

US EPA ARCHIVE DOCUMENT

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May 5, 1998

Office of the Secretary

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Ann E. Goode, Director  
Office of Civil Rights  
U.S. Environmental Protection Agency  
41 M Street, SW  
Washington DC 20460

RE: Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Permits

Dear Ms. Goode:

The Pennsylvania Department of Environmental Protection appreciates this opportunity to comment on EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging State Permits ("the Guidance"). Pennsylvania agrees that environmental programs should be implemented to protect the health of all citizens and in a manner which complies with Title VI of the Civil Rights Act and EPA's implementing regulations. Further, we believe that the system which Pennsylvania currently implements meets those standards regardless of the race, color or national origin of the permit applicant or of the surrounding community.

Pennsylvania is, however, always willing to accept helpful suggestions and guidance which could improve program implementation. To this end, Secretary Seif will shortly announce the formation of an Environmental Equity Work Group to assist the Department in developing such improvements. We have already begun recruiting members of the group.

Unfortunately, the Guidance released February 5, 1998 is not particularly helpful to a state permitting agency. While portrayed as guidance for EPA's Office of Civil Rights, it appears to be really aimed at influencing if not intimidating the state permitting agencies. In developing the Guidance, EPA has ignored the usual public review and comment given to other guidance. Rather, the Guidance was developed in secret and state agencies were explicitly and intentionally excluded from the process. Not surprisingly the end result is a Guidance which is disconnected from the real world of permit decision making and which focuses on how to second guess and criticize the state's permit decision, rather than on how to actually accomplish environmental equity.

Whether intended to guide EPA or influence states, the Guidance is far too vague to be helpful. The discussions of topics such as disparate impact, affected population and universe of facilities fail to provide clear definitions of terms or clear procedures and methods of analysis. This is of no value unless the goal of the Guidance is to give EPA maximum opportunity to second guess state decisions.

The Guidance is based on the discriminatory effects standard in EPA's regulations rather than the provisions of Title VI itself. Yet there is no discussion of how a "disparate impact" standard comports with the EPA's regulations which prohibits the use of "criteria or methods" which have a discriminatory effect. The regulations seem to create one requirement on the recipient state and the Guidance another. In short, the Guidance fails to adhere to EPA's regulations and fails to define necessary terms.

Identification and analysis of "impacts" is, of course, key to any program which relies on disparate impact as its foundation. Yet the Guidance is entirely unhelpful in that regard. While first indicating that only impacts relevant under the permitting program will be considered when judging the state's actions (page 9), the Guidance then suggests that cumulative impacts unrelated to the permitting agencies' authority will be considered (footnote 12). This is both unhelpful and unreasonable. To suggest that state environmental agencies may find their funding at risk as a result of alleged disparate impacts from facilities beyond their jurisdiction goes far beyond what Congress authorized EPA to do.

The Guidance gives no recognition to the respective roles of state and local governments in land use decisions. Most state environmental permits do not determine the location of facilities. This is done by local governments through zoning or land use planning. Land use concepts have, historically, encouraged the concentration of industrial activities in designated areas. Whether this is appropriate land use policy is not for state environmental agencies to decide. However, the Guidance states that the environmental agency must implement its program in a way which "avoids discriminatory cumulative burdens and distributional patterns." In other words, EPA is proposing that the Federal government become the arbiter of the correctness of local land use decisions and that state environmental agencies must carry out EPA's social theories.

The Guidance also fails to recognize the realities of state permit decision and adjudication procedures. To address environmental equity issues 180 days after a permit is issued is unrealistic and unhelpful. Such a procedure will only serve to create a new "federal environmental justice permit" which will have to be obtained after the regular permit. To be helpful and successful the Guidance should focus on how to address environmental justice issues as part of the state permit decision process. For example, mitigation as discussed in the Guidance is a worthy concept, but is more difficult to accomplish if tacked on to the end of the process. If dealt with as part of the process it can offer real benefits.

Anne E. Goode  
1998

- 3 -

May 5,

The Guidance states that permits which meet the environmental and health standards established by EPA and the states will not eliminate disparate impacts because of the potentially discriminatory effects of "residual pollution". If EPA truly believes that its standards do not protect the public from cognizable impacts when more than a certain number of facilities are located in a community, then this issue goes far beyond Title VI. Rather than using vast resources on the Title VI issue, EPA should be applying its scientific resources to identify and eliminate the cumulative impacts of facilities in all communities. This approach will provide protection for all citizens rather than creating a means to divide them.

In conclusion, Pennsylvania DEP believes that if EPA really wants to promote environmental equity it should do three things:

- Substantially revise and reduce the current Guidance so that it really is just a procedural guidance for OCR. This could be done in three or four pages and be limited to the material in the "Overview" section of the current Guidance.
- Begin immediately a good faith, inclusive stakeholder process, with the states as partners, to develop a useful guidance which the states and the federal government could both use during the processing of permit applications to avoid Title VI problems before they occur.
- Invest EPA's resources in an effort to determine whether there is a real cumulative impact problem from residual pollution and develop a means to deal with it if it exists.

Pennsylvania DEP is prepared to work with EPA to develop a meaningful and useful environmental equity program. Please direct any questions you may have about these comments to me or to Terry R. Bossert, Chief Counsel.

Sincerely,

Donald S. Welsh  
Deputy Secretary for  
State/Federal Relations