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**Nancy W. Newkirk**
**Director**
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August 28, 2000

Via Courier and E-mail

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

RE: Title VI Guidance Comments

Dear Ms. Yorker:

Enclosed are comments from the American Petroleum Institute (API) on the Environmental Protection Agency's (EPA's) Draft Title VI Guidance. API represents more than 500 companies involved in all aspects of the oil and gas industry.

API recognizes the substantial effort that EPA's Office of Civil Rights (OCR) put forth in gathering input from interested stakeholders, including the states, industry and community groups. The draft guidance documents represent a substantial improvement over the Interim Investigation Guidance that was released by EPA in 1998. We must conclude, however, that these guidance documents do not go far enough to clarify many issues that are involved in determining the existence of discrimination in environmental permitting processes. All parties involved in the permitting process need guidance from EPA that will give greater certainty to the procedures that will be applied to the investigation process and timelines of that process.

Should you have any questions about our comments or would like to discuss them, please contact me or Peter Lidiak, at (202) 682-8325.

Sincerely,

Nancy W. Newkirk
Director, Regulatory & Scientific Affairs

Enclosure

cc: William Harnett
Ann Goode

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**Comments from the American Petroleum Institute**
**To the U.S. Environmental Protection Agency on its**
**Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and**
**Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)**
**8/28/2000**

The American Petroleum Institute (API) represents more than 500 companies involved in all aspects of the oil and gas industry, including exploration, production, transportation, refining and marketing. API is pleased to submit the following comments on the U.S. Environmental Protection Agency's (EPA's) Draft Recipient Guidance and Draft Revised Investigation Guidance (65 FR 39650-39701). The bulk of our comments will focus on the Draft Revised Investigation Guidance since most of what is covered in the Draft Recipient Guidance is also covered in the Draft Revised Investigation Guidance.

API also participates in the Business Network for Environmental Justice (BNEJ) and supports the comments filed by that coalition. However, regarding BNEJ's comments in section III, I entitled, "The Investigation Guidance Should Require Fairness in the Remedy", API believes that the resolution of a Title VI complaint on a single permit action should not mandate modification of permits for all other sources in a given area.

## I. General Comments

### A. EPA has made a significant effort to involve all of the stakeholders.

API commends EPA for the effort it has put forth over the last two years, since the issuance of the Interim Guidance in 1998, to gather input and engage in dialog with all interested parties. We support the concept of early and broad involvement of the parties involved in a civil rights issue to forestall the need for a complaint. Compliance with the law can be promoted by involving all stakeholders, not only in the complaint process, but also in the initial promulgation, and the subsequent implementation of rules, guidance and policies. We hope the Agency will continue to reach out to all of the affected stakeholders, including permittees, as well as complainants and recipients, as it applies the provisions of the Civil Rights Act of 1964 (CRA).

### B. The draft guidance documents represent a significant improvement over the 1998 Interim Investigation Guidance.

API congratulates EPA on the marked improvements reflected in the Draft Recipient Guidance and Draft Revised Investigation Guidance, especially in clarifying timelines for action and the complaint process, when compared to the 1998 Interim Investigation Guidance. However, we believe that EPA's approach to compliance with

the CRA could be improved by a change in focus and some additional clarification, as explained below.

**C. Civil rights complaints could have a significant adverse impact on timely implementation of national environmental priorities.**

API's immediate concern is that permitting actions required for our members to comply with the Tier 2 and Sulfur Regulations may be some of the first actions tested under these guidelines. If complaints are filed, it will be necessary for EPA and recipient agencies to resolve them ahead of the deadlines discussed in the draft guidelines to enable our members to meet the mandatory deadlines of the Tier 2 and Sulfur Rulemaking. While we support the conclusion that "[n]either the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue", it is very difficult for any of our members to justify the very significant financial investment to install equipment at a facility to meet Tier 2 and Sulfur requirements without knowing what the final permit conditions might be or whether these conditions may ultimately be changed.

Further, we are concerned that once a recipient has had a complaint filed against it, further permitting actions at the subject facility[1] or other geographically proximate facilities, might be put "on hold" due to the considerable public interest that is generated when allegations of discrimination and adverse impacts are made. Another scenario we can envision is where a construction permit is issued, a complaint is filed, construction is completed and then the terms of the construction permit are ultimately changed as a result of the complaint. The significant investments (often millions of dollars) for construction could be stranded.

EPA should address this issue in the final investigation guidance by including a more compressed timeline for resolving claims impacting legally mandated permit actions, such as those required to comply with the Tier 2 and Sulfur Rulemaking. Because of the narrow window to begin construction and meet the regulatory deadline for production of low sulfur gasoline, the terms of construction and operating permits must be finalized at the earliest possible moment.

Finally, the Agency should use its resources to actively educate the public about the benefits local communities will reap from the Tier 2 and Sulfur Program. Delays that could occur as a result of civil rights complaints were not addressed in the Tier 2 and Sulfur Rulemaking and could adversely impact our members' ability to meet their legal requirements.

**D. EPA's focus should be on addressing state and local permitting processes that result in discrimination rather than individual permitting actions.**

Both draft guidance documents focus very heavily on addressing or investigating the effects of a particular permit action. Though it is appropriate to examine a recipient's

[1] In some jurisdictions there is a two-stage process in which a construction permit and then later an operating permit is issued, while others use a one-permit process for construction and operation.

process that results in disparate significant adverse impacts, a single permitting action is not likely to cause such impacts. This is particularly true for permits that do not authorize significant increases in releases of pollutants of concern into the environment. While EPA acknowledges in the guidance that a single permit is rarely the sole cause of a disparate adverse impact, more emphasis needs to be placed on identifying patterns of discrimination in permitting processes and assisting state and local permitting agencies to improve their processes so that, ultimately, these patterns of discrimination do not continue.

The CRA, EPA's implementing regulations and these draft guidance documents do not address other, more direct causes of disproportionate impacts such as land use and planning practices, taxation, spending and other public policies. These public policies often encourage the construction of low-cost residences and schools near older industrial facilities. There is usually nothing that state or local environmental agencies can do or should be expected to do to affect these factors. Thus, we support EPA's position that a complaint's scope can only extend as far as the authority of the permitting agency. Factors that fall outside of the permitting agency's authority must be addressed through other means. EPA should work with other federal, state and local agencies and interested stakeholders to address these factors that can lead to disparate significant adverse environmental impacts rather than trying to solve these problems solely through individual environmental programs.

## E. Compliance with the Civil Rights Act should be EPA's goal.

EPA's statement of principles in the Draft Revised Investigation Guidance says, "strong civil rights enforcement is essential". Broad compliance with civil rights laws, as well as enforcement of those laws, should be the driving principle to achieving equity in the application of environmental laws. Individual permitting actions that lead to disparate significant adverse impacts should be investigated. However, investigating individual permitting actions is time and resource intensive. Applying those same resources to assist the state and local agencies to address discriminatory policies, where they exist, would yield broader compliance and ultimately result in fewer complaints.

## F. The role of the permittee is not addressed.

The role of the permittee is not adequately addressed in the draft guidance documents. Permittees should receive notice when a complaint is filed, be able to provide input to the decision to investigate such a complaint, and to participate in that investigation. The permittee may not have a direct legal interest in a civil rights complaint under Title VI, but the outcome of an investigation will have real and significant effects on the permittee. We have addressed our concerns about the role of the permittee in the "Detailed Comments" section below.

## G. The Civil Rights Act should not be used to force areas to comply beyond the requirements of existing environmental laws.

In making an adverse impact decision, the Draft Investigation Guidance states the "[c]ompliance with environmental laws does not constitute per se compliance with Title VI." (65 FR 39680) It is not appropriate for EPA to use the Title VI complaint process to force recipient's and permit applicants to agree to permit terms that exceed the requirements of applicable environmental standards. If permit terms that meet current environmental standards are not considered "safe and healthful," then the appropriate recourse is to seek changes in the underlying standards.

The draft guidance also states that in identifying voluntary compliance measures the recipient might look at additional controls in the permit at issue or focus on " . . . other permitted entities and other sources . . ." (65 FR 39683). This would mean that facilities that are operating under the terms of their own permits, and which have successfully been through the permitting process, may be affected at any time by any permit action within a given area. Such a process would be fundamentally unfair and without basis in law.

## H. It is impossible to provide the same environmental conditions to all people.

The CRA does not require, nor did Congress intended it to require, that all people experience the same exposure to environmental pollutants. We support EPA's paradigm of determining first if the actions of a recipient result in a significant adverse impact on an affected population and then determining if the impact constitutes a disparate significant adverse impact on the affected population before moving forward on a complaint. However, EPA seems to imply in the Draft Revised Investigation Guidance that the occurrence of a disparity may be proof of discrimination. The fact that a disparity exists cannot alone be a measure of discrimination because it is impossible to ensure that all parts of an airshed, for instance, have identical air quality. Such conditions simply do not exist. Likewise, a sparsely settled wilderness will not have the same level of pollutants as a dense urban center.

## I. EPA's process could have unintended effects on unprotected populations.

We strongly support the principle that "[a]ll persons regardless of race, color, or national origin are entitled to a safe and healthful environment." EPA's goal should be to ensure reasonable protection of human health and the environment. EPA needs to assure the policies put forth in these guidance documents do not have the unintended effect of shifting adverse impacts from potentially affected minority populations to populations with members not of named classes or that are simply more diverse (i.e., low-income communities with a more even distribution of peoples of race, color, or national origin.)

**J. EPA should commit itself to be bound by its own guidance.**

EPA should make a firm commitment to follow the Draft Investigation Guidance in conducting investigations. The notice states that, "EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented." As currently drafted, there is no commitment on the part of the Agency to follow these guidelines, which reduces the certainty for all parties about how EPA will handle investigations.

**K. API supports the use of Alternative Dispute Resolution and other informal resolution processes.**

API supports the use of Alternative Dispute Resolution and other informal resolution processes to avoid complaints and encourage voluntary remedies. Such processes, however, need to have clearly defined timeframes associated with them so that they do not result in unproductive or protracted negotiation. Each party should be able to unilaterally end the informal process and move the action into a more formal process. Parties should also be able to jointly agree to continue the process beyond deadlines if they believe that progress toward a resolution is being made.

## II. Detailed Comments

A. Framework for Processing Complaints; Summary of Steps (65 FR 39670)

1. Timing For Acceptance For Investigation

There seems to be a discrepancy in the process laid out in both the draft guidance and EPA's Title VI regulations. The guidance states that "OCR will notify the complainant and the recipient in writing within five calendar days of the receipt of the complaint by EPA." (65 FR 39670) Then the recipient may respond within 30 days of receiving the notification. The guidance goes on to say: "Each allegation that satisfies the jurisdictional criteria will be accepted for investigation within 20 calendar days of acknowledgement of its receipt." We read this to say that EPA will decide on whether to accept a complaint prior to the expiration of the period that has been allowed for the recipient to file a response. EPA should have the benefit of the recipient's response before deciding whether to accept the complaint for investigation.

2. Roles and Opportunities To Participate – Role of the Permittee

The guidance barely mentions one of the most affected parties in the complaint process – the permittee. Although a complaint under EPA's Title VI regulations is brought against the permitting agency, and not the permittee, there are numerous potential impacts on the permittee. The very fact that there is a complaint, in addition to any changes to the permit that might result from a

complaint, can have serious implications for a permittee. There are usually significant financial resources already committed to and expended on a project by the time a permit is issued, in addition to negative impacts of being identified as a facility involved in a civil rights complaint. When a complaint is received, the permittee should be notified at the same time as the complainant and the recipient. The permittee should also have the right to submit supporting documents to assist EPA's investigation of the complaint. EPA should proactively seek input from the permittee at all points in the investigation and communicate to the permittee, on an ongoing basis, the status and results of its actions in processing a complaint.

## B. Accepting or Rejecting Complaints

### 1. Who May File a Complaint

There needs to be better clarification of who is entitled to file a complaint. The guidance and regulations currently allow complaints to be filed by three categories of persons: a person who was allegedly discriminated against in violation of EPA's Title VI regulations; 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 a party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations.

It should be clarified that simply being a member of a class does not allow a party to file a complaint without some direct interest in the recipient's jurisdiction where the permit is being considered. For example, an Asian American in New York should not be able to file a complaint on a permit being considered in California simply because there are other Asian Americans represented in the affected population in California.

In addition, EPA needs to clarify what it means to be "authorized to represent a person or specific class of people". It should be clarified that this language is not intended to open the door for individuals or groups from outside of the affected population to initiate a complaint on behalf of a person or specific class of people within the affected population, unless representation has been specifically requested from someone within the affected population. Otherwise, groups outside of the area without any stake in the local permitting process may inappropriately intercede and may not represent the best interests of the local affected population.

### 2. Weighing a Complaint

In deciding to investigate a complaint, EPA should give greater weight to complaints supported by a quorum of adults (i.e., 8 to10) from the affected community to discourage the filing of potential nuisance complaints from a single individual.

3. Complaints Filed By Persons Not Engaged In The State or Local Process

Most state permitting processes include comprehensive notice and comment provisions designed to afford all stakeholders and interested parties an opportunity to participate in the rulemaking process in a meaningful way. When considering whether a complaint should be accepted for investigation, EPA should determine whether the complainant reasonably knew about and participated in the recipient's administrative process. If he/she chose not to participate or participated but chose not to bring forth an issue that could have been reasonably anticipated and addressed, EPA should not accept the complaint or, at the very least, should give additional deference to the results of the recipient's process. It is not fair to accept complaints from individuals who knew a permit was being considered, had a reasonable opportunity to participate, but chose not to be involved or did not surface all relevant issues early in the process.

API agrees that if there was inadequate public notice and insufficient opportunity to participate in public meetings or to comment, then a timely complaint should be accepted by EPA, assuming that it meets all of the other relevant requirements.

4. Timeliness of Complaints – The 180-day "Clock"

One hundred eighty days following the issuance of a permit should be a sufficiently long time to allow for filing a complaint. By that time, the permittee has typically begun construction, and made significant investments based on the permit, which could be jeopardized. The guidance and regulations state that EPA might choose to review the recipient's relevant permit based on an untimely complaint "at some future date" or will determine whether to waive the 180-day limit "for good cause" on a "case-by-case basis". This guidance needs to provide some clarification of when EPA might decide to investigate untimely complaints or extend the time limit. EPA should provide some examples in the guidance of "good cause" and under what circumstances it might decide to investigate a complaint filed after the 180-day limit. EPA should also give some indication of an outside timeframe (in the case of an extension) after which a permittee can proceed with certainty that the permit conditions are final. Finally, EPA should consider a regulatory amendment to set a shorter, binding time limit.

EPA has stated in meetings with our industry that it does not have the manpower to address complaints in 180 days and, in fact, currently has a 7-8 year backlog of civil rights complaints. Should a complaint be filed concerning a refinery's Tier 2 permit and the investigation is delayed that long, a refinery would obviously not be able to supply low sulfur gasoline without considerable risk to its permit status and to the capital investments it made to comply with the Tier 2 and Sulfur Rulemaking. This is an unconscionable position. EPA must prioritize its resources so that facilities, such as refineries, legally obliged to make

changes requiring new permits, can get prompt resolution of permit issues in order to meet other legal requirements.

C. Resolving Complaints

1. Informal versus formal complaint resolution (65 FR 39673 and 39674)

EPA should clarify that both informal and formal (i.e., "voluntary compliance agreements") resolutions need to be reduced to writing and will be enforceable.

2. Voluntary actions to resolve a complaint (65 FR 39674)

As stated previously, the resolution of a Title VI complaint on a single permit action should not mandate modification of permits for all other sources in a given area. Facilities not involved in a complaint may agree to provide voluntary reductions in emissions or other releases as part of the resolution to the complaint. Due process should be afforded to document the voluntary reductions, afford appropriate public notice and comment, and make any resulting agreements binding and enforceable on all parties.

D. Investigative Procedures -- Area Specific Agreements

In the Draft Recipient Guidance, EPA encourages states to consider "area-specific agreements" as mechanisms to avoid civil rights complaints. API is concerned that there is little guidance on how to establish the boundaries of the areas to be included in such agreements. The recipient guidance should recommend the smallest reasonable scope for these areas. It is also unclear how such agreements might affect parties not involved in developing the agreement whose facilities are within the area or are immediately outside of the established boundaries. For instance, could a facility be forced to meet a "voluntary" standard without an opportunity to participate in the agreement?

In the Draft Investigation Guidance, EPA indicates that the existence of an area-specific agreement may be used to accord due weight to the state or local permitting procedure. API supports this position. In investigating a complaint, EPA could resolve the matter by finding that such agreements reduce adverse disparate impacts to the point required by Title VI. In general, subsequent complaints raising allegations covered by such an area-specific agreement should be dismissed. This policy may create a disincentive for potential complainants to enter into such agreements, since the existence of the agreement might close the door to future recourse under EPA's Title VI process. The draft guidance states that a possible exception to this general policy could be where EPA is presented with evidence that the agreement is no longer adequate, due to changed circumstances, or not being implemented properly. API requests that EPA explain the types of evidence that would be required to determine when a change

in circumstances is sufficient to set aside an area-specific agreement. The threshold to setting aside an agreement should be high.

E. Adverse Disparate Impact Analysis

1. Determining the type of permit action at issue

The guidance is too broad on what types of permit actions EPA will investigate. We agree that it is not appropriate for simple permit changes (i.e., change of name or mailing address) to be considered for investigation. Permit renewals also should not be subject to complaint and investigation unless the renewal results in significant increases in emissions or other releases from the permitted facility. The only permitting actions that should be considered are new permits or permit modifications that could result in a significant net increase of actual emissions from the facility.

2. Permit Action Decreases Pollutants of Concern (65 FR 39676)

When a complaint names particular pollutants of concern and the permit at issue has either no net effect on or decreases emissions or other releases of those pollutants, EPA should close the investigation. EPA has proposed to do so when a permit action "significantly decreases overall emissions at the facility." There can be no adverse impact from a permit action if it does not contribute to increases of the specific pollutants at issue.

3. State Actions that Mitigate the Effect of a Permit Action

In considering whether to investigate permit actions that result in a net increase in facility's emissions, EPA should consider whether the state undertakes to offset those impacts. One such instance might be under the recently released Draft Guidance, "Use of Emissions Reductions from Motor Vehicles Operated on Low-Sulfur Gasoline as New Source Review (NSR) Offsets for Tier 2/Gasoline Sulfur Refinery Projects in Nonattainment Areas", which allows a state to identify emissions reductions from the mobile source sector in its State Implementation Plan to specifically offset emissions increases at refineries. In this case, there are projected to be large emissions benefits locally and nationally. EPA should consider whether there actually are any adverse impacts when the state chooses to set aside these offset emissions.

4. Define Scope of Investigation

a. Determine the Nature of Stressors and Impacts Considered

The guidance states "In determining the nature of stressors . . . and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by

applicable laws and regulations." (65 FR 39678) The guidance goes on to say that applicable laws over which the recipient has some "obligation or authority" would be considered as part of the adverse disparate impacts analysis, even if not part of the permitting program. EPA should not consider stressors over which a permitting agency has no control. If the permitting program does not address these stressors, they should not be used as a basis for determining adverse disparate impact in investigating a complaint.

b. Impact Assessment – Source of Data

Impact assessments should determine the level of environmental risk experienced by the affected population based upon some measure of exposure. Sources of data should include exposure data, monitored ambient pollutant levels, emissions data, and known releases of pollutants. It is preferable to use actual or monitored data whenever available, but when it becomes necessary to use modeled data, EPA must ensure that scientifically sound assumptions are used in the modeling. The Agency should also seek relevant data from the permittee (i.e., emissions estimates based on facility specific parameters).

EPA suggests that measures of product production and use, and storage of pollutants, and their potential for release, or activities "associated" with potential exposure might be used to assess impacts, but these data are generally not reliable enough to determine actual exposure and risk. If these are the only sources of data, EPA should consider whether this data is sufficient to demonstrate an impact. API encourages EPA to continue its efforts to develop better environmental data focusing on assessment of risk.

We strongly support EPA's decision to note uncertainties in data where they are known.

5. Adverse Impact Decision

a. Adverse Impact Benchmarks

API agrees with EPA that the application of appropriate benchmarks for risk can be an important tool for determining whether there is an adverse impact. In discussing these benchmarks, EPA indicates it would use measures of cumulative risk to compare to the benchmarks. We strongly urge EPA to clarify that cumulative risk is determined for annual or lifetime risk resulting from exposure to pollutants from the facility at issue.

b. Use of the National Ambient Air Quality Standards (65 FR 39680).

API supports the use of national ambient air quality standards (NAAQS) (and presumably health-based standards for other media and pollutants) to establish a presumption of protectiveness. When complaints include a concern about a specific pollutant for which the area is meeting a health-based standard, EPA will generally find there is no adverse impact. However, we are troubled by the statement that " . . . if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome." The NAAQS set requirements for ambient levels of criteria pollutants that have been determined to protect public health. The Agency's implication that there can be an adverse impact even if standards are being met cannot be supported. Since the Agency sets NAAQS by rulemaking, it cannot disregard them for purposes of assessing the impact of a pollutant (stressor) in the investigation of a civil rights complaint. If a health-based standard is not protective of public health, then the appropriate recourse is to seek changes in the standard.

c. Comparison Population

The guidance does not provide sufficient discussion of how comparison populations should be determined. The draft guidance suggests that comparison populations could be drawn from those who live within a reference area such as the recipient's jurisdiction, political jurisdictions or areas defined by environmental criteria, such as an airshed or watershed. The draft guidance also suggests that a comparison population would usually be larger than the affected population. These seem to be arbitrary measures for determining a comparison population.

The general characteristics of comparison populations should be better defined (i.e., compare urban settings to urban settings and consider similar proximity to key features like transportation infrastructure or industrial facilities.) It would not be appropriate in most cases to compare populations in widely separated geographic areas because geographic features, meteorology, etc. can have large impacts on the formation and movement of pollutants.

F. Definition of terms

We commend EPA for expanding its definitions and including a glossary at the end of each guidance document. However, many of the definitions are still somewhat unclear or incomplete. Further, some terms are used inconsistently throughout the document.

1. Statistical Significance

In the text of the guidance it is suggested that 2 to 3 standard deviations from the mean be a measure of statistical significance (65 FR 39682) in measuring the demographic disparity between the affected and reference populations. The definition in the glossary for statistical significance should include this language.

Clear examples of what the Agency considers "significant" in all instances where the term is used would be useful.

2. Actual vs. Allowable Emissions

Throughout the document when talking about what are the proper measures of emissions of "stressors", reference is made to actual and allowable emissions in a seemingly interchangeable manner. The proper measure of emissions is actual emissions, which should be used consistently throughout the document.

3. Consistency With EPA Permitting Regulations

An effort should be made by EPA to ensure that definitions used in the guidance documents are consistent with definitions used in the underlying permitting provisions.

4. The definition of "adverse impact" is quite open to interpretation and does not clarify how to determine whether there is an adverse impact.

The definition states that EPA's determination would be " . . . based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science." There is very little that falls outside of that definition.