

US EPA ARCHIVE DOCUMENT

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EPA's Office of Civil Rights should be commended for its development of the Draft Recipient Guidance and the Draft Revised Investigation Guidance. A review of these documents makes the thoughtful deliberation employed in their development apparent to a consciences reader. As news articles regarding EPA's Title VI program have shown over the past two years, EPA has developed this guidance despite significant political pressure applied by elected officials at the local, state and federal level. In light of most federal agency's failure to promulgate any Title VI guidance, EPA's efforts warrant special recognition.

The following comments will focus on the Draft Revised Investigation Guidance and the framework it presents for assessing "Adverse Impacts." Generally, the revised guidance presents a sound approach for conducting complaint investigations and determining if Title VI has been violated. However, EPA's exclusive dependance on health related stressors to establish adversity threaten EPA's ability to address other discriminatory effects which may result from its recipients permitting program. As noted in footnote 38 on page 39668 of the June 27, 2000 federal register notice, the Supreme Court ruled in Alexander v. Choate, 469 U.S. 287, 292-294 (1985) that Title VI "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable to warrant altering the practices of federal grantees that had produced those impacts." In this ruling, the Court recognized that each federal agency responsible for implementing Title VI also had the responsibility to determine the types of disparate impacts that its program would address. As such, EPA now bears the burden of deciding the types of disparities produced by its recipients that it wants to address.

In accordance with the Court's decision, EPA's Title VI program should address disparate impacts upon minorities constituting significantly sufficient social problems that are readily enough remediable to warrant altering the practices of federal grantees that produced those impacts. In short, EPA should recognize as the Court in Alexander v. Choate that discrimination is a social problem not an epidemiological problem. And while sickness and disease may result from racial discrimination they represent only a limited subset of the effects that flow from discrimination. The decision to redefine discriminatory effects based solely on sickness and disease resulting from a permits issuance betrays the manifest intent of Title VI, deviates from the conduct of other federal agencies, unreasonable interprets 40 C.F.R. 7.35b and fails to address social problems associated with discrimination in environmental permitting.

Unless modified the approach to assessing impacts and their adversity presented in the revised guidance will steer EPA's Office of Civil Rights away from the direction of the Court and the intent of Title VI into a restricted understanding of discrimination which can only be proven through risk assessments and extensive health studies. Specifically, the approach proposed in the draft revised guidance ignores the onus of Title VI to address the "social phenomenon" of racial

discrimination manifested in social impacts on minorities. EPA's proposed approach is extremely expensive, time consuming and labor intensive. Additionally, because of its complexity and technical dependence the methodology is beyond the kin of most citizens it protects and grant recipients it regulates. The result being that persons protected by Title VI will be unable to assess whether discrimination against them has occurred under EPA's severely restrained definition. In fact since EPA intends to limit the scope of its investigation to the allegations in the complaint, complainants will have to employ technical experts to craft meaningful allegations that fit within EPA's definition.

Moreover, EPA's approach effectively reduces its discrimination investigation to a probability analysis for obtaining cancer or some other ailment. This narrowed approach to discrimination deviates from that followed by other federal agencies and the courts. Examples of this can be found in the Department of Health and Human Services (HHS) Title VI enforcement, a number of cases exists regarding disparate impacts in access to hospitals, health care or other benefits. Neither HHS nor the courts required that complainants and plaintiffs show that cancer or some other grave illness result from the disparity in access.¹ Likewise, in EPA's own history the disparate provision of municipal services in using EPA grant funds has constituted an adversity without showing some health based harm or injury. In those cases racial disparities in accessing municipal sewage facilities were adequate to constitute a violation of Title VI.

Some academics and others have rationalized the discrepancy between the federal governments treatment of the two scenarios above and environmental permitting based on a dichotomy of benefits and harms, however, EPA's Title VI regulations make no such distinction. They simply provide that recipients shall not use criteria or methods of administering their program that have the effect of discriminating based on race, color or national origin. In most cases the effects of discrimination are felt by its victims long before cancer risks and other health effects are known. EPA has an obligation to deal with discriminatory effects resulting from its recipients program that transcends cancer risks and health studies.

Therefore, EPA should establish an approach to discrimination that considers the social impacts of the recipients behavior beyond those related to human health. These impacts would still be based on the activities permitted by the recipient and would therefore be within the recipients authority to address. One example of this would be the concentration of landfills in African American communities as discussed in the case of R.I.S.E. v. Kaye, Inc., 768 F. Supp. 1144 (E.D. Virginia 1991). In that case four permits were issued in King and Queens County for solid waste landfills, three of those were in African American communities while the fourth was in a white community but closed after operating a short time. A number of negative or adverse effects were associated with these landfills operations: decreased property values, lowered aesthetic quality (e.g., garbage mountains) increased disease vectors, truck traffic and the racial polarization that results from permitting pollution sources in racially identifiable location patterns. These social realities evince discrimination, yet under EPA's proposed methodology for assessing adversity they are invisible.

Another worthwhile example of discrimination which EPA's approach ignores occurred in

¹ NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir.1981).

Chester, Pennsylvania. In that matter, Chester, Pennsylvania became the location of multiple facilities permitted to handle the overwhelming majority of trash for the entire county. In this instance the majority population of African Americans residing in Chester suffered the disamenities associated with these facilities while the benefit accrued to the majority white population throughout the county. While in that case health studies were conducted to exemplify one aspect of the harm associated with discrimination, the intuitive harms associated with singling out this predominantly minority community for managing the county's trash are apparent. Just as in the case when access to a municipal sewage treatment facility is disproportionately distributed based on race. Plaintiffs under those circumstances will not have to demonstrate that they suffer from some actual or potential human health harm because of the disparity. Unjustified racial disparity in the distribution of access to a publically owned treatment works constructed with federal dollars would arguably violate Title VI without a risk assessment or other health studies. To require such an approach for environmental permitting creates an artificial distinction that ignores the harms associated with the operations of many permitted facilities.

To accomplish this EPA's revised guidance should establish a category for analysis that addresses social inequities resulting from recipients conduct. Specifically, the revised guidance should address patterns of permitting waste facilities based on the race of nearby residents. In those circumstances, investigations should focus on the adversity associated with residing in proximity to those facilities. Beyond that an assessment of stressors and risk should not be required unless the complaint specifically alleges health related harms. Such an approach would save money, decrease OCR labor requirements and expedite complaint resolution.