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State of Louisiana
Department of Environmental Quality

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GOVERNOR

August 25, 2000

J. DALE GIVENS
SECRETARY

Title VI Guidance Comments
Attention: Ann Goode
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Comments on Title VI Guidance Documents and Request for Extension
of Time to Comment.

Dear Ms. Goode:

Pursuant to the instructions published at 65 Fed. Reg. 39,650 (June 27, 2000), please find enclosed the Louisiana Department of Environmental Quality's (LDEQ) comments on the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance) and the Draft Revised Guidance for Investigation Title VI Administrative Complaints (Investigation Guidance). The LDEQ also will be submitting these comments electronically.

In addition, during an EPA (Region 6) Title VI "listening session" held in Baton Rouge, Louisiana, on Monday, August 21, 2000, many Louisiana citizens who attended complained that EPA failed to provide adequate notice of the Recipient Guidance and Investigation Guidance. The citizens also complained that they were not provided a sufficient amount of time to review and/or comment on the documents.

Because of these and other similar complaints, the LDEQ formally requests that the comment period for the Recipient Guidance and Investigation Guidance be extended for at least an additional 60 days to allow citizens of Louisiana more time to review the Guidance documents and to offer meaningful comment.

Sincerely,

Dale Givens
Deputy Secretary

Dale Givens
Secretary

Enclosure

received
8/31/00



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Louisiana Department of Environmental Quality

Comments on U.S. EPA Draft Title VI Recipient Guidance and Investigation Guidance

In accordance with instructions contained in the Federal Register, the Louisiana Department of Environmental Quality (LDEQ) submits to the United States Environmental Protection Agency the following comments regarding the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance)* and the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Investigation Guidance)*.

In general, the LDEQ believes that substantial revision of the guidance documents is still required, since the new draft *Recipient Guidance* and *Investigation Guidance* fail to address with sufficient clarity and detail many fundamental issues regarding Title VI responsibilities and administration processes.

TECHNICAL COMMENTS

1. **The *Investigation Guidance* discussion of data evaluation methods for determining impact disparities and demographic disparities is far too vague. Concrete guidance is needed.**

Although the LDEQ agrees with many of the data evaluation statements provided in this document (e.g., inclusion of a discussion of uncertainties, giving greater weight to the most representative data, etc.), we are concerned that the information provided is too vague to provide decision-makers with any definitive guidelines for assessing data. The document should include, *at a minimum*, “guiding principles” for data evaluation. Better yet the guidance could include specific examples of appropriate data evaluation techniques. As a starting point, the guiding principles for data evaluation may include the following:

- The *null hypothesis* should be that there is no disparity (i.e., statistically significant evidence is required to reach the conclusion of a disparate impact).
- Data assessment should always focus on addressing whether the permitting action or actions will result in a change (especially an increase) in disparate impact.
- A significance level of at most 0.05, for example, for all statistical tests should be used; or for confidence intervals, a confidence level of at least 0.95 should be used. (Note: this provides more guidance to data evaluators than to say that test shall achieve a “statistical significance of two to three standard deviations”).
- The magnitude of the disparity will be considered in addition to the statistical significance of the disparity.

- Longitudinal (across time) data evaluations should be considered wherever feasible.
- The sampling unit should be considered in all statistical tests. For example, if the sampling unit is a census block, then statistical tests based on individuals (where n = the number of people rather than the number of blocks) may be inappropriate. At a minimum, the uncertainties and potential biases associated with performing statistics on individuals when the sampling unit is a group of individuals (e.g. census block) should be discussed.

2. The *Investigation Guidance* framework fails to address discriminatory effects of permitting decisions within the agency’s authority to consider.

- A. As described in section I A, *Purpose of the Revised Investigation Guidance*, the stated intention is to “provide a framework explaining how OCR intends to process and investigate allegations about discriminatory effects resulting from environmental permitting decisions.”

Why then, is there no specific discussion in the document about how data should be evaluated so that a causal link can be established between a permitting decision and an adverse disparate impact? The document does not even state that one of the objectives of the data evaluations should be to assess the link between the permitting action(s) and the discriminatory effects.

Section VI B, *Description of Adverse Disparate Impact Analysis*, states for example, that a complaint might be filed as a result of a permit renewal and that the “universe of sources” may include a broad array of regulated and permitted facilities. If a broad array of regulated and permitted facilities are included in an investigation designed to identify discriminatory effects of permitting decisions, the data should be evaluated in such a way that either:

- It can be concluded that the activity named in the complaint (such as a new permit or permit renewal) will significantly increase the disparity of an adverse impact caused by the “universe of facilities”, or
- It can be shown with data covering an appropriate time period that the pattern of granting permits to the “universe of facilities” resulted in the current disparity, and
- It can be shown that the disparity is not a result of demographic patterns that can be explained by economic or population migration considerations outside the control of the recipient.

An investigation that fails to address the above issues cannot be said to evaluate whether a recipient’s permitting decisions result in adverse disparate impacts. Although it may have been EPA’s intent to focus data assessments on establishing a causal link between recipient activities and either current disparities or future increases in disparity, the document contains no guidance to this effect. Rather, it appears to suggest that, regardless of the progression of events that led to the disparity, if there is a disparity, the

recipient will not be allowed to either grant new permits or renew existing ones without risking a finding of noncompliance. The LDEQ believes that this is a fundamental flaw in this guidance document.

- B. In section I C, *Scope of the Guidance*, the document states that “It likely will be a rare situation where the permit that triggered the complaint is the sole reason discriminatory effects exist.” It goes on to state that because of this fact, there should be cooperative efforts between permitting agencies and communities to address disparate impacts, outside the context of Title VI-related problems.

Although the LDEQ concurs with these statements, the document falls short in that it fails to call attention to the fact that the evolution of disparate impacts often is not well understood. Any community efforts to address disparity need to begin with an understanding of the factors that, over time, led to the disparity. Otherwise, there is a strong risk of “treating the symptoms” only, instead of identifying and treating the root cause of disparities.

3. **Since the *Investigation Guidance* framework fails to consider whether past permitting decisions are the cause of discriminatory effects, investigations of permit actions that do not result in increased disparity should be closed.**

- A. Section VI B 1 a, *Determine Type of Permit*, states one of the types of permit actions that could form the basis for a Title VI investigation is a permit action that allows existing levels of stressors, predicted risks, or measures of impact to continue unchanged.

The LDEQ believes that if permit actions do not result in an *increase* of existing levels of disparity, then the investigation should be closed, unless it can be demonstrated that the past permitting activities *led to* the current disparity. Such an analysis would require a longitudinal study to evaluate whether the past permitting decisions created a disparity, or if post-permitting settlement and migration patterns led to the current levels of disparity (based on economic factors or population migration factors, for instance, or other factors outside the recipient’s authority).

- B. Section VI B 2 b, *Determine Universe of Sources*, states one “universe of sources” may include a wide range of regulated and permitted sources as well as unregulated and unpermitted sources, depending on the scope of the complaint.

Although the LDEQ agrees that permit decision-makers may consider the broad circumstances surrounding the permitting activity, much more emphasis needs to be placed on evaluating whether the activities covered by the recipient’s authority constitute a significant portion of the total disparate impact. As such, the assessment should identify the relative contribution of various source categories. In fact, the *only* reason for considering other sources that are not covered by the permit(s) in question should be to provide the ambient background levels for assessing whether the permit(s) in question will result in a significant increase in disparity above what currently exists.

4. **The *Investigation Guidance* does not adequately address uncertainties in performing impact disparity and demographic disparity evaluations.**

- A. Section VI B 3, *Impact Assessment*, states that the investigation report should include a discussion of uncertainties in the impact assessment.

Although the LDEQ concurs with this statement, the document would be well served to include a list of factors that should be considered in the uncertainties. As a start, this could include the following:

- How accurate are the measurements?
 - How representative are the data (based on source, date, etc)?
 - How variable is the population?
 - How many sampling units are available (note: if there are a large number of people, but a small number of census reporting units, the distinction between individuals and sampling units may be important).
- B. In section VI B 5 a, *Identify and Characterize Affected Population*, the document states that the OCR would expect to use the smallest geographic resolution feasible for the demographic data, such as census blocks, when conducting disparity assessments.

The LDEQ concurs but believes that the guidance document should go further and state the level of data resolution will be accounted for in the data evaluation statistical assessment of uncertainty. For example, if the resolution is census blocks, then tests based on counts of individuals should be interpreted with caution (some approaches based on counts of individuals may be appropriate, but it may also be necessary to document caveats and/or uncertainties as a result of the approach).

5. **The *Investigation Guidance* is unclear as to how the significance of impact disparities and demographic disparities should be determined.**

- A. Section VI B 6, *Adverse Disparate Impact Decision*, and other places throughout the document, state that the data normally will be evaluated statistically to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations.

Although the LDEQ has developed an interpretation of the author's intended meaning, it is very unclear what this means in the context of general hypothesis testing. It would be more appropriate to provide guidance, for example, that hypothesis tests will be performed at the 0.05 significance level or below and that confidence intervals of at least 95% confidence will be constructed.

- B. In section VI B 5 b, *Comparison to Assess Disparity*, the document provides a list of "minimal" comparisons that should be performed. One of these is to compare the demographic characteristics of the most likely affected population (e.g. highest impacted 5% of population) to the least likely affected (e.g., lowest impacted 5% of population).

In general, the LDEQ would caution against statistics that only consider ten percent of the population as the basis for policy decisions. The LDEQ does not agree that the demographics of the most likely affected portion of the population are of interest (for example, the top 5%). However, it would be more appropriate to compare this subset of the population to the population at large or to the 50% least likely to be affected.

- C. Section VI B 6, *Adverse Disparate Impact Decision*, includes a discussion about the magnitude of impact disparities and the magnitude of the demographic differences.

This discussion is confusing and does not provide any real guidance to decision-makers. For example, what is a “relatively slight (under 20%) demographic disparity”?

6. **Existing multimedia risk assessment approaches evaluate cumulative impacts of permitting decisions to protect the health and quality of life of all persons, regardless of their race, color, or national origin.**

Section I B, *Title VI of the Civil Rights Act of 1964, as amended*, in the *Recipient Guidance* states that Title VI prohibits discrimination based on race, color, or national origin under any program or activity of a Federal financial assistance recipient.

Title VI can be interpreted to mean that *all persons*, regardless of race, color, or national origin, should be protected from adverse effects. In other words, if adverse health effects are found to result from a proposed permit action, it should not matter whether the receptors (affected population) are Native-American, African-American, Hispanic, Caucasian, or some other race or national origin. Adverse effects should not be allowed to occur upon any individual or social group; therefore, one shouldn't have to evaluate whether there is a disparity from a racial standpoint to determine that the proposed action causes adverse effects and should be denied.

Permits often rely upon the use of health-based risk assessments to determine whether a proposed facility meets a certain *de minimis* risk level. Risk assessment results are based on a series of health protective assumptions and calculations which are designed to ensure that risks are over-estimated and that sensitive populations, regardless of their race, color, or national origin, are provided an adequate margin of safety. The LDEQ therefore urges EPA to consider risk assessment results showing no adverse health effects when making adverse disparate impact determinations.

7. **If the guidance must evaluate disparate impacts on populations rather than ensure protection of health and quality of life for all persons, then the threshold for what constitutes a population must be defined.**

Section II B 3 f of the *Recipient Guidance, Conducting Disparity Analyses and Assessing Significance*, states that

As part of the adverse impact [analysis], one method of identifying an affected population would involve assessing the distribution of adverse impacts in the

environment, and associating populations with them. Where this method is infeasible, estimating affected populations based on proximity to sources may provide initial estimates for assessment.

EPA should define the *reasonable* threshold for the size of an affected population. Is it 1 person, 2, 3, 10,000? Does unequal health risk for 1 person constitute an adverse impact that warrants a finding of noncompliance with Title VI? Furthermore, estimating affected populations based on proximity to sources does not tell anything about the potential health risk or adverse impact to quality of life. As such it should not be used to make a judgement regarding whether a permitting action causes discriminatory effects.

8. Defining comparison populations on a case-by-case basis will lead to unequal protection of “affected populations” since the level of impact on comparison populations will vary.

Section II B 3 f of the *Recipient Guidance, Conducting Disparity Analyses and Assessing Significance*, states

Another element of [an investigation] involves a disparity analysis that compares the affected population to a comparison population to determine to what degree a disparity exists. EPA expects that appropriate comparison populations will be decided on a case-by-case basis. Generally, relevant comparison populations would be drawn from those who live within a reference area such as your jurisdiction (*e.g.*, an air district, a state), a political jurisdiction (*e.g.*, city, parish (county)).

EPA should provide specific guidance on how to perform an adverse impact disparity analysis. What are the implications if the comparison population is also found to have high risks (or whatever the selected impacts metric is)? Does this make it acceptable for the “affected” population to have high risk? Furthermore, an appropriate comparison population could turn out to have the same ethnic composition as the affected population, which would also seem to indicate no disparity regardless of the level of risk. Given these concerns, would it not be better to establish socially acceptable risk levels, and protect *all* populations, or better yet, *all persons*, equally?

9. The discussion of how to perform an adverse impact assessment is entirely vague. Clear guidance is needed.

The discussion of impact assessment steps in section II B 3 b of the *Recipient Guidance, Potential Steps for Conducting Adverse Disparate Impact Analyses*, states

The analysis should determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, cause one or more impacts. The analysis should also include measure(s) of the magnitude of impact and likelihood of impact occurrence.

Clear guidance is needed on how to perform an impact assessment. The LDEQ further asks EPA to clarify how to handle a situation where a facility has no effect on its own,

but may have an effect in combination with others when multimedia sources and stressors are considered.

10. The discussion of how to determine the significance of an adverse impact is vague. Definitive guidance is needed.

The *Recipient Guidance* states that, before an adverse impact decision is made, the analyst must determine whether impacts are sufficiently adverse to be considered significant.

EPA should explain the meaning of “sufficiently adverse”. Many potential precedents exist for defining sufficiently adverse impacts, such as national ambient air quality standards and de minimis risk levels established for carcinogens and non-cancer toxicity. The guidance is unclear however, as to whether such standards apply to adverse impacts determinations.

Although section VI B 4 a, *Example of Adverse Impact Benchmarks*, in the *Investigation Guidance*, does provide an example of possible thresholds for determining adverse effects, many questions remain.

EPA uses a range of risk values for implementing various environmental programs, depending upon the legal, technical, and policy context of the decision at issue. Based on these values, OCR would expect that cumulative risks of less than 1 in 1 million (10^{-6}) of developing cancer would be very unlikely to support a finding of adverse impact under Title VI. OCR may make a finding in instances where cumulative risk levels fall in the range of 1 in 1 million (10^{-6}) to 1 in 10,000 (10^{-4}). OCR would be more likely to issue an adversity finding for Title VI purposes where the cumulative cancer risk in the affected area was above 1 in 10,000 (10^{-4}). A finding of adverse impact at this stage of the investigation does not represent a finding of noncompliance under Title VI, but rather represents a criterion for proceeding further in the analysis.

For cumulative non-cancer health effects, which are often measured as a hazard index, the range of values previously used is less well-documented, and has been less often applied in a cumulative exposure context. Based on the available precedents, OCR generally would be very unlikely to use values of less than 1 to support a finding of adverse impact under Title VI. Values above 1 cannot be represented as a probability of developing disease or other effect.

This discussion, although appreciated, provides very uncertain guidance as to what levels of risk constitute an adverse impact. If the above statement is meant to imply that, except in cases with extenuating legal, technical, and policy circumstances

- cancer risks of 10^{-6} do not constitute adverse impacts;
- hazard indexes less than 1 do not constitute adverse impacts;
- cancer risks of 10^{-6} to 10^{-4} indicate potential adverse impact and warrant further investigation; and
- cancer risks greater than 10^{-4} indicate adverse impact

what are some examples of extenuating legal, technical, and policy circumstances? Is the interpretation provided above supported by EPA? What about standards, other than NAAQS, that are “presumptively protective of human health”, as discussed in section VI B 4 b, *Use of National Ambient Air Quality Standards*? Will they also be used as thresholds for making adverse impact decisions? If so, why is this not stated in the guidance? If not, why have NAAQS been singled out by EPA?

11. The guidance causes unnecessary confusion in its discussion of “acceptable” adverse impact analysis methods. The guidance does not support the use of best-available science and confuses technological tools with scientific methods.

A. Section V B 1 of the *Investigation Guidance, Analyses or Studies*, states

OCR would expect that a relevant adverse impact analysis or a disparity analysis would, at a minimum, generally conform to accepted scientific approaches.

There are not any—at least they are not described or cited in this guidance. Defining generally accepted scientific approaches for adverse impact and disparity analyses is, or rather *should be*, the purpose of this guidance.

B. Section II B 3 c of the *Recipient Guidance, Availability of Tools and Methodologies for Conducting Adverse Impact Analyses*, states that

Geographically detailed estimates of risks or other measures of impact are the most useful in assessing adverse disparate impacts because they often provide a clearer connection between sources, stressor, and impacts. However, producing these estimates or measures can require significant resources. Moreover, in some contexts, less detailed methods or measures can be as useful. For example, ambient risks may often be directly proportional to release amounts and toxicity of the stressors. As a result, by examining the amount and toxicity of stressors coming from the relevant source(s), it is often possible to identify sources or combinations of sources that have a higher likelihood of being associated with adverse disparate impacts.

The LDEQ agrees with EPA that geographically detailed risk studies can require significant resources. However, the LDEQ disagrees that “less detailed measures or methods can be as useful.” The suggestion to use less detailed methods (i.e., examine only the amount and toxicity of stressors) may be less time consuming but may provide misleading information and either underestimate or overestimate health risks in various situations. EPA must carefully consider the merits of less-time consuming but also less-accurate methods, since their results are more likely to be contested and less likely to stand as proof that (a) adverse impacts exist, and (b) that a recipient’s permitting program contributes to adverse impacts.

Although the LDEQ agrees that less detailed methods of analysis may, in certain cases, be useful in identifying “sources or combinations of sources that have a higher *likelihood* of being associated with adverse disparate impacts”, EPA’s investigation must go much farther than that. EPA must show that adverse impacts actually do exist

and have been exacerbated by the recipient's permitting program. "Less detailed approaches" are not suitable for this task.

Even in the case of an analysis that considers actual release amounts or exposure levels, the link to adverse health effects or some other indicator of degradation of quality of life must be made clear, since it is the dose that determines whether a chemical will produce adverse effects. Unequal exposure to doses of chemical that have no acute or chronic health effects should not be "sufficiently adverse to be considered significant".

While it may be true in some cases that higher amounts and toxicity of stressors may indicate a higher likelihood of adverse effects, it may not always be the case. For instance a neighborhood dry cleaner may well produce a higher cancer risk than a refinery, but an analysis of amount and toxicity of stressors would lead to the opposite conclusion.

- C. Section II B 3 c of the *Recipient Guidance, Availability of Tools and Methodologies for Conducting Adverse Impact Analyses*, states that

When designing, selecting, and using adverse impact methodologies, you should consider the...availability of tools, resources, and training to evaluate risks (both from single and multiple stressors).

This can be taken to imply that if an agency doesn't have adequately trained personnel or adequate resources to conduct more costly analyses it could consider an alternative evaluation approach. This is not guidance. If it were, it would describe the best approach for conducting impacts analyses. The "guidance" provided above will result in "apples vs. oranges" impacts comparisons and may result in a disincentive to use the best available science.

- D. Section VI B 3, *Impact Assessment*, of the *Investigation Guidance* discusses toxicity-weighted emissions approaches:

This approach sums the releases of multiple stressors (usually chemicals) that may be associated with significant risks, weighted by a relative measure of each's toxicity or potential to cause impacts.

The use of such a score does not provide any useful information regarding whether or not these emissions are causing health effects. As such they are not useful and should not be used.

- E. Section II B 3 c, *Availability of Tools and Methodologies for Conducting Adverse Impact Analyses*, of the *Recipient Guidance* states that

One tool which is likely to be useful is a geographic information system (GIS). Many organizations have found GIS useful in environmental impact analyses. GIS is not, however, a specific demographic or impact analysis method. Instead, GIS software can be used to perform a range of analyses and produce maps and other display products that are effective means of communicating the findings and facilitating public participation.

GIS may be a useful tool for displays and some types of analyses, but this statement does nothing more than say “consider using GIS technology” when performing investigations. If this were definitive guidance, EPA would specify what types of analyses to perform. In comparison to providing guidance on what analyses to perform, providing guidance on the tools used to perform the (unspecified) analyses is an insignificant issue. Suggesting the use of specific tools, like GIS, is fundamentally flawed when key analyses to be made have not been delineated.

12 The investigation process does not allow for substantive technical input from recipients, permittees, or complainants.

Section IV B 5 a, *Submission of Additional Information*, of the *Investigation Guidance* states

During the course of the investigation, complainants and recipients may submit additional relevant information to supplement EPA’s analyses. OCR intends to balance the need for a thorough investigation with the need to complete the investigation in a timely manner. Therefore, at the conclusion of interviews of the complainants, recipients, or other witnesses, OCR expects to ask each to submit, within a reasonable time of the interview (*e.g.*, 14 calendar days), any additional information that they would like considered as OCR drafts its investigative report. Also, “While recipients are not required to submit complaint-specific analyses or to develop more comprehensive Title VI approaches, such as the area-specific agreements described below, such efforts could help avoid Title VI problems by identifying and addressing potential adverse disparate impacts.

It is not likely that the type(s) of analyses required of recipients and complainants could be performed in 14 days. EPA should provide for longer comment periods or a mechanism to petition for longer comment periods. As it stands, the 14-day period has the effect of prohibiting recipients and complainants from providing anything more than cursory input.

13. The discussion of area-specific agreements is not clear on the levels of protection that must be achieved in protected areas.

- A. Section V B 2, *Area-Specific Agreements*, of the *Investigation Guidance* states that conditions of area-specific agreements should

result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA's Title VI regulations.

The LDEQ requests a specific definition of "to the extent required by Title VI" (e.g., what is a significant disparity?) and "reasonable time." Since the guidance is not specific, are these definitions left to the discretion of the recipient agency?

B. Section V B 2, *Area-Specific Agreements*, of the *Investigation Guidance* states

An exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented.

"Substantially" should be defined and examples provided. This is extremely important, since it would speak directly to the criteria required by EPA in implementing and administering area-specific agreements.

14. **The *Recipient Guidance* fails to consider the unintended, potentially detrimental effects to populations covered by area-specific agreements.**

The LDEQ believes that all persons have the right to a reasonable level of protection of their health and quality of life and understand EPA's guidance for recipients to consider forming area-specific agreements is intended to serve these ends. In practice, however, area-specific agreements have the potential to slow, if not halt, economic development and place existing industries at a competitive disadvantage. Once formed, both people and businesses will likely see these areas as less-appealing places to locate, which could have unintended, but nonetheless negative consequences on local economies.

All people, regardless of race, color, or national origin, share a fundamental need for an environment that provides basic levels of health and well-being. Environmental justice can be defined as "the fair treatment of people of all social groups with respect to the development and enforcement of environmental, laws, regulation, and policies. Fair treatment implies that no social group should be required to shoulder a disproportionate share of environmental impacts". Environmental justice thus focuses on the human need for a healthy environment as a component of *social justice*, which also includes *economic justice* and justice in the distribution of social positions and access to political and legal systems.

In practice, the goals of economic and environmental justice often conflict. Economic development zones, for example, have the potential to improve economic justice, but pollution from these enterprises may contribute to existing environmental inequity. Conversely, areas protected by area-specific agreements may have the potential to improve environmental justice, but the cost may include reinforcing or even increasing existing economic inequity. What is needed in such cases is a process that identifies the most beneficial balance between economic and environmental justice. Therefore, the LDEQ strongly urges EPA to consider the balance between environmental justice and

broader goals of social justice, including economic justice, when forming policy on area-specific agreements.

15. It is highly questionable whether recipient agencies have the authority to enter into area-specific agreements and enforce all actions required to meet their stated objectives.

Section V B II, *Area-Specific Agreements*, in the *Investigation Guidance* states that, in order for an area-specific agreement to be granted due-weight, the agreement must be:

supported by underlying analyses that have sufficient depth, breadth, completeness, and accuracy, and are relevant to the Title VI concerns; and [must] result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA's Title VI regulations.

The greatest weight OCR could accord such an agreement is to find that the actions taken under it will eliminate or reduce, to the extent required by Title VI, existing adverse disparate impacts. If OCR makes such a finding, it would then close its investigation into the allegation.

Although the guidance provides two examples of area-specific agreements with specific objectives—one to reduce lead exposure levels in an area of a city and one to reduce pollutant releases with a steady reduction over time—no examples are given of the specific actions that could be taken by the recipient agency to achieve these objectives. The LDEQ is concerned that, in practice, recipients will have only limited power to enforce many of the types of actions required to meet objectives of area-specific agreements such as those cited above.

For example, in an area with high pollutant releases, it may turn out that the only way to bring about “actual reductions to the extent required by Title VI” is for existing permittees to reduce emissions and for the recipient agency to allow no new industrial development in the area. Although many, but not all, approaches for requiring emissions reductions from existing permittees are within the agency's authority, reductions realized through this approach may not result in reductions “to the extent required by Title VI.” The other step, disallowing new industrial development, even if a new industry meets all existing permit requirements, is a zoning decision that, if made by the agency, encroaches on the authority of local government.

16. Implementing *Recipient Guidance*, Section II B 2, *Encourage Meaningful Public Participation and Outreach*, would require significant agency resources.

The LDEQ recognizes the value of the public participation process and believe it is one of the most effective means of identifying and resolving issues of concern before they lead to formal administrative complaints. However, significant recipient agency resources may be required to initiate and maintain an effective public participation program at the level suggested by the *Recipient Guidance*.

The LDEQ is concerned that an inadequately funded public participation program may raise expectations within the community that cannot be met. Communities that have been led to believe they have a stake in the process are likely to perceive *increased* discrimination when it becomes apparent that, due to a lack of adequate funding, on-the-ground public participation activities (e.g., on-going public meetings and workshops, information distribution) are not taking place.

Should it be the recipient agency's expectation that the permittee will fund the outreach effort? If so, the recipient will need to issue specific guidance on the minimum acceptable effort required of permittees. Recipients need specific guidance from EPA before they can communicate outreach requirements to permittees.

17. Attempting alternative dispute resolution before performing a complaint investigation would be at best ineffective, and at worst grounded by concerns that are irrelevant to adverse disparate impacts as defined by EPA.

The LDEQ recognizes the value of Alternative Dispute Resolution (ADR) as a concept. However, we are unclear as to when and how it is appropriate to use ADR.

For example, assume a case where an adequate public participation process has been undertaken but has not been able to resolve an issue of concern, and an administrative complaint has been filed. The parties would enter into ADR with no more data than was available during the public participation process. What new could be accomplished at this stage? Would we assume a neutral ADR facilitator could achieve a resolution that thus far had been eluded? Would it be more productive to postpone ADR until adverse disparate impact analyses had been completed so that the process could be based on the evidence from an objective, scientific evaluation?

The LDEQ would appreciate a more complete explanation of the practical, rather than theoretical, use of ADR in the permitting process.

18. The administrative complaint investigation and resolution process as described in the *Recipient Guidance* and *Investigation Guidance* poses an undue burden on recipient agencies.

In section II B 3 a of the *Recipient Guidance, Availability of Demographic Data and Exposure Data*, EPA lists not fewer than 19 EPA regulatory program databases that should be consulted during analyses to determine adverse impacts, and states that "OCR does not expect to limit its disparate adverse impact analyses to [only] information in these databases." The guidance further suggests that recipients "may also examine other available sources (e.g., those developed by states and localities) for additional important data, and consider collecting additional locally-relevant data."

The *Shintech* investigation, *Select Steel* investigation, and other Title VI investigations performed since 1998 under the *Interim Guidance* required substantial time and resources to complete. The scope of these investigations was also limited. For example,

the draft (February 1998) and revised (April 1998) *Shintech* investigations relied only upon data from TRI and TEDI databases. The LDEQ believes expanding the scope of evaluations to include a multitude of other data sources places an unreasonable burden on the time and resources of recipient agencies and seriously question whether such broad-reaching investigations could be completed within the specified 180-day time period. The LDEQ requests that EPA revise the guidance to adopt a more streamlined investigation approach.

19. The LDEQ seriously doubts there is any location in the United States where some form of disproportionate impact cannot be found if Title VI complaints are investigated as outlined in the *Recipient Guidance* and *Investigation Guidance*.

In any form of quantitative analysis involving assessment of statistical significance, it is almost certain that, if one has a large amount of data and looks at that data using a number of analytical methods, statistically significant patterns will occur *by chance alone*. As an example, although it is highly unlikely one will flip a coin five times and have it come up heads each time, if one keeps flipping the coin one is bound to eventually observe that result. In the case of Title VI, this means that, if one looks hard enough and long enough, one will find statistical evidence of disproportionate impacts in an area. And conversely, if one looks hard enough and long enough, one will find statistical evidence that disproportionate impacts do not exist in an area.

The LDEQ seriously questions whether there is any location in the United States where some form of disproportionate impact cannot be found when considering the multitude of data and analysis techniques allowed for in the guidance. Based on the discussion of data sources available for analyzing adverse impacts provided in section II B 3 a, *Availability of Demographic Data and Exposure Data* (see discussion in comment 18), it is not unreasonable that adverse impact analyses could include investigation of 30 or more EPA, state, and local datasets. The combinations of parameters available for analysis are endless if you add to the multitude of data the number of choices available in determining investigation methods (e.g., proximity-based, emissions-weighted, toxicity-weighted, risk-based, etc.), the “universe of facilities”, “affected populations”, “comparison populations”, and thresholds of significance. The LDEQ compliments EPA for providing a discussion of the range of data and analytical techniques available for analyzing disparity, but do not believe this discussion constitutes definitive guidance as to (a) what evidence is sufficient to form the basis of a finding of disparate adverse impact and (b) what studies should be conducted in determining that evidence.

20. A Title VI complaint may have the effect of suspending permittee operations.

In section A, *Preamble*, EPA states:

The filing or acceptance for investigation of a Title VI complaint does not suspend an issued permit. Title VI complaints concern the programs being implemented by Federal financial assistance recipients and any EPA investigation of such a complaint primarily concerns the actions of recipients rather than permittees. While a particular permitting

decision may act as a trigger for a complaint, allegations may involve a wider range of issues or alleged adverse disparate impacts within the legal authority of recipients.

Although a Title VI complaint may not suspend an issued permit, what of other permits required for a facility to operate? Take for example a case where the permit to construct a facility has been granted, construction commences, and a Title VI complaint is filed and accepted for investigation by EPA. The statement above implies that facility *construction* can continue during the investigation period. However, before the facility can begin *operation*, it must obtain a number of other permits (e.g., air, water, etc.). Should the process of reviewing and approving the facility's operating permits continue without regard to the pending Title VI investigation involving the construction permit? Or, should the process of reviewing and approving operating permits be suspended until the Title VI investigation is closed? Furthermore, is the facility's construction permit not in jeopardy of being suspended? If a finding of noncompliance is made, could suspending the facility's construction permit be made a condition of achieving compliance?

ADDITIONAL COMMENTS

21. Area-Specific Agreements that the Guidances recommend will have the effect of redlining African-American communities in Louisiana. Promoting redlining conflicts with the Civil Rights Act of 1964.
22. EPA still relies on the flawed and highly subjective "Adverse Disparate Impact Analysis" to make a determination of whether a recipient is in violation of Title VI. Both the Title VI Implementation Advisory Committee and the National Environmental Justice Advisory Council have expressed opposition to this analysis and it should be eliminated from the Investigation Guidance.
23. The Guidances do not respect local land-use plans and authorities. The Guidances hold states responsible for the autonomous decisions of local governments and recommend that states perform demographic and disparate impact analyses not required in current laws. Traditionally, land use is limited by local planning controls and the requirements of parish (county) or municipal governments. These decisions are made at the local level with no interference from states. The Guidance would have states oversee local decisions using demographic and other analyses that are inappropriate and not based in law. The Guidance impinges upon the zoning authority legally delegated to local government.
24. There is no "standing" requirement in the jurisdictional criteria. Thus, an individual in Maine who has never set foot in Louisiana can file an administrative complaint against the LDEQ alleging violation of Title VI. This can be done without demonstrating that complainant is an intended beneficiary, has suffered injury-in-fact, has shown the injury-in-fact is concrete and particularized and fairly traceable to the actions of the LDEQ, and that the actions are within the complainant's zone of interest.
25. The *Investigation Guidance* relies on an incorrect interpretation of Title VI in that it misconstrues and misapplies the holding in *Alexander v. Choate*, 469 U.S. 287 (1985). Contrary to EPA's assertion, *Alexander* only addresses section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and any discussion of Title VI in *Alexander* is *dicta*.

- (*Investigation Guidance*, p. 5, fn. 12). Further, nothing in Title VI of the Civil Rights Act of 1964, as amended, or its legislative history ever envisioned that Title VI would be used to prohibit unintentional discrimination in the context of environmental permitting. The LDEQ agrees with Justice O'Connor's concurrence in *Guardian Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983) that proof of purposeful discrimination is a necessary element of a valid Title VI claim, and that hence Title VI implementing regulations incorporating an impact standard are not valid.
26. The Guidance fails to provide clear definitions of many crucial issues such as what constitutes a "disparate impact."
 27. There are no clearly defined standards and methodologies which are precise, based on sound, peer-reviewed science and provide a high degree of certainty in decision-making outcomes.
 28. The use of weasel-words such as "generally, likely" and the freedom granted to EPA to diverge from the Investigation Guidance at whim fail to end the uncertainty surrounding the Title VI complaint review process.
 29. The Guidances assume that all Title VI Administrative complaints are filed for legitimate purposes. The Guidances fail to consider instances where such complaints are filed merely as a stall tactic. There are no guidelines for rejecting unfounded or frivolous Title VI complaints filed solely for the purpose of delaying the permit process and/or exhausting government resources.
 30. There are no safeguards and/or sanctions in place to deter groups or individuals from filing unfounded or frivolous Title VI Administrative complaints.
 31. The fact that no burden is placed on complainant to prove allegations is contrary to our legal tradition. Under the *Investigation Guidance*, a recipient is not deemed to be "innocent until proven guilty" but is forced to prove its innocence.
 32. In the event of an EPA referral of the matter to another Federal agency (such as HUD), it is unclear what enforcement authority and remedies the Federal agency to whom the matter is referred will have over an entity alleged to be in violation of Title VI. This is especially true when the accused is not a recipient of federal funds from the Federal agency.
 33. If OCR cannot delegate its enforcement authority and defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations, as it claims on page 22 of the Investigations Guidance, then how can OCR defer a matter to another Federal agency?
 34. The threshold for processing and accepting Title VI administrative complaints contained in the jurisdictional criteria remains too low.
 35. Some recipients may lack statutory authority to implement certain recommended methods of informal resolution.
 36. Translation of permits and other documents into languages other than English is not realistic and would exhaust resources.
 37. It is ridiculous for EPA to establish timelines to which it will not adhere or can easily waive. [DEQ has been waiting for disposition of the Title VI administrative complaint filed in the Supplemental Fuels, Inc. matter (long since moot) nearly seven years ago]. The term "good cause", as it relates to the waiving on the 180-day time limit in which to file a Title VI administrative complaint is not defined.

38. The Guidances fail to recognize that informal resolution often requires compromise, something that often is not feasible in emotionally charged situations involving a contested pollution control permit.
39. It is wrong for EPA to find a violation of Title VI of EPA's Title VI regulations based solely on alleged discrimination in the procedural aspects of the permitting process (*e.g.*, public hearings, translations of documents) without a finding of discrimination in the substantive outcome of that process (*e.g.*, discriminatory human health or environmental effects).
40. *Investigation Guidance* fails to explain how EPA will undertake factual investigation of the Title VI complaint.
41. The *Investigation Guidance* fails to detail the specific procedures EPA will use "to deny, annul, suspend, or terminate EPA assistance," or what "other means authorized by law" EPA will utilize to ensure compliance.
42. Although *Investigation Guidance* states that the Office of Civil Rights "may choose not to proceed with a complaint investigation if the allegations in the complaint were actually litigated and substantively decided by a Federal court," it is not clear what action OCR would or would not take in the event allegations were actually litigated and substantively decided by a state court. In the past, OCR has rejected complaints if there is litigation pending before a state court. This should be clarified.
43. There is no basis in law that grants EPA approval authority over any proposed informal resolution. If a resolution is truly informal, then why does a recipient need EPA approval?
44. It is illogical for the Office of Civil Rights to conduct a compliance review even after it dismisses a complaint on the basis of emissions decrease. If there is no violation of Title VI, there is no need to conduct a compliance review and to do so, without just cause, is nothing more than harassment.
45. It is not clear how the OCR will attempt to conduct an assessment to identify the relative contribution of various source categories where the activities covered by a recipient's authority constitute a portion of the impact. See *Investigation Guidance*, p. 33.
46. The process that OCR will use to determine whether the recipient's programs or activities have resulted in an "unjustified adverse disparate impact" is not clear.