Center for Constitutional Rights

A NON-PROFIT LEGAL/EDUCATIONAL ORGANIZATION COMMITTED TO THE CREATIVE USE OF LAW AS A POSITIVE FORCE FOR SOCIAL CHANGE.

Testimony

of

The Center for Constitutional Rights

on the

Draft Investigative Guidance for Title VI Administrative Complaints

Submitted
by
Barbara J. Olshansky
Assistant Legal Director
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

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666 Broadway New York, NY 10012 U.S.A. TEL 212.614.6464 FAX 212.614.6499 EMAIL CCR@igc.apc.org
213 Main Street Greenville, MS 38701 U.S.A. TEL 601.334.1122 FAX 601.334.1274

Introduction

The Center for Constitutional Rights (the "Center") appreciates this opportunity to comment on the Draft Investigative Guidance ("Draft Guidance") for investigations by the U.S. Environmental Protection Agency Office of Civil Rights ("OCR") pursuant to accepted Title VI Administrative Complaints.

The Center recognizes the difficulty of delineating guidelines for assessing disparate environmental impacts given the paucity of data establishing causal links between environmental stressors and health outcomes. For this reason, the Center commends OCR for its efforts to include a variety of yardsticks and methodologies in its Draft Guidance. The Center wishes to call attention to the fact that the Draft Guidance paints the critical need for empirical health effects studies in bold relief, and urges the U.S. Environmental Protection Agency ("EPA") to work with other federal agencies to remedy this situation.

Among other issues discussed in detail below, the Center is concerned about OCR's position on two very important issues in Title VI administrative enforcement efforts: (1) the showing that will be required for administrative complaints to be deemed to warrant investigation; and (2) the commitment of OCR to consider existing cumulative loads on communities of color.

Prior to the issuance of the new Draft Investigative Guidance, EPA's position has been that proximity to a facility or point source (or multiple point sources) has been a proxy for harm. If, as appears from the language of the Draft Guidance, OCR intends to substantially alter its analysis of the "adverse impact" or harm issue and move to a more "tort-like" approach, it must take the paucity of health outcome data into account and work assiduously to ensure that the lack

of such data does not translate into a lack of adequate protection for communities of color. Of particular concern in this regard is the nature of the initial showing that must be made in administrative complaints to survive to the investigation stage. A guideline that requires complainants to demonstrate causation and physical injury that differs in some measurable fashion from injuries suffered by a comparison population would likely eviscerate Title VI protections altogether. Because of the difficulty of proving causation and injury in these situations, if OCR were to require such an initial showing, the hurdle that communities would have to overcome in order to raise a Title VI claim would be nearly insurmountable. In its current form, the Draft Guidance fails to specify the type and specificity of the allegations that must be included in an administrative complaint to survive to the investigation stage. The Center therefore recommends the inclusion of a specific section discussing the nature of the allegations required with illustrative examples.

Another serious concern raised by the Draft Guidance is the absence of any real emphasis on the need to take into consideration the cumulative burdens under which communities of color presently live in OCR's determination of whether to investigate a complaint. The long history in this country of problematic siting decisions, the unequal enforcement of environmental laws and regulations, the unjust distribution of environmental risks due to policy decisions, and the many years of accumulated adverse health effects, must be included and given appropriate weight in any adverse impact calculus.

Specific Comments on the Draft Investigative Guidance

Scope of the Guidance

1. How will OCR take into account the extant environmental burdens on communities of

color? How does the Guidance achieve the necessary objective of assessing the pre-existing cumulative load on the affected communities?

2. Why is the Guidance limited to actions taken under certain acts and not others? For example, why was the decision made not to include agency actions under TOSCA, FIFRA, and CERCLA? Plainly, governmental decisions made pursuant to these laws have had disparate impacts on communities of color. Given this fact, OCR's decision not to investigate complaints raised under these laws is difficult to understand.

3. Why was the decision made not to include other actions in addition to permitting decisions by state and local agencies? Why has OCR decided not to accept allegations that a state agency's failure or refusal to enforce existing laws and regulations has a disparate impact?

The Center is deeply concerned that such an omission will leave communities at the mercy of renegade state agencies. The Center believes that such situations have arisen in the past and are likely to occur in the future, where, for example, a state agency runs its Title V Air Permitting Program in a manner that is both biased and corrupt. How will OCR respond to such allegations? Under what circumstances will OCR seek to revoke the grant of jurisdiction from a renegade state agency?

Investigative Procedures

4. Area-specific Agreements - Better defined parameters are needed before OCR accords any weight to area-specific agreements. Will OCR evaluate whether such an agreement is fair and effective prior to according it any weight in a disparate impact assessment? What criteria will OCR use to determine whether such an agreement is effective?

More specifically, the Center would like to urge OCR to require any area-specific

agreement to cover the same types of impacts as the challenged permitted activity in order to be considered as a mitigating effort by the state agency. In other words, OCR should require that there be a direct offset by the agreement to the environmental stressors caused by the permit.

5. Other Exemptions - The Guidance describes two situations where OCR will likely close its investigation into allegations of discriminatory effects: 1) "where the permit action that triggered the complain significantly decreases overall emissions at the facility;" and 2) "where the permit action that triggered the complaint significantly decreases all pollutants of concern named in the complaint or all pollutants EPA reasonably infers are the potential source of the alleged impact."

Neither of these exemptions are clear. What is the baseline against which any purported decreases in emissions will be assessed? Is OCR referring to proposed modifications to be made by the emitting source in response to a Title VI investigation? In that case, any purported decrease would presumably be assessed against the initial permit conditions. This is not stated in the Guidance and needs to be clarified.

Defining the Scope of Investigations

6. What is the definition of "similar stressors"? The Guidance states that in looking at the universe of sources to be assessed, "OCR may consider other relevant and/or nearby sources of similar stressors for inclusion in the analysis." It is unclear, however, what the term "similar" means in this context. Is OCR referring to stressors with similar medical/health effects (e.g. respiratory system effects), chemical similarity (e.g. solvents), or physical similarity (e.g. gases or particulates)?

7. Will OCR take into consideration the synergistic health effects of different stressors (e.g.

airborne particulates and solvents) on the affected population?

8. Will OCR take into consideration the total cumulative health load on an affected community (e.g. contaminated water, air emissions)?

9. In delineating the three main categories of the universe of sources, the Guidance refers to an assessment of a permitted facility that is one of a number of similar sources in a geographic area, including background sources (both permitted and unpermitted, and unregulated). Another universe "may include only those that are regulated and permitted." The Guidance then states that the determination to look at one universe as compared to another will rest upon whether the allegations of the administrative complaint specify cumulative impacts from multiple sources. Does this mean that OCR will not look at background sources if there is not a specific allegation to that effect in the administrative complaint? If so, this seems to be a significant burden to place on communities. The Draft Guidance should delineate what types of allegations would be sufficient on this issue.

Impact Assessment

The Guidance delineates the job of the investigatory team as "confirming that an entity is a source of stressors that could cause or be associated with an exacerbation of the alleged impacts, and that there is a plausible mechanism and exposure route." The Guidance also delineates the hierarchy of data types, and the various impact methodologies that may be used to determine whether a likely causal link exists.

10. This section raises several critical concerns. First, the Guidance does not specify the level of detail that will be demanded of the administrative complaint in this regard. All of the impact methodologies discussed require a level of scientific expertise that far exceeds that available to

the community groups that will likely be filing administrative complaints. What showing will be required of the administrative complaint in order to survive to the investigation stage? This showing needs to be spelled out clearly in the Guidance.

11. Second, the Guidance fails to specify the models to be used in the risk assessment methodologies or the appropriate benchmarks to be used in evaluating non-carcinogens, chronic toxicity potency factor scores, or chemical concentrations.

12. Third, how will the methodologies used take into account the cumulative load and synergistic effects of multiple chemical exposures and multiple exposures through different pathways?

13. Fourth, how will the methodologies used take into account the particular sensitivities of affected populations? For example, in Convent, Louisiana, many people suffer from chronic and severe asthma, lung and tracheal cancers, and other respiratory system disorders. How will OCR take these pre-existing sensitivities when assessing an administrative complaint challenging an air permit for a facility in that area?

14. Fifth, the Center is concerned about OCR's reliance on NAAQS as establishing an appropriate public health threshold. While such standards may be protective of the health of the general population, they have not been adjusted to ensure adequate protection for sensitive subpopulations, nor do they account for the synergistic effects of multiple exposures. How will communities overcome the contemplated "presumption" under these circumstances? In certain situations, the existence of such a "presumption" will no doubt create an unfair hurdle for some of the most ill and overburdened people in this country.

Characterizing the Affected Population and Comparison Population

15. The Draft Guidance does not specify the mathematical models that will be used in analyzing distribution patterns. What are the dispersion models that OCR intends to rely upon in making its determination regarding the likely affected population?

16. The Center's experience with various alternatives methods for determining the appropriate boundaries of comparison populations clearly indicates that this factor alone frequently determines whether a disparate impact will be found. In the absence of a more definitive statement from OCR, the Center is concerned that attempts will be made to define the comparison population to be coterminous with the affected population, thereby eliminating any possibility of a finding of disparate impact.

Adverse Disparate Impact Decision

17. The Draft Guidance indicates that the two populations will be statistically evaluated to determine "whether the differences achieved statistical significance to at least 2 to 3 standard deviations." This is a higher threshold for demonstrating disparate impact than that required under Title VII (1.8 standard deviations) which the decisional authority states is the proper basis for conducting Title VI disparate impact analyses. Why has OCR increased the statistical showing required?

18. The Draft Guidance states that in evaluating disparity in adverse impacts, "OCR would expect to also consider such factors as: the level of adverse impact; the severity of the impact; and the frequency of occurrence." Will OCR also include in its calculus the cumulative load on the affected population – the history of burdens that constitute the baseline load which such communities bear?

Determining Whether a Finding of Noncompliance is Warranted

19. In delineating what will constitute an acceptable justification, the Draft Guidance states that "OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification." The Center believes that while such goals may be well-intentioned, they all too frequently have been illusory and unenforceable. Furthermore, economic justifications clearly will not be an appropriate consideration in certain situations. For example, certain types of polluting facilities may simply be too noxious to even warrant the consideration of economic justifications. In addition, such justifications arguably should not be accepted by OCR when the siting is intended for an already overburdened community. Finally, the Center believes that it is incumbent upon OCR to make a firm commitment to considering the views of the affected community when making its assessment of whether the permitted facility will provide direct economic benefits to the community.

20. While the Center agrees that OCR should take into consideration situations in which the challenged permit action "will clearly lead to significant decreases in adverse disparate impacts," we are concerned that OCR ensure that such situations do not lead to informal toxics trading situations in which a decrease in the emissions of one pollutant enables a permitted entity to create an increase in a different and more toxic pollutant.