



# Federal Register

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**Tuesday,  
June 27, 2000**

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## **Part II**

# **Environmental Protection Agency**

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**Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance); Notice**

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-6720-7]

**Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Draft Agency Guidance.

**SUMMARY:** EPA today released two draft guidance documents to clarify for agencies and citizens the compliance requirements of Title VI of the Civil Rights Act. The guidance strikes a fair and reasonable balance between EPA's strong commitment to civil rights enforcement and the practical aspects of operating permitting programs. Title VI prohibits discrimination based on race, color, or national origin, and applies to entities that receive federal funding from EPA. When state and local agencies that receive federal funding have questions about avoiding discrimination in their permitting programs, the first guidance, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, explains how to effectively deal with the types of concerns that often lead to complaints of discrimination.

If formal complaints are filed, the second guidance, *Draft Revised Guidance for Investigating Title VI Administrative Complaints*, explains how EPA will investigate and resolve them. It also explains to communities and recipients the types of concerns that Title VI addresses and their roles in the investigation process. Once the *Draft Revised Guidance for Investigating Title VI Administrative Complaints* is final, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)* issued in February 1998.

**DATES:** Comments on the two draft guidance documents must be received in writing by August 28, 2000. Comments should be mailed to the address listed below.

**ADDRESSES:** Written comments on the two draft guidance documents should be mailed to: Title VI Guidance Comments, US Environmental Protection Agency, Office of Civil Rights (1201A), 1200 Pennsylvania Avenue NW., Washington, DC, 20460, or

submitted to the following e-mail address: [civilrights@epa.gov](mailto:civilrights@epa.gov). Please include your name and address, and, optionally, your affiliation.

**FOR FURTHER INFORMATION CONTACT:**

Yasmin Yorker, US Environmental Protection Agency, Office of Civil Rights (1201A), 1200 Pennsylvania Avenue NW., Washington, DC, 20460, telephone (202) 564-7272.

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- D. Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance

**A. Preamble**

Today's **Federal Register** document contains two draft guidance documents on which the U.S. Environmental Protection Agency (EPA) is seeking public comment. The first is the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*. The second is the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*. After the *Draft Revised Investigation Guidance* is finalized, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)* issued in February 1998. EPA is soliciting public comment on both of these documents for 60 days.

During the public comment period, EPA will hold six public listening sessions around the country to receive additional input. EPA also expects to meet with various stakeholder organizations during the comment period to listen to their comments. (A current list of scheduled outreach meetings is posted on EPA's Office of Civil Rights' (OCR) Web site at <http://www.epa.gov/civilrights>). See the Public Comment Period section of this document for details about the public comment period and the listening sessions.

EPA will consider both the written public comments submitted and the information collected during the listening sessions and stakeholder meetings as it drafts the final versions

of both the *Draft Recipient Guidance* and the *Draft Revised Investigation Guidance* documents. EPA will also continue its interagency coordination through its work with the U.S.

Department of Justice and the Council on Environmental Quality.

Today's document also contains a *Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance*. EPA is not soliciting comments on the *Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance*. It is provided for informational purposes only.

**Background**

Entities applying for EPA financial assistance submit an assurance with their application stating that they will comply with the requirements of EPA's regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI) with respect to their programs or activities. When the recipient receives the EPA assistance, they accept the obligation to comply with EPA's Title VI implementing regulations. Persons who believe Federal financial assistance recipients are not administering their programs in a nondiscriminatory manner may file administrative complaints with the EPA or other relevant Federal agencies. These complaints must be filed subsequent to a particular action taken by a recipient (such as the issuance of an environmental permit) that the complainants allege has a discriminatory purpose or effect.

In February 1998, EPA issued its *Interim Guidance*, which is internal guidance that provides a framework for OCR's processing of complaints filed under Title VI that allege discrimination in the environmental permitting context on the basis of race, color, or national origin.

The *Draft Revised Investigation Guidance* was developed to address the application of Title VI to alleged adverse disparate impacts caused by environmental permitting. It does not address other applications of Title VI in the environmental context, such as allegations concerning the unequal enforcement of environmental permit conditions, regulations, or statutes, or allegations relating to discrimination in public participation processes associated with permitting decisions. This guidance is directed at the processing of discriminatory effects allegations. Title VI complaints may also allege discriminatory intent in the context of environmental permitting. Such complaints generally will be investigated by OCR under Title VI, EPA's Title VI regulations, and

applicable intentional discrimination case law. Such topics will be addressed in future guidance documents as appropriate.

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.

At the time EPA issued the *Interim Guidance*, EPA also solicited public comment for a 90-day period. EPA received over 120 written comments. In addition, EPA received stakeholder input through:

- Meetings with a number of stakeholder representatives including those from environmental justice groups, communities, industry, state and local governments, and the civil rights community to discuss their concerns and views on issues associated with the *Interim Guidance*;
- An advisory committee that provided a broad range of views on a number of issues under consideration in the *Interim Guidance* revision process;
- A facilitated meeting with stakeholder group representatives to receive more feedback on draft options under consideration for inclusion in the *Draft Revised Investigation Guidance*; and
- Internal EPA and U.S. Department of Justice review processes.

Based upon that input and the experience gained from processing and investigating complaints during the intervening months, EPA is now issuing the *Draft Revised Investigation Guidance*. The *Draft Revised Investigation Guidance*, when final, will replace the *Interim Guidance*. OCR has included substantially more detail throughout the *Draft Revised Investigation Guidance* than was provided in the *Interim Guidance* to better enable the reader to understand the approach that OCR expects to take with Title VI administrative complaints challenging permits. The *Draft Revised Investigation Guidance* is not intended to address every situation that may arise in the interaction between Title VI and environmental permitting. Instead, it explains how OCR generally intends to process and investigate allegations of discriminatory effects from environmental permitting.

In addition, OCR developed the *Draft Recipient Guidance*, which is voluntary in nature, to offer suggestions to recipients about approaches they could use to address potential Title VI issues before complaints arise. The *Draft Recipient Guidance* complements the *Draft Revised Investigation Guidance* by providing information and flexible tools that may help recipients achieve compliance with Title VI. For example, the document describes geographic area-wide approaches which use active public participation processes to identify and prevent pollution. The *Draft Recipient Guidance* also notes that the process used by recipients to assess conditions, set goals, and track reductions can provide important information for EPA to consider when conducting a Title VI investigation. This type of data may be examined by EPA and accorded due weight. In addition, EPA's intended approach regarding permits that decrease pollution, which is described in the *Draft Revised Investigation Guidance*, reduces the uncertainty concerning permitting actions taken pursuant to such community-based reduction efforts.

The *Draft Recipient Guidance* relies heavily on the work of the Title VI Implementation Advisory Committee of EPA's National Advisory Council for Environmental Policy and Technology (Title VI Advisory Committee); the October 9, 1998, draft *Proposed Elements of State Environmental Justice Programs* developed by the Environmental Council of States; and available descriptions of state environmental justice programs. The discussions of mitigation draw heavily from the Title VI Implementation Advisory Committee report. Further, both the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* adopt many of the principles agreed to by the Title VI Advisory Committee.

In fact, the *Draft Recipient Guidance* was written at the request of the states and is intended to offer suggestions to assist state and local recipients in developing approaches and activities that address Title VI concerns. In addition to the steps described above, EPA engaged in an extensive consultation process with elected state and local officials, and other representatives of state and local governments in the process of developing both the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance*. Specifically, EPA met with the National League of Cities in September 1998, the National Association of Attorneys General in June 1999, and members of the Local

Government Advisory Committee and Small Communities Advisory Subcommittee in September 1999.

The *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* are non-binding policy statements that do not directly affect the rights and responsibilities of state and local recipients. Instead, they merely explain EPA's policy regarding existing obligations that recipients accept when they receive EPA assistance. Those obligations were established by Title VI, which has been in place since 1964, and by EPA's implementing regulations, which were first promulgated in 1973 and require recipients to submit assurances of compliance with EPA's regulations.

The *Draft Revised Investigation Guidance* is an internal EPA document that concerns the manner in which OCR will conduct its Title VI investigations. It is not a guidance that directs states to take any action. The *Draft Recipient Guidance* does not require recipients to develop Title VI-related approaches and activities. Moreover, recipients that choose to develop Title VI-related approaches and activities are in no way bound by the suggestions made in the *Draft Recipient Guidance*. If a recipient develops Title VI-related approaches or activities, then EPA intends to carefully consider the results of that work and give it any appropriate weight it is due.

#### **Responding to Concerns Raised About the Interim Guidance**

A number of issues were raised during our outreach and comment process. Stakeholders raised concerns that the *Interim Guidance* was vague, lacked clarity and definitions, and failed to provide direction on critical issues. The draft guidance documents respond to these concerns.

First, the draft documents provide more detail and clarity than was provided in the *Interim Guidance*. Plain language is used and more detail provided in areas where comments suggested it was needed, such as informal resolution and the disparity analysis. In addition, the *Draft Revised Investigation Guidance* provides a clearer structure and additional information about the basis for OCR's positions. Also, the *Draft Revised Investigation Guidance* includes cross references to the *Draft Recipient Guidance* and vice versa.

Second, the *Draft Revised Investigation Guidance* more clearly explains the various steps of the adverse disparate impact analysis and the actions that can be taken at each stage (e.g., how a finding of adverse impact is expected to be reached, or when an

allegation will likely be dismissed). Also, EPA has attached a flowchart as an appendix to more fully explain the Title VI complaint processing regulations at 40 CFR part 7, subpart E and how those govern OCR's receipt and handling of complaints filed with EPA.

Third, more terms are defined by providing examples within the text and including a glossary of terms as an attachment to each draft guidance document.

Fourth, the draft documents contain guidance on issues that were not included in the *Interim Guidance* or required further clarification. They discuss tools to conduct an adverse impact analysis, and describe EPA's intent to accord due weight to approaches by recipients that reduce or eliminate adverse disparate impacts. The *Draft Revised Investigation Guidance* also outlines EPA's intended approach regarding permit actions that result in an actual and significant decrease in emissions, and provides that such permit actions will likely not serve as bases for findings of violation of Title VI.

Flexibility is also a key concept embodied in the draft documents. For example, EPA recognizes that recipients have different Title VI concerns, different amounts of resources, and different organizational structures, so a "one-size-fits-all" Title VI program will not adequately address all recipients needs. As a result, the *Draft Recipient Guidance* offers a range of possible approaches to Title VI issues and encourages recipients to develop other techniques.

In addition to the general matters described above, the key elements of the *Draft Recipient Guidance* and some of the other specific additions or changes to the *Interim Guidance* contained in the *Draft Revised Investigation Guidance* are described below.

#### *Draft Recipient Guidance*

Entities applying for EPA financial assistance submit an assurance with their application stating that they will comply with the requirements of EPA's Title VI implementing regulations with respect to their programs or activities. When the recipients receive the EPA assistance, they accept the obligation to comply with EPA's Title VI implementing regulations. The *Draft Recipient Guidance* is written for the recipients of EPA financial assistance that implement environmental permitting programs. It provides a framework to help recipients address situations that might otherwise result in the filing of complaints alleging violations of Title VI and EPA's Title VI

implementing regulations. In particular, it provides a framework designed to improve a recipients' existing programs or activities and reduce the likelihood or necessity for persons to file Title VI administrative complaints with EPA alleging either: (1) Discriminatory human health or environmental effects resulting from the issuance of permits; or (2) discrimination during the permitting public participation process.

To ensure stakeholder involvement in the development of the *Draft Recipient Guidance*, EPA Administrator Carol M. Browner established a Title VI Implementation Advisory Committee in March 1998. The Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry, and other interested stakeholders. The committee reviewed and evaluated existing techniques that EPA funding recipients, such as state and local environmental permitting agencies, may use to administer environmental permitting programs in compliance with Title VI. It was also asked to make recommendations to help EPA financial assistance recipients design programs or approaches that will address Title VI concerns early in the permit process. The core components of the *Draft Recipient Guidance* are based, in part, on the March 1, 1999, *Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs*.

The *Draft Recipient Guidance* is divided into two main sections. The first section describes several general approaches recipients may want to adopt to help identify and resolve issues that could lead to the filing of Title VI complaints. The second section provides guidance on individual activities that EPA encourages recipients to consider integrating into their permitting programs.

#### Title VI Approaches and Activities

The *Draft Recipient Guidance* suggests a number of approaches and individual activities recipients can consider adopting and implementing to address Title VI-related concerns. The suggested Title VI approaches include: (1) A *Comprehensive Approach* that integrates all or most of the Title VI activities described in the *Draft Recipient Guidance*; (2) an *Area-Specific Approach* to identify geographic areas where adverse disparate impacts may exist; and (3) a *Case-by-Case Approach* or permit-specific approach through which a recipient develops criteria to evaluate permit actions that are likely to raise

Title VI concerns. The individual Title VI activities described in the *Draft Recipient Guidance* include effective public participation, intergovernmental involvement, and alternative dispute resolution.

The approaches described are not intended to represent all those recipients may adopt, nor are they intended to be mutually exclusive. Recipients should determine the proper mix and extent of appropriate Title VI activities and approaches. Recipients are not required to implement any of the Title VI activities or approaches described in the *Draft Recipient Guidance*; they should develop and implement any approaches for addressing Title VI issues that they believe are appropriate. In any case, recipients will be held accountable for operating their programs in compliance with the non-discrimination requirements of Title VI and EPA's implementing regulations as determined by OCR.

#### *Draft Revised Investigation Guidance* Acceptance/Rejection

EPA determines whether to accept a complaint for investigation or to reject it based on a set of jurisdictional criteria listed in its Title VI implementing regulations. The acceptance of a complaint for investigation does not mean that there has been a finding of violation of Title VI. Because the *Interim Guidance* did not list all of the steps of complaint processing or all of the time frames outlined in EPA's Title VI implementing regulations, some commenters thought that EPA was deviating from the administrative structure the regulations created or had eliminated some of the time frames. To address that misunderstanding, the *Draft Revised Investigation Guidance* incorporates all of the major steps and time frames mentioned in the Title VI regulations.

The *Draft Revised Investigation Guidance* eliminates the term "complete or properly pleaded complaint" as a criterion for acceptance because it led to unnecessary confusion. In addition, the discussion of "timeliness" includes substantially more detail to assist complainants in filing within the time allowed. This section also explains that premature complaints and complaints involving certain concurrent litigation will likely be rejected. Furthermore, the *Draft Revised Investigation Guidance* explains that OCR expects to dismiss a complaint if the permit that triggered the complaint is withdrawn or revoked, or if a final decision is made by the permittee not to operate under that

permit before OCR completes its investigation or before any activities allowed by the permit have begun.

#### Investigative Procedures

The *Draft Revised Investigation Guidance* adds a brief section on investigative procedures. This section covers a number of important topics such as the submission of additional information relevant to the investigation by recipients and complainants. This information will be reviewed by EPA and may be accorded due weight in its investigation, based on a series of listed factors. It also describes when allegations submitted by the complainant after the initial complaint will be treated as amendments to the existing complaint or will be considered a new and separate complaint. Furthermore, it explains that neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue.

#### Informal Resolution

EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable. EPA believes cooperative efforts between permitting agencies and communities frequently offer the best means of addressing potential problems. However, as several commenters pointed out, the *Interim Guidance* contained little explanation of how OCR intended to approach informal resolution. Therefore, the *Draft Revised Investigation Guidance* describes the various types of informal resolution that are possible. The *Draft Recipient Guidance* includes a description of alternative dispute resolution (ADR) techniques that EPA will use, as appropriate, and encourages recipients to explore these techniques to assist in resolving concerns that might otherwise result in Title VI complaints.

#### Resolving Complaints

EPA believes flexibility is critical when considering measures that eliminate or reduce adverse disparate impacts to the extent required by Title VI. Often, Title VI concerns are raised communities believe they are suffering from adverse effects caused by multiple sources. For those communities, filing a Title VI complaint about a permit for a new facility or the most recent modification to an existing one, is a way to focus attention on the cumulative impacts of a number of the recipient's permitting decisions. As the *Draft Revised Investigation Guidance* states, EPA believes it will be a rare situation where the permit that triggered the complaint is the sole reason a

discriminatory effect exists; therefore, denial of the permit at issue will not necessarily be an appropriate solution. Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions.

The *Draft Revised Investigation Guidance* contains a more detailed discussion on resolving complaints than the *Interim Guidance*. In particular, it focuses primarily on measures that recipients could offer to perform during the course of informal resolution attempts with complainants or OCR. It also eliminates the reference to "supplemental mitigation projects" to avoid confusion with EPA's environmental programs. The *Draft Revised Investigation Guidance* suggests a variety of possible measures to eliminate or reduce to the extent required by Title VI any adverse disparate impacts, including additional pollution control on the source, use of pollution prevention techniques, or emission offsets from other pollution sources.

The *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* also encourage recipients to identify geographic areas where adverse disparate impacts may exist and to enter into agreements (area-specific agreements) with the affected communities and stakeholders to reduce pollution impacts in those geographic areas over time. The *Draft Revised Investigation Guidance* also describes several elements that would be considered in decisions regarding voluntary compliance efforts sought by EPA after a formal finding of noncompliance, including the cost and technical feasibility of such efforts.

#### Due Weight

Many commenters, particularly those representing state agencies and industry, asked EPA to provide incentives for recipients to develop proactive Title VI-related programs. In particular, some asked EPA to recognize, and to the maximum extent possible rely on, the results of the recipient's Title VI approaches or activities in assessing complaints filed with EPA. The Investigative Procedures section of the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* discuss the issues of deference to recipients' activities and "due weight" that EPA may provide in the context of adverse disparate impact investigations. Moreover, the *Draft Recipient Guidance* contains a discussion of the circumstances under which OCR might accord a public participation process due weight.

Under the Civil Rights Act of 1964, EPA is charged with assuring compliance with Title VI and cannot delegate its responsibility to enforce Title VI to its recipients. Therefore, OCR cannot defer in the entirety to a recipient's own assessment that it has not violated Title VI or EPA's regulations, or to a recipient's assertion that a Title VI program has been followed. Nevertheless, under certain circumstances, EPA can consider the results of recipients' analyses and give them appropriate due weight.

For example, during the course of an investigation, recipients may submit analyses to support their position that an adverse disparate impact does not exist and, under certain circumstances, OCR may give due weight to those analyses. OCR would expect that a relevant adverse impact analysis or a disparity analysis would, at a minimum, generally conform to accepted scientific approaches. It may focus on a spectrum of potential adverse impacts, such as that described in the analytical framework set forth in the *Draft Revised Investigation Guidance*, or may be more focused, such as the impact of a specific pollutant on nearby populations (e.g., a study regarding the impact of lead emissions on blood lead levels in the surrounding area).

In the *Draft Recipient Guidance*, EPA encourages recipients to identify geographic areas where adverse disparate impacts may exist and to enter into agreements with affected residents and stakeholders to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts in those specific areas. Collaboration with communities and other appropriate stakeholders to develop the criteria used to identify the geographic areas and in designing potential solutions to address any adverse disparate impacts will be an important element of the approach.

The *Draft Revised Investigation Guidance* describes the factors OCR will use to evaluate the appropriateness and validity of the analysis or the area-specific agreements and to assess the overall reasonableness of their conclusions or projected results. The *Draft Revised Investigation Guidance* also explains that more weight will be given to analyses and area-specific agreements that are relevant to the Title VI concerns in the complaint and have sufficient depth, breadth, completeness, and accuracy. Where a recipient or complainant submits a relevant analysis or area-specific agreement that meets the factors described in the *Draft Revised Investigation Guidance*, OCR expects to give the results due weight and rely on it in finding the recipient in

compliance or not in compliance with EPA's Title VI regulations.

#### Disparate Impact Analysis

In order to find a recipient in violation of EPA's Title VI implementing regulations, OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin, and, if so, whether that impact is justified. The adverse disparate impact analytical framework in the *Interim Guidance* did not describe how EPA would determine what constituted an adverse impact for Title VI purposes. Rather, the *Interim Guidance* focused attention on the disparity analysis. The *Draft Revised Investigation Guidance* not only addresses this gap, but also expands the description of the disparity analysis.

EPA has remained mindful that no single analysis or definition of adverse disparate impact is possible due to the differing nature of impacts (e.g., cancer risk, acute health effects, odors) and the various environmental media (e.g., air, water) that may be involved. EPA did not set an across-the-board definition of what is an adverse impact, but instead the *Draft Revised Investigation Guidance* provides more clarity about how OCR will determine whether it exists. The *Draft Revised Investigation Guidance* describes how EPA will use environmental laws, regulations, policy, and science as touchstones for determining thresholds for what is adverse.

The *Draft Revised Investigation Guidance* indicates that in considering adverse disparate impact claims, OCR generally expects to consider only those types of impacts affected by factors within the recipient's authority under applicable law. The *Draft Revised Investigation Guidance* also indicates that EPA would generally not initiate an investigation of allegations of discriminatory effects from emissions, including cumulative emissions, where the permit action that triggered the complaint significantly decreases overall emissions at the facility or where the permit action that triggered the complaint significantly decreases pollutants of concern named in the complaint or all the pollutants EPA reasonably infers are the potential source of the alleged impact.

The *Draft Revised Investigation Guidance* provides significantly more information about the process proposed to identify and determine the characteristics of the affected population. It also describes the process of conducting an analysis to determine whether a disparity exists between the

affected population and an appropriate comparison population, and discusses comparison methods and criteria to be used in assessing the significance of any disparities identified.

The "initial finding of disparate impact" suggested by the *Interim Guidance* has been deleted. It was intended to provide an opportunity for recipients to submit input during OCR's assessment of the alleged disparate impacts. The *Draft Revised Investigation Guidance* omits the initial finding of disparate impact and, instead, focuses more upon the recipient's opportunity to provide comments following acceptance of a complaint.

#### Justification

EPA has also elaborated on the *Interim Guidance's* explanation of what may constitute a substantial legitimate justification. While the *Interim Guidance*, uses the term "articulable value," EPA has eliminated this term from the *Draft Revised Investigation Guidance's* Justification section. Instead, the *Draft Revised Investigation Guidance* focuses on determining whether specific factors, such as public health or environmental benefits, and when economic benefits might constitute a substantial legitimate justification.

A recipient will have the opportunity to "justify" the decision to issue the permit notwithstanding the adverse disparate impact. To justify the action, the recipient would show that it is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission. Because investigations conducted under the *Draft Revised Investigation Guidance* are about permitting decisions by environmental agencies, OCR expects to consider the provision of public health or environmental benefits (e.g., waste water treatment plant) to the affected population to be an acceptable justification because such benefits are generally legitimate, important, and integral to the recipient's mission.

The *Draft Revised Investigation Guidance* indicates that OCR will likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission. Also, in its evaluation of the offered justification, OCR will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of whether the permitted facility, in fact, will provide direct, economic benefits to

the community. However, a justification may be rebutted if EPA determines that a less discriminatory alternative exists.

#### Public Comment Period

EPA will accept written comments on the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* for a 60-day period. All comments must be received in writing by OCR before August 28, 2000.

Comments received by the Agency will be carefully considered in the revision of the draft guidance documents. Public comments should be mailed to Title VI Guidance Comments, Office of Civil Rights (1201A), 1200 Pennsylvania Ave NW., Washington DC, 20460, or submitted to the following e-mail address: [civilrights@epa.gov](mailto:civilrights@epa.gov). Please include your name and address, and, optionally, your affiliation.

Additionally, EPA's Office of Civil Rights will coordinate six national public listening sessions to receive additional feedback on the *Draft Recipient Guidance* and the *Draft Revised Investigation Guidance*. Each of these listening sessions will be attended by the Director of the Office of Civil Rights and key regional personnel. Members of the public wishing to make oral comments during the public listening session will be limited to no more than five (5) minutes, and must register at the meeting site the day of the conference. Seating will be limited and available on a first-come, first-served basis. The dates, times, and locations of the public listening sessions are as follows: June 26 in Washington, DC from 9:00 a.m. until 12:00 p.m. and from 6:00 p.m. until 9:00 p.m. at the Ronald Reagan Building/International Trade Center, 1300 Pennsylvania Avenue NW., Polaris Suite (Concourse Level); July 17 in Dallas, Texas from 4:00 p.m. until 7:00 p.m. at U.S. EPA—Region 6, 1445 Ross Avenue, 12th Floor; July 18 in Chicago, Illinois from 5:00 p.m. until 8:00 p.m. at U.S. EPA—Region 5, 77 West Jackson Boulevard, Room 331; August 1 in New York, New York from 4:00 p.m. until 7:00 p.m. at U.S. EPA—Region 2, 290 Broadway, Room 27A; August 2 in Los Angeles, California from 6:00 p.m. until 9:00 p.m. at the Carson Community Center, 801 East Carson Street; and August 3 in Oakland, California from 6:00 p.m. until 9:00 p.m. at the Henry J. Kaiser Convention Center, 10th Street (near the Lake Merritt BART station).

If anyone attending the listening sessions needs special accommodations (i.e., sign language interpreter, alternative text format for materials), please contact Mavis Sanders of the Office of Civil Rights at (202) 564-7272,

or send an e-mail message to [civilrights@epa.gov](mailto:civilrights@epa.gov) at least three business days before the scheduled listening session. Information regarding these listening sessions can also be found on the OCR Web site at <http://www.epa.gov/civilrights/reviguid2.htm>.

## B. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)

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## I. Introduction

### A. Purpose of the Recipient Guidance

This draft guidance is written for the recipients<sup>1</sup> of U.S. Environmental Protection Agency (EPA) financial assistance that implement environmental permitting programs ("you"). It provides a framework to help you address situations that might otherwise result in the filing of complaints alleging violations of Title VI of the Civil Rights Act of 1964, as

amended (Title VI) and EPA's Title VI implementing regulations.<sup>2</sup> In particular, it provides a framework designed to improve your existing programs or activities and reduce the likelihood or necessity for persons to file Title VI administrative complaints with EPA alleging either: (1) discriminatory human health or environmental effects resulting from the issuance of *permits*; or (2) discrimination during the permitting public participation process.

Cooperative efforts between permitting agencies and communities, whether or not in the context of Title VI-related approaches, frequently offer the best means of addressing potential problems.

### B. Title VI of the Civil Rights Act of 1964, as Amended

Title VI prohibits discrimination based on race, color, or national origin under any program or activity of a Federal financial assistance recipient. Title VI itself prohibits intentional discrimination. In addition, Congress intended that its policy against discrimination by recipients of Federal assistance be implemented, in part, through administrative rulemaking.<sup>3</sup> Title VI "delegated to the agencies in the first instance the complex determination of what sorts of *disparate impacts* upon minorities constituted significant social problems, and were readily enough remediable, to warrant altering the practices of the Federal grantees that had produced those impacts."<sup>4</sup>

EPA issued Title VI implementing regulations (*see* 40 CFR part 7) in 1973 and revised them in 1984.<sup>5</sup> Under EPA's Title VI implementing regulations, you are prohibited from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin."<sup>6</sup> As a result, you may not issue permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.

When you applied for EPA financial assistance, EPA's Title VI implementing regulations required that you submit an assurance with your application that you will comply with the requirements of EPA's Title VI implementing regulations with respect to your

programs or activities. When EPA approves an application for EPA assistance and you receive the EPA funds, you accept the obligation of your assurance to comply with EPA's Title VI implementing regulations. The primary means of enforcing compliance with Title VI is through *voluntary compliance* agreements. Fund suspension or termination is a means of last resort.

Executive Order 12250 requires agencies to issue appropriate implementing directives, either in the form of policy guidance or regulations that are consistent with requirements proscribed by the Attorney General.<sup>7</sup> Also, the number of administrative complaints filed with EPA alleging discrimination prohibited under Title VI and EPA's Title VI implementing regulations has increased over the past several years. The growing number of complaints and the requests of state and local agencies for guidance, provided the impetus to develop this draft guidance. The guidance provides you with recommendations on individual activities and more comprehensive approaches designed to identify and resolve circumstances that may lead to complaints being filed with EPA under Title VI.

### C. Coordination With Draft Revised Investigation Guidance

Along with the *Draft Recipient Guidance*, EPA is concurrently issuing the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*. The *Draft Revised Investigation Guidance* describes the framework for how EPA's Office of Civil Rights (OCR) plans to process Title VI administrative complaints filed with EPA. Once finalized, the *Draft Revised Investigation Guidance* will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)* issued in February 1998. The *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* were developed concurrently to ensure consistency. Furthermore, each draft Title VI guidance document references appropriate sections of the other.

The attached *Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance* document provides an additional discussion that addresses

<sup>2</sup> Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>3</sup> 42 U.S.C. 2000d-1.

<sup>4</sup> *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985).

<sup>5</sup> 38 FR 17968 (1973), as amended by 49 FR 1656 (1984) (codified at 40 CFR part 7).

<sup>6</sup> 40 CFR 7.35(b).

<sup>7</sup> Exec. Order No. 12250, 45 FR 72995 (1980) (Section 1-402). The head of each Federal agency is required to ensure compliance with Executive Orders, to the extent permitted by existing law. Executive Orders are signed by the President of the United States.

<sup>1</sup> The underlined terms are defined or explained in the attached Glossary.



questions and concerns expressed in comments the Agency has received on the issue of Title VI guidance.

#### D. Stakeholder Involvement

To ensure stakeholder involvement in the development of the *Draft Recipient Guidance*, EPA Administrator Carol M. Browner established a Title VI Implementation Advisory Committee (Title VI Advisory Committee) under the National Advisory Council for Environmental Policy and Technology (NACEPT) in March 1998. The Title VI Advisory Committee was comprised of representatives of communities, environmental justice groups, state and local governments, industry, and other interested stakeholders. The EPA asked the committee to review and evaluate existing techniques that EPA funding recipients, such as state and local environmental permitting agencies, may use to administer environmental permitting programs in compliance with Title VI. The EPA also asked the committee to make recommendations to help recipients of EPA financial assistance design activities or approaches that will address Title VI concerns early in the permit process.

The core components of the Draft Recipient Guidance are based, in part, on the April 1999, Report of the *Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs*. The report is available via the OCR Web site at <http://www.epa.gov/civilrights/t6faca.htm>. EPA also considered information from several other sources including:

- Public comments on the Interim Guidance received by OCR;
- Recommendations and feedback provided to EPA staff during meetings, over the past 18 months, with representatives of communities (including environmental justice organizations), representatives of state and local governments, representatives of industry, and other interested stakeholders;
- Available descriptions of state environmental justice programs; and
- The Environmental Council of States (ECOS) October 9, 1998, draft document entitled *Proposed Elements of State Environmental Justice Programs*.

#### E. EPA's Guiding Principles for Title VI Recipient Guidance

In implementing Title VI and developing this draft guidance, EPA adheres to the following principles:<sup>8</sup>

- All persons regardless of race, color, or national origin are entitled to a safe and healthful environment.
- Strong civil rights enforcement is essential.
- Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development.
- Potential adverse *cumulative impacts* from *stressors* should be assessed, and reduced or eliminated wherever possible.
- Research efforts by EPA and state and local environmental agencies into the nature and magnitude of *exposures*, *stressor hazards*, and *risks* are important and should be continued.
- Decreases in environmental *impacts* through applied *pollution prevention* and technological innovation should be encouraged to prevent, reduce, or eliminate adverse disparate impacts.
- Meaningful public participation early and throughout the decision-making process is critical to identify and resolve issues, and to assure proper consideration of public concerns.
- Early, preventive steps, whether under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, are strongly encouraged to prevent potential Title VI violations and complaints.
- Use of *informal resolution* techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved.
- Intergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints.

#### F. Scope and Flexibility

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights or obligations enforceable by any party in litigation with the United States. This guidance may be revised to reflect changes in EPA's approach to implementing Title VI. In addition, this guidance does not alter in any way, a regulated entity's obligation to comply with applicable environmental laws.

This guidance suggests a flexible framework for a Title VI approach and individual Title VI activities. EPA recognizes that a "one-size-fits-all" Title VI approach will not adequately address all your needs. Recipients may have different Title VI concerns in communities within their jurisdiction,

different amounts of resources, and different organizational structures. You may choose the activities or approaches that are most relevant to address your needs. EPA also recognizes that some of you have already begun to address Title VI concerns through your existing programs. Therefore, this guidance:

- Presents you with a menu of possible options from which you may choose to address Title VI concerns;
- Provides suggestions to those of you who choose to develop formal Title VI approaches or to amend your permit process to include or revise Title VI considerations without developing formal Title VI approaches; and
- Provides flexibility for you, if you choose to broaden the scope of your Title VI approaches or activities to improve other areas, such as enforcement or hazardous waste clean-up.

While this draft guidance is intended to focus on issues related to permitting, you may also consider developing proactive approaches to promote equality in monitoring and enforcement of environmental laws within your jurisdiction.

#### G. Title VI and Tribes

The applicability of Title VI and EPA's implementing regulations to Federally-recognized tribes will be addressed in a separate document because the subject involves unique issues of Federal Indian law.

## II. Title VI Approaches and Activities

The following discussion provides guidance to you on the types of activities and approaches that EPA believes you may wish to consider adopting and implementing as part of a strategy to address Title VI-related claims and issues that arise in the environmental permitting context. Identifying and resolving these concerns early in the permitting process will likely reduce the number of Title VI complaints filed with EPA and may also lead to improvements in public participation processes, as well as public health and environmental benefits. You are not required to adopt such activities or approaches, but outcomes that result from the activities or approaches may be considered in the analysis of Title VI complaints that relate to your programs, activities, or methods of administration. You may choose to select one or more of the activities described in section II.B. below, implement some of the more comprehensive approaches described in section II.A., or develop and implement approaches or activities not listed in

<sup>8</sup>The guiding principles were adapted, in part, from the consensus principles identified by the Title VI Implementation Advisory Committee under

EPA's National Advisory Council for Environmental Policy and Technology.



this guidance that would likely address potential Title VI issues.

### A. Title VI Approaches

As a recipient, you must decide which activities or techniques are most relevant to address your needs. You may already have begun to address Title VI concerns through your existing programs and may have different amounts of resources or different types of organizational structures from other recipients. There are several possible approaches described below; however, they are not intended to represent all possible approaches you may want to adopt. It is also important to note that the approaches described below are not mutually exclusive. You can combine activities and approaches described below to address a range of potential issues that might result in Title VI complaints. In other words, if you implement an area-specific approach, you may also want to develop a method to identify and address Title VI concerns related to a specific permit that is not covered by an area-specific agreement.

#### 1. Comprehensive Approach

You may want to adopt a broad approach that will improve your existing permitting process, rather than addressing Title VI concerns on a case-specific or area-specific basis, through an alternative process. You may elect to adopt a comprehensive approach that integrates all of the Title VI activities described below into your existing permitting process. EPA expects that such comprehensive approaches will offer recipients the greatest likelihood of adequately addressing Title VI concerns, thereby minimizing the likelihood of complaints.

#### 2. Area-Specific Approaches

You may choose to develop an approach to identify geographic areas where adverse disparate health impacts or other potential Title VI concerns (e.g., where translation of documents may be necessary) may exist. Collaboration with communities and other appropriate stakeholders to develop the criteria used to identify the geographic areas will be an important element of the approach. Once the areas are identified, you would work with the affected communities and stakeholders to develop an agreement to reduce and eliminate adverse disparate impacts or other Title VI concerns in those specific areas.

For example, if a recipient, in collaboration with communities and other appropriate stakeholders, identifies a section of a city as an area where permitted emissions are

contributing to discriminatory health effects on African Americans. The recipient then might convene a group of stakeholders with the ability to help solve the identified lead problem, including owners of facilities with lead emissions, other state and local government agencies, affected community members, and non-governmental organizations. The group may develop an agreement where each party agrees to particular actions that will eliminate or reduce the adverse lead impacts in that specific area.

Another example might be an area-specific agreement that establishes a ceiling on pollutant *releases* with a steady reduction in those pollutants over time. The period of time over which those reductions should occur will likely vary with a number of factors, including the magnitude of the adverse disparate impact, the number and types of *sources* involved, the scale of the geographic area, the *pathways* of exposure, and the number of people in the *affected population*. It is worth noting, however, that pre-existing obligations to reduce impacts imposed by environmental laws (e.g., "reasonable further progress" as defined in Clean Air Act section 171(1)) might not be sufficient to constitute an agreement meriting *due weight*.<sup>9</sup> Also, area-specific agreements need not be limited to one environmental *media* (e.g., air emissions), they may also cover adverse disparate impacts in several environmental media (e.g., air and water).

#### 3. Case-by-Case Approach

For some recipients, permit-specific approaches may also be advisable. You could develop general criteria to evaluate permits that could highlight those permit actions that are likely to raise Title VI concerns. Or, you may focus your efforts on specific permitting actions where Title VI concerns are actually raised and then employ alternative dispute resolution (ADR) techniques for those situations to reduce or eliminate them.<sup>10</sup> You might also be made aware of Title VI concerns in particular permitting actions through any number of means, including, but not limited to, comments received on the permit application, prior work with residents of the area, and other outreach efforts performed by the recipient.

As a recipient, you determine the proper mix and extent of appropriate

<sup>9</sup> See sections V.B.2. of the *Draft Revised Investigation Guidance* (discussing due weight and any subsequent reliance OCR may give in the course of its investigation to area-specific agreements).

<sup>10</sup> See section II.B.5. (discussing ADR).

Title VI activities and approaches. While you are not required to implement the Title VI activities or approaches described in this guidance, you are required to operate your programs in compliance with the non-discrimination requirements of Title VI and EPA's implementing regulations.

For claims and analyses related to disparate impacts, EPA expects that the analysis would generally conform to the analytical framework set forth in the Draft Revised Investigation Guidance in order for EPA to accord it due weight.

### B. Title VI Activities

As a recipient, you may should consider integrating the following activities into permitting programs to help identify and resolve issues that could lead to the filing of Title VI complaints:

1. *Staff training*—to help you meet your Title VI responsibilities;
2. *Encourage effective public participation and outreach*—to provide permitting and public participation processes that occur early, and are inclusive and meaningful;
3. *Conduct adverse impact and demographic analyses*—to analyze new and existing sources, stressors, and adverse impacts with relevant demographic information, especially potential cumulative adverse impacts, to provide confidence that Title VI concerns are identified and appropriately addressed;
4. *Encourage intergovernmental involvement*—to bring together all agencies and parties that may contribute to identifying and addressing stakeholder concerns to reach innovative and comprehensive resolutions;
5. *Participate in alternative dispute resolution*—to involve both the community and recipient in an informal process to resolve Title VI concerns;
6. *Reduce or eliminate the alleged adverse disparate impact(s)*—to reduce or eliminate identified or potential adverse human health or environmental impacts; and
7. *Evaluate Title VI activities*—to identify progress and areas in need of improvement.

#### 1. Train Staff

The success of Title VI activities will depend on your agency staff's knowledge, credibility, and actions. Given the nature of Title VI concerns, a team approach that includes, at a minimum, permitting and community liaison functions may likely be the most effective. Other team members may include staff with specialized knowledge or experience such as risk

assessors. You may not necessarily have to hire new staff in order to address Title VI concerns. You may consider using existing staff and training them about Title VI. OCR believes that an effective staff training program may address the following issues:

1. Your Title VI responsibilities, Title VI approaches or activities you have adopted to assist in meeting those responsibilities, and environmental permitting programs;
2. Cultural and community relations sensitization to establish and maintain the trust and mutual respect between you and communities;
3. Skills and techniques to enable your staff to communicate effectively with communities and then relay community concerns to your agency;
4. Exposure, risk, and demographic analysis techniques, cumulative impact assessments, and ongoing technical advances relevant to conducting disparate impact analyses; and
5. Alternative dispute resolution techniques to enable your staff to design and carry out a collaborative and informal process that can help resolve Title VI concerns.

## 2. Encourage Meaningful Public Participation and Outreach

Early, inclusive, and meaningful public involvement in the permitting process will likely help to reduce the filing of Title VI complaints alleging that the public participation process for a permit was discriminatory. It is possible to have a violation of Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the permitting process without a finding of discrimination in the substantive outcome of that process, such as discriminatory human health or environmental effects. Likewise, it is possible to have a violation due to discriminatory human health or environmental effects without the presence of discrimination in the public participation process.

An effective public participation process:

- Seeks out and facilitates the involvement of individuals who will be potentially affected by permitting decisions;
- Ensures that the public is involved early in the process;
- Provides participants in the process with the information they need to participate in a meaningful way;
- Ensures that public concerns are appropriately considered; and
- Communicates to participants in the process how their input was, or was not, used.

More specifically, an effective public participation process is one that:

- *Is early and inclusive:*
  - Engages the public during the pre-permitting process, as well as during the permitting process, whenever possible;
  - Includes community participants that represent the spectrum of views;
  - Uses communication methods likely to reach the affected community (e.g., insert information with utility bills; place public service announcements on local radio shows; and place notices on bulletin boards in grocery stores, houses of worship, community newspapers, and community centers);
  - Schedules meeting times and places that are convenient for residents who work and those who use public transportation;
  - Schedules meeting places that are accessible to persons with disabilities; and
  - Avoids creating schedule conflicts with other community or cultural events, whenever possible.
- *Is meaningful:*
  - Uses an open and transparent process;
  - Provides understandable information necessary for effective community participation (Writing User-Friendly Documents and other guidance on how to write in plain language are available from the *Plain Language Action Network (PLAN)* on the Internet at <http://www.plainlanguage.gov>);
  - Provides supplemental technical information (e.g., trend and comparison data, background on types of health effects, concepts of exposure assessment) and technical assistance to make data more meaningful;
  - Takes reasonable steps to communicate,<sup>11</sup> in written documents as well as orally, in languages other than English, when appropriate for the community;<sup>12</sup> and
  - Provides clear explanations and reasons for the decisions made with

<sup>11</sup> A recipient's failure to take reasonable steps to provide a "meaningful opportunity" for limited English speaking individuals to effectively participate in its programs and activities can constitute discrimination prohibited by Title VI. See *Lau v. Nichols*, 414 U.S. 563 (1974). Further, EPA's Title VI regulations state that "[a] recipient shall not use criteria or methods of administering its program which \* \* \* have the effect of defeating or substantially impairing accomplishment of the objective of the program with respect to individuals of a particular race, color, [or] national origin." 40 CFR 7.35(b).

<sup>12</sup> See DOJ's regulation entitled "Coordination of Enforcement of Non-discrimination in Federally-Assisted Programs," 28 CFR subpart F, specifically section 42.405(d)(1) for a discussion of factors recipients should consider when determining whether translation for limited English speaking populations is necessary.

respect to the issues raised by the community.

There are a number of publications describing effective public participation techniques. The publications listed below may provide useful information as you assess your Title VI activities:

- *The Model Plan for Public Participation* developed by the EPA National Environmental Justice Advisory Council, a Federal Advisory Committee to the U.S. EPA. (For more information on the EPA National Environmental Justice Advisory Council, contact the EPA Office of Environmental Justice (OEJ) at 202-564-2515, or visit the OEJ Web site at <http://es.epa.gov/oeca/main/ej/index.html>);
- American Society for Testing and Materials (ASTM) Standard Guide to the Process of Sustainable *Brownfields* Redevelopment (ASTM Standard E-1984-98). (For more information on this standard, contact ASTM at 610-832-9585. The ASTM Web site location is <http://www.astm.org>);
- *Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs* (Available on line as an Acrobat format pdf file at (<http://es.epa.gov/oeca/ocej/t6report.pdf>));
- EPA's 1998 *Final Supplemental Environmental Projects Policy* contains information on the public's opportunity to participate in the consideration of Supplemental Environmental Projects (<http://www.epa.gov/oeca/sep/>);
- EPA's 1998 *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* contains a discussion regarding public participation in Section 4 (pages 39-43) (<http://es.epa.gov/oeca/ofa/ejepa.html>); and
- EPA's 1996 *Resource Conservation and Recovery Act (RCRA) Public Participation Manual* explains how public participation works in the permitting process and also contains useful information for public participation in non-RCRA environmental activities (<http://www.epa.gov/epaoswer/hazwaste/permit/pubpart/>).

## 3. Conduct Impact and Demographic Analyses

The ability to analyze new and existing potentially adverse impacts, together with relevant demographic information concerning *receptor* populations (i.e., populations that may be exposed to stressors), will often help identify potential Title VI concerns and assist in appropriately addressing them. Potential and existing impacts may

involve a broad spectrum of concerns. Although there is no single place to obtain access to data sources and tools needed to address these concerns, and some are incomplete or still being developed, major assessment tools and data are available. EPA has developed several Web sites that may help identify existing and emerging resources, including the:

- EnviroFacts data warehouse (<http://www.epa.gov/enviro/>);
- Environmental Quality (<http://www.epa.gov/ceis/>);
- Community-Based Environmental Protection (<http://www.epa.gov/ecocommunity/>);
- National Center for Environmental Assessment (<http://www.epa.gov/ncea/>); and
- Superfund *risk assessment* home page (<http://www.epa.gov/superfund/programs/risk/index.htm>).

a. *Availability of Demographic Data and Exposure Data:* The availability of information needed to assess the presence or likelihood of adverse impact(s) may vary widely from one geographic location to another. In addition to nationally available data, many states and localities collect and maintain important information concerning sources, stressors and *ambient* levels. Geographically detailed demographic information (e.g., sub-county level data) is available through the United States Bureau of the Census and commercial sources, but is often limited to decennial census (e.g., 1990) data at the appropriate levels of geographic resolution. Information on sources and stressors is also available for some industries' releases of chemicals in air, land, and soil. However, the databases may only address certain categories of facilities and pollutants, are not of consistent completeness or quality, and may change significantly over time.<sup>13</sup> To assess *accuracy*, completeness, and relevance, you may choose to review and evaluate key data. You 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.

Some of the information on sources and stressors, which are available in

<sup>13</sup> For example, the Toxics Release Inventory (TRI) data base has had a number of chemicals added for reporting (and a few deleted) since its inception. Recently, a number of additional facility types have begun reporting, with the first year's data for 1998 expected to be released in Spring 2000. Significantly expanded reporting for small releases of highly toxic and/or persistent chemicals has also recently become effective for reporting year 2000, with the first data release expected in Spring 2002.

EPA's regulatory program databases, include the following:<sup>14</sup>

- The Toxic Release Inventory System (TRIS) contains information about more than 650 toxic chemicals that are being used, manufactured, treated, or released into the environment. Manufacturing and other selected facilities (which meet reporting criteria for size and quantities of chemicals) are required to report annually on waste generation, releases and transfers of chemicals to EPA and states (<http://www.epa.gov/enviro/html/tris/>);
- The Resource Conservation and Recovery Information System (RCRIS) and Biennial Reporting System (BRS) are national program management and inventory systems of Resource Conservation and Recovery Act (RCRA) hazardous waste handlers (<http://www.epa.gov/epaoswer/hazwaste/data/>);
- RCRIS handlers (including large and small quantity generators; treatment, storage and disposal facilities; and transporters) (<http://www.epa.gov/enviro/html/rcris/rcris—overview.html>); and
- BRS (data on waste streams from large quantity generators of hazardous waste) (<http://www.epa.gov/enviro/html/brs/index.html>);
- The Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS) is a database that contains information on the location of over 30,000 Superfund hazardous waste sites. In addition, for sites included in the National Priority List (NPL), the database contains information on pre-remedial actions such as the discovery data and preliminary assessment, site inspection and the date of final hazardous ranking determinations (<http://www.epa.gov/enviro/html/hazard.html#Superfund>);
- The Aerometric Information Retrieval System (AIRS) is a computer-based repository for information about air pollution in the United States. AIRS contains information on air releases by various stationary sources of air pollution, such as power plants and factories, and provides information about the criteria air pollutants that they produce. In AIRS, these sources are known as facilities, and the part of AIRS containing data about sources is called the AIRS Facility Subsystem, or AFS (<http://www.epa.gov/enviro/html/air.html>);

<sup>14</sup> Note that OCR does not expect to limit its disparate adverse impact analyses to information in these databases. Data availability will be taken into consideration as OCR decides, on a case-by-case basis, which databases to include in an assessment.

- The Permit Compliance System (PCS) provides information on companies which have been issued permits to discharge waste water into water bodies (<http://www.epa.gov/enviro/html/water.html>);
  - Risk management plans (describing potential accidental releases) are available for approximately 1500 facilities ([http://www.epa.gov:9966/srmpdcd/owa/overview\\$.startup](http://www.epa.gov:9966/srmpdcd/owa/overview$.startup)).
- Efforts to collect comprehensive information about sources of contaminants in particular geographic areas include:
- The total maximum daily load (TMDL) program develops inventories of water emissions of contaminants from a variety of sources, both *point* and *non-point*, to develop and allocate watershed-based emission limits (<http://www.epa.gov/OWOW/tmdl/index.html>), and has developed software for building, maintaining and displaying source inventories called BASINS (<http://www.epa.gov/ost/BASINS/>);
  - The EPA Office of Groundwater and Drinking Water source water protection program (<http://www.epa.gov/safewater/protect.html>) provides a drinking water contaminant source index (<http://www.epa.gov/OGWDW/swp/intro4.html>), including a list of potential contaminant source inventory tools (<http://www.epa.gov/safewater/protect/feddata/inventory.html>); and
  - The National Air Toxics Assessment program of EPA's Office of Air Quality Planning and Standards is developing updated 1996 comprehensive air toxics emissions information from a variety of sources for release in 2000 (<http://www.epa.gov/ttnuatw1/urban/nata/natapg.html>).
- The following information may be helpful to locate additional data about ambient environmental monitoring levels, and facilities which provide drinking water:
- The Safe Drinking Water Information System/Federal version (SDWIS/FED) is a database storing information about the nation's drinking water. SDWIS/FED stores identification, violation and follow up actions for approximately 175,000 public water systems (<http://www.epa.gov/enviro/html/sdwis/sdwis—ov.html>);
  - The National Contaminant Occurrence Database (NCOD) provides raw data on occurrences of physical, chemical, microbial and radiological contaminants from both Public Water Systems and other sources (<http://www.epa.gov/ncod/>);
  - The Storage and Retrieval of Water-Related Data System (STORET), which contains information about the chemical, physical, and biological

characteristics of ambient water monitoring data as well as select ground water and surface water data. States, Regions, local governments, Tribal groups, commissions, other Federal Agencies, and volunteer groups provide the information to EPA, which can be retrieved by written request.

([www.epa.gov/reisite1/flshcard/storet.htm#](http://www.epa.gov/reisite1/flshcard/storet.htm#)); and

- The AIRS Air Quality Subsystem (AQS), which contains data on levels of *criteria pollutants* from air quality monitoring stations throughout the U.S. AQS reports show summaries of the prevailing levels of air pollution from specific monitoring sites, and maps can display the locations of monitoring stations and *non-attainment areas* (<http://www.epa.gov/airsdata/monitors.htm>).

Many other sets of data, guidelines, and assessment tools exist both within and outside EPA. Therefore, the list above is in no way intended to be comprehensive. Instead it provides some introductory information as an initial starting point in developing information about these resources.

*b. Potential Steps for Conducting Adverse Disparate Impact Analyses:*

You may consider including the following steps when conducting an adverse disparate impact analysis and refer to section VI of the Draft Revised Investigation Guidance for more detailed guidance on how to conduct the steps below:

1. *Define Scope:* Review community concerns and available data, determine which other relevant *sources of stressors*, if any, should be included in the analysis, and develop a project plan.

2. *Impact assessment:* Determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, cause one or more impacts and develop measure(s) of the magnitude and likelihood of occurrence.

3. *Adverse impact decision:* Determine whether the impact(s) are sufficiently adverse to be considered *significant*.

4. *Characterize populations and conduct comparisons:* Determine the characteristics of the affected population, and conduct an analysis to determine whether a *disparity* exists between the affected population and an appropriate *comparison population* in terms of race, color, or national origin, and adverse impact.

5. *Adverse disparate impact decision:* Determine whether the disparity is significant.

*c. Availability of Tools and Methodologies for Conducting Adverse Impact Analyses:* Analytical tools are

available for conducting impact analyses for a particular permit application or for a particular area of concern. These analytical tools have limitations given the state of the science in assessing risks from multiple stressors and *exposure pathways*. You should use the best available tools for conducting analyses to identify potential adverse impacts. Peer reviewed tools and methodologies are the most credible.

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.<sup>15</sup> 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.

When designing, selecting, and using adverse impact methodologies, you should consider the following:

- Availability of tools, resources, and training to evaluate risks (both from single and multiple stressors);
- Best available data concerning sources, stressors, and ambient conditions;
- Availability of a *threshold* of potential concern for assessing the adversity of the impacts; and
- The capacity of the assessment method to identify who may be adversely impacted.

One tool which is likely to be useful is a *geographic information system* (GIS), which allows users to manage, analyze, and display integrated data, such as source locations, ambient conditions derived from monitoring or modeling, and potentially impacted populations. 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. For

<sup>15</sup> Estimations of risk or other measures of impact are also likely to be dependent on many other factors such as environmental conditions, stressor characteristics and interactions, exposure pathways, and receptor population characteristics.

example, GIS is useful in overlaying data regarding adverse impacts on maps that display population data.

Many organizations are using GIS to produce integrated geographically-focused inventories of sources, which can be analyzed and displayed in conjunction with population *receptor* information as one type of initial focusing tool. Although such efforts do not necessarily agree completely with the results of more sophisticated analyses, many users are exploring how they can be used to help set priorities and identify areas of possible concern, which can help target outreach and further studies, such as the creation of more comprehensive data on sources and stressors. Also, while such approaches would rarely be used to indicate areas with adverse impacts, they may be useful in identifying communities in which to conduct area-specific Title VI approaches, or selecting permit decisions for further investigation in a case-by-case approach.

*d. Relevant Data:* Generally, all readily available and relevant data should be used to conduct adverse impact assessments. Data may vary in completeness, reliability, and geographic relevance to the assessment area. You should evaluate available data and place the greatest weight on the most reliable data. The following data, in approximate order of preference, could be used for assessments:

- Ambient monitoring data;
- *Modeled* ambient concentrations;
- Known emissions or other release of a pollutant or stressor;
- Production, use or storage of quantities of pollutants; and
- Presence of sources or activities associated with potential exposures.

Additional sources of information on tools and databases for conducting an adverse disparate impact analysis include:<sup>16</sup>

- An introduction to risk assessment concepts contained in the brochure, *Air Pollution and Health Risk* ([http://www.epa.gov/oar/oaqps/air\\_risc/\\_3\\_90\\_022.html](http://www.epa.gov/oar/oaqps/air_risc/_3_90_022.html));
- The Office of Civil Rights Web page on investigative methods contains background information provided to the *Science Advisory Board* (SAB) regarding possible disproportionate impact methodologies (<http://www.epa.gov/civilrights/investig.htm>);

<sup>16</sup> See *Draft Revised Investigation Guidance*, section VI (regarding how EPA expects to conduct and adverse disparate impact analysis in a complaint investigation).

- The SAB December 1998 report<sup>17</sup> on its review of EPA's adverse disparate impact methodologies is available at the Office of Civil Rights Web site (in Acrobat pdf format) at (<http://www.epa.gov/civilrights/investig.htm>); and

- The Cumulative Exposure Project is developing methods for evaluating the combined exposures to multiple pollutants through three different pathways—air, food, and drinking water. The goal is to examine the cumulative impacts of multiple pollutants and to determine the important contributors to *cumulative exposures*. Initial results for 1990 modeled ambient air concentrations are available from the EPA Web site at: <http://www.epa.gov/cumulativeexposure/>, with a cautionary note on the applicability of the results to current local conditions at <http://www.epa.gov/cumulativeexposure/air/intrair.htm>. As part of its National Air Toxics Assessments, EPA is using this same model, updated with 1996 data for 33 priority air toxics, and plans to release the modeled ambient air concentrations in Spring 2000. These data will also be used to model exposure estimates, which will be available later in 2000.

e. *Resources for Assessing Significance of Impact*: Assessing the significance of a risk or *measure of impact* involves legal, policy, and scientific considerations. Various environmental and health programs have used a range of values for determining regulatory or public health protection levels over time. Generally, the risk or measure of impact should first be evaluated and compared to *benchmarks* provided under relevant environmental statutes, regulations or policies. Where those risks meet or exceed a significance level as defined by law, policy or science, the measure of impact would likely be recognized as adverse in a Title VI approach.

In some cases, the relevant environmental laws may not identify regulatory levels for the risks of the health impact of concern. For example, an impact may result from cumulative or other risk of effects from multiple environmental exposure *media*. In such cases, you may consider whether any scientific or technical information indicates that those impacts should be recognized as significantly adverse under Title VI. This evaluation would need to take into account considerations

such as policies developed for single stressors or sources without explicit consideration of cumulative contributions and uncertainties in estimates.

f. *Conducting Disparity Analyses and Assessing Significance*: As part of the adverse impact, one method of identifying an affected population would involve assessing the distribution of adverse impacts in the environment, and associating populations with them.<sup>18</sup> Where this method is infeasible, estimating affected populations based on proximity to sources may provide initial estimates for assessment. You may wish to also attempt to assess the demographic characteristics of the potentially affected population. In many cases, this will involve associating the impact assessment results with data from the 1990 (or later)<sup>19</sup> U.S. Census, which is readily available at a detailed level of geography. The residential census data includes population characteristics such as language spoken at home and degree of English fluency. This information will likely be helpful to you in determining when limited English proficiency might be an issue for outreach and public participation efforts.

Another element of this step 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. You could consider the situation in communities and/or permitting decisions together with the types of impacts. 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, county). For example, where a complaint alleges that Asian Americans throughout a state bear adverse disparate impacts from permitted sources of water pollution, an appropriate reference area would likely be the state. Another potentially appropriate area might be one defined by environmental criteria, such as an airshed or watershed. Comparison populations should usually be larger than the affected population, and may include the *general population* for the reference area (e.g., a county or state

population which includes the affected population) or the *non-affected population* for the reference area (e.g., those in the reference area which are not part of the affected population).

A disparity may be assessed using comparisons both of the different prevalence of race, color, or national origin of the two populations, and of the level of risk of adverse impacts experienced by each population. You may wish to conduct comparisons of demographic characteristics, such as the composition of an affected population to that of a non-affected population or general population;<sup>20</sup> and/or the probability of different demographic groups (e.g., African Americans, Hispanics, Whites) in a surrounding jurisdiction being in an affected population or a highly affected portion of it.<sup>21</sup> In conjunction with comparisons of demographic characteristics between populations, you may also wish to compare the level of risk or other measure of potential adverse impacts between populations. These comparisons might include the average<sup>22</sup> or range of risks for demographic subgroups of the general population or between an affected population and the general population.

Measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved *statistical significance* to at least 2 to 3 standard deviations. The purpose of this review is to minimize the chance of a false measurement of difference where none actually exists (because of an inherent variability of the data). In your analysis, you may also wish to consider the demographic disparity measures and their results in the context of several related factors, such as the size of the affected population, the proportion of a jurisdiction's total population within an affected population, and the demographic composition of the general comparison population.

<sup>20</sup> See, e.g., *Draft Revised Demographic Information, Title VI Administrative Complaint, re: Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility*, April 1998 (*Shintech Demographic Information, April 1998*), Facility Distribution Charts D1 through D40 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, files t-d01-10.pdf, t-d11-20.pdf, t-d21-30.pdf, t-d31-40.pdf.

<sup>21</sup> See, e.g., *Shintech Demographic Information, April 1998*, the last column in Tables A1 through B7 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, table-al.pdf through table-b.7.pdf.

<sup>22</sup> See, e.g., *Shintech Demographic Information, April 1998*, last column in Tables C1 through C5 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, table-cl.pdf through table-c5.pdf.

<sup>17</sup> *An SAB Report: Review of Disproportionate Impact Methodologies; A Review by the Integrated Human Exposure Committee (IHEC) of the Science Advisory Board (SAB)*.

<sup>18</sup> See *Draft Revised Investigation Guidance*, section VI.B.5. (discussing how EPA expects to conduct disparity analyses in Title VI investigations).

<sup>19</sup> In 2000, the most current geographically detailed U.S. Census information is from the 1990 U.S. Census. Information from the 2000 U.S. Census will not be available until 2001.

The determination of what level(s) of disparity that can be considered significant should take into account the nature of the decision being made (*e.g.*, allocation of resources, triggering further action); the type of disparity comparison; the consistency of results between multiple comparisons; and underlying data quality. In many instances, you should consider both the degree of disparity of population composition with the degree of disparity of estimated level of adverse impact.<sup>23</sup>

#### 4. Encourage Intergovernmental Involvement

Bringing all agencies and parties together that may contribute to both the problems and the solutions is one effective way to reach innovative and comprehensive resolutions. You may not have the authority, resources, or expertise to address all of the elements that may contribute to the issues of concern to the community. For example, you may not have authority over zoning or traffic patterns. Including community representatives and the permit applicant in discussions regarding Title VI concerns and resolutions can be an important part of this process. The earlier you identify all appropriate parties, including other governmental agencies, and bring them into the process, the greater the likelihood that you will reach effective solutions.

#### 5. Participate in Alternative Dispute Resolution

The ability to address identified or potential adverse impacts is critical to resolving problems that may form the basis for a Title VI complaint. The handling of Title VI concerns through the formal administrative process can consume a substantial amount of time and resources for all parties involved. Therefore, EPA strongly encourages you to use alternative dispute resolution (ADR) techniques to address concerns regarding adverse and disparate impacts from the issuance of permits. EPA expects that recipients with the ability to engage in ADR with affected communities and permit applicants are the most likely to have success in informally resolving these types of issues.

ADR is a collaborative effort to design and implement a process leading to an outcome acceptable to all parties. If you use ADR to address some Title VI concerns you may choose to review the recommendations in section II.B.2. of this guidance about effective public

participation. Providing early, inclusive and meaningful public participation during the ADR process will help to ensure that the agreement reached through ADR provides solutions to reduce or eliminate: (1) Discriminatory human health, environmental, or other effects resulting from the issuance of permits; and/or (2) discrimination during the public participation process associated with the permitting process. Usually, an experienced third party (a "neutral") facilitates the process. The neutral would work with each of the parties to develop a mutually agreeable process.

There are several possible approaches to consider when developing an ADR process:

- *Dialogue*—Facilitated conversations for improving understanding and relationships;

- *Consensus-Building*—An informal, but structured process through which parties can participate in shared learning and creative problem-solving; and

- *Mediation*—A third party neutral, with no decision-making authority, helps all parties reach a voluntary negotiated settlement of their issues.

Three common elements of all these approaches include:

- Shared responsibility for the parties to find a resolution that can satisfy their important concerns;

- Voluntary resolutions that are not developed and imposed by an external authority; and

- A neutral environment where parties express their concerns and views in a neutral environment.

Often resolution through ADR results in new understandings of and innovative ideas to address issues of concern. It is also particularly helpful in building better relationships that may be important for future interactions between the parties.

Resources available to help you with informal dispute resolution include:

- The U.S. Institute for Environmental Conflict Resolution, located at Suite 3350, 110 S. Church Avenue, Tucson, Arizona 85701 (telephone: 520-670-5529, Web site: <http://www.ecr.gov>).

- *Alternative Dispute Resolution: A Resource Guide*. This guide, written by the U.S. Office of Personnel Management (OPM), provides an overall picture of how the most common forms of ADR are being implemented in Federal agencies. It summarizes a number of current ADR programs, and it includes descriptions of shared neutrals programs where agencies have collaborated to reduce the costs of ADR. It also provides a listing of training and

resources available from Federal and non-Federal sources along with selected ADR-related Web sites. The document may be downloaded from the OPM Web site. <http://www.opm.gov/er/adrguide/adrrhome.html.ssi>; and

- Various States have offices of dispute resolution that can provide information and resources.

#### 6. Reduce or Eliminate Alleged Adverse Disparate Impact

EPA believes that cooperative efforts between permitting agencies and communities, whether or not in the context of Title VI-related approaches, frequently offer the best means of addressing potential problems. Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions. It will be a rare situation where the permit which triggered the complaint is the sole reason a discriminatory effect exists.

The Agency expects that remedial measures that reduce or eliminate alleged disparate impacts will be an important focus of the informal resolution process.<sup>24</sup> You can offer to provide various forms of remediation, including remedial measures that are narrowly tailored toward sources using your existing permitting authorities. Alternatively or in addition, you can propose broader remedial measures that are outside those considerations ordinarily considered in the permitting process. Before selecting a remedial measure, analyze and compare all potential remedial measures. Remediation may take many forms, including:

- Changes in policies or procedures;
- Pollution reduction;
- *Pollution prevention*;
- Environmental remediation (*e.g.*, lead abatement);
- Emission *offsets*;
- Emissions caps for geographic areas of concern;
- Emergency planning and response measures; and
- Measures to promote equality in monitoring and enforcement.

The EPA *Supplemental Environmental Projects (SEPs) Policy* is a source of information for recipients on remedial options and procedures. SEPs are environmentally beneficial projects that may be part of a settlement of environmental enforcement cases. The EPA SEP Policy also contains a section on community input which may be

<sup>23</sup> See *Draft Revised Investigation Guidance*, section VI.B.6. (discussing how EPA expects to assess the significance of disparity in Title VI investigations).

<sup>24</sup> For a more detailed discussion of measures to reduce or eliminate adverse disparate impact, see section IV.B. of the *Draft Revised Investigation Guidance*.

especially useful guidance for involving the public in the development of remedial measures to address potentially disparate impacts. A copy of EPA's SEPs policy is available through the National Service Center for Environmental Publications (see reference section for address) and is also available at <http://www.epa.gov/oeca/sep/>.

#### 7. Evaluate Title VI Activities

You may decide to evaluate your Title VI approach or Title VI activities to identify areas in need of improvement. For example, if you choose to develop a public participation program, you may wish to collect and analyze feedback from communities and businesses. In which case, it would be important to give communities and businesses the necessary information to provide appropriate feedback. The ability to effectively evaluate any approach or activity is based primarily on information and resource availability. If you choose to evaluate your Title VI approach or activities, you should also consider data quality when choosing an evaluation method. One resource on program evaluation is *Practical Evaluation for Public Managers, Getting The Information You Need* by the Department of Health and Human Services, Office of the Inspector General (see reference section for address).

#### C. Due Weight

As recipients, many of you have asked EPA to provide "incentives" for you to develop proactive Title VI-related approaches. In particular, some of you have asked EPA to recognize, and to the maximum extent possible, rely on the results of any such approaches in assessing complaints filed with EPA. While EPA encourages efforts to develop proactive Title VI approaches, under the Civil Rights Act of 1964, EPA is charged with assuring compliance with Title VI. Thus, EPA cannot completely defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations and cannot rely entirely on an assertion that a Title VI approach has been followed.<sup>25</sup> In

<sup>25</sup> See 28 CFR 50.3(b) ("Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."); Memorandum from Bill Lann Lee, Acting Assistant Attorney General, U.S. Department of Justice, to Executive Agency Civil Rights Directors (Jan. 28, 1999) (titled *Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs*) ("It is important to remember that that Federal agencies are responsible for enforcing the nondiscrimination requirements that apply to recipients of assistance under their programs.")

addition, EPA cannot delegate its responsibility to enforce Title VI to its recipients. Thus, with regard to the processing of Title VI complaints, EPA retains the:

- Ability to supplement the recipient's analysis or to investigate the issues *de novo*;
- Approval authority over any proposed resolution; and
- Ability to initiate its own enforcement actions and compliance reviews.

Nevertheless, EPA believes that it can, under certain circumstances, recognize the results of analyses you submit and give them appropriate due weight.<sup>26</sup> For example, if you adopt any of the individual Title VI activities discussed above, and during the course of an investigation you seek to submit the results of those activities as evidence that you have not violated EPA's Title VI regulations, EPA will review the activity and the results to determine how much weight to give the submission in its investigation.

You may seek to conduct your own evaluation of whether a disparate impact exists and submit it to EPA. These evaluations should at a minimum generally conform to accepted scientific approaches. They may focus on a spectrum of potential adverse impacts, such as described in the analytical framework set forth in section II.B.3. above, or may be more focused, such as the impact of a specific pollutant on nearby populations (e.g., a study regarding the impact of lead emissions on blood lead levels in the surrounding area). The weight given any evidence related to the level or existence of adverse impacts and the extent to which OCR may rely on it in its decision will likely vary depending upon:

- Relevance of the evidence to the alleged impacts;
- The validity of the recipient's methodologies;
- The completeness of the documentation that is submitted by the recipient;
- The degree of consistency between the methodology used and the findings and conclusions; and
- The uncertainties of the input data and results.

Consequently, submitted materials would be subject to scientific review by EPA experts.

OCR expects to give more weight to submitted analyses that are relevant to the Title VI concerns in the complaint

<sup>26</sup> For more information on how OCR plans to determine the appropriate amount of due weight to give to evidence or information submitted by recipients, see section V.B. of the *Draft Revised Investigation Guidance*.

and have sufficient scope, completeness, and accuracy. If the analyses submitted meet the factors above, OCR will not seek to duplicate or conduct such analyses, but instead will evaluate the appropriateness and validity of the relevant methodology and assess the overall reasonableness of the outcome or conclusions at issue.

If OCR's review reveals that the evidence contains significant deficiencies with respect to the factors above, then the analysis will likely not be relied upon in OCR's decision. If these factors are met, then OCR will likely rely on the evidence in its investigation. In the instance where a submitted analysis that shows no adverse disparate impact exists, and the analysis generally follows the steps in section II.B.3.b. of this document and meets the factors described above, then OCR may rely on it in a finding that the recipient is in compliance with EPA's Title VI regulation.

Some recipients may develop procedures for their permitting program that meet certain criteria designed to ensure a nondiscriminatory public participation process. OCR expects to give due weight to the public participation program if:

- The criteria that formed the basis for the program were sufficient to ensure a nondiscriminatory process;
- Your overall permitting process met those criteria; and you followed your program for the relevant case.

An example of a public participation process that meets these steps would be one that followed the guidelines for the EPA Brownfields Assessment Demonstration Pilot projects. A copy of *The Brownfields Economic Redevelopment Initiative Proposal Guidelines for Brownfields Assessment Demonstration Pilots* is available through the National Service Center for Environmental Publications (see reference section for address) and is also available at <http://www.epa.gov/swerosps/bf/html-doc/apappg00.htm#guide>.

EPA also intends to consider other available information, including information submitted by complainants when investigating Title VI complaints. If EPA's review reveals that the activity or analyses does not meet the criteria above, then EPA will likely not rely on the evidence in its decision. If EPA finds that the activity, whether it is a public participation process, disparate impact analysis, the results of an area-specific agreement, or other activity, is an acceptable approach to ensure nondiscrimination, EPA would generally rely upon this finding in subsequent decisions. Consequently,



OCR would generally dismiss future allegations related to issues covered by the activity, unless there is an allegation or information revealing that circumstances had changed substantially such that the activity is no longer adequate or that it is not being properly implemented.

### III. Conclusion

This guidance recommends an approach to Title VI that focuses on recipients identifying areas of concern and addressing potential adverse impacts by implementing preventative activities or approaches. It also indicates EPA's objective of lending clarity to the process by providing due weight to a recipient's appropriate analytical efforts that assess and resolve disparate impact claims. This approach recommends community involvement at the beginning of the permitting process and collaboration at all levels of government to find innovative, cost-effective ways to reduce adverse disparate impacts. EPA believes that such an approach will enable potentially adversely impacted communities to be involved in the permit process in a meaningful manner, while also providing state and local decision-makers and businesses sufficient clarity regarding the Title VI process.

### IV. Acronyms and Abbreviations

ADR—Alternative Dispute Resolution  
 AIRS—Aerometric Information Retrieval System  
 ASTM—American Society for Testing and Materials  
 BASINS—Better Assessment Science Integrating Point and Nonpoint Sources  
 CERCLIS—Comprehensive Environmental Response Compensation and Liability Information System  
 CFR—Code of Federal Regulations  
 ECOS—Environmental Council of States  
 EPA—United States Environmental Protection Agency  
 FRDS—Federal Reporting Data System  
 GIS—Geographic Information Systems  
 HHS—Department of Health and Human Services  
 NACEPT—National Advisory Council for Environmental Policy and Technology  
 NEJAC—National Environmental Justice Advisory Council  
 OCR—EPA's Office of Civil Rights  
 PCS—Permit Compliance System  
 PLAN—Plain Language Action Network  
 RCRA—Resource Conservation and Recovery Act  
 RCRIS—Resource Conservation and Recovery Information System  
 SAB—Science Advisory Board

SDWIS/FED—Safe Drinking Water Information System/Federal version  
 SEP—Supplemental Environmental Projects  
 STORET—Storage and Retrieval of Water-Related Data System  
 TRI—Toxics Release Inventory  
 TRIS—Toxics Release Inventory System

### V. References

- ASTM, 1998, *ASTM E 1984—98, Standard Guide to the Process of Sustainable Brownfields Redevelopment*, American Society for Testing and Materials, Environmental Risk Management/Sustainable Development/Pollution Prevention Subcommittee (For more information on this standard, contact ASTM at 610-832-9585. (The ASTM Web site location is <http://www.astm.org>).
- ECOS, 1998, *Proposed Elements of Environmental Justice Programs, Draft*, October 9, 1998, Environmental Council of States, Washington, DC (For more information on this draft document, contact ECOS at 444 North Capitol Street, N.W., Suite 305, Washington, DC 20001 or call 202-624-3660 (The ECOS Web site is <http://www.sso.org/ecos>).
- EPA, 1999, *The Brownfields Economic Redevelopment Initiative Proposal Guidelines for Brownfields Assessment Demonstration Pilots*, October 1999. (A copy of the guidelines is available through the National Service Center for Environmental Publications, P.O. Box 42419, Cincinnati, OH 45242-2419 or call 800-490-9198 and is available at <http://www.epa.gov/swerosps/bf/html-doc/apappg00.htm#guide>).
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- NACEPT, 1999, *Report of the Title VI Implementation Advisory Committee, Next Steps for EPA, State, and Local Environmental Justice Programs*, April 1999, EPA 1000-4-99-004. (The report is available on the OCR Web site at <http://www.epa.gov/civilrights/t6faca.htm>. However, Appendices 1-3 and A-N are not posted on the OCR Web site, but are available by ordering a paper copy, using a form on the OCR Web site).
- NEJAC, 1996, *The Model Plan for Public Participation*, the Public Participation and Accountability Subcommittee of the National Environmental Justice Advisory Council, A Federal Advisory Committee to the EPA (The OEJ Web site location is <http://es.epa.gov/oeca/main/ej/index.html>).
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PLAN, 1998, Writing User-Friendly Documents, Plain Language Action Network (available at <http://www.plainlanguage.gov>).  
 SAB, 1999, *An SAB Report: Review of Disproportionate Impact Methodologies*, A Review by the Integrated Human Exposure Committee (IHEC) of the Science Advisory Board (SAB)", EPA-SAB-99-007, December 1998, United

States Environmental Protection Agency, Science Advisory Board, Washington, DC (This SAB report is available in Acrobat pdf format via the OCR Web site at <http://www.epa.gov/civilrights/investig.htm>).

*Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, unless a direct citation to the Code of Federal Regulations (CFR) is provided. Please note that italicized words are ones for which definitions are available in this glossary.

**Glossary of Terms**

The definitions provided in this glossary only apply to the *Draft Title VI*

Term	Definition
Accuracy .....	The measure of the correctness of data, as given by the difference between the measured value and the true or standard value.
Adverse Impact .....	A negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science.
Affected Population .....	A population that is determined to bear an adverse impact from the source(s) at issue.
Ambient Standards .....	A level of pollutants prescribed by regulations that are not to be exceeded during a given time in a defined area. (e.g., <i>National Ambient Air Quality Standards</i> ).
Ambient .....	Any unconfined portion of a water body, land area, or the atmosphere, such as the open air or the environment surrounding a source.
Attainment Area .....	An area considered to have air quality as good as or better than the national ambient air quality standards as defined in the Clean Air Act. An area may be an attainment area for one pollutant and a non-attainment area for others. (See also <i>non-attainment area</i> ).
Benchmark .....	A value used as a standard for comparison. Several types used in Title VI investigations include benchmarks of exposure level, risk, and significance. (See also <i>RfC, RfD, threshold</i> )
Brownfields .....	Abandoned, idled, or under-used industrial and commercial facilities/sites where expansion or redevelopment is complicated by real or perceived environmental contamination. They can be in urban, suburban, or rural areas.
Carcinogen .....	A chemical or other stressor capable of inducing a cancer response.
Chronic Toxicity .....	The capacity of a substance to cause long-term harmful health effects.
Comparison Population .....	A population selected for comparison with an affected population in determining whether the affected population is significantly different with respect to demographic characteristics or degree of adverse impact.
Criteria Pollutants .....	The 1970 Clean Air Act (CAA) required EPA to set National Ambient Air Quality Standards for certain pollutants known to be hazardous to human health. EPA has identified and set standards to protect human health and welfare for six pollutants: Ozone, carbon monoxide, particulate matter, sulfur dioxide, lead, and nitrogen oxide. The term, "criteria pollutants" derives from the requirement that EPA must describe the characteristics and potential health and welfare effects of these pollutants in "criteria." See CAA section 108.
Cumulative Exposure .....	Total exposure to multiple environmental stressors (e.g., chemicals), including exposures originating from multiple sources, and traveling via multiple pathways over a period of time.
Cumulative Impact .....	The harmful health or other effects resulting from cumulative exposure.
Disparity (Disparate Impact) .....	A measurement of a degree of difference between population groups for the purpose of making a finding under Title VI. Disparities may be measured in terms of the respective composition (demographics) of the groups, and in terms of the respective potential level of exposure, risk or other measure of adverse impact.
Due Weight .....	The importance or reliance EPA gives to evidence or agreements to reduce impacts provided by recipients or complainants, depending on a review of relevance, scientific validity, completeness, consistency, and uncertainties. Where evidence or agreements prove to be technically satisfactory, OCR may rely upon that information rather than attempting to duplicate the analysis.
Environmental Council of States (ECOS) .....	The Environmental Council of States (ECOS) is a national non-partisan, nonprofit association of state and territorial environmental commissioners.
Exposure .....	Contact with, or being subject to the action or influence of, environmental stressors, usually through ingestion, inhalation, or dermal contact.
Exposure Pathway .....	The physical course a chemical or other stressor takes from its source to the exposed receptor (See also <i>Exposure Route</i> ).
Exposure Route .....	The avenue by which a chemical or other stressor comes into contact with an organism (e.g., inhalation, ingestion, dermal contact).
Exposure Scenario .....	A set of facts, assumptions, and inferences about how exposure takes place that aids in evaluating, estimating, or quantifying exposures (e.g., exposure pathway, environmental conditions, time period of exposure, receptor lifetime, average body weight).
Financial Assistance .....	Any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of personnel; or (3) Real or personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) Proceeds from a subsequent transfer or lease of such property if EPA's share of its fair market value is not returned to EPA. 40 CFR 7.25.
General Population .....	A comparison population that consists of the total set of persons in a jurisdiction or area of potential impact, including an affected population.

Term	Definition
GIS (Geographic Information System) .....	An organized computer system designed to efficiently capture, analyze, and display information in a geographically referenced manner, such as a map. Commonly, GIS is used to produce maps which combine various data and analysis results together, allowing for convenient visual analysis.
Hazard .....	The degree of potential for a <i>stressor</i> to cause illness or injury in a <i>receptor</i> , or the inherent toxicity of a compound.
Hazard Index .....	A summation of <i>hazard quotients</i> for multiple chemicals; a measure of cumulative risk for substances which exhibit a <i>threshold</i> for toxicity.
Hazard Quotient .....	The ratio of a single substance exposure level to a <i>reference dose</i> or <i>benchmark</i> for that substance. An exposure at the same concentration as the <i>reference dose</i> would have a hazard quotient of 1.
Hazardous Air Pollutant (HAP) .....	Air toxics which have been specifically listed for regulation under Clean Air Act section 112.
Health Outcome .....	A measure of disease rate or similar impact, such as age-adjusted cancer death rate.
Impact .....	In the health and environmental context, a negative or harmful effect on a receptor resulting from <i>exposure</i> to a stressor ( <i>e.g.</i> , a case of disease). The likelihood of occurrence and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity.
Informal Resolution .....	Any settlement of complaint allegations prior to the issuance of a formal finding of noncompliance by EPA.
Measure of Impact .....	A measure used in evaluating the significance of an impact, which may involve the general likelihood, frequency, rate or number of instances of the occurrence of an impact. (See <i>risk</i> , which is similar, but expressed as a numeric probability of occurrence).
Media or Medium .....	Specific environmental compartments such as air, water, or soil, that are the subject of regulatory concern and activities.
Mitigation .....	Measures taken to reduce or eliminate the intensity, severity or frequency of an adverse disparate impact.
Mobile Source .....	Any non-stationary source of air pollution such as cars, trucks, motorcycles, buses, airplanes, ships or locomotives.
Model/Modeling/Modeled .....	A set of procedures or equations (usually computerized) for estimating or predicting a value, <i>e.g.</i> , the ambient environmental concentration of a stressor. Also, the act of using a model.
National Ambient Air Quality Standards (NAAQS) .....	Standards established by EPA pursuant to Clean Air Act section 109 that apply for outdoor air throughout the country. (See <i>criteria pollutants</i> )
New Permit .....	For the purposes of this guidance, the term "new permits" refers to the initial issuance of any permit, including permits for (1) The construction of a new facility, (2) the continued operation of an existing facility that previously operated without that type of permit, and (3) an existing facility that adds a new operation that would require a new type of permit ( <i>e.g.</i> , newly issued water discharge permit), in addition to the facility's existing permits ( <i>e.g.</i> , existing air emission permit). (See <i>permit</i> ).
Non-Affected population .....	The remainder of a <i>general population</i> which is not found to be part of an <i>affected population</i> ( <i>e.g.</i> , a county population minus those in an affected population).
Non-Attainment Area .....	Area that does not meet one or more of the National Ambient Air Quality Standards for the criteria pollutants designated in the Clean Air Act.
Non-Point Source .....	A diffuse water pollution source ( <i>i.e.</i> , without a single point of discharge to the environment). Common non-point sources include agricultural, forestry, mining, or construction areas, areas used for land disposal, and areas where collective pollution due to everyday use can be washed off by precipitation, such as city streets. (See also <i>point source</i> ).
Noncompliance .....	A finding by EPA that a recipient's program or activities do not meet the requirements of EPA's Title VI implementing regulations.
Offsets .....	A concept whereby emissions from proposed new or modified stationary sources are balanced by reductions from existing sources to stabilize total emissions.
Pathway (exposure) .....	The physical course a chemical or other stressor takes from its source to the exposed <i>receptor</i> (See also <i>Exposure Route</i> ).
Pattern (of disparate impact) .....	An allegation or finding that multiple sources of a certain type are consistently associated with likely adverse impacts to a protected group.
Permit .....	An authorization, license, or equivalent control document issued by EPA or other agency to implement the requirements of an environmental regulation ( <i>e.g.</i> , a permit to operate a wastewater treatment plant or to operate a facility that may generate harmful emissions).
Plain Language Action Network .....	Plain Language Action Network (PLAN) is a government-wide group working to improve communications from the federal government to the public.
Point Source .....	A stationary location or fixed facility from which pollutants are discharged; any single identifiable source of a stressor ( <i>e.g.</i> , a pipe, ditch, small land area, pit, stack, vent, building).
Pollution Prevention .....	The practice of identifying areas, processes, and activities that create excessive waste products or stressors, and reducing or preventing them from occurring through altering or eliminating a process or activity.
Potency Factor .....	A measure of the power of a toxic <i>stressor</i> to cause harm at various levels of <i>exposure</i> (sometimes based on the slope of a dose-response curve), or above a single specific value.
Receptor .....	An individual or group that may be exposed to <i>stressors</i> .
Recipient .....	Any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 40 CFR 7.25.
Reference Area .....	An area from which one or more comparison populations are drawn for conducting a disparity analysis.

Term	Definition
Reference Dose .....	See <i>RfC</i> and <i>RfD</i> .
Release .....	The introduction of a <i>stressor</i> to the environment, where it may come in contact with receptors. Includes, among other things, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.
RfC (inhalation reference concentration) .....	An estimate (with uncertainty spanning perhaps an order of magnitude) of the daily <i>exposure</i> of the human population to a chemical, through inhalation, that is likely to be without risk of harmful effects during a lifetime.
RfD (oral reference dose) .....	An estimate (with uncertainty spanning perhaps an order of magnitude) of the daily <i>exposure</i> of the human population to a chemical, through ingestion, that is likely to be without risk of harmful effects during a lifetime.
Risk .....	A measure of the probability that damage to life, health, property, and/or the environment will occur as a result of a given hazard. In quantitative terms, risk is often expressed in values ranging from zero (representing the certainty that harm will not occur) to one (representing the certainty that harm will occur). The following are examples showing the manner in which cancer risk is expressed: E-4 = 1 in 10-4, or a risk of 1 in 10,000; E-5 = a risk of 1/100,000; E-6 = a risk of 1/1,000,000. Similarly, 1.3E-3 = a risk of 1.3/1000 = 1 chance in 770.
Risk Assessment .....	Qualitative and quantitative evaluation of the risk posed to human health and/or the environment by the actual or potential presence and/or use of specific <i>stressors</i> . This involves a determination of the kind and degree of <i>hazard</i> posed by a stressor (e.g., <i>toxicity</i> ), the extent to which a particular group of people has been or may be exposed to the agent, and the present or potential health risk that exists due to the agent.
Science Advisory Board (SAB) .....	A group of external scientists who advise EPA on science and policy.
Significant .....	A determination that an observed value is sufficiently large and meaningful to warrant some action. (See <i>statistical significance</i> ).
Source .....	The site, facility, or origin from which one or more environmental <i>stressors</i> originate (e.g., factory, incinerator, landfill, storage tank, field, vehicle).
Statistical Significance .....	An inference that there is a low probability that the observed difference in measured or estimated quantities is due to variability in the measurement technique, rather than due to an actual difference in the quantities themselves.
Stressor .....	Any factor that may adversely affect <i>receptors</i> , including chemical (e.g., <i>criteria pollutants</i> , toxic contaminants), physical (e.g., noise, extreme temperatures, fire) and biological (e.g., disease pathogens or parasites). Generally, any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems. Airborne stressors may fall into two main groups: (1) Those emitted directly from identifiable sources and (2) those produced in the air by interaction between chemicals (e.g., most ozone).
Threshold .....	The dose or <i>exposure</i> level below which an adverse impact is not expected. Most carcinogens are thought to be non-threshold chemicals, to which no exposure can be presumed to be without some risk of contracting the disease.
Toxicity .....	The degree to which a substance or mixture of substances can harm humans or animals. (See <i>chronic toxicity</i> ).
Unit Risk Factor .....	A measure of the power of a toxic <i>stressor</i> to cause cancer at various levels of <i>exposure</i> (based on the slope of a dose-response curve, combined with an <i>exposure scenario</i> ).
Universe of Sources .....	A category of relevant and/or nearby sources of similar <i>stressors</i> to those from the permitted activity included in assessments of potential <i>adverse disparate impacts</i> .
Voluntary Compliance .....	Settlement between EPA and a recipient after a formal finding of noncompliance.

### C. Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigations Guidance)

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### I. Introduction

#### A. Purpose of the Revised Investigation Guidance

The *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* is intended to provide a framework for the United States Environmental Protection Agency's (EPA or Agency) Office of Civil Rights (OCR) to process complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI),<sup>27</sup> and EPA's Title VI implementing regulations<sup>28</sup> alleging discriminatory effects resulting from the issuance of pollution control *permits*<sup>29</sup> by recipients of EPA financial assistance.

#### B. Title VI of the Civil Rights Act of 1964, as Amended

The goal of the Civil Rights Act of 1964 is to eliminate discrimination in several areas of American society.<sup>30</sup> The Act prohibits discrimination in public accommodations (Title II); segregation in public facilities (Title III); segregation in public schools (Title IV); and discrimination in employment (Title VII).<sup>31</sup> Title VI of the Act, which prohibits discrimination on the basis of race, color, and national origin in all Federally-assisted programs and activities, applies to the recipients of an estimated \$900 billion in Federal assistance distributed annually by approximately 27 Federal agencies.<sup>32</sup>

<sup>27</sup> 42 U.S.C. 2000d to 2000d-7.

<sup>28</sup> 40 CFR part 7.

<sup>29</sup> The underlined terms are defined or explained in the attached Glossary.

<sup>30</sup> See, e.g., 110 Cong. Rec. 7062 (1964) ("[T]he purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination.") (statement of Sen. Pastore).

<sup>31</sup> Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>32</sup> U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in*

When submitting the Civil Rights Act to Congress, President Kennedy stated that "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion, which encourages, entrenches, subsidizes, or results in racial discrimination."<sup>33</sup>

Title VI itself prohibits intentional discrimination.<sup>34</sup> In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects.<sup>35</sup> This is often referred to as reaching actions that have an unjustified adverse disparate impact. EPA in 1973 promulgated regulations that implement Title VI and revised them in 1984.<sup>36</sup> Under EPA's Title VI implementing regulations, agencies receiving EPA financial assistance are prohibited, among other things, from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin."<sup>37</sup> As applied to the permitting process, recipients of EPA financial assistance may not issue permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.

#### C. Scope of Guidance

While this guidance is directed at the processing of discriminatory effects allegations, Title VI complaints may also allege discriminatory intent in the context of environmental permitting. Such complaints generally will be investigated by OCR under Title VI, EPA's Title VI regulations, and applicable intentional discrimination case law. Moreover, even for allegations of discriminatory effects, this document is not intended to comprehensively address every scenario that may arise in the interaction between Title VI, EPA's Title VI regulations, and environmental permitting.<sup>38</sup> Given the infinite number

*Federally Assisted Programs*, p.12 (June 1996) [hereinafter *Federal Title VI Enforcement*].

<sup>33</sup> H.R. Doc. No. 124, 88th Cong., 1st Sess. (1963), reprinted in 1963 U.S.C.C.A.N. 1534.

<sup>34</sup> *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589 (1983).

<sup>35</sup> See *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Guardians Ass'n*, 463 U.S. at 589-93.

<sup>36</sup> 38 FR 17968 (1973), as amended by 49 FR 1656 (1984) (codified at 40 CFR part 7).

<sup>37</sup> 40 CFR 7.35(b).

<sup>38</sup> 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 the federal grantees that had produced those impacts." *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985). In addition, DOJ, which is charged with coordinating the Federal government's Title VI

of possible permutations of facts, allegations, and circumstances, such an approach is infeasible. Instead, this guidance provides a detailed framework explaining how OCR intends to process and investigate allegations about discriminatory effects resulting from environmental permitting decisions. In particular, OCR generally expects to use this guidance for complaints involving allegations related to environmental permits, such as Clean Air Act<sup>39</sup> permits, Clean Water Act<sup>40</sup> discharge permits, Safe Drinking Water Act<sup>41</sup> permits, underground injection<sup>42</sup> permits, and Resource Conservation and Recovery Act<sup>43</sup> permits for treatment, storage, and disposal.<sup>44</sup>

The types of allegations that complainants have identified in previous complaints span a wide range, and may involve public participation, as well as adverse disparate impacts from the issuance of permits. Some are focused narrowly on the impacts from a single permitted activity or facility, while others have identified concerns with groups of similar facilities (e.g., all waste disposal sites in an area), or the combined *impacts* of facilities and other sources in a particular area (e.g., major permitted sources together with other stationary, *mobile*, or *non-point sources*). In some cases, allegations suggest that the recipient's permitting action may be part of a discriminatory *pattern* of decision-making for certain types of facilities (e.g., hazardous waste landfills throughout a state). The nature of each of the allegations accepted for investigation in a particular complaint

work, Executive Order 12250, 45 FR 72995 (1980), issued regulations that provide, in part, that "Federal agencies shall publish Title VI guidelines for each type of program to which they extend financial assistance." 28 CFR 42.404(a). Furthermore, Executive Order 12250 requires agencies to issue appropriate implementing directives in the form of policy guidance or regulations that are consistent with requirements prescribed by the Attorney General. Pursuant to that authority, EPA is issuing the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance*.

<sup>39</sup> Clean Air Act, 42 U.S.C. 7401 to 7671q.

<sup>40</sup> Federal Water Pollution Control Act, 33 U.S.C. 1251 to 1387.

<sup>41</sup> Safe Drinking Water Act, 42 U.S.C. 300f to 300j-26.

<sup>42</sup> Underground injections are regulated pursuant to the Safe Drinking Water Act.

<sup>43</sup> Resource Conservation and Recovery Act, 42 U.S.C. 6901 to 6992k.

<sup>44</sup> Use permits, such as those issued for pesticides, have some similarities to the permits listed above. OCR may use this guidance for complaints involving use permits if appropriate for the allegations and facts. For example, if a complaint alleged discriminatory effects from the application of a state-registered pesticide in a particular location, this guidance could be relevant. For investigations about such allegations, the term "permitted activity" would substitute for "source" in this guidance.

will generally form the basis for the scope of the investigation, which is further described in Section VI of this document.

Application of Title VI to issues other than environmental permitting, such as allegations concerning enforcement-related matters and public participation, will be addressed in future internal EPA guidance documents, as appropriate. Once that further guidance is available, complaints involving such allegations will be addressed under both EPA's Title VI regulations, which provide a general process for investigation of complaints, and that guidance. Until that time, such allegations will be addressed under the regulations.

This guidance does not discuss in detail specific remedies for violations of Title VI or EPA's implementing regulations because remedies tend to be case-specific. Nonetheless, it should be noted at the outset that Title VI provides a variety of options in the event that EPA finds a recipient in violation of the statute or regulations. The primary administrative remedy described in the regulations involves the termination of EPA assistance to the recipient.<sup>45</sup> Alternatively, EPA may use other means authorized by law to obtain compliance (e.g., referral to the Department of Justice (DOJ) for judicial enforcement).<sup>46</sup> However, as noted elsewhere in this document, EPA encourages the use of *informal resolution* to address Title VI complaints whenever possible.

It will likely be a rare situation where the permit that triggered the complaint is the sole reason discriminatory effects exist. EPA believes that cooperative efforts between permitting agencies and communities, whether or not in the context of Title VI-related programs, frequently offer the best means of dealing with such impacts, either before or after an investigation and finding. Efforts that focus on all contributions to the adverse disparate impact, not just from the permit at issue, will likely yield the most effective long-term solutions.

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights or obligations enforceable by any party in litigation. EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised to reflect changes in EPA's approach to implementing Title VI. In addition, this guidance does not alter in

any way, a regulated entity's obligation to comply with applicable environmental laws. This guidance uses mandatory language when repeating explicit requirements found in EPA's Title VI regulations. The remainder of the guidance is discretionary and gives EPA flexibility to address the particularities of each complaint.

This guidance does not address complaints against EPA recipients that are Federally-recognized Indian tribes. That subject will be addressed by EPA in separate guidance because the applicability of Title VI to Federally-recognized Indian tribes involves unique issues of Federal Indian law.

#### D. Coordination With Recipient Guidance

Concurrently with this Draft Revised Investigation Guidance, EPA has issued *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*, which provides a series of recommendations designed to improve existing programs of EPA recipients and reduce the likelihood or necessity for persons to file Title VI complaints. Implementation of the approaches suggested by the *Draft Recipient Guidance* should reduce the likelihood or necessity for communities to file Title VI administrative complaints with EPA alleging either: (1) Discriminatory human health or environmental effects resulting from the issuance of permits; or (2) discrimination during the public participation process associated with the permit. The *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* documents were developed concurrently to ensure consistency. Furthermore, both Title VI guidance documents reference appropriate sections of the other and share an attached glossary.

The attached *Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance* document provides an additional discussion that addresses questions and concerns expressed in comments the Agency has received on the issue of Title VI guidance.

#### E. Principles for Implementing Title VI at EPA

In implementing Title VI and developing this draft guidance, EPA adheres to the following principles<sup>47</sup>:

<sup>47</sup> The guiding principles were adapted, in part, from the consensus principles identified by the Title VI Implementation Advisory Committee under EPA's National Advisory Council for Environmental Policy and Technology.

- All persons regardless of race, color, or national origin are entitled to a safe and healthful environment.

- Strong civil rights enforcement is essential.

- Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development.

- Potential adverse disparate *cumulative impacts* from *stressors* should be assessed, and reduced or eliminated wherever possible.

- Research efforts by EPA and state and local environmental agencies into the nature and magnitude of *exposures*, *stressor hazards*, and *risks* are important and should be continued.

- Decreases in environmental impacts through applied *pollution prevention* and technological innovation should be encouraged to prevent, reduce, or eliminate adverse disparate impacts.

- Meaningful public participation early and throughout the decision-making process is critical to identify and resolve issues, and to assure proper consideration of public concerns.

- Early, preventive steps, whether under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, are strongly encouraged to prevent potential Title VI violations and complaints.

- Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved.

- Intergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints.

#### F. EPA's Nondiscrimination Responsibilities and Commitment

Title VI is inapplicable to EPA actions, including EPA's issuance of permits, because it only applies to the programs and activities of recipients of Federal financial assistance, not to Federal agencies. The statute clearly excludes Federal agencies from its definition of "program or activity."<sup>48</sup> Nonetheless, EPA is committed to a policy of nondiscrimination in its own permitting programs. The equal protection guarantee in the Due Process Clause of the U. S. Constitution prohibits the Federal government from engaging in intentional

<sup>48</sup> 42 U.S.C. 2000d-4a.

<sup>45</sup> 40 CFR 7.130(a).

<sup>46</sup> *Id.*

discrimination.<sup>49</sup> Moreover, section 2–2 of Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,”<sup>50</sup> directs Federal agencies to ensure, in part, that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. Consequently, EPA intends to conduct itself in a manner consistent with EPA’s Title VI regulations.

## II. Framework for Processing Complaints

The following discussion describes how OCR intends to process Title VI complaints alleging discriminatory effects in the context of environmental permitting under EPA’s Title VI implementing regulations.<sup>51</sup> In order to find a recipient in violation of the discriminatory effects standard in EPA’s Title VI implementing regulations, OCR would determine whether the recipient’s programs or activities have resulted in an unjustified adverse disparate impact.<sup>52</sup> In other words, OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin,<sup>53</sup> and, if so, whether that impact is justified.<sup>54</sup> Assessing background sources of stressors allegedly contributing to discriminatory effects may be required to understand whether an *adverse impact* exists. However, in determining whether a recipient is in violation of Title VI or EPA’s implementing regulations, the Agency expects to account for the adverse disparate impacts resulting from sources of stressors (e.g., facilities), stressors (e.g., chemicals or pathogens), and/or impacts (e.g., risk of disease) within the recipient’s authority.<sup>55</sup>

<sup>49</sup> See U.S. Const. amend. V; see also *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

<sup>50</sup> Section 2–2 provides: Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin. Executive Order 12898, 59 FR 7629 (1994).

<sup>51</sup> 40 CFR part 7.

<sup>52</sup> See 40 CFR 7.30, 7.35 (stating prohibitions against discrimination).

<sup>53</sup> See section VI (describing analysis for determining whether adverse disparate impact exists).

<sup>54</sup> See section VII (discussing justification).

<sup>55</sup> See section VI.B.2. (discussing scope of investigation).

It is worth noting that it is possible to have a violation of Title VI or EPA’s Title VI regulations based solely on 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). Likewise, it is possible to have a violation due to discriminatory human health or environmental effects without the presence of discrimination in the public participation process. It is also important to keep in mind that OCR is committed to keep in mind that OCR is committed to pursuing informal resolution of Title VI complaints whenever possible because informal resolution will often lead to the most expeditious and effective outcome for all parties.<sup>56</sup>

### A. Summary of Steps

The steps that OCR will follow in complaint processing, as required by EPA’s Title VI implementing regulations, are summarized below. These steps comport with the Federal government-wide standard for processing Title VI complaints.<sup>57</sup>

#### 1. Acknowledgment of Complaint

OCR will notify the complainant and the recipient in writing within five calendar days of the receipt of the complaint by EPA.<sup>58</sup> The recipient may then make a written submission responding to, rebutting, or denying the complaint within 30 calendar days of receiving the notification.<sup>59</sup>

#### 2. Acceptance for Investigation, Rejection, or Referral

A complaint may contain more than one allegation. Each allegation that satisfies the jurisdictional criteria<sup>60</sup> will be accepted for investigation<sup>61</sup> within 20 calendar days of acknowledgment of its receipt, and the complainant and the

<sup>56</sup> See section IV (discussing informal resolution).

<sup>57</sup> See 28 CFR 42.101 to 42.112 (DOJ’s regulations implementing Title VI); 28 CFR 42.401 to 42.415 (DOJ’s regulations for coordinating enforcement of Title VI); Executive Order 12250, 45 FR 72995 (1980) (Executive Order giving authority for coordinating Federal government’s implementation of Title VI to DOJ).

<sup>58</sup> 40 CFR 7.120(c).

<sup>59</sup> 40 CFR 7.120(d)(1)(iii).

<sup>60</sup> See section III.A. (describing jurisdictional criteria).

<sup>61</sup> “Acceptance” of a complaint merely indicates that the complainant has satisfied the basic jurisdictional criteria described in this section. The fact that OCR accepts a complaint for investigation does not in any way mean that a finding of *noncompliance* with Title VI will result. OCR must conduct an investigation to determine whether the recipient has complied with its Title VI responsibilities.

recipient will be so notified.<sup>62</sup> In some cases, individual allegations within a single complaint may be treated differently. Some allegations may meet the jurisdictional criteria in EPA’s implementing regulations, some may not, and still others may need further clarification.

If OCR does not accept an allegation for investigation, it will be rejected or referred to the appropriate Federal agency.<sup>63</sup> A referral is appropriate when it is evident that another Federal agency has jurisdiction over the subject matter.<sup>64</sup> If a complaint lacks sufficient information to determine whether any of the allegations contained in it should be accepted for investigation, OCR expects to request clarification. OCR will then decide whether to accept the allegation for investigation or to reject it within 20 calendar days of receiving the clarifying information. Failure of a complainant to respond within the specified time period OCR provides in its letter requesting clarification may result in rejection of those allegations.

### 3. Investigation

OCR intends to promptly investigate all Title VI complaints that satisfy the jurisdictional criteria.<sup>65</sup> If a complaint is accepted for investigation, OCR will first attempt to resolve it informally.<sup>66</sup> If informal resolution fails, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create an adverse disparate impact or add to an existing adverse disparate impact on persons based on race, color, or national origin. The investigation would consider any steps taken by the recipient to address Title VI concerns, as described in sections V and VI. Within 180 calendar days from the start of the complaint investigation, OCR will notify the recipient by certified mail of preliminary findings.<sup>67</sup> If, based on its investigation, OCR concludes that there is no discriminatory effect (i.e., no unjustified adverse disparate impact), the complaint will be dismissed.<sup>68</sup> If OCR finds that there is a discriminatory effect, a preliminary finding of noncompliance with EPA’s Title VI regulations will be made.<sup>69</sup>

<sup>62</sup> 40 CFR 7.120(d)(1)(i), (ii).

<sup>63</sup> 40 CFR 7.120(d)(1).

<sup>64</sup> 40 CFR 7.125.

<sup>65</sup> 40 CFR 7.120.

<sup>66</sup> 40 CFR 7.120(d)(2). See also section IV. (discussing informal resolution). Even in cases where informal resolution occurs, OCR may investigate the allegations to some extent to get a better understanding of the facts and circumstances.

<sup>67</sup> 40 CFR 7.115(c)(1).

<sup>68</sup> 40 CFR 7.120(g).

<sup>69</sup> 40 CFR 7.115(c).



#### 4. Preliminary Finding of Noncompliance

If OCR makes a preliminary finding of noncompliance with the regulations, it will notify both the recipient and the complainant, and send a copy to the EPA grant award official (Award Official) and the Assistant Attorney General for Civil Rights.<sup>70</sup> OCR's notice generally will include recommendations for the recipient to achieve *voluntary compliance* and notification of the recipient's right to engage in voluntary compliance negotiations.<sup>71</sup> In determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the Agency expects to assess whether the adverse disparate impact results from factors within the recipient's authority to consider as defined by applicable laws and regulations. The recipient may submit a written response, within 50 calendar days of receiving the preliminary finding, demonstrating that the preliminary findings are incorrect or that compliance may be achieved through steps other than those recommended by OCR.<sup>72</sup>

#### 5. Formal Finding of Noncompliance

If, within 50 calendar days of receipt of the notice of preliminary finding, the recipient either fails to submit a written response or states that it does not agree to OCR's recommendations, OCR will issue a formal written determination of noncompliance to the recipient within 14 calendar days. A copy of the formal determination of noncompliance will also be sent to the Award Official and the Assistant Attorney General for Civil Rights.<sup>73</sup>

#### 6. Voluntary Compliance

EPA's Title VI regulations provide that the recipient will have 10 calendar days from receipt of the formal determination of noncompliance within which to come into voluntary compliance.<sup>74</sup> If the recipient fails to meet this deadline, OCR must start procedures to deny, annul, suspend, or terminate EPA assistance, or may use any other means authorized by law to ensure compliance, including referring the matter to DOJ for litigation.<sup>75</sup>

<sup>70</sup> 40 CFR 7.115(c).

<sup>71</sup> *Id.*

<sup>72</sup> 40 CFR 7.115(d).

<sup>73</sup> *Id.*

<sup>74</sup> See section VII.A.3. (discussing voluntary compliance), 40 CFR 7.115(e).

<sup>75</sup> 40 CFR 7.115(e), 7.130(b). OCR may postpone or pause proceedings to deny, annul, suspend, or terminate EPA assistance, if the recipient has demonstrated a good faith effort (e.g., signed a voluntary compliance agreement) to come into compliance.

#### 7. Hearing/Appeal Process

Within 30 calendar days of receipt of the formal finding of noncompliance, the recipient must file a written answer and may request a hearing before an EPA administrative law judge (ALJ). Following the hearing and receipt of the ALJ's determination, the recipient may, within 30 calendar days, file its exceptions to that determination with the Administrator. The Administrator may elect to review the ALJ's determination. If the Administrator decides not to review the determination, then the ALJ's determination is final. If the Administrator reviews the determination, all parties will be given reasonable opportunity to file written statements. Subsequently, if the Administrator decides to deny an application for financial assistance, or annul, suspend, or terminate EPA assistance, that decision becomes effective 30 calendar days after the Administrator submits a written report to Congress.<sup>76</sup>

Recipients may be able to challenge EPA's finding in court. Moreover, those who believe they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA.<sup>77</sup>

#### B. Roles and Opportunities To Participate

##### 1. Recipients

OCR may work closely with recipients to ensure that the Agency has a complete and accurate record of all relevant information pertaining to the complaint, and a full understanding of the recipient's position relating to the allegations. In order for OCR to perform the appropriate analyses, one of the most important things recipients may do as early as possible is to provide OCR with all of the information relevant to the complaint, including, but not limited to, background information, the permit application(s), monitoring data, computer *modeling*, other aspects of the recipient's analysis of the application(s), and any information relating to steps the recipient took to address potential Title VI concerns, as described in Section V. B. of this document. OCR may request interviews of a recipient's staff, and copies of or access to relevant documents in the recipient's possession.

<sup>76</sup> 40 CFR 7.130(b).

<sup>77</sup> See *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999) (finding that citizens have a private right of action under agency's regulations promulgated under section 602 of Civil Rights Act of 1964).

Moreover, under EPA's Title VI regulations, OCR has the authority to obtain information from recipients and interview recipient staff.<sup>78</sup> Full and expeditious disclosure of such information would facilitate resolution of Title VI complaints.<sup>79</sup>

EPA's Title VI implementing regulations provide the recipient with several opportunities to respond to the complaint and to OCR's finding. First, the recipient may make a written submission responding to, rebutting, or denying the allegations raised in a complaint within 30 calendar days of receiving notification that OCR has received the complaint for investigation.<sup>80</sup> Second, OCR will attempt to resolve the complaint informally, during which time the recipient will be able to state its position. Third, if OCR makes a preliminary finding of noncompliance with the regulations, the recipient may submit a written response within 50 calendar days of receiving the preliminary finding, demonstrating that the preliminary findings are incorrect or that compliance may be achieved through steps other than those recommended by OCR.<sup>81</sup> Finally, if OCR begins the procedure to deny, annul, suspend, or terminate EPA assistance, recipients may request a hearing before an ALJ<sup>82</sup> and, if the ALJ's decision upholds a finding of noncompliance, the recipient may then file exceptions with the Administrator.<sup>83</sup>

##### 2. Complainants

Once OCR accepts a complaint for investigation, complainants may play an important role in the administrative process; however, that role is determined by the nature and circumstances of the claims. As with the recipient, one of the most important things that complainants may do is to provide OCR with all of the information in their possession relevant to their complaint. OCR may request interviews of complainants, and copies of or access to relevant documents in the complainant's possession.

Also, complainants may play an important role in the informal resolution process. Upon accepting a complaint for investigation, OCR may suggest that the complainant and the recipient attempt to informally resolve

<sup>78</sup> 40 CFR 7.85(b), (f).

<sup>79</sup> In addition to considering information supplied by recipients, OCR will also evaluate information provided by complainants and may develop its own information and analyses.

<sup>80</sup> 40 CFR 7.120(d)(1).

<sup>81</sup> 40 CFR 7.115(d).

<sup>82</sup> 40 CFR 7.130(b)(2).

<sup>83</sup> 40 CFR 7.130(b)(3).

their issues with minimal direct involvement by OCR. In such cases, complainants would clearly have a significant role in the process. Alternatively or in addition to that process, OCR may seek to informally resolve the complaint directly with the recipient. In those situations, the complainant's role is determined by the nature and circumstances of the claims.

It is important to note that EPA does not represent the complainants, but rather the interests of the Federal government, in ensuring nondiscrimination by its recipients. The investigation of Title VI complaints does not involve an adversarial process between the complainant and the recipient. Instead, it should be viewed as OCR following up on information that alleges EPA funds are being used inappropriately. Consequently, the complainants do not have the burden of proving that their allegations are true, although their complaint should present a clearly articulated statement of the alleged violation. It is OCR's job to investigate allegations and determine compliance, although OCR may have difficulty conducting its investigation if complainants are unable or unwilling to provide relevant information. In addition, because the Title VI administrative process is not an adversarial one between the complainant and recipient, there are no appeal rights for the complainant built into EPA's Title VI regulatory process.

### III. Accepting or Rejecting Complaints

#### A. Criteria

It is the general policy of OCR to investigate all administrative complaints concerning the conduct of a recipient of EPA financial assistance<sup>84</sup> that satisfy the jurisdictional criteria in EPA's implementing regulations.<sup>85</sup> OCR does not expect to investigate complaints that are so incoherent that they cannot be considered to be grounded in fact and those that fail to provide an avenue for contacting the complainant (e.g., no phone number, no address).

OCR intends to accept and investigate a complaint if it meets the following jurisdictional criteria:

(1) It is written (*i.e.*, oral complaints will not be accepted for investigation);<sup>86</sup>

(2) It identifies the entity that allegedly performed the discriminatory act<sup>87</sup> and describes the alleged

discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act of intentional discrimination or one that has the effect of discriminating on the basis of race, color, or national origin);<sup>88</sup>

(3) It is filed within 180 calendar days of the alleged discriminatory act(s);<sup>89</sup> and

(4) It is filed by:

(a) A person who was allegedly discriminated against in violation of EPA's Title VI regulations;

(b) A person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or

(c) A party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations.<sup>90</sup>

EPA's Title VI regulations state that OCR will make a determination to accept for investigation, reject, or refer to the appropriate Federal agency, a complaint within 20 calendar days of acknowledgment of its receipt.<sup>91</sup> Also, if OCR needs clarification before any of the above listed determinations can be made on particular allegations, it will request further clarification.

If a complaint contains multiple allegations, it is possible that OCR may reject some allegations, refer some allegations to other appropriate Federal agencies, and/or request clarification on some allegations. OCR will notify the complainant and the recipient of such actions.<sup>92</sup>

It is expected that some recipients may voluntarily adopt individual activities or more comprehensive approaches designed to identify and address potential Title VI concerns. Section II of the *Draft Recipient Guidance* discusses steps that recipients can take to reduce the likelihood of Title VI complaints, including emphasizing effective public participation and identifying areas for development of agreements to reduce impacts. The identification and remedy of such concerns, independent of a particular permitting decision or early in a permitting process, may lead to generalized improvements in public

within the 20-day period, establish whether the person or entity that took the alleged discriminatory act is in fact an EPA recipient as defined by 40 CFR 7.25.

<sup>88</sup> 40 CFR 7.120(b)(1).

<sup>89</sup> 40 CFR 7.120(b)(2); see also section III.B. (discussing timeliness of complaints).

<sup>90</sup> 40 CFR 7.120(a). Information submitted by parties that does not satisfy these criteria may be used by OCR to determine whether to perform a compliance review under 40 CFR 7.110, 7.115.

<sup>91</sup> 40 CFR 7.120(d)(1).

<sup>92</sup> 40 CFR 7.120(d)(1)(ii).

health and the environment and may reduce the number of Title VI complaints filed with EPA. Recipients can combine individual activities and approaches encouraged in the *Draft Recipient Guidance* to address a range of potential issues that might result in Title VI complaints.<sup>93</sup> However, OCR's threshold decision to accept a complaint for investigation or to reject it is based on the jurisdictional criteria provided in EPA's Title VI regulations,<sup>94</sup> regardless of whether the recipient adopted any individual activities or a more comprehensive approach to address Title VI concerns.

#### B. Timeliness of Complaints

##### 1. Start of 180-day "Clock"

Under EPA's regulations, a complaint must be filed within 180 calendar days of the alleged discriminatory act.<sup>95</sup> Complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit. If the 180th day falls on a weekend or holiday, that day will not be counted and the deadline for filing will be extended to the next business day. However, weekends and holidays that occur before the 180th day should be counted toward the 180 days. OCR generally considers a complaint to be "filed" on the date that it arrives at EPA, not on the date that the complaint is mailed or otherwise transmitted to EPA by the complainant. EPA will likely accept a complaint alleging a continuing violation as long as action subject to Title VI has occurred within the 180-day period.

Allegations concerning a discriminatory public participation process should be filed within 180 calendar days of the alleged discriminatory act in that process. For example, if complainants allege that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing.

Complaints not filed within the 180 calendar day time period will generally be considered untimely and will not be accepted for investigation. While a specific complaint may be rejected on the basis of untimeliness, OCR may choose to conduct a compliance review of the recipient's relevant permit

<sup>93</sup> See Sections V.B.2. and VI.B.1.b. (discussing "due weight" for recipient's complaint-specific analyses and other Title VI efforts).

<sup>94</sup> See 40 CFR 7.120; see also Section III.A.

<sup>95</sup> 40 CFR 7.120(b)(2). It should be emphasized that "180 calendar days" is not the same as "six months."

<sup>84</sup> See 40 CFR 7.15.

<sup>85</sup> See 40 CFR 7.120.

<sup>86</sup> 40 CFR 7.120(b)(1).

<sup>87</sup> Because EPA's Title VI regulations apply only to recipients of EPA financial assistance, OCR will,

program either at that point in time or at some future date.<sup>96</sup>

OCR may waive the 180-day time limit for good cause.<sup>97</sup> OCR will determine on a case-by-case basis whether to waive the time limit for good cause.

### 3. Ongoing Permit Appeals or Litigation

OCR will generally dismiss complaints without prejudice<sup>98</sup> if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court. The outcome of such permit appeals or litigation could affect the circumstances surrounding the complaint and any investigation that OCR may conduct. In such cases, OCR believes that it should await the results of the permit appeal or litigation. As a result, such complaints will generally be closed, but OCR expects to waive the time limit to allow complainants to re-file their complaints after the appeal or litigation, rather than conduct a simultaneous investigation on the basis of facts that may change due to the outcome of the administrative appeal or litigation.

*a. Permit Appeal Processes:* OCR believes, in making a good cause determination, that it is appropriate to consider a complainant's pursuit of its Title VI concerns through the recipient's administrative appeal process. This will encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process and foster early resolution of Title VI issues. Under such circumstances and after evaluating other considerations relevant to the particular case, OCR may waive the 180 day filing time limit if the complaint is filed within a reasonable time period after the conclusion of the administrative appeal process. Generally, that reasonable time period will be no more than 60 calendar days.

*b. Litigation:* If the complainant seeks to pursue a Title VI complaint with OCR on issues that are the subject of ongoing Federal or state court litigation, the complaint should be re-filed within a reasonable time period, generally no more than 60 calendar days after the conclusion of the litigation. However, OCR 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. For example, if a Federal court reviewed

evidence presented by both parties and issued a decision that stated the allegations of discrimination were not true, OCR may choose not to investigate allegations in the complaint that deal with those same issues. In addition, if a state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process.

Generally, OCR may choose to investigate if the complaint raises issues that were not actually litigated or substantively decided by a Federal court, or if it raises unique and important legal or policy issues. OCR may look for guidance to judicial principles and other provisions of law on how prior court decisions may affect OCR's determination of whether to investigate a complaint.

### 4. Premature Complaints

When complaints alleging discriminatory effects from a permit are filed prior to the issuance of the permit by the recipient, OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice. If the complainant is not satisfied Title VI nondiscrimination requirements have been met when the permit is issued, the complainant can re-file its complaint if and when the permit is issued. In any case, OCR intends to provide the recipient with a copy of the complaint to facilitate the recipient's ability to appropriately address the concerns raised in the complaint during the permitting process.

## IV. Resolving Complaints

EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable.<sup>99</sup> To conserve EPA investigative resources and to obtain beneficial results for the parties, EPA encourages pursuit of informal resolution from the beginning of the administrative process. The term "informal resolution" refers to any settlement of complaint allegations prior to the issuance of a formal finding of noncompliance. Settlement after a formal finding is referred to as reaching "voluntary compliance." Voluntary compliance agreements must be in writing, set forth the specific steps the recipient has agreed to take, and be signed by the Director of OCR or her designee and an official with legal authority to bind the recipient.<sup>100</sup>

### A. Reaching Informal Resolution

OCR will encourage informal resolution in both the notification of receipt of a complaint and again with acceptance of a complaint for investigation. Informal resolution may follow either of the two approaches below.

#### 1. Informal Resolution Between Recipient and Complainant

The first approach is for the recipients and complainants to try to resolve the issues between themselves. To the extent resources are available, EPA expects to provide support for efforts at informal resolution. If the resolution results in withdrawal of the Title VI administrative complaint, OCR would expect to dismiss the complaint, notify the recipients and complainants, and close the complaint file. OCR encourages recipients to consider the use of alternative dispute resolution (ADR) techniques when appropriate to informally resolve the complaint. ADR includes a variety of approaches including the use of a third party neutral acting as a mediator or the use of a structured process through which the parties can participate in shared learning and creative problem solving to reach a consensus.<sup>101</sup>

#### 2. Informal Resolution Between EPA and Recipient

A second approach is for OCR and the recipient to reach agreement on relief. Depending upon the facts and circumstances of the complaint, OCR may seek participation from the complainant, the permittee, or others. In appropriate situations, OCR expects to use ADR techniques to informally resolve the complaint.

OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before the formal finding. However, it is OCR's responsibility to ensure that the interests of the Federal government are served and no violations of Title VI or EPA's implementing regulations exist in a recipient's programs or activities. Therefore, before any agreement between the recipient and OCR can be reached, an investigation may be needed to determine the appropriate relief and/or corrective action necessary to eliminate or reduce to the extent required by Title VI the adverse disparate impacts.

<sup>101</sup> See *Draft Recipient Guidance*, Section II.B.5. (providing additional information about alternative dispute resolution).

<sup>96</sup> See, 40 CFR 7.110, 7.115.

<sup>97</sup> 40 CFR 7.120(b)(2).

<sup>98</sup> In other words, OCR may dismiss the complaint, but that dismissal would not prohibit the complainant from re-filing its complaint at a later date.

<sup>99</sup> 40 CFR 7.120(d)(2).

<sup>100</sup> 40 CFR 7.115(f).

### B. Implementing Informal Resolutions<sup>102</sup>

As described above, EPA encourages recipients to informally resolve Title VI complaints with complainants and/or OCR. In appropriate circumstances, the Agency expects that measures that eliminate or reduce to the extent required by Title VI the alleged adverse disparate impacts will be an important focus of the informal resolution process. Denial of the permit at issue will not necessarily be an appropriate solution. It will likely be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists. During the informal resolution process, whether with EPA or with complainants, recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing *sources*, including the permit at issue, using the recipient's existing permitting authorities. Such measures include changes in policies or procedures, additional pollution control, pollution prevention, *offsets*, and emergency planning and response.

Alternatively or in addition, during the informal resolution process, recipients can propose broader measures that are outside those matters ordinarily considered in the permitting process. For example, in response to a complaint alleging that airborne lead emissions from a permitted facility will have an adverse disparate impact on nearby residents, the recipient and complainant could agree to an informal resolution under which the recipient would obtain lead emissions reductions from that facility, as well as from other facilities contributing lead emission in the area. The recipient could also offer to work with other agencies to establish a household lead abatement program to further reduce the facility's impact.<sup>103</sup> If the issues are informally resolved and the complainant withdraws the complaint, OCR expects to close its investigation.

During the informal resolution process, the recipient may independently submit a plan to OCR to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts. While the plan may be developed without consulting with complainants or others, EPA expects that informal resolution will be more successful if recipients work with OCR,

complainants, and other appropriate parties to develop a plan for eliminating or reducing the alleged adverse disparate impact. Cooperative approaches, such as area-specific agreements<sup>104</sup> to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts, will more likely adequately address the Title VI concerns.

If the recipient is pursuing a resolution with OCR, the sufficiency of such an approach would likely be evaluated in consultation with experts in the EPA program at issue. OCR may also consult with complainants, although their consent is not necessary. If, based on its review, OCR agrees that the adverse disparate impact will be eliminated or reduced, to the extent required by Title VI, pursuant to the plan, the parties will be so notified. Assuming that sufficient assurances are provided regarding implementation of such a plan, the complaint would be resolved and closed. The measures should be established in a settlement agreement to be monitored by OCR. Any settlement agreement should provide for enforcement by EPA, which may include special conditions on future assistance grants for failure to comply with the agreement.

It may be possible to reach informal resolution regarding some, but not all, of the allegations OCR accepts for investigation. Those not informally resolved will be investigated and resolved through the process outlined in EPA's Title VI regulations and in accordance with this guidance. OCR may also reopen a complaint if the recipient does not comply with its commitments in the settlement agreement.

### V. Investigative Procedures

The process of investigating a Title VI complaint is not analogous to a judicial process in which plaintiffs and defendants must each present information and arguments supporting a particular finding. EPA, like other Federal agencies, is responsible for investigating formal complaints concerning the administration of programs by recipients of financial assistance. However, EPA expects that this process will often be substantially improved and expedited by information submitted by complainants and recipients.

<sup>104</sup> See sections V.B.2. and VI.B.1.b. (discussing area-specific agreements); see also, *Draft Recipient Guidance*, section II.A.2. (describing geographic area-specific approaches).

### A. Submission of Additional Information

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.

EPA encourages recipients to adopt individual activities or more comprehensive approaches designed to identify and address potential Title VI concerns. Section II of the Draft Recipient Guidance offers suggestions that recipients can take to reduce the likelihood of Title VI complaints, including emphasizing effective public participation, and identifying areas for development of agreements to reduce impacts. The identification and remedy of such concerns, independent of a particular permitting decision or early in a permitting process, may lead to generalized improvements in public health and the environment, and may reduce the number of Title VI complaints filed with EPA. OCR will carefully review any information provided by a recipient concerning the procedures and outcomes of programs adopted to address Title VI concerns.

### B. Granting Due Weight to Submitted Information

Under the Civil Rights Act of 1964, EPA is charged with assuring compliance with Title VI and cannot delegate its responsibility to enforce Title VI to its recipients.<sup>105</sup> Therefore, OCR cannot grant a recipient's request that EPA defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations or that EPA rely on an assertion that a Title VI program has been followed.<sup>106</sup> Thus, with regard

<sup>105</sup> 42 U.S.C. 2000d-1.

<sup>106</sup> See 28 CFR 50.3(b) ("Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."); Memorandum from Bill Lann Lee, Acting Assistant Attorney General, U.S. Department of Justice, to Executive Agency Civil Rights Directors, p. 3 (Jan. 28, 1999) (titled *Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs*) ("It is important to remember that Federal agencies are responsible for enforcing the nondiscrimination requirements that apply to recipients of assistance under their programs.").

<sup>102</sup> See *Draft Recipient Guidance*, section II.B.6. (providing additional information about remedial measures).

<sup>103</sup> See *Draft Recipient Guidance*, section II.B.4. (providing additional information about intergovernmental involvement).

to the processing of Title VI complaints, EPA is required to retain the:

- Ability to supplement the recipient's analysis or to investigate the issues *de novo*;
- Approval authority over any proposed resolution; and
- Ability to initiate its own enforcement actions and compliance reviews.

#### 1. Analyses or Studies<sup>107</sup>

In response to allegations, or during the course of an investigation, recipients as well as complainants may submit evidence such as data and analyses to support their position that an adverse disparate impact does or does not exist.<sup>108</sup> EPA believes that it can, under certain circumstances, recognize the results of such analyses and give them appropriate due weight.

OCR would expect that a relevant adverse impact analysis or a *disparity* analysis would, at a minimum, generally conform to accepted scientific approaches. It may focus on a spectrum of potential adverse impacts, such as described in the analytical framework set forth in section VI below, or may be more focused, such as upon the impact of a specific pollutant on nearby populations (*e.g.*, a study regarding the impact of lead emissions on blood lead levels in the surrounding area). The weight given any information related to the level or existence of adverse impacts and the extent to which OCR may rely on it in its decision will likely vary depending upon the following elements:

- Relevance of the evidence to the alleged impacts;
- Validity of the methodologies;
- Completeness of the documentation submitted;
- Degree of consistency between the methodology used, and the findings and conclusions; and
- Uncertainties of the input data and results.

Consequently, submitted materials would be subject to scientific review by EPA experts.

<sup>107</sup> 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.

<sup>108</sup> This *Draft Revised Investigation Guidance* is limited to investigating allegations of discriminatory effects resulting from the issuance of permits; therefore, investigatory techniques and the concept of due weight applied in the context of allegations regarding discrimination in public participation processes are not addressed. However, the *Draft Recipient Guidance*, section II.C. contains a discussion of the circumstances under which OCR might accord a public participation process due weight.

OCR expects to give more weight to submitted analyses that are relevant to the Title VI concerns in the complaint and have sufficient scope, completeness, and *accuracy*. If the analyses submitted meet the elements above, OCR will not seek to duplicate or conduct such analyses, but instead will evaluate the appropriateness and validity of the relevant methodology and assess the overall reasonableness of the outcome or conclusions at issue.

If the elements above are met, then OCR will likely rely on the evidence in its decision. In the instance where a submitted analysis shows no adverse disparate impact exists, and the analysis generally follows the procedures in section VI below and meets the elements described above, then OCR may rely on it in a finding that the recipient is in compliance with EPA's Title VI regulations. If OCR's review reveals that the evidence contains *significant* deficiencies with respect to the elements above, then the analysis will likely not be relied upon in OCR's decision.

#### 2. Area-specific Agreements

In the Draft Recipient Guidance, EPA encourages recipients to identify geographic areas where adverse disparate impacts may exist and to enter into agreements with affected residents and stakeholders to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts in those specific areas.<sup>109</sup> Collaboration with communities and other appropriate stakeholders to develop the criteria used to identify the geographic areas and in designing potential solutions to address any adverse disparate impacts will be an important element of the approach.

An example of an approach to develop an area-specific agreement might be where a recipient, in collaboration with communities and other appropriate stakeholders, identifies a section of a city as an area where permitted lead emissions are contributing to discriminatory health effects on African Americans. The recipient then might convene a group of stakeholders with the ability to help solve the identified lead problem, including owners of facilities with lead emissions, other state and local government agencies, affected community members, and non-governmental organizations. The group may develop an agreement where each party agrees to particular actions that will eliminate or reduce the adverse lead impacts in that specific area.

<sup>109</sup> See *Draft Recipient Guidance*, section II.A.2. (discussing area-specific agreements).

Another example might be an area-specific agreement that establishes a ceiling on pollutant *releases* with a steady reduction in those pollutants over time. The period of time over which those reductions should occur will likely vary with a number of factors, including the magnitude of the adverse disparate impact, the number and types of sources involved, the scale of the geographic area, the *pathways* of exposure, and the number of people in the *affected population*. It is worth noting, however, that pre-existing obligations to reduce impacts imposed by environmental laws (*e.g.*, "reasonable further progress" as defined in Clean Air Act section 171(1)) might not be sufficient to constitute an agreement meriting due weight. Also, area-specific agreements need not be limited to one environmental *media* (*e.g.*, air emissions), they may also cover adverse disparate impacts in several environmental media (*e.g.*, air and water).

If OCR accepts a complaint for investigation involving allegations of adverse disparate impacts related to any of the permitting actions covered by an area-specific agreement, OCR expects, under certain circumstances, to review and give due weight to the agreement if it:

- Is supported by underlying analyses that have sufficient depth, breadth, completeness, and accuracy, and are relevant to the Title VI concerns; and
- Will 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.<sup>110</sup>

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.

If a later-filed complaint raises allegations regarding other permitting actions by the recipient that are covered by the same area-specific agreement, OCR would generally rely upon its earlier finding and dismiss the allegations. 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

<sup>110</sup> The determination that an area-specific agreement will result in actual reductions of adverse disparate impacts will likely entail many of the same steps described in sections VI.B.2 through 4.

agreement is no longer adequate or that it is not being properly implemented.

If OCR's review reveals that the area-specific approach, the specific agreement, or its underlying analyses do not result in actual reductions to the point of significantly reducing or eliminating impacts that would result in a finding of non-compliance with EPA's Title VI regulations, then it will likely not be relied upon in OCR's decision. In that instance, OCR would be more likely to conduct a first-hand investigation of the allegations. Throughout the investigation, EPA also intends to consider other available information, including information submitted by complainants.

### C. Submission of Additional or Amended Complaints

During the course of OCR's investigations, complainants can also submit additional allegations of violations of EPA's Title VI regulations. Each additional allegation would have to satisfy the jurisdictional criteria described in section III.A. above in order to be accepted for investigation.<sup>111</sup> Generally, the additional allegations will be considered a new and separate complaint. In some cases, for reasons of efficiency, OCR may treat the new allegations as amendments to the existing complaint and incorporate them into the existing investigation.

For example, assume OCR accepts a complaint for investigation that only alleges that a recently issued water discharge permit has a discriminatory human health impact on African Americans. Two months after OCR conducts interviews, complainants attempt to amend their complaint by alleging that two air emissions permits issued for a different part of the source have a discriminatory effect on African Americans. In this instance, OCR will generally consider the allegations regarding the air permits as a new complaint, not an amendment to the existing complaint, because incorporating the new allegations would substantially change the scope of the existing investigation. Complainants and recipients will be appropriately notified.

If a complainant amends its complaint with additional allegations before OCR decides to accept for investigation, reject, or refer the allegations to another Federal agency, OCR intends to acknowledge receipt of the new allegations and notify the recipient. Both the complainant and the recipient should also be notified that OCR expects to make a determination to accept for

investigation, reject, request clarification, or refer all of the allegations within 20 calendar days of receipt of the most recent allegations.<sup>112</sup>

### D. Discontinued Operations/Mootness

OCR expects to dismiss allegations about discriminatory effects of a permit if, prior to commencement of any activities allowed by the permit and before OCR completes its investigation, that permit is withdrawn or revoked, or if a final decision is made by the permittee not to operate under that permit. If the activities commence under the permit at issue, but are permanently halted for any reason prior to the conclusion of OCR's investigation, OCR may continue its investigation because some discriminatory effects may have occurred as a result of operations. However, the current status of the source should be taken into account in the analysis. OCR expects that other allegations that are not specific to the permit (e.g., allegations concerning state-wide issues) would not be closed because those issues may continue to exist notwithstanding the status of the permit.

### E. Filing/Acceptance of Title VI Complaint Does Not Invalidate Permit

Neither the filing of a Title VI complaint nor the acceptance of one for investigation by OCR stays the permit at issue.

## VI. Adverse Disparate Impact Analysis

Evaluations of alleged violations of EPA's Title VI regulations should be based upon the facts and totality of the circumstances that each case presents, and show both an adverse and disparate effect. Rather than using a single technique for analyzing and evaluating adverse disparate impact allegations in all situations, OCR expects to use several techniques within the broad framework discussed here. Moreover, OCR expects that parts of the analytical framework described in this section will be omitted, altered, or supplemented to address the particular characteristics of each complaint. Any method of evaluation chosen within that framework will be a reasonably reliable indicator of the level of potential adverse impacts and disparity.

### A. Framework for Adverse Disparate Impact Analysis

The framework that OCR expects to use for determining whether an adverse disparate impact exists should generally be performed in a step-wise fashion in the order set forth below.

#### Step 1: Assess Applicability

- Determine the type of permit action at issue (i.e., new permit, renewal, modification). Generally, OCR will not initiate an investigation where the permit that triggered the complaint is a modification, such as a facility name change or a change in a mailing address, that does not involve actions related to the stressors identified in the complaint.

- Determine whether the relevant permit is covered by an area-specific agreement that OCR has already determined will eliminate or reduce, to the extent required by Title VI, the adverse disparate impacts. If so, then the investigation of the allegation will likely be closed.<sup>113</sup>

- If the complaint alleges discriminatory effects from emissions, including cumulative emissions, determine whether the permit action that triggered the complaint significantly decreases overall emissions at the facility. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts.

- If the complaint alleges discriminatory effects from emissions, including cumulative emissions, and it specifies certain pollutants of concern, determine whether the permit action that triggered the complaint significantly decreases those pollutants of concern named in the complaint or those pollutants EPA reasonably infers are the potential source of the alleged impact. If so, then OCR will likely close the investigation of allegations regarding cumulative impacts.

#### Step 2: Define Scope of Investigation:

Determine the nature of stressors, sources of stressors, and/or impacts cognizable under the recipient's authority; review available data; determine which sources of stressors should be included in the analysis; and develop a project plan.

#### Step 3: Conduct Impact Assessment:

Determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, are likely to result in an impact.

#### Step 4: Make Adverse Impact Decision:

Determine whether the estimated risk or measure of impact is adverse. If the impact is not adverse, the allegation will not form the basis of a finding of non-compliance with EPA's Title VI regulations and will be closed. If the permit action clearly leads to a decrease in adverse disparate impacts, it is not expected to form the basis of a finding of a recipient's non-compliance with EPA's Title VI regulations and will be closed.

<sup>113</sup> See section V.B.2. (discussing criteria for area-specific agreements that would receive due weight).

<sup>111</sup> See 40 CFR 7.120.

<sup>112</sup> 40 CFR 7.120(d)(1).

*Step 5: Characterize Populations and Conduct Comparisons:* Determine the characteristics of the affected population. Conduct an analysis to determine whether a disparity exists between the affected population and an appropriate *comparison population* in terms of race, color, or national origin, and adverse impact.

*Step 6: Make Adverse Disparate Impact Decision:* Determine whether the disparity is significant. If it is not significant, the allegation will not likely form the basis of a finding of non-compliance with EPA's Title VI regulations and will likely be closed.

Each of these steps is described more fully below.

### B. Description of Adverse Disparate Impact Analysis

#### 1. Assess Applicability

Assessing the applicability involves three initial considerations as outlined below.

##### a. Determine Type of Permit:

Allegations that concern impacts resulting from a recipient's permitting actions can arise in several different contexts: (1) The issuance of new permits; (2) the renewal of existing permits; and (3) the modification of existing permits. Regardless of the type of permit involved, if a complaint is filed with OCR alleging that the recipient violated Title VI or EPA's regulations, OCR's decision to accept the complaint for investigation or to reject it must be based on the jurisdictional criteria provided in EPA's Title VI regulations.<sup>114</sup>

Modifications, such as a facility name change or a change in a mailing address, that do not involve actions related to the stressors identified in the complaint, generally will not form the basis for a finding of noncompliance and will likely be closed.

The following type of permit actions could form the basis for initiating a Title VI investigation of the recipient's permitting program:

- Permit actions, including new permits, renewals, and modifications, if the permit causes a net increase in the level of stressors or predicted risks or measures of impact (e.g., an increase in pollutants with no offsetting reductions).

- Permit actions, including new permits, renewals, and modifications, that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged.

If an allegation regarding a permit modification is accepted for

investigation, EPA expects the analysis would only evaluate the modification and its effects.

There are two situations where OCR will likely close its investigation into allegations of discriminatory effects:<sup>115</sup>

(1) If the complaint alleges discriminatory effects from emissions, including cumulative emissions, and the permit action that triggered the complaint significantly decreases overall emissions<sup>116</sup> at the facility; and

(2) If the complaint alleges discriminatory effects from emissions, including cumulative emissions, and the permit action that triggered the complaint significantly decreases all pollutants of concern named in the complaint or all the pollutants EPA reasonably infers are the potential source of the alleged impact.<sup>117</sup>

In both situations, the recipients should demonstrate<sup>118</sup> (not merely assert) that the decrease is actual and is significant.<sup>119</sup> The decreases should be in the same media, as well as from the same facility, as alleged in the complaint (i.e., a decrease in discharges to water may not form the basis for closing investigations into allegations of cumulative air impacts). The decreases are measured based on actual, contemporaneous<sup>120</sup> emissions from the facility being permitted. In situations where OCR determines that significant uncertainty exists regarding the significance of the overall decrease or whether the decrease will actually occur, OCR will normally resolve such uncertainty in favor of proceeding to investigate for potential discriminatory

<sup>115</sup> This guidance does not alter in any way, a regulated entity's obligation to comply with applicable environmental laws. Merely proposing a decrease in emissions does not entitle the permit applicant to a permit.

<sup>116</sup> Assessing a significant overall decrease would entail taking into account factors such as total quantity and relative *toxicity* of the emissions reductions.

<sup>117</sup> It is important to remember that OCR will treat a decrease in emissions at a particular facility differently from an area-specific agreement that eliminates adverse disparate impacts as discussed in section V.B.2. While the decrease in emissions from a single permit may result in dismissal of the instant complaint, other complaints regarding permit renewals and increases in emissions for other sources in the area may be investigated. However, if OCR determines that an area-specific agreement meets the criteria described in section V.B.2, then investigations into future complaints regarding permit actions covered by the area-specific agreement generally will be closed.

<sup>118</sup> A recipient may use actual monitoring data, reasonable estimates, permit limits, parametric monitoring, or any other reliable means to demonstrate the decrease to the satisfaction of EPA.

<sup>119</sup> EPA will determine significance of a decrease in the context of a specific case.

<sup>120</sup> Contemporaneous emissions decreases are required. Banking over time is not a basis for a decrease dismissal.

effects. If the permit action includes an increase in any emissions, then it would generally result in a decision to investigate the cumulative impact allegation.

OCR will determine the relevant pollutant(s) or stressors of concern based on the allegations in the complaint. However, if a complaint does not explicitly name or refer to particular pollutants or stressors of concern and refers generally to "cumulative impacts" or "overburdened" communities, EPA will use its expertise to determine which pollutants or stressors are of concern based on the complaint and the permitting action at issue.

While a specific complaint may be dismissed on the basis of a decrease, OCR may choose to conduct a compliance review of the recipient's relevant permit program either at that point in time or at some future date.<sup>121</sup> The analysis of whether discriminatory effects result from cumulative emissions, and any resulting remedy, would include consideration of the emissions from the permit actions that triggered the original complaint (i.e., the one that had the decrease).

The above discussion regarding decreases does not affect allegations relating to public participation.

*b. Determine if Permit is Part of an Agreement to Reduce Adverse Disparate Impacts:* Recipients may have identified geographic areas where adverse disparate impacts may exist, and may have entered into agreements with the affected communities and stakeholders to reduce impacts in those specific areas.<sup>122</sup> If the relevant permit is covered by an area-specific agreement that OCR has already determined will eliminate adverse disparate impacts, then the allegation will likely be closed.

#### 2. Define Scope of Investigation

Determine the nature of stressors, sources of stressors, and/or impacts cognizable under the recipient's authority; review available data; determine which sources of stressors should be included in the analysis; and develop a project plan.

In defining the scope of an investigation, OCR expects to rely on four sets of information: The complaint's allegations, an understanding of the recipient's authorities, the results of an evaluation of relevant scientific information, and relevant available data. In particular, assessing background sources of stressors (e.g., mobile source air

<sup>121</sup> See 40 CFR 7.110, 7.115.

<sup>122</sup> See section V.B.2. (discussing criteria for area-specific agreements that would receive due weight).

<sup>114</sup> 40 CFR 7.120. See also section III.A.



emissions, non-point source runoff) allegedly contributing to discriminatory effects, as discussed below, may be required to understand whether an adverse impact is created or exacerbated. However, in determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the Agency expects to account for the adverse disparate impacts resulting from sources of stressors, stressors, and/or impacts cognizable under the recipient's authority.<sup>123</sup>

*a. Determine the Nature of Stressors and Impacts Considered:* In determining the nature of stressors (e.g., chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations. These could include laws and regulations that concern permitting programs and laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts. For example, a state statute might require all major state actions (including the issuance of certain air pollution control permits) to take into consideration impacts resulting from noise and odors associated with the action. Even if these were not explicitly covered by the permitting program, they would appropriately be considered as part of the adverse disparate impact analysis, since the recipient has some obligation or authority regarding them. A recipient need not have exercised this authority for the stressor or impact to be deemed within the recipient's authority to consider.

OCR will also review the allegations presented in the complaint concerning geographic scope, sources of concern, pollutants or other stressors, and potentially affected populations. OCR expects to supplement this review using available data on identified stressors, as well as others that may be associated with the identified permitted activities, (e.g., TRI and other pollutant inventories that include chemicals not listed in most permits) and other sources of stressors. This review will include information about the characteristics of the sources and stressors (e.g., toxicity, physical-chemical properties) as well as available reports describing possible exposures or risks of release of stressors from permitted activities and sources.

*b. Determine Universe of Sources:* In performing assessments of potential

adverse disparate impacts, OCR may consider other relevant and/or nearby sources of similar stressors for inclusion in the analysis. Those included in the analysis are referred to as the *universe of sources*. When a complaint contains more than one allegation, there may be more than one appropriate universe of sources for an investigation. OCR intends to determine the appropriate universe(s) of sources based upon the allegations and facts of a particular case.

As noted above, the relevant universe of sources contributing to the potential adverse impacts could include, if appropriate, background sources (e.g., mobile source air emissions, non-point source runoff). For example, in the case of lead, preexisting or estimated children's blood lead levels that may result from both a permitted source and household lead paint exposures would be used to help decide whether additional emissions of lead are adverse. Thus, cumulative impacts of regulated and unregulated sources can be considered to determine the cumulative level of potential adverse impacts. OCR would generally expect to assess potential adverse cumulative impacts to the extent appropriate data are available, taking into account the uncertainties associated with the data.

In many cases, the nature of the sources of stressors, the stressors, or the impact being alleged is clear from the complaint. For example, complainants may allege that air emissions from specific chemical plants have resulted in higher cancer rates for Hispanics living near those facilities. In some cases, the nature of the sources of stressors or other important information, is not clear. For example, complainants may allege that Asian Americans are "overburdened by pollution" or suffer a variety of impacts from multiple, unidentified types of sources.

In cases where it is unclear, OCR will attempt to determine the source of the stressors and/or the nature of the impact(s) being alleged, based on the type of permitted entity at issue and the kinds of impacts EPA expects could result from the situation described in the complaint. This determination would be made after consulting such resources as scientific literature reviews, engineering studies, and technical experts.

In addition to considering the scope of the allegations and the circumstances of each complaint, OCR expects that the universe of sources will fall into three main categories. One category includes allegations that involve a permitted facility that is one of a number of similar sources in a geographic area. These facilities, together or in

conjunction with background sources, may present a cumulative adverse disparate impact or may reflect a pattern of adverse disparate impact. In these cases, OCR expects an assessment will need to evaluate the cumulative impacts of pollution from a broad universe of regulated and permitted sources<sup>124</sup> (e.g., large manufacturing facilities), as well as regulated but usually unpermitted sources (e.g., some paint stripping or metal finishing operations, mobile sources, sources of surface water runoff), and unregulated sources.

Another universe of sources may include only those that are regulated or permitted. For example, a complaint may allege that the permitting of sanitary landfills throughout the state resulted in discriminatory human health effects for African Americans. If the complaint does not contain an allegation of cumulative impacts from multiple sources, then without any evidence to suggest that permitted sanitary landfills is an inappropriate universe of sources, OCR would investigate the impacts from those regulated sources (e.g., sanitary landfills) described in the complaint.

In some instances, a third universe of sources category, a single permitted entity alone, may support an adverse disparate impact claim. While such a case has not yet been presented to EPA, it might, for example, involve a permitted activity that is unique (i.e., "one of a kind") under a recipient's program, such as a permit to store or dispose of a unique type of stressor (e.g., radioactive materials, pathogens). In these cases, only pollutants or other stressors from the specific individual entity that was the focus of the complaint would be considered in the adverse disparate impact analysis. Background sources would generally not be considered in the analysis.

Where the activities covered by a recipient's authority constitute a portion of the impact, OCR would expect to attempt to conduct an assessment to identify the relative contribution of various source categories. Some cases may require updating the scope of the assessment as a result of an initial review of available materials or investigation. For example, available data estimates or initial assessments of the status of environmental conditions in a study area may change.

<sup>124</sup> In this context, "regulated or permitted" sources include those with permits, as well as those subject to Federal or state requirements for reporting of waste generation or emissions (e.g., Toxics Release Inventory reporters, Resource Conservation and Recovery Act hazardous waste generator sites).

<sup>123</sup> See section VII (discussing findings of noncompliance).

Having identified the relevant sources and stressors, OCR would then expect to define the overall scope of the adverse disparate impact investigation, and develop time and resource estimates. The investigation may focus on one or more exposure *pathways* that stressors could travel from the permitted entity and other sources to potential *receptors*. This process will also involve forming a project team; assessing data availability, relevance, and reliability; and reviewing the availability of assessment tools, such as appropriate mathematical models and *exposure scenarios*. The team would develop an initial project scope plan, identify information products, and create a schedule with milestones for the analysis.

### 3. Impact Assessment

Determine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, may result in an adverse impact.

In this step, the investigatory team develops an assessment to determine whether the alleged discriminatory act may cause or is associated with one or more impacts. This involves confirming that an entity is a source of stressor(s) that could cause or be associated with an exacerbation of the alleged impacts, and that there is a plausible mechanism and *exposure route* (e.g., release of a stressor with known *chronic toxicity* effects that may be transported via air to receptors for inhalation). EPA expects to attempt to quantify potential impacts, using data on sources, stressors, and associated potential impacts. While EPA will rely on the best available relevant data in its investigations, the utility of available data to make a finding will likely vary with the environmental *medium*, geographic area, and the recipient's program, among other things. OCR expects to use all readily available relevant data in conducting its assessments.

However, data may not be readily available for many types of impacts, or where available, may not be relevant to the appropriate geographic area. In some situations, the data may be insufficient to perform an analysis. OCR expects to use available data in a hierarchical fashion, depending on their completeness and reliability, placing greatest weight on the most reliable. The following is an example of this hierarchy of data types, in approximate descending order of preference, that OCR expects to use for assessments:

- Ambient monitoring data;

- Modeled exposure concentrations or surrogates in various environmental media;
- Known releases of pollutants or stressors into the environment;
- The manufacture, use, or storage of quantities of pollutants, and their potential for release; and
- The existence of sources or activities associated with potential exposures to stressors (e.g., facilities that are generally likely to use significant quantities of toxic chemicals which could be routinely or catastrophically released; types of agricultural production usually associated with chemical application).

Depending on the allegations in a particular case, and the availability of data, any of these above sources of information may be considered relevant.

The reliability, degree of scientific acceptance, and uncertainties of impact assessment methods varies greatly. In each case, the investigation report is expected to include a discussion of uncertainties in the impact assessment. OCR expects to weigh these uncertainties in the data and methods as part of its decision process (in Step 5). As part of its identification and development of methods for conducting impact assessments, OCR submitted several example assessment tools for review by the EPA *Science Advisory Board*.<sup>125</sup> OCR expects to select from the following set of approaches. The facts and circumstances of each complaint will determine whether a likely causal link exists.

*Direct link to impacts.* The strongest evidence demonstrating a causal link between the alleged discriminatory act and the alleged adverse impact would directly link an adverse health or environmental outcome with the source of a stressor. Although such evidence is preferred in reaching a decision, it is rarely available. Not only must one have a set of geographically-specific health or environmental outcome data (e.g., age-adjusted cancer rates), but also evidence that the health or environmental outcomes stem from environmental stressors from the permitted entity. Many types of adverse health impacts may require years of exposure to a large number of people in order to be observed in *health outcome* data.

*Risk.* Another approach involves prediction of potentially significant

exposures and risks resulting from stressors created by the permitted activities or other sources. These predictions may be based on *ambient* levels of stressors derived from monitoring or modeling, with information about the likelihood of toxic effects occurring. In estimating cancer risks, such *unit risk factors* estimate the probability of contracting a cancer case for a unit of exposure.<sup>126</sup> For example, an area's predicted cancer risk could be based on the estimated ambient concentration times the unit risk factor. These could be assessed for single chemicals, or be summed for multiple chemicals, based on releases from a single source or a combination of sources and background levels.<sup>127</sup>

*Toxicity-weighted emissions.* 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. This approach does not present an explicit prediction of ambient concentrations or levels of the stressors. For example, OCR could obtain or estimate the release quantity of each chemical stressor from a source, multiply it by a chronic toxicity *potency factor* score, then sum the products across chemicals to yield a total toxicity-weighted stressor score per source. Sources with higher levels of toxicity-weighted stressors would be expected to be associated with a higher likelihood of causing potential adverse impacts.

*Concentration levels.* This approach would include modeled or monitored ambient concentrations of stressors that may indicate potential levels of concern. For example, if the result of an analysis is a series of chemical concentration estimates, these would be compared to benchmarks of concern for each chemical separately. These benchmarks may be based on several things, including toxicity potency factors

<sup>126</sup> A unit of exposure could include an exposure scenario of a person breathing, on average over a lifetime, a concentration of 1 microgram of pollutant per cubic meter of air.

<sup>127</sup> For non-*carcinogens*, it is not possible to estimate a probability of occurrence (i.e., risk); however, a ratio of the estimated exposures to *benchmark* levels can be calculated (i.e., a *hazard quotient*). Hazard quotients for individual chemicals may be combined to create a cumulative *hazard index*, which may be used to evaluate the cumulative impact potential. If an exposure occurs at a level below the benchmark level (which would result in a hazard index value less than 1), this usually indicates that no adverse effects would occur. A *reference dose* is a frequently used example of such a benchmark. However, if an exposure occurs above a benchmark level, it may not be possible to conclude from those data alone that an effect would necessarily occur.

<sup>125</sup> The findings were presented in the December 1998 report, *An SAB Report: Review of Disproportionate Impact Methodologies; A Review by the Integrated Human Exposure Committee (IHEC) of the Science Advisory Board (SAB)*. The report and related materials are available on the OCR Web site at <http://www.epa.gov/civilrights/investig.htm>.

similar to those outlined in the Risk discussion above, or rely on less quantitative data.

#### 4. Adverse Impact Decision

Determine whether an estimated risk or measure of impact is significantly adverse. If the impact is not significantly adverse, the allegation is not expected to form the basis of a finding of non-compliance with EPA's Title VI regulations and will likely be closed.

OCR intends to use all relevant information to determine whether the predicted impact is significantly adverse under Title VI. Generally, OCR would first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy. Where the risks or other measure of potential impact meet or exceed a significance level, they generally would be recognized as adverse under Title VI.

OCR will work with other appropriate EPA offices to evaluate the results. If exposures exceed established environmental or human health benchmarks, the appropriate EPA program office or the Office of Enforcement and Compliance Assurance will be notified so they may take appropriate action under environmental laws and regulations. OCR will coordinate its investigation into potential Title VI violations with any actions taken by other EPA offices. Where no adverse impacts are present for any of the sources or combination of sources described above, the allegation will not form the basis of a finding of non-compliance with EPA's Title VI regulations and will be closed.

This evaluation would need to take into account considerations such as policies developed for single stressors or sources without explicit consideration of cumulative contributions and uncertainties in estimates. In some cases, the relevant environmental laws may not identify regulatory levels for the risks of the alleged human health impact or may not address them for Title VI purposes. For example, the alleged impact may result from cumulative or other risk of effects from multiple environmental exposure *media*. In such cases, OCR could consider whether any scientific or technical information indicates that those impacts should be recognized as adverse under Title VI. In making that determination, OCR would work closely with other EPA offices with relevant regulatory programs. Again, where no such risks or impacts are present for any of the sources or combination of sources

described above, the allegation will not form the basis for a finding of non-compliance with EPA's Title VI regulations and will be closed.

*a. Example of Adverse Impact Benchmarks:* 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 non-compliance 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.<sup>128</sup> Generally, the farther the hazard index is above 1, the more likely OCR will be to issue an adversity finding under Title VI.

Compliance with environmental laws does not constitute per se compliance with Title VI. Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. EPA recognizes that most permits control pollution rather than prevent it altogether. Also, there may be instances in which environmental laws do not regulate certain concentrations of sources, or take into account impacts on some subpopulations which may be disproportionately present in an affected population. For example, there may be evidence of adverse impacts on some subpopulations (*e.g.*, asthmatics) and that subpopulation may be disproportionately composed of persons of a particular of a race, color, or national origin. Title VI is concerned

<sup>128</sup> For further discussions of this issue, see the preceding footnote.

with how the effects of the programs and activities of a recipient are distributed based on race, color, or national origin. A recipient's Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program.

*b. Use of National Ambient Air Quality Standards:* EPA and the states have promulgated a wide series of regulations to implement public health protections. Some of these regulations are based on assessment of public health risks associated with certain levels of pollution in the ambient environment. The *National Ambient Air Quality Standards (NAAQS)* established under the Clean Air Act are an example of this kind of health-based *ambient standard* setting. By establishing an ambient, public health *threshold*, the primary NAAQS contemplate multiple source contributions and establish a protective limit on cumulative pollution levels that should ordinarily prevent an adverse air quality impact on public health. Air quality that adheres to such standards (*e.g.*, air quality in an *attainment area*) is presumptively protective of public health in the general population.

If an investigation includes an allegation raising air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as "adverse" within the meaning of Title VI. However, if the investigation produces evidence that significant adverse impacts may occur, this presumption of no adverse impact may be overcome.

For example, one situation where the presumption could be overcome is the following: An area may be in attainment with the lead NAAQS, but in some cases residents could still suffer adverse effects from lead. The lead standard was designed to take into account both exposures from inhalation of airborne lead (subject to the standard) and exposures resulting from non-air pathways such as ingestion of lead contained in paint, soil, or water (not subject to the standard).<sup>129</sup> Contributions to total exposure from non-air sources, however, can vary widely, and unusually high levels of lead in paint, soil, or water might cause residents of some areas to experience adverse effects even if the standard is

<sup>129</sup> See 43 FR 46248, 46252-54 (Oct. 5, 1978); *Lead Industr. Ass'n v. EPA*, 647 F.2d 1130, 1141-45 (D.C. Cir. 1980).

met. In such cases, the presumption of no adverse impacts from lead could be overcome.<sup>130</sup>

*c. Assessing Decreases in Adverse Impacts in a Permit Action:* In some circumstances, such as where a decrease in certain emissions is accompanied by an increase in other emissions and OCR determines that the permit action identified in the complaint clearly leads to a significant decrease in adverse disparate impacts, OCR's voluntary compliance measures will take that decrease into account, because it is unlikely the permit is solely responsible for the adverse disparate impacts.<sup>131</sup> In general, OCR expects any alleged decrease in impact to be clearly evident and will likely involve the same types of pollutants and pathways that are alleged in the complaint. Generally, when determining whether the alleged discriminatory act increases, decreases, or does not affect the level of adverse impacts, OCR expects to evaluate the allowable release levels in the permit.

#### 5. Characterize Populations and Conduct Comparisons

Identify and determine the characteristics of the affected population, and conduct an analysis to determine whether a disparity exists between the affected population and an appropriate comparison population in terms of race, color, or national origin, and adverse impact. If there is no disparity, the allegation will not form the basis of a finding of non-compliance with EPA's Title VI regulations and will be closed.

*a. Identify and Characterize Affected Population:* The first element of this step is to identify the affected population. The affected population is that which suffers the adverse impacts of the stressors from assessed sources. Depending on the allegations and facts in the case, various affected populations may be identified.<sup>132</sup> The affected population may be categorized, for example, by likely risk or measure of impact above a threshold of adversity, or by the sources or pathways of the adverse impacts.

The impacts from permitted entities and other sources are not always distributed in a predictable and uniform

manner. Therefore, the predicted degree of potential impacts could be associated with a possible receptor population in several ways. Based on Step 3's assessment, which predicted the magnitude (and in some cases, the geographic distribution) of stressor levels associated with adverse impacts, OCR expects to use mathematical models, when possible, to estimate the location and size of the affected populations. An area of adverse impacts may be irregularly shaped due to environmental factors or other conditions such as wind direction, stream direction, or topography. Likewise, depending upon the location of a plume or pathway of impact, the affected population may or may not include those people with residences in closest proximity to a source.

However, simpler approaches based primarily on proximity may also be used where more detailed (e.g., modeled) estimates cannot be developed. The proximity analysis would reflect the environmental medium and impact of concern in the case. For example, for air releases, an inverse relationship with distance from a source could be used within a circle (i.e., the further away from a source, the less the potential degree of impact to a population). For surface water releases, the impact allocation might involve identifying downstream receptor populations. All of these approaches may incorporate the contribution of other sources of chemical stressors to assess potential cumulative impacts.

The analysis would also attempt to determine the race, color, or national origin of the affected population(s). OCR intends to use available data and demographic analysis methods, such as the currently available U.S. Census information<sup>133</sup> in *geographic information systems* (GIS) to describe the affected population. In conducting a typical analysis to determine an affected population, OCR would likely generate data estimating the race, color or national origin and density of populations within a certain proximity from a facility or within the geographic distribution pattern predicted by scientific models. OCR would expect to use the smallest geographic resolution feasible for the demographic data, such as census blocks, when conducting disparity assessments. OCR would expect to characterize the affected population for the permitted entity at

issue, as well as those in other areas of estimated cumulative adverse impacts.

*b. Comparison to Assess Disparity:* The second element of this step involves a disparity analysis that compares the affected population to an appropriate comparison population to determine whether disparity exists that may violate EPA's Title VI regulations. OCR would consider the allegations and factors of each case, and would generally expect to draw relevant comparison populations from those who live within a *reference area* such as the recipient's jurisdiction (e.g., an air district, a state, an area of responsibility for a branch office), within a political jurisdiction (e.g., town, county, state), or an area defined by environmental criteria, such as an airshed or watershed. For example, where a complaint alleges that Asian Americans throughout a state bear adverse disparate impacts from permitted sources of water pollution, an appropriate reference area would likely be the state. Comparison populations would usually be larger than the affected population, and may include the *general population* for the reference area (e.g., a county or state population which includes the affected population) or the *non-affected population* for the reference area (e.g., those in the reference area who are not part of the affected population).

A disparity may be assessed using comparisons both of the different prevalence of race, color, or national origin of the two populations, and of the level of risk of adverse impacts experienced by each population. Since there is no one formula or analysis to be applied, OCR intends to use appropriate comparisons to assess disparate impact depending on the facts and circumstances of the complaint.

As part of OCR's assessment, it is expected that at least one and usually more of the following comparisons of demographic characteristics will be conducted:

- The demographic characteristics of an affected population to demographic characteristics of a non-affected population or general population;<sup>134</sup>
- The demographic characteristics of most likely affected (e.g., highest 5% of

<sup>130</sup> Note also that even if an area is in compliance with the NAAQS for a *criteria pollutant*, there still may be Title VI concerns related to other criteria pollutants, to toxic hot spots associated with *hazardous air pollutants* under section 112 of the Clean Air Act, or to pollutants from other media.

<sup>131</sup> See section VII.A.3. (discussion of voluntary compliance).

<sup>132</sup> This could occur when a complaint contains more than one allegation, and/or different populations may be disproportionately affected by different pollutants or exposure pathways.

<sup>133</sup> The most current geographically detailed Census information is from the 1990 U.S. Census. Information from the 2000 U.S. Census will not be available until 2001.

<sup>134</sup> See, e.g., *Draft Revised Demographic Information, Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, April, 1998 (Shintech Demographic Information, April 1998), Facility Distribution Charts D1 through D40 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, files t-d01-10.pdf, t-d11-20.pdf, t-d21-30.pdf, t-d31-40.pdf.*

risk or measure of adverse impact) to least likely affected (e.g., lowest 5%)<sup>135</sup>

- The probability of different demographic groups (e.g., African Americans, Hispanics, Whites) in a surrounding jurisdiction being in an affected population or a highly affected portion of it;<sup>136</sup>

OCR also expects to compare the level of risk or measure of potential adverse impacts:

- The average risk or measure of adverse impact by demographic group within the general population or within an affected population;<sup>137</sup> or

- The range of risk or measure of adverse impact by demographic group within the general population or within an affected population.

#### 6. Adverse Disparate Impact Decision

Determine whether the disparity is significant. If it is not, the complaint will likely be closed.

The final step of the analysis is to determine whether the disparities demonstrated by comparisons in Step 5 are significant under Title VI. OCR generally expects to review both the disparity in demographic characteristics and in levels of risk or other measure of potential impacts, in the context of the allegations identified in the complaint and investigation scope.

In determining whether a disparity is significant, OCR generally expects to review several possible measures (described in the previous step), and take into account to what degree they are consistent. Moreover, the significance of a given level of disparity may vary depending upon the facts and circumstances of the complaint and comparison population at issue. Nevertheless, OCR intends to apply a few basic rules in assessing the significance of disparity.

For instance, measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved *statistical significance* to at least 2 to 3 standard deviations. The purpose of this initial review is to minimize the chance

<sup>135</sup> These values approximate the outlying portions (sometimes called the "tails") of a distribution of risk that are beyond two standard deviations of the mean value.

<sup>136</sup> See, e.g., *Shintech Demographic Information*, April 1998, the last column in Tables A1 through B7 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, table-a1.pdf through table-b.7.pdf.

<sup>137</sup> See, e.g., *Shintech Demographic Information*, April 1998, last column in Tables C1 through C5 found at <http://www.epa.gov/civilrights/shinfileapr98.htm>, table-c1.pdf through table-c.5.pdf.

of a false measurement of difference where none actually exists (e.g., because of an inherent variability of the data). OCR expects to work with statisticians to evaluate initial disparity calculations done by investigators.

Initial assessments of disparity would thus be informed by expert opinion, and take into account other considerations such as uncertainties. For example, some time may have passed since the most recent Census, and residential population shifts may have occurred, resulting in uncertainties in demographic characterization. Uncertainties in adverse impact assessments might include the accuracy of predicted risk levels, and the applicability of these levels to potentially exposed populations (e.g., subsistence fish consumption patterns).

OCR would also expect to evaluate the demographic disparity measures and their results in the context of several related factors such as:

- Affected population size;
- Overall demographic composition of the general comparison population (especially those with very low or very high proportions of particular subgroups); and
- The overall proportion of a jurisdiction's total population within an affected population.

In evaluating disparity in adverse impacts, OCR would expect to also consider such factors as:

- The level of adverse impact (e.g., a little or a lot above a threshold of significance);
- The severity of the impact; and
- Its frequency of occurrence.

OCR expects to weigh carefully the potential uncertainties along with these factors in making the determination of whether an adverse disparate impact exists, and whether a finding of noncompliance with EPA's regulations is warranted. EPA generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented programs, unless justification can be provided.

A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear. For example, where credible measures of both the demographic disparity and the disparity in rates of impact are at least a factor of 2 times higher in the affected population, OCR would generally expect to find disparate impact under Title VI. Similarly, in instances where the disparity of both

demographic characteristics and impacts are relatively slight, a finding of disparate impact is somewhat less likely (e.g., in cases where both the disparity of impact and demographics are not statistically significant). Finally, where a large disparity exists in terms of impact and a relatively slight disparity exists with regard to demographics (or vice versa), EPA will ordinarily attempt to balance these factors, taking into account the particular circumstances of the case. For instance where a large disparity (e.g., a factor of 10 times higher) exists with regard to a significant adverse impact, OCR might find disparate impact even though the demographic disparity is relatively slight (e.g., under 20%).

However, for both demographic disparity and disparity of impact, there is no fixed formula or analysis to be applied. The significance of a level of disparity may vary depending upon the facts and circumstances of the complaint, the analysis, and the comparison population. Given the wide variability in many of the underlying factors such as the proportion of racial subgroups in the general population,<sup>138</sup> it is impossible to determine a single factor that could be applicable in all cases.

#### VII. Determining Whether a Finding of Noncompliance is Warranted

In order to find a recipient in violation of the discriminatory effects standard in EPA's Title VI implementing regulations, OCR would determine whether the recipient's programs or activities have resulted in an unjustified adverse disparate impact.<sup>139</sup> In other words, OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin,<sup>140</sup> and, if so, whether that impact is justified.<sup>141</sup> While assessing background sources of stressors contributing to alleged

<sup>138</sup> For example, state populations may be used as a basis for comparison with the affected population. Recent data show that the proportion of total "minority" populations (defined as other than white races together with white Hispanics) range from about 4% to 50% of various state populations. In light of that variance, the adoption of a single level of disparity, such as a factor of 2, as the only indicator of significance, would lead to highly inconsistent results. If a complaint alleged discrimination against minorities, as defined above, in some states, a significant disparity would be presumed to exist if less than 10% of an affected population were minority, whereas in other states, the percentage would have to reach 100%.

<sup>139</sup> See 40 CFR 7.30, 7.35 (stating prohibitions against discrimination).

<sup>140</sup> See section VI (describing analysis for determining whether adverse disparate impact exists).

<sup>141</sup> See section VII.A. (discussing justification).

discriminatory effects may be required to understand whether an adverse impact is created or exacerbated, in determining whether a recipient is in violation of Title VI or EPA's implementing regulations and the extent of any voluntary compliance measures, the Agency expects to account for the adverse disparate impacts resulting from sources of stressors, the stressors themselves, and/or impacts cognizable under the recipient's authority.<sup>142</sup>

OCR also expects to base a preliminary finding of noncompliance on the results of the adverse disparate impact analysis, and any information submitted by the complainant or recipient, and any defenses presented by the recipient during the investigation. Within 50 calendar days of OCR's preliminary findings, the recipient may:

- (1) Submit a written response demonstrating that the preliminary findings are incorrect;
- (2) Agree to OCR's recommendations for voluntary compliance; or
- (3) Argue that compliance may be achieved through steps other than those recommended by OCR.<sup>143</sup>

If the recipient does not take one of these actions, EPA's Title VI regulations require OCR to send a formal written determination of noncompliance to the recipient, the Award Official, and the Assistant Attorney General.<sup>144</sup> If the recipient does not voluntarily comply within 10 calendar days of receipt of the formal determination of noncompliance, OCR must start proceedings to deny, annul, suspend, or terminate EPA assistance.<sup>145</sup> Recognizing that elimination of adverse disparate impacts within 10 days may not be achievable; therefore, OCR may postpone proceedings to deny, annul, suspend, or terminate EPA assistance, if the recipient has demonstrated a good faith effort (e.g., signed a voluntary compliance agreement) to come into compliance.

#### A. Justification

The recipient will have the opportunity to "justify" the decision to issue the permit notwithstanding the adverse disparate impact, based on a substantial, legitimate justification.<sup>146</sup> The recipient may offer its justification

<sup>142</sup> See section VI.B.2. (discussing defining the scope of an investigation).

<sup>143</sup> 40 CFR 7.115(c), (d).

<sup>144</sup> 40 CFR 7.115(d).

<sup>145</sup> 40 CFR 7.115(e), 7.130(b).

<sup>146</sup> In some circumstances, recipients may justify adverse disparate impacts under Title VI as described in the text. This guidance, however, does not concern justifications for any violations of environmental law.

following its receipt of the notice of complaint,<sup>147</sup> or after a preliminary finding of non-compliance with Title VI or EPA's implementing regulations.<sup>148</sup>

#### 1. Types of Justification

Determining what constitutes an acceptable justification will necessarily be based on the facts of the case. Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission.<sup>149</sup> For example, because recipients are environmental permitting agencies, OCR expects to consider provision of public health or environmental benefits (e.g., waste water treatment plant) to the affected population from the permitting action to be an acceptable justification because such benefits are generally legitimate, important, and integral to the recipient's mission.

In addition, OCR would also likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission. OCR will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of whether the permitted facility, in fact, will provide direct, economic benefits to the community. However, a justification may be rebutted if EPA determines that a less discriminatory alternative exists, as discussed below.

#### 2. Less Discriminatory Alternatives

Courts have defined the term "less discriminatory alternative" to be an approach that causes less disparate impact than the challenged practice, but is practicable and comparably effective in meeting the needs addressed by the challenged practice.<sup>150</sup> OCR will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives. Practicable mitigation measures<sup>151</sup> associated with

<sup>147</sup> 40 CFR 7.120(d)(1)(ii).

<sup>148</sup> 40 CFR 7.115(d)(2).

<sup>149</sup> See *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 593 (D.R.I. 1996), aff'd on other grounds, 110 F.3d 2 (1st Cir. 1997); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412-13 (11th Cir. 1993); see also *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1328 (3d Cir. 1981).

<sup>150</sup> See *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Elston*, 997 F.2d at 1413.

<sup>151</sup> For further discussion of potential measures that may reduce or eliminate adverse disparate impacts, see section IV.B.

the permitting action could be considered as less discriminatory alternatives, including, in some cases, modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impacts.

#### 3. Voluntary Compliance

OCR expects to explore a range of possible options to achieve voluntary compliance. Narrowly focused approaches to eliminate or reduce unjustified adverse disparate impacts might deal solely with the permitted activities that triggered a complaint. More broadly focused remedial efforts might deal with the combined impacts of several contributing sources, taking into account their approximate relative contributions. The Agency expects to account for the adverse disparate impacts resulting from factors within the recipient's authority.<sup>152</sup> In addition, the approaches explored may be assessed with respect to implementation considerations such as cost and technical feasibility.

As previously mentioned, it is expected that denial or revocation of a permit is not necessarily an appropriate solution, because it is unlikely that a particular permit is solely responsible for the adverse disparate impacts. Also in some circumstances, such as where OCR's investigation shows that the permit action identified in the complaint clearly leads to a significant decrease in adverse disparate impacts, OCR will likely recommend voluntary compliance measures that take this decrease into account. OCR will likely recommend that the recipient focus on other permitted entities and other sources within their authority to eliminate or reduce, to the extent required by Title VI, the adverse disparate impacts of their programs or activities.

#### B. Hearing/Appeal Process

If compliance with EPA's Title VI regulations cannot be achieved by informal resolution or voluntary compliance, OCR must make a finding of noncompliance.<sup>153</sup> Within 30 days of receipt of the formal finding of noncompliance, the recipient must file a written answer and may request a hearing before an EPA ALJ.<sup>154</sup> If the recipient does not request a hearing, it shall be deemed to have waived its right to a hearing, and OCR's finding will be deemed to be the ALJ's

<sup>152</sup> See section VI.B.2.a. (discussing the scope of recipient's authority).

<sup>153</sup> 40 CFR 7.115(e); 7.130(b)(1).

<sup>154</sup> 40 CFR 7.130(b)(2)(i), (ii).

determination.<sup>155</sup> Following receipt of the ALJ's determination, the recipient may, within 30 days, file its exceptions to that determination with the Administrator.<sup>156</sup> The Administrator may, within 45 days after the ALJ's determination, serve notice that she will review the determination.<sup>157</sup> If the recipient does not file exceptions or if the Administrator does not provide notice of review, the ALJ's determination constitutes the

Administrator's final decision.<sup>158</sup> If the Administrator reviews the determination, all parties will be given reasonable opportunity to file written statements.<sup>159</sup> Subsequently, if the Administrator's decides to deny an application, or annul, suspend, or terminate EPA assistance, that decision becomes effective 30 days after the Administrator submits a written report to Congress.<sup>160</sup>

**Appendix A: Glossary of Terms**

The definitions provided in this glossary only apply to the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* and the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, unless a direct citation to the Code of Federal Regulations (CFR) is provided. Please note that italicized words are ones for which definitions are available in this glossary.

Term	Definition
Accuracy .....	The measure of the correctness of data, as given by the difference between the measured value and the true or standard value.
Adverse Impact .....	A negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science.
Affected Population .....	A population that is determined to bear an adverse impact from the source(s) at issue.
Ambient Standards .....	A level of pollutants prescribed by regulations that are not to be exceeded during a given time in a defined area. (e.g., <i>National Ambient Air Quality Standards</i> .)
Ambient .....	Any unconfined portion of a water body, land area, or the atmosphere, such as the open air or the environment surrounding a source.
Attainment Area .....	An area considered to have air quality as good as or better than the national ambient air quality standards as defined in the Clean Air Act. An area may be an attainment area for one pollutant and a non-attainment area for others. (See also <i>non-attainment area</i> .)
Benchmark .....	A value used as a standard for comparison. Several types used in Title VI investigations include benchmarks of exposure level, risk, and significance. (See also <i>RfC</i> , <i>RfD</i> , <i>threshold</i> .)
Brownfields .....	Abandoned, idled, or under-used industrial and commercial facilities/sites where expansion or redevelopment is complicated by real or perceived environmental contamination. They can be in urban, suburban, or rural areas.
Carcinogen .....	A chemical or other stressor capable of inducing a cancer response.
Chronic Toxicity .....	The capacity of a substance to cause long-term harmful health effects.
Comparison Population .....	A population selected for comparison with an affected population in determining whether the affected population is significantly different with respect to demographic characteristics or degree of adverse impact.
Criteria Pollutants .....	The 1970 Clean Air Act (CAA) required EPA to set National Ambient Air Quality Standards for certain pollutants known to be hazardous to human health. EPA has identified and set standards to protect human health and welfare for six pollutants: ozone, carbon monoxide, particulate matter, sulfur dioxide, lead, and nitrogen oxide. The term, "criteria pollutants" derives from the requirement that EPA must describe the characteristics and potential health and welfare effects of these pollutants in "criteria." See CAA section 108.
Cumulative Exposure .....	Total exposure to multiple environmental <i>stressors</i> (e.g., chemicals), including exposures originating from multiple <i>sources</i> , and traveling via multiple pathways over a period of time.
Cumulative Impact .....	The harmful health or other effects resulting from <i>cumulative exposure</i> .
Disparity (Disparate Impact) .....	A measurement of a degree of difference between population groups for the purpose of making a finding under Title VI. Disparities may be measured in terms of the respective composition (demographics) of the groups, and in terms of the respective potential level of <i>exposure</i> , <i>risk</i> or other measure of <i>adverse impact</i> .
Due Weight .....	The importance or reliance EPA gives to evidence or agreements to reduce impacts provided by recipients or complainants, depending on a review of relevance, scientific validity, completeness, consistency, and uncertainties. Where evidence or agreements prove to be technically satisfactory, OCR may rely upon that information rather than attempting to duplicate the analysis.
Environmental Council of States (ECOS) .....	The Environmental Council of States (ECOS) is a national non-partisan, nonprofit association of state and territorial environmental commissioners.
Exposure .....	Contact with, or being subject to the action or influence of, environmental <i>stressors</i> , usually through ingestion, inhalation, or dermal contact.
Exposure Pathway .....	The physical course a chemical or other <i>stressor</i> takes from its source to the exposed <i>receptor</i> (See also <i>Exposure Route</i> .)
Exposure Route .....	The avenue by which a chemical or other <i>stressor</i> comes into contact with an organism (e.g., inhalation, ingestion, dermal contact).
Exposure Scenario .....	A set of facts, assumptions, and inferences about how <i>exposure</i> takes place that aids in evaluating, estimating, or quantifying exposures (e.g., <i>exposure pathway</i> , environmental conditions, time period of exposure, <i>receptor</i> lifetime, average body weight).
Financial Assistance .....	Any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of personnel; or (3) Real or personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) Proceeds from a subsequent transfer or lease of such property if EPA's share of its fair market value is not returned to EPA. 40 CFR 7.25.

<sup>155</sup> 40 CFR 7.130(b)(2)(ii).  
<sup>156</sup> 40 CFR 7.130(b)(3)(i).

<sup>157</sup> *Id.*  
<sup>158</sup> *Id.*

<sup>159</sup> 40 CFR 7.130(b)(3)(ii).  
<sup>160</sup> 40 CFR 7.130(b)(3)(iii).

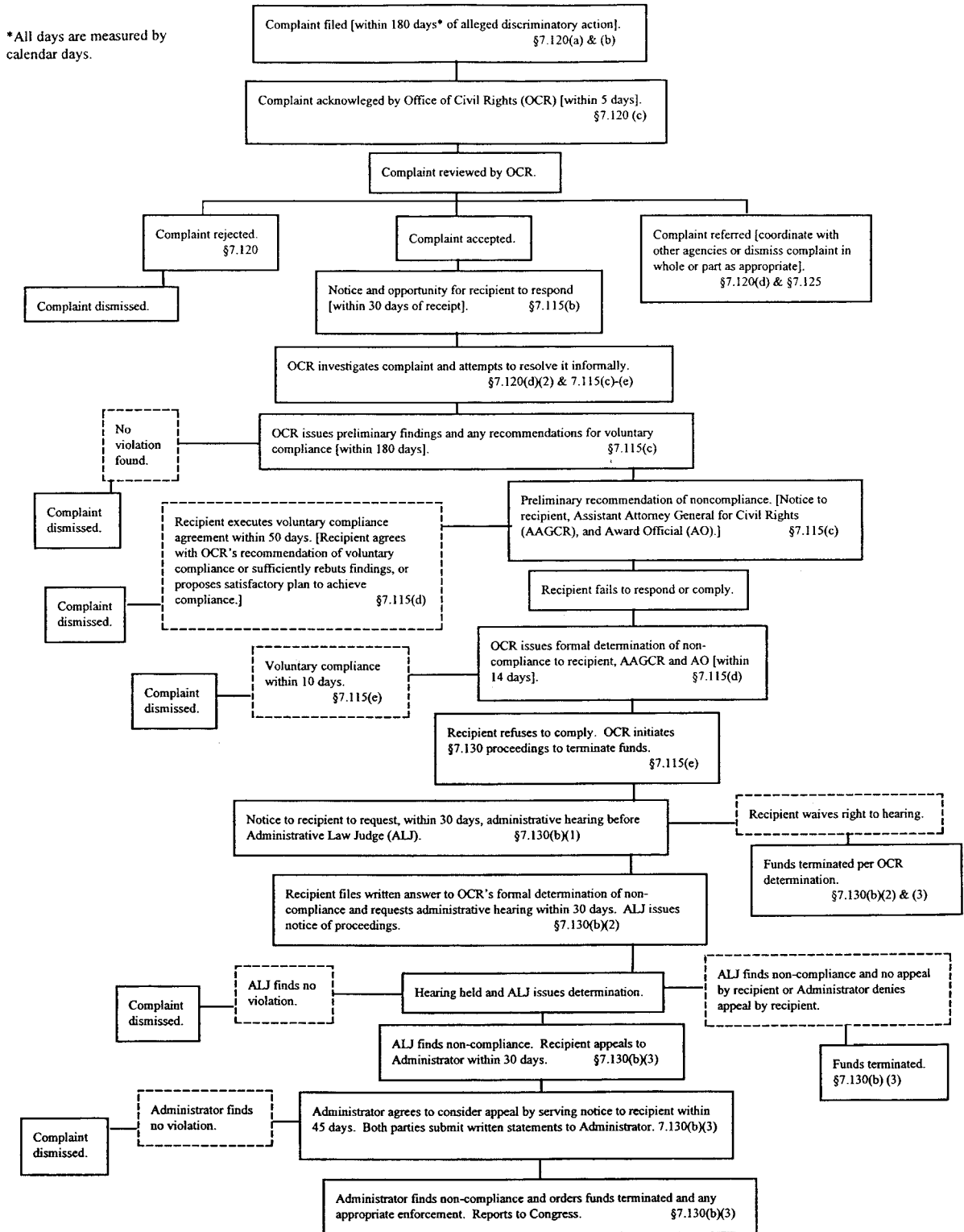


Term	Definition
General population .....	A comparison population that consists of the total set of persons in a jurisdiction or area of potential impact, including an <i>affected population</i> .
GIS (Geographic Information System).	An organized computer system designed to efficiently capture, analyze, and display information in a geographically referenced manner, such as a map. Commonly, GIS is used to produce maps which combine various data and analysis results together, allowing for convenient visual analysis.
Hazard .....	The degree of potential for a <i>stressor</i> to cause illness or injury in a <i>receptor</i> , or the inherent toxicity of a compound.
Hazard Index .....	A summation of <i>hazard quotients</i> for multiple chemicals; a measure of cumulative risk for substances which exhibit a <i>threshold</i> for toxicity.
Hazard Quotient .....	The ratio of a single substance exposure level to a <i>reference dose</i> or <i>benchmark</i> for that substance. An exposure at the same concentration as the <i>reference dose</i> would have a hazard quotient of 1.
Hazardous Air Pollutant (HAP) .....	Air toxics which have been specifically listed for regulation under Clean Air Act section 112.
Health Outcome .....	A measure of disease rate or similar impact, such as age-adjusted cancer death rate.
Impact .....	In the health and environmental context, a negative or harmful effect on a receptor resulting from <i>exposure</i> to a stressor (e.g., a case of disease). The likelihood of occurrence and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity.
Informal Resolution .....	Any settlement of complaint allegations prior to the issuance of a formal finding of noncompliance by EPA.
Measure of Impact .....	A measure used in evaluating the significance of an impact, which may involve the general likelihood, frequency, rate or number of instances of the occurrence of an impact. (See <i>risk</i> , which is similar, but expressed as a numeric probability of occurrence.)
Media or Medium .....	Specific environmental compartments such as air, water, or soil, that are the subject of regulatory concern and activities.
Mitigation .....	Measures taken to reduce or eliminate the intensity, severity or frequency of an adverse disparate impact.
Mobile Source .....	Any non-stationary source of air pollution such as cars, trucks, motorcycles, buses, airplanes, ships or locomotives.
Model/Modeling/Modeled .....	A set of procedures or equations (usually computerized) for estimating or predicting a value, e.g., the ambient environmental concentration of a stressor. Also, the act of using a model.
National Ambient Air Quality Standards (NAAQS).	Standards established by EPA pursuant to Clean Air Act section 109 that apply for outdoor air throughout the country. (See <i>criteria pollutants</i> .)
New Permit .....	For the purposes of this guidance, the term "new permits" refers to the initial issuance of any permit, including permits for (1) the construction of a new facility, (2) the continued operation of an existing facility that previously operated without that type of permit, and (3) an existing facility that adds a new operation that would require a new type of permit (e.g., newly issued water discharge permit), in addition to the facility's existing permits (e.g., existing air emission permit). (See <i>permit</i> ).
Non-affected population .....	The remainder of a <i>general population</i> which is not found to be part of an <i>affected population</i> (e.g., a county population minus those in an affected population).
Non-Attainment Area .....	Area that does not meet one or more of the National Ambient Air Quality Standards for the criteria pollutants designated in the Clean Air Act.
Non-Point Source .....	A diffuse water pollution source (i.e., without a single point of discharge to the environment). Common non-point sources include agricultural, forestry, mining, or construction areas, areas used for land disposal, and areas where collective pollution due to everyday use can be washed off by precipitation, such as city streets. (See also <i>point source</i> ).
Noncompliance .....	A finding by EPA that a recipient's program or activities do not meet the requirements of EPA's Title VI implementing regulations.
Offsets .....	A concept whereby emissions from proposed new or modified stationary sources are balanced by reductions from existing sources to stabilize total emissions.
Pathway (exposure) .....	The physical course a chemical or other stressor takes from its source to the exposed <i>receptor</i> (See also <i>Exposure Route</i> ).
Pattern (of disparate impact) .....	An allegation or finding that multiple sources of a certain type are consistently associated with likely adverse impacts to a protected group.
Permit .....	An authorization, license, or equivalent control document issued by EPA or other agency to implement the requirements of an environmental regulation (e.g., a permit to operate a wastewater treatment plant or to operate a facility that may generate harmful emissions).
Plain Language Action Network .....	Plain Language Action Network (PLAN) is a government-wide group working to improve communications from the federal government to the public.
Point Source .....	A stationary location or fixed facility from which pollutants are discharged; any single identifiable source of a stressor (e.g., a pipe, ditch, small land area, pit, stack, vent, building).
Pollution Prevention .....	The practice of identifying areas, processes, and activities that create excessive waste products or stressors, and reducing or preventing them from occurring through altering or eliminating a process or activity.
Potency factor .....	A measure of the power of a toxic <i>stressor</i> to cause harm at various levels of <i>exposure</i> (sometimes based on the slope of a dose-response curve), or above a single specific value.
Receptor .....	An individual or group that may be exposed to <i>stressors</i> .
Recipient .....	Any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 40 CFR 7.25.
Reference area .....	An area from which one or more comparison populations are drawn for conducting a disparity analysis.
Reference dose .....	See <i>RfC</i> and <i>RfD</i> .
Release .....	The introduction of a <i>stressor</i> to the environment, where it may come in contact with receptors. Includes, among other things, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

Term	Definition
RfC (inhalation reference concentration).	An estimate (with uncertainty spanning perhaps an order of magnitude) of the daily <i>exposure</i> of the human population to a chemical, through inhalation, that is likely to be without risk of harmful effects during a lifetime.
RfD (oral reference dose) .....	An estimate (with uncertainty spanning perhaps an order of magnitude) of the daily exposure of the human population to a chemical, through ingestion, that is likely to be without risk of harmful effects during a lifetime.
Risk .....	A measure of the probability that damage to life, health, property, and/or the environment will occur as a result of a given hazard. In quantitative terms, risk is often expressed in values ranging from zero (representing the certainty that harm will not occur) to one (representing the certainty that harm will occur). The following are examples showing the manner in which cancer risk is expressed: E-4=1 in 10 <sup>-4</sup> , or a risk of 1 in 10,000; E-5=a risk of 1/100,000; E-6=a risk of 1/1,000,000. Similarly, 1.3E-3=a risk of 1.3/1000=1 chance in 770.
Risk Assessment .....	Qualitative and quantitative evaluation of the risk posed to human health and/or the environment by the actual or potential presence and/or use of specific <i>stressors</i> . This involves a determination of the kind and degree of <i>hazard</i> posed by a stressor ( <i>e.g.</i> , <i>toxicity</i> ), the extent to which a particular group of people has been or may be exposed to the agent, and the present or potential health risk that exists due to the agent.
Science Advisory Board (SAB) .....	A group of external scientists who advise EPA on science and policy.
Significant .....	A determination that an observed value is sufficiently large and meaningful to warrant some action. ( <i>See statistical significance</i> ).
Source .....	The site, facility, or origin from which one or more environmental <i>stressors</i> originate ( <i>e.g.</i> , factory, incinerator, landfill, storage tank, field, vehicle).
Statistical significance .....	An inference that there is a low probability that the observed difference in measured or estimated quantities is due to variability in the measurement technique, rather than due to an actual difference in the quantities themselves.
Stressor .....	Any factor that may adversely affect <i>receptors</i> , including chemical ( <i>e.g.</i> , <i>criteria pollutants</i> , toxic contaminants), physical ( <i>e.g.</i> , noise, extreme temperatures, fire) and biological ( <i>e.g.</i> , disease pathogens or parasites). Generally, any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems. Airborne stressors may fall into two main groups: (1) Those emitted directly from identifiable sources and (2) those produced in the air by interaction between chemicals ( <i>e.g.</i> , most ozone).
Threshold .....	The dose or <i>exposure</i> level below which an adverse impact is not expected. Most carcinogens are thought to be non-threshold chemicals, to which no exposure can be presumed to be without some risk of contracting the disease.
Toxicity .....	The degree to which a substance or mixture of substances can harm humans or animals. ( <i>See chronic toxicity</i> ).
Unit risk factor .....	A measure of the power of a toxic <i>stressor</i> to cause cancer at various levels of <i>exposure</i> (based on the slope of a dose-response curve, combined with an <i>exposure scenario</i> ).
Universe of Sources .....	A category of relevant and/or nearby sources of similar <i>stressors</i> to those from the permitted activity included in assessments of potential <i>adverse disparate impacts</i> .
Voluntary Compliance .....	Settlement between EPA and a recipient after a formal finding of noncompliance.

APPENDIX B: TITLE VI COMPLAINT PROCESS FLOW CHART

**Title VI Complaint Process  
40 CFR Part 7**



#### D. Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance

This document summarizes and addresses the key issues raised in comments received by the U.S. Environmental Protection Agency (EPA) concerning the February 4, 1998, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)*. These key issues were raised in a number of forums, including the over 120 written comments received on the *Interim Guidance*, meetings with a number of stakeholder representatives over the past two years, the meetings of the Title VI Implementation Advisory Committee of the National Advisory Council for Environmental Policy and Technology (Title VI Implementation Advisory Committee), a facilitated meeting with a variety of stakeholders on draft options under consideration for inclusion in the revised investigation guidance, and the internal EPA and Department of Justice review processes.

This summary explains how the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*, which are being published in the **Federal Register** concurrently with this document, deal with the key issues raised. This summary should not be read without also considering the two draft guidance documents.

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights or obligations enforceable by any party in litigation. EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised to reflect changes in EPA's approach to implementing Title VI. In addition, this guidance does not alter in any way, a regulated entity's obligation to comply with applicable environmental laws.

#### General Issues

##### Stakeholder Input

A number of commenters raised questions about the stakeholder input process for the *Interim Guidance* and the *Draft Revised Investigation Guidance*.

*Response:* Issuance of the *Interim Guidance* opened a continuing dialogue with stakeholders that helped to shape the Agency's *Draft Revised Investigation Guidance*. EPA provided a 90-day comment period on the *Interim Guidance* during which time more than 120 commenters representing a broad range of interested parties provided written comments. The Title VI Implementation Advisory Committee, with representatives from environmental justice organizations, community groups, state and local governments, businesses, and academia, also provided input about the *Interim Guidance*. In addition, over the past two years, EPA staff have met with other representatives from those groups to discuss their concerns about environmental justice and Title VI issues. Furthermore, in

September 1999, EPA held three sessions with representatives of various stakeholder groups to discuss policy options the Agency was considering as it revised the *Interim Guidance*. (A current list of scheduled outreach meetings is posted on EPA's Office of Civil Rights' (OCR) Web site at [www.epa.gov/civilrights](http://www.epa.gov/civilrights)).

Based upon that input and on experience gained from processing and investigating complaints during the intervening months, EPA developed the *Draft Revised Investigation Guidance*. In today's **Federal Register** document, EPA has established a 60-day public comment period on both the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance*. During the public comment period, EPA will host five public listening sessions at EPA headquarters and regional offices. Details regarding the listening sessions are provided in the Public Comment Period section of this notice. Additionally, EPA staff will meet with various stakeholder groups during the public comment period to listen to their comments. EPA's Authority To Issue Guidance

A number of commenters raised concerns about EPA's authority to issue the *Interim Guidance*, including one who stated that EPA's regulatory authorities under Title VI extend only to prohibiting cases of intentional discrimination and not to prohibiting instances of discriminatory effects. The commenter asserted that the Supreme Court has held that the Fourteenth Amendment to the U.S. Constitution prohibits only intentional discrimination, and not instances of discriminatory effects. Likewise, the commenter claimed, the Supreme Court held that the authority granted under Title VI extends no further than the Fourteenth Amendment, and therefore does not prohibit discriminatory effects. A further commenter stated that a Supreme Court decision invalidated EPA's Title VI regulations.

*Response:* Title VI itself prohibits intentional discrimination.<sup>161</sup> To find intentional discrimination, it must be proven that "a challenged action was motivated by an intent to discriminate."<sup>162</sup> This standard requires a showing that the recipient was aware of the complainant's race, color, or national origin, and that the recipient acted, at least in part, because of the complainant's race, color, or national origin.<sup>163</sup> Evidence of discriminatory intent may be direct or circumstantial.<sup>164</sup>

In addition, the Supreme Court has stated that Title VI authorizes agencies to adopt implementing regulations that also prohibit discriminatory effects.<sup>165</sup> This is often referred to as reaching actions that have an unjustified disparate impact. In July 1994,

<sup>161</sup> *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589 (1983).

<sup>162</sup> *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

<sup>163</sup> See Civil Rights Division, U.S. Department of Justice, *Title VI Legal Manual* 48–53 (Sept. 1998).

<sup>164</sup> *Id.*

<sup>165</sup> See *Alexander v. Choate*, 469 U.S. 287, 292–94 (1985); *Guardians Ass'n*, 463 U.S. at 584 n.2 (White, J.); *id.* at 623 n.15 (Marshall, J.); *id.* at 642–45 (Stevens, Brennan, Blackmun, JJ.).

the Attorney General issued a memorandum to the heads of all Federal agencies with Title VI responsibilities stating that "[e]nforcement of the disparate impact provisions is an essential component of an effective civil rights compliance program."<sup>166</sup> The Attorney General directed the head of each Federal agency "to make certain that Title VI is not violated, [and] ensure that the disparate impact provisions in [the Title VI] regulations are fully utilized."<sup>167</sup>

Congress intended that its policy against discrimination by recipients of Federal assistance be implemented, in part, through administrative rulemaking.<sup>168</sup> Federal agencies were directed to promulgate standards in the form of rules, regulations, and orders, governing the administration of Title VI.<sup>169</sup> 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 the federal grantees that had produced those impacts."<sup>170</sup> EPA promulgated regulations that implement Title VI in 1973 and revised those regulations in 1984.<sup>171</sup>

EPA's regulations implementing Title VI adopt a discriminatory effects standard and expressly provide that:

A recipient shall not use criteria or methods of administering its programs which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin \* \* \* or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, [or] national origin \* \* \*.<sup>172</sup>

Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially neutral policies and practices that result in discriminatory effects violate EPA's Title VI regulations, unless it is shown that they are legitimately justified and there is no less discriminatory alternative.<sup>173</sup>

<sup>166</sup> See Memorandum from Janet Reno, Attorney General, to Heads of Departments and Agencies that Provide Federal Financial Assistance 1 (July 14, 1994) (titled *The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964*).

<sup>167</sup> *Id.*

<sup>168</sup> 42 U.S.C. 2000d–1.

<sup>169</sup> *Id.*

<sup>170</sup> *Alexander*, 469 U.S. at 293–94; see also Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining Discrimination*, 70 Geo. L.J. 1, 32 (1981) (concluding that Congress intended to confer wide discretion on agencies by giving them rule making authority).

<sup>171</sup> 38 FR 17968 (1973), as amended by 49 FR 1656 (1984) (codified at 40 CFR part 7).

<sup>172</sup> 40 CFR 7.35(b) (emphasis added).

<sup>173</sup> See Memorandum from Attorney General, *supra* note 7, at 1–2.

In enacting Title VI, Congress relied on the Fifth and Fourteenth Amendments to the Constitution, which guarantee due process and equal protection under laws.<sup>174</sup> In addition, Congress relied on its authority under the spending clause of the Constitution,<sup>175</sup> rather than its authority under the commerce clause.<sup>176</sup> Title VI was not intended to serve as a regulatory measure over state and local activities, rather, it allows the Federal government to require compliance with Title VI as a condition of receiving assistance. "No recipient [was] required to accept Federal aid. If he [did] so voluntarily, he must take it on the conditions on which it [was] offered."<sup>177</sup> EPA is unaware of any case law that overturned the Supreme Court's decision and invalidated Federal agencies' Title VI implementing regulations.

#### Interplay Between Guidance and Executive Order 12898

A number of commenters argued that EPA incorrectly relied on Executive Order 12898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations," as authority to issue the Interim Guidance.

Response: EPA did not rely on Executive Order 12898<sup>178</sup> to provide authority for issuing the *Interim Guidance*. EPA relied on Title VI itself. Title VI "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted significant social problems, and were readily enough remediable, to warrant altering the practices of the Federal grantees that had produced those impacts."<sup>179</sup> In addition, the Department of Justice (DOJ), which is charged with coordinating the Federal government's Title VI work,<sup>180</sup> issued

<sup>174</sup> For a further discussion of the legislative history of Title VI, see U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* 25-30 (June 1996).

<sup>175</sup> U.S. Const., art. I, section 8, cl. 1.

<sup>176</sup> U.S. Const., art. I, section 8, cl. 3.

<sup>177</sup> 110 Cong. Rec. S6546 (1964) (statement of Sen. Humphrey).

<sup>178</sup> Executive Order 12898, 59 FR 7629 (1994). Executive Order 12898, in part, directs Federal agencies to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin.

<sup>179</sup> *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); see also Charles F. Abernathy, Title VI and the Constitution: A Regulatory Model for Defining Discrimination, 70 Geo. L.J. 1, 32 (1981) (concluding that Congress intended to confer wide discretion on agencies by giving them rule making authority).

<sup>180</sup> Executive Order 12250, 45 FR 72995 (1980).

regulations that provide, in part, that "Federal agencies shall publish Title VI guidelines for each type of program to which they extend financial assistance."<sup>181</sup> Further, Executive Order 12250, which directed the Attorney General to coordinate the implementation and enforcement of Title VI by Federal agencies, also requires agencies to issue appropriate implementing directives either in the form of policy guidance or regulations that are consistent with requirements proscribed by the Attorney General.<sup>182</sup> Pursuant to that authority, EPA issued the Interim Guidance, and is now issuing the Draft Revised Investigation Guidance and the Draft Recipient Guidance.

#### Consistency With EPA's Title VI Regulations

Some commenters thought that the Interim Guidance was inconsistent with EPA's existing Title VI regulations at 40 CFR part 7.

Response: The *Interim Guidance* and the *Draft Revised Investigation Guidance* are both consistent with EPA's Title VI implementing regulations. The *Interim Guidance*, however, did not mention all of the elements of the investigative process described in the regulations because it only focused on certain elements of that process. As a result, some commenters may have had the mistaken impression that OCR did not intend to conform its investigations to the regulations. In order to remedy that problem, the *Draft Revised Investigation Guidance* makes clear that OCR will conform its investigations to EPA Title VI regulations and it includes a complete discussion of the regulations' complaint handling procedures, including the 30-day opportunity for recipients to respond to the allegations, as specified in 40 CFR 7.120(d)(iii). In addition, the *Draft Revised Investigation Guidance* eliminates the initial finding of disparate impact, which was included in the *Interim Guidance* primarily to promote informal resolution before a preliminary finding of noncompliance.

#### Interim Guidance and Notice-and-Comment Rulemaking

Some commenters argued that the *Interim Guidance* constitutes a rule and should have been issued pursuant to the Administrative Procedure Act and the requirements of the Small Business Regulatory Enforcement Fairness Act.

Response: OCR only intends the *Interim Guidance* and the *Draft Revised*

<sup>181</sup> 28 CFR 42.404(a).

<sup>182</sup> Executive Order 12250, section 1-402.

*Investigation Guidance* to provide a framework for the processing of complaints filed under Title VI. The draft guidance documents update the Agency's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discrimination in the environmental permitting context. Neither creates any new substantive rights nor establishes any binding legal requirements. Accordingly, both the *Interim Guidance* and the *Draft Revised Investigation Guidance* are expressly exempted from the notice-and-comment rulemaking requirements of the Administrative Procedure Act by section 553(b)(A).<sup>183</sup> Nonetheless, EPA is publishing the *Draft Revised Investigation Guidance* in the **Federal Register** and on EPA's Web site to solicit written public comment, and EPA will also hold a series of public listening sessions to obtain additional feedback.

With respect to impacts on small entities, including small businesses, because the *Interim Guidance* did not, and the *Draft Revised Investigation Guidance* will not, establish any binding legal requirements, there is no regulatory impact to any entity of any size. The analytical requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, only apply to certain regulations that impose an impact on those small entities directly regulated by a proposed or final regulation.<sup>184</sup> That is not the case here.

#### Scope and Applicability of the Guidance and Permit Modifications

EPA received comments regarding the scope of activities that the *Interim Guidance* is intended to address. Some felt that it should address a broader range of activities, such as allegations regarding discriminatory enforcement or discrimination in public participation processes. Other commenters felt that it should be narrowed by limiting its applicability to only new permits. EPA received numerous comments about permit modifications, some of which suggested that modifications should be covered by the guidance, and others of which suggested that all or some modifications should be excluded.

Response: In order to maximize the use of its limited resources, OCR felt

<sup>183</sup> 5 U.S.C. 553(b)(A) ("Except when notice or hearing is required by statute, this subsection does not apply \* \* \* to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.")

<sup>184</sup> *Motor & Equip. Mfg. Ass'n v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

that it should focus the *Interim Guidance* and the *Draft Revised Investigation Guidance* on environmental permitting because the majority of Title VI complaints filed with EPA allege discrimination associated with the issuance of environmental permits. Also, most of the complaints to date have made allegations of discriminatory effects; however, Title VI complaints may also allege discriminatory intent. The focus of the *Draft Revised Investigation Guidance* is on the more common effects allegations, rather than investigating allegations of discriminatory intent. Discriminatory intent complaints generally will be investigated by OCR under Title VI, EPA's Title VI regulations, and applicable intentional discrimination case law. EPA intends to issue guidance on other applications of Title VI, as appropriate, in the future.

Under the *Draft Revised Investigation Guidance*, OCR expects that any type of permit actions, including new permits, renewals, and modifications, could form the basis for an investigation if the permit allows existing levels of alleged adverse disparate impacts to continue unchanged or causes an increase (e.g., landfill capacity doubled).<sup>185</sup> For all types of permits, the mere filing of a Title VI complaint, whether or not accepted by OCR for investigation, will not stay or reverse the permitting action.

The *Draft Revised Investigation Guidance* states that permit modifications that are merely administrative, such as a facility name change, and that do not involve actions related to the impacts identified in the complaint, are not likely to form the basis for an investigation. If this were the case, OCR would likely close the complaint investigation.<sup>186</sup>

The *Draft Revised Investigation Guidance* addresses permits that either result in decreases in emissions or decreases in adverse disparate impacts. OCR will likely not initiate an investigation of complaints alleging discriminatory effects from emissions, including cumulative emissions, where the permit action that triggered the complaint significantly decreases overall emissions<sup>187</sup> at the facility. In addition, OCR would not initiate an investigation of allegations alleging discriminatory effects from emissions, including cumulative emissions of

pollutants or stressors of concern named in the complaint where the permit action that triggered the complaint significantly decreases all named pollutants of concern or all the pollutants OCR reasonably infers are the potential source of the alleged impact. Recipients should demonstrate<sup>188</sup> (not merely assert) that the decrease is actual and is significant.

If an investigation is conducted and OCR determines that the permit that triggered the complaint clearly leads to a significant decrease in adverse disparate impacts, then any voluntary compliance measures required by OCR take that decrease into account, because it is unlikely that particular permit is solely responsible for the adverse disparate impacts. While a specific complaint may be dismissed on the basis of a decrease, OCR may choose to conduct a compliance review of the recipient's relevant permit program either at that point in time or at some future date. (40 CFR 7.110 and 7.115). The analysis of whether discriminatory effects result from cumulative emissions, and any resulting remedy, would include consideration of the emissions from the permit actions that triggered the original complaint (i.e., the one that resulted in the decrease).

#### Federally Recognized Indian Tribes

One commenter asserted that Tribes should not be excluded from the *Interim Guidance* because they too receive Federal funds.

*Response:* The *Draft Revised Investigation Guidance* does not address complaints against EPA recipients that are Federally-recognized Indian tribes. That subject will be addressed by EPA in separate guidance because the applicability of Title VI to Federally-recognized tribes involves unique issues of Federal Indian law. EPA recently concluded a consultation with Federally-recognized tribes and now plans to address the issue in collaboration with DOJ.

#### Application of Title VI and the Interim Guidance to EPA Permitting Actions

Several comments concerned whether Title VI and the Interim Guidance applied to EPA.

*Response:* EPA is committed to a policy of nondiscrimination in its own permitting programs. The equal protection guarantee in the Due Process Clause of the U. S. Constitution prohibits the Federal government from engaging in intentional

discrimination.<sup>189</sup> Moreover, section 2-2 of Executive Order 12898<sup>190</sup> is designed to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. However, Title VI is inapplicable to EPA actions, including EPA's issuance of permits, because it only applies to recipients of Federal financial assistance, not to Federal agencies. The statute clearly defines "program or activity" to exclude Federal agencies.<sup>191</sup>

#### Consistency With State Permitting Procedures

A number of commenters suggested that the *Interim Guidance* was not fully consistent with state permitting procedures, and therefore inappropriate because it requires actions that may go beyond the authority provided in existing statutes and regulations.

*Response:* The *Interim Guidance* was issued to implement Title VI of the Civil Rights Act of 1964. It was not intended to implement environmental law. EPA believes that compliance with environmental laws does not constitute *per se* compliance with Title VI. Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. EPA recognizes that most permits control pollution, which is beneficial, but could, in some cases, still raise Title VI concerns because environmental laws do not account for disparity on the basis of race, color, or national origin. Title VI is concerned with how the effects of the programs and activities of a recipient are distributed based on race, color, or national origin. No Federal environmental laws address the issue of a disparity of impacts based on race, color, or national origin that may result from environmental permits.

<sup>189</sup> U.S. Const. amend. V; see also *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>190</sup> Section 2-2 provides: Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Executive Order 12898, 59 FR 7629 (1994).

<sup>191</sup> 42 U.S.C. 2000d-4a. See also *Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983) ("[Title VI] was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary."); *Williams v. Glickman*, 936 F. Supp. 1, 5 (D.D.C. 1996) ("Title VI does not apply to the programs conducted directly by federal agencies.").

<sup>185</sup> See *Draft Revised Investigation Guidance*, section VI.B.1.a.

<sup>186</sup> *Id.*

<sup>187</sup> Assessing a significant overall decrease would entail taking into account factors such as total quantity and relative toxicity of the emissions reductions.

<sup>188</sup> A recipient may use actual monitoring data, reasonable estimates, permit limits, parametric monitoring, or any other reliable means to demonstrate the decrease to the satisfaction of EPA.

Consequently, the scope of a recipient's Title VI obligation is not circumscribed by the framework established to carry out their environmental regulatory program.<sup>192</sup>

A recipient's Title VI obligation is layered upon its separate, but related obligations under the Federal or state environmental laws governing its environmental permitting program. Applicants for EPA financial assistance are required to submit an assurance with their applications stating that they will comply with the requirements of EPA's Title VI regulations.<sup>193</sup> Recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants, as a condition of receiving funding under EPA's continuing environmental programs. It is EPA's position that Title VI and EPA's implementing regulations act as a substantive bar to discrimination under programs operated by EPA assistance recipients.

A number of commenters argued that the key reasons why adverse disparate impacts might exist are controlled by factors outside the powers of state permitting agencies. One commenter cited factors such as market forces, stringency of environmental regulation and zoning, and land use laws. One commenter suggested that if disparate impact were found, EPA should curtail funding for agencies with authority over local land use planning, and not agencies with no control over siting or zoning.

*Response:* Some have argued that the issuance of environmental permits does not "cause" discriminatory effects.<sup>194</sup> Instead, they claim that local zoning decisions or siting decisions determine the location of the sources and the distribution of any impacts resulting from the permitted activities. However, in order to operate, the source's owners must both comply with local zoning requirements and obtain the appropriate environmental permit.

In the Title VI context, the issuance of a permit is the necessary act that allows the operation of a source in a given location that could give rise to the adverse disparate effects on individuals. Therefore, a state permitting authority has an independent obligation to comply with Title VI, which is a direct result of its accepting Federal assistance

and giving its assurance to comply with Title VI. In accordance with 40 CFR 7.35(b), recipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources. Accordingly, if the recipient did not issue the permit, altered the permit, or required mitigation measures, certain impacts that are the result of the operation of the source could be avoided. The recipient's operation of its permitting program is independent of the local government zoning activities.

#### Impact on States and Other Recipient's Environmental Programs

Some comments expressed concern about whether the *Interim Guidance* can be implemented consistently with environmental laws. In particular, some believed that the *Interim Guidance* may open recipients' permitting decisions to legal challenge. Others felt that the *Interim Guidance* requires recipients to address social and economic issues that they are not prepared to address.

*Response:* EPA prohibits discriminatory effects in programs and activities administered by its recipients. With regard to environmental permitting programs, the scope of coverage includes, but is not limited to, the screening of permit applications, the public participation process for permit issuance, and the adverse disparate impacts that may result from the permits that the recipient issues. Recipients use a variety of criteria or methods of administration to implement their permitting programs, and they have a duty to comply with their Title VI obligation in exercising their permitting authority. This means that recipients have an obligation under Title VI and EPA's regulations to ensure that their approval of a permit does not subject those protected under Title VI to unjustified discriminatory effects, including human health and environmental effects.

The *Interim Guidance* should not interfere with permitting programs that have properly been designed to meet Title VI obligations. The *Draft Recipient Guidance* suggests approaches and individual activities that recipients can develop to proactively address Title VI concerns in the permitting process.<sup>195</sup> In terms of states' susceptibility to legal challenges to permitting decisions, recipients are already subject to legal challenges by individuals who have a private right of action in court to enforce the nondiscrimination requirements in

Title VI and EPA's Title VI implementing regulations without exhausting their administrative remedies.<sup>196</sup>

EPA has issued the *Draft Revised Investigation Guidance* to clarify how EPA will handle complaint investigations and thereby reduce confusion. Neither the *Interim Guidance* nor the *Draft Revised Investigation Guidance* requires EPA recipients to take any action. The documents merely provide a framework for OCR to address certain complaints. Similarly, the *Draft Recipient Guidance* only offers suggestions for recipients to address Title VI concerns, but it does not require that recipients take any action. On the other hand, Title VI and EPA's Title VI implementing regulations prohibit entities from discriminating when they accept EPA's financial assistance. Rather than impeding a recipient's efforts to balance environmental protection with other considerations and to operate its permitting program, Title VI and EPA's regulations should help guide recipients in those efforts.

Neither the *Interim Guidance* nor the *Draft Revised Investigation Guidance* requires recipients to address social and economic issues that they are not authorized to address. EPA expects to only assess the adverse disparate impact that result from factors within the recipient's authority to consider as defined by applicable laws, including those that involve broader cross-cutting matters.<sup>197</sup>

#### Public Participation and Stakeholder Input in the Permitting Process

Several comments concerned the relationship between the public participation processes required by environmental law and the process discussed in the *Interim Guidance*.

*Response:* Although the *Interim Guidance* does not specify how to approach Title VI concerns in the public participation process, the *Draft Recipient Guidance* provides suggestions and techniques that a recipient can use to develop procedures for its permitting process to ensure a non-discriminatory public participation process.<sup>198</sup> EPA recognizes that recipients have different resources, organizational structures, and issues. Therefore, if a recipient elects to develop or modify its public participation process, it is up to the

<sup>192</sup> Although not determinative, compliance with certain types of environmental standards may play a role in a Title VI investigation. See *Draft Revised Investigation Guidance* section VI.B.4.b.

<sup>193</sup> 40 CFR 7.80(a)(1).

<sup>194</sup> If an EPA recipient is involved in the siting of a facility, EPA's Title VI regulations also prohibit recipients from choosing a site that has discriminatory effects. 40 CFR 7.35(c).

<sup>195</sup> See *Draft Recipient Guidance*, section II.

<sup>196</sup> See *Powell v. Ridge*, 189 F.3d 387, 399 (3rd Cir.), cert. denied, 120 S. Ct. 579 (1999).

<sup>197</sup> See *Draft Revised Investigation Guidance*, section VI.B.2.a.

<sup>198</sup> See *Draft Recipient Guidance*, section II.B.2. (discussing factors that contribute to effective and meaningful public participation).



recipient to choose which suggestions or techniques are most suitable to address its needs. It is not limited to adopting the suggestion or technique mentioned in the *Draft Recipient Guidance*. If OCR accepts a complaint regarding a recipient's public participation process, OCR expects to give due weight<sup>199</sup> to a permitting program if it ensures a non-discriminatory public participation process.<sup>200</sup>

#### Need for External Guidance

Some commenters requested that EPA develop guidance for recipients to assist them in their efforts to comply with Title VI and EPA's Title VI regulations.

*Response:* EPA encourages recipients to address Title VI issues early in the permitting process to reduce the likelihood that Title VI complaints will be filed after a permit has been issued. Although the *Interim Guidance* does not provide a framework for addressing Title VI concerns before the permit has been issued, the *Draft Recipient Guidance* provides recipients with suggestions that they can voluntarily use to address potential Title VI problems and reduce the likelihood of Title VI complaints.

The *Draft Recipient Guidance* offers several suggestions to assist recipients in addressing those issues, including: (1) Development of new public participation procedures, or modification of existing procedures, to better incorporate and address the public's concerns;<sup>201</sup> (2) creation of an approach to identify areas where adverse impacts disparately affect people on the basis of race, color, or national origin, and to reduce those impacts over time;<sup>202</sup> and (3) performance of additional Title VI-related analyses and actions in some permitting decisions to address Title VI concerns.<sup>203</sup> If recipients decide to develop Title VI programs, they may take the steps they deem appropriate to address their particular Title VI concerns and they are not limited to the suggestions offered by the *Draft Recipient Guidance*.

#### Definition of Terms

A variety of commenters requested that EPA provide more precise definitions of terms used in the *Interim Guidance* (e.g., disparate impact,

affected population, mitigation). These commenters argued that because the *Interim Guidance* lacked precise definitions, they could not provide a reasonable critique. Commenters identified a number of terms that they believed would benefit from further definition and still other terms and phrases for which clarification was sought.

*Response:* In the *Draft Revised Investigation Guidance*, EPA provides more clarity and gives definition to many terms presented in the *Interim Guidance* by including examples within the text, as well as a glossary of terms as an attachment. However, the exact parameters of some terms, such as what constitutes a adverse impact, appropriate mitigation, and acceptable justification, will depend upon case-specific circumstances. EPA has also eliminated other terms that may have been confusing, ambiguous, or unnecessary.

#### Unfunded Mandates Reform Act

Some commenters felt that the *Interim Guidance* will impose an unfunded mandate on states if they must revise existing permitting processes to conform to the guidance.

*Response:* The Unfunded Mandates Reform Act of 1995 (UMRA) applies when an agency decides to take regulatory action through rulemaking.<sup>204</sup> OCR issued the *Interim Guidance* as a non-binding policy statement because the *Interim Guidance* (and the *Draft Revised Investigation Guidance*) merely provide a framework for the processing of Title VI administrative complaints. Neither document creates any new substantive rights nor establishes any binding legal requirements.

Moreover, even if OCR has issued the *Interim Guidance* as a rule, the scope of UMRA's coverage does not include the provisions of a proposed or final Federal regulation that establish or enforce nondiscrimination requirements, such as those in Title VI.<sup>205</sup> If one or more provisions of a Title VI-related rule fell outside this exception, the Agency would be required to assess the effects of these regulatory provisions on state, local, and tribal governments and the private sector, pursuant to Title II of UMRA.

The *Draft Recipient Guidance* was created to assist state and local governments in their efforts to address Title VI concerns. Both draft guidance documents were developed with

significant input from state and local governments. EPA plans to assist state efforts by sharing methodologies and information pertaining to the adverse disparate impact assessment whenever practicable.

#### Brownfields and Clean-Ups

Several comments concerned the effect of the *Interim Guidance* on brownfields redevelopment, economic development, and clean-up activities.

*Response:* EPA does not believe that the *Interim Guidance* or the *Draft Revised Investigation Guidance* discourage brownfield redevelopment or encourage greenfield development. In fact, in a recent report analyzing the interaction between Title VI and brownfields, EPA found that "claims that EPA's Interim Title VI Guidance would hinder brownfields redevelopment are largely unfounded. \* \* \* It is apparent from the interviews conducted for these case studies that while there are many potential issues that can forestall redevelopment at brownfields sites, Title VI is not high on the list of concerns."<sup>206</sup> Also, no Title VI complaints have been filed regarding EPA brownfields projects.

EPA believes that the implementation of civil rights and environmental laws is compatible and consistent with state and local recipients' efforts to achieve sustainable economic development. Addressing Title VI concerns in the permitting process does not prevent sustainable development, but rather ensures responsible development that protects the basic right of every citizen not to be discriminated against. EPA is firmly committed to continuing its work with community leaders, state and local governments, and businesses to facilitate economic development while ensuring strong protections of public health, the environment, and basic civil rights.

Both the *Interim Guidance* and the *Draft Revised Investigation Guidance* address Title VI issues related to environmental permitting decisions. EPA may, if appropriate, develop future guidance relating to Title VI and clean-up activities.

#### Issues Regarding the Overall Framework for Processing Complaints

##### Involvement of Additional Parties

Several commenters urged that additional parties be involved in the evaluation of complaints including the permit applicant, the affected

<sup>199</sup> See *Draft Revised Investigation Guidance*, Appendix A (defining "due weight").

<sup>200</sup> See *Draft Recipient Guidance*, section II.B.2. (discussing the circumstances under which OCR might accord a public participation process due weight).

<sup>201</sup> See *id.*, section II.B.2.

<sup>202</sup> See *id.*, section II.A.2.

<sup>203</sup> See *id.*, section II.A.3.

<sup>204</sup> Public Law 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. 1501 *et seq.* (Supp. III 1998)).

<sup>205</sup> 2 U.S.C. 1503(2).

<sup>206</sup> Office of Solid Waste and Emergency Response, U.S. EPA, *Brownfields Title VI Case Studies: Summary Report 23* (1999).

community, the complainant, and the recipient of Federal assistance.

*Response:* Depending upon the specifics of each complaint, OCR expects to involve a variety of parties in its investigations of Title VI complaints. OCR plans to work closely with recipients to ensure that the Agency has a complete and accurate record, and a full understanding of the recipient's position.<sup>207</sup>

Once a complaint is accepted for investigation by OCR, complainants may play an important role in the administrative process; however, that role is determined by the nature and circumstances of the claims.<sup>208</sup> Complainants will likely be asked to allow OCR to conduct interviews and to collect a variety of documents during the course of the investigation. Also, complainants may play an important role in the informal resolution process. However, it is important to note that EPA does not represent the complainants, but rather the interests of the Federal government, in ensuring nondiscrimination by its recipients. Other members of the community could be involved in a similar manner.

The permittee may also be asked to provide information to assist in the investigation of the complaint. The recipient may wish to notify the permittee about the investigation, particularly if potential mitigation measures may involve the permittee. During several investigations, permit applicants have sent information to OCR that they believe is relevant. In those instances, OCR has reviewed the information and placed it in the investigatory file.

#### Submission of Information by Recipients and Complainants

Some comments raised questions about the points in the investigation process when recipients and complainants should provide or receive information.

*Response:* EPA's Title VI implementing regulations provide the recipient with several opportunities to respond to and/or to rebut both a complaint and OCR's findings. It is both up to the recipient and in the recipient's interest to provide a rebuttal as early as possible because it might help to quickly resolve the complaint. As the *Draft Revised Investigation Guidance* explains, the recipient may make a written submission responding to,

<sup>207</sup> See *Draft Revised Investigation Guidance*, section II.B.1. (discussing when recipients can provide information to OCR).

<sup>208</sup> See *Draft Revised Investigation Guidance*, section II.B.2. (providing additional discussion about a complainant's role in OCR's investigation).

rebutting, or denying the allegations raised in a complaint within 30 calendar days of receiving notification that a complaint has been accepted.<sup>209</sup> OCR will then attempt to resolve the complaint informally, during which time the recipient will have a second opportunity to state its position.

If OCR later makes a preliminary finding of noncompliance, the recipient may then submit a written response, within 50 calendar days of receiving the preliminary finding, demonstrating that the preliminary findings are incorrect or that compliance may be achieved through steps other than those recommended by OCR.<sup>210</sup> Finally, if OCR initiates procedures to deny, annul, suspend, or terminate EPA assistance, a recipient may request a hearing before an administrative law judge (ALJ).<sup>211</sup> If the ALJ's decision upholds OCR's finding of noncompliance, the recipient may then file exceptions with the Administrator.<sup>212</sup>

Once a complaint has been accepted for investigation by OCR, the complainants may play an important role in the investigative process, as well as in the informal resolution process; however, that role is determined by the nature and circumstances of the claims.<sup>213</sup> EPA's Title VI regulations and administrative investigations are not designed to create an adversarial relationship between the complainant and the recipient. Rather, the process should be viewed as EPA investigating allegations of improper use of EPA financial assistance.

Because the process is not adversarial, the complainants do not have the burden of proving that their allegations are true. Investigating allegations and determining compliance is EPA's job. However, complainants are encouraged to provide information that is helpful to the investigation and resolution of the complaint. It is important to note that EPA does not represent the complainants, but rather the interests of the Federal government in ensuring nondiscrimination by its recipients.

The complainants may provide documentary evidence in support of their allegations as attachments to the complaint. Recipients may include evidence to support their claims in their response to the allegations. In addition, during the course of the investigation,

<sup>209</sup> See *Draft Revised Investigation Guidance*, section II.A.1. See also 40 CFR 7.120(d)(1).

<sup>210</sup> See *Draft Revised Investigation Guidance*, section II.A.4. See also 40 CFR 7.115(d).

<sup>211</sup> 40 CFR 7.130(b)(2).

<sup>212</sup> 40 CFR 7.130(b)(3).

<sup>213</sup> See *Draft Revised Investigation Guidance*, section II.B.2.

complainants and recipients may seek to submit additional relevant information that comes to their attention. OCR must balance the need for a thorough investigation with the need to complete the investigation in a timely manner. Therefore, at the conclusion of interviews with the complainants, recipients, or other witnesses, OCR expects to ask each to submit, within 14 calendar days of the interview, any additional information that they would like considered as OCR drafts its investigative report.

#### Ability for Complainants to Appeal

One commenter requested that EPA provide an administrative appeal process for complainants who believe their complaints have been inappropriately dismissed.

*Response:* The Title VI administrative process is not an adversarial one between the complainant and recipient. As a result, the complainants do not have the burden of presenting evidence to support their allegations or proving that their allegations are true. EPA, however, encourages complainants to provide as much information as possible to assist in the investigation. Investigating allegations and determining compliance is EPA's responsibility. EPA does not represent the complainants, but rather the interests of the Federal government in ensuring nondiscrimination by its recipient. As a result, there are no appeal rights for the complainant built into EPA's Title VI regulatory process. Complainants, however, may be able to challenge the recipient's action or EPA's ultimate finding in court.

#### Accepting and Rejecting Complaints

Several commenters suggested that EPA raise the threshold for accepting complaints.

*Response:* The criteria for accepting and rejecting complaints are described in EPA's Title VI regulations, which are based on DOJ's model regulations.<sup>214</sup> In addition, Executive Order 12250 requires that agencies' Title VI implementing directive "be consistent with the requirements prescribed by the Attorney General \* \* \* and shall be subject to the approval of the Attorney General \* \* \*." As a result, EPA's Title VI regulations are very similar to the criteria applied by other agencies for accepting and rejecting Title VI complaints.

OCR intends to accept and investigate a complaint if it: (1) Is written; (2) describes the alleged discriminatory act(s) of an EPA recipient that violates

<sup>214</sup> 28 CFR 42.401-42.415.

EPA's Title VI regulations; (3) is filed within 180 calendar days of the alleged discriminatory act(s); and (4) is filed by a person or member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or their authorized representative.<sup>215</sup>

EPA regulations define a recipient as "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient."<sup>216</sup> As mentioned above, Title VI allows the Federal government to require compliance with Title VI as a condition of receiving financial assistance. Acceptance of EPA financial assistance creates an obligation on the recipient to comply with the regulations for the duration listed below:

- For assistance involving real property or structures on the property, the obligation attaches "during the period the real property or structures are used for the purpose for which EPA assistance is extended, or for another purpose in which similar services or benefits are provided."<sup>217</sup>
- For assistance in the form of personal property, the obligation attaches "for so long as [the recipient] continues to own or possess the property."<sup>218</sup>
- In all other cases, the obligation attaches "for as long as EPA assistance is extended."<sup>219</sup>

EPA's Title VI administrative complaint process is not designed to be an adversarial one between the complainant and the recipient. Rather, the complainant is providing EPA with information about potential violations of Title VI and EPA's implementing regulations, so that the Agency can investigate whether its funds are being spent in a discriminatory manner. Raising the threshold for accepting complaints for investigation would likely impose a burden of proof on Title VI complainants at EPA that is not imposed by other Federal agencies and would be inappropriate for the non-adversarial scheme established by EPA's Title VI regulations.

#### Use of Permit Appeal Processes

Other comments concerned the relationship between Title VI

complaints filed with EPA and permit appeals filed with the permitting authority. Several commenters suggested Title VI complaints be handled through permitting processes.

*Response:* The *Interim Guidance* indicated EPA's support for complainants use of recipients' permit appeal process.<sup>220</sup> To encourage early resolution of Title VI issues, OCR expects to consider a complainant's pursuit of its Title VI concerns through the recipient's administrative appeals process when evaluating a request to waive the 180-day timeliness requirement for good cause.<sup>221</sup>

Similarly, the *Draft Revised Investigation Guidance* states that OCR will generally dismiss complaints without prejudice (*i.e.*, OCR may dismiss the complaint, but that dismissal would not prohibit the complainant from re-filing its complaint at a later date) if the issues raised in the complaint are the subject of either ongoing administrative permit appeals, or litigation in Federal or state court.<sup>222</sup> In such cases, OCR believes that it should await the results of the permit appeal or litigation by waiving the time limit, rather than conducting a simultaneous investigation on the basis of facts that may change due to the outcome of the administrative appeal or litigation. OCR expects to notify the complainant that it may re-file the complaint within a reasonable time, generally not more than 60 calendar days after the conclusion of the administrative appeal process. OCR would then likely make a determination, after considering factors relevant to the particular case, whether to waive the 180-day regulatory time frame.

If a complaint is premature, the *Draft Revised Investigation Guidance* states that OCR expects to notify the complainant that the complaint is premature and dismiss the complaint without prejudice. If the complainant is not satisfied that the Title VI nondiscrimination requirements have been met when the permit is issued, the complainant can re-file its complaint if and when the permit is issued. In addition, OCR will provide the recipient with the information contained in the complaint to facilitate the recipient's ability to appropriately address the concerns raised in the complaint during the permitting process.<sup>223</sup>

OCR encourages communities, recipients, and permittees to identify and address potential Title VI problems as early as possible. In most cases, that should occur before the permitting process begins. In other cases, it may occur during the permitting process. The *Draft Recipient Guidance* suggests that recipients develop approaches to deal with Title VI issues prior to or during implementation of their existing permitting procedures.<sup>224</sup> Such approaches could involve the modification of existing public participation processes in the recipient's permitting program, or the establishment of a plan to find and remedy potential disparate impacts. In some cases, however, even where such a plan is in place, if a complainant feels that a recipient has violated Title VI or EPA's implementing regulations, OCR may have to conduct an investigation independent of the current permitting process.

Imposing a requirement that complainants use all of the recipient's available permit appeal processes prior to filing a Title VI complaint would be inconsistent with the structure of Title VI. Courts have held that those who believe they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA.<sup>225</sup> In other words, Title VI does not require complainants to utilize the Federal administrative process, so it would seem inconsistent to require complainants to utilize state administrative processes. Nonetheless, as discussed above, OCR strongly encourages all parties to seek early resolution of their Title VI concerns.

#### 180-Day Time Period for Filing Complaints: Start of Clock

Commenters also voiced opinions on when the 180-day period should begin to run and whether the *Interim Guidance's* position on that issue was consistent with certain environmental permitting requirements.

*Response:* Title VI imposes obligations that are related to, but separate from, those imposed by environmental law. As a result, the 180-day period for filing complaints under EPA's Title VI regulations may be triggered by certain actions that do not necessarily match similar aspects of

<sup>215</sup> See *Draft Revised Investigation Guidance*, section III.A.

<sup>216</sup> 40 CFR 7.25.

<sup>217</sup> 40 CFR 7.80(a)(2)(i).

<sup>218</sup> 40 CFR 7.80(a)(2)(ii).

<sup>219</sup> 40 CFR 7.80(a)(2)(iii).

<sup>220</sup> See *Interim Guidance*, at 6-7.

<sup>221</sup> 40 CFR 7.120(b)(2); *Draft Revised Investigation Guidance*, section III.B.2.

<sup>222</sup> See *Draft Revised Investigation Guidance*, section III.B.3.

<sup>223</sup> See *Draft Revised Investigation Guidance*, section III.B.4.

<sup>224</sup> See *Draft Recipient Guidance*, section II.A.

<sup>225</sup> See *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999) (finding that citizens have a private right of action under agency's regulations promulgated under section 602 of Civil Rights Act of 1964).

environmental laws (*i.e.*, as explained below, Title VI's 180-day period for filing a complaint begins when the permit is issued, but, for the purposes of the environmental law, the issuance of the permit might not have the same significance). Nonetheless, EPA expects that the two approaches will be compatible because neither the filing of nor the investigation of a complaint alleging a Title VI violation impacts the effectiveness of a permit. A permit is not automatically stayed as a result of the filing or acceptance for investigation of a Title VI complaint.

Complaints alleging discriminatory effects arising out of a permit should be filed within 180 calendar days of the issuance of the permit, while complaints alleging public participation issues should be filed within 180 calendar days of the alleged discriminatory act in the public participation process.<sup>226</sup> If a complaint is filed more than 180 calendar days after the alleged discriminatory act occurred, OCR will generally reject it as untimely. In general, as discussed above, OCR will dismiss complaints without prejudice<sup>227</sup> where there are ongoing administrative appeals or litigated issues in Federal or state courts regarding the same permit.

#### 180-Day Time Period for Filing Complaints: Duration, Waivers and Effect on Permittees

A number of comments related to the length of the 180-day time period for filing. Some felt that it is too long, while others thought it is too short.

*Response:* DOJ is responsible for coordinating the implementation and enforcement by Executive agencies of Title VI.<sup>228</sup> In fulfilling its responsibilities, DOJ published regulations entitled, "Nondiscrimination in Federally Assisted Programs-Implementation of Title VI of the Civil Rights Act of 1964."<sup>229</sup> Among other things, these regulations discuss the way in which investigations should be conducted, and explain, regarding complaints, that: "A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee."<sup>230</sup>

<sup>226</sup> See *Draft Revised Investigation Guidance*, section III.B.1.

<sup>227</sup> In other words, OCR may dismiss the complaint, but that dismissal would not prohibit the complainant from re-filing its complaint at a later date.

<sup>228</sup> See Executive Order 12250, 45 FR 72995 (1980) (section 1-2).

<sup>229</sup> See 28 CFR 42.101 *et seq.*

<sup>230</sup> 28 CFR 42.107(b).

This regulation forms, in part, the basis for EPA's own regulations, which require a complaint to be filed within 180 days. As mentioned above, neither the filing nor the investigation of a complaint alleging a Title VI violation impacts the effectiveness of a permit.

#### Timing and Sequencing Issues

*Issue:* One commenter suggested that Title VI complaints should be filed as outlined in 40 CFR part 122, which concerns the issuance of permits under the National Pollutant Discharge Elimination System. Several commenters expressed concern about when recipients would be notified by EPA about complaints and how the time frame for voluntary compliance works. Some commenters were particularly concerned about the "initial finding of a disparate impact" described in the Interim Guidance.

*Response:* EPA's regulations, which are based on DOJ's model regulations,<sup>231</sup> are specifically intended to address the processing of Title VI complaints. Therefore, OCR cannot adopt the procedures described in other EPA regulations. The *Interim Guidance* did not mention all of the time frames for conducting complaint investigations and for attaining compliance set forth in EPA's Title VI regulations. To avoid confusion, the *Draft Revised Investigation Guidance* addresses all of the time frames specified in EPA's Title VI implementing regulations.<sup>232</sup> Accordingly, the *Draft Revised Investigation Guidance* states that OCR will notify the recipient of a complaint filed against it within five calendar days of OCR's receipt of the complaint.<sup>233</sup> The 10-day time frame for a recipient to come into voluntary compliance is also a requirement under EPA's Title VI regulations.<sup>234</sup> Recognizing that elimination of adverse disparate impacts within 10 days may not be achievable, OCR may postpone proceedings to deny, annul, suspend, or terminate EPA assistance, if the recipient has demonstrated a good faith effort (*e.g.*, signed a voluntary compliance agreement) to come into compliance.

Concerning the comment about the initial finding of disparate impact, the *Draft Revised Investigation Guidance* eliminates that part of the investigation process. OCR suggested the initial finding provision primarily to promote

<sup>231</sup> 28 CFR 42.408 (DOJ Complaint Procedures); 40 CFR 7.120 (EPA Complaint Investigation).

<sup>232</sup> See *Draft Revised Investigation Guidance*, sections II & III.

<sup>233</sup> See *id.*, section II.A.1; see also, 40 CFR 7.120(c).

<sup>234</sup> See 40 CFR 7.115(e); *Draft Revised Investigation Guidance*, section II.A.6.

informal resolution before a preliminary finding of noncompliance, but found that the provision created confusion. Instead, EPA now encourages informal resolution throughout the process, but particularly early in the process.

*Issue:* One commenter suggested that EPA impose a time limit for conducting a disparate impact analysis.

*Response:* EPA's Title VI implementing regulations state that OCR will provide its preliminary findings on a complaint within 180 days from the start of the complaint investigation.<sup>235</sup> As OCR gains more experience with conducting the necessary analyses, we expect to reduce the time that it takes.

In addition, if the recipient takes steps to proactively address the Title VI concerns raised in a complaint, such as performing an analysis of the potential impacts, OCR may grant due weight to those analyses and the investigative process could be completed more quickly. The *Draft Revised Investigation Guidance* describes the factors OCR will use to evaluate the appropriateness and validity of a recipient's analysis and to assess the overall reasonableness of its conclusions.<sup>236</sup> The *Draft Revised Investigation Guidance* also explains that more weight will be given to analyses that are relevant to the Title VI concerns in the complaint under investigation and have sufficient depth, breadth, completeness, and accuracy. Where a recipient or complainant submits a relevant analysis, OCR may give the results of that study due weight and rely on it in determining whether the recipient is in compliance with EPA's Title VI regulations.

*Issue:* Some commenters indicated that under EPA's Title VI regulations, after the complainant files a valid Title VI claim, the recipient should be given an opportunity to justify its decision and thereafter the complainant may identify a less discriminatory alternative.

*Response:* Recipients are afforded several specific opportunities to provide information to OCR before and during an investigation. For example, upon receiving notification of OCR's receipt of the complaint, the recipient may make a written submission responding to, rebutting, or denying the allegations in the complaint within 30 calendar days.<sup>237</sup> In any of the recipient's submissions, it may provide a justification for its decision.

Title VI burdens of proof in litigation inform EPA of what information is

<sup>235</sup> 40 CFR 7.115(c)(1).

<sup>236</sup> See *Draft Revised Investigation Guidance*, section V.B.

<sup>237</sup> 40 CFR 7.120(d)(1)(iii).

necessary to decide whether Title VI has been violated. In litigation, a plaintiff (*i.e.*, a person or persons who believe they have been discriminated against) must show that an alleged act has a disparate impact on an identifiable population defined by race, color, or national origin.<sup>238</sup> If the disparate impact is shown, the defendants (*i.e.*, recipients) must prove that the activity is justified by a substantial legitimate justification.<sup>239</sup> If the recipient's justification meets the test, the plaintiff may show that there is a less discriminatory alternative that meets the same objective.<sup>240</sup> The recipient may rebut this by showing that the alternatives do not meet its legitimate objectives.<sup>241</sup> If the recipient cannot rebut the plaintiff's showing, then there is a violation of Title VI.<sup>242</sup> OCR intends to apply a similar approach to its investigations.

The investigation of Title VI administrative complaints by OCR does not involve an adversarial process, as in litigation, between the complainant and the recipient. Rather, it should be viewed as EPA investigating allegations that EPA financial assistance is being used improperly. Consequently, the complainants do not have the burden of proving that their allegations are true and are not obligated to offer less discriminatory alternatives. Instead, EPA has the responsibility to determine whether a violation exists and, where appropriate, to uncover less discriminatory alternatives. Nonetheless, EPA encourages complainants to provide whatever relevant information they may have.

#### Filing of Complaints Issues

*Issue:* Some comments involved the question of who may file a Title VI administrative complaint.

*Response:* It is the general policy of OCR to investigate all administrative complaints concerning the conduct of a recipient of EPA financial assistance<sup>243</sup> that satisfy the jurisdictional criteria in EPA's implementing regulations.<sup>244</sup> EPA's regulations provide that complaints may only be filed by:

(a) A person who was allegedly discriminated against in violation of EPA's Title VI regulations;

(b) A person who is a member of a specific class of people allegedly discriminated against in violation of EPA's Title VI regulations; or

(c) A party that is authorized to represent a person or specific class of people allegedly discriminated against in violation of EPA's Title VI.

In some cases, a person or a class of people allegedly discriminated against may select a representative from another geographic area. The regulations allow complainants to take such action.<sup>245</sup>

*Issue:* One commenter stated that permittees should not be allowed to continue construction of a new facility while a complaint is being investigated.

*Response:* EPA's Title VI regulations do not provide for staying a permit during the pendency of an investigation. If the permit has been validly issued under the recipient's environmental program, then the facility may begin permitted activities. However, should discriminatory effects be found as a result of a Title VI investigation, mitigation measures by the recipient may be necessary. Because, as the *Draft Revised Investigation Guidance* states, EPA believes it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists, denial of the permit at issue will not necessarily be an appropriate solution.<sup>246</sup> Often, Title VI concerns are raised where a number of sources are contributing to the adverse effects that communities believe they are suffering. Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions.

#### Informal Resolution

One commenter argued that the Interim Guidance gave EPA too much flexibility with regard to the use of informal resolution.

*Response:* EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable.<sup>247</sup> Therefore, OCR will endeavor to facilitate the use of informal resolution to resolve pending Title VI complaints and to reduce the likelihood of future Title VI complaints. OCR intends to encourage informal resolution particularly in the notification of receipt of a complaint and again with acceptance of a complaint for investigation. Informal

resolution may follow either of the two approaches discussed below.<sup>248</sup>

The first approach would be to encourage recipients and complainants to try to resolve the issues between them. If the informal resolution results in withdrawal of the Title VI administrative complaint, EPA will dismiss the complaint, notify the recipients and complainants, and close the file. To the extent resources are available, EPA expects to provide support for such informal resolution efforts. The second approach would be for OCR and the recipient to reach an agreement on relief. In either case, other parties may be involved depending upon the facts and circumstances of the complaint.

In appropriate situations, EPA expects the use of alternative dispute resolution (ADR) techniques to informally resolve the complaint. ADR includes a variety of approaches including the use of a third party neutral acting as a mediator or the use of a structured process through which the parties can participate in shared learning and creative problem solving to reach a consensus. The recipient, as a result of its efforts to informally resolve a Title VI complaint with complainants or with OCR, may elect to submit a plan for mitigating a disparate impact.<sup>249</sup>

OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before filing a formal finding of noncompliance. However, it is OCR's responsibility to ensure nondiscrimination in the programs or activities of recipients to whom EPA provides financial assistance. Therefore, an investigation may be needed to determine the appropriate relief and/or corrective action.

#### Suspension of Federal Assistance

Some commenters asked EPA to explain EPA's authority to terminate funding and to specify which Federal funds could be affected by a finding of noncompliance with Title VI and how that process would proceed.

*Response:* Whenever possible, OCR will attempt to resolve complaints informally, as described above.<sup>250</sup> If this fails and OCR makes a formal determination of noncompliance and the recipient does not voluntarily comply, OCR must start proceedings to deny, annul, suspend, or terminate EPA assistance,<sup>251</sup> or "use any other means

<sup>238</sup> See *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984).

<sup>239</sup> *Damian*, 608 F. Supp. at 127.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*; see also *Sandoval v. L.N. Hagan*, 7 F. Supp. 2d 1234, 1298 (M.D. Ala. 1998) (plaintiffs prevailed in proving a Title VI violation by offering an effective less discriminatory alternative).

<sup>243</sup> See 40 CFR 7.15.

<sup>244</sup> See 40 CFR 7.120.

<sup>245</sup> See *Draft Revised Investigation Guidance*, section III.A. (describing criteria for accepting or rejecting complaints).

<sup>246</sup> *Id.*, sections I.C. and IV.B.

<sup>247</sup> 40 CFR 7.120(d)(2).

<sup>248</sup> See *Draft Revised Investigation Guidance*, section IV.A.

<sup>249</sup> See *id.*, section IV.B.

<sup>250</sup> 40 CFR 7.120(d)(2). See *Draft Revised Investigation Guidance*, section IV.

<sup>251</sup> 40 CFR 7.115(e), 7.130(b).

authorized by law to get compliance, including a referral of the matter to the Department of Justice.”<sup>252</sup>

Even if OCR decides to deny, annul, suspend, or terminate assistance, the recipient is entitled to a hearing on this decision before an EPA ALJ.<sup>253</sup> If the ALJ’s determination is not favorable to the recipient, the recipient may appeal the ALJ’s determination to the Administrator.<sup>254</sup> Thus, OCR’s complaint resolution process is not one that immediately contemplates suspending EPA assistance, but one that resorts to suspending assistance when informal resolution and voluntary compliance efforts are not possible or have failed.

In the event OCR attempts to deny, annul, suspend, or terminate assistance, EPA’s Title VI implementing regulations only concern EPA assistance.<sup>255</sup> The regulations do not give EPA authority to pursue denying, annulling, suspending, or terminating Federal financial assistance from sources outside EPA. Accordingly, both the *Interim Guidance* and the *Draft Revised Investigation Guidance* refer only to initiating procedures to deny, annul, suspend, or terminate EPA assistance.<sup>256</sup>

Title VI prohibits discrimination in “any program or activity receiving Federal financial assistance.”<sup>257</sup> The Civil Rights Restoration Act of 1987<sup>258</sup> amended Title VI and defined a “program” or “activity” to include, among other things, “all of the operations of \* \* \* a department, agency, special purpose district, or other instrumentality of a State or of a local government \* \* \* any part of which is extended Federal financial assistance.”<sup>259</sup> Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act, which historically have not been grant-funded by EPA, or the actions they take under programs that do not derive their authority from EPA statutes (e.g., state environmental

assessment requirements), are part of a program or activity covered by EPA’s regulations if the recipient receives any funding from EPA.

EPA’s regulations also limit the scope of the decision to deny, annul, suspend, or terminate assistance to “the particular applicant or recipient who was found to have discriminated, and shall be limited in its effect to the particular program or the part of it in which the discrimination was found.”<sup>260</sup>

EPA has some discretion about how to enforce Title VI and EPA’s implementing regulations, but not about whether to enforce. In July 1994, the Attorney General issued a memorandum to the heads of all Federal agencies with Title VI responsibilities stating that “[e]nforcement of the disparate impact provisions is an essential component of an effective civil rights compliance program.”<sup>261</sup> The Attorney General directed the head of each Federal agency “to make certain that Title VI is not violated, [and] ensure that the disparate impact provisions in [the Title VI] regulations are fully utilized.”<sup>262</sup>

#### Permit Renewals Issues

*Issue:* Some commenters asked whether EPA’s approach to renewals is consistent with environmental permitting requirements.

*Response:* Although there may be some overlapping of legal principles and requirements, Title VI and EPA’s Title VI regulations impose separate requirements on recipients from those of environmental statutes and their implementing regulations. Even if environmental laws mandate different treatment for new permits, permit renewals, and permit modifications, EPA’s Title VI regulations do not require different review of these actions.

Under the *Draft Revised Investigation Guidance*, renewals and modifications, like new permits, would be available to form the basis for an initial investigation. Such an approach will assist recipients in achieving an equitable distribution of their efforts to meet Title VI’s requirements. In addition, the inclusion of renewals and modifications improves the ability to consider existing adverse disparate impacts. However, where OCR is not likely to initiate an investigation where: (1) A complaint alleges discriminatory effects from emissions, including cumulative emissions, and the permit action that triggered the complaint

significantly decreases overall emissions<sup>263</sup> at the facility or (2) where a complaint alleges discriminatory effects from emissions, including cumulative emissions, of pollutants or stressors of concern (pollutants of concern) named in the complaint, and the permit action that triggered the complaint significantly decreases all named pollutants of concern or all the pollutants OCR reasonably infers are the potential source of the alleged impact.

Regardless of the type of permit involved, if a complaint is filed with OCR alleging that a recipient violated Title VI or EPA’s regulations, OCR’s decision to accept or reject the complaint would be based on the standard jurisdictional criteria provided in EPA’s Title VI regulations.<sup>264</sup> If a complaint is accepted, OCR expects to evaluate the impact of the permitting action. Permitting actions that reduce adverse impacts from the source are not likely to form the basis for a finding of noncompliance with Title VI. In addition, modifications, such as a facility name change or a change in a mailing address, that do not involve actions related to the stressors<sup>265</sup> identified in the complaint generally will not form the basis for a finding of noncompliance and will likely be dismissed.<sup>266</sup>

*Issue:* Other commenters argued that the application of Title VI to renewals should consider whether the demographics of the area in question have changed.

*Response:* EPA’s Title VI regulations direct OCR to investigate actions by recipients allegedly involving intentional discrimination or resulting in discriminatory impacts, and to determine whether the actions violate the regulations. In the permitting context, OCR must analyze a Title VI complaint based on the facts and circumstances existing at the time the permitting decision at issue was made because those are the conditions that the complaint concerns. Therefore, the demographic composition of the area at the time that the permit was initially issued, perhaps a decade or more ago, may or may not be relevant for OCR’s review of an allegation that discriminatory effects currently exist.

<sup>263</sup> Assessing a significant overall decrease would entail taking into account factors such as total quantity and relative toxicity of the emissions reductions.

<sup>264</sup> See 40 CFR 7.120 (stating the criteria for accepting a complaint); *Draft Revised Investigation Guidance*, sections III.A. and VI.B.1.a.

<sup>265</sup> See *Draft Revised Investigation Guidance*, Glossary.

<sup>266</sup> See *id.*, section VLB.1.a.

<sup>252</sup> 40 CFR 7.130(a).

<sup>253</sup> 40 CFR 7.130(b)(2).

<sup>254</sup> 40 CFR 7.130(b)(3)(i).

<sup>255</sup> 40 CFR 7.130(b) (“Procedure to deny, annul, suspend or terminate EPA assistance.”).

<sup>256</sup> See *Interim Guidance* at 3; *Draft Revised Investigation Guidance*, section II.A.7.

<sup>257</sup> 42 U.S.C. 2000d.

<sup>258</sup> Public Law 100–259, 102 Stat. 28 (1988).

<sup>259</sup> 42 U.S.C. 2000d–4a.

<sup>260</sup> 40 CFR 7.130(b)(4).

<sup>261</sup> See Memorandum from Attorney General supra note 7, at 1.

<sup>262</sup> *Id.*

*Issue:* A commenter suggested that in order to avoid conducting a disparate impact analysis for each permit renewal for facilities with multiple permits, an initial disparate impact analysis covering all permits for the facility, not merely the permit up for renewal, should be conducted. Assuming any Title VI concerns were resolved, further claims regarding renewals related to permits at the facility would be dismissed.

*Response:* The *Draft Revised Investigation Guidance* indicates that EPA intends, in some cases, to consider the cumulative impacts of pollution from a wide range of sources. OCR may investigate cases in which the permitted activity is one of several activities, which together present a cumulative impact.<sup>267</sup> This may include evaluating multiple activities at a single facility. In some rare instances, EPA may need to determine whether the impacts of a single permit, standing alone, may be considered to support a disparate impact claim. EPA intends to let the circumstances of each complaint dictate which approach is appropriate.

Furthermore, the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* also encourage recipients to identify geographic areas where adverse disparate impacts may exist and to enter into agreements (area-specific agreements) with the affected communities and stakeholders to reduce pollution impacts in those geographic areas over time.<sup>268</sup> The results of such efforts may be granted due weight in appropriate circumstances<sup>269</sup> and reduce the likelihood that additional complaints would be filed in those areas. Moreover, if OCR had previously determined that actions taken pursuant to an area-wide agreement would eliminate discriminatory effects, OCR would generally rely upon that earlier finding and dismiss later-filed allegations relating to permit actions covered by the agreement.

#### Takings

Some commenters raised questions about "takings" of property without compensation and opportunities for permittees to achieve compliance.

*Response:* As a general rule, permits are not compensable property rights. They are treated as conferring privileges rather than rights, because they may be revocable at the will of the government, they are generally nontransferable, and

they are often issued for a limited term. On the other hand, permits sometimes are treated as property for due process purposes, requiring notice and hearing before they can be revoked.

As the *Draft Revised Investigation Guidance* states when discussing measures that might be required as a result of a finding of noncompliance with Title VI, EPA believes it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists. Therefore, denial of the permit at issue will not necessarily be an appropriate solution. Also, in order to establish a compensable taking, the governmental action generally must deny all economically viable use of the property in question. It is highly unlikely that a permit modification would deny all economically viable use of the property.

As part of a voluntary compliance agreement, recipients may agree to mitigate the adverse impacts through permit modifications. If informal resolution and attempts at reaching voluntary compliance fail, the primary authority for an administrative remedy in EPA's Title VI implementing regulations and corresponding provisions in the *Draft Revised Investigation Guidance* concerns the denial, annulment, suspension, or termination of EPA assistance.<sup>270</sup> Because this remedy would be imposed on a recipient of EPA assistance, the permittee would not be directly affected. Clearly, the recipient's programs and activities may relate to the permittee, but even if a recipient is found to be in violation of EPA's Title VI regulations, EPA's primary authority for an administrative remedy is directed toward the recipient. The regulations do not require EPA to seek a denial or revocation of the permittee's permit.

OCR may also explore other solutions authorized by law, such as referring a matter to DOJ for enforcement in court.<sup>271</sup> If a court ordered remedy involved the initiation of a permitting action, EPA expects that the recipient would follow the procedures outlined in the relevant environmental law, thereby providing sufficient due process.

#### Other Issues

*Issue:* One commenter requested that EPA develop a Title VI complaint process flowchart. Another commenter requested clarification as to who would be responsible for implementing the *Interim Guidance*.

<sup>270</sup> 40 CFR 7.130(b); *Draft Revised Investigation Guidance*, section II.A.6.

<sup>271</sup> 40 CFR 7.130(a); *Draft Revised Investigation Guidance*, section II.A.6.

*Response:* A flowchart that outlines the steps in the process described by EPA's Title VI regulations has been included as an appendix to the *Draft Revised Investigation Guidance*.

OCR has the responsibility within EPA to process and review Title VI administrative complaints, and both the *Interim Guidance* and the *Draft Revised Investigation Guidance* are mainly directed at EPA staff in that office. However, OCR typically involves staff with appropriate expertise from other EPA offices and regions to assist in its investigations. The guidance also provides direction to these staff persons as they assist OCR in the investigation.

#### Impacts and the Disparate Impact Analysis

##### Substantial Impairment

One commenter requested clarification as to what constitutes a "significant" disparate impact, citing EPA's regulations that require a "substantial impairment" of program objectives to establish a disparate impact.

*Response:* OCR has provided more detail and clarity in the *Draft Revised Investigation Guidance* about the process for determining whether an adverse disparate impact exists.<sup>272</sup> However, given the infinite number of possible permutations of facts, allegations, and circumstances, defining an across-the-board standard of what level of harm or disparity constitutes "significant" is infeasible. Instead, the *Draft Revised Investigation Guidance* explains more clearly how OCR will determine whether it exists. The *Draft Revised Investigation Guidance* describes how EPA will use environmental statutes, regulations, policy, and science as measures for determining thresholds for what is adverse.<sup>273</sup>

EPA's Title VI regulations include a variety of prohibitions, only one of which uses the term "substantial impairment."<sup>274</sup> For example, the regulations prohibit recipients from using "criteria or methods of administering its programs which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin."<sup>275</sup> It is this

<sup>272</sup> See *Draft Revised Investigation Guidance*, section VI.

<sup>273</sup> *Id.*, section VI.B.4.

<sup>274</sup> 40 CFR 7.35(b) ("A recipient shall not use criteria or methods of administering its programs which \* \* \* have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, [or] national origin." (emphasis added).

<sup>275</sup> *Id.*

<sup>267</sup> See *id.*, section VI.B.1.a.

<sup>268</sup> *Id.*, section V.B.2.; *Draft Recipient Guidance* sections II.A.2. and 3.

<sup>269</sup> See *Draft Revised Investigation Guidance*, section V.B.2.



discriminatory effects regulation that is the focus of the *Interim Guidance* and the *Draft Revised Investigation Guidance*.

#### Scope and Extent of Adverse Impact Analysis Issues

*Issue:* Commenters were divided regarding both the degree to which adverse impacts must be "significant" before they can be considered under the *Interim Guidance* and whether the risk of adverse health impacts should be considered actionable.

*Response:* To determine whether the impacts alleged in the complaint are sufficiently "adverse" to be cognizable under Title VI, OCR expects to focus its efforts on addressing adverse impacts that are "significant" rather than on those that may be considered inconsequential. The *Draft Revised Investigation Guidance* provides more specificity about what constitutes a "significant" impact. Depending upon the facts and circumstances of the complaint, OCR will apply relevant tests to determine whether the alleged impact is significant.<sup>276</sup> In fact, the *Draft Revised Investigation Guidance* specifically includes consideration of health impacts in terms of risk.<sup>277</sup>

*Issue:* One commenter said that any guidance that is developed regarding disparate impact should be subjected to a peer reviewed process.

*Response:* As part of its identification and development of methods for conducting impact assessments, OCR submitted several example assessment tools for review by the EPA Science Advisory Board.<sup>278</sup> These included approaches concerning the estimation of the magnitude and distribution of impacts and the identification of affected populations.

#### Identifying the Affected Population

Many commenters asked EPA to provide more guidance related to identifying the affected population.

*Response:* The *Draft Revised Investigation Guidance* provides significantly more information about the process proposed to identify and determine the characteristics of the affected population than the *Interim*

*Guidance* provided.<sup>279</sup> The affected population, as defined in the Glossary, is the population that is determined to bear an adverse impact from the source(s) at issue. In section VI.B., and especially in subsection 5, of the *Draft Revised Investigation Guidance*, OCR describes the analysis it expects to use to define the affected population in investigations. Section VI also describes the process of conducting an analysis to determine whether a disparity exists between the affected population and an appropriate comparison population, and discusses comparison methods and criteria used in assessing the significance of any disparities identified.

#### Determining the Demographics of Populations

Some comments concerned the manner in which EPA would determine the demographics of certain populations.

*Response:* Title VI and EPA's implementing regulations prohibit discrimination on the basis of race, color, or national origin. Racial classifications described in the regulations include: (1) American Indian or Alaskan native; (2) Asian or Pacific Islander; (3) Black and not of Hispanic origin; (4) Hispanic; and (5) White, not of Hispanic origin.<sup>280</sup> Additional subcategories based on national origin or primary language spoken may be used when appropriate.<sup>281</sup>

OCR intends to use the most accurate data readily available when determining the characteristics of the affected and comparison populations. In most cases, residential census data are expected to be the most accurate and relevant available demographic data, but other data sources will be used as needed. Generally, OCR expects to use residential census data in combination with geographic information systems and mathematical models to identify and characterize affected populations.<sup>282</sup>

#### Cumulative Impacts

EPA received a number of comments concerning the role of cumulative impacts in the *Interim Guidance*. Some expressed support for considering cumulative impacts in determining whether an adverse disparate impact exists and others requested additional information. Some opposed considering

cumulative impacts because they were concerned about how cumulative impacts could be quantified.

*Response:* The *Draft Revised Investigation Guidance* provides more clarity about the process of identifying the scope of an adverse disparate impact analysis that OCR may conduct as part of an investigation. Rather than attempting to summarize that lengthy process here, readers should refer to the *Draft Revised Investigation Guidance* for an explanation of how OCR expects to evaluate allegations concerning cumulative impacts.<sup>283</sup>

#### Commenter's Suggested Alternative Approach to Adverse Disparate Impact Analysis

One commenter provided EPA with an alternative approach to simplify OCR's analysis of Title VI complaints. The primary elements of the proposal include: (1) Defining the affected area as a circle of radius one-half to one mile from the facility; (2) assessing the public health status of the affected population based on mortality, cancer, infant mortality and low birth weight rates; and (3) determining the health rate to be substandard when it deviates by 10 to 20 percent from the "standard" (comparison population) rate. Permits to build or operate a new facility in any area with substandard health rates would be prohibited. The commenter asks whether this proposal could be adopted by OCR.

*Response:* Both Title VI and EPA's implementing regulations prohibit discrimination on the basis of race, color, or national origin in the programs and activities of EPA financial assistance recipients. As a result, a finding of non-compliance with the statute or regulations requires a finding that the programs or activities of a recipient involved intentional discrimination or caused a discriminatory effect.

The proposal does not appear to require any link between the adverse health effects and the programs or activities of a recipient. In addition, it does not consider any disparity on the basis of race, color, or national origin. While the proposal may warrant consideration as a way of identifying public health "hot spots," it would not be an appropriate basis for OCR to make a finding of non-compliance with Title VI or EPA's implementing regulations.

<sup>283</sup> See *Draft Revised Investigation Guidance*, sections VI.B.2. and 3.

<sup>276</sup> *Draft Revised Investigation Guidance*, section VI.B.4.

<sup>277</sup> See *Draft Revised Investigation Guidance*, section VI.B.3.

<sup>278</sup> The findings were presented in the December 1998 report, *An SAB Report: Review of Disproportionate Impact Methodologies; A Review by the Integrated Human Exposure Committee (IHEC) of the Science Advisory Board (SAB)*. The report is available at the Office of Civil Rights Web site at: <http://www.epa.gov/civilrights/investig.htm>.

<sup>279</sup> See *Draft Revised Investigation Guidance*, section VI.B.5.

<sup>280</sup> 40 CFR 7.25.

<sup>281</sup> *Id.* at n.1.

<sup>282</sup> See *Draft Revised Investigation Guidance*, section VI.B.5.

### Clarifications Regarding Disparity of Impact

A number of commenters requested additional details regarding the disparate impact analysis. For instance, commenters requested that EPA provide additional details regarding the statistical analysis that will be conducted, the backgrounds of the experts that will be conducting the analysis, and what comparisons would be appropriate within the affected population.

*Response:* OCR provided more specificity about the disparate impact analysis in the *Draft Revised Investigation Guidance*, including additional details about what constitutes disparity and options for selecting comparison populations.<sup>284</sup> OCR intends to select an appropriate statistical or mathematical analysis based upon various factors, including the allegations and available data. That analysis will be performed or reviewed by those with the relevant professional training and expertise. The *Draft Revised Investigation Guidance* is not intended to comprehensively address every scenario that may arise in the interaction between Title VI, EPA's Title VI regulations, and environmental permitting. Given the infinite number of possible permutations of facts, allegations, and circumstances, such an approach is infeasible. Instead, the *Draft Revised Investigation Guidance* provides a framework explaining how EPA intends to implement its responsibilities under Title VI as a general matter. OCR then expects to apply the guidance's framework according to the specific facts and circumstances of each complaint.

In terms of the appropriate comparison populations, the zoning or land use designation of an area has been offered as a possible basis on which to compare impacts and demographics. OCR does not expect to use those factors when evaluating an affected population against a comparison population. Consideration of zoning would place an inappropriate focus on the siting of facilities. The *Interim Guidance* and the *Draft Revised Investigation Guidance* focus on permitting. The impacts addressed by the guidance documents do not necessarily stay within areas that are zoned "industrial"; they may affect "residential" areas, "commercial" areas, and areas with other designations. In addition, many impacts are felt in areas designated for "mixed-use," but that fact alone should not lead to reduced protections for the local residents. Therefore, an arbitrary comparison of

populations with similar zoning would be inappropriate, as well as impractical.

### Resolving Complaints and Justification Remedial Measures/Mitigation

*Issue:* Several commenters requested clarification on the process of mitigation as described in the *Interim Guidance*.

*Response:* EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable.<sup>285</sup> The Agency expects that measures that reduce or eliminate alleged disparate impacts will be an important focus of the informal resolution process. Section IV of the *Draft Revised Investigation Guidance* contains a more detailed discussion of such measures, drawn heavily from the Title VI Implementation Advisory Committee report,<sup>286</sup> than the *Interim Guidance*. Moreover, the *Draft Recipient Guidance* also discusses measures to reduce adverse disparate impacts in section II.B.6.

Often, Title VI concerns are raised where a number of sources are contributing to the adverse effects communities believe they are suffering. For those communities, filing a Title VI complaint about a permit for a new facility or about the most recent modification to an existing one, is a way to focus attention on the cumulative impacts of a number of the recipient's permitting decisions. As the *Draft Revised Investigation Guidance* states, EPA believes it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists; therefore, denial of the permit at issue will not necessarily be an appropriate solution. Efforts that focus on all contributions to the adverse disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions.<sup>287</sup>

For example, the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* encourage recipients to identify geographic areas where adverse disparate impacts may exist and to enter into enforceable agreements (area-specific agreements) with the affected communities and stakeholders to reduce pollution impacts in those geographic areas over time.<sup>288</sup>

Efforts to reduce impacts could include measures that are narrowly tailored toward contributing sources, including the permit at issue, using the recipient's existing permitting

authorities. Such measures include changes in policies or procedures, additional pollution control, pollution prevention, offsets; and emergency planning and response. More broadly focused efforts might deal with the combined impacts of several contributing sources, taking into account both the approximate contributions and the degree to which the sources may be covered by various authorities available to the recipient.<sup>289</sup>

*Issue:* Several commenters questioned the legal basis for requiring mitigation.

*Response:* As mentioned above, EPA's Title VI regulations call for OCR to pursue the informal resolution of administrative complaints wherever practicable.<sup>290</sup> The term "informal resolution" refers to any settlement reached by the parties before a finding of noncompliance is issued. OCR expects to encourage measures to reduce and eliminate impacts in the course of achieving informal resolution.<sup>291</sup> EPA hopes that the parties will be able to work together at an early stage because they will have more flexibility in this informal context to develop innovative solutions than later when remedial measures are required after a finding of noncompliance has been made. Measures developed by the recipient, local community, and other interested parties are likely to be the most direct way to resolve potential Title VI concerns. Both the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* discuss measures to reduce or eliminate impacts.<sup>292</sup>

If OCR makes a finding of noncompliance with EPA's Title VI regulations, two potential remedies exist in EPA's administrative process—voluntary compliance or fund termination. Another option for EPA to ensure compliance is referring the matter to DOJ for litigation.<sup>293</sup> Settlement after a formal determination of noncompliance is called "voluntary compliance."<sup>294</sup> Measures to reduce or eliminate impacts will be included as conditions in a voluntary compliance agreement. Recipients can either agree to the voluntary compliance conditions or risk losing EPA financial assistance.

### Justification Issues

*Issue:* Some commenters requested that EPA provide more detail as to what would constitute an adequate

<sup>289</sup> *Draft Revised Investigation Guidance*, section IV.

<sup>290</sup> See 40 CFR 7.120(d)(2).

<sup>291</sup> See *Draft Revised Investigation Guidance*, section IV; *Draft Recipient Guidance*, section II.B.6.

<sup>292</sup> *Id.*

<sup>293</sup> 40 CFR 7.130(a).

<sup>294</sup> 40 CFR 7.115(e) (indicating that recipient may voluntarily comply after formal determination of noncompliance).

<sup>284</sup> *Draft Revised Investigation Guidance* sections VI.B.5. and 6.

<sup>285</sup> 40 CFR 7.120(d)(2).

<sup>286</sup> See *Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs*, at 82-90 and appendix D (April 1999).

<sup>287</sup> See *Draft Revised Investigation Guidance*, sections I.C. and IV.B.

<sup>288</sup> *Draft Revised Investigation Guidance*, section V.B.2.; *Draft Recipient Guidance*, section II.A.2.

justification and a less discriminatory alternative.

*Response:* The *Draft Revised Investigation Guidance* clarifies and provides more detail about justification and less discriminatory alternatives.<sup>295</sup> Determining what constitutes a legitimate justification will necessarily turn on the facts in the case at hand. Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission.

Because investigations conducted under the *Draft Revised Investigation Guidance* are about permitting decisions by environmental agencies, OCR expects to consider provision of public health or environmental benefits (e.g., waste water treatment plant) to the affected population to be an acceptable justification because such benefits are generally legitimate, important, and integral to the recipient's mission. The *Draft Revised Investigation Guidance* indicates that OCR will likely consider broader interests, such as economic development, from the permitting action to be an acceptable justification, if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient's mission. Also, in its evaluation of the offered justification, OCR will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of

whether the permitted facility, in fact, will provide direct, economic benefits to the community.

A justification generally will not be accepted if it is shown that a less discriminatory alternative exists. A less discriminatory alternative is a comparably effective practice that causes less of a disparate impact than the challenged practice.<sup>296</sup> Mitigation measures including, in some cases, additional permit conditions that would lessen or eliminate the demonstrated adverse disparate impacts, could be part of a less discriminatory alternative. Pollution prevention may be either used by the recipient as a mitigation measure, or raised by EPA or complainants as a less discriminatory alternative. OCR will likely consider cost and technical feasibility in its assessment of the practicability potential alternatives.

*Issue:* Other commenters asserted that a recipient should be allowed to justify an action before undergoing a mitigation analysis.

*Response:* The *Interim Guidance* did not require the creation of mitigation plans before a finding. It merely suggested that recipients could consider establishing a plan to reduce the likelihood of a finding of a Title VI violation. The *Draft Revised Investigation Guidance* clarifies the process.<sup>297</sup> Recipients are expected to have an opportunity to propose

mitigation measures to address the problem, but those measures would not be required unless a finding of violation occurs. In that case, OCR would describe the measures that the recipient should take to come into voluntary compliance.

EPA's Title VI regulations provide recipients with several opportunities to submit information.<sup>298</sup> Nothing precludes recipients from including information about justification or mitigation measures in their written submissions. The recipient may offer a justification before mitigation measures are considered. However, the justification would not be considered acceptable if a less discriminatory alternative exists.

*Issue:* Other comments concerned EPA's role in identifying less discriminatory alternatives and approving justifications.

*Response:* EPA must evaluate the sufficiency of proffered justifications, and the existence and validity of less discriminatory alternatives, because EPA determines whether a violation of EPA's Title VI regulations has occurred.

Nonetheless, EPA may consult with complainants and other parties, as appropriate.

Dated: June 15, 2000.

**Ann E. Goode,**

*Director, Office of Civil Rights.*

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<sup>295</sup> See *Draft Revised Investigation Guidance*, section VII.A.

<sup>296</sup> See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993), citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

<sup>297</sup> See *Draft Revised Investigation Guidance*, section IV.

<sup>298</sup> See *Draft Revised Investigation Guidance*, sections II.B. and V.A.