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NORBERT DEE, Ph. D.
Director, Environmental Affairs

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Ms. Ann E. Goode:

The National Petrochemical & Refiners Association (NPRA) is pleased to provide comments on EPA's proposed draft *Title VI Guidance for EPA Assistance Recipients Administrating Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* which was published on June 27, 2000 in (65 *FR* 39650). Because the material covered in the Recipients Guidance is also included in the Investigative Guidance, the focus of our comments will only be on the Investigative Guidance (Referred to as Guidance).

The National Petrochemical & Refiners Association (NPRA) has roughly 500 members involved in hydrocarbon processing. NPRA represents petrochemical manufacturers using processes similar to refineries and virtually all domestic refiners. Our members, which include not only the larger companies, but many small and independent companies, are regulated through the permit process by EPA, States, and Local governments. Therefore, this Guidance has a direct and significant impact on NPRA's members

NPRA supports EPA's efforts to improve and clarify the Guidance. The Agency has made substantial improvements in this Guidance over the 1998 Guidance and should be commended for both its substantive changes and the process used to obtain input from the various stakeholders. There are marked improvements in many areas such as defining the complaint process and providing time lines for action for the various stakeholders.

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NPRA's comments are intended to provide the Agency with recommended improvements that will make the Guidance a more useful document for all stakeholders. Our major focus is to improve the complaint process to provide more certainty to the outcomes. We also recommend that because of the importance of the Title VI Administrative complaint process challenging permits, it be promulgated as a regulation and not as guidance.

If you have any questions, please contact me.

Sincerely,

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Comments of
National Petrochemical & Refiners Association
Draft Title VI Guidance for EPA Assistance Recipients Administrating Environmental Permitting Programs and
Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

The National Petrochemical & Refiners Association (NPRA) is pleased to provide comments on EPA's proposed draft *Title VI Guidance for EPA Assistance Recipients Administrating Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* which was published on June 27, 2000 in (65 *FR* 39650). Because the material covered in the Recipients Guidance is also included in the Investigative Guidance, the focus of our comments will only be on the Investigative Guidance (Referred to as Guidance).

Executive Summary

A summary of NPRA's suggested improvements to EPA's Guidance :

- Use of the Guidance needs to provide a higher degree of predictability and certainty for all stakeholders.
- Criteria need to be included in the Guidance that more clearly define both an affected population and an appropriate comparison population.
- The Complaint process should focus primarily on permit actions that may potentially cause a significant, adverse, disparate impact and not encourage complaints that lack merit.
- The scope of the impacts should be limited to those that are within the legal authority of the permitting agency.
- It is important to include the permittee early in the process especially before the start of any investigation.
- Technically sound data are essential to determine and mitigate a significant, adverse, disparate impact.
- It is important that complaints from persons with a genuine stake in the community be given due weight in the process and that all administrative remedies be used to resolve concerns prior to filing a complaint

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Detailed Comments

I. A Complaint Process With Increased Certainty Will Help Improve the Effectiveness of the Guidance

The Guidance is intended to provide a framework for both EPA and the Recipients of Federal funding to process complaints filed under the Title VI of the Civil Rights Act of 1964 resulting from the issuance of permits and to address situations that could result in complaints alleging violations of Title VI of the Civil Rights Act of 1964. Further, the Guidance will be used by the Permittee and individuals who believe that they have been affected by an action and wish to file a complaint. In order for the complaint process to be effective, all of these stakeholders must have clear directions, not only on how to proceed but also when to proceed, to address a perceived potential, adverse, disparate impact.

NPRA believes that EPA has made marked improvement in the certainty of the complaint process from the earlier Guidance. However, we believe additional improvements are necessary for the Guidance to be effective. Without a reasonable degree of certainty, it is difficult for the Recipient or the Permittee to take any positive steps to reduce or eliminate significant adverse disparate impacts.

1. EPA's Proposed Detailed Complaint Process is Intended to Assist Affected Stakeholders

The Guidance developed by EPA is designed to be used by EPA and other stakeholders who could be affected by a Title VI complaint. In this respect, all stakeholders must be able to rely on EPA's using its own Guidance, otherwise the credibility of the program suffers and all stakeholders, including the Agency, lose. NPRA urges EPA to revise its statement that asserts that the Agency has the flexibility to ignore its own Guidance. ("EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance." (65 *FR* 39669))

In the Guidance, EPA has developed a detailed process to screen complaints. A suggested improvement is to include as early as possible in the process additional screening criteria which retain for further consideration only those complaints that have merit. This will allow all parties to use their limited resources to focus on the important objective of addressing significant adverse disparate impacts.

It is very important that the stakeholders living in the immediate area of the facility be given significant "weight" in the complaint process. Although EPA identifies three general cases of who may file a complaint, the members of the local community are the ones potentially affected by the action. These are also

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the people who have participated in any outreach efforts and discussions with the facility or Recipient prior to the action. To give a complaint from someone outside the community the same weight as community members' concerns, defeats the intent of working with the community in a positive manner to address their concerns early and thus avoid the filing of a complaint.

The complaint process needs to focus on a speedy resolution of complaints. If the impacts identified in the complaint are in fact significant, adverse, disparate impacts on the community, delaying the process does not solve the problem; it only makes it worse. For this reason, it is very important that EPA's 180 day time limit be fixed. Currently in the Guidance, EPA indicates that it may waive the 180 day limit "for good cause" or on a "case-by-case" basis. We urge EPA to eliminate these potential delays in the process and provide certainty with the 180 day limit. Allowing only the EPA Administrator the discretion to waive the limit is an option that would give EPA some flexibility and help in dealing with those extremely unusual circumstances under which the generally more-than-sufficient 180 day time limit might be shown to present an unreasonable burden on those potentially affected by significant, adverse disparate impacts.

2. To Improve the Effectiveness of the Complaint Process, the Focus Should Be on Permits Having Actual Significant Increases in Net Emissions

We support EPA's statement in the Guidance that individual permit actions are unlikely to create significant, adverse disparate impacts. However, because a small likelihood that this could occur may exist; it is important to identify that subset of all permits that may result in them. We believe that such permits are those that have actual, significant net emission increases either as individual permits or as State (Recipient) permitting actions.

Further, it is important to recognize that, to support a complaint, the emission increases must be actual not potential. Without actual emissions increases, it would be difficult to show the linkage to a significant, adverse disparate impact, and to develop appropriate mitigation actions, if appropriate.

In the context of only focusing on permits having actual significant net emission increases, we urge EPA to screen out of the process those permits that do not meet these conditions early in the process. These include minor permit modifications on administrative issues, permit renewals where there have been "no emissions increase," and permits having significant decreases.

In the Guidance, EPA considers renewals with no emission increases a possible basis for a complaint and therefore would not be screened out early in the complaint process. This position is not consistent with EPA's previous statement that individual permit actions are unlikely to create significant, adverse, disparate impacts. This would be especially true for a renewal that does not alter the level

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of stressors, predicted increases, or measures of impact.

The permitting process should be linear with well defined decision points. Further, the permit process should provide for adequate public and community input while meeting the required need for certainty necessary for responsible investment decisions.

3. EPA Has Properly Decided to Limit Investigations to Impacts That Are Within the Recipient's Legal Authority, and That Are Significantly Adverse.

NPRA supports the decision by EPA to limit the investigation to those impacts that "are within the recipient's authority to consider, as defined by applicable regulations." The recipient must only consider impacts for which it is directly responsible and where it can, therefore, offer remedies to reduce or eliminate these impacts. Investigating impacts which are beyond the scope of the recipient's legal authority does not further Title VI objectives, and only dilutes Title VI efforts.

Although EPA does state that its position is to limit its investigation to those that are within the recipient's legal authority, EPA makes other statements that seem to be inconsistent with that position. For example, EPA states that considering noise and odor impacts under a recipient's responsibility is acceptable even if the recipient has no legal authority to address or mitigate these impacts. This places the recipient in an untenable position in which it is faced with an inherently illogical situation with no reasonable means of reconciling the conundrum.

NPRA is concerned that identifying impacts beyond the recipient's legal authority will expand the scope of the complaints to those that can not be addressed through the Tile VI process. This gives a false sense of hope to those filing such complaints and invites criticism of both EPA and the Title VI process when the identified "impacts' are not resolved through the process.

4. The Administrative Remedies Available in the Permit Process Provide an Opportunity to Address Title VI Issues without filing a Complaint

NPRA urges EPA to state in the Guidance that members of the "affected" community are strongly encouraged to use the existing permitting process to seek administrative remedies to their complaints. It is much better for the community, the recipient, and the permittee to discuss and resolve any issues in the administrative permit review and appeal process than to wait and file a Title VI complaint.

This approach benefits the Title VI process by reducing the number of complaints because they typically have already been resolved during the

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permitting. The complainant can utilize the Title VI process if its arguments are rejected in the permit review process. To further encourage the use of the existing permit review process, NPRA suggests that EPA give "due weight" in the Title VI process to only those complaints that have been already considered in the permitting process.

II. To Improve the Consistency and Substance of the Title VI Investigations Across the U.S., it Is Important to Clarify the Definitions of the Affected and Comparison Populations

NPRA requests that EPA revise the proposed process by the addition of explicit criteria to define the affected and comparison populations. A clearer process is needed to identify both populations in order to enable all stakeholders to make progress toward achieving the goals of Title VI.

1. Need to Clearly State how to Define the Affected Population

The fifth step in the adverse disparate analysis is to identify and determine the characteristics of the affected population which is then used for comparison to the reference population. This is an extremely important element of the investigation process because it will determine whether there is a statistically significant, difference between the two populations. This analysis can be conducted after a complaint is filed or in a positive proactive fashion to take measures to avoid a complaint. In either case, predictability and certainty are needed by all stakeholders to define both populations.

The approach suggested by EPA is to draw circles around the affected sources and assume that the population within the circles is affected by the impacts from the sources. These circles may or may not correspond to air emissions or water discharges from the source. Further, EPA does not provide criteria which could be used to determine the sizes of the circles or how these circles are to reflect the realities of exposure given that exposure is rarely distributed in circular patterns.

2. Need to Clearly State How to Define the Comparison Population

After the affected population has been identified, the next step is "to compare the affected population to an appropriate comparison population." This comparison will then determine the existence of a significant, adverse, disparate impact.

The Guidance does not provide any specifics on how to define this comparison population. According to EPA, it could be an air district, a state, a jurisdiction, a water or air shed, etc. Use of these general terms is of only limited assistance to all the stakeholders, especially given the complexities involved in selecting an appropriate comparison population. More detailed criteria are needed so that

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any stakeholder can determine with some assurance the location of a comparison population for any source(s).

We are concerned with statements made by EPA concerning the distribution of significant, adverse, disparate impacts and the possibility that the comparison populations will be selected to fit these statements or policy. The first concern is that EPA expects to find "similar" levels of risk everywhere in a State, regardless of where one looks. The second concern is that , where EPA finds significant, adverse, disparate impacts, they can be considered evidence of unlawful discrimination.

These statements do not appear to be based on any particular set of facts or specific land use or socioeconomic analysis and therefore should not be included in the Guidance as EPA "policy." Legitimate Title VI claims will not be furthered by selecting comparison populations based on social aspirations instead of sound technical criteria.

III. The Role of the Permittee in the Title VI Process Should Be Enhanced to Ensure a Comprehensive Solution to Any Complaints

In the investigation process described in the Guidance, EPA does not identify a role for the permittee. We strongly urge that EPA include the permittee in the process even though it may not be explicitly required by the Title VI Civil Rights Act of 1964. The resolution of potentially contentious issues must involve input from all affected stakeholders. By not informing permittees that a complaint has been filed, and is being pursued, and further, not allowing them to participate in the process would be contrary to EPA's longstanding policy, and does not encourage a speedy resolution to the complaint.

In many cases the permittee will be directly involved in the implementation of a solution to address a significant, adverse, disparate impact, or may have data that would be useful in determining whether a complaint is significantly adverse. It is, therefore, important to involve the permittee in the process as soon as possible.

Further, many of the mitigation measures to reduce or eliminate a significant, adverse, disparate impact would directly involve funding to some degree by the permittee. To leave the permittee out, until it is time to implement a funding of the mitigation measure is inherently unfair and runs counter to the desired goal of inclusion of all stakeholders throughout the process. This aspect of the Guidance needs to be improved if the overall process is to work efficiently and effectively.

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IV. Technically Sound Data are Essential to Determine the Existence of and Identify Measures to Directly Mitigate any Significant, Adverse, Disparate Impact

The source of data used in the investigation is critical to determining whether there is sufficient justification to indicate that there may be a significant, adverse, disparate impact suggesting that the investigation should continue or whether the complaint should be screened out of the complaint process. Further, these data form the linkage between any identified impact and the mitigation measures selected to eliminate or reduce that impact. Therefore, the data must be valid and reliable.

1. NPRA Supports the Use of Data Based on Sound Science.

NPRA supports EPA's need for valid and reliable data based upon potential exposures to pollutants having a known risk. The bases for the exposure/risk assessment are ambient monitoring data, known releases of pollutants into the environment, and finally modeled data. These data will allow EPA and the other stakeholders to determine any impacts based on the principles of sound science, thus providing certainty and defensibility to the process. The Select Steel complaint [full cite] is a specific example in which actual emissions data showed that there was no violation of the NAAQS standards (which are heath standards), and, therefore, no significant, adverse, disparate impact.

In demonstrating a causal link between the alleged discriminatory act and the alleged significant, adverse, disparate impact, the use of health exposure data of pollutants having a known risk is the strongest evidence. In the absence of these data, the use of risk predictions are an acceptable alternative as long as they are based upon ambient levels of stressors derived from monitoring or modeling.

We support EPA's use of appropriate risk benchmarks to determine if there is an significant adverse impact. However, in EPA's discussion of risk, it implies that cumulative risk of populations and sub-populations are to be compared to the benchmark. Normally, the risk that is compared to the proposed benchmark is conducted for an annual lifetime risk for a person not a population resulting from exposure to pollutants from a source (Maximum Exposed Individual, MEI). NPRA requests that EPA clarify the procedure used to determine the risk associated with the disparate impact analysis.

It stated in the Guidance that risks of less than of 1 x E-6 are unlikely to support a finding of significant, adverse, disparate impacts, while a risk of greater than 1 x E-4 has a higher likelihood of supporting an impact. We support these commonly accepted risk benchmarks for a annual risk to a person. In addition, we support the benchmark of using statistical significance of "at least 2 to 3 standard deviations" for determining a significant, adverse, disparate impact.

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2. The Use of Potential Releases Can Mislead All Stakeholders by Not Portraying an Accurate Representation of the True Situation

Although EPA expresses a preference for accurate and valid data, it indicates a willingness to use data that do not meet these criteria where "good" data are not available. NPRA believes that using potential release data without any technical basis may open the investigation to legal challenges and divert EPA's resources from legitimate investigations. It also does a disservice to all of the stakeholders involved in the investigation by involving them in an effort which is based not on merit but speculation.

Potential release data such as from risk management plans must be used with care for purposes of assessing significant, adverse, disparate impacts. Without a sound technical basis, potential release data can lead to a false conclusion that a significant, adverse, disparate impact already exists from something that has not yet happened but which has only the potential to happen in the future -- under certain circumstances. Therefore, we believe that a high priority should be given to data based on measured and/or permitted emissions, and potential release data only be considered if based on a sound technical analysis such as used in developing a risk management plan.

The mere existence of an activity at a facility does not, in itself, result in any emissions or an increase in emissions. In fact, the permit may reduce the potential of any releases instead of increasing them.

V. A Facility's Effort to Improve Environmental Quality and Compliance Should Be a Major Consideration in Determining the Need to Go Beyond Environmental Compliance with Additional Emissions Reductions

NPRA urges EPA to recognize that the Agency already has in place standard setting and permitting process to minimize sources' pollutant releases and the surrounding population's potential exposure to those releases. The recipient and permittee should be given credit for these reductions in the Title VI complaint process. Although, there may be instances where a permit action may result in a net increase of actual emissions, such cases are not the norm. Even EPA recognizes that it is unlikely that an individual permit will cause a significant, adverse, disparate impact.

EPA's NSR, Urban Air Toxics, and SIP programs are already providing significant, reductions in emissions. These reductions should be considered in addressing any significant, adverse, disparate impact in both the permitting process and any Area-Specific Agreement. These programs are requiring either the "Best Available Control Technologies (BACT)" or the Lowest Achievable Emission Rate (LAER). Air pollution controls required by these programs will reduce emissions, in many cases, over 95% and in some cases by over 98%.

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Many of the issues that may contribute to any significant, adverse impact are not associated with individual permit decisions but with land use planning and zoning and socioeconomic considerations. These impacts are not alleviated or changed through additional emission reductions beyond the level of compliance.

VI. If Modified, Area Agreements Can be a Useful Mechanism to Reduce or Eliminate Significant, Adverse, Disparate Impacts

NPRA supports positive efforts by stakeholders to resolve Title VI issues instead of going through the Title VI complaint process. However, the concept of "Area-specific Agreements", while having general merit, does have several limitations which need to be addressed before it can be an effective alternative to the Title VI process.

According to the Guidance, EPA will grant "due weight" to state and local permitting agencies where an "Area-specific Agreement" has been reached by "affected residents and stakeholders." This Area-specific Agreement would result in a shield from future Title VI complaints.

Several areas need to be improved in order for this concept to be both credible and workable. The scope of these agreements must be focused only on significant, adverse disparate impacts resulting from actual releases; otherwise, the mitigation measures will go beyond what is intended by Title VI. An "Area-specific Agreement" should not be an open-ended negotiation requiring participation just to avoid a Title VI complaint.

Some stakeholders may have an incentive not to reach an area-specific agreement so that the door is open to file a Title VI complaint if they disagree with the permitting decision. In addition, even if an agreement is reached with some stakeholders, it is possible that others, who are not part of the agreement, would still file a Title VI complaint. Recognizing that these agreements actually provide limited protection from Title VI complaints, facilities have little incentive to participate in and reach any agreements under the Area-specific concept.

The recommendation by EPA urging the State to identify locations where area-specific agreements would be useful results in redlining the State without any investigation. The consequences of this action could result in reduced property values for businesses and residences and could discourage investments in areas needing investments. This type of de facto redlining could very well prevent development in precisely those areas where States and communities, as well as, EPA would like to see investment and redevelopment, e.g. so-called brown-field sites. Again, there is little incentive on the part of cities and States to sign up for this type of program.

Finally, in developing an area-specific agreement, it is likely that all facilities within the geographic area will be invited to participate. Some of these facilities will have permits requiring BACT or LAER control technologies while others may be in the process of obtaining similar permits. It is important that any area-specific agreement give appropriate "due weight" to pre-existing permit conditions.

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