

US EPA ARCHIVE DOCUMENT

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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 Ave., N.W.
Washington, D.C. 20460

Re: Comments on:

Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance) and

Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Investigation Guidance).

Dear Administrator Browner and Ms. Goode:

In recognizing the implications of Title VI for recipient environmental permitting agencies, EPA has courageously recognized the potential of our civil rights laws to protect communities of color from some of the most important threats to their well-being. My comments therefore begin by emphasizing the importance and the potential inherent in the path EPA has taken. The question, then, is whether EPA's guidance documents will, in reality, fully implement what Title VI requires. While EPA's guidance documents reflect a recognition of the importance of disparate effects on the communities impacted by recipient agencies' permitting decisions, some aspects of the guidance documents risk seriously undermining the goal of eliminating such disparate consequences. The comments therefore proceed to identify some of the most important ways in which the draft guidances may fail to redress the inequities proscribed by Title VI.

I. General Comments in Support of the Draft Guidance Documents

Comment #1: EPA's Interpretation of Title VI Helps Address the Shortcomings in the Existing Implementation of Environmental Laws. My first general comment is to emphasize that EPA's interpretation of Title VI, and its applicability to environmental permitting, presents a major step forward in responsibly addressing the distributional implications of

environmental laws. As anyone familiar with environmental laws is aware, our environmental laws have not been implemented in a way that systematically considers the distribution – and concentration – of polluting facilities. Pollution controls imposed by regulations and then incorporated into environmental permits generally focus on single sources, they focus on technological feasibility, they focus on economic feasibility. Even where health considerations factor into the regulatory structure, the analysis rarely considers the actual impact of a given facility in a particular location. The environmental permitting process has thus failed to consider the fairness of the distribution of multiple facilities. Nor has the environmental permitting process been effective at dealing with the cumulative impacts of multiple facilities or their impacts in combination with other types of sources. Through EPA’s interpretation of Title VI, the federal government has had the courage to address the deficiencies in our environmental permitting programs and to confront the real-life implications of the permits issued by the state and local agencies wielding EPA funding and authority.

Comment #2: The Title VI Regulations’ and the Guidances’ Focus on Disparate Impacts Rather than Discriminatory Intent Appropriately Focuses Attention on the Harm Suffered Rather than the Motives of the Permitting Agencies. Some might imply that little “harm” is done if an agency does not act with discriminatory intent. That approach ignores the real-life experience of those on whom polluting facilities are concentrated. The fact that EPA’s Title VI regulations, like the implementing regulations of most federal agencies, address the disparate effects of recipient agency decisions means that regulatory attention is properly focused on the extent to which communities are protected by the permitting process. Were Title VI to apply only where discriminatory motives could be demonstrated, it would fail to address the many circumstances in which environmental pollution might be concentrated in minority neighborhoods for non-discriminatory reasons. Industries and local governments might concentrate – and have concentrated – in particular areas for any number of reasons, such as cheaper land prices and the presence of available infrastructure. Existing inequities may be traceable, in part, to a legacy of historic segregation and discrimination. Because of the myriad factors that cause existing inequities, environmental permitting agencies may very well make decisions that adversely and disparately impact minority neighborhoods even if environmental permitting agencies themselves do not intentionally discriminate. If the law were to apply only to decisions tainted by direct discrimination, the law would “miss” the distributional inequities minority communities confront.

Comment #3: It Is Appropriate for Recipient Agencies To Be Accountable for the Disparate Effects of Their Permitting Decisions Even if They Were Not Responsible for Preexisting Inequities. As suggested by Comment #2, environmental permitting agencies may not be the direct or even the indirect cause of many of the disparate impacts communities experience. However, environmental permitting agencies do have the power, the opportunity, and the obligation to keep from exacerbating existing inequities. Undesirable land uses may have been concentrated in certain neighborhoods for a whole host of reasons, many beyond the control of a particular permitting agency. EPA’s Title VI regulations indicate that, when a polluting facility applies for a permit for that neighborhood, the agency should deny the permit if it will exacerbate the existing inequity, regardless of the agency’s role, or lack of a role, in creating the

underlying inequity. While the agency might not be the cause of the disparities, it could provide one of the few mechanisms for improving them.

Comment #4: EPA’s Draft Recipient Guidance Appropriately Directs Our Focus to the Permitting Process Itself. EPA’s guidance on Title VI is most important for what it tells us about how the permitting process should work. State and local agencies must come to terms with the fact that, under Title VI, they must consider the distributional implications of the permits they issue. The message is positive, not negative. While the original 1998 draft investigation guidance might have seemed negative given its sole focus on the processing of complaints against recipient agencies, the Recipient Guidance explains how an agency might be expected to execute the responsibilities EPA has identified. The primary issue is that permitting agencies must now consider distributional issues. They now have the opportunity to address issues that were previously considered outside of their expertise. The opportunity is an exciting one. In time, the mission of protecting communities equally will hopefully become as important as the basic underlying mission of protecting the environment. Ideally, changes in the permitting process will preclude the need for subsequent complaints.

Comment #5: The Proposal for Area-Specific Approaches and Agreements Could Allow the Recipient Agencies to Serve as Catalysts for a More Comprehensive and Far-Reaching Resolution to Distributional Inequities than the Agencies Could Accomplish Pursuant to Their Own Jurisdictional Powers. To the extent the Recipient Guidance encourages agencies to assess the disparate impacts within their geographical jurisdiction, regardless of pending permit applications, the Guidance will promote a much-needed assessment of distributional equity. More importantly, to the extent that Title VI, and the Guidance, prompt recipient agencies to begin working with other entities that play a role in existing disparities, one increases the potential for a more comprehensive and far-reaching resolution than a single agency, such as an air permitting agency, could accomplish on its own. In that case, the recipient agencies could be serving as a catalyst that will remedy distributional inequities, even in the absence of a specific permitting application and/or a particular complaint.

In addition, the area-specific approach suggests that existing sources might have to assume greater responsibility for existing inequities than would be the case if Title VI were to apply only to prospective permit applicants. If Title VI were to apply only to new facilities, the new facilities might argue that they should not bear the burden of the existing cumulative burdens created by other sources and facilities. The area-specific approach would allow for an assessment of existing sources as well as new sources, and could lead to measures that would reduce existing inequities. Arguably, Title VI could be read to *require* that such an approach be taken, whether or not a recipient agency is considering proposals for new facilities. The area-specific approach is not just a “good idea.” It is one that deserves development and amplification in its own right.

As discussed below, however, the area-specific approach, and the potential for effective and meaningful area-specific agreements, may be undermined by a number of the guidances’ provisions. The approach thus has an enormous potential, but one that may not be realized under

the guidances.

Comment #6: The Flexibility to Consider a Wide Range of Solutions in Informally Resolving Complaints Has the Potential to Facilitate Broad Improvements in Disparate Impacts. Like area-specific approaches and agreements, the voluntary compliance process provides recipient agencies with an incentive to take a wide variety of actions to reduce disparate impacts. One permit application might trigger a resolution process that would expand the universe of activities subject to regulation or to more rigorous regulation. As with the area-specific approaches, existing sources, as well as new sources, might find themselves subject to more stringent regulation. While existing sources might not greet this prospect with anticipation, the burden of reducing a legacy of unequal impacts might, through such settlements, distribute the burden of reducing impacts to existing contributors as well as proposed new contributors. As is discussed below, however, it is not clear how willing agencies would be to re-open existing permits. The draft guidances may be insufficient to promote their own suggestions.

II. Comments Critical of the Draft Guidance Documents

A. Consideration of Disparate Impacts

Comment #7: The definition of disparate impact fails to account for social, economic, and cultural impacts. According to the glossary, an impact is an effect resulting from exposure to a stressor. A stressor is defined as a factor that could adversely affect receptors, such as chemicals, physical effects (like noise), and biological effects, or as any substance “that adversely affects the health of humans, animals, or ecosystems.” Thus, the guidances seem to recognize only physical and health-related impacts. Facilities seeking permits from recipient agencies may, however, result in a host of negative impacts not covered by the guidances, such as negative impacts on the social, cultural, or economic life of a community. These impacts are considered relevant under other laws considering environmental effects, such as NEPA. The Title VI regulations should cover impacts at least as broadly as other statutes. If anything, the term “impacts” should have an even broader interpretation under Title VI than under environmental statutes, since Title VI was passed to guarantee “civil” rights, not just “environmental” rights. Finally, the placement of environmentally significant facilities can have stigmatic impacts in addition to tangible impacts. For example, the placement of a sewage facility is not a neutral. Taking serious account of stigmatic and symbolic impacts is an important part of addressing the racial disparities that are the target of EPA’s Title VI regulations.

Comment #8: The frequently-repeated assertion that the OCR, in determining compliance, will consider only disparate impacts resulting from stressors “cognizable under the recipient’s authority” is ambiguous and, under at least one reading, could undermine the guidances’ commitment to recognizing and redressing cumulative impacts. The guidances’ strength is in requiring consideration of the real cumulative impacts faced by real people in a particular location. To the extent a permitting or other decision could create a disparity or exacerbate an existing disparity, it violates the Title VI regulations. This

understanding of the regulations is reflected in the Recipient Guidance's reference to President Kennedy's statement that "[s]imple justice requires that public funds ... not be spent in any fashion which ... entrenches ... racial discrimination." The agency does not have to be the sole cause of the discrimination; it is enough if the agency makes a decision that "entrenches" or exacerbates disparities caused by other sources.

The guidances' oblique comment that, when it comes to the critical question of compliance or violation it will consider only those impacts associated with the agency, seems to cut directly against the tenor of the guidances and the regulations they implement. Does this mean that OCR will consider only the impacts associated with the agency in determining whether a decision having a disparate impact violates the regulations? Does this mean that OCR will ignore existing disparities that the agency's decision might exacerbate? What, then, is the purpose of considering the cumulative impact in the first place?

If the interpretation I critique is, in fact, the interpretation OCR has adopted, then it fails to prevent recipient agencies from exacerbating and/or "entrenching" existing disparities. That significantly undercuts Title VI. The virtue of the Title VI regulations is that they look to effects, not just intent, as discussed above in Comment #2. The regulations focus on what people experience, not on the state of mind of decisionmakers. If the purpose of the Title VI regulations were to punish a bad agency for treating people badly, then, at least for argument's sake, it might be appropriate to evaluate only that agency's actions to determine if it behaved wrongly. But the Title VI regulations are not about punishing agencies for having a "bad" state of mind. They are about requiring agencies to make sure that their actions do not have bad consequences. Agencies' actions could have bad consequences even if the agencies' decisions were not the sole cause of those consequences. If the focus is on the impact of agencies' decisions, not on their state of mind, then an agency's decision to exacerbate an existing disparity, even if it did not cause the underlying disparity, would violate the Title VI regulations.

As discussed in Comment #3, above, the Title VI regulations present an opportunity. They provide agencies with a mission: to factor distributional consequences into permitting decisions. Title VI is not about fault, it is about the opportunity to improve conditions for those who have suffered inequities. Agencies should be required to improve, not worsen, conditions. Agencies who do not do so, and who exacerbate existing inequities, should be found in violation of the law, even if they are not the sole cause of the disparities of concern.

If the foregoing interpretation of the Guidance is mistaken, then the Guidance needs to be clarified. Perhaps the proper interpretation is that an agency will not be found to have violated Title VI if there is nothing it can do about an identified disparate impact. But it is unclear what would have prompted the complaint if the impact is something entirely outside of an agency's control. Presumably, a complaint is filed against an agency because it has made a decision having an impact on a community. If its action will not have a particular impact on a community, then there would not be an adverse impact at issue and this stage of the analysis would not have been reached.

Comment #9: Permit modifications should receive the same disparity analysis as other permit applications. The Investigation Guidance states that allegations addressing permit modifications would analyze only the modification and its effects, suggesting that OCR would not consider cumulative impacts from a variety of sources in determining whether to grant a request for a modification. With all due respect to the political difficulties raised by modifications, OCR appears to be creating an unjustified loophole for modifications. For the community experiencing the disparate impact, an increase in impacts is equally detrimental whether it is caused by a modification or by a new source. An existing source does not have a vested right to a modification that impacts the surrounding community. The guidances' important focus on cumulative impacts, from all stressors, should be applied to modifications as well as applications for new permits.

Comment #10: In assessing the “adversity” of a disparate impact, the Guidances place too much weight on the “benchmarks” provided by environmental laws, including the NAAQS. One of the virtues of the guidances is their emphasis on collecting area-specific information. Many of the benchmarks established by environmental laws, in contrast, are considered in isolation, without full consideration of cumulative and symbiotic impacts. Existing benchmarks, including the NAAQS, provide a tempting but potentially misleading picture of the cumulative impacts a community may face. If the problem of cumulative impacts resulting from the inequitable distribution of facilities is to be taken seriously, each setting should be evaluated on its own terms. The data that has gone into the creation of various benchmarks will, of course, be relevant to determining the degree of adversity presented by a particular confluence of facilities. But the potential for variation presented by unique circumstances suggests that presumptions based upon the benchmarks would be flawed. In addition, given the scientific uncertainties that are frequently present, and the limited resources of many complainants, presumptions could be inappropriately difficult to overcome. Presumptions, or overreliance on benchmarks, could create a false sense of certainty and impede the full exploration of site-specific cumulative impacts.

B. Complaint Investigation and Consideration

Comment 11#: OCR should accept complaints filed prior to the issuance of a final permit and assist recipient agencies in avoiding disparate impacts. One of the critical benefits provided by the guidances is that they encourage incorporation of consideration of disparate impacts in the permitting process. If a complainant files a complaint prior to the issuance of the permit, the OCR is on notice that a permitting process may not be proceeding in an appropriate fashion. Intervention early, to prevent the disparate impact, would be highly preferable to waiting until the permit is actually issued. Early intervention is appropriate for all parties: for the recipient agencies, who could thereby avoid subsequent litigation; for the permittee, who could avoid the uncertainty associated with having its permit challenged; and for the complainant, who would be spared the period of impact that could occur between issuance of the permit and a subsequent finding of its disparate impact. As a matter of institutional structure, OCR could develop a “compliance counselling” function in addition to its enforcement functions.

If a complaint is filed prior to the issuance of a permit, it could be referred to the compliance staff who could begin to intervene in the permitting process to assure that disparate impacts are not created.

Comment 12 #: OCR should investigate, not dismiss, complaints that require additional clarification. The Investigation Guidance suggests that, if a complaint lacks sufficient information to determine whether its allegations should be accepted for investigation, it will send a letter requesting clarification to the complainant and that a complainant's failure to respond within 20 days could result in a rejection of the complaint. As OCR suggests throughout the guidances, it is OCR's duty to investigate and resolve potential violations of the Title VI regulations. OCR should be grateful when a complainant comes forward to alert it to a potential violation of Title VI. Once alerted, the burden should be on OCR, not the complainant, to determine whether the allegation is worth investigating.

Comment 13#: The OCR should maintain a strong role in investigating complaints; the "due weight" provisions of the Guidances suggest that OCR might be tempted to rely too heavily on recipient agencies' own studies. It is understandable that OCR would want to encourage agencies to conduct disparate impact analyses, and that one mechanism for encouraging such studies is to indicate that the results of proper studies will be respected by OCR. However, in providing this inducement to recipient agencies, OCR risks abdicating its own responsibilities.

Recipient agencies essentially have a duty, under Title VI, to conduct whatever studies may be necessary to ensure that their decisions do not have disparate impacts. No additional inducement should be expected; no *quid pro quo* for performing a function that is already required should be provided. Furthermore, the methodology for conducting disparate impact analyses varies, and there is a strong likelihood that the outcome of an analysis could depend significantly upon how the study was conducted. OCR might have one view of how it should be conducted; the recipient agencies might have another view. The recipient agencies are likely to follow whatever approach is least likely to show a violation. While the agency's study might conform to accepted scientific approaches, it might not conform to what OCR, the agency responsible for enforcing Title VI, would find. OCR, the agency responsible for enforcing Title VI, should have the last word, not the recipient agency. Deference to the recipient agency is likely to encourage reliance on methodologies that are least likely to show a violation, and that undermines OCR's authority to determine the methodology and approach that best meets the requirements of Title VI.

Comment #14: The OCR should not base its findings upon a proposed activity's conformance to an area-specific agreement. As discussed in Comment #5, the area-specific agreement process appears to present a very positive opportunity to address distributional inequities. The Guidance's "due weight" provisions suggest that an agency action contemplated by an area-specific agreement will be considered in compliance with Title VI (presumably notwithstanding the action's individual disparate impact). As with the "due weight" accorded an

agency's own studies, OCR appears to be attempting to create an inducement, this time for the area-wide approach.

In this case, the need for an inducement is particularly understandable. Unlike the disparate impact studies, discussed above, most recipient agencies would not be considered required to take an area-wide approach. Here, there may be little to incline an agency to undertake the approach without some sort of inducement. However, the inducement may simply generate poor area-wide agreements that do not provide a sufficient level of protection. OCR may be under considerable pressure to accept area-wide agreements, even if they do not go as far as OCR might like. Future complainants might be unlikely to become involved in the creation of an area-wide agreement since the stakes, at that point in time, may be relatively low. If an agency can come up with an agreement that allows for new facilities or modifications, and can get the agreement accepted by OCR, then the Guidance suggests that any subsequent complaints challenging facilities contemplated by the agreement would be dismissed.

Each complaint should receive more attention than that; the area-wide agreement should not have such preclusive effect. When an individual application is under consideration, its effects, and the concerns of the complainants challenging the application, should receive full attention. The area-wide agreement may still be of value to the recipient agency if it can show how the agreement is being implemented and how, in the individual case, it is working to decrease impacts. If it turns out that the application is connected to other activities that will decrease impacts, then that can be determined on the merits, after full consideration. To simply dismiss the complaint, without considering the individual case and without giving a full hearing to the individual complainants, who might not have participated in the area-wide agreement, would be to cut short the analysis Title VI requires and to give too much deference to the area-wide agreements.

Comment #15: The absence of appeal rights for complainants undercuts their ability to seek the protection Title VI requires. The Title VI regulations are intended to protect complainants from disparate impacts. By denying complainants the right to appeal, OCR is undercutting the ability of affected communities to enforce the rights the regulations are designed to serve. The Guidance documents should be facilitating the enforcement of complainant rights, not cutting off their ability to pursue them.

Furthermore, as a pragmatic matter, EPA and recipient agencies have a long history of working together in administering environmental programs. The Title VI Guidances create new responsibilities that will undoubtedly be challenging for both EPA and recipient agencies to undertake. Complainants will thus be requesting relief that runs counter to the status quo and counter to what the agencies – federal and state – are accustomed to providing. In recognition of the possible reluctance recipient agencies and EPA may feel, the complainants' ability to challenge agency action should not be hampered.

C. Remedy

Comment #16: The Guidance fails to establish an effective remedy, thus undermining the likelihood of recipient agency compliance. The Guidances frequently states that permit denial is an unlikely consequence of a Title VI dispute since, in many instances, the permit application at issue is not the sole cause of the disparate impact at issue. As the Guidance also notes, however, many communities experience disparate impacts from a multitude of sources. The only way in which a recipient agency may be able to avoid “entrenching” or exacerbating that disparate impact is by denying a permit application. As noted in Comment #3, above, the recipient agency should be required to take measures, such as permit denial, that are necessary to protect the impacted community, regardless of whether the permit is the sole cause of the identified disparity.

The alternatives to permit denial, such as area-wide agreements and informal voluntary compliance measures, are all well and good. But they may not present a feasible alternative to permit denial. A recipient agency may have difficulty convincing other sources, outside of their control, to reduce impacts. Additional legislative measures may be necessary before there is a sufficient incentive for local, state, and federal agencies to enter into such agreements and approach reductions in disparate impacts in the comprehensive way envisioned.

And a recipient agency might prefer to deny a new permit if the alternative is re-opening an existing permit to require additional controls that would enable the new applicant to start up. Informal compliance might be achieved if the permit applicant agrees to finance reductions of the stressor of concern by other entities, but such agreements would likely be complex to negotiate. Similarly, it is unlikely that OCR would take the drastic step of terminating a recipient agency’s funding. Without a credible threat that an agency’s funding could be terminated or that a new permit could be denied if the requisite reductions in impact are not achieved, it appears unlikely that the significant efforts necessary to reduce impacts from other sources would be undertaken.

D. Justifications

Comment #17: Arguably, economic benefits should not justify a disparate impact. By indicating that a disparate impact could be justified if the activity in question provides economic benefits to the affected community, the Investigation Guidance creates the possibility that community residents could be subject to “environmental blackmail.” A community could be convinced that it must accept environmental degradation, and risks to health and happiness, as a necessary tradeoff to accomplish economic development. Especially given the high threshold for establishing an adverse disparate impact established by the Guidance, it is morally questionable whether the law should allow a community to trade its environmental and physical well-being for economic growth.

Such an approach also suggests that industries will have little incentive to minimize their impacts. An entity seeking a permit might look for the most economically desperate community on the expectation that economic need will allow it to pollute without having to consider its adverse disparate impact. The Guidance contains much promise as a mechanism for ameliorating

the legacy of disparate impacts that some communities have endured. OCR should be highly reluctant to accept justifications that could undermine the progress that is possible.

Comment #18: Even if OCR retains the “economic benefits” justification, the confirmed existence of economic benefits to a community should not be sufficient to justify a disparate impact unless there is clear evidence that the community not only recognizes the benefits, but chooses to accept them notwithstanding the permitted activity’s adverse consequences. The Investigation Guidance appropriately states that it will consider the community’s, not just the recipient’s, view as to the likelihood that a permitted activity would provide direct economic benefits to the affected community. However, a community may recognize the possibility of direct economic benefits but choose to reject those benefits in light of the disparate impact associated with the activity. The community may be seeking environmentally benign forms of economic development. From a community’s perspective, the presence of economic benefits does not necessarily justify the activity in question. To the extent the Guidance permits economic benefits to be a justification for a disparate impact, it should require an assessment not only of the community’s recognition of the benefits, but its desire for them as well.

E. Less Discriminatory Alternatives

Comment #19: OCR’s consideration of “cost” in determining the feasibility of alternatives is likely to perpetuate concentrations of disparate impacts in minority communities. Property owned by minorities is typically valued less than comparable property that is not owned by minorities. Thus, land in minority neighborhoods tends, overall, to be cheaper than land elsewhere. Sites in white neighborhoods will generally be more expensive than sites in minority neighborhoods. Under the Guidance’s approach, a comparable site in a white neighborhood that cost more than the site in a minority neighborhood would not be considered a viable alternative, even if it was less discriminatory, because of the additional cost. As long as “cost” is considered a variable, it will, overall, tend to limit the number of alternatives that do not result in disparate impacts.

Comment #20: A permit applicant’s economic gain should not be valued more than protecting a community from disparate impacts. A disparate impact should be permitted simply because it is more costly for a company to locate in an area where it will not cause a disparate impact. This variable suggests that it is more important for a company to be able to meet its cost projections than it is for a community to be spared inequitable impacts.

In sum, the Draft Recipient and Investigation Guidances present a major step forward in recognizing the problem of disparate impacts and the necessity of addressing them. However, many aspects of the Guidance may dilute EPA’s capacity to accomplish real change. Notwithstanding the political pressure associated with the significant requirements Title VI imposes, I hope that EPA will have the courage to turn the Guidance into a roadmap for

improving the quality of life of communities who have suffered disparate impacts for too long.

Respectfully Submitted,

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