appears in this policy is contrary to the purpose and intent of Title VI. The prevention of discrimination does not occur by forcing the discriminated to "settle" their complaint with the recipient for efficiency. ADR creates an outcome that all the parties are forced to accept, but not necessarily acceptable to all parties. Therefore, EPA should abandon efforts to encourage the use of ADR between the complainant and recipient according to the current policy. Instead, EPA should allow the administrative process to decide disputes under Title VI. If, however, ADR is implemented as EPA's primary process of dispute resolution for Title VI complaints, EPA should:

• Consult and conduct investigations, research, and analysis on whether the ADR process is the appropriate method of resolving complaints from people of color who are poor and traditionally disadvantaged and discriminated against.

• Draft a specific guidance on how ADR will be implemented in order to resolve complaints under Title VI and open up the guidance to public comment so that the ADR process includes all the elements that complainants feel will level the playing field. Included in the guidance, for example, should be a detailed procedure on how to identify parties in the convening process, when a third-party neutral mediator is necessary, and the process in which the mediator is selected.

• Examine different approaches to ADR and implement one that takes into account the inherent inequalities in bargaining power between EPA, the recipient, and complainant.

• Recognize that the ADR process for Title VI may deal with parties that are traditionally discriminated against and thus must be sensitive to cultural, social and racial issues.

• Require that the ADR process be more open and accessible to the public eye. The public is skeptical of results and decisions made out of the public eye, and opening the ADR negotiations to public scrutiny may increase its trust in the process, in addition to ensuring that one party does not continue to discriminate and take advantage of another party.

• Practice a heightened standard for employing ADR in cases where one of the party members may be part of a traditionally disadvantaged or discriminated class.

• Practice discretion and not use ADR when there are potentially important precedent-setting legal issues that need resolution.

• Not employ ADR when the conduct of one of the parties is so egregious as to make it in the public interest to subject that party to the most visible trial and punishment available.

• Not employ ADR in instances where it would require one party to compromise moral or

value beliefs (i.e. siting hazardous waste facilities in religiously sacred areas).

• Not employ ADR when the result may have a substantial effect on people who are not at the actual negotiation.

• Complainants should be able to inform EPA that they reject ADR and begin the official 180-day investigation of their complaint.

2. Informal Resolution Between EPA and Recipient

Resolution of complaints solely as a result of negotiations between EPA and a recipient should be avoided, as it may lead to EPA settling for terms that are unacceptable to the complainant or the affected community. Complainants and the affected community should have the opportunity to sign off on any resolution agreed to between EPA and recipients. We also apply this comment to §IV.B, below, in which EPA states that a complainant's "consent is not necessary."

B. Implementing Informal Resolutions

1. EPA should cause permits to be denied or at least stayed during the pendency of its Title VI investigations.

In §IV.B, EPA states that "denial of the permit at issue will not necessarily be an appropriate solution." EPA repeats this language elsewhere in the Guidance, as well (§VII.A.3). This language is deeply troubling. Experience and common sense indicate that affected communities generally raise complaints in response to a single proposed new or expanded facility, discovering or realizing that they are subject to a disparate impact in such instances.[29] The suspension, denial, or revocation of a permit is a powerful tool for communities fighting against disparate impact. EPA, in essence, is robbing complainants of the most effective tool they have to prevent disparate adverse impact. While EPA may believe that encouraging recipients to come into "voluntary compliance" is an acceptable solution to disparate adverse impact, the idea improperly holds complainants' health and safety hostage. EPA here again acts in a way which hurts the civil rights complainant, and helps the civil rights violator.

The EPA Guidance states explicitly that "it is expected that 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." By this surprising statement, the EPA

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[29] *See, e.g.*, Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 326 (1994). Of the first 17 Title VI complaints filed with the EPA and examined in this article, almost every single one, whether accepted or rejected, was prompted by individuals or groups challenging the permitting of a single facility.

makes it virtually impossible to successfully challenge the legitimacy of a permit proceeding (or other agency action for that matter) in light of Title VI. Consider the case of a flagrant violation: a hypothetical official advises a permit applicant that the agency will only grant a permit for a major facility if it is sited in an overburdened Latino community. This action is taken because the environmental agency doesn't want to contend with opposition from a white wealthy community situated near a more geographically appropriate site for the facility. Under the logic reflected in the Guidance, denial of the permit in this fictional case would *not* be an appropriate solution simply because the permit is not the "sole" cause of the impacts within the Latino community. No one discrete agency action is likely ever to be solely responsible for an adverse impact, but it does not follow that actions that contribute to disparate impacts should be allowed.

Instead of adopting this baffling position, the EPA should make it clear that a permitting agency's complicity in the unrelenting addition of new sources and facility expansions in an environmentally devastated area may make permit denial an appropriate solution in some cases. The EPA, in attempting to assuage the regulated community by categorically rejecting permit denial as a potential solution in a Title VI case, while at the same time sending a strong message that withdrawal of funds is unlikely to ever occur, effectively decimates the authority of this Civil Rights law in the permitting context, and probably beyond that.

The "sole cause" idea is contrary to cumulative impacts analysis, which EPA embraces in theory. The whole point is that this project is *adding to* the burden. If "sole cause" is taken to an extreme, the more polluted an area gets, the less likely ti is that a permit will be denied, exactly what Title VI is supposed to combat.

2. EPA's approach to mitigation measures is flawed.

EPA's faith that mitigation measures employed by the recipient agency are sufficient to assure compliance with Title VI is misplaced and will ultimately result in increased violations of Title VI.

EPA sets out the guidelines for its policy regarding mitigation measures in §II.B.6 of the Recipient Guidance and in §IV.B of the Guidance.[30] EPA couches these measures as steps that the recipient agency can take in order to "reduce or eliminate alleged adverse disproportionate impact." Generally speaking, using these measures to compensate for current Title VI violations by creating additional violations of Title VI in other areas is unjust. Granting such measures due weight and considering such measures a "less discriminatory alternative" is ill-advised since it will likely not eliminate adverse disparate impact "to the extent required by Title VI" in the area actually affected by the sited facility. The following mitigating factors and their usage should be carefully reviewed.

a. Mitigation must focus on the site complained about

[30] Those recommendations are short, but generally point out that mitigation is an appropriate way to deal with potential violations of Title VI.

Mitigation measures are sometimes devices used by agencies and polluters to trade certain pollution to other areas or media. This may include promising to reduce water pollution while increasing air pollution, or buying wetlands in another region to compensate for increased air and water pollution. One difficulty with mitigation is that it may not actually cause a reduction in the harmful pollution at the site itself, since mitigation could potentially take the form of positive environmental action in other regions.

Thus, EPA needs to require that any mitigation measure undertaken must solve problems at the actual site, and not deal with an unrelated problem that has no bearing on the community where the facility is to be located.[31] This means keeping mitigation at the site, and concentrating mitigation on the medium specifically claimed to be causing the violation. There is no sense in allowing for reductions in water pollution at a site if the air pollution is the focus of the complaint.[32] This would appear to be the only way to truly address Title VI concerns. Buying wetlands in another region will not help minority communities who are exposed to disproportionate environmental impacts.

b. Offsets

One confusion that EPA needs to clear up is what it means by "offsets." Offsets can be promises by a polluter to reduce pollution at other facilities in exchange for keeping emissions high at the disputed facility. Or offsets can mean allowing the polluter to send pollution to another area in exchange for having to reduce its pollution at the disputed facility. Assuming EPA means reducing pollution at other areas, this is inadequate to address Title VI concerns. Only offsets that apply to the specific neighborhood directly affecting the complaining community would reduce an adverse impact as required by Title VI. Otherwise, a facility's emissions could pollute an area in violation of Title VI, while pollution is reduced in areas where it does not require reductions (perhaps, ironically, in white neighborhoods, the result Title VI is intended to prevent).

Assuming EPA intends to give due weight to offsets, there are significant possible problems. Implementation of pollution offsets (in this case allowing for more pollution in another

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[31] "The significance of the adverse environmental impact of the particular agency action can not be obviated by pointing to the beneficial environmental impact of a different and unrelated action." *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982). *See also* Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 831 (1999) ("EPA should amend its supplemental mitigation proposal to require that any mitigation address similar health or environmental risks as those caused by the project").

[32] *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 189-90 (1998) (stating generally that the success cross-media mitigation measures are difficult to establish since a baseline comparison to classic regulation is difficult).

area to compensate for having to reduce emissions at the complained-about site) will necessarily reroute pollution to other areas that may also bear a disproportionate burden of air pollution.[33] As a result, Title VI's core purposes will not be achieved by this sort of scheme. It will be a "rare situation" that the extra pollution created in another area will be placed in an area inhabited by rich, white, property owners. Instead, it would invariably be most economical for a company to deposit its offset pollution in an area that is poor and relatively powerless. Giving companies an incentive to pollute in other poor areas by advocating offsets for Title VI violation areas does not solve the problem of disparate impact, it merely moves it somewhere else.

If EPA wishes to use offsets in a Title VI context, it should limit the recipient of the offset pollution to communities that do not experience adverse disparate impact, and *would* experience no adverse impact as a result of the offset. By limiting the offset destinations, EPA can ensure that the goals of Title VI are not defeated.

c. Abatement procedures should be avoided as they place the burden on the host community.

Abatement procedures are generally those measures that involve reducing chemical exposure by attacking exposure routes that might exist in the homes of the community residents experiencing adverse impact or elsewhere in the community, but not the emitting facility itself. Abatement procedures by their very nature ignore the serious pollution problem that creates the violation in the first place, and as a result, abatement will not in all likelihood solve the root cause of the problem – the emissions that create an adverse impact.

By not addressing the facility actually emitting the pollutant, and rather assigning responsibility for unhealthy conditions to low-income home owners (as in the case of lead), no effective solutions can be truly formed. Given that the data for a source of emissions is much easier to interpret than possible extra-site sources of pollution, the first source targeted for controls should be the sited facility. While data is understandably difficult to ascertain, clearly some polluters are worse than others and no amount of abatement will make up for their emissions.

Until the main source is cleaned up, all abatement measures will likely prove ineffective. It is unlikely that any abatement measure will conclusively eliminate the basis for a Title VI complaint. Allowing abatement as a mitigating factor in rare cases where abatement may be considered will not solve the Title VI problem and should not generally be granted due weight. EPA should restrict the use of abatements as mitigating features to only those circumstances

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[33] *See Communities for a Better Environment v. South Coast Air Quality Management Dist*., EPA File No. 10R-97-R9, filed June 23, 1997 (generally alleging that source pollution, wherever it exists in the SCAQMD, is concentrated in minority communities); Vicki Ferstel, *The Advocate (Baton Rouge, LA)*, June 21, 1998, at 1A (reporting on a 1984 consultative report to the city of Los Angeles that recommended siting facilities in already highly industrialized neighborhoods in low-income neighborhoods).

where abatement is *proven* to be as effective as shutting the facility down completely.

d. The complainants and the affected community must endorse the mitigation measures chosen by EPA and recipients.

By allowing state agencies to submit a mitigation plan to OCR without consulting with the affected community, EPA lacks the input it needs to make a determinative finding. EPA can not adequately find that a mitigation plan will eliminate impact "to the extent required by Title VI" without checking with the community first to make sure they are comfortable with the plan. One of the first assumptions of democracy is that all information is colored by perspective. All perspective and voices are needed to make sound policy decisions. These democratic goals are not met if the decisions regarding solutions to Title VI violations are made without community input, by people who do not live where the violation is occurring. The assumption behind a Title VI administrative complaint is that the regulators and policy makers have failed to adequately assure equality of environmental condition. Moreover, excluding affected community members at a crucial policy making stage is fundamentally unjust, and will ultimately lead to EPA decisions that do not adequately address Title VI violations. It therefore seems illogical to exclude groups which have the crucial perspective needed to evaluate a plan from the process of plan approval.

EPA acknowledges the value of hearing community concerns and ideas when it recommends as most effective mitigation plans those which involve community groups that filed the Title VI complaint.[34] EPA should keep this in mind and strike the language on page 72 that reads "OCR may also consult with complainants, although their consent is not necessary," and replace it with "OCR will consult with complainants."

e. The overall efficacy of mitigation measures must be monitored.

Communities' main suspicion regarding mitigation procedures is that they will not actually work. If a state agency promises to carry out mitigation procedures, and then fails to do so or implements them inadequately, there is very little recourse for the community members affected. Even if the mitigation measures are faithfully put in place, there is no guarantee that they will actually work.[35] Therefore, it is important that EPA do two things to ensure that mitigation

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[34]Recipient Guidance at §II.B.6.

[35]*See* Michael G. LeDesma, Note, *A Sound Of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497, 500-501 (1994) (stating that wetland bank mitigation is generally unmonitored and in fact starts a race to the regulatory bottom among states); Daniel Jack Chasan, *Salmon; Ruling: Agencies Violate Law; So What? It Happens All The Time*, SEATTLE POST-INTELLIGENCER, March 19, 2000, at P-I FOCUS, Pg. G1 (stating again that wetland programs are ineffective and that generally, state environmental agencies do not follow the law with regard to their mitigation plans, at least in Washington state); Michael J. Bean, Testimony Before the Senate Subcommittee on Fisheries, Wildlife and Drinking Water, November 3, 1999 (stating generally that HCP mitigation efforts are underregulated, hard to enforce, and difficult to judge in terms of efficacy); Keith Rogers, *Employees Say Agency*

schemes will actually work.

First, EPA should make sure that third parties that are responsible for conducting mitigation (namely the polluters or state agency) actually do it. The Supreme Court's position in *Robertson v. Methow Valley*[36] is instructive in this regard. The Court there decided that mitigation schemes did not have to be proven sound in order for a project to be legal under NEPA, only that they must be discussed. But the Court insisted that this was because NEPA holds no requirement for substantive environmental protection, so no proof of such protection is required in a mitigation scheme.[37] Since in the Guidance EPA is looking toward mitigation schemes to provide substantive environmental protection, the original reliance standard set out in *Pierce*[38] and the Circuit Court's *Methow* opinion, and not the Supreme Court's *Methow* decision, applies. In short, if EPA wants to rely on third parties to provide mitigation that is supposed to guarantee substantive environmental protection, than those measures must work, and EPA must make sure they do. The easier standard should only be used in NEPA cases, where there is no requirement for substantive environmental protection. Regular EPA monitoring would be required in order to guarantee that mitigation measures were working.

Second, EPA should include administrative recourse for parties who put their faith in mitigation only to see it fail. While EPA grants that an area-specific agreement or other such mitigation scheme may be reviewed if circumstances change (*i.e.*, if it does not work), this review process seems to require a new permitting action in order to make the complaint ripe. And even then, community members must still wait while EPA investigates. Given what is at stake, EPA should allow for a direct review of mitigation measures if the scheme is accused of failure.

V. INVESTIGATIVE PROCEDURES

A. Submission of Additional Information

In §§ V.A and V.B.1, EPA states that recipients may submit evidence to support their position that disparate impacts do not exist "during the course of the investigation." This apparently conflicts with EPA deadline at §II.B.1 of the recipient having 30 days – and just 30 days – to rebut the complaint.

Retaliating, LAS-VEGAS REVIEW JOURNAL, December 9, 1998, at 1B (stating how Clark County Health District (NV) officials were accused of harassing employees who reported violations of mitigation schemes to EPA).

[36]490 U.S. 332 (1989).

[37] "Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." *Robertson v. Methow Valley*, 490 U.S. 332, 353 (1989).

[38]*Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982).

B. Granting Due Weight to Submitted Information

In general, the idea that EPA can dismiss complaints merely because a state agency claims it is in compliance with Title VI is contrary to EPA's obligations under the Civil Rights Act. EPA grants that these obligations exist, saying that EPA "cannot grant a recipient request that EPA defer to a recipient's own assessment." EPA resolves the contradiction between policy and obligation by saying that it will review state plans to make sure they are adequate. This promise is insufficient to legitimize the prima facie illegality of EPA's due weight policy under Title VI. EPA should be much more specific about its review process for both scientific studies and area-specific plans.

In §V.B, EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

1. Analyses or Studies

Requiring that studies that be granted due weight conform to "accepted scientific approaches" necessarily biases due weight in favor of industry and state agencies. Clearly, a low-income community group fighting for environmental protection is not generally going to have the resources to pay for a comprehensive study that meets EPA's standards. There is also evidence to suggest that EPA ignores studies by community groups, even when submitted in a scientifically acceptable fashion.[39]

Thus, it is likely that most studies of the area mentioned in a particular complaint will be filed by the party adverse to the complainant. This creates an obvious objectivity problem. How can EPA trust a study paid for and conducted by the agency whose funding is riding on the outcome of the study? Does EPA truly expect any result other than one that would lead to a finding of Title VI compliance? While the study itself must meet methodological criteria in order to pass muster with EPA, this seems to be inadequate to truly guarantee the objectivity of any such study. As former EPA Administrator William Ruckelhaus said, "a risk assessment is like a captured spy. Torture it enough and it will tell you whatever you want."

In addition, EPA's promise not to duplicate a study if relevant studies meet the methodological criteria seems foolish. In the unlikely event that a community group can actually afford a study, it is likely that their study and the one submitted by the state agency would reach opposite conclusions. Faced with such contradiction, there seems to be no way for EPA to

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[39] Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

resolve the matter except to make its own survey of the situation. While EPA is likely to argue that it can resolve any such conflict by examining the methodology of the two studies to see which is superior, this is inadequate. EPA itself grants that data and interpretation of data is difficult and it is certainly possible that two different studies can reach opposite conclusions even if conducted properly.

EPA should conduct its own studies, when able, because the standard for dismissing a study is too high. By denying due weight only to studies that have "significant deficiencies," EPA sets a standard for dismissal that allows for “moderately” deficient studies to be accepted. For example, if community residents complain of adverse impact, an agency study suggests that there are no impacts, and the study has "minor" deficiencies, EPA could grant the study due weight under the current Guidance. By making the standard "significant" EPA allows for too much inconsistency in studies that may result in unchecked violations of Title VI.

EPA should also do the following:

• If an agency study contains discrepancies, then EPA should not rely on it, instead of using the current “likely not” language in §V.B.1.

• Be flexible in allowing unscientific studies from community groups to have at least some weight, perhaps enough to trigger an EPA study. Understandably, EPA does not want to grant full weight to a study that does not conform to “accepted scientific principles.” But at the same time, EPA should be sensitive to the fact that many poor communities may not be able to pay for scientific studies, and out of respect for their means, EPA should grant those studies at least some weight.

• If a complainant requests that EPA conduct an independent study, EPA should not grant due weight to a study submitted by a recipient but should evaluate the recipient’s study in light of EPA’s own findings.

• If a recipient’s study is contradicted by external evidence or by studies submitted by complainants, EPA should conduct its own study.

2. Area-specific Agreements

EPA has taken a seriously wrong turn with its promotion of "area-specific agreements." Ostensibly put forward as a way for recipients to be more pro-active in identifying and working to remedy or prevent environmental justice problems (Recipient Guidance § II.A.2), these agreements turn out to be a part of EPA's Title VI enforcement plan (*see, e.g.*, Guidance § V.B.2). EPA encourages recipients to develop area-specific agreements (ASAs) which contain plans to eliminate or reduce existing disparate impacts. As an incentive, EPA will review such plans and if they meet certain criteria, they will be given “due weight” in a Title VI investigation. The precise role the Guidance ascribes to ASAs in the course of a civil rights investigation is both ambiguous and troubling. Despite EPA's assertions in § V.B. ¶ 1 that it "cannot grant a recipient's request that EPA defer to a recipient's own assessment,” the treatment of area-specific agreements

in essence does just that.

The Guidance suggests that unless certain criteria are met, plans "might not be sufficient to constitute an agreement meriting due weight." This suggests that "due weight" is a threshold rather than a range. This makes "due weight" operate like a presumption rather than a factor warranting typical evidentiary weight. This distinction is not merely academic. If a determination that an ASA merits "due weight" precludes further inquiry into the recipient's actions, then operationally it is an improper presumption of compliance with Title VI. For example, consider a hypothetical recipient who establishes an agreement that meets the "due weight" criteria because the plan it contains will optimistically result in some pollutant reduction over time. But the plan is mediocre at best and it is not as good as plans developed in other jurisdictions under similar scenarios. Nevertheless, if this plan meets the "due weight" threshold, the Guidance suggests that at that point the EPA will determine without further inquiry that the recipient is adequately responding to the disparate impact and therefore is not violating Title VI. In such a case, a mediocre plan operates just as effectively in a Title VI investigation as a much more comprehensive plan. If interpreted this way, the Guidance promotes the perverse incentive for recipients to do the minimum necessary to trigger the "due weight" determination and insulate the recipient from an adverse Title VI decision. Once again, EPA hurts the civil rights complainant and rewards the civil rights violator.

EPA proposes to rely on its findings about such a *general agreement* to dismiss a *specific complaint* alleging violations of the agency's Title VI regulations. It is difficult to see how this would fulfill EPA's legal responsibilities under Title VI, which require the agency to investigate the complaints that are filed. EPA could not itself legally adopt a policy that said, "We will dismiss all Title VI complaints brought against recipients which have announced that they are trying to address environmental justice issues in some fashion, without determining whether the complaints of actions in violation of the regulations are in fact justified." But by proposing in the Guidance to rely on area-specific agreements, EPA manages to adopt such a policy by the back door.

The construct of area-specific agreements thus has no basis in law, and indeed flies in the face of EPA's legal obligations. Even if one were to assume that the notion of the area-specific agreement were legitimate, it is completely devoid of any features that could assure the recipient's compliance with any goals of pollution reduction, pollution prevention, or environmental justice. There is no requirement that anyone monitor progress, or revise the plan to meet changed circumstances. There is no requirement that the community groups that are parties to such an agreement be able to enforce it in court. The only thing about the area-specific agreement that has *any* enforceable consequences is EPA's proposal to use it to dismiss complaints without deciding whether the complaint, considered on its own, has merit. The agreement is voluntary and informal. There is no requirement that the any of the parties actually represent any people in any affected community, or that any party has the power to deliver what it is promising. There is no provision for any EPA evaluation of these issues. EPA appears to be prepared to take any area-specific agreement at face value, no matter how unrepresentative the process by which it was arrived at, how unrealistic the goals it announces, or unfair the result of its application to preclude particular complaints.

This advocacy of an informal, unenforceable, uncontrolled method to preclude investigation of Title VI complaints is a disgrace. It should be completely eliminated in favor of what this Guidance should have presented, but did not: a program of civil rights enforcement, in which EPA informs recipients of their obligations to obey federal civil rights law, provides examples of what this means, and decides whether recipients who are complained against have failed to live up to their legal responsibilities.

With regard to ASAs and due weight in general, EPA should carefully consider the lessons learned from the experiences with states under the Clean Air Act. The due weight provisions of this part of the Guidance are strikingly similar to the theory if not the practice of certifying state implementation plans under the Clean Air Act. Those plans have not been universally successful, and indeed, in some cases appear to give states a blank check to continue polluting with little or no enforcement threat from EPA. As of December 13, 1999, 119 areas around the country were in nonattainment for one or more listed air pollutant, 29 years after the passage of the Clean Air Act.[40]

EPA must not repeat the mistakes it has made under the Clean Air Act. Some examples of these failures are: 1) constantly granting interim approval to inadequate state permitting schemes resulting in slow action by states to correct them; 2) certifying SIPs only to see them ignored by states (leaving enforcement to citizen groups[41]); and 3) many urban areas of the country still contain unhealthy air that do not meet the NAAQS some thirty years after the passage of the Clean Air Act. The easiest thing that EPA could do is to be less conditional in its enforcement language in the Guidance. Let state agencies know that if they violate EPA regulations, they will indeed be held accountable. For example, by saying that EPA *may* investigate if the ASA is inadequate, EPA is sending a message that it is not serious about making state agencies abide by the law. This is a mistake.

EPA should drop ASAs altogether. The ASA framework completely ignores the reality and the history of the environmental justice movement, and will only end up hurting, not helping the communities in need.

a. EPA penalizes complainants by using ASAs in later-filed complaints.

The practical consequences of a threshold-type "due weight" standard are more disturbing considering EPA's position that if a later-filed complaint raises allegations regarding "other permitting actions" by the recipient, EPA will generally rely on the earlier finding (presumably of due weight) and dismiss the complaint. Not only does the existence of an ASA act as an evidentiary presumption in the current Title VI investigation but, remarkably, it effectively

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[40] <http://www.epa.gov/airs/nonattn.html> checked on July 5, 2000.

[41] *See Coalition for Clean Air, Inc. v. South Coast Air Quality Management District* (C.D. Cal. 1999) 1999 U.S. Dist. LEXIS 16106; *Citizens for a Better Environment v. Bay Area Air Quality Management District* (N.D. Cal. 1990) 746 F.Supp. 976.

operates as *res judicata* or *collateral estoppel* in subsequent Title VI proceedings.

The Guidance goes on to limit this disturbing "due weight" provision by two exceptions: (1) for improperly implemented agreements; and (2) when circumstances have changed substantially so that the agreement is no longer adequate. The presence of these exceptions raise further ambiguity. Normally, one would presume that new permitting actions *per se* constitute a change of circumstances, as they typically result in substantially more (new) emissions into the impacted area. If this is the Agency's position, the Guidance should clarify that new permits, modifications or renewals that result in an increase in emissions categorically constitute "changed circumstances" such that the existence of an ASA is no longer is entitled to "due weight."

b. Area Specific Agreements are a majoritarian impulse that has no place in civil rights enforcement.

The lack of any EPA quality control and the potentially preclusive effect of ASAs create an open invitation to fraud. Recipients – and even more, polluters and developers – have every incentive to draft a fine-sounding plan, set up a few front groups of employees, friends, and/or relatives of the industry or developer, and have the front groups sign the plan. Then, after a group whose members are actually residents of the affected community of color files a Title VI complaint with EPA, the recipient triumphantly produces the area-specific agreement for EPA's review, with the expectation that the complaint will be dismissed.

At base, ASAs are a majoritarian impulse: get agencies and community leaders to agree on what is best for a community, and then preclude complaints about that agreement. However, Title VI was passed to protect minority interests from just such majoritarian tyranny – to protect community residents who disagree with their governments and "leaders." As such, ASAs have no place in Title VI enforcement.

C. Submission of Additional or Amended Complaints

EPA should understand that some submissions by complainants with complaints under investigation are not new complaints or amendments, but simply evidence of a pattern of discriminatory impact by a recipient. In these situations, the EPA should not accept or reject the new information as if it were a complaint, but use it during EPA's investigation of the underlying complaint.

D. Discontinued Operations/Mootness

If a complaint alleges a pattern of discriminatory siting, as evidenced by a particular facility, it would be inappropriate to dismiss the complaint if the facility's operations are discontinued. EPA should continue to investigate the pattern of discrimination. This situation arose in *Residents of Sanborn Court v. California Department of Toxic Substances Control*, No. 02R-95-R9, in which the facility was closed but the discriminatory pattern of siting by DTSC continued unabated.

E. Filing/Acceptance of Title VI Complaint Does Not Invalidate Permit

The Guidance states that the OCR will not consider a complaint until the permit has issued, and further that the submission of a complaint will not stay the permit. This means that the most meritorious Title VI complainants will nevertheless experience a substantial lag time and possibly irreversible impairment to their communities before any relief is provided. Considering the current backlog of cases, even the most flagrant violators can expect to continue plainly illegal practices for years, even decades, before any sanctions occur. Yet, in light of this troubling potential situation, the Guidance contains no provision to consider the stay of a new permit (and associated adverse impacts) pending an investigation in cases which would warrant a temporary injunction in an analogous court proceeding. EPA's failure to stop the permit complained about from going into action during the investigation of a Title VI complaint discourages the resolution of Title VI complaints. Because EPA is refusing to stay the permit in question, the agency being complained against has no incentive to either change its practices or resolve the Title VI complaint.

EPA has not ever decided a Title VI complaint against a state or local agency. In fact, of the almost 100 complaints filed in the past 7 years, EPA has only decided one – and in that one, it decided it against the complainant and for the state of Michigan. Some 51 complaints are pending at the time this comment is filed, and there is no hope for resolution of those cases anytime soon. With this record, state agencies have no fear of EPA's Title VI enforcement when the agencies see a new complaint come in, because they know EPA will never do anything about it.

By refusing to stay permits while a complaint is investigated, EPA is guaranteeing that communities' civil rights will be violated. Rather than practicing a precautionary principle – first, do no harm – EPA lets the violation go on, unchecked, for years. If, instead, the permits were stayed, then agencies would move to quickly resolve the complaints, leading to actual civil rights improvements.

VI. DISPARATE ADVERSE IMPACT ANALYSIS

A. Framework for Disparate Adverse Impact Analysis

A troubling aspect of the new EPA civil rights policy is found in §§ VI.A (steps 1 and 4) and VI.B.1.a. In § VI.A, step 4, the Guidance states that "if a permit action clearly leads to a decrease in adverse disparate impacts, it is not expected to form the basis of a finding of a recipient's non-compliance with EPA's Title VI regulations and will be closed." Similarly, section VI.B.1.a notes two situations "where OCR will likely close its investigation into allegations of discriminatory effects":

(1) If the complaint alleges discriminatory effects from emissions and the permit significantly decreases overall emissions; and

(2) If the complaint alleges discriminatory effects from emissions and the permit

significantly decreases the pollutants of concern named in the complaint.

Two examples of how this new policy of EPA's will allowed continued discriminatory effects on communities of color throughout the U.S. illustrate why it is flawed, and should be withdrawn.

First, let's look at the "multiple similar sources of pollution under the control of one jurisdiction" example. In this example, imagine that a particular state has three power plants, each of which emit 100 tons of toxic chemicals per year. Two of the power plants are located in white communities, and one in an African American community; the state is roughly 66 percent white an 33 percent African American, so there is no disproportionate distribution of the plants themselves. Each plant comes up for review of its new permits. The state grants a permit to plants #1 and #2, both in white communities, which impose new pollution control techniques that both require and enable the power plants to emit only 25 tons per year of toxic chemicals. It also grants a permit to plant #3, in the African American community, but there, it imposes permit conditions that only require the plant to reduce its emissions to 75 tons per year of toxic chemicals. Is this discriminatory impact? Clearly – the African American community is forced to bear 50 tons more toxic chemicals than similarly situated white communities. What would EPA do? Well, under this Guidance, EPA would determine that the permit reduced the tons of emissions from power plant #3 by 25 tons – and 25% is certainly a "significant reduction" in emissions in anyone's book – and would thus dismiss the complaint. Thus, EPA, far from enforcing civil rights laws, would, through this new guidance, allow continued discrimination. We pointed out this same flaw in EPA's Interim Guidance, but that input was ignored.

The second example is the "unique source." Let's say there is a pollution source that is unique in a particular jurisdiction, for example a medical waste incinerator. There is only one in the entire state, and it is located squarely in the middle of a Latino and African American community. Now, the hypothetical plant emits 100 tons of toxic chemicals each year, and that pollution clearly has adverse impacts, and those impacts are clearly disparate on the basis of race. The plant has been there 20 years, and now comes in for a permit renewal. The agency gives it a permit, but says to the plant, "you have to reduce your emissions to 75 tons per year." The new permit will still have significant, disparate adverse impact – 75 tons per year of toxic pollutants borne by people of color and not whites – but it is a *reduction* from the old permit. A clear violation of civil rights. What would EPA do? Under this Guidance, EPA would determine that the permit reduced the tons of emissions from the incinerator by 25 tons – again, a "significant reduction" – and would thus dismiss the complaint. Thus, EPA would again avoid enforcing civil rights laws, and would allow continued discrimination.

Even if projects do decrease the total pollution, the emissions, even with the reductions, could still result in disparate impact. Title VI and EPA regulations make it illegal for a federally-funded program or project to discriminate, intentionally or unintentionally, against people of color. The Guidance should not make exceptions for disparate impact by allowing projects that are only *less* discriminatory than an alternative, or than the project originally was.

B. Description of Adverse Disparate Impact Analysis

EPA's Title VI regulations prohibit federally funded programs and projects from having a disparate impact on people on the basis of race, color, or national origin. EPA must revise at least two sections of its impact analysis to comply with that charge. First, the Guidance currently allows recipients to discharge hazardous amounts of pollutants in exchange for reducing overall pollution in a way that has a disparate impact on people of color. Second, it sets forth a dangerously narrow view of impact. We address both of these flaws in their respective sections, below.

1. Assess Applicability

a. Determine Type of Permit

According to the Guidance, EPA will likely dismiss a complaint if the permit action that triggered the complaint significantly decreases overall emissions at the facility. To prevail, the recipient must demonstrate that the decreases occur in the same media and facility. For instance, EPA will not dismiss a complaint alleging adverse disparate impact from air discharges where the recipient demonstrates a decrease in water discharges.

The Guidance should also require the recipient to show that the decrease came from the *same pollutant* within that same media. Trading different pollutants from the same media can adversely affect communities of color in violation of the regulations implementing Title VI. Because different air pollutants have different properties, they interact differently, and affect humans and the environment in different ways. Air pollutants are not interchangeable. Some air pollutant emissions spread out throughout a basin, while others hover, affecting primarily the immediate area. Other air pollutants are highly toxic, while some are relatively benign. For EPA to treat all air pollutants as the same for purposes of "overall emissions" reduction is to ignore the very real health consequences that reductions in relatively non-toxic chemicals – and increases in more toxic chemicals – can have. For instance, if OCR dismisses a Title VI claim because a facility has reduced its emission of SOx, bringing down its overall air emissions, but emits larger quantities of vinyl chloride, persons located in the vicinity of the facility likely will face dire adverse impacts. The Guidance should state that in order to show that the permit action triggering the complaint significantly decreases the overall emissions at the facility, the recipient must demonstrate that the decreases occur within the same media, *pollutant* and facility. Thus, if a facility emits toxic and relatively non-toxic pollutants, it should not be allowed to trade one for the other for the purposes of "significantly reducing" its emissions overall.

In footnote 117 in §VI.B.1.a, the Guidance notes that "if OCR determines that an area-specific agreement meets the criteria described [earlier]... then investigations into future complaints regarding permit actions covered by the area-specific agreements generally will be closed." We refer to our comments on §V.B.2, above, but also point out that this is completely antithetical to civil rights enforcement and goes far beyond EPA's regulations in narrowing EPA's Title VI obligations. Simply because a permit is covered by an area-specific agreement does not mean that it will not have disparate impact on the basis of race, color or national origin. Further, the ASAs do not measure conditions on the ground and thus cannot be dispositive of whether or

not there is disparate impact. Finally, because EPA would apply the ASA dismissal to future complaints, it is effectively telling people in jurisdictions with ASAs that EPA will never enforce civil rights in their communities – a flagrant disregard for Title VI and EPA's obligations to enforce it. This is yet another example of EPA hurting the civil rights complainant, and helping the civil rights violator.

Here again EPA asserts it may conduct compliance reviews even if complaints are dismissed on the basis of a decrease in permitted emissions. As we have noted in §§ III.A, III.B.1 and V.B, the fact that EPA has the authority to undertake such a review is no solace to complainants. As a practical matter, EPA is incapable of timely investigating the 51 complaints currently pending before it, much less undertaking independent *sua sponte* compliance reviews.

Please also see the comments under section VI.A, above.

b. Determine if Permit is Part of an Agreement to Reduce Adverse Disparate Impacts

The EPA should not defer to Area Specific Agreements, because such agreements are conceptually flawed and may also not mirror the reality on the ground. Please also see our comments on §§ V.B.2 and VI.B.1.a, above.

2. Define Scope of Investigation

In §VI.B.2, EPA again illegally limits the scope of its investigation and enforcement to only impacts "cognizable under the recipient's authority." This arbitrary and artificial limitation on which impacts will be examined ignores the fact that the recipient may be the proximate cause of the impacts complained of – that the impacts would not occur but for the recipient's actions, whether or not such impacts are "cognizable under the recipient's authority." This is a radical narrowing of EPA's Title VI enforcement from the mandate found in Title VI itself and EPA's Title VI regulations. A better approach would be to encompass those impacts within a recipient's *control*, so that when a recipient was the proximate cause of an impact, it would be liable under Title VI for that impact.

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving federal financial assistance.[42] Nothing in Title VI limits its application to "discrimination on the basis of race, color or national origin *which manifests itself in ways cognizable under the recipient's authority*," as the Guidance would read it.

EPA's regulations under Title VI explicitly codify the disproportionate impact, or discriminatory impact, standard. Under 40 CFR §7.35(b),

[42] 42 USC §2000d (1988).

> A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of substantially defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

Nothing in this regulation states that a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *cognizable under the recipient's authority* because of their race, color or national origin." The regulations simply say, a recipient cannot take actions which have a discriminatory effect. Period.

This is yet another example of EPA taking a policy position in clear conflict with its own Title VI regulations. It is also yet another example of EPA taking a policy position which hurts the civil rights complainant and helps the civil rights violator.

We also endorse and join in the comments of the Georgetown Legal Clinic on this section.

a. Determine the Nature of Stressors and Impacts Considered

The Guidance construes "impact" in an unacceptably narrow way. According to the Guidance, impact is "a negative or harmful effect on a receptor resulting from exposure to the stressor," and, "generally, a stressor is any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems." This definition does not take into account the social, cultural or economic impacts of projects, and is a significant narrowing of both Title VI and EPA's Title VI regulations, neither of which limits impacts solely to health impacts. Looking again at 40 CFR §7.35(b), quoted above, nothing in the regulatory language says a "recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination *in terms of health impacts* because of their race, color or national origin." Here again EPA is hurting the civil rights complainant and helping the civil rights violator, in dramatically limiting the scope of its investigation. This narrowing is far more limited than 40 CFR §7.35(b), putting the Guidance once more in conflict with its own regulations.

In Title VII and Title VIII cases, the basic inquiry is whether a policy has a disproportionate impact on people of color "in the total group to which the policy was applied."[43] Here, the corresponding inquiry is whether the program or the stressor has a disproportionate impact based on race, color, or national origin. It is EPA's power and duty to consider all impacts, including health, social, cultural and economic.

Although we feel this is unnecessary, if EPA needs to hang its enforcement of civil rights on environmental statutes, there are ample opportunities for it to do so. The purpose of

[43] *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4th Cir. 1989).

environmental statutes is often not only to prevent health impacts but also aesthetic injuries. For example, the Clean Water Act states in §101 that a primary purpose of the Act is to make water swimmable and suitable for recreation. The National Environmental Policy Act similarly requires environmental impact statements to consider not only the health impacts but also the social impacts that major projects will have on a community before commencing those projects.

As Tseming Yang has written, the accustomed dependency on hard, quantifiable evidence and its illusory authoritative power has obscured the understanding of discrimination and environmental justice by many involved in environmental regulation. In fact, EPA's heavy reliance on exactly such considerations, such as risk and exposure assessments, toxicity-weighting, pollutant concentrations, ambient air quality standards, and statistical analysis in its disparate adverse impact analysis of administrative complaints under Title VI of the Civil Rights Act of 1964 fall exactly in this way of thinking. It is unlikely that a civil rights complaint process directed at analyzing quantifiable factors will adequately and fairly judge the many intangible concerns, including aesthetic, dignitary, and social impacts, that environmental justice communities complain of. After all, it is all too frequent to think that "[i]f you can't count it, it doesn't exist."[44] Of course, quantitative analysis and especially statistical analysis has been used in other discrimination contexts, such as in employment discrimination. However, unlike the careful consideration that incommensurable values receive in the judicial adjudication context, given the traditional heavy reliance and dependence on quantifiables, it is highly unlikely that EPA will be able to overcome the tendency to undervalue the intangibles without utilizing a process that is significantly different from its traditional decision-making processes or that pays special attention to such intangibles.

i. EPA must consider cultural and social impacts.

To illustrate the cultural impacts a project can have, consider a situation in which a company proposes to build a factory that would have the effect of destroying a piece of land which was culturally significant to a certain protected class – say, for example, a Native American burial mound or a historical African American church. In such a situation, the activity that destroyed the cultural resource would clearly have a disparate impact on the basis of race, but that impact would not be a health-based impact. Under EPA's Guidance, a Title VI claim in this context would be rejected. This is an illegal narrowing of EPA's Title VI enforcement responsibilities.

Federal courts repeatedly have rejected the narrowing of Title VI which EPA proposes here. Instead, the courts have construed disproportionate impact to relate to the impact of the project as a whole. In *Bear Lodge Multiple Use Association v. Babbitt*, a Title VI case, the court construed impact broadly to include cultural, spiritual and religious impacts.[45] Several Native American Nations consider Devil's Tower the place of creation and hold their religious and

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[44]Laurence H. Tribe, Trial by Mathematics: Precision And Ritual in The Legal Process, 84 Harv. L. Rev. 1329, 1358-68 (1971).

[45]*Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (1999), *cert. denied* (2000).

cultural practices there. Devil's Tower is also a recreation spot for avid rock-climbers. The National Park Service considered the impact of the climbing activity on the cultural and spiritual life of Native Americans, to protect the cultural resources of Devil's Tower and to provide visitor enjoyment. The NPS developed a Climbing Management Plan. The plan, among other things, restricted climbing at the Tower during certain times. The Court upheld the NPS's decision and supported the view that preservation of the cultural quality of the site was an appropriate consideration.

In other Federal Civil Rights cases, plaintiffs have raised social and cultural impacts. In *Grimes v. Sobol*,[46] plaintiffs alleged that a public school curriculum discriminated against African American students, and contributed to the low self-esteem and high crime rate, of African Americans. In *Allen v. Wright*,[47] the court acknowledged that stigma was a legally cognizable injury. In *Rozar v. Mullis*,[48] plaintiffs alleged injury to property values and welfare as well as to health. In none of these cases did the court deny or dismiss the claim because cultural injuries were not appropriate.

ii. EPA must consider economic impacts.

The Guidance also fails to consider economic impacts, although one of the central truths of environmental discrimination is that it has profound economic impact on people of color. Even facilities that do not have a demonstrable health impact often have a dramatic impact on housing and land values; where such impact is distributed in a discriminatory pattern, Title VI clearly applies. EPA's failure to consider economic impacts again hurts the civil rights complainant and helps the civil rights violator, and is a marked limitation of its own Title VI regulations. To further this unfairness, ironically, EPA *is* willing to consider the *positive* economic effects of the permit, as "justification" for the facility offered by the recipient.

The Guidance's definitions fail to fully reflect the true impact of facilities that require environmental permits. To choose to limit the definitions construing impact solely as health impact, is artificial, arbitrary and capricious.

iii. EPA must change other sections of the Impact Analysis.

In clarifying that impact extends to injury of cultural and social life, EPA will need to adjust some sections of its impacts analysis. For instance, in step 5 of the impact analysis, (disparate impact), the Guidance explains that if there is a health impact, OCR will consider the complaint regardless of the complainants' proximity to the stressor, so long as there is a pathway.

This recognition is significant because injury does not always correspond with proximity.

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[46]832 F. Supp. 704 (1993).

[47]468 U.S. 737 (1984).

[48]85 F.3d 556 (11th Cir. 1996).

For example, if African Americans attend a Baptist Church in a white section of town, and a large factory is built next door to that church, the white residents might not be adversely affected but the African Americans who attend the church will be. The Guidance should state clearly that OCR is to consider all impacts arising from the permitted facility, including health, cultural, social and economic impacts, regardless of the complainants proximity to the stressor.

The same applies to the impact assessment, step 3 of the impact analysis, in which OCR inquires into whether there is a "direct link" from the stressor to an adverse health or environmental impact. Currently, that approach does not take into account a direct link from the stressor to social, cultural or economic impacts. The Guidance should consider all the discriminatory effects arising from stressors that EPA regulates.

The EPA is required to comply with Title VI which prohibits racial discrimination. In that vein, EPA should revise its subsection that exempts recipients who show a decrease in overall pollution from the Title VI complaint process, and clarify its impacts analysis to include social, cultural and economic impacts.

Please see our comments on §VI.B.2 on EPA's policy of only considering impacts that "are within the recipient's authority to consider." We believe this policy has the perverse outcome of punishing states (like California) that have permitting processes that consider comprehensively a facility's impact, and rewarding states with weak environmental oversight.

b. Determine Universe of Sources

We note that in many situations, additional emissions of a particular substance are by definition adverse – for example, adding more carcinogens to any particular environment will cause adverse impacts.

3. Impact Assessment

EPA's "hierarchy of data types," found in §VI.B.3, should move "known releases of pollutants or stressors into the environment" into the top position on the hierarchy, certainly above modeled exposure concentrations.

EPA calls for a "direct link" between an adverse health or environmental outcome and the "source of the stressor." This, as the EPA well knows, is virtually impossible except in the most egregious cases of toxic poisoning. Further, as EPA notes, it may require data gathered longitudinally over years – far longer than the 180 days which EPA gives complainants to assemble data and file a complaint – to discover such a link. Further, there may be impacts which do not manifest themselves for many years after exposure, such as certain types of cancer. Thus, EPA should focus on exposure to pollution, not only health outcomes.

4. Adverse Impact Decision

The Guidance suggests that where risks or other measures of potential impacts meet or

exceed a relevant "significance level," the impact will be presumed adverse. While this may be a good approach, EPA should not make the converse assumption, *i.e.*, a presumption of no adverse impact if a significance level is not exceeded. It is not unheard of for permit applicants and regulatory officials to manipulate baselines and emission factors to keep from triggering applicable significance levels. This risk is likely to be greater in those very cases that Title VI is designed to address, cases where regulatory agencies have an inappropriate bias in favor of the regulated community to the detriment of residents near the polluting facilities. Thus, even in cases where significance levels are *not* exceeded, EPA should investigate further to determine whether the significance determination was made in a supportable manner. Even if made in a supportable manner, EPA should also consider the context of the significance determination. For example, a community with troubling health indicators and/or expected emission increases from other facilities in the area makes the community more vulnerable to the emissions increase of any particular operation, albeit "insignificant" in isolation for regulatory purposes.

EPA should also keep in mind, as discussed below in §VI.B.4.b, that significance thresholds are not set by science but through a political process which is subject to influence by industry and rarely subject to influence by affected communities.

a. Example of Adverse Impact Benchmarks

EPA's use of a significance threshold of 1 in 10,000 to define "adverse impact" is extremely loose, more so than every single EPA regulation establishing significance thresholds, where such thresholds range from 1 in 100,000 to 1 in 1,000,000. EPA should consider a cancer risk of greater than 1 in 1,000,000 an adverse impact.

In its example of using the Hazard Index, it appears that EPA will only use the benchmark to find against complainants, but not to find for them. EPA states that a hazard index score of under 1 would make it "unlikely" for EPA to find the impact adverse, while values over 1 – the significance threshold for many regulations – would not trigger EPA's automatic finding of adversity. This double standard is again a policy decision EPA has made which hurts the civil rights complainant and rewards the civil rights violator.

b. Use of National Ambient Air Quality Standards

The Guidance sets forth EPA's policy position that if the area in question is in compliance with a health based standard ambient air quality standard, there is no "adverse" impact. The Guidance further suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. In the context of the backlog of cases, intense political pressure from industry and some state regulators, budget constraints, this facile presumption is not only a recipe for regulatory inertia, but a convenient escape hatch as well. Moreover, since the complainant does not have standing as an "adverse party," and the recipient will not challenge such a finding, the OCR is in the awkward position of having to rebut its self-imposed presumption. This procedural deformity is a consequence of the EPA's curious attempt to cast the process as non-adversarial with respect to the complainant, while at the same time affording the recipient the protections (and more) of an adjudicative,

adversarial process. Perhaps the better approach would be to recognize that the because the complainants' civil rights may have been violated by the recipient, the process is necessarily adversarial, even though the proceedings are labeled an administrative investigation. Moreover, since the recipient has significantly more resources than the complainant, EPA should be extremely cautious in imposing procedural roadblocks that operate to leave the complainants without recourse. The use of the presumption – which is wholly unsupported, as detailed below – is a burden on complainants, another example of where EPA hurts the civil rights complainant and helps the civil rights violator.

In addition to the procedural burden on complainants, EPA's reliance on the National Ambient Air Quality Standards (NAAQS) is misplaced, because an air basin's attainment status under NAAQS does not mean a polluting facility will not have an adverse impact on the surrounding community.[49] EPA's reasoning is flawed because polluting facilities can still have an impact on a community even when NAAQS are met. EPA's rationale – that attainment under NAAQS equals no adverse impact – is factually incorrect and conceptually flawed on six different grounds: it ignores toxic hotspots, ignores the fact that significant health effects can occur at exposure to air pollution levels below the NAAQS, ignores that "health-based" standards are set through a political process, ignores acute health effects of exposure to VOCs, ignores accidents and upset conditions at plants, and ignores the fact that health based standards are normed on healthy white males. These deficiencies are detailed below.

First, the EPA's rationale ignores toxic hotspots, or localized impacts from air pollution sources that do not cause an area-wide effect. U.S. environmental history is replete with examples of facilities that have had a significant impact on the health of nearby residents, while the air basin remained in compliance with NAAQS. Such local impacts may be diluted or lessened when averaged or spread across an entire air basin. This is particularly true for some VOCs, such as toxic air contaminants, which have their greatest effect when they are most concentrated, and for lead, which tends to "fall out" close to its source of emission. The general determination that an area is in compliance with NAAQS – although perhaps appropriate for SIP planning purposes – may be virtually meaningless at the local level. Air sheds that are "in attainment" contain unhealthy hot spots that go undetected because of the placement of the monitors or because modeling methodologies are not completely reliable. They also do not take into account the localized effect of non-compliance, which is an unfortunate but common occurrence.

Second, EPA's presumption that compliance with ambient air quality standards equals no impact ignores the fact that significant health damage can occur at exposure levels well below the

[49]EPA's approach also appears to contradict its statement in the Recipient Guidance, at §III.B.3.e, that "risks [which] meet or exceed a significance level as defined by law, policy *or* science... would likely be recognized as adverse in a Title VI approach." (Emphasis added) In relying on the NAAQS, EPA is embracing only law, ignoring the fact that both science and public policy indicate that exposure to pollutants at the NAAQS levels is harmful to human health.

NAAQS levels. Researchers funded by the EPA have found significant health damage to humans exposed to pollution at levels lower than EPA's "health-based" standards. For example, researchers at Loma Linda University studied more than 6,000 non-smoking volunteers over 15 years to determine the impact of ozone and other airborne pollutants on them. The study found that men exposed to ozone levels of 80 parts per billion (ppb) -- EPA's 8-hour "health-based" NAAQ standard – ran three times the risk of lung cancer as men exposed to lower levels. Additionally, both men and women regularly exposed to levels of particulate matter lower than the NAAQS of 50 micrograms per cubic meter ran an increased risk of lung cancer. Both men and women exposed to elevated levels of sulfur dioxide also ran an increased risk of lung cancer.[50] Other studies have demonstrated that long-term exposure to low levels of lead can also have significant impact to kidney function.[51]

One can see how EPA's new policy plays out in practice by examining the recent *Select Steel* decision,[52] in which EPA dismissed a Title VI complaint because the facility complained of, the Select Steel mill in Flint, Michigan, would not have caused the state to violate the NAAQS for ozone. According to Michigan state records, Flint's average 8-hour ozone levels were between .082 and .086 parts per million (ppm) in 1996-1998. Not only does this violate EPA's health-based standard of .080 ppm, but it is also above the 80 ppb (=.080 ppm) level at which EPA-funded researchers found significant health impacts. In the *Select Steel* decision, EPA equated this level of ozone pollution – which caused levels of lung cancer three times normal and was actually *above* the NAAQS – with "no adverse impact."

EPA's rationale also ignores the fact that the setting of "health-based" standards for air pollutants such as ozone is partly a political process, in which the standards are often set based on negotiation with industry. Nor are the "health-based" standards infallible: in case after case, new, more restrictive standards have been promulgated when the existing "health-based" standard has proven inadequate. Examples include the failure of government to set correct or adequate standards for blood lead levels – the Centers for Disease Control has lowered the "safe" blood lead levels from 40μ/dl to 25μ/dl to 20μ/dl to today's current 10μ/dl over the past 15 years -- to the constant readjustment of buffer zones and re-entry intervals for pesticides in agriculture. Further, significant data gaps exist, particularly in the area of volatile organic compounds (VOCs), which make it impossible to state with certainty that exposure to such chemicals -- even at "safe"

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[50]W. Lawrence Beeson, David Abbey and Synnopve Knutsen, *Long-term Concentrations of Ambient Air Pollutants and Incident Lung Cancer in California Adults*, 106 ENVIRONMENTAL HEALTH PERSPECTIVES 813-823 (December 1998).

[51]Ja-Liang Lin, Huei-Huang Ho and Chun-Chen Yu, *Chelation Therapy for Patients with Elevated Body Lead Burden and Progressive Renal Insufficiency,* 130 ANNALS OF INTERNAL MEDICINE 7-13 (January 1999).

[52]*St. Francis Prayer Center v. Michigan Department of Environmental Quality*, EPA File No. 5R-98-R5.

levels -- will not have an impact.

EPA's reasoning does not take into account acute health impacts of exposure to VOCs, and also omits the cumulative physiological and psychological effects of environmental pollution from trucking, odors, noise, vibrations and stigma, which all increase human stress. There is considerable evidence that exposure to air pollutants such as VOCs causes increased stress.[53]

Overlooked in EPA's analysis, but perhaps of greatest consequence of all to communities adjacent to hazardous facilities, are industrial accidents and upset conditions. The fact that a facility's permit meets health-based standards is no guarantee there will not be accidents or upset conditions at that facility. The impact of industrial accidents has been well documented by federal agencies – including the EPA – and watchdog groups. The United States Chemical Safety and Hazard Investigation Board (CSHIB) reports that "[n]o comprehensive, reliable historical records exist" regarding chemical accidents in the United States, and thus the scope of accidents is under-reported. The number of accidents that *is* reported, however, is staggering. CSHIB reports that "[d]uring the years 1988 through 1992, six percent, or 2070 of the 34,500 accidents that occurred resulted in immediate death, injury and or/evacuation; an average of two chemical-related injuries occurred every day during those five years."[54] Further, CSHIB notes that between 1982 and 1986, 464,677 people were evacuated from their homes or jobs due to chemical accidents.[55]

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[53]*See, e.g.*, J. Timmons Roberts, *Stress, Trauma, and Hidden Impacts of Toxic Exposures on Vulnerable Populations*, Testimony presented at the National Environmental Justice Advisory Council, Baton Rouge, Louisiana, December 9, 1998.

[54]United States Chemical Safety and Hazard Investigation Board, "What Human Consequences Result from Chemical Accidents," CSHIB website, http://www.csb.gov/about/why_04.htm (February 2, 1999).

[55]*Id.* The United States Public Interest Research Group (USPIRG), in its recent report *Too Close to Home*, chronicles some of serious impacts on surrounding communities from chemical accidents at facilities. In August and September, 1994, in Rodeo, California, a 16-day release of 125 tons of a caustic catalyst at a Unocal facility sickened and injured 1500 people living near the plant**.** The report elaborates:

> Victims experienced vomiting, headaches, memory loss, brain damage, and other cognitive disorders. Some residents remained sick for well over a year after the Unocal accident.

U.S. Public Interest Research Group, *Too Close to Home: A Report on Chemical Accident Risks in the United States* (1998). The report can be found at http://www.pirg.org/pirg/enviro/toxics/home98/page4.htm (February 2, 1999). USPIRG's *Too Close To Home* found a strong correlation between high disaster potential and actual accident frequency. The report publishes a table titled "Top U.S. Counties ranked by worst-case disaster potential," which found Harris County, Texas (Houston) number one, Los Angeles County, California number two and Cook County, Illinois (Chicago) number three in the nation for disaster potential. These areas already have well documented environmental justice problems.

EPA itself has documented the impact of industrial accidents on communities. A summary by EPA's Chemical Emergency Preparedness and Prevention Office (CEPPO) of Accident Investigations is a sobering look at life in a community where an industrial accident has occurred. One such community is Savannah, Georgia, where an accident happened at Powell Duffryn Terminals, Inc., on April 10, 1995. EPA reports that 2000 residents were evacuated — some for as long as 30 days. The local elementary school was temporarily closed. Water in an adjacent marsh was heavily contaminated.[56] Other reports by EPA's CEPPO chronicle similar evacuations of the surrounding community. One accident at a Shell Chemical facility in Deer Park, Texas on June 22, 1997 mentions "[b]roken window damage reported in area" and an explosion that could be heard ten miles away.[57] Another accident at the Accra Pac facility in Elkhart, Indiana on June 24, 1997 reports a fire and explosion involving ethylene oxide where approximately 2500 residents were evacuated and 59 people were treated at the hospital.[58]

Similarly, EPA's rationale that a facility, once permitted, cannot be considered to have a disparate impact on a community, ignores the reality of compliance violations (sometimes in the form of upset conditions). Communities and the public are well aware, and facts substantiate, that accidents and even the potential for accidents and compliance violations from an industrial facility have a serious impact on community health and well-being.

Finally, the "health-based" standards historically have been set using the norm of a healthy, white male of average weight. The use of such standards may be discriminatory in itself, and certainly does not take into account sensitive receptors and people who are outside the "norm." By omitting any consideration of the critiques of existing regulatory standards and procedures, by the environmental justice movement and others, the EPA's Guidance naturalizes environmental injustice.

There are some among us who are concerned that EPA's new Title VI policy may create a

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In Williamsport, Pennsylvania, on January 4, 1996, a thick cloud of chlorine gas blanketed the city, sending 26 people to the hospital. Victims suffered headaches, eye irritation, and breathing problems. The cloud formed as a result of a chlorine leak from a railroad tanker at the Lonza Chemical Plant. A 1993 accident at General Chemical Corp. in Richmond, California sent 24,000 people to the hospital from inhaled acid mist. The USPIRG report lists several other mass evacuations, including one in Superior, Wisconsin in 1992 where 40,000 people were evacuated. *Id.*

[56]Chemical Emergency Preparedness and Prevention Office, Office of Solid Waste and Emergency Reponse, U.S. Environmental Protection Agency, http://www.epa.gov/awercepp/pubs/accsumma.html (February 2, 1999).

[57]*Id.*

[58]*Id.*

legal hurdle that is impossible to surmount for Title VI complainants in areas that are in attainment under the Clean Air Act. By setting the threshold of "adverse" impact at the level at which a facility will affect the area's compliance with the national ambient air quality standards (NAAQS), EPA has effectively shut the door on any Title VI complaints from areas in attainment under the Clean Air Act, because the EPA's hurdle is legally impossible to meet. It is legally impossible for an agency to grant a permit in an attainment area which would result in the violation of NAAQS. Under the Clean Air Act, an agency may not grant a permit which would violate NAAQS.[59] In other words, if a facility applied for a permit that would violate NAAQS, the agency would be required to turn it down; if a facility is granted a permit, by definition it does not violate NAAQS. Thus, EPA's hurdle – that a permit must cause a violation of NAAQS to have an impact – means that, legally, there can never be a successful Title VI claim filed in an attainment area. EPA has effectively read Title VI out of the equation entirely.

c. Assessing Decreases in Adverse Impacts in a Permit Action

See our comments on this concept in §VI.A

VII. DETERMINING WHETHER A FINDING OF NONCOMPLIANCE IS WARRANTED

A. Justification

EPA proposes to tolerate concededly discriminatory effects if the recipient comes up with a plan to "mitigate," but not eliminate, those effects. Less discrimination is still discrimination. Civil rights enforcement must have as its goal the prevention and elimination of discrimination. EPA proposes here to institutionalize discrimination, allowing recipients who are known to be responsible for discriminatory impacts to patch things up and get a clean bill of health.

EPA gives recipients "the opportunity to 'justify' the decision to issue the permit *notwithstanding the adverse disparate impact*, based on a *substantial, legitimate justification*." §VII.A (emphasis added). This position, contrary to EPA's stated goal of complying with Executive Order 12898,[60] opens wide the door to recipients to continue practices that cause

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[59] 42 U.S.C. §7475(a)(3); 40 C.F.R. §52.21(k). The Code of Federal Regulations is clear:

> The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification... would not cause or contribute to air pollution in violation of:
>
> (1) Any national ambient air quality standard in any air quality control region[.]

40 C.F.R. §52.21(k).

[60] Executive Order 12898 "directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based

disparate adverse impacts in violation of Title VI and EPA's regulations. A recipient merely needs to claim "legitimate justification" of the permitting action to avoid a successful Title VI claim. Specifically, the recipient simply shows that "the challenged activity ... meets a goal that is legitimate, important, and integral to the recipient's institutional mission." §VII.A.1. The Guidance uses the permitting of a waste water treatment plant as an example of "acceptable justification." EPA considers the "public health or environmental benefits ... to the affected population" as "generally legitimate, important and integral to the recipient's mission." All of what EPA says about the plant may be true – it may treat the sewage of nearby residents – but not very relevant. The treatment plant *also* treats the sewage of many other communities, which receive that benefit, but none of them bears the burden of having the plant sited there.[61]

The issue is not whether or not these facilities are legitimate or necessary, but whether the permitting and siting of them causes an disparate adverse impact in violation of Title VI. With the present "justification" model in place, no Title VI complaint is ever likely to be resolved in a complainant's favor. Here again EPA has worked to hurt the civil rights complainant and reward the civil rights violator.

While OCR'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 benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission." 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 recipients in Title VI complaints are almost always environmental permitting agencies whose institutional mission – 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.). Thus, such "justifications" should be disallowed *per se* as inconsistent with the *Elston* standard.

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on race, color, or national origin." Executive Order 12898, 59 FR 7629 (1994); *see also* Guidance at §I.F.

[61]Further, the justification may fail on a factual level as well as the conceptual level detailed above. In the sewage plant example, the recipient attempts to justify the plant by arguing that nearby residents will benefit by having their water bill reduced, by better overall service, or, perhaps, by being hired at the expanded facility. But if the expanded facility creates a larger and more omnipresent plume of odor and pollution in the area, and threatens to devalue local property, has the project really rendered a benefit at all? One simply cannot calculate the value of good health.

1. Types of Justification

Throughout, EPA suggests that "economic benefits" might be a reason to conclude that there has not been a violation of Title VI, either because the benefits negate the claim that there has been any adverse impact, or because the economic benefits justify the discrimination. §VII.A.1. It is impossible to imagine a project whose economic benefits would inure exclusively to the very people who bear the burden of the project. In fact, economic benefits tend to be dispersed away from the community of color that bears the burden, with the vast majority of the benefits going to people who live nowhere near the burdens.

The complainant can only challenge a recipient's invocation of justification by showing that the challenged activity is not legitimate, important or integral to the agency's mission. This burden is nearly impossible to carry. Few would deny that most, if not all, challenged activities are legitimate. Everyone agrees that waste water treatment plants and disposal sites are generally necessary, even if not desirable. Likewise, it is hard to imagine that a recipient state agency would authorize, or a private company would wish to build, a polluting facility for no legitimate reason.

EPA also asserts that OCR will consider "broader interests, such as economic development ... to be an acceptable justification, if the benefits are delivered directly to the affected population[.]" §VII.A.1. EPA, however, does not specify what "economic development benefits" are weighed and how much so against the disparate adverse impact?

Finally, EPA took some of its "justification" language from Title VII cases, which cover employment law. Courts often look to Title VII in construing Title VI claims and vice versa. But when considering justification, employment cases are distinguishable. The very premise of employment law is contract. There is an assumption, rightly or wrongly, that the parties, the employer and employee, come to the table with some degree of choice, and consent to enter a relationship with one another. By contrast, Title VI is more akin to nuisance or trespass, where one party unilaterally imposes its will upon another. In those cases, one party might not receive a value that it could rationally choose. Justification is inappropriate for Title VI complaints in which the element of choice is absent. Even where a few members of the community might receive a job, the others cannot be made to get cancer in exchange. A community does not choose to enter the such relationships. If a recipient can choose to justify a project, that agency should bear a heavier burden. For instance, the agency would have to show that they had no reasonable alternative but to site the facility in a particular place notwithstanding reliance that had formed since the permit was issued.

2. Less Discriminatory Alternatives

The description of what EPA considers a "less discriminatory alternative" (LDA) run

contrary to the spirit and letter of EPA's Title VI regulations.[62] While the due weight given to mitigation schemes discussed above in §IV.B requires them to at least reduce emissions "to the extent required by Title VI," there is no such threshold for LDA as represented in §VII.A.2. Rather, LDAs must only cause "less disparate impact." This is of course allows for some, perhaps significant, disparate impact; as long as it is "less" than the impact that occurred when the complaint was filed. Any adverse disparate impact is illegal under Title VI; merely lessening disparate impact is not good enough.

Indeed, while EPA interprets *Georgia State Conference of Branches of NAACP v. Georgia*[63] to allow for any "less discriminatory alternative" to be justified under Title VI, the Supreme Court case that the *Georgia State Conference* court relies on to justify its LDA rationale says that an LDA must eliminate *as many discriminatory effects as possible*.[64] This is a much tougher standard than what EPA is proposing. Basically, the Guidance allows for the diminishment of some, but not all, adverse impacts, while the Supreme Court reasons that an LDA should eliminate all possible effects, and not just some. If EPA wants to rely on *Georgia State Conference* for its LDA standard, than it should follow the Supreme Court's reasoning in *Albermarle*. Discriminatory impact must be statistically eliminated in order for EPA to comply with Title VI. Otherwise, this justification arrangement outlined in the Guidance becomes a rather wide loophole that agencies may use to skirt the spirit of Title VI, allowing them to mandate token mitigation.

Please also see our comments on mitigation measures at §IV.B.

The Guidance's consideration of cost in assessing the practicability of alternatives suggests that such factors 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., may come into play again here despite their manifest irrelevance, as described above in the discussion of justification. The Guidance should be explicit that costs incurred by the permit applicant will not be a consideration with respect to less discriminatory alternatives analyses.

Indeed, it is difficult to imagine a situation in which cost would be a relevant consideration at all. OCR must recall that it is the recipient permitting agency – not the permit applicant – which is the "defendant" in a Title VI complaint. Thus, it is the recipient agency whose costs would be considered, not those of the permit applicant. It is hard to imagine the case where the

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[62] EPA defines an LDA as "an approach that causes less disparate impact than the challenged practice." §VII.A.2.

[63] 775 F.2d 1403.

[64] "Where racial discrimination is concerned, the (district) court has not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past, as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

agency's costs would be raised so excessively by choosing some "less discriminatory alternative" that such alternative would not be practicable.

3. Voluntary Compliance

EPA's plan to encourage recipients to examine all "permitted entities and other sources within their authority to eliminate or reduce ... the disparate adverse impacts of their programs[.]" is a laudable suggestion. However, EPA's general position that it expects "that denial or revocation of a permit is not necessarily an appropriate solution" to complaints is troubling. Please see our comments on this topic at §IV.B.

APPENDIX A: GLOSSARY OF TERMS

Hazardous air pollutant is singular in the term and plural in the definition.

"Informal resolution" would better be defined as "Any settlement of complaint allegations prior to the formal resolution of a complaint." For example, informal resolution may dispose of a complaint before dismissal of the complaint, not just "prior to the issuance of a formal finding of non-compliance by EPA," as suggested in the current definition.

The use of the term "compartments" in the definition of "media" is confusing.

In the definition of "pollution prevention," the word "excessive" should be removed. Pollution prevention refers to the practice of identifying activities that create waste, period, and reducing that waste.

In the definition of "statistical significance," EPA needs to make the following addition to reflect what statistical significance really is about:

> An inference that there is a low probability that the observed difference in measured or estimated quantities is due to *chance or* variability in the measurement technique, rather than to an actual difference in the quantities themselves.

The term "stressor" should not be limited to "chemical, physical and biological" impacts but also include cultural, religious, social and economic impacts.

We note that only the definitions of ECOS and PLAN have the term itself repeated in the definition.

Comments on Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs

I. INTRODUCTION

B. Title VI of the Civil Rights Act of 1964, as Amended

EPA undercuts its entire Recipient Guidance by stating that "Fund suspension or termination is a means of last resort." EPA's active avoidance of even threatening to use the tools at its disposal to enforce civil rights law sends a clear signal to recipients that they may violate that law with impunity.

D. Stakeholder Involvement

EPA states "the Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry and other interested stakeholders." This is misleading, as of the 25-member Advisory Committee, only one person – Suzana Almanza, of Austin, TX – was named as a community representative, and she specifically declined to endorse the Advisory Committee's final report to EPA.

We refer EPA to our comments on the Investigatory Guidance, above, for our critique of EPA's statement that the "use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved."

II. TITLE VI APPROACHES AND ACTIVITIES

A. Title VI Approaches

2. Area-Specific Approaches

Please refer to our comments on the Investigatory Guidance, above, on area-specific agreements.

The first sentence in the second paragraph of this section is a sentence fragment. In the third paragraph, EPA refers to "one environmental media" when it should read "one environmental medium."

B. Title VI Activities

The first line of this section contains a typographical error: "you may should consider."

2. Encourage Meaningful Public Participation and Outreach

In the Recipient Guidance, EPA encourages recipients to consider integrating various activities into their permitting programs in order to identify and resolve issues that could lead to

the filing of a Title VI complaint. Specifically, EPA encourages effective public participation and outreach to "provide permitting and public participation processes that occur early, and are inclusive and meaningful." EPA indicates that integrating meaningful public participation and outreach activities will likely reduce the filing of Title VI complaints alleging discrimination in the public participation process for a permit. We define meaningful input to mean substantive input – not merely a fancy process – so that the community's input and desires are reflected in the permit outcome.

When a decision may disproportionately affect people of color, it is imperative to encourage the maximum level of meaningful public participation from the affected people of color. Without a higher level of scrutiny for public participation activities that affect people of color, there is no way to be sure that those who are traditionally disadvantaged and left out of the decision-making process will be included.

a. EPA fails to make recommendations to recipients that will make the public participation process "meaningful."

Public participation is meaningful if community groups not only participate early in the process, but also have a tangible *influence* on a potential project's design and location. The first myth that the proposed public participation activities create is the idea that affected communities have a "meaningful" say in the permitting process. Nowhere in EPA's recommended "meaningful" public participation activities, however, are there any references to activities where the public actually has the opportunity to participate actively in the decision-making process. All the recommended activities focus on education, communication, providing understandable information, and making the process clear and visible. All the activities are one-way processes, from a recipient to a community. The only activity that differs is the activity that recommends that recipients "provide clear explanations for reasons for the decisions made with respect to the issues raised by the community." This activity simply requires that the recipient justify its decision in light of the community's concerns. The activity does not require that the recipient give any "meaningful" weight to the public's comments. As a result, EPA's recommendations for meaningful public participation activities fails to encourage recipients to "meaningfully" include the affected people and stakeholders in the actual decision-making process.

b. Public participation does not guarantee fairness.

The second myth that EPA's proposed "meaningful" public participation activities create is that the availability of public participation eliminates the possibility of discriminatory decision-making in the siting of human health and environmental hazards. EPA assumes that procedures for increased public participation will create fairness or "level-playing field" in the decision-making process. This myth is wrong for two reasons:

1. The disparity in legal and technical expertise and resources between recipients and communities are barriers to meaningful public participation.

It cannot be assumed that procedures for increased public participation will necessarily address the fundamental differences in expertise and resources between communities of color and recipients.[65] For example, the recipients may ignore or overlook the comments and views of community members because they may have a preference for the opinions and advice of industry and state experts with advanced degrees.[66] In addition, environmental issues are commonly extremely technically complex. Even legislators admit that issues are too complex and often delegate their power to administrative agencies with the justification that the issues require the technical expertise of a panel of experts.[67] If legislators, with their vast resources of highly educated staffers and legislative assistants, cannot understand complex technical environmental issues, it is not reasonable to expect that low-income communities of color, without technical experts and university degrees, will understand the technical issues. Therefore, it is difficult, or near impossible, for the community to meaningfully participate in the procedural aspects of permitting if they cannot understand the complexities of the crucial issues that may affect their community.

Although EPA suggests that recipients should provide supplemental technical information and technical assistance to make data more meaningful, neither of EPA's options substitute for a technical expert who works specifically for the community. Technical assistance from the recipient may be helpful, but it would be dangerous to conclude that the recipient's expert knows what is best, and what the needs are, for the community. The community should have the capacity to determine itself what its needs are.

If community residents decide to get their own experts to represent their own needs, the next problem that arises is where they are going to get the money to hire the experts. EPA cannot award damages to complainants under its section 602 regulations or provide attorney fees.[68] As a result, there is no guarantee that a community can actually afford to hire or pay for a technical or legal expert. Many technical and legal experts are hesitant to do work for these communities knowing that there is a chance they might not get paid for their work. Also, as in other areas of

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[65]Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARVARD ENVIRONMENTAL LAW REVIEW 115, 181 (2000).

[66] John C. Duncan, *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J.ENVTL. L. 169, 188-193 (1999).

[67]Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17 (1998).

[68]*See* 40 C.F.R. § 7.130(a) (1997) and *North Carolina Department of Transportation v. Crest Street Council, Inc.*, 479 U.S. 6, 12-16 (1986).

environmental law, without legal or technical assistance, the community may find it difficult to even apply for an EPA technical assistance grant (TAG) in the first place because the application process is often so complex that it requires the help of another expert.[69] For example, in the case of Superfund TAG grants, EPA has admitted that "the agency has made it difficult for local citizens or environmental groups to win [grants] because of unnecessary 'restrictions, complexity, costs, and red tape.'"[70] One of the restrictions in that case was that the community group had to supply funds matching twenty percent of the total grant unless it obtained a waiver.[71]

Some of the other restrictions that may prevent communities from receiving grants and other federal assistance include that the applicant must demonstrate that it has reliable procedures or has plans for establishing reliable procedures for record-keeping and financial accountability related to the management of the TAG, and that the applicant is an incorporated non-profit organization.[72] This precludes assistance to communities that do not have an organization with 501(c)(3) non-profit status.

Such grants and technical assistance are imperative for communities who are filing a Title VI complaint. Although the complaint only requires a written letter, the community may need a technical expert to review pollution and demographic data. In addition, with a number of criteria required for the complainant to file a Title VI complaint that will be accepted by EPA, the community may need a legal expert to evaluate the best approach to take in filing the complaint. Without the grants and assistance it is difficult for a community even to participate in the administrative process of filing a Title VI complaint.

2. Time constraints in public hearings often unfairly prevent disadvantaged people of color from meaningfully participating.

Although EPA does encourage recipients to schedule meeting times and places that are convenient for residents who work and those who use public transportation, EPA fails to take into account the fact that the public hearing process itself does not guarantee meaningful public

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[69]Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TULANE LAW REVIEW 787, 834 (1999)(application process for TAGs in other areas of environmental law are so cumbersome for the average community organization that they often need to hire experts to apply for a grant to hire more experts).

[70]Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: Need for Legislative Authorization*, 25 ECOLOGY LAW QUARTERLY 1, 78 (1998) (quoting 1989 SUPERFUND MANAGEMENT REVIEW at 5-16).

[71]*See* Mank, *Environmental Justice and Title VI*, supra, at 835.

[72]*See* 40 C.F.R. Section 35.4020 (1997).

participation. Disadvantaged people of color may be unfairly left out of the public hearing process due to time constraints imposed by those running the hearing. Such time constraints often control how public hearings are run. It is common that public hearing may address a large array of issues, limiting the amount of time that can be spent on any single issue. The result is that an issue that is important to large numbers of people may only be allotted a small amount of time on the agenda. Often times, an issue will have a significant impact on a large number of people. It, however, may be impossible to allow every single potentially affected person to have an individual time to voice all her comments on the topic within the issue's allotted time. In addition, the social position of an individual may dictate how much time, if any, she will have to wait to testify. Although a moderator must be fair in allotting speaking times to individuals, a person who may be more powerful, influential, or connected may be able to influence the timing of the agenda and manipulate the hearing to disadvantage less influential members of the public. As a result, the time constraints of public hearings may unfairly affect a low-income, person of color's ability to effectively participate in a public hearing, further increasing the individual's feeling of powerlessness and frustration. In addition, the public participation process often ignores the fact that different social and cultural groups have different ways of communicating or participating.[73]

c. EPA fails to address the cultural and social barriers to meaningful public participation.

Nowhere in EPA's recommendations for meaningful public participation is there an emphasis on understanding cultural and social differences in communication, problem solving, and perspectives or world views. When a decision is being made that may disproportionately affect people of color, it is appropriate to encourage the maximum level of participation from the affected people.[74] An understanding of the cultural and social differences between various cultures is vital for a recipient if it is to include different, non-white cultures in an effective public participation process.[75] Among separate cultures there are different methods of communication through non-verbal communication, values and behavioral styles, frames of references, and cultural awareness. Awareness of the differences in communication may be the difference between reaching an agreement and stirring more anger and distrust. For example, how people look at each other and what a particular look or expression means often varies within different cultures within a society. To effectively communicate, one must be aware of these differences, identify them, and make an effort to create an understanding. If recipients and EPA desire effective public participation, they must take the steps necessary to effectively communicate and accept differences, but be aware enough to respect the differences. Otherwise, when attempts that are made to understand each other fail, cultural differences are commonly ignored, causing for a culturally and socially different group of people to not have the opportunity to meaningfully participate in a permitting decision and thus claim discrimination.

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[73] *See* Duncan, *Multicultural Participation in the Public Hearing Process, surpa,* at 188-193.

[74] *Id.* at 188.

[75] *Id.*

d. Recommendations

EPA should include further advice to recipients on achieving the three keys to meaningful public participation in the context of permitting:

1. Maximizing the inclusion of the affected people of color in the permitting process by actively seeking them out and attempting to understand their social and cultural background;

2. Supplying them with the technical and legal knowledge and expertise so they may actively and meaningfully participate in the permitting process; and

3. Giving recognition and weight to the needs and opinions of affected people of color so they may be empowered to participate meaningfully in the decision-making process.

Without inclusion, knowledge, and weight to their opinions and needs, public participation activities will fail to reduce Title VI complaints alleging discrimination. Steps EPA should encourage recipients to take in order to ensure meaningful public participation among low-income communities of color include:

• Recipients should strive to achieve a level playing field for low-income communities of color, not only during the public participation process, but also within political and legal processes.

• Recipients should engage in aggressive outreach to embrace a large spectrum of the public.

• Recipients should run public meetings with affected communities of color that include attempts to understand and respect cultural differences. These meetings should increase respect for differences and allow for a more effective and "meaningful" public participation process.

• Recipients should create Community Advisory Boards (CABs) that include environmental scientist or engineers, health experts, elected representatives, and community representatives. The CAB should also participate early in the planning and permitting process. CABs may potentially provide ideas and suggestions about a broad range of issues, including possible alternatives sites or proposals, community relations, monitoring, mitigation, and economic development. The criteria for selecting community representatives should be focused on including members of low-income communities of color who are not involved in politics and citizens at highest risk from a potential project.

• Recipients should be encouraged to create community advisory groups (CAGs) that participate early in the planning and permitting process. Unlike CABs, who only participate at one or two points of the process, the CAGs would publicly participate throughout the process. In addition, the CAG would have some decision-making authority, as opposed to the purely advisory function of the CAB. Much like the proposed Community Working Groups under 1994 proposed

Superfund legislation, the CAGs should receive "substantial weight" by the EPA on their recommendations achieved by consensus.[76] The formation of a CAG would be, in part, designed to supplement the sometimes limited capacity of an agency or recipient to take into consideration public input under review and comment on procedure. Ideally, the CAG would also negotiate rule-making, as opposed to the traditional role of the public only participating in reviewing and commenting on substantive issues.

• Recipients should include a diverse range of citizens on the CAGs, especially people of color and those at highest risk from the project. The CAG should be a collective voice that speaks for people who do not traditionally have individual voices. It is important to recognize, however, that CAGs still may not effectively, completely, or accurately reflect or account for all public concerns and should not be depended on for the sole source of community outreach.

Additionally, EPA should provide meaningful technical assistance grants (TAGs) to allow complainants to thoroughly investigate a complaint once the EPA concludes after a preliminary investigation that the complaint raises serious health issues. This would allow the complainant to hire its own technical or legal expert who has the flexibility to pursue the complainant's own investigative leads, as opposed to the narrowly tailored assistance of a recipient expert.

3. Conduct Impact and Demographic Analyses

a. Availability of Demographic Data and Exposure Data

In footnote 13, the use of the term "data release" in the last line is confusing in the context of discussing toxic releases.

b. Potential Steps for Conducting Adverse Disparate Impact Analyses

We refer EPA to our comments on the Investigatory Guidance for a critique of the construction "adverse disparate impact."

c. Availability of Tools and Methodologies for Conducting Adverse Impact Analyses
d. Relevant Data

EPA's current and proposed mapping methods do not adequately evaluate existing cumulative toxic burdens in impacted communities. The EPA's mapping methods, as illustrated in the Shintech case in St. James parish, Louisiana, are *facility-based*: existing and proposed polluting facilities are the focal point of the maps produced by the EPA. EPA plotted the existing and proposed facilities on a map and then generated radii of various sizes around the facilities to

[76] H.R. 3800, §§ 117(g)(3); S. 1834, §§ 103 (Version 4, Oct. 3, 1994) (proposing to amend CERCLA §§ 117(1)(3)).

estimate the population count and racial composition within these radii. While this mapping method provides some important demographic information on the population in an area, this facility-based method is insufficient for analyzing and displaying the existing cumulative toxic burden in an area.

Please compare EPA's maps from the Shintech case[77] with the attached maps of two communities in Louisiana (Appendix B, Convent, and Appendix C, Alsen).[78] The attached maps are *community-based*: important community facilities, in this case, elementary schools with Head Start programs, are the focal point of the maps. Radii of various sizes are generated around these community facilities and then, instead of counting the population, TRI emissions and other potential sources of pollution within the radii are summed in order to calculate the existing cumulative toxic burden in these communities. We suggest that EPA incorporate community-based mapping methods in order to complement their facility-based mapping methods such that the existing cumulative toxic burdens on communities can be more accurately analyzed and displayed.

Known emissions should be above modelled data in the data hierarchy.

5. Participate in Alternative Dispute Resolution

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of alternative dispute resolution and EPA's reliance on it.

6. Reduce or Eliminate Alleged Adverse Disparate Impact

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of EPA's odd "sole source" argument, and to §IV.B for our comments on mitigation measures.

C. Due Weight

We refer EPA to our comments on the Investigatory Guidance, above, for a critique of EPA's "due weight" concept.

EPA asserts that it has a right to conduct a compliance review of a recipient agency. Pointing out EPA's unquestioned authority to undertake such compliance reviews is of little comfort to complainants. Currently, EPA is incapable of timely investigating *pending* complaints, some of which have been around for more than seven years, much less undertaking independent *sua sponte* compliance reviews.

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[77]Available online at *http://www.epa.gov/civilrights/shinfileapr98.htm*.

[78]The community-based maps were created by Charles A. Flanagan, Louisiana Environmental Action Network.

GLOSSARY OF TERMS

Please see our comments on the identical Glossary of Terms found following the Investigatory Guidance, above.

V. CONCLUSION

Because the Investigatory Guidance is fatally flawed in so many ways, each of which penalizes the communities suffering civil rights violations and benefits the civil rights violators, we request that the Guidance be withdrawn and scrapped. We request that EPA begin again the process of formulating a Guidance, this time with the ambition not of making "stakeholders" satisfied but with enforcing civil rights.

Signed,[79]

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Attorneys for complainants in *African American Environmental Justice Action Network v. Alabama Department of Environmental Management*, No. 28R-99-R4; *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9; *Community United for Political and Individual Development v. Arizona Department of Environmental Quality*, No. 19R-99-R9; *IWU Negotiating Committee v. Arizona Department of Environmental Quality*, No. (filed August 2000); *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9; *Lucha Ambiental de la Comunidad Hispana v. Los Angeles County*, et al., No. 13R-97-R9; *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9; *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9; *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9; *Residents of Sanborn Court v. Department of Toxic Substances Control*, No. 02R-95-R9
Member of EPA's National Environmental Justice Advisory Council and member of EPA's Title VI Implementation Committee*

Complainants

African American Environmental Justice Action Network, Montgomery, AL
Complainant in *African American Environmental Justice Action Network v. Alabama Department of Environmental Management*, No. 28R-99-R4

African Americans for Environmental Justice, Noxubee County, MS

[79]Please note that Appendix A contains a complete list of all the complaints involving the signatories to this letter.

Complainants in *African Americans for Environmental Justice v. Mississippi Department of Environmental Quality*, No. 01R-93-R4

Alternatives for Community & Environment, Roxbury, MA
Complainants in *Alternatives for Community & Environment v. Massachusetts Department of Environmental Protection*, No. 27R-99-R6

LaNell Anderson, Houston, TX
Complainant in *LaNell Anderson v. Texas Natural Resources Conservation Commission*, No. 02R-94-R6

Ascension Parish Residents Against Toxic Waste, Geismar, LA
Complainants in *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality*, No. 04R-97-R6; *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality*, No. 01R-94-R6

Lula Bishop, Daly City, CA
Complainant in *Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control*, No. 01R-99-R9

Angelita C., Pajaro, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Californians for Renewable Energy, Pittsburgh, CA
Complainant in *Californians for Renewable Energy v. California Energy Commission, et al.*, No. 2R-00-R9

Chemical Weapons Working Group, KY
Complainant in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6; *E. Boateng, et al., v. Alabama Department of Environmental Management*, No. 15R-97-R4

Chester Street Block Club Association, Oakland, CA
Complainant in *Chester Street Block Club Association v. Department of Toxic Substances Control*, No. 8R-97-R9

Coalition for a Good Environment, Morgan City, LA
Complainant in *Coalition for a Good Environment v. Louisiana Department of Environmental Quality*, No. 13R-98-R6

Reverend Louis Coleman, Louisville, KY
Complainant in *Justice Resource Center, et al., v. Metropolitan Sewer District*, et al., No. 3R-00-R4

Communities for a Better Environment, Oakland and Huntington Park, CA
Complainant in *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9; *Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control*, No. 03R-97-R9

Community United for Political and Individual Development, Randolph, AZ
Complainant in *Community United for Political and Individual Development v. Arizona Department of Environmental Quality*, No. 19R-99-R9

Concerned Citizens of Westmorland, Westmorland, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

El Pueblo para el Aire y Agua Limpio, Kettleman City, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

Environmental Health Coalition, San Diego, CA
Complainant in *Environmental Health Coalition, et al., v. San Diego County Air Pollution Control District, et al.*, No. 02R-96-R9

Jorge G., Watsonville, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Maria G., Oxnard, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Garden Valley Neighborhood Association, Austin, TX
Complainant in *Garden Valley Neighborhood Association v. Texas Natural Resources Conservation Commission*, No. 03R-94-R6

Greater Harrisburg Area Branch of the NAACP, Harrisburg, PA
Complainant in *Greater Harrisburg Area Branch of the NAACP v. Pennsylvania Department of Environmental Protection*, No. 01R-98-R3

Hyde Park/Aragon Park Improvement Committee, Augusta, GA
Complainant in *Hyde Park/Aragon Park Improvement Committee v. Georgia Department of Natural Resources, et al.*, No. 08R-94-R4

Improving Kids Environment, Indianapolis, IN
Complainant in *Improving Kids Environment v. City of Indianapolis*, No. 23R-99-R5

Involved Citizens of Helena Community, Inc., Newberry, SC
Complainant in *Involved Citizens of Helena Community, Inc., v. Newberry County*, No. 09R-97-R4

Isleta Pueblo, NM
Complainant in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

IWU Negotiating Committee, Phoenix, AZ
Complainant in *IWU Negotiating Committee v. Arizona Department of Environmental Quality*, No. (filed August 2000)

Jackson/Mahon Neighborhood Association, Lubbock, TX
Complainant in *Jackson/Mahon Neighborhood Association v. Texas Natural Resources Conservation Commission*, No. 02R-96-R6

Justice Resource Center, Louisville, KY
Complainant in *Justice Resource Center, et al., v. Metropolitan Sewer District*, et al., No. 3R-00-R4

Margarita M., Pajaro, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Lewisburg Prison Project, Inc., Lewisburg, PA
Complainant in *Lewisburg Prison Project, Inc., et al., v. Pennsylvania Department of Environmental Resources*, No. 02R-94-R3

Lone Star Chapter of the Sierra Club, Austin, TX
Complainant in *Texans United Education Fund, et al. v. Texas Natural Resources Conservation Commission*, No. 16R-98-R6; *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 1R-00-R6

Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente (LA CAUSA), Los Angeles, CA
Complainant in *Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District*, No. 10R-97-R9

Louisiana Environmental Action Network, Baton Rouge, LA
Complainant in *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 20R-99-R6; *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality*, No. 17R-98-R6; *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality,* No. 07R-98-R6; *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality,* No. 04R-97-R6; *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality,* No. 01R-94-R6.

Lucha Ambiental de la Comunidad Hispana, CA
Complainant in *Lucha Ambiental de la Comunidad Hispana v. Los Angeles County,* et al., No. 13R-97-R9

Manzanar Action Committee, Pico Rivera, CA
Complainant in *Manzanar Action Committee v. Department of Toxic Substances Control*, No. 11R-97-R9

Midway Village Advisory Committee, Daly City, CA
Complainant in *Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control,* No. 01R-99-R9

Mothers Organized to Stop Environmental Sins, Winona, TX
Complainant in *Mothers Organized to Stop Environmental Sins v. Texas Natural Resources Conservation Commission,* No. 05R-94-R6

George Munchus, Birmingham, AL
Complainant in *Jefferson County Black Chamber of Commerce*, No. 02R-98-R4; *George Munchus v. Browning-Ferris Industries, Inc. of Birmingham*, No. 03R-94-R4; *George Munchus v. City of Hueytown*, Alabama, No. 05-94-R4; *George Munchus v. Jefferson County Commission,* No. 06R-94-R4; *George Munchus v. City of Leeds, Alabama, No. 04R*-94-R4

North Baton Rouge Environmental Association, Baker, LA
Complainant in *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality,* No. 07R-98-R6; *Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality,* No. 17R-98-R6

Northwest Civic Association, Jacksonville, FL
Complainant in *Northwest Civic Association v. Florida Department of Environmental Protection, et al.,* No. 09R-94-R4

Oakville Community Action Group, Belle Chasse, LA
Oakville Community Action Group v. Louisiana Department of Environmental Quality, No. 03R-96-R6

Organized North Easterners and Clay Hill and North End, Inc., Hartford, CT
Complainant in *Organized North Easterners and Clay Hill and North End, Inc. v. Connecticut Department of Environmental Protection*, No. 01R-96-R1

Emiliano P., Salinas, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

Padres Hacia una Vida Mejor, Buttonwillow, CA
Complainant in *Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control*, No. 01R-95-R9

People Against Contaminated Environments, Beaumont, TX
Complainant in *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 02R-95-R6; *People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission*, No. 1R-00-R6

People Organized in Defense of Earth and Her Resources, Austin, TX
Complainant in *People Organized in Defense of Earth and Her Resources, et al. v. Texas Natural Resources Conservation Commission*, No. 01R-96-R6 and *People Organized in Defense of Earth and Her Resources, et al. v. City Council, City of Austin*, No. 05R-99-R6

Pine Bluff for Safe Disposal, Pine Bluff, AR
Complainant in *Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality*, No. 15R-99-R6

Residents Involved in Saving the Environment, Inc., Richmond, VA
Complainant in *Residents Involved in Saving the Environment, Inc. v. Virginia Department of Environmental Quality*, No. 12R-98-R5

Residents of Sanborn Court, Salinas, CA
Complainant in *Residents of Sanborn Court v. Department of Toxic Substances Control*, No. 02R-95-R9

Residents of the Easton Acres and Feltonsville Communities, Holly Springs, NC
Complainants in *Residents of the Easton Acres and Feltonsville Communities v. Wake County, North Carolina, et al.*, No. 12R-99-R4

Residents Opposed to Pigs and Livestock, College Station, TX
Complainant in *Residents Opposed to Pigs and Livestock v. Texas A&M University*, No. 02R-97-R6

Bernabe S., Oxnard, CA
Complainant in *Angelita C., et al., v. California Department of Pesticide Regulation*, No. 16R-99-R9

St. Francis Prayer Center, Flint, MI
Complainant in *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, No. 05R-98-R5 and *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, No. 01R-94-R5

St. James Citizens for Jobs & the Environment, Convent, LA
Complainant in *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality,* No. 04R-97-R6

Save Sierra Blanca, Sierra Blanca, TX
Complainant in *Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al.*, No. 07R-97-R6

Save Sierra Blanca Legal Defense Fund, El Paso, TX
Complainant in *Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al.*, No. 07R-97-R6

South Cook County Environmental Action Coalition, Robbins, IL
Complainant in *South Cook County Environmental Action Coalition v. Illinois Environmental Protection Agency*, No. 14R-97-R5

South Suburban Citizens Opposed to Polluting Our Environment, Bloom Township, IL
Complainant in *South Suburban Citizens Opposed to Polluting Our Environment v. Illinois Environmental Protection Agency*, No. 01R-95-R5

South Valley Coalition of Neighborhood Associations, Albuquerque, NM
Complainant in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

SouthWest Organizing Project, Albuquerque, NM
Complainants in *South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department*, No. 13R-99-R6

Southwest Public Workers Union, San Antonio, TX
Complainant in *Southwest Public Workers Union, et al., v. Texas Natural Resources Conservation Commission*, et al., No. 12R-99-R4

Waimanalo Citizens for a Healthy Future, Waimanalo, HI
Waimanalo Citizens for a Healthy Future v. Hawaii Department of Health, No. 02R-99-R9

William C. Whitehead, Tahlequa, OK
Complainant in *William C. Whitehead, et al. v. Hardage Site Remedy Corp., et al.*, No. 06R-97-R6

Environmental Justice Networks

Asian Pacific Environmental Network
Oakland, CA

Farmworker Network for Economic and Environmental Justice
Lake Alfred, FL

Indigenous Environmental Network
Bemidji, MN

Northeast Environmental Justice Network
New York, NY and Boston, MA

Southern Organizing Committee for Economic and Social Justice
Atlanta, GA

Southwest Network for Environmental and Economic Justice
Albuquerque, NM

Organizations & Individuals

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Sierra Blanca, TX

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San Francisco, CA

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White Castle, LA

Concerned Citizens of Norco
Norco, LA

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People United for a Better Oakland
Oakland, CA

Chavel Lopez/Ruben Solis
Southwest Public Workers Union
San Antonio, TX

Louisiana ACORN
New Orleans, LA

Louisiana Communities United
Gonzales, LA

Louisiana Environmental Justice Project
New Orleans, LA

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Coalition for a Livable Future
Portland, OR

Linda MacKay
Endangered Species
Alpaugh, CA

Aaron Mair

Arbor Hill Environmental Justice Corporation
Albany, NY

Reverend Roy Malveaux
People Against Contaminated Environment
Beaumont, TX

Carlos Marentes
Border Agricultural Workers Project
El Paso, TX

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Hartford, CT

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North Lake Charles Environmental Action Network
Lake Charles, LA

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Community Coalition for Change
Los Angeles, CA

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West Harlem Environmental Action
New York, NY
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Communities for a Better Environment
Oakland, CA

Yolanda Sinde
Community Coalition for Environmental Justice
Seattle, WA

Tiwana Steward-Griffin
New Jersey Environmental Justice Network
Newark, NJ

Samara Swanston
Minority Environmental Lawyers Association
New York, NY

Elizabeth Teel
Tulane Environmental Law Clinic
New Orleans, LA
Attorney for complainants in *Leonard Jackson, et al., v. Louisiana Department of Environmental Quality,* No. 01R-94-R6; *North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality,* No. 07R-98-R6; *Oakville Community Action Group v. Louisiana Department of Environmental Quality,* No. 03R-96-R6; *St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality*, No. 04R-97-R6

Robert Thompson
Involved Citizens of Helena
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Gerald Torres
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Member of EPA's National Environmental Justice Advisory Council and EPA's Title VI Implementation Committee*

Robert R.M. Verchick
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Kansas City, MO

Donele Wilkens
Michigan Environmental Justice Coalition
Detroit, MI

Jane Williams
California Communities Against Toxics
Rosamond, CA

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Member of EPA's National Environmental Justice Advisory Council*

Evelyn Yates
Pine Bluff for Safe Disposal
Pine Bluff, AR

*For identification purposes only.

APPENDIX A:
CASES OF SIGNATORIES:

African American Environmental Justice Action Network v. Alabama Department of Environmental Management, No. 28R-99-R4

African Americans for Environmental Justice v. Mississippi Department of Environmental Quality, No. 01R-93-R4

Alternatives for Community & Environment v. Massachusetts Department of Environmental Protection, No. 27R-99-R6

LaNell Anderson v. Texas Natural Resources Conservation Commission, No. 02R-94-R6

E. Boateng, et al., v. Alabama Department of Environmental Management, No. 15R-97-R4

Angelita C., et al., v. California Department of Pesticide Regulation, No. 16R-99-R9

Californians for Renewable Energy v. California Energy Commission, et al., No. 2R-00-R9

Coalition for a Good Environment v. Louisiana Department of Environmental Quality, No. 13R-98-R6

Chester Street Block Club Association v. Department of Toxic Substances Control, No. 8R-97-R9

Community United for Political and Individual Development v. Arizona Department of Environmental Quality, No. 19R-99-R9

Environmental Health Coalition, et al., v. San Diego County Air Pollution Control District, et al., No. 02R-96-R9

Garden Valley Neighborhood Association v. Texas Natural Resources Conservation Commission, No. 03R-94-R6

Greater Harrisburg Area Branch of the NAACP v. Pennsylvania Department of Environmental Protection, No. 01R-98-R3

Hyde Park/Aragon Park Improvement Committee v. Georgia Department of Natural Resources, et al., No. 08R-94-R4

Improving Kids Environment v. City of Indianapolis, No. 23R-99-R5

Involved Citizens of Helena Community, Inc., v. Newberry County, No. 09R-97-R4

IWU Negotiating Committee v. Arizona Department of Environmental Quality, No. (filed August 2000)

Leonard Jackson, et al., v. Louisiana Department of Environmental Quality, No. 01R-94-R6

Jackson/Mahon Neighborhood Association v. Texas Natural Resources Conservation Commission, No. 02R-96-R6

Jefferson County Black Chamber of Commerce, No. 02R-98-R4

Justice Resource Center, et al., v. Metropolitan Sewer District, et al., No. 3R-00-R4

Lewisburg Prison Project, Inc., et al., v. Pennsylvania Department of Environmental Resources, No. 02R-94-R3

Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, et al. v. South Coast Air Quality Management District, No. 10R-97-R9

Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality, No. 20R-99-R6

Louisiana Environmental Action Network v. Louisiana Department of Environmental Quality, No. 17R-98-R6

Lucha Ambiental de la Comunidad Hispana v. Los Angeles County, et al., No. 13R-97-R9

Manzanar Action Committee v. Department of Toxic Substances Control, No. 11R-97-R9

Midway Village Advisory Committee, et al., v. California Department of Toxic Substances Control, No. 01R-99-R9

Mothers of East Los Angeles - Santa Isabel, et al. v. Department of Toxic Substances Control, No. 03R-97-R9

Mothers Organized to Stop Environmental Sins v. Texas Natural Resources Conservation Commission, No. 05R-94-R6

George Munchus v. Browning-Ferris Industries, Inc. of Birmingham, No. 03R-94-R4

George Munchus v. City of Hueytown, Alabama, No. 05-94-R4

George Munchus v. Jefferson County Commission, No. 06R-94-R4

George Munchus v. City of Leeds, Alabama, No. 04R-94-R4

North Baton Rouge Environmental Association, et al., v. Louisiana Department of Environmental Quality, No. 07R-98-R6

Northwest Civic Association v. Florida Department of Environmental Protection, et al., No. 09R-94-R4

Oakville Community Action Group v. Louisiana Department of Environmental Quality, No. 03R-96-R6

Organized North Easterners and Clay Hill and North End, Inc. v. Connecticut Department of Environmental Protection, No. 01R-96-R1

Padres Hacia Una Vida Mejor, et al., v. Department of Toxic Substances Control, No. 01R-95-R9

People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission, No. 02R-95-R6

People Against Contaminated Environments, et al. v. Texas Natural Resource Conservation Commission, No. 1R-00-R6

People Organized in Defense of Earth and Her Resources, et al. v. Texas Natural Resources Conservation Commission, No. 01R-96-R6

People Organized in Defense of Earth and Her Resources, et al. v. City Council, City of Austin, No. 05R-99-R6

Pine Bluff for Safe Disposal, et al., v. Arkansas Department of Environmental Quality, No. 15R-99-R6

Residents Involved in Saving the Environment, Inc. v. Virginia Department of Environmental Quality, No. 12R-98-R5

Residents of Sanborn Court v. Department of Toxic Substances Control, No. 02R-95-R9

Residents of the Easton Acres and Feltonsville Communities v. Wake County, North Carolina, et al., No. 12R-99-R4

Residents Opposed to Pigs and Livestock v. Texas A&M University, No. 02R-97-R6

St. Francis Prayer Center v. Michigan Department of Environmental Quality, No. 05R-98-R5

St. Francis Prayer Center v. Michigan Department of Environmental Quality, No. 01R-94-R5

St. James Citizens for Jobs & the Environment, et al., v. Louisiana Department of Environmental Quality, No. 04R-97-R6

Save Sierra Blanca, et al. v. Texas Low-Level Radioactive Waste Disposal Authority, et al., No. 07R-97-R6

South Cook County Environmental Action Coalition v. Illinois Environmental Protection Agency, No. 14R-97-R5

South Suburban Citizens Opposed to Polluting Our Environment v. Illinois Environmental Protection Agency, No. 01R-95-R5

South Valley Coalition of Neighborhood Associations, et al. v. New Mexico Environmental Department, No. 13R-99-R6

Southwest Public Workers Union, et al., v. Texas Natural Resources Conservation Commission, et al., No. 12R-99-R4

Texans United Education Fund, et al. v. Texas Natural Resources Conservation Commission, No. 16R-98-R6

Waimanalo Citizens for a Healthy Future v. Hawaii Department of Health, No. 02R-99-R9

William C. Whitehead, et al. v. Hardage Site Remedy Corp., et al., No. 06R-97-R6

Appendix B: Convent, Louisiana Community Map

Appendix C: Alsen, Louisiana Community Map