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Sent Via Email

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Ann Goode, Director of the Office of Civil Rights
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC
Email: civilrights@epa.gov

Re: EPA Draft Investigative Guidance for Title VI Complaints

Dear Ms. Goode:

We are writing to comment on the EPA Draft Investigative Guidance for Title VI Complaints ("Guidance"). We commend the EPA's attempt to bring clarity to the Title VI Complaint process and application of law. However, the Guidance falls short in its effort to protect public health and the environment in many communities of color. Our critique of the guidance is brought to your attention in light of the severity of the environmental justice problem throughout the U.S. and in New York City, in particular.

On August 1, 2000, we submitted oral comments on the Guidance. Our oral comments focused on the importance of considering cumulative impacts in an impacts assessment, particularly in the context of communities of color that are already burdened with environmental insults. Moreover, on August 1, 2000, the Center for Constitutional Rights submitted written comments on the Guidance. Rather than duplicating comments already provided, we support and adopt the comments of the Center for Constitutional Rights and will not reiterate the statements contained therein. In addition to those comments already provided, we submit the following brief points:

Scope of the Guidance

The Guidance states that its scope is limited to those complaints involving disparate treatment from permitting. We question the value of such a limitation. In attempting to narrow the scope, the document becomes confusing. The Guidance should include reminders that individuals with complaints concerning intentional discrimination or

discrimination in the public process should submit complaints that outline those issues as well. Without this acknowledgment, individuals' rights under Title VI cannot be fully exercised.

Evaluation of Impact

The issue of greatest concern regarding the Guidance is how adverse impact will be evaluated. Recently, in every attempt made by the State or the City to address environmental justice concerns in communities of color, the respective agencies have found no adverse impact associated with the project under review. In all of those environmental assessments, the issue of cumulative impact was ignored and the potential impact evaluated was based solely on compliance with NAAQS. As stated above, many communities of color in New York City are inundated with polluting facilities and associated diesel truck traffic. Many of these communities suffer some of the highest rates of asthma in the country, if not the world. EPA has stated publicly time and time again that, in many instances, NAAQS are not protective of public health and the environment. They are regional averages and often do not consider localized impacts.

If the Guidance is to address disparate impacts faced by communities of color, it must require that those direct and indirect impacts that are associated with an action be identified (multiple stressors that contribute to the cumulative impact) and the cumulative impact of the project and all other polluting facilities in a localized area be fully evaluated. Cumulative impact should consider all stressors, whether under the recipients' legal authority or regulated by some other entity. In addition, impact should be compared not only to "benchmarks for significance under any relevant environmental statute, EPA regulation, or EPA policy", but also EPA scientific and technical research. See Guidance at (VI)(B)(4). It is not enough to state that compliance with NAAQS comes with a presumption of "no adverse impact" that may be rebutted by the complainant. It is the permitee and the agency that should bear the burden of a comprehensive assessment of the cumulative impact on the health and welfare of a community slated to house multiple polluting facilities.

Consideration of State Court Proceedings

When OCR receives a complaint that a recipient of federal funds has violated Title VI, OCR should conduct its own review of both the facts and the law. The Guidance states, "if a state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process." See Guidance at III(3)(b). This provision is inappropriate; state court decisions should not be given precedential value in an OCR review. OCR's review should be *de novo*. State court decisions that applied state laws and procedures should have no bearing on OCR's determination. OCR should apply its own standards and federal law when determining if an agency has violated Title VI. To do otherwise would allow inconsistent reviews and diminish the weight of federal civil rights law.

Justifications

The Guidance fails to describe the traditional Title VI standard for determining whether a justification is "necessary." Also, EPA must evaluate whether the justification is pretextual. In other words, is the justification simply a pretext used to hide the agency's true actions? For example, the Guidance states that economic development may be a satisfactory justification. However, considering the EPA's primary mission, we question whether economic development could ever be a necessary justification for harming the environment and human health.

Burden of Proof

The Guidance must not diminish any rights provided for under the implementing regulations. However, the Guidance does just that. For instance, when delineating the obligations to provide racial data, the Guidance is written in a permissive fashion, whereas the implementing regulations clearly require the agencies to provide this important information. Without unequivocal language, the burden for producing this information will invariably fall to the complainant. To avoid this unacceptable result, the Guidance should be reviewed in context of the rights afforded under the implementing regulations and edited with a focus on preserving rights of the complainants.

Loopholes

In clarifying the implementation of Title VI the Guidance must be careful not to create new loopholes by which violators may excuse their conduct. The Guidance states that the Title VI investigation will be closed automatically if the facility results in a decrease of pollutants. What if a facility is temporarily closed, then applies for a permit where the facility will be cleaner than the old facility but undeniably creates more pollution than when it was closed? This happens quite often in communities of color where heavily polluting facilities close after decades of violations and adverse environmental impacts. The reopening of such facilities will still have adverse impact on these communities. In the Title VI analysis, OCR should factor in years of discriminatory siting practices and lack of environmental enforcement.

Drafting Problems

There are a number of places in the Guidance where the only explanation for the illogical statements is that there are problems with the actual drafting of the document. These drafting problems are serious concerns in that they both change the meaning of the Guidance and make the Guidance difficult for complainants to understand and use. For instance:

- The Guidance states that OCR will notify the recipient of the preliminary findings but neglects to mention that it will also notify the complainant. See Guidance at II(A)(4).

- When listing the jurisdictional criteria that the complaint must be filed within 180 calendar days of the alleged discriminatory act, the Guidance inadvertently does not include the phrase "or which can be waived for good cause (see below)." See Guidance at III(A)(3).

- The sentence "EPA will likely accept a complaint alleging a continuing violation as along as an action subject to Title VI has occurred within the 180-day period" is illogical. See Guidance at III(B)(1). By definition, a continuing violation is continuing and should not be evaluated within the 180-day period.

- The Guidance states that in defining the scope of the investigation, OCR will "determine the nature of stressors, sources of stressors and/or impacts cognizable under the recipient's authority…." This statement neglects to include both the multiple other stressors that contribute to the cumulative impact of an action and impacts that occur as a result of an action whether or not under the recipients' legal authority. See Guidance at VI(B)(2).

In sum, the purpose of the Guidance should be to provide a meaningful process for identifying and eliminating violations of Title VI. It is critical that EPA redraft the Guidance to accomplish this goal. Thank you for taking the time to consider these comments. If you have any questions, please call us at (212) 244-4664.

Sincerely,

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