

August 28, 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)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

RE: Comments on *Draft Revised Guidance for Investigating Title VI  
Administrative Complaints Challenging Permits*

Dear Administrator Browner and Ms. Goode:

The Natural Resources Defense Council (NRDC)<sup>1</sup> submits the following comments in response to the U.S. Environmental Protection Agency's (EPA) recently released *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* ("The Guidance"). NRDC commends EPA for investing time and resources to formulating a comprehensive strategy to investigate Title VI complaints in the environmental permitting arena. This momentous task places EPA at the crossroads and presents an extraordinary opportunity to move beyond the contentious debate on the causes of environmental inequities and to implement action to revive environmentally devastated communities.

Real life experience shows that many state recipient agencies have consistently failed to address blatantly unfair distributions of environmental harms, despite wide discretion to do otherwise. This makes EPA's Title VI Guidance an indispensable tool for communities fighting against overwhelming environmental and public health threats.

However, a review of the new Guidance reveals serious flaws. Despite efforts expended thus far, the Guidance still fails to yield a framework that will guarantee compliance with civil rights laws. Much of the document is spent on imploring recipient agencies to address and reduce pollution in affected communities. Yet, on the heels of this directive is an even stronger message: that EPA will go to great lengths to escape administering a Title VI remedy, either through termination of funding or seeking injunctive relief via the U.S. Department of Justice. This is apparent in the substantial deference afforded to the recipient agencies, through significant procedural protections

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<sup>1</sup> NRDC is a national nonprofit organization dedicated to protecting the world's natural resources and ensuring a safe and healthy environment for all people. With 400,000 members and a staff of lawyers, scientists, and other environmental specialists, NRDC combines the power of law, the power of science, and the power of people in defense of the environment.

and generous presumptions, as compared to the absence of ample avenues for redress to civil rights complainants.

To comply with the letter and spirit of civil rights law, as well as its duties under Title VI, EPA should reconsider its position. NRDC respectfully offers the following comments which outlines the more serious deficiencies in the Guidance and proposes recommendations.

## II. Framework for Processing Complaints

### A. Summary of Steps

**Guidance states:** Section II(A) establishes a strict timeline to facilitate acknowledgment, acceptance and investigation of Title VI complaints. EPA should be commended for setting a maximum window of 205 days for a complaint to be received and ultimately decided upon based on its merits.<sup>2</sup>

**Deficiency:** It is highly improbable that EPA currently has the resources to comply with the deadlines set forth in the Guidance. In fact, EPA has missed its regulatory deadlines in every single Title VI case accepted for investigation in the history of the agency, with only one exception, and missed the regulatory deadlines for acknowledgment of complaints in almost every case. Given this current state of affairs, it seems likely that OCR will encounter difficulty in responding to future complaints filed, in addition to the 51 complaints that are awaiting resolution.<sup>3</sup>

**Recommendation:** EPA should (1) ensure that OCR is adequately staffed to investigate all Title VI complaints in a manner that provides for a fair and timely investigation; (2) implement oversight procedures to make sure that investigations are being handled properly, ranging from periodic reports submitted by investigators to full public disclosure of such progress.

## 6. Voluntary Compliance

In Section II.A.6, the Guidance states that if the recipient does not voluntarily comply after the receipt of a formal determination of noncompliance, EPA *must* start proceedings to deny, annul, suspend, or terminate EPA assistance. It is commendable that EPA has committed itself, at least in theory, to actually enforcing funding termination sanctions for recalcitrant violators.

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<sup>2</sup> 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.

<sup>3</sup> 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.

## B. Roles and Opportunities to Participate

**Guidance states:** In Section II(B)(2), EPA describes the proceedings between the complainant and recipient as not "adversarial" and therefore, the complainant has no right to appeal.

**Deficiency:** However, EPA affords a disturbingly different standard to the recipient, offering it substantial procedural protections, including the right of appeal after an adverse decision. This scheme unfairly elevates and offers significantly more protection to a governmental entity's monetary interest over private citizens' constitutional interests.

**Recommendation:** It is critical for EPA to remember that its 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 (Section II.7). 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.

## III. Accepting or Rejecting Complaints

### B. Timeliness of Complaints

#### b. Ongoing Permit Appeals or Litigation

**Guidance states:** EPA states that it will generally dismiss complaints without prejudice if the issues raised in the complaint are the subject of "litigation in Federal or state court."

**Deficiency:** This broad policy has the potential to penalize 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 with EPA. Such complainants would have their civil rights complaint dismissed because they sought to force an agency to abide by environmental law – simply because the "issues raised in the complaint" would be the same issues raised in the lawsuit.

**Recommendation:** Since, in effect, this provision forces complainants to choose between vindicating certain rights and foregoing others, it should be eliminated from the Guidance.

#### 4. Premature Complaints

**Guidance states:** EPA states that when complaints are filed prior to the issuance of the permit by the recipient, the complaint will be deemed premature and dismissed without prejudice.

**Deficiency:** As a general matter, 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 ignores this approach by stating that a permit must be issued before a complaint can be considered ripe, otherwise it will be dismissed as premature.<sup>4</sup> While this language provides a clear and simple definition of ripeness for EPA, it disadvantages the communities supposedly protected by Title VI. Using permit issuance as a ripeness test means that EPA misses the ideal opportunity to *prevent* discriminatory impacts – before they occur.

**Recommendation:** If all indicators show that a permit will be issued, and if a complaint meets the initial acceptance criteria, then there is 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 ripeness test is relatively meaningless.

#### IV. Resolving Complaints

##### B. Implementing Informal Resolutions

###### (i). Eliminating or Reducing Adverse Disparate Impacts

**Guidance states:** EPA states that it will encourage recipients to informally resolve Title VI complaints. The agency further explains that it “expects that measures that eliminate or reduce *to the extent required by Title VI* the alleged adverse disparate impact will be an important focus of the informal resolution process (emphasis added).”

**Deficiency:** The Guidance fails to explain what “eliminate or reduce [adverse disparate impacts] to the extent required by Title VI means.

**Recommendation:** At the very least, this language can be read to mean that it should be a reduction to the level at which they are no longer “significant” enough to be considered “adverse” or “disparate” under Title VI. EPA must propose how it will define legal significance, with respect to both level of impacts and demographic distribution of impact.

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<sup>4</sup> “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.

## (ii) Denials of Permits

**Guidance states:** EPA states 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 " and reiterates this point elsewhere in the Guidance (Section VII.A.3).

**Deficiency:** This language is alarming given that 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.<sup>5</sup> In these cases, the suspension, denial, or revocation of a permit is a powerful tool for communities fighting against disparate impact. In essence, EPA is robbing complainants of the most effective tool they have to prevent disparate adverse impact.

**Recommendation:** While, no one discrete agency action is likely ever to be solely responsible for an adverse impact, actions that contribute to disparate impacts should NOT be allowed. Indeed, the "sole cause" concept is antithetical to cumulative impacts analysis, which EPA embraces, at least in theory. Accordingly, 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.

## (iii). Mitigation Measures

**Guidance states:** During the informal resolution process, recipients can offer "to provide various measures to reduce or eliminate impacts...such measures include changes in policies or procedures, additional pollution control, pollution prevention, *offsets*, and emergency planning and response."

**Deficiency:** In effect, EPA proposes to tolerate concededly discriminatory effects if the recipient comes up with a plan to "mitigate," but not eliminate, those impacts. Less discrimination is still discrimination.

**Recommendation:** Civil rights enforcement must have as its goal the prevention and elimination of discrimination. Within the framework described in the Guidance, EPA's faith that mitigation measures employed by the recipient agency are sufficient to ensure compliance with Title VI is dangerously misplaced.

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<sup>5</sup> 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.

It is important for EPA to acknowledge that mitigation measures are devices often used by agencies and polluters to trade certain pollution to other areas or media. For example, a facility may propose to reduce water pollution while increasing air pollution, or preserve pristine areas in another region to compensate for increased emissions at a particular site. One pitfall 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 improvements in locations outside the community in which the facility is located.

Thus, EPA should require that any mitigation measure undertaken must address concerns at the actual site, and not propose to address issues that have no relevance to the community where the facility is to be located.<sup>6</sup> Therefore, mitigation must be targeted to the site at issue in the complaint and concentrate 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.<sup>7</sup>

Moreover, if a state agency promises to carry out mitigation procedures, and then fails to do so, there is currently no avenue of redress for the community members affected. Even if the mitigation measures are faithfully put in place, there is no guarantee that they will actually work.<sup>8</sup> Therefore, it is important that EPA ensure that third parties that are responsible for conducting mitigation actually do it and should include administrative recourse for complainants. Also, while EPA grants that an area-specific agreement or other such mitigation scheme may be reviewed if circumstances change, this review process suggests that a new permitting action is required to

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<sup>6</sup> "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 (9<sup>th</sup> 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").

<sup>7</sup> 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).

<sup>8</sup> 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 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).

make the complaint ripe. Instead, EPA should allow for a direct review of mitigation measures if the scheme is accused of failure.

Furthermore, 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 fair determination. Sound policy decisions require the input of all interested perspectives and, as such, EPA should make it explicit that the affected community shall have a meaningful role in fashioning mitigation plans.

(iv). Offsets

**Guidance states:** During the informal resolution process, recipients can offer “to provide various measures to reduce or eliminate impacts...such measures include changes in policies or procedures, additional pollution control, pollution prevention, *offsets*, and emergency planning and response.”

**Deficiency:** EPA should clarify what the agency means by “offsets.” Typically, offsets include either (1) reducing pollution at other facilities in exchange for keeping emissions high at the disputed facility; or (2) sending pollution to another area in exchange for reducing its pollution at the disputed facility (the Prevention of Significant Deterioration (PSD) model). 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, such as an affluent community with fewer environmental threats present.

Still, PSD style offsets pose potential problems. Implementation of pollution offsets (in this case allowing for more pollution in another area to compensate for having to reduce emissions at the complained-about site) will likely reroute pollution to other areas that in all probability are in violation of Title VI already.<sup>9</sup> 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.

**Recommendation:** Ultimately, if EPA insists on using offsets in a Title VI context, it should limit the recipient community of the offset pollution to areas that do not experience adverse disparate impact, and *would* experience no adverse impact as a result of the offset. In doing this, EPA can ensure that the goals of Title VI are not defeated.

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<sup>9</sup> 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 \_\_\_\_, 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).

Lastly, if EPA is going to defer to “informal resolutions” reached between complainants and recipients, there must be some independent investigation to ensure that the complainant that entered in to the agreement was adequately representative of the affected community.<sup>10</sup>

## V. Investigative Procedures

### B. Granting Due Weight to Submitted Information

#### 1. Analysis or Studies

**Guidance states:** EPA states that recipients as well as complainants may submit “evidence such as data and analyses to support their position that an adverse impact does or does not exist.”

**Deficiency:** Requiring that studies that be granted due weight conform to "accepted scientific approaches" necessarily favors submissions by industry and state agencies over submissions by affected communities. Generally, a low-income community group in an environmentally devastated area will not have the resources to pay for a comprehensive study that meets EPA's standards. Moreover, there is also evidence to suggest that EPA ignores studies by community groups, even when submitted in a scientifically acceptable fashion.<sup>11</sup> Thus, it is likely that most studies of the area at issue in a particular complaint will be filed by the party adverse to the complainant; i.e. the agency whose funding is dependent on the outcome of the study and subsequent investigation. Hence, EPA is confronted with an objectivity dilemma.

**Recommendation:** To assist in overcoming this objectivity problem that offers too much deference to the recipient agencies, EPA should conduct its own studies, when possible, because the standard for dismissing a study is too high. In other words, 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.

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<sup>10</sup> (Cf. Federal Rules of Civil Procedure R. 23(a)(4) requiring adequate representation of the class by the class representative.) If the complainant was not adequately representative – especially as indicated by the presence of other community organizations opposing the informal resolution, whether or not such groups have filed a Title VI complaint of their own – then EPA should not dismiss the complainant’s original complaint but rather continue its investigation, as before, despite complainant’s attempt to withdraw the complaint. (Cf. FRCP R. 23(e), requiring court approval of settlements in class actions to ensure that the interests of absent class members is adequately protected.) If EPA proposes to make a finding that the complainant is adequately representative, and that an informal resolution will therefore be deemed to satisfy the requirements of Title VI, EPA should first provide notice and an opportunity for comment by all interested parties.

<sup>11</sup> Catherine O’Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

Lastly, EPA should be sensitive to the fact that low-income affected communities may not be able to pay for costly scientific studies, and out of respect for their means, EPA should afford those studies weight and consideration (see additional comments on Section VI.3. "Impact Assessment").

## 2. Area-Specific Agreements

**Guidance states:** EPA encourages recipients to develop area-specific agreements (ASAs) which contain plans to eliminate or reduce existing disparate impacts, and if they meet certain criteria, they will be given "due weight" in a Title VI investigation.

**Deficiency:** The precise role the Guidance ascribes to ASAs in the course of a civil rights investigation is vague and disturbing. 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 described treatment of ASA's in essence does just that. EPA's proposal to rely on its findings about such a *general agreement* to dismiss a *specific complaint* thwarts EPA's legal responsibilities under Title VI, which require the agency to actually investigate the complaints that are filed. ASA's may be fatally flawed in that they are devoid of any features that could assure the recipient's compliance with any goals of pollution reduction, pollution prevention, or environmental justice. Furthermore, there may be no mechanisms to (a) monitor progress, (b) revise the plan to meet changed circumstances, (c) allow community groups that are parties to such an agreement be able to enforce it in court.

**Recommendation:** As a backdrop to ASAs and standards for due weight, EPA should carefully consider experiences with states under the Clean Air Act since the due weight provisions of this part of the Guidance parallel the practice of certifying state implementation plans under the Clean Air Act. Those plans have not been universally successful, and indeed, in some cases fail to prevent states from polluting with little or no 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.<sup>12</sup>

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 vague exceptions is problematic. Typically, 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 entitled to "due weight."

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<sup>12</sup> <<http://www.epa.gov/airs/nonattn.html>> checked on July 5, 2000.

## VI. Adverse Disparate Impact Analysis

### 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. To fulfill this duty, EPA must revise various sections of its adverse disparate impact analysis.

#### 1. Assess Applicability

##### a. Determine Type of Permit

**Guidance states:** 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.

**Deficiency:** 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.

**Recommendation:** The Guidance should also require the recipient to show that the decrease came from the *same pollutant* within that same media. Accordingly, 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.

#### 2. Define Scope of Investigation

**Guidance states:** EPA will utilize the nature of stressors, sources of stressors, and/or impacts "cognizable under the recipient's authority" to define the scope of the investigation.

**Deficiency:** The language of Title VI and EPA’s implementing regulations are not, on their face, limited to any particular type of discriminatory impacts. Title VI provides in broad terms that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>13</sup> EPA’s Title VI regulations state that a recipient shall not “use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination” nor “choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies.”<sup>14</sup>

Here, EPA incorrectly interprets Title VI as prohibiting only “impacts cognizable under the recipient’s authority.” This view is too narrow and limits the impacts to environmental ones as regulated under environmental laws and regulations. And because federal environmental laws, in many instances, provide for delegation to the states, states in effect will be choosing what standards to implement Title VI. In effect, this will lead to a lack of uniformity in implementing federal civil rights law.

**Recommendation:** To its credit, EPA acknowledges that impact should be evaluated if the recipient has “some obligation or authority regarding them” and that “a recipient need not have exercised this authority for the impact to be deemed within the recipient’s authority.” Section VI.B.2.a. This suggests that applicable laws and regulations may in fact include more than environmental laws and regulations, which by themselves, do not provide the protection required by Title VI and its underlying civil rights objectives.

Therefore, it can be argued that any impacts on a community’s well-being which are linked to a permitted facility -- e.g., health,<sup>15</sup> environmental,<sup>16</sup> socioeconomic, and other quality of life impacts<sup>17</sup> -- are cognizable under Title VI’s broad anti-discrimination mandate.<sup>18</sup>

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<sup>13</sup> 42 U.S.C.A. § 2000d (West 1999).

<sup>14</sup> 40 C.F.R. § 7.35 (b)-(c) (West 1999). Note, however, that the full text of § 7.35(b) reads: “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 defeating or substantially impairing accomplishment of the objectives of the program* with respect to individuals of a particular race, color, national origin, or sex.” 40 C.F.R. § 7.35(b) (emphasis added).

<sup>15</sup> “Health” impacts include actual illness or injury, as well as increased risk of illness or injury. The term may also include mental and psychological health as well as physical health. *See, e.g.*, TITLE VI ADVISORY COMMITTEE REPORT at 000021.

<sup>16</sup> “Environmental” impacts include pollution of air, water, land, noise and odor. *See, e.g.*, TITLE VI ADVISORY COMMITTEE REPORT at 000021; Complaint, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960, ¶ 43 (E.D. Pa., 1996) (alleging, *inter alia*, toxic contamination of air, water, and soil; increased noise and vibration due to added trucking; emission of malodorous and noxious odors adversely creating acute health problems; increased dirt and litter on community roads).

a. Determine Nature of Stressors and Impacts Considered

**Guidance states:** 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."

**Deficiency:** The Guidance construes "impact" in an unacceptably narrow way. The proposed framework ignores 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 and environmental impacts. This approach places the Guidance once more in conflict with its own regulations.

**Recommendation:** The approach to evaluating impacts taken in Title VII and Title VIII cases is instructive here. 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."<sup>19</sup> Within the Guidance, the corresponding inquiry is whether the program or the stressor has a disproportionate impact based on race, color, or national origin.

Therefore, EPA has a duty to consider all impacts from a facility, including health, social, cultural and economic. In fact, federal courts repeatedly have rejected the narrowing of Title VI that EPA proposes here. Instead, the courts have construed disproportionate impact to relate to the impact of the project as a whole. For example, in *Bear Lodge Multiple Use Association v. Babbitt*, a Title VI case, the court construed impact broadly to include cultural, spiritual and religious impacts.<sup>20</sup> In other federal Civil Rights cases, plaintiffs have raised social and cultural impacts. In

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<sup>17</sup> "Socioeconomic and other quality of life impacts" includes such diverse impacts as decreased property value, traffic, aesthetics, impacts to cultural, religious, spiritual and archaeological resources. See, e.g., TITLE VI ADVISORY COMMITTEE REPORT at 000021; Complaint, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960, ¶ 43 (E.D. Pa., 1996) (alleging, *inter alia*, interference with residents' peaceful enjoyment of their property and interference with residents' sleep; decreased property values; stigmatization of the community; loss of self-esteem of residents, which adversely affects community "esprit-de-corps").

<sup>18</sup> TITLE VI ADVISORY COMMITTEE REPORT at 61, 62, 000021, 000027. See also Brief of Plaintiffs in Opposition to Defendants' Motion to Dismiss, *Chester Residents Concerned for Quality Living v. Seif*, No. 96-CV-3960 (1996), at 2-3 (on file with author) ("Though it is the waste facility permit applicant, in the first instance, who proposes the waste facility location, defendants [Pennsylvania Dept. of Env'l Protection] have the authority and power to deny the permit application. . . . Defendants, therefore, have the power and duty to deny a waste facility permit to prevent the construction or operation of a proposed waste facility whenever the proposed facility is found to be violative of applicable laws and regulations or whenever defendants' grant of a permit would violate defendants' obligations under the civil rights laws and regulations." (emphasis added)).

<sup>19</sup> *Edwards v. Johnston Cnty. Health Dep't*, 885 F.2d 1215 (4<sup>th</sup> Cir. 1989).

<sup>20</sup> *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (1999), cert. denied 120 S. Ct. 1530 (2000).

*Grimes v. Sobol*,<sup>21</sup> 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*,<sup>22</sup> the court acknowledged that stigma was a legally cognizable injury. In *Rozar v. Mullis*,<sup>23</sup> 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 the alleged cultural and social injuries were deemed irrelevant.

Generally, EPA should avoid limiting the scope of its civil rights enforcement on environmental statutes. However, if EPA insists on using such statutes as a leading guide, it must recognize that the purpose of environmental statutes is often not only to prevent health and environmental 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.

### 3. Impact Assessment

**Guidance states:** EPA states that “the strongest evidence demonstrating a causal link between the alleged discriminatory act and the alleged adverse impact would *directly link* an adverse health or environmental outcome with the source of the stressor. Although such evidence is preferred. . .it is rarely available.”

**Deficiency:** EPA calls for a "direct link" between an adverse health or environmental outcome and the "source of the stressor." In reality, this is virtually impossible except in the most horrific cases of toxic poisoning. As EPA acknowledges, it may require data gathered systematically over years – much longer than the timeframe provided for investigation in the Guidance - to discover the causation. Further, there may be impacts, which do not manifest themselves for many years after exposure, such as certain types of cancer.

**Recommendation:** EPA should make explicit that the unavailability of preferred data on “direct links to impacts” will not in any way prejudice a Title VI complaint. Furthermore, EPA needs to be explicit that, where the ideal form of evidence about impacts is not available, whatever the best available form of evidence is will be used, and it will be given, in such a case, no less weight than any other more “ideal” type evidence would have received. Indeed, the Guidance alludes to such an approach in Section VI. B.5. where it states that “simpler approaches based primarily on proximity may also be used where more detailed (e.g., modeled) estimates cannot be developed. . .” This language should be expanded upon to make clear that a proximity analysis is always

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<sup>21</sup> 832 F. Supp. 704 (1993).

<sup>22</sup> 468 U.S. 737 (1984).

<sup>23</sup> 85 F.3d 556 (11<sup>th</sup> Cir. 1996).

appropriate where other forms of analysis are unavailable due to lack of data or methodological difficulties. Lastly, EPA should also focus on exposure to pollution, not solely health outcomes.

#### 4. Adverse Impact Decision

**Guidance states:** EPA suggests that where risks or other measures of potential impacts meet or exceed a relevant "significance level," the impact will be presumed adverse.

**Deficiency:** While this is a reasonable framework, the Agency should be careful that the converse assumption is not made, i.e., a presumption of no adverse impact if a significance level is not exceeded. As a practical matter, EPA should acknowledge that permit applicants and regulatory officials can manipulate baselines and emission factors to keep from triggering applicable significance levels.

**Recommendation:** 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, the OCR 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.

**Guidance states:** To its credit, in determining whether an impact is "adverse" EPA generally states that it will consider adverse impacts outside of the traditional environmental regulatory framework.

**Deficiency:** However, EPA then goes on to frame its adverse impact analysis in terms of risk values, based upon hazard indexes and risk assessments, which are used to implement environmental laws and regulations. EPA reiterates the position that if the area in question is in compliance with a health based standard, there is no "adverse" impact. For example, EPA states that "if an investigation includes an allegation raising air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as "adverse" within the meaning of Title VI."

**Recommendation:** EPA should avoid limiting the evaluation of whether an impact is adverse to safe levels as defined by environmental laws and regulations is inadequate. By relying solely on such mechanisms, EPA is in effect reducing Title VI compliance and enforcement to compliance and enforcement of environmental law, thereby undermining the civil rights objectives of Title VI.

Furthermore, the Guidance suggests that if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome. Given the extreme backlog of Title VI cases, resource limitations and unrelenting pressure from industry and

some state regulators, this presumption is relatively meaningless. Given that the complainant does not have standing as an "adverse party," and the recipient is unlikely to challenge such a finding, EPA is in the awkward position of having to rebut its self-imposed presumption. Moreover, since the recipient has significantly more resources than the complainant, the EPA should avoid imposing procedural roadblocks that operate to leave the complainants without recourse.

a. Example of Adverse Impact Benchmarks

**Guidance states:** EPA appropriately concludes that “ a recipient’s Title VI obligations exists in addition to the Federal or state environmental permitting program,” in large part, since “Title VI is concerned with how the effects of the programs and activities of a recipient are distributed based on race, color or national origin.” EPA appropriately acknowledges that “in some cases, the relevant environmental laws may not identify regulatory levels for the risks of the alleged human health impact or may not address them for Title VI purposes.”

**Deficiency:** At various points in the Guidance, EPA takes positions that fly in the face of this important premise. For example, EPA states that it will “ evaluate the risk or measure of impact compared to benchmarks for significance provided under any environmental statute, EPA regulation or EPA policy.” Environmental laws, as EPA acknowledges, do not address the cumulative effects and risks from multiple exposure media. Moreover, EPA admits that “environmental laws do not regulate concentrations of sources, or take in to account impacts on some sub-populations which may be disproportionately present in an affected population.”

**Recommendation:** The list of elements that environmental laws fail to regulate should be expanded to include, for example, not only cumulative impacts (multiple sources of the same pollutant) but also synergistic impacts (multiple pollutants combining to have a different or heightened health impact). The Guidance should provide for ways to include these relevant factors in an adverse disparate impact analysis and avoid citing to only environmental laws as though they are the paramount benchmarks for analysis.

b. Use of Ambient Air Quality Standards

**Guidance states:** EPA relies on National Ambient Air Quality Standards (NAAQS) as an ideal example of a health-based standard appropriate for use in an adverse impact investigation.

**Deficiency:** 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.<sup>24</sup> EPA’s reasoning is flawed because polluting facilities can still have an impact on a community even when NAAQS

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<sup>24</sup> 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.

are satisfied; NAAQS typically ignore 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 based on healthy white males.

**Recommendation:** If the agency is committed to using health-based standards to raise presumptions, it should avoid doing so when the standard applies to a large geographical area, such as an air shed. These general determinations—although perhaps appropriate for SIP planning purposes—may be virtually meaningless at the local level. For example, 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.

Moreover, EPA's reasoning 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 volatile organic compounds causes increased stress.<sup>25</sup>

Thus, the sufficiency of compliance with such standards as a defense to a Title VI complaint should be closely scrutinized by EPA, on a case-by-case.

## 5. Characterize Populations and Conduct Comparisons

**Guidance states:** In analyzing disparate effects, EPA describes the various ways in which it may consider an "affected community" and a "comparison community."

**Deficiency:** Ultimately, the Guidance does little to define how the disparity of the impact is defined. Specifically, the Guidance is agnostic as to whether the appropriate comparison is between (1) the "affected population" and the "general population" (i.e., including the "affected population") or (2) the "affected population" and the "non-affected population" (i.e., the "general population" excluding the "affected population"). This seems to be an important methodological choice that could have a bearing on the outcome of a complaint investigation. Second, the Guidance is also agnostic as to whether disparity should be assessed by comparisons of (1) the different prevalence of race, color, or national origin of the two populations; or (2) the level of risk of adverse impacts experienced by each population; or (3) both. It is striking that EPA does not state which comparisons are preferred or which comparisons EPA will use if some comparisons show disparity while others do not.

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<sup>25</sup> 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.

**Recommendation:** By the end of this section, EPA simply states that it will choose the “appropriate comparisons . . . depending on the facts and circumstances of the complaint.” Given that this analysis is a highly important and potentially outcome-determinative methodological choice, EPA should go further and solicit advice from those in the environmental justice movement who have experience and expertise with these methodological issues as to which approaches are most methodologically sound and reasonable.

## VII. Determining Whether A Finding of Noncompliance is Warranted

### A. Justification

**Guidance states:** 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).

**Deficiency:** This position, contrary to EPA’s stated goal of complying with Executive Order 12898,<sup>26</sup> extends an open invitation to recipients to continue practices that cause 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.

In turn, 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. In reality, this burden is nearly impossible to carry. Few would deny that most, if not all, challenged activities are legitimate. Everyone agrees that wastewater 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.

To illustrate “acceptable justification” the Guidance uses the permitting of a wastewater treatment plant as an example." 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.

**Recommendation:** Generally, benefits to the larger population, including both the affected population and the non-affected population, should not be used to justify burdening only one segment of the population. While it is true that the affected population would receive benefits

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<sup>26</sup> 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 on race, color, or national origin." Executive Order 12898, 59 FR 7629 (1994); *see also* Guidance at §I.F.

from a proposed facility, it would also receive burdens that the rest of the benefited population would not. This reasoning cannot be used to potentially justify every permitted facility.

Thus, the critical and determinative 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.

## 1. Types of Justification

**Guidance states:** EPA suggests that "economic development" 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.

**Deficiency:** It is impossible to imagine a project whose economic benefits would flow solely 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 Guidance properly adopts the standard of *Elston v. Talladega County Bd. of Education*, 997 F.2d 1394, 1412-13 (11<sup>th</sup> Cir, 1993), which requires that the recipient's challenged practice be "necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission."<sup>27</sup> EPA's actual application of the *Elston* standard to "economic development," for example, however, 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 "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.).

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<sup>27</sup> Inexplicably, however, the Draft Guidance also cites to *NAACP v. Med. Ctr.*, 657 F.2d 1322 (3d Cir. 1981) in support of the *Elston* standard. The *Med. Ctr.* case, however, adopted a much weaker standard of justification that has been largely superseded by the Civil Rights Act of 1991 and should not under any circumstances be adopted by EPA.

**Recommendation:** “Economic justifications” should be disallowed as a rule under the *Elston* standard adopted by the Draft Guidance.

## 2. Less Discriminatory Alternatives

**Guidance states:** EPA expresses a willingness to consider “practicable mitigation measures associated with the permitting [that] could be considered as less discriminatory alternatives.”

**Deficiency:** The description of what EPA considers a "less discriminatory alternative" (LDA) runs contrary to the spirit and letter of EPA's Title VI regulations.<sup>28</sup> 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 insufficient to comply with the civil rights mandates of Title VI.

Indeed, while EPA interprets *Georgia State Conference of Branches of NAACP v. Georgia*<sup>29</sup> 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*.<sup>30</sup> 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.

**Recommendation:** If EPA wants to rely on *Georgia State Conference* for its LDA standard, than it should follow the Supreme Court’s reasoning in *Albermarle*.<sup>31</sup> Discriminatory impact must be statistically eliminated in order for EPA to comply with Title VI. Otherwise, this justification

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<sup>28</sup> EPA defines an LDA as "an approach that causes less disparate impact than the challenged practice." §VII.A.2.

<sup>29</sup> 775 F.2d 1403 (11<sup>th</sup> Cir. Ga. 1985).

<sup>30</sup> "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." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

<sup>31</sup> EPA also cites *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413 (11<sup>th</sup> Cir. 1993) to justify its LDA standard. Yet again, this case fails to adequately justify EPA’s toothless standard. This case defines the requirement of an LDA in the face of a state action that is legitimate, important and integral to its mission. Clearly, Title VI complaints are distinguishable. While siting is an important mission of a state regulatory agency, compliance with Title VI is as well. One can not be considered prior to the other.

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.

In addition, consideration of cost in assessing the practicability of alternatives suggests, however, that such factors as saving the permit applicant money, allowing the permit applicant to turn a profit, ease of access to transportation arteries, availability of pre-existing infrastructure, etc., may come into play again here. The Guidance should be explicit that cost will not be a consideration in this respect. It is important to remember, 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 agency’s costs would be raised so excessively by choosing some “less discriminatory alternative” that such alternative would not be practicable.

### Conclusion

As currently drafted, the Guidance is fatally flawed in numerous ways. While laden with language that speaks to reducing disparate environmental burdens, the Guidance in reality undermines the spirit of Title VI by penalizing the civil rights complainant and aiding the civil rights violator. EPA should place the Guidance back on the drawing board, continue the ongoing dialogue with interested stakeholders and ultimately finalize a viable and workable remedy for long standing disparities.

Sincerely,

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