Report

of the

Title VI Implementation Advisory Committee

Next Steps for EPA, State, and Local Environmental Justice Programs

March 1, 1999

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INTRODUCTION AND OVERVIEW

The Committee's Charge, Composition, and Process

The Title VI Implementation Advisory Committee (Committee) was convened on April 14, 1998 by EPA Administrator Carol M. Browner. The charge she delivered to the Committee asked that it review and evaluate existing techniques used by state and local agencies that receive EPA funding and operate permitting programs covered by Title VI, 42 U.S.C. §§2000d-d7. A copy of that charge is attached to this report as Appendix A.[1] The Committee commenced deliberations with the overall goal of developing a single set of recommendations for EPA to use in implementing its Title VI policies. This goal included developing advice for state and local governments[2] concerned about these issues, which the Committee described as developing a "template" for state and local environmental justice programs.

The Committee is comprised of representatives from the EPA constituencies directly affected by Title VI and also includes advisors from academia. A list of Committee members is

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[1] Two kinds of documents are included as appendices to this report: (1) additional views filed by members of the Committee following its approval of the final report (numbered appendices) and (2) additional resource materials. Unless indicated otherwise in the final report, the Committee has not endorsed the content of these appendices.

[2] Unless otherwise indicated, the terms "state"and "local government" are used throughout the report to connote the governing entity as a whole, including agencies that play different roles in making decisions with respect to environmental justice issues. Thus, a "state" would include a state environmental agency, as well as the entire executive, legislative, and judicial branches of state government. Similarly, a "local government" includes agencies that regulate, land use decision makers, sewage treatment plants, and other executive, legislative, and judicial agencies, departments, or councils. However, it is worth noting that the "state or local government representatives" on the Committee were environmental agency officials with considerable expertise in the application of environmental justice principles to government and industry.

attached to this report as Appendix B. The Committee completed its deliberations and submitted a final report to the Administrator on March 2, 1999. The Committee held a total of four plenary sessions, and also spent many hours considering the issues in three "workgroups" of participants.

Workgroup I, entitled "Assessment," debated the factors involved in determining the merits of a Title VI complaint, including such central issues as defining the affected community, deciding what problems to include in the universe of adverse effects, and evaluating the nature and degree of the disparate impact that violates the statute's prohibition on discrimination.

Workgroup II, entitled "Mitigation," discussed the remedies that could be implemented to lessen or eliminate discrimination in the context of individual facility permitting decisions as well as broader programs that address disparities outside the permitting process.

Workgroup III, entitled "Implementation," was assigned to develop a template for state and local environmental justice programs.

All three workgroups ultimately produced draft reports that provided one source of material for this final report. Those draft workgroup documents, along with the respective lists of workgroup members, are attached to this report as Appendices C, D, and E. It is important to note that these drafts did not receive final endorsement by members of the workgroups because a decision was made to focus the Committee's effort on crafting this report.

EPA's Interim Guidance and the *Select Steel* Decision

Two months before the Committee convened, EPA issued the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Interim Guidance*), a

document designed to "provide a framework" for processing Title VI complaints that allege "discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding." *Interim Guidance* at 1. A copy of the *Interim Guidance* is attached to this report as Appendix F. Aware that the *Interim Guidance* was controversial and had engendered strong opposition among some of the Agency's most important constituencies, Administrator Browner instructed the Committee that "while finalizing EPA's Title VI interim guidance is not included in the committee charge, EPA may consider revision or supplementation to the interim guidance if necessary to fulfill the Committee's recommendations." As predicted by this aspect of the charge, the Committee's discussions inevitably returned time after time to the *Interim Guidance*, with members debating both the policies it contained and the issues it omitted.

In October 1998, several months after the Committee began deliberations, EPA issued its first decision under the *Interim Guidance*, dismissing the complaint in St. Francis Prayer Center v. Michigan Department of Environmental Quality, EPA File No. 5R-98-R5 (*Select Steel*). Members of the Committee read *Select Steel* with great interest, ultimately arriving at conflicting interpretations of its significance, with some members believing that it is a positive precedent, others viewing it as a negative precedent, and still others believing the decision will have little lasting impact. A copy of the opinion is attached to this report as Appendix G.

Although suggested revisions to the *Interim Guidance* -- on the basis of *Select Steel* or otherwise -- were not the central mission of the Committee, reactions to the guidance and the decision had a major effect on the Committee's deliberations, serving the positive purpose of expanding and clarifying the issues at stake, but at the same time underscoring how difficult

these issues are to resolve.

In sum, it is safe to say that no member of the Committee is satisfied with the *Interim Guidance*. While some see it as a "good start" that needs further development, others are unsparing in their critiques. As one industry representative put it, the guidance hurts all constituencies and "exists to make the business community think they should not locate near minority communities and communities think they will never win." Many members of the Committee attribute these flaws to EPA's failure to consult with outside stakeholders during development of the guidance.

One persistent criticism of the *Interim Guidance* is that it is unclear or silent with respect to the substance of the crucial issues that confront permitting authorities. State and industry representatives on the Committee contend that because the guidance is unclear, it operates as a *de facto* stay once a complaint was filed, casting a cloud over the permit that slows and can even stop its implementation. Several members believe that the inequitable outcomes caused by this uncertainty are especially discouraging to those who might consider undertaking negotiations with communities at the beginning of the permitting process. State representatives further note that the unreasonably short time frames imposed by the guidance make it virtually impossible to negotiate solutions with states willing to try to correct the problem. Everyone in this group urges EPA to redraft the *Interim Guidance* as quickly as possible.

Environmental justice advocates, including grassroots community representatives, and Committee members from the academy, are somewhat more satisfied with the *Interim Guidance* than their industry and government colleagues. However, they believe that aspects of the guidance unlawfully restrict Title VI complaints and create hurdles for prospective complainants.

Some are more troubled by the *Interim Guidance* in the wake of the *Select Steel* decision, which many view as an objectionable and unfortunate precedent. These members of the Committee do not agree with the observation that the guidance operates as a *de facto* stay on the permitting process. Rather, they believe that EPA's long delays in processing complaints allow harmful projects to go forward and become an accomplished fact before EPA gets around to deciding the complaint, thereby allowing project sponsors to reap the benefits of Agency inaction. Lastly, these members contend that the *Interim Guidance* is too narrowly focused on permitting and that, in addition to revising it quickly, EPA should proceed without delay to consider other environmental problems confronting communities of color.

Significantly, no member of the Committee endorses the idea of leaving the *Interim Guidance* vague, a result that would mean that EPA would develop Title VI policy on a case-by-case basis. Rather, the Committee recognizes the need of all stakeholders for coherent, uniform standards, however much they disagree on what those standards should be.

Summary of the Issues and Committee Views

As the above discussion indicates, members of the Committee have strikingly different views regarding the parameters of the mission that was intended by the Administrator, as well as the substance of the standards that should govern the resolution of Title VI disputes.

Some participants believe that the group's mission is limited to the validity of Title VI claims raised in the context of individual permitting decisions. They argue that permitting should remain the primary focus of this report, and a few contend that permitting should be the exclusive subject addressed by the Committee. Other members believe that to solve the real

environmental problems faced by people of color and, not incidentally, to prevent the filing of Title VI complaints, EPA, the states, and local governments must take a significantly broader view, addressing disparate impacts more comprehensively. They believe that confining consideration of Title VI disputes to the permitting of whichever facility is unlucky enough to need a renewal or modification of its permit at the moment would be unfair to the facility's owner and to the community. Still other members maintain that the same core issues are at stake in the full range of environmental decisions that may have discriminatory effects and that the Committee to must come to grips with those issues however its mission is defined.

Environmental justice advocates recommend that the Committee take an expansive view of the problems posed by polluting facilities located in communities comprised of a protected class, drawing health, cultural, economic, and social concerns within the ambit of Title VI. While some government representatives are sympathetic to this view, others agree with industry representatives that human health effects are the only legitimate focus of the Committee's deliberations.

Members of the Committee generally agree on the list of the core issues that must determine the success of a Title VI complaint. However, once again, they have divergent views on the appropriate resolution of those questions.

Some members believe that a facility's compliance with existing regulatory requirements should defeat a Title VI claim. Others argue that EPA and other decision makers must go beyond those requirements to assess the cumulative risks and synergistic effects that face communities comprised of a protected class. They contend that proof of a disparate impact, even if all applicable legal requirements are met, should result in either denial of a permit or

withdrawal of federal funds. These conflicting views mark the most important fault line between members of the Committee and are the issues that have proved the most difficult to resolve.

Members of the Committee also disagree about the degree of disparity needed to support a Title VI complaint, with some arguing for any statistically measurable difference in adverse effects between a community comprised of a protected class and the general population. Others contend that the disparity must be "substantial or significant."

As for the troubling and difficult question of what adverse effects to include in the analysis of disparate effects, some participants argue that the appropriate universe is defined by the scope of federal, state, and local environmental laws. They contend that disparate effects under Title VI should be limited to actual harm or imminent threats to public health. Others strongly disagree with this approach, arguing that all of the adverse effects caused by the permitting decision -- including harm to the environment and the economic, social, and cultural well-being of people of color -- must be taken into account.

The Committee heard public testimony proposing a transparent but narrow test to determine disparate impact that focuses on available public health statistics for populations living within one-half mile of the facility to be permitted (or a greater distance if necessary to include at least 1,000 residents). See *Environmental Justice Protocol* proposed by Jerome Balter, representing the Public Interest Law Center of Philadelphia, included with this report as Appendix H. Some Committee members believe that such precise calculations, however appealing in their simplicity, could never capture the adverse effects that should trigger government action. Others argue that a test based on health statistics would sweep data on illness that has no "causal connection" to pollution releases into the evaluation of disparate

impact, a result they view as both illegal and undesirable.

Members also have different views regarding the threshold question of how to define the "affected community" versus the "general population," with some arguing for a simple "radius approach" such as that proposed in the *Environmental Justice Protocol*, and others arguing for a site-specific analysis of exposure pathways to determine the populations directly affected by a facility's operation.

Once a determination of disparate impact is made, members further diverge on what should happen next in the decision making process. Many return to the complicated issue of agency "jurisdiction," with the term used in both the remedial and geographic sense. Thus, many participants argue that the scope of Title VI complaints cognizable by EPA and the courts, as well as the scope of any mitigation required in response to such complaints, must be limited to the scope of applicable regulatory requirements. They contend that state and local regulatory agencies do not have the authority to control pollution caused by unregulated sources or sources located out of their jurisdiction and therefore cannot be held responsible for addressing the disparate impact caused by such sources.

Others argue that this view is unduly restrictive and will result in an environmental justice program with greatly diminished effectiveness. They believe that environmental statutes give federal, state, and local regulators ample authority to go beyond the constraints of detailed and prescriptive regulatory requirements, especially where those requirements are not sufficient to address the imposition of disproportionate burdens of pollution on prohibited grounds. They also contend that regulators have an obligation to consider and find a way to address all sources that threaten human health and the environment, and that it is both bad policy and illegal for

them to invoke the technical details of the law to duck these responsibilities.

All participants recognize that whatever the definition of appropriate mitigation, it may not be possible to obtain sufficient relief from a single facility. Many endorse the conclusions of Workgroup II, calling for a "hybrid" approach that combines "narrow to moderate nexus" mitigation on the basis of what is "reasonable" and "practical" to achieve. Under this approach, mitigation would be targeted as narrowly as possible to address adverse effects, but more attenuated remedies (e.g., pollution prevention, medical monitoring, additional research into cumulative risk) would be considered if it was very difficult to develop a narrower approach. Some members of the Committee, however, thought that a narrow nexus approach should be the preferred, if not exclusive, basis for addressing any adverse human health effects.

Members further diverge on how to provide state and local regulatory agencies with an opportunity to develop "justification" for a permit's terms and conditions, both in terms of timing and content. Some believe that state and local governments must explore all feasible mitigation before being given and opportunity to present a justification for a discriminatory effect. Others believe that state and local governments should have an opportunity to provide justification before mitigation is required. Some believe that acceptable justification should include economic damage to facility owners, while others would restrict it to the demonstrated benefits to the public that would be provided by the facility.

As for the development of "template" or "model plan" for state and local governments interested in developing environmental justice programs, Workgroup III was fortunate to have the active participation of the directors of three state environmental agencies: New Jersey, Texas, and Oregon. As the Workgroup studied the efforts made by the three states to develop proactive

programs, it discovered that they approach the issues from two distinct directions, or programmatic "tracks." In the first track, state and local governments would address the imposition of a disproportionate burden of adverse environmental effects on communities comprised of a protected class without regard to the constraints of the permitting process. In the second track, state and local environmental justice programs would address potential discrimination against communities that results from individual permitting decisions.

The first track is important because it takes a more proactive approach to community concerns, potentially preventing the emergence of Title VI complaints. The model plan developed by the Workgroup and accepted by the Committee assumes that state and local governments would consider developing programs along both tracks, giving them an opportunity to address cumulative risks that may be difficult to remedy in single-facility permitting proceedings. However, the Committee also recognizes that the first track may extend beyond the dictates of Title VI and could pose significant resource concerns to states, local governments, and industrial facilities.

Redefining the Committee's Mission

While Committee members have shared many hours of enlightening and constructive conversation regarding these and other issues, they recognize two realities that require a fundamental revision of the Committee's overall goals. The first reality is that the issues involved in developing an acceptable environmental justice policy at the turn of this century are both complex and difficult. The second and related reality is that the diverse constituencies represented by the Committee are unable to reach consensus on the most important of these

issues at this juncture in EPA's efforts to develop a national program. The Committee does not consider the absence of consensus on these crucial questions a failure. Rather, it is the inevitable outcome of a serious effort to grapple with troubling questions in a diverse and committed group.

Rather than struggle in the face of these divergent views to develop innocuous, watered-down recommendations for EPA's consideration, the Committee has decided to present a report to the Agency that explores its members' divergent views regarding the implications of the full range of policy options available to EPA, the states, and local governments. The Committee is also recommending a detailed agenda for the next steps EPA should take in revising the *Interim Guidance,* developing a model plan for state and local programs, and improving the scientific and technical information necessary to consider Title VI complaints in a fair and comprehensive manner. As the Committee prepared this report, members achieved consensus on several threshold principles that should guide EPA's future efforts.

Eight Consensus Principles

1. The Committee unanimously endorses the concept of environmental justice.
2. The Committee is united in the belief that discrimination on the basis of race, color, or national origin is illegal and unjust.
3. Members of the Committee are unanimous in the conviction that early, proactive intervention is necessary if one is to deter Title VI violations and complaints. Whether preventive steps are implemented under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, opportunities for potential protagonists to sit down and

discuss their true needs before positions harden are invaluable. (Materials on the chemical industry's Responsible Care program are included with this report as Appendix I.)

4. The Committee unanimously agrees that the affected community, as an actual or potential victim of the discrimination Title VI seeks to prohibit, should not be treated by EPA and other regulatory agencies as merely another stakeholder group. Therefore, for state and local environmental justice programs to be truly proactive, they must purposefully promote and ensure meaningful participation by these communities.

5. The Committee believes that EPA must develop transparent and comprehensive standards and decision-making processes accessible to the community that it will use to evaluate Title VI complaints so that communities, industry members, and state and local officials will understand their prospects if a negotiated solution is impossible and EPA must decide the merits of a formal complaint. Although Committee members strongly disagree about the substance of those standards, they agree that such standards are necessary, and recognize that uncertainty harms everyone by wasting limited resources that could be far better spent.

6. The Committee recognizes that community concerns about cumulative impacts are at the heart of many Title VI disputes. As described in the discussion of Track 1, below, to address the communities' fundamental concerns effectively, appropriate authorities and other responsible parties should recognize the cumulative nature of such impacts and to attempt to take action to reduce and

ultimately, eliminate the impacts.

7. The Committee recognizes that cumulative exposure to pollution and synergistic effects are important concerns raised in the Title VI context. The Committee is convinced that a dearth of reliable scientific research, as well as monitoring and modeling data, frequently makes it difficult to address such concerns. The Committee urges EPA and the states to make concerted, well-supported efforts to research the nature and existence of cumulative exposures and synergistic effects and the risks they pose. The Agency has already begun this crucial work, and the Committee recommends that it significantly expand those efforts.

8. Finally, the Committee urges EPA to conduct meaningful consultations with all affected stakeholders, including community groups and local governments, as it revises the Interim Guidance and moves on to consider other equally pressing applications of Title VI. The Committee has discovered during its deliberations that preconceptions about the positions various stakeholders will take are often erroneous and that it is always possible for people of good faith to gain a deeper understanding of the issues from each other. EPA's perception that stakeholders are in a state of irreconcilable difference, or that the Agency must respond immediately to reports of crisis in the field, should not deflect its attention from the very constructive efforts it has already made to encourage this ongoing dialogue.

Roadmap to This Report

Because environmental justice law and policy are at a relatively early stage of development, the Committee's agenda for EPA's next steps is exceptionally important and is presented as the first section of this report. The report then presents a model plan for state and local environmental justice programs. The template adopts a two-track approach, with the first track devoted to proactive, preventive programs with a broader agenda and the second track focused on individual facility permitting decisions.

With this two-track approach in mind, the next section of the report explores the substantive issues that must be addressed in all aspects of federal, state, and local environmental justice environmental programs. At the risk of oversimplifying, those issues can be reduced to eight discrete sets of questions:

1. **Defining and Evaluating Effects:** Should disproportionate adverse effects be defined to include health effects only, or should that definition include cultural, religious, economic, social, or environmental harm?
2. **Identifying the Community of Concern**: How should communities affected by a permitting or other decision be identified? Should modeling and monitoring be used to identify people exposed to the facility's emissions, or should regulators concentrate on those living within a given distance from the facility?
3. **Determining Disparity:** What degree of disproportionate adverse effect is covered by Title VI? Must the effect be substantial, above generally accepted norms, significant, statistically in excess of the risk or rate in the general population, or subject to some other standard?
4. **The Role of Existing Standards:** If permitting a facility will result in a disproportionate

adverse impact on a community of color but will otherwise comply with applicable regulatory requirements, is the decision illegal under Title VI?

5. **Agency Jurisdiction:** Must federal, state, and local regulators go beyond the legal and geographic constraints imposed by agency jurisdiction in defining disproportionate adverse effects or in responding to Title VI complaints? How should environmental justice programs address the local land use decisions that often play such a crucial role in creating -- as well as resolving -- Title VI disputes?

6. **New versus Renewal Permits:** Should EPA and state and local governments apply different standards in processing Title VI complaints that deal with permit renewals or modifications, as opposed to applications for new permits? For the purposes of this report, the terms "renewal" or "modification" include both the continuation of permits without major changes and requests that permits be revised to allow expansion of existing facilities. "New permits" apply to facilities that have not yet been built. See section entitled "New versus Renewal Permits" below.

7. **Mitigation:** What standards should apply in determining the acceptability of the mitigation being proposed? How closely must mitigation relate to the disparate impact that is discriminatory under Title VI?

8. **Justification:** If mitigation is difficult or impossible, what standards should apply in determining the validity of justifications offered by respondents to a Title VI complaint?

NEXT STEPS FOR EPA

The Committee's recommendations to EPA fall into seven broad categories: (1) revision

and implementation of the *Interim Guidance* on the basis of broad public review and comment; (2) development of policy statements addressing other areas of concern, including enforcement policy, Brownfields redevelopment, and the control of non-regulated sources; (3) expanded research and data-gathering regarding cumulative risks and synergistic effects; (4) development and dissemination of better tools for conducting Title VI assessments; (5) analysis of precedents set in other areas of civil rights law; (6) implementation of pilot projects and distribution of their results; and (7) concerted efforts to integrate Title VI issues and constituencies into other major Agency initiatives.

Revision and Implementation of the Interim Guidance

Step One: Stakeholder Consultations, Especially at the Grassroots

The Committee recommends that EPA continue to consult with its constituencies and other experts as it rewrites the *Interim Guidance* and develops other Title VI policy statements. The Committee expects that the guidance will be published for public comment before it is issued in final form. However, publication in the *Federal Register* does not constitute effective notice for community groups, environmental justice advocates, and some local governments, and the Committee urges EPA to launch more effective outreach efforts to obtain the comments of these crucial stakeholder groups.

Specifically, the Committee recognizes that grassroots environmental justice groups are necessarily focused on the issues they have raised about potential disparate impacts in their own communities. Composed of people who must earn their living in other ways, grassroots advocacy groups must use human – as well as their financial – resources very carefully. If EPA

wishes to understand their perspectives on environmental justice, in all of its varied meanings and implications, it must accommodate these constraints, both by assisting volunteer advocates to attend meetings where the issues are discussed, and making those sessions more accessible to the communities directly affected by policies that will result from such exchanges.

Thus, environmental justice advocates on the Committee recommend that EPA immediately initiate communication with groups and individuals who have filed Title VI complaints, regardless of the status of their cases, in an effort to explain how it plans to accomplish revision of the *Interim Guidance.* These members of the Committee further recommend that EPA staff make the effort to develop ongoing, consultative relationships with the established environmental justice networks that have expressed an interest in these policies.

EPA has already facilitated one meeting among grassroots environmental justice advocates to discuss revision of the *Interim Guidance*. Environmental justice advocates urge the Agency to arrange further meetings of this nature, noting that a single meeting in one location during a period when people may have difficulty arranging time off their jobs or family obligations is insufficient to garner the views of all the grassroots groups involved most intensely in these issues.

Once it has completed these consultations, and revised the *Interim Guidance,* EPA should prepare materials that explain the process for filing a Title VI complaint to affected communities, translating such materials into the languages that are spoken in the communities of color where such problems have arisen.

Step Two: Revision and Implementation

After these consultations are completed, the Committee recommends that EPA issue revised guidance as expeditiously as possible, especially given the backlog of Title VI complaints now pending in the Agency's Office of Civil Rights.

Once the *Interim Guidance* is made final, the Committee recommends that EPA and the states, in consultation with affected local governments, consider using National Environmental Performance Partnership agreements to set forth their expectations regarding state programs. (These agreements are now the vehicle of choice for establishing the criteria EPA will use in evaluating state implementation of delegated programs.) The Committee recommends that EPA monitor the implementation of such programs both to learn from these experiences and to evaluate their effectiveness.

In addition to continuing its consultations with community groups, environmental justice advocates, and state and local governments regarding Title VI issues, the Committee recommends that EPA educate industry groups about the requirements imposed under its revised guidance. It is the Committee's sense that although the chemical and waste management industries are aware of the issues, other business sectors may not understand how such considerations can affect their business. The Committee particularly encourages proactive efforts to educate the smaller business community.

Beyond Permitting: Consideration of Other Areas of Concern

While it is understandable that recent, high-profile permit disputes provoked EPA and state and local governments to focus on this aspect of their mission, environmental justice advocates on the Committee have repeatedly noted that permitting issues are only one

manifestation of the problem, and may have little -- if any -- relevance for many communities. The Committee's work suggests three other areas that warrant extensive consideration by the Agency.

The first is enforcement policy and practice with respect to regulated entities located in communities comprised of a protected class. There is a widespread perception among community groups that federal, state, and local regulators are less vigorous in enforcing the law with respect to such facilities, and the merits of this concern deserve sustained attention. Although the Committee neither adopts nor rejects this perception, it believes that EPA and its state and local partners, in addition to developing objective data on past enforcement actions, should evaluate enforcement policies to determine whether they have the effect of de-emphasizing enforcement in communities containing a protected class.

The second area is the effect Title VI programs may have on the redevelopment of Brownfields (abandoned and contaminated land) in the inner city. State and local representatives have urged the Committee to think twice before endorsing the identification of communities of color on a geographic basis because they are convinced that such a system will create a stigma that forecloses economic development. They add that this outcome would be especially unfortunate because programs designed to encourage the voluntary cleanup of contaminated land in the inner city offer productive opportunities for business to address environmental justice issues in partnership with communities.

Members of the Committee who represent community interests are skeptical about the value of economic development that exacerbates adverse health effects in neighborhoods already bearing a disproportionate burden. While they often support Brownfields initiatives, and believe

that such programs frequently avoid environmental justice disputes because they require early consultation with affected communities, they are not willing to relinquish screening or mapping on the basis that it may chill any form of economic development, including development that exacerbates discriminatory effects. All of these perspectives deserve more discussion than the Committee was able to afford them.

Finally, the difficult but important issue of pollution caused by unregulated sources deserves concerted attention from EPA, the states, and local governments. Industry and community representatives agree that unregulated sources are a major source of disproportionate harm in communities of color. Industry representatives contend that it is unfair to expect large facilities to shoulder the burden of reducing overall emissions. Community representatives assert that to implement effective programs, regulators must address pollution sources outside the limits of their regulatory programs. Both groups agree that limited resources must be committed to the most severe risks, but disagree on how to accomplish that important goal.

Research and Data Gathering on Cumulative Risk and Synergistic Effects

The Committee is unanimous in its belief that EPA should strengthen its research regarding the implications of cumulative risks and synergistic effects. Some industry representatives believe that the science "isn't there yet" to document the actual existence of such adverse effects. One state representative further contends that states should implement programs that endeavor to address cumulative risks only where peer-reviewed, scientifically valid methodology is available.

Other members of the Committee disagree with these assessments, contending that

compelling information either exists or should be developed through enhanced monitoring and modeling requirements. They argue that information regarding such risks will never be perfect, and that developing regulatory policy in the face of scientific uncertainty has always been an integral part of EPA's mission.

The *Environmental Justice Protocol* proposed by the Public Interest Law Center and included in this report as Appendix H would cope with gaps in data regarding cumulative risks and synergistic effects by assuming that environmental exposure has caused elevated public health statistics in such categories as age-adjusted mortality rates, infant mortality rates, and low birth weight rates. The Committee did not reach consensus on the merits of this approach, but members agree that it emphasizes the need to improve the information available to document and assess adverse impact.

EPA has launched research projects exploring the cumulative risks and synergistic effects presented by air toxics, and is also doing important work in assessing cumulative risk through its program to assist the states in establishing total maximum daily loads under the Clean Water Act, 33 U.S.C. §§1313-1315. The Committee urges EPA to increase the resources devoted to such research and to ensure that these findings are accessible to constituencies concerned about Title VI implementation.

The Committee also urges EPA to investigate innovative state and local initiatives to understand cumulative risks and synergistic effects. For example, the South Coast Air Quality Management District has launched an innovative new program known as the Multiple Air Toxics Exposure Study, or MATES. That and similar projects are pioneering the development of methodologies for assessing cumulative exposure and synergistic effects. They rely on

monitoring that collects data on gaseous and particulate emissions from stationary and mobile sources simultaneously, providing a quantifiable assessment of localized risks. EPA assistance is crucial to make such programs available nationwide.

Development and Distribution of Assessment Tools

The Committee recommends that EPA continue its efforts to develop the assessment tools necessary to implement effective Title VI programs. For example, EPA is developing programs such as the Land View series that list and identify many types of potential emission sources that are proximate to a community. EPA and the states are also making efforts to computerize and make available to the public information regarding the status of facility permits, as well as critical data about the condition of the environment, enforcement activities, and regulatory requirements.

EPA and the states are pioneering the development of methodologies that help industry identify and implement pollution prevention opportunities. They are also investigating mobile sensor technology that allows measurements of ambient air quality in communities, a category of information that is often requested by community groups. The Committee hopes that EPA will consider developing a checklist or inventory of the sources of pollution that are most prevalent in urban communities of color. All of these tools are vital building blocks in the implementation of effective programs, and the Committee recommends that EPA devote significant resources to making them readily available to state and local governments, industry, and the public.

Environmental justice advocates further urge EPA, the states, and local governments not to become enmeshed in the development of complex methodology that would prove a direct link

between specific pollution and manifest adverse health effects. They argue that assessing disparate impact should be a much more straightforward, less costly process of evaluating the number and type of facilities causing pollution in a neighborhood and comparing that burden to the comparable burden born by other communities. They see the demand by industry representatives for techniques that will link pollution and illness as a false test that will make it very difficult to carry out the law's prohibition on discrimination as a practical matter.

Legal Research and Analysis

Another subject warranting EPA's immediate attention is the analysis of the legal precedents developed in other areas of civil rights law that may prove useful in interpreting the application of Title VI to environmental decision making. At the Committee's request, EPA's Office of General Counsel (OGC) prepared a summary of precedents set under other civil rights laws on such crucial topics as the degree of disparity that must be present to find discrimination, the nature of the justifications that would serve to overcome such a finding, and the mitigation required to address violations that are not justified. The summary is attached to this report as Appendix J. The Committee's review of this lengthy report suggests that EPA would be well-advised to convene a group of civil rights experts from the public and private sector to further develop this analysis. By identifying available precedents and translating their application to the environmental arena, EPA and its constituencies will be able to take the crucial step of identifying whether there are aspects of environmental decision making that require the development of new law and policy.

The Utility of Pilot Projects

The Committee recommends that EPA and state and local governments work together to develop pilot projects that address different aspects of environmental justice issues, documenting the results of these initiatives carefully and making their findings available nationwide. The pilot project methodology is particularly well-suited to deal with the issues raised by disparate environmental impacts because both the science and the policy that affect such situations are at a relatively early stage of development.

The Best Context for Title VI Programs

The Committee recommends that EPA and its state and local partners make explicit the relationship between effective Title VI programs and other initiatives that address the fundamental sources of such concerns. For example, programs that address pollution on a watershed or airshed basis have the potential to define and ameliorate the cumulative effects of emissions on communities more effectively than individual permit decisions, although they may present similar technical and scientific challenges. Similarly, EPA, state, and local efforts to develop cross-media permitting programs may provide better opportunities for mitigating the adverse effects of emissions on communities. Finally, EPA, state, and local efforts to develop and make accessible to the public data regarding environmental indicators could prove helpful in bolstering the transparency of the public participation process recommended by the Committee in the "A Template for State and Local Government Programs" section of this report. EPA, state, and local policy statements regarding Title VI, cross-media regulation, watershed and airshed protection, and efforts to improve environmental information should describe these interrelationships and encourage coordination between these activities.

A TEMPLATE FOR STATE AND LOCAL GOVERNMENT PROGRAMS

Guidance, Not a Mandate, for the States and Local Governments

Webster's Third International Dictionary defines a template as a pattern or guide used to produce a desired profile. The template described in this report is intended to serve as a model plan for states and local governments that elect to establish environmental justice programs. The Committee emphasizes, however, that it does not view this model plan as the basis for a mandatory requirement that state and local governments adopt such programs. While many members of the Committee, including state and local government representatives, believe that establishing proactive environmental justice programs is a desirable, even necessary, public policy, the group did not agree to recommend a new mandate for state and local governments.

The Committee recommends that EPA and its stakeholders encourage state and local governments to implement environmental justice programs. It further recommends that EPA explore ways to motivate industry, communities, public interest groups, and other branches of government to participate actively in such initiatives. State and local government programs are clearly the foundation for making significant progress on these issues, and should be a top priority for EPA.

Two Paths to Equity

The model plan endorsed by the Committee proposes that state and local governments develop environmental justice programs along two distinct tracks. The first would explore and attempt to remedy the imposition of disproportionate burdens on communities that comprise a

protected class outside the constraints of the single-facility permitting process. The second would address potential discrimination that may result from individual permitting decisions. The major advantage of the first track is its capacity to identify and ameliorate cumulative effects that are difficult to address in permitting proceedings.

The Committee is aware that the first track goes beyond the dictates of Title VI and may require a significant commitment of resources by state and local governments and regulated industry. We also recognize the importance of creating incentives for state and local governments, industry, business, and community groups to participate in broadly defined, preventive programs. The Committee discussed effective incentives at some length and its conclusions are presented in the section entitled "Incentives," below.

Deference to State and Local Government Permitting Decisions

Several of the incentives identified by the Committee raise important policy issues, but none is more significant than the possibility of EPA deferring to state and local governments in order to encourage their implementation of proactive programs. State and industry representatives on the Committee have explained that EPA deference is the single most effective incentive that EPA could offer to inspire the implementation of proactive programs. Indeed, some members contend that deference by EPA is a condition precedent for states to even consider establishing such ambitious programs. They characterize Track 1 programs as asking the states and local governments to go "beyond compliance" with Title VI, comparing that request to other EPA reinvention initiatives aimed at industry, such as Project XL.

These members of the Committee urge EPA to recognize that state regulators face the

daily dilemma of deploying limited resources to address demanding federal statutory mandates. They argue that in this atmosphere, unless states derive clear benefits from implementing proactive environmental justice programs, such initiatives will never become a priority. They add that states will be unable to persuade industry to participate voluntarily unless their final decisions are accorded deference, eliminating the extensive delays that now affect the processing of Title VI complaints by EPA and limiting EPA's authority to undertake a *de novo* "second guessing" of state decisions made in good faith. In short, they believe it is unrealistic to expect Track 1 to succeed without a generous measure of deference.

In contrast to these views, environmental justice advocates are very reluctant to endorse deference as an incentive. They argue that the appropriate incentive for state and local governments to implement the model plan is the prospect that they will "win complaints" because proactive programs produce better decisions that will withstand scrutiny in the context of a Title VI case. They question why it would ever be appropriate to create special incentives for state and local governments to comply with the law.

These members of the Committee are especially sensitive to the risks of deference because they do not know what substantive standards EPA will apply in deciding to give state and local programs such leeway, and cannot endorse the concept of deference in a substantive vacuum. Even if EPA ultimately develops substantive standards that are acceptable, they question whether EPA will apply rigorous oversight to the actual implementation of state and local programs.

Some members of the Committee, all of whom are lawyers representing a range of stakeholders involved in Title VI disputes, question whether EPA is authorized to defer to state

and local programs in deciding the merits of a formal complaint. They argue that Title VI was enacted to protect constitutional rights, protecting the people of color from "majoritarian impulses." They believe that the statute imposes a clear mandate that EPA evaluate complaints *de novo* -- that is, without according any special weight to the state or local agency's views on the merits. In this view, the most EPA should do when confronted with a complaint regarding a permitting decision made in the context of a program based on the model plan is to acknowledge the state or local government's efforts, while still reviewing the merits of the complaint with the same level of attention as the Agency would apply to any other complaint.

Other Committee members, who are also lawyers involved in Title VI matters, believe EPA has significant authority to defer to state and local programs. They point out that Title VI nowhere tells EPA how to evaluate complaints. Thus, they argue that *de novo* review is neither expressly required nor impliedly favored by the statute.

Several members of the Committee agreed that it is important to distinguish between aspects of a state or local program that are "procedural" (e.g., affording ample opportunities for public participation), as opposed to those that are "substantive" (e.g., measuring disparate impact pursuant to a protocol recommended by EPA). They add that if EPA adopts deference as an incentive, it should parse the appropriate scope of such deference carefully. For example, if a complaint alleges a disparate impact, and the state or local government did not follow federal guidance on the assessment of such impacts, it should receive no deference, even if it faithfully followed the public participation aspects of the model plan. They are also concerned that EPA look behind the simple fact that a state or local government has an environmental justice program in evaluating the merits of a complaint. For example, a state may adopt elaborate public

participation procedures but fail to apply them in any given case. In such circumstances, EPA decision makers should not assume that these portions of the state's plan are entitled to any deference, credit, or even less stringent review.

State and Local Government Flexibility

Although the Committee developed consensus regarding the desirability of a two-track structure for environmental justice programs, members diverge on the question of how much flexibility states and local governments should be given to translate the principles contained in the template into an operational protocol. One state representative describes the model plan as a "menu" of options for the states, and believes that EPA must avoid "micromanaging" state environmental justice programs. A second state representative contends that a "one-size-fits-all" approach will inhibit the development of Title VI programs.

In contrast, environmental justice advocates urge that EPA include as much prescriptive detail as possible when it drafts final guidance on this subject. They agree with the observations of other state and local government representatives, who urge the federal government to take a strong leadership role in defining the elements of an effective program, including minimum prescriptive standards for making decisions with Title VI implications, in order to ensure a "level playing field" nationwide.

Industry representatives generally favor greater flexibility for the states. Although they agree that stronger federal leadership could help achieve greater predictability, so that consideration of environmental justice concerns could proceed at the same time as permits are processed, they also emphasize that much of the wisdom and experience on these issues resides

with state and local governments.

The Committee recognizes EPA's continuing commitment to serve as an arbiter of Title VI claims. As EPA refines the model plan, the Committee recommends that it achieve a balance between the need to establish a clear floor for state and local programs while still giving the states and local governments the flexibility to adapt these principles to their own local circumstances.

The Committee has developed seven principles to serve as a template for incorporating environmental justice into state and local permitting decisions. These principles are listed and discussed below in the approximate order that they arise in the permitting process.

Proactive Problem Solving

Identify environmental justice issues proactively, with a community-based focus.

Perhaps the single most important characteristic of the model plan proposed by this report is its emphasis on early and proactive efforts to identify and address environmental justice issues. This principle applies to both tracks of the model plan: efforts in Track 1 to address the cumulative effects of pollution on communities that comprise a protected class and the processing in Track 2 of single-facility permits that raise environmental justice concerns.

Under the first track, state and local governments, in consultation with environmental justice advocates, affected communities, and regulated industry, would identify areas that may bear a disproportionate burden of adverse environmental effects. They would work to characterize the nature and sources of those effects as accurately and comprehensively as possible. (See discussion of an inventory of pollution sources, below.) Once adverse effects are

thoroughly understood, Track 1 programs would develop effective mitigation to reduce them. Mitigation might involve reductions of pollution at permitted facilities, or it might involve efforts to reduce exposure to pollution -- or other adverse impacts -- by addressing the operations of unpermitted activities.

For example, lead is a contaminant common in major cities that has a devastating impact on young children. There are many sources of lead emissions, some of which are regulated (the ban on lead in gasoline and Clean Air Act permit restrictions on major industrial facilities) and some of which are not (lead paint in older rental housing). Under Track 1, a state or local government could develop programs to remediate lead paint that would reduce the overall burden borne by a given community, and would also alleviate the pressure to secure extraordinary reductions from permitted facilities.

The Committee believes that, over time, as Track 1 efforts to address disproportionate adverse effects on protected communities become more sophisticated, creative, and extensive, the level of controversy provoked by individual permitting decisions may tend to recede. Thus, Track 1 programs are a crucial alternative to mitigation in the context of individual permitting decisions, and hopefully will be implemented thoughtfully, and then embraced by all stakeholders.

With regard to Track 2, the Committee strongly recommends that EPA, state and local governments, and industry embrace the principle that community outreach and dialogue should begin as soon as possible in the permitting or pre-permitting process (e.g., a transaction that involves trading of pollution "credits" or a decision by the permittee to renew, modify, or acquire a new permit). The Committee further recommends that at these initial stages, land use decision

makers and environmental agency officials conduct community outreach to identify parties potentially interested in the decision. Informal discussions with the community, as well as the state and local officials who may play a role in the decision, should begin as soon as possible once these parties are identified. In this regard, industry representatives urge EPA and their state and local partners to recognize voluntary industry initiatives as a supplement to these efforts, giving appropriate recognition to those who implement such projects.

The Committee believes that, in general, few constraints should be placed on those initial discussions. It is especially important to encourage residents who would be directly affected by the permitting decision to raise the full range of their concerns about the potential impact of new or existing facilities on their environment, defined in the broadest sense. Thus, if communities are concerned that truck traffic will cause an increase in vehicle accidents, or believe that the siting or expansion of a facility will change property values, they should be encouraged to put those concerns on the table during these preliminary discussions so that the facility's sponsor can consider them.

On the other hand, the Committee also recognizes that in some cases, state and local officials and facility sponsors may believe that some or all of the community's concerns are beyond the scope of the environmental permitting process. In these situations, state and local officials and facility sponsors may seek to draw clear and explicit distinctions between such open-ended problem-solving and the issues that will be considered if the parties are unable to reach a voluntary agreement. As discussed below in the section entitled "Mitigation" below, many members of the Committee believe that benefits unrelated to disproportionate adverse effects are not sufficient mitigation for discrimination under Title VI. Nevertheless, the

Committee agrees that reaching early agreements that effectively address the community's most significant concerns is the best way to prevent the festering of such problems to the point that they provoke a Title VI complaint.

It cannot be overemphasized that when the Committee recommends early intervention, it means just that. Ideally, a dialogue would begin even before decisions are made to allow construction or expansion of facilities and would be underway before the permit process officially begins. Education of land use decision makers about the environmental implications of their actions is a crucial component of early intervention.

In addition to giving the parties the forum and the flexibility to find solutions to community concerns, early intervention reduces the possibility that delays will cost industry time, money, and even a competitive advantage in the siting or expansion of new and existing facilities. Finally, early intervention keeps the focus on the community's true concerns, rather than compelling the community to fight a permit on the basis of issues that are less important, but which may be of great significance to facility sponsors. This is why the Committee strongly recommends a concurrent, more relational, first-track approach.

A final issue considered by the Committee is the extent to which environmental justice programs should conduct outreach in communities that have not otherwise indicated concern about environmental risks. Should program staff try to educate community residents about environmental problems, or should they simply develop accessible notification procedures and terminate official consideration of environmental justice concerns if no one—or only a small number of residents—come forward?

The Committee agrees that it is not the role of a state and local environmental justice

program to organize opposition to permitting decisions. However, the Committee also believes that the first track of environmental programs should proceed even if communities are not demanding change. As science and technology become more sophisticated and we are able to identify and measure cumulative effects, amelioration of disproportionate burdens will become an integral part of the overall mission of federal, state, and local environmental agencies, with or without public complaints.

Incentives

Identify and create incentives for state and local governments to establish environmental justice programs and for the full range of stakeholders to participate in such programs.

The Committee agrees that finding suitable incentives for state and local governments, affected communities, and regulated industry to participate in environmental justice programs will prove crucial to their long-term success. Incentives are particularly important as a motivation for the implementation of Track 1, proactive programs at the state and local levels. The Committee strongly recommends that EPA emphasize the development of such incentives as one of its top priorities. Possible incentives are discussed below in the context of the stakeholder groups they are designed to motivate: (1) state and local governments; (2) regulated industry; and (3) community groups. To be successful, EPA must develop equally strong incentives in all three categories. The following discussion explains the Committee's views on the incentives that could be offered to each group. The Committee has also included, as Appendix K to this report, a paper dated September 28-29,1999, and entitled "Draft Preliminary Report on Incentives" prepared for the NACEPT Committee on Reinvention, which contains further insight into this important issue.

State and Local Governments

The Committee has identified three possible incentives for state and local governments to implement the model plan recommended by this report: (1) EPA deference to state and local permitting decisions; (2) expedited processing of Title VI complaints regarding decisions by state and local governments that have implemented model plan principles; and (3) the likelihood that decisions based on the standards contained in the model plan will prove more compelling on their merits when they are reviewed by EPA.

As discussed above in the section on "Deference to State and Local Permitting Decisions," the Committee did not achieve consensus on the complex issue of whether and how to accord deference to state and local permitting decisions made in the context of programs that follow a model plan. State and industry representatives argue that deference is an indispensable incentive for states to consider implementing the "beyond compliance" programs called for in Track 1 of the model plan and for regulated industry to participate in such initiatives. Environmental justice advocates are skeptical of deference, fearing that in the absence of strong substantive standards and consistent EPA oversight and enforcement, it could lead to ratification of bad state and local permitting decisions. Some of the lawyers on the Committee disagree about how deference fits with the statutory mandates set forth in Title VI.

Avoidance of the extensive delays that may accompany the filing of a Title VI complaint is a second, potentially powerful incentive for state and local implementation of environmental justice programs, particularly those modeled on the Track 1 proposals in this report. State and local representatives argue that under the current system, even if they implement an extensive

program of public outreach and dialogue, permitting decisions can still get "trumped" by a Title VI complaint filed by a handful of people who do not truly represent the community's views. If EPA pledged to expedite its resolution of complaints regarding decisions made by state and local governments with good programs, this deterrent to the investment of significant state and local resources could be overcome.

The Committee assumes that decisions made by state and local governments with effective programs based on federal standards will include a well-developed record that considers possible environmental justice concerns, including the nature and scope of potential disproportionate adverse effects. Such decisions should be more compelling upon EPA review, both because they should not require the Agency to conduct significant additional investigation of the merits of a Title VI complaint and because they should set forth a better-reasoned analysis of those issues.

One academic member of the Committee suggests that one possible way to describe this approach is that the existence of a well-run environmental justice program will be considered as evidence when EPA adjudicates a Title Vi complaint. For example, if the program is inclusive, and provides meaningful opportunities for input, then that fact would be considered evidence that the complainant was not shut out of the process. She compares this approach to existing "burden shifting" regimes developed under other civil rights laws.

Although its review of permitting decisions is likely to be easier with respect to state and local governments that implement robust environmental justice programs, it has also become clear that more resources are needed to process such complaints expeditiously. EPA is coping with a large backlog of cases. Although the Committee did not reach consensus on a

recommendation to increase funding for the Office of Civil Rights, it suggests that the EPA Administrator evaluate the benefits of various potential resource levels and then seek a specific appropriation for this vital function.

Industry

The nature of incentives offered to inspire industry participation in state and local environmental justice program may vary between Tracks 1 and 2, and between the sectors of industry that are affected. Industry representatives believe that industry's participation in Track 1 must remain voluntary, and urge state and local governments to be creative in developing incentives that encourage industry -- especially unregulated industry -- to participate in the voluntary reductions that are a central goal of Track 1. They reason that using Track 1 programs to achieve a proportionate share of reductions from a comprehensive list of large and small pollution sources is likely to garner the support and active involvement of companies that operate large facilities, encouraging them to go "beyond compliance" in shouldering responsibility for their "fair share" of necessary mitigation.

Thus, industry incentives fall into three distinct categories: (1) expedited decision making that has the potential to inspire participation by the full range of regulated sources; (2) more equitable distribution of pollution prevention and reduction that has the potential to motivate the involvement of larger regulated sources; and (3) incentives -- as yet unidentified -- that would garner the support of generally smaller, nonregulated sources, especially in the context of Track 2 initiatives..

Industry representatives on the Committee consistently emphasized their need for

certainty and clear, timely decision making. They argue that if regulated industry members are convinced that the process is likely to reduce delays and last-minute "surprises," and will improve industry relations with adjacent communities, their participation in both tracks is likely to prove both more extensive and fruitful. They add that uncertainty undermines their ability to make timely business decisions and imposes both direct and "lost opportunity" costs on companies. Since industry representatives have explained that Title VI complaints often function as a stay on a permitting decision, relief from such delays is broadly viewed as a highly desirable attribute of state and local programs. In sum, expedited processing of permits by state and local governments and expedited consideration of Title VI complaints by EPA are as powerful an incentive for regulated industry to participate in environmental justice programs voluntarily as they are for state and local governments.

As for the possibility that Track 1 programs will rationalize the burden of pollution prevention and reduction between regulated and unregulated -- and large and small -- sources, one industry member characterizes this incentive as an opportunity to escape the typical scenario in which state agencies "line up the usual suspects and shoot us."

However, for this incentive to work, federal, state, and local regulators must develop meaningful incentives to inspire the participation of unregulated sources, a far more challenging proposition. As discussed in the section entitled "A Comprehensive Inventory of Pollution Sources" below, inclusion of unregulated pollution in any analysis of disproportionate adverse effects is central, consensus recommendation of this report. Wide dissemination of this information can be a powerful tool in encouraging pollution reduction. Another possible result of such inventories may be state and local decisions to extend regulations to those sources. In

the absence of legal compulsion, however, other incentives must be developed as well to encourage voluntary reductions by this group, many of which are small businesses.

The Committee did not have a full opportunity to address this difficult question. We urge EPA to pursue it in subsequent dialogues with environmental justice stakeholders, and to include in those discussions further consideration of regulatory and legislative proposals that would "carve out" pollution sources from the controls that apply to other entities in the public and private sectors.

Federal, state, and local regulators should also consider recognizing industry efforts to address community concerns by including such "supplemental projects" as a term of the permit that may, when appropriate, lessen the burden imposed by other permit conditions.

Finally, it may prove worthwhile to study emerging Brownfields reclamation programs and the proceedings of the EPA NACEPT on Reinvention for examples of incentives that encourage industry participation in an affirmative manner. A copy of a draft preliminary report prepared by the NACEPT Committee is attached as Appendix K.

Community Groups

Members of the Committee identified three possible incentives to motivate community participation in environmental justice programs: (1) an accessible process that produces meaningful -- and not just token -- involvement; (2) technical support and assistance that allows community groups to participate on a "level playing field" with industry and government; and (3) quantifiable pollution prevention and reductions.

The conditions for meaningful public involvement are addressed in greater detail in the

section of this report entitled "Public Participation" below. In addition to such important procedural protections as meetings in accessible places during convenient times and the translation of documents if necessary, environmental justice advocates on the Committee emphasize the importance of assisting the community to develop technical capacity, advocating that EPA and industry provide financial support for such initiatives. They add that technical assistance is vital at two distinct stages of the process: (1) during the initial consideration of permit provisions, in order to evaluate their potential impacts on the affected community and (2) following approval of the permit, in order to enable the affected community to monitor compliance independently.

Without the advice of independent technical consultants who do not have a vested interest in approval of the permit, these members argue, the community is easily overwhelmed by the large number of lawyers and technical experts typically retained by permit proponents. The debate over permit conditions occurs at a level that is not easily comprehended by people from the community, exacerbating their alienation and suspicion of government and industry and crippling any effort it makes to influence the outcome of the proceeding.

One member of the Committee underscored the value of small grants that enable community organizations to develop data gathering and analysis capability. Her organization recently received a grant in the range of $40-60,000 to purchase the computer software necessary to compile its own Geographic Information System (GIS) and to hire and train a staff person to run the system. Faculty at the Columbia School of Public Health will conduct this training, which will enable to community to participate more actively and effectively in the daily decision making that has direct effects on its health.

This member of the Committee also stressed the importance of small grants to support travel to public meetings and other incidental expenses. She stated that communities without large organizations cannot support these costs, which become an insurmountable barrier to their participation in the process.

Industry and state representatives oppose the creation of an ambitious, new, resource-intensive program to provide technical support beyond the information already provided by federal and state regulators. They argue that such information might be used to fuel costly tort and other litigation, rather than education and problem solving. Moreover, they believe it is the role of the regulator to provide sound, reliable information to citizens about the permitting process.

Given the inadequate federal funding for processing actual Title VI complaints at the Track 2 stage, industry representatives are also concerned about providing federal funding at the Track 1 stage, where the nature and extent of the problem remains to be determined in any particular community. At a minimum, one industry representative suggests, any federal grants should be part of a specific EPA appropriations request and should be subject to strict fiscal controls such as regular audits and rules designed to prevent conflicts of interest.

A state representative further argues that providing technical assistance would confuse the issue of who actually represents the community because it would introduce "citizen groups, lawyers, and consultants" into the situation. In his view, only elected officials provide reliable representation of a community.

The Committee did not have an opportunity to discuss either the qualitative or quantitative aspects of the technical assistance that could be provided to community groups and

must leave the issue to other dialogue groups.

The second incentive advocated by environmental justice advocates is the possibility that pollution will be prevented and reduced if the community participates actively in either or both tracks of a state or local environmental justice program. (Prevention and reduction are not necessarily synonymous because reductions affect the overall burden of adverse impacts shouldered by the community, while the concept of pollution prevention also includes the elimination of new emissions from facilities that are not yet built.)

Environmental justice advocates stress that directly measurable benefits to public health produced by pollution abatement are the overriding litmus test they apply to state or local environmental justice programs. They strongly recommend that EPA incorporate this factor as a central theme of its guidance to state and local governments. They are willing to remain flexible on how pollution reduction and prevention are achieved and support creative approaches to mitigation, especially in the context of Track 1 programs. For example, they are willing to support the approach suggested by the lead paint example set forth in the discussion of industry incentives immediately above. However, they believe that programs with the exclusive goal of processing permit applications efficiently within the black letter of the law will not win the support of communities focused on tangible health effects.

Addressing Cumulative Effects

Define relevant pollution sources to be addressed by state and local environmental justice programs accurately and inclusively, taking into consideration cumulative health and environmental effects.

Disagreements over the existence and the evaluation of cumulative effects are at the heart

of many environmental justice disputes. The Committee's views in this crucial area involve two distinct stages of the problem: (1) how to assess cumulative effects in a comprehensive and accurate manner and (2) how to evaluate the significance of cumulative effects for the environmental decision at issue. Members of the Committee achieved significant consensus around the goal that cumulative effects should be evaluated when possible, but did not agree on the nature, scope, or solution to the technical issues that arise in such evaluations.

A Comprehensive Inventory of Pollution Sources

The Committee believes that, within the constraints of their limited resources, federal, state, and local agencies that choose to implement Track 1 programs should endeavor to assess the cumulative effects on human health and the environment of all pollution sources, without respect to the constraints of the permitting process or applicable law. Permitted and unpermitted, private and public, stationary and mobile sources should be included in all inventories of releases and other environmental conditions that may pose a risk to communities that comprise a protected class. Inventories should be conducted without regard to the applicability of federal, state, and local regulations and should include all levels of government entities that produce pollution or cause other significant risks.

Environmental justice advocates and representatives of large industrial sources have particularly strong views on the importance of including "exempt" sources of pollution. They are alarmed by what they see as a growing trend in legislation, EPA regulation and elsewhere toward exempting a variety of sources, especially small business sources, from the laws and regulations that apply to major industries. Examples of this trend include nonpoint sources of

water pollution, which are either unregulated or subject to ineffective regulation in most states. Recent proposals to exempt recyclers from the Superfund program are another example of this trend. Government agencies are also subject to special, and, in the view of these members, unwarranted, favorable treatment. For example, one member of the Committee explained that the New York City Board of Education recently won permission to construct schools on Brownfields sites contaminated by chemicals that pose a direct threat to the children.

The Committee believes that exempting sources from the assessment of cumulative effects can only result in inaccurate measurements of the real risks to public health, skews the evaluation of disparate impact, and prevents the formulation of effective remedies for such problems. Focusing exclusively on major sources is unfair to the companies that operate them, could result in the imposition of a disproportionately heavy burden of pollution reduction on such facilities, and, most importantly, could leave adverse impacts unaddressed.

In this regard, a local government representative notes that if a comprehensive analysis of cumulative risk is undertaken that includes all sources, it could lead to situations where new facilities would not be allowed to add to that cumulative burden unless mitigation was accomplished, either by the new source or overall.

Although the Committee agrees on the importance of taking a comprehensive inventory of pollution sources in the context of Track 1 programs, taking into account the limits of government resources, members did not achieve consensus on the role such inventories should play in Track 2 of state and local environmental justice programs.

Evaluating Potentially Adverse Impacts

Under Track 1 of the model plan proposed in this report, state and local governments would (1) use general screening to identify communities with a significant pollution load and a population comprised of a protected class; (2) determine whether such communities face a disproportionate burden of adverse effects; and (3) if so, work with industry and community organizations to find methods for decreasing such effects. State and local governments would also consider developing compliance outreach and technical assistance to respond to such situations, or special enforcement if appropriate.

One state representative predicted that if state and local governments work to reduce pollution loading in communities of color, "non-protected class communities with similar pollution loads will demand the same treatment," potentially leading to "reverse discrimination complaints and lawsuits."

The Committee understands that state and local government programs must set priorities among sources, leaving those that cause relatively minor adverse impacts out of their programs, and tailoring the amount of scrutiny other sources receive on the basis of substantive criteria. The development of priorities and a tiered public participation process would occur primarily in the context of permit reviews conducted with respect to individual facilities. The Committee recognizes that states and some local governments process hundreds, even thousands, of permits each year and that it would be impractical, unreasonable, and unnecessary to require a full environmental justice process for each one. The Committee also understands that many permitted sources are small businesses, which may not have the resources to undertake extensive public outreach.

Workgroup III developed a list of potential criteria for establishing priorities among

permitted sources that included such factors as the nature and amount of emissions, the potential adverse effects caused by such emissions, and the type of permit at issue, but the Committee did not achieve consensus on this relatively detailed list.

Further, the Committee did not reach consensus on two closely related and equally important issues. First, how should environmental justice programs take into consideration the cumulative risks and synergistic effects of neighboring sources when making permitting decisions for a single facility? Second, should the process and procedures of environmental justice analysis differ with respect to new and existing facilities under a permit-by-permit approach?

As discussed in detail in the next section of the report, members of the Committee disagree on the adequacy of the scientific data that is available to assess cumulative and synergistic effects. Some members argue that cumulative risks and synergistic effects are essential factors to consider at the same time that EPA works to improve the technical basis for such decisions. Others believe that until the technical basis for such assessments is improved, federal, state, and local regulators should not consider such adverse effects during the permitting process. They are also concerned about efforts to address cumulative risk and synergistic effects in Track 1 programs, given the current gaps in our understanding and analytical tools.

One state representative observes that cumulative effects are already a factor in state permitting decisions under the Clean Water Act because states conduct an assimilative analysis of affected water bodies, and try to leave room for industrial growth. He acknowledges, however, that the states' ability to develop remedies that address such effects vary depending on the legal authority given to the environmental agency under existing state law.

Industry representatives on the Committee believe that the cumulative risk analysis suggested by some in the context of Title VI complaints is quite different and more complex than assimilative capacity analysis under the Clean Water Act.

Members of the group further disagree on the issue of whether to regulate new facilities differently than existing facilities. Some environmental justice advocates endorse an approach sometimes described as "zero-based permitting" that would compel regulators to scrutinize permit renewals (including upgrades and expansions) for existing facilities using the same standards they apply to permit applications for new facilities. They argue that zero-based permitting is fundamental to the elimination of discrimination because in certain circumstances, it is be the only way to reduce disproportionate pollution loads.

Committee members representing industry, as well as state and local governments, strongly objected to this approach, contending that it is unfair, impractical, and illegal, and that it would cause severe economic dislocation harmful to facility owners and community residents.

In their dialogue on this difficult issue, members of Workgroup III considered -- but did not reach resolution on -- a compromise approach that would include renewals and modifications to existing permits in a Title VI analysis, but would not require the same degree of mitigation from such facilities if significant economic hardship would result. Members of the Workgroup discussed two alternative ways of dealing with such difficult situations: using offsets or pollution trading programs or adopting a pollution "budget"approach that would be modeled on the waste load allocations performed under the Clean Water Act.

Expansion of Existing Programs

Expand existing decision making processes to incorporate environmental justice issues, rather than creating a new and separate process, while ensuring that decision makers address such issues in a timely, efficient, and predictable manner.

The Committee strongly recommends that the second track of state and local environmental justice programs -- evaluation of potential environmental justice concerns raised by individual permit applications -- occur within the existing process for making such decisions. To the maximum extent practical, the technical review of permit applications should occur concurrently with the consideration of environmental justice issues, rather than leaving such issues to the tail end of the process, where they can trump technical review, wasting time and resources. Further, leaving the evaluation of environmental justice issues to the end of the permit process makes it more difficult for the permitting agency and the permittee to work with the community to develop creative approaches to mitigation.

The Committee recognizes that there are different definitions of state and local agency authority with respect to the terms and conditions of environmental permits, with some statutes granting state and local agencies the authority to change the standards that apply to a given facility in order to address cumulative effects. In general, the Committee urges state and local agencies to define the nature and scope of their authority clearly, both for internal purposes and for interested parties participating in a mediation process. However, the Committee did not address the complicated and controversial issues of whether and in which contexts state and local agencies should seek new legal authority in order to implement their environmental justice programs. Some members of the Committee felt that adequate legal authority was essential to an effective program, while others expressed concern about politicizing the process in a legislative context. EPA, the states, and local governments may wish to consider addressing this issue in

more detail.

Public Participation

Establish a transparent, accessible, honest, and accurate process for public participation.

The Committee identified five elements that are essential to the creation of a transparent process for public participation in decisions involving environmental justice issues:

1. Accessible, understandable notification;
2. Effective education regarding the legal and technical aspects of facility operations, permitting, and environmental exposures;
3. A process that allows community residents to participate in the debate effectively;
4. The development of adequate information to inform participants about the implications of the decision at issue; and
5. Clear statements by state and local agencies explaining the reasons for the decisions made with respect to environmental justice issues.

Included with this report as Appendices L and M are the public participation guidelines prepared by the National Environmental Justice Advisory Council, as well as ASTM E-50.03 -- *Standard Guide to the Process of Sustainable Brownfields Redevelopment.* These documents give helpful guidance to state and local governments in achieving these goals.

Another source of effective approaches to public participation is the Department of Energy's procurement program, which asks businesses seeking contracts to enter into a constructive dialogue with the affected community. EPA's recently revised 1998 guidance on the public's opportunity to participate in the consideration of Supplemental Environmental

Projects may also prove helpful, especially in the context of developing mitigation measures to address disproportionate environmental impacts.

A state member of the Committee points out that national and state environmental statutes contain detailed public participation public participation procedures that apply to permitting decisions. He adds that these procedures should be supplemented as recommended in this report to ensure that environmental justice concerns are addressed adequately. A local government representative stresses that communities must be given assurance that their concerns are being heard, respected, and considered.

The Committee also makes the following additional recommendations to EPA as it considers this aspect of the template.

Notification in newspapers, even those of general distribution, may not be sufficient to place affected communities on notice of a permit or other decision making process that will address environmental justice concerns. The Committee believes that such minimal notification should be supplemented by more aggressive community outreach. For example, New Jersey has considered placing notices in electric or telephone bills. New Jersey has also established a community liaison staff who develop an ongoing relationship with protected communities, even when no decisions are before them.

Effective notification includes educating citizens about the timelines that affect the process, the standards that will apply to the decisions made by the permitting agencies, and the remedies available to members of the community if they perceive the decision to be adverse. Members of the public must receive notification in their native languages whenever possible.

The Committee also emphasizes the widely-recognized reality that to achieve effective

public participation, meeting times and places must be convenient for residents who work and for those without access to an automobile. Holding a meeting during the day or at a location that is inaccessible gives the community the clear impression that the conveners of the session are not interested in what it has to say.

Industry and state representatives suggest that ongoing advisory groups, such as the community advisory groups established under the chemical industry's Responsible Care program, could provide fertile opportunities for consulting with community representatives about environmental justice issues in a timely and effective manner.

The Committee also recommends that state and local governments consider developing public education classes to inform the public about the operation of permit programs, the science of assessing exposure and risk, and the technical aspects of plant operations and pollution control. People with this base of knowledge are more likely to participate meaningfully in the consideration of disproportionate burdens and cumulative risk, whether those issues arise in the first or second track of a state or local environmental justice program.

The Committee further urges EPA and state and local environmental agencies to consider making similar educational opportunities available to the staff of agencies responsible for economic development and zoning whose decisions have grave but perhaps unforeseen implications for environmental justice.

The Committee recommends that early efforts to mediate permitting disputes occur in an informal atmosphere where participants feel comfortable, are encouraged to ask any questions that occur to them, and are allowed to raise all concerns that are related to the facility's operation. Early, informal participation may not obviate the need for more formal hearings later in the

process, but the Committee believes that it provides the most promising opportunity for timely resolution of environmental justice disputes.

During such deliberations, participants must have access to understandable data concerning the facility's operations and the likely implications of the permitting decision for public health. EPA can assist state and local governments in developing such information through its national databases that include monitoring and release data, as well as information about environmental conditions in the area where the facility is located.

The Committee agrees that permit applicants should be asked to develop additional information if necessary to supplement materials provided by the government, especially facility-specific facts such as compliance history, discharges and emissions, and facility processes, including opportunities for pollution prevention.

State and local programs should ensure that important documents are translated into languages other than English as appropriate. Permit proceedings can involve extensive documentation, and state and local regulatory agencies should make their best efforts to impose a reasonable burden on permittees.

Last but not least, the Workgroup believes that state and local governments should articulate in writing the reasoning that underlies their decisions on environmental justice issues, explaining to the community and the permittee why they reached the resolution they have adopted.

The Committee did not reach consensus on another possible aspect of public participation programs: giving communities the financial resources to obtain their own technical advisors. Environmental justice advocates believe that such technical assistance is always valuable, and

even necessary in many circumstances. They stress that communities should be able to find their own technical experts who are able to give them independent advice that is not influenced by government or industry. Industry representatives are generally opposed to the mandatory inclusion of technical assistance in environmental justice programs, arguing that it would create an expensive new bureaucracy to support state and local permitting programs. State representatives respond that while some situations create a need for technical assistance, state agencies should be able to provide it to people. A local government representative cautions, however, that most local governments are not in the position to promise such help. One state representative said that it was important for industry and the states to recognize that if the process becomes hypertechnical, communities have little choice but to "go political."

Participation by Government

Inform and involve all relevant levels and types of government entities in the process of reviewing actions that may have environmental justice implications. It is especially important to cooperate with local government officials, including economic development officials.

The Committee recognizes that successful environmental justice programs prevent, avoid, or mitigate discrimination in environmental decision making. Another important attribute of such programs is to avert, to the maximum extent practicable, extensive delays and inconsistent results as the applicant traverses the web of state and local agencies that must approve its operation of a facility. In addition to agencies with regulatory authority, other branches of government, such as economic development agencies, are frequently involved in planning new or expanded facilities, as well as ensuring that existing facilities remain where they are and prosper.

While the importance of including the permit applicant and community representatives in

early discussions of environmental justice issues is obvious, the significance of involving these other government entities is too often overlooked. Not only should their involvement prevent inordinate delays in the decision making process, it may well make it possible to address community concerns more directly. For example, residents may be concerned about fire code issues or the configuration of a highway used by trucks delivering materials to the plant. By including officials with the authority to rectify such problems, both the permit applicant and the community will benefit.

State and local government representatives on the Committee stress that zoning and land use decisions are frequently at the root of environmental justice concerns, which can be characterized as the problems caused by the proximity of industrial activities to residential neighborhoods. To truly prevent such problems, local officials must be consulted early and educated on the potential future ramifications of such decisions.

Some state representatives take this point one step further, arguing that because they have no control over such local decisions, state agencies should not be held accountable for them in the context of permitting decisions with respect to facilities that are clearly allowed to operate in the area under local zoning laws.

As important as it is to include all relevant state and local officials in the outreach effort, the Committee believes that state or local environmental agencies must remain firmly in charge of the process with respect to ongoing permitting decisions. Wherever possible, environmental justice concerns should be integrated into the permitting process. Members of the Committee disagree, however, on the important issue of whether career permitting staff should be trained to evaluate environmental justice issues raised by their work or whether these issues require the

participation of staff whose job it is to focus exclusively on environmental justice concerns, with some members fearful that if officials without technical background and expertise are assigned responsibility for evaluating complaints, important issues could get inadequate attention.

Community Monitoring

Build community monitoring capacity.

The Committee recommends that, in the context of Track 2 programs, state and local governments consider initiatives that allow communities to continue to assess the compliance of permitted facilities after initial environmental justice issues relating to the issuance of the permit have been resolved. Building community capacity to monitor industry performance may prove very effective in assuaging community anxiety about the health and environmental risks posed by individual facilities. The Committee believes that monitoring and other information reported to the government should be readily accessible to affected communities.

Many Committee members further believe that, in the context of Track 2 programs, consideration should be given to incorporating terms and conditions that mitigate discrimination in the permit, making them enforceable by state and local governments, as well as EPA. Alternatively, such requirements could be set forth in separate, binding contracts negotiated with the community, with provisions that permit their enforcement in court.

Industry representatives note, however, that voluntary agreements achieved in Track 1 programs are distinguishable from Track 2 mitigation arrangements. They are concerned that the voluntary nature of Track 1 programs not be forgotten. Although industry has many reasons to honor the commitments it makes to the community, turning these commitments into legally

enforceable obligations could undermine the basic premise of a voluntary program.

The Committee did not reach consensus on the question of whether environmental justice programs should facilitate the initiation of citizen suits by, for example, adding expanded authority for private enforcement to relevant state laws. Industry and state representatives were strongly opposed to the idea that states assist citizen efforts in this direction, while other participants believe that citizen enforcement was an important supplement to government authority, and would give citizens the sense that they are "empowered" to address future concerns. A local government representative suggests that EPA examine the California Public Utility Commission Ombudsman Program for effective approaches to these issues.

This disagreement should be distinguished from the Committee's recommendation that citizens be given a meaningful opportunity to monitor compliance with agreements that require permittees to carry out mitigation measures for a period of time. As discussed in the section entitled "Mitigation" of this report, ensuring community capacity to enforce contracts they negotiate with the permittee is essential so that the benefits of mitigation measures are delivered over the long-run.

Significance of the Template

The Committee recognizes that EPA has a difficult task ahead in ensuring that communities are protected against discriminatory effects, dealing with state and local government requests for flexibility, and responding to industry's need for expeditious, predictable, and technically sound decision making. However, the Committee believes that this task is of the utmost importance and urges EPA to continue to give it high priority. As one state

representative put it, the development of effective environmental justice programs gives government the opportunity to "walk its talk," fulfilling the equitable ideals that are at the heart of Title VI.

EIGHT ISSUES OF SUBSTANCE

Defining and Evaluating Effects

As explained in the introduction to this report, members of the Committee had profoundly different views regarding the definition of the "adverse effects" covered by Title VI. The Committee understands that these issues inevitably will be addressed by the courts. The Committee also recommends that EPA seek the counsel of experts in other areas of civil rights law, in an effort to glean whatever insights are available from those better developed legal precedents. (See the "Next Steps" section of this report.) The Committee hopes that EPA and, for that matter, other decision makers, will keep the following considerations in mind as the Agency rewrites the *Interim Guidance*, develops a model plan for state and local environmental justice programs, and turns its attention to other areas that raise environmental justice concerns.

The Committee's views regarding the appropriate definition of "adverse effect" can be explained as a spectrum. At one end is what can be described as the "narrow implications" interpretation of the statute, which defines adverse effects as health problems caused by emissions or discharges that are directly regulated at the facility at issue. Industry representatives on the Committee generally subscribe to this view. The other end of the spectrum is best described as the "broad implications" interpretation, which defines adverse effects as changes in a community's well-being that are related to the permit under consideration.

Environmental justice advocates on the Committee generally subscribe to this approach. Between these two positions are multiple shades of gray that at times perplex even those who are certain that their views are anchored at one end of the spectrum or the other. Before considering those shades of gray, it may be helpful to explain the two positions more thoroughly.

Under a narrow implications reading of Title VI, adverse health effects are covered by the statute's prohibition on discrimination. Adverse health effects would include problems that are described by the Committee's Workgroup I as "bodily impairment," "infirmity," "illness," or "death." To fall within Title VI, such injuries must be caused by the activity addressed by the permit. Threatened as well as actual health effects would be covered by this interpretation, at least to the extent that disparities in levels of risk can be quantified. In this view, harm to the environment is not covered by the statute's ban on discrimination against people unless such harm can be linked to threats or actual effects on human health.

Members of the Committee subscribing to this view recognize that demonstrating a causal link between a regulated activity and the manifestation of disease is a difficult and controversial problem. For the purposes of Title VI, policy options range from a very demanding test of causation, akin to the level of evidence that would be required in a private lawsuit seeking damages for illness caused by a defendant's pollution, to a less demanding and more protective test, such as one modeled on the regulation -- with an ample margin of safety -- of toxic air emissions that may cause illness at uncertain levels of exposure. The first test would require that adverse effects be manifest and their causes provable, while the second test would infer the existence of adverse effects on the basis of elevated levels of pollution in the community.

Industry representatives on the Committee advocate a test that would require Title VI

plaintiffs to prove a direct link between the permitted activity and the adverse health effect. While they would not necessarily require proof of causation comparable to what some courts have required in the context of toxic tort cases, they would reject "circumstantial" evidence of a causal link and instead require demonstrations that (1) exposure to the pollutant probably did occur and (2) such exposure could have the effect of producing the adverse health consequences covered by the complaint.

Environmental justice advocates are equally strong in their opposition to this approach, arguing that -- at the least -- it would require a full-blown risk assessment to quantify the precise nature and scope of the harm at issue and -- if taken to its logical extreme -- would mandate clinical or epidemiological studies proving causation. These members contend that this heavy burden, if imposed on claimants, would nullify the protections afforded by Title VI as a practical matter. They argue that evidence that a community is affected by from multiple industrial facilities and that no other neighborhood in the area is similarly affected is enough – in and of itself – to demonstrate an illegal disparate impact without undertaking a controversial analysis of cumulative risk and associated health effects.

One academic member of the Committee suggests that if industry representatives insist on such a demanding standard, it should only be imposed in the context of a two-step, "burden-shifting" approach. During the first step, a claimant would make a showing that the permit or other environmental decision could cause disproportionate adverse effects by, for example, demonstrating that communities of color bear a larger burden of pollution than the general population, and this showing would constitute a *prima facie* case. During the second step, the state or local agency, in conjunction with the permittee, would be given the opportunity to rebut

this showing by producing a risk assessment or other convincing empirical study.

Members of the Committee subscribing to the narrow implications interpretation of Title VI believe equally firmly that as long as the permit conforms with applicable regulations, its issuance cannot violate Title VI because EPA is required to set permit standards that protect all persons. They contend that to read the law to override the health assessments in EPA's regulations would result in the promulgation of more stringent environmental regulations on a site-by-site, industry-by-industry, or neighborhood-by-neighborhood basis, under the authority of a civil rights -- not an environmental -- law, an outcome that they view as both illegal and unfair.

Environmental justice advocates respond that industry is routinely regulated site-by-site and sector-by-sector under federal, state, and local environmental laws, and that there is no legally cognizable prohibition on such approaches if they are necessary to eliminate illegal discrimination.

There remains the issue of adverse health effects caused by "cumulative risks" and "synergistic effects." The term "cumulative risk" is used here to connote threats to public health caused by exposure to the sum total of releases, and the term "synergistic effects" is used to mean adverse health effects caused by exposure to a mixture of emissions that interact with each other to produce new risks.

At this point, the relative simplicity of the narrow implications approach becomes more complicated because proponents of this interpretation recognize that environmental regulations often do not address such potentially serious threats. Or, to put it another way, proponents of the narrow implications interpretation of Title VI recognize that risk assessment, as well as the assessment and regulation of sources on a cross-media basis, have a role to play in the

application of the statute even if a facility is otherwise operating in compliance with traditional regulatory requirements. Although they recognize the potential importance of cumulative health risks and synergistic health effects, some members of the Committee believe that the science "isn't there yet" to identify and measure such problems with the precision necessary to support a Title VI complaint. Despite these reservations, they support the Committee's recommendation that EPA make research and data gathering in these areas a high priority.

However the causal link between pollution and an adverse health effect is defined, a narrow implications interpretation of Title VI would draw the line at this category of harm, excluding from the ambit of the law, as well as programs designed to implement it, any environmental, economic, cultural, social, or psychological harm that may befall people of color as a result of a permitted activity or other environmental decision. Proponents of this analysis believe that the application of Title VI to environmental programs must remain limited to the protection of human health and aspects of the environment that affect human health, and cannot be extended to other aspects of community life. They argue that to read Title VI more broadly would be to import social and economic policymaking into the implementation of environmental laws, a result never intended by Congress. They further contend that economic and social concerns are not only amorphous, but are caused by factors way beyond the control of facilities seeking environmental permits. Attempting to address such deep-seated problems in this context is impossible as a practical matter and would cause severe and unfair hardship for the owners and operators of permitted facilities.

Environmental justice advocates object to this reading of Title VI, arguing that both Title VI and the major environmental laws have a significantly broader reach than health effects, and

extend to the environmental, economic, and social costs that pollution imposes upon people. They read Title VI to encompass a broad range of potentially adverse effects, including damage to human health, the environment, or a community's economic, cultural, social, or psychological well-being. Any of these harms would be an appropriate subject of a Title VI complaint if it is linked to the permitted activity or other environmental decision.

Examples are probably the best way to explain the scope of this perspective. "Adverse effects" covered by Title VI would include contamination of the food chain, as well as damage to other natural resources, whether used for subsistence or recreation. The term would also include economic harm such as decreased property values or a deterioration of the quality of life in the neighborhood that makes it more difficult for residents to maintain a decent standard of living. Adverse effects would include interference with religious practice or cultural and spiritual traditions, such as the destruction of sites held sacred by Native American land-based religions, as well as damage to culturally and historically significant places or artifacts. The term would encompass social problems that may be attributable to added truck traffic to and from the permitted facility, such as more prostitution on public streets. The term would also include psychological harm, such as people's perceptions that permitted facilities are not safe, posing either acute or chronic threats to the community. Finally, environmental justice advocates believe that excluding a community of color from the permitting process, even if no other adverse effect is documented, would constitute disparate treatment that is illegal under Title VI.

These members of the Committee suggest that EPA analyze disparate impact by constructing scenarios and giving guidance both on how they should be handled by state and local governments and how they will be handled if subject to a Title VI complaint filed with the

Agency. An initial – and not exhaustive -- list of such scenarios would include:

1. Situations in which a state or local government has treated the permitting of similar facilities within its jurisdiction differently, and this disparate treatment affects communities of color more adversely than other communities. For example, the state or local government may have excluded communities of color from participating in the permitting process but allowed similarly situated non-minority communities to participate.
2. Situations where a state or local government has granted a permit to a facility located in a community of color that is already affected by a disproportionate burden of adverse effects related to the presence of other industrial facilities that are permitted by the state or local government.
3. Situations where a state or local government has granted a permit to a facility located in a community of color that is already affected by a disproportionate burden of adverse effects related to the presence of other industrial facilities that are not permitted by the state or local government.

Environmental justice advocates on the Committee believe that if EPA takes the approach of describing situations that would constitute illegal discrimination under Title VI, the preventive goals of the law would be achieved far more effectively.

Consistent with their broad view of the scope of Title VI, these members of the Committee would use a standard of causation that is expansive, encompassing adverse effects that are linked directly -- and indirectly -- to the permit or other environmental decision. For example, they argue that if a community is especially vulnerable to environmental pollution

because it lacks access to medical care or has a poor diet, the community is a vulnerable population that deserves stronger protection than populations that do not labor under such disadvantages.

These members of the Committee reject the argument that the ambit of Title VI is limited to the scope of applicable environmental law, and instead contend that adverse effects are covered by Title VI if they are made possible or caused by the activities covered by the permit or decision. Under this approach, a state or local agency could grant a facility a permit that complies with all of the requirements imposed by environmental law and still violate Title VI.

The shades of gray along the spectrum marked by these two interpretations depend on acceptance of the concept of preventive programs that could be sponsored by EPA, the states, or local governments. Thus, many members of the Committee, including some industry, state, and local government representatives, are willing to broaden the scope of preventive programs to encompass problems beyond adverse health effects, including environmental, economic, social, and cultural harm. They are willing to take this step because they believe that some of these problems are in fact exacerbated by industrial facilities. They also think that people of color are convinced that this link exists. To address both the real and the perceived manifestations of such problems, a preventive program should distribute responsibility for mitigation more equitably than is possible in the context of permitting a single facility. Industry representatives note that while they share the view that preventive programs should be proactive and will prove more expensive, such programs must be clearly distinguished from the narrower legal confines of a Title VI complaint.

Perhaps because these issues are difficult, and the difference in viewpoints is stark, the

Committee spent far more time discussing preventive programs than debating the definition of adverse effect in the context of permit decisions. EPA may be drawn in a similar direction when it rewrites the *Interim Guidance* and further develops a model plan for state and local governments. Ultimately, however, to develop meaningful standards for permitting and other decisions, a more precise definition of adverse effects must be developed.

Identifying the Community of Concern

Members of the Committee generally recognize that, in the context of decisions made with respect to individual facilities, the term "community of concern" has two distinct components: demographics and exposure.

The demographic factor measures the percentage of members of a protected class in the population affected by a permit or other decision in comparison to the percentage of protected class members in the population of a "reference area." Obviously, delineation of the community of concern and the reference area is critical because it determines which areas are protected against discrimination under Title VI.

Many members of the Committee advocate a site-specific test to identify the community of concern that would trace the environmental releases affected by the permitting or other decision to the populations likely to be exposed to such releases. Neighborhoods in an exposure pathway would be included in the community of concern. Because existing modeling and monitoring methodology often are not accurate reflections of actual exposure, this step of the analysis is easier said than done. The Committee's concerns about the accuracy of such predictions, especially given the dearth of monitoring results in many places and the lack of data

regarding cumulative risks and synergistic effects, are the basis for its recommendation that EPA commit significantly more resources in this area.

Some members of the Committee are sufficiently concerned about imperfect data that they are willing to consider a more arbitrary but consistent "radius" approach. Under this approach, a circle of a given radius would be drawn around the facility and everyone living within the circle would be defined as the community of concern. For example, as an admittedly arbitrary, but transparent and easily applied alternative, the *Environmental Justice Protocol* developed by the Public Interest Law Center of Philadelphia proposes a one-half mile radius, with the circle to be enlarged if it does not encompass 1,000 people. The protocol is attached to this report as Appendix H.

An industry representative objects strongly to this approach, noting that site-specific assessments must be based on actual exposure to the releases in question, as opposed to "mere proximity." Even under the relatively looser approach to defining affected communities envisioned for Track 1, preventive programs, this member argues that exposure and effect must remain the measure, as opposed to such concepts as "pollution load" or "environmental burden."

A local government representative agrees with this perception, arguing that disproportionate adverse impacts must be assessed on the basis of the risk of exposure. However, she contends that a radius approach might very well be useful in the context of general screening (or mapping) conducted to identify vulnerable communities, especially in the context of Track 1 preventive programs. She adds that the appropriate radius distance will vary by pollutant (e.g., degree of toxicity) and media type (air, water, or soil) because mere proximity is too crude a tool to use to gauge potential risks to public health.

Environmental justice advocates urge a more flexible resolution of these issues that would depend on the adverse effect to be measured. For example, they say that a negative impact on property values might be best evaluated using a radius approach, while the adverse health effects of air pollution could be modeled or monitored without resort to a relatively arbitrary radius cut-off. However, as noted elsewhere in this report, the Committee did not reach consensus on such flexibility, primarily because it lacks consensus on the universe of adverse effects that Title VI addresses in the first place.

Some state and industry representatives on the Committee argue that in many cases, people who are not adversely affected, nevertheless insist that they are members of the community of concern. They contend that this problem, as well as a tendency to leave the process perpetually open to public participation by new people, mean that the concept of "community" can become a "moving target." They urge federal and state regulators to include local officials, both elected and appointed, in whatever definition of community of concern is ultimately adopted. It is worth noting that however federal, state, and local regulators define communities of concern, the courts are likely to superimpose a standing requirement on plaintiffs when Title VI disputes reach them for decision. Discussing the status of standing doctrine and its likely application to Title VI cases is beyond the scope of the Committee's work, but this issue could be addressed if EPA convenes the group of legal experts suggested in the "Next Steps" section of this report.

As for the important issue of defining the reference area (the same concept is sometimes referred to as the "general population") with which the demographics of the community of concern is compared, the Committee assumes that in the vast majority of cases, this area or

population will coincide with the state or local agency's jurisdiction. Thus, in a dispute involving permitting decisions by a state, the demographics of the state's entire population would be compared to the demographics of the community adversely affected by the decision. Of course, decisions made by multiple agencies or decisions that affect communities that straddle jurisdictional lines can pose problems for this relatively straightforward approach.

Ironically, defining the community of concern in the context of individual permitting decisions may prove less difficult and controversial than defining such communities in the context of preventive (or Track 1) programs. Environmental justice advocates on the Committee generally favor the application of "mapping"-- also known as "general screening"-- to geographic areas that appear to be vulnerable on the basis of pollution levels and demographics. They urge federal, state, and local regulators to use such comprehensive profiles to design innovative prevention programs, deploy limited resources, target enforcement, and undertake more extensive research and data gathering.

Industry and state representatives on the Committee predict that mapping, screening, or similar efforts to identify communities of concern will chill economic development because they will result in more stringent standards and more burdensome procedures for permitting of facilities in the targeted area. By discouraging business interest in locating in a community, mapping or screening could harm residents of the "protected" neighborhood as gravely as industry. They question why mapping is necessary if existing regulatory standards are being met. Some industry representatives further argue that mapping technology may not reflect actual exposure, much less a causal relationship between exposure and adverse effects, and could result in unwarranted decisions to exclude industrial operations from a given neighborhood.

State and local government members of the Committee are especially concerned about the implications of mapping for Brownfields redevelopment, an aspect of state and local environmental programs that the Agency has pledged to support. Apart from its obvious advantages to the inner city, these members of the Committee point out that Brownfields redevelopment is a crucial component of initiatives to combat the substantial harm to the environment and public health caused by suburban sprawl, a growing problem in many areas of the country.

Environmental justice advocates counter by explaining that they recognize the implications of screening or mapping that leads to special treatment of a neighborhood or other geographic area and understand that such efforts could result in chilling economic development. They view this risk as worth taking, however, in order to avoid the far more significant possibility that disproportionate adverse effects will be overlooked. Further, they contend that distinctions must be drawn between the beneficial kinds of economic development that are sponsored under many Brownfields programs and development that leads to the siting or expansion of facilities that exacerbate the burden of environmental pollution borne by a community.

In their final comments on the report, two members of the Committee -- one representing industry and the other local government -- commented that it is possible to discover which areas bear a disproportionate environmental burden without taking the analysis to the point of mapping or screening specific neighborhoods. Indeed, these members believe that to implement a preventive program, state and local governments must discover, with some specificity, the total burden from regulated and unregulated sources that confronts a community of concern.

However, to make good use of this analysis, state and local officials need not label a neighborhood as sensitive or otherwise suspect. The Committee did not have time to explore these possibilities further, but reiterates its recommendation that EPA devote resources to strengthening available assessment tools in this context.

Some members of the Committee believe that in the context of preventive -- or Track 1-- programs, EPA, the states, and local governments should incorporate low income communities in their analysis of disparate impact, especially because a 1994 Executive Order includes such communities within the scope of EPA's environmental justice mission. Executive Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (*February 11, 1994*)*. However, other members of the Committee, including some of its industry representatives, strongly disagree with this proposal, arguing that environmental justice initiatives should remain focused on the classes protected by Title VI. Although EPA will continue to implement Executive Order 12,898, the Committee did not reach consensus on this important point.

Determining Disparity

What degree of disparity in adverse effects is covered by Title VI? Is a measureable difference in the harm experienced by a community of concern versus the reference area population enough to trigger sanctions, or must the harm be severe in order to warrant federal intervention? Although the Committee debated this important question, it did not develop a consensus response.

Workgroup I was assigned the task of discussing disparity, and the group ultimately

compiled a universe of five possible standards on the basis of its discussions and knowledge of the standards used in other contexts. (A copy of the group's final draft report on these issues is attached as Appendix C.) The disproportionate adverse effect could be described as (1) "significant," (2) "substantial," (3) "above generally accepted norms," (4) "appreciably exceeding the risk to (or the rate in) the general population," or (5) "any measurable disparity." Some members of the Workgroup favor the term "significant" as they understand that standard to be applied under the National Environmental Policy Act. However, other members of the group say that they do not understand the content of such a standard, pointing out that NEPA does not actually control activities but rather requires that they be analyzed before they are undertaken.

Some industry members of the Committee propose use of the term "substantial" to summarize the degree of disparity covered by Title VI, arguing that relatively large harms are the appropriate targets of the nation's civil rights laws.

Environmental justice advocates disagree with this view, believing that it sets too high a bar to proving disparate impact. Some suggest the alternative of using a statistically-based test that would find a *prima facie* case of illegal discrimination if the disparity between the affected community and the reference population is two standard deviations or higher. If the disparity is greater than two standard deviations, the proposal would create a presumption that discrimination had occurred.

A local government member of the Committee objects to this approach, however, arguing that a statistical correlation is not the same as a demonstration that a facility is causing a disparate impact. This member of the Committee further emphasizes the importance of monitoring and other data that reflects actual conditions in the field, to be used in conjunction

with the modeling and other hypothetical modes of analysis that are often employed.

An academic member of the Committee notes that whichever standard is applied, it must be sufficiently sensitive to respond to communities of color that are particularly vulnerable because, for example, they experience a high rate of asthma or other respiratory diseases. In that context, a test that simply measured order of magnitude disparities in total pollution loads (e.g., X tons of emissions versus Y tons) would not sufficiently protect the community from discrimination.

Whichever standard EPA, the courts, and state and local governments ultimately adopt, given the imprecise nature of monitoring and modeling, exposure analysis, and risk assessment in virtually any environmental context, the determination of disparity is likely to remain the subject of debate for the foreseeable future.

The Role of Existing Standards

As mentioned above, the role of compliance with existing regulatory standards in determining the merits of a Title VI complaint is among the most difficult problems tackled by the Committee and is the issue that underlies members' differing views of the *Select Steel* decision. Industry representatives generally read the decision as establishing the favorable precedent that a permit's compliance with "health-based standards" will defeat a Title VI claim. Some environmental justice advocates and academic representatives agree with this interpretation, but view the decision as an unfortunate precedent. Other members of the Committee believe that the precedent set in *Select Steel* is limited to the relatively unusual circumstances of the case: a permit for a facility located in an area categorized as attainment for

the purposes of the "Prevention of Significant Deterioration" program under the Clean Air Act, 42 U.S.C. §§ 7470-7492.

As this last interpretation suggests, it is crucial to establish at the threshold of this discussion what is meant by the phrase "health-based standards." Many environmental regulations are not based on an analysis of what levels are "safe" from a health perspective, but rather are technology-based, performance-based,[3] or procedural. Technology-based standards represent a judgment that employment of the technology is the best we can do to control pollution at a reasonable cost. Similarly, performance standards specifying how facilities must be designed reflect a judgment regarding the best practices available to prevent contamination, rather than a guarantee that contamination will never occur. Procedural requirements such as the maintenance of records or the submission of monitoring reports are essential tools to ensure compliance but do not directly control pollution.

The question remains, therefore, whether compliance with technology and performance-based standards, as well as such procedural mandates as monitoring, reporting, record keeping, and inspection requirements, should mean that a permit complies with Title VI? The Committee has no easy answer, especially if the claim involves the possible creation of cumulative risks or synergistic effects.

As discussed above, some members of the Committee argue that Title VI imposes an independent mandate that disproportionate adverse effects be controlled, even if those effects are

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[3] The term "performance-based" standards is used here to connote such requirements as the design specifications imposed under the Resource Conservation and Recovery Act and is not intended to encompass standards that set performance targets in order to achieve "safe" levels of pollution, such as waste load allocations under the Clean Water Act.

perfectly legal under existing law. Under this view, if a community of concern is exposed to a level of releases higher than that experienced by the general population, Title VI requires that additional relief be provided.

But what standards should apply beyond the application of existing requirements, especially in the context of individual permitting decisions? Industry and some state representatives on the Committee observe that forcing a facility to reduce emissions significantly more than its competitors has a range of undesirable implications, as discussed further in the section entitled "Mitigation," below. They argue that EPA and state and local governments lack the legal authority to make such standards up as they go along on a permit-by-permit basis, and instead must either return to Congress for additional authority or amend existing regulations before they require a facility to go "beyond the law" in mitigating the effects of its emissions or discharges.

On the other hand, environmental justice advocates contend that while it may seem logical to use health-based standards as the benchmark for determining whether an impact is "adverse," several factors suggest that this approach is extremely problematic. First, statutory mandates that EPA implement health-based standards have not been fully implemented, for a variety of political, economic, scientific, and legal reasons. Especially with respect to toxic pollutants, many of which are common in urban areas, EPA has been slow in crafting specific standards that will protect human health and the environment as the statutes mandate.

Second, even if there is a health-based standard in place, such as the ambient air standards for ozone that were at issue in *Select Steel*, the problem of "hot spots" must be considered. The air across a large regional area might be clean enough to meet the standards overall, but there

may well be pockets of pollutants at levels well above the standards. If such hot spots occur in racially-disparate patterns, these members of the Committee argue, EPA should find a Title VI violation.

Third, EPA must take the nature of the community into account. Communities comprised of a protected class may include many people who experience high levels of respiratory illness, elevated blood lead levels, restricted access to medical care, or other problems that make them especially vulnerable to certain types of pollution. If health-based standards are not sufficiently stringent to protect such "vulnerable populations," a disparate adverse impact may well occur despite compliance with regulatory requirements.

Finally, environmental justice advocates contend that health-based standards are sometimes not sufficiently protective and it may be common knowledge in the scientific community that they need to be tightened before such changes are actually made. For example, EPA recently announced changes in National Ambient Air Quality Standards that may not be implemented for several years. These members of the Committee believe that in making such changes, EPA has acknowledged that existing standards are not sufficient to address ongoing health risks.

Agency Jurisdiction

Members of the Committee advocating a narrow implications interpretation of Title VI believe that it is unreasonable to require state or local governments to address problems that are not within their jurisdiction, even if a community of concern is adversely affected by those matters. In this context, jurisdiction means the agency's authority over certain activities. For

example, environmental agencies often do not have authority over truck traffic to and from a permitted facility; that role is generally left to local public works and police departments. Jurisdiction can also mean the geographic location of a regulated activity. For example, state agencies typically cannot affect pollution that travels across state lines from a facility regulated by another state. In either sense of the term, industry and some state representatives argue that the appropriate scope of Title VI is coterminous with the jurisdiction of the state or local agency responsible for the decision under challenge. Not only do they believe that it is bad policy to expect state agencies to reach beyond their jurisdiction, they contend that Title VI cannot be read to require a state agency to exert control with respect to activities over which it has no legal authority.

One state representative notes that environmental agencies generally do not make facility siting or other potentially objectionable land use decision. Because zoning is an activity reserved to local governments across the country (i.e., counties, cities, and towns), this member argues that environmental agencies have no control over such decisions and become involved in their implications "very late in the game" after a "great deal of history has been created." This member further contends that zoning has allowed industrial facilities to be located near residential neighborhoods. Facility-specific decisions are then made in corporate board rooms outside the public arena. He asserts that early, proactive involvement with communities should occur before local land use and business location decisions are made, which is also before state environmental regulators become involved.

Local government representatives on the Committee also emphasize the importance of local land use decisions. They urge EPA to make aggressive efforts to both educate and involve

land use decision makers in the development and implementation of environmental justice policies at the national, state, and local levels.

Other members of the Committee, including other state and local government representatives, environmental justice advocates, and academics, disagree with the position that because local land use decisions may be the first step in the creation of discrimination, environmental agencies are not responsible for the effects of such decisions. They argue that the mission of environmental agencies is correctly viewed as the protection of public health and the environment wherever and whenever necessary and that this mission cannot be limited by the short-sighted details of particular regulatory programs. They also contend that the true respondent to a Title VI complaint is the state or local government as a whole, as opposed to the environmental agency in isolation, and that all of the state's resources and authority should be combined to redress discrimination.

These members of the Committee believe that programs to redress Title VI concerns will be needlessly undermined if agencies take a constricted view of problems and potential solutions, especially in the context of Track 1 preventive programs. They point to such success stories as EPA and state cooperation to establish emissions trading programs as a means to meet National Ambient Air Quality Standards as a classic example of a creative and effective response to the perceived constraints of agency jurisdiction, and they urge federal, state, and local regulators to take a similarly innovative approach to problems raised under Title VI.

One representative with extensive experience at the municipal level stated that the first step in dealing with any environmental justice issue is to identify all of the governmental entities with influence over the outcome, including zoning boards, economic development agencies, and

public works departments. Agency officials can then be consulted, or even organized into a taskforce, to consider the problem cooperatively.

It is worth noting that one industry representative on the Committee supports proactive approaches, although she believes that it is important to distinguish between the legal confines of Title VI and the more creative Track 1 programs designed to address broader issues of environmental justice.

However, another industry representative on the Committee believes that the issue of expanding Title VI beyond the confines of the permitting agency's jurisdiction should never have been considered by the Committee because it was "taken off the table" by EPA Administrator Carol M. Browner during a meeting with state officials in late 1998. He adds that the Administrator reassured state administrators that EPA would not interpret Title VI to encompass activities beyond their legal jurisdiction and that he urged the Committee's Workgroup I to remove it from the Committee's agenda. The Workgroup did not achieve consensus on that point.

Significantly, members of the Committee willing to go beyond agency jurisdiction in defining the appropriate scope of environmental justice programs also interpret the scope of federal and state environmental statutes more broadly, pointing to federal or state versions of the Resource Conservation and Recovery Act, the Clean Air Act, and the Clean Water Act as granting state agencies authority to include permit provisions other than those specified by regulation if necessary to accomplish the overall mission of the statute. These members of the Committee, including its academic representatives, argue that the key federal environmental statutes contain authority for -- and, indeed, a mandate that -- EPA and state and local agencies

go significantly beyond actual harm or imminent threats in protecting public health and the environment.

As one key example of such authority, these members of the Committee point to section 3005(c)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. §6903(c)(3), which states that permits must contain such terms and conditions as federal, state, or local regulators decide are "necessary to protect human health and the environment." They further note that a decision by the EPA Appeals Board, *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeals No. 95-2 (June 29, 1995), involved the application of this authority to an environmental justice complaint. The Appeals Board concluded that this provision authorizes EPA permit writers to take a "more refined look" at a facility's "health and environmental impacts assessment" in response to environmental justice claims.

Academic members of the Committee also mention the Clean Air Act's requirements concerning the Non-attainment New Source Review Program, which calls for an analysis of whether the "benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." 42 U.S.C. §7503(a)(5) (emphasis added). These members contend that the most sensible reading of this and similar language in other statutes is that Congress intended permitting agencies to have the authority to consider a wide range of harms in the permitting context. One of the academic members of the Committee provided an extensive analysis of these issues that he helped to prepare for the National Environmental Justice Advisory Committee (NEJAC). A copy of that paper is included with this report as Appendix N.

Once again, it is important to emphasize that members of the Committee subscribe to

three distinct positions with respect to the issue of reconciling agency jurisdiction and the application of Title VI: (1) the application of Title VI is coterminous with the limits of agency jurisdiction; (2) if an agency's action would cause a disproportionate adverse effect, the agency is responsible for that effect, whether or not the agency must go beyond the limits of its jurisdiction in response to such discrimination; and (3) for the purposes of preventive Track 1 programs only, agencies should make their best efforts to reach beyond their jurisdictional limits in defining and mitigating such problems.

New versus Renewal Permits

State and local governments are routinely faced with four kinds of permit decisions: (1) renewal or modification of an existing permit with no significant changes in emissions or discharges; (2) renewal or modification of an existing permit with decreases in emissions or discharges; (3) renewal or modification of an existing permit with increases in emissions or discharges; and (4) applications for new permits to cover facilities that will be built. The first type of permitting decision, which typically does not increase emissions or discharges, is sometimes referred to as "flipping" the permit and is viewed as the least controversial determination an agency must make. The difficulty of the decision required by renewal applications that seek to expand operations is determined by the increase in emissions or discharges that will occur. Applications for new permits covering new facilities are generally the most controversial.

The *Interim Guidance* distinguishes between permit modifications and renewals, viewing modifications as triggering reexamination of only those aspects of the facility's operations that

are covered by the proposed changes, but defining renewals as an opportunity to review the "overall operations" of the facility. See *Interim Guidance*, attached to this report as Appendix F, at page 7. Thus, the guidance states that EPA will generally treat permit renewals as if they were applications for new facility permits, but will only examine permit modifications to determine if the modification itself causes a disparate impact.

Industry representatives strongly oppose this policy, once again arguing that if an existing facility seeks to either renew or modify its permit in full compliance with applicable regulations, EPA and the states have no authority to deny the request. Indeed, these members of the Committee believe that to approach such situations in the manner suggested by the *Interim Guidance* could lead to shutdowns of facilities located near neighborhoods of people of color on the basis that the cumulative pollution burden in the community is too large, even if the burden is caused by many sources, including some that are unregulated and others that have permits they do not need to renew. Industry representative say that companies are willing to play by the rules EPA sets forth regarding the implementation of environmental justice standards at new and existing facilities, but they argue that these rules must be promulgated using normal procedures, not developed on an *ad hoc*, facility-by-facility basis.

In contrast, because environmental justice advocates believe that the exclusive goal of Title VI must be to prevent discrimination against protected classes, they would apply the same standards to all three categories of decisions. A ton of pollution emitted by an existing facility has exactly the same effect as a ton of pollution emitted by a new facility, so this reasoning goes, and to distinguish between them would flout the central meaning of the law. In fact, environmental justice advocates argue existing facilities are often worse offenders because they

have polluted in a discriminatory way for years.

Despite the difference in their views, environmental justice advocates, industry representatives, and state and local officials all recognize that, as a practical matter, it will be considerably more difficult to persuade regulators to ignore the distinction between existing and new facilities given the economic dislocation that would be caused by so-called "zero-based permitting." Some urge state and local governments and EPA to apply stricter standards to permits requests that would increase overall emissions in communities that are disproportionately burdened, whether those requests arise in the context of renewals, modifications, or new applications. The possibility that such a standard would deter new economic development is not persuasive to those advocating this approach, who express general skepticism that the benefits of such development would ever reach the people actually living in the community.

Other members of the Committee suggest that EPA and state and local governments investigate regulatory approaches modeled on the non-attainment program under the Clean Air Act, using bubbles, offsets, and emissions trading to compel overall reductions without imposing an undue burden on existing facilities. However, environmental justice advocates have expressed concern about the potential discriminatory implications of trading programs.

Mitigation

It is necessary to answer all of the difficult questions discussed above -- from the definition of adverse effects and the identity of the community of concern to the role of existing regulatory standards and the significance of agency jurisdiction -- in order to reach the ultimate issue in any Title VI dispute: what remedy is required to mitigate the discrimination? This

question was tackled by Workgroup II, and a copy of its draft report is attached as Appendix D.

At the outset, it is important to note that the Committee did not achieve consensus on when the question of mitigation should be addressed in the process of evaluating a Title VI complaint. Industry representatives argue that a state or local government should first be granted an opportunity to demonstrate "justification" for the decision under review and should only be required to mitigate the impacts of its action if the proffered justification is inadequate. In contrast, environmental justice advocates would reverse the order of consideration of these two crucial issues: requiring first that mitigation be considered and giving a state or local government the opportunity to justify its action only if adequate mitigation is not possible.

In any event, returning to the issue of what characterizes adequate mitigation, it is helpful to describe the universe of possible interpretations as a continuum, which Workgroup II categorized as "loose nexus" mitigation, "moderate nexus" mitigation, and "narrow nexus" mitigation. The term "nexus" is used here to connote the relationship between mitigation and the disproportionate adverse effects that are the subject of the complaint. Thus, narrow nexus mitigation means remedies that eliminate or reduce the disparate impact.

The dilemma presented by this approach is that it is often impossible to accomplish full mitigation in the context of an individual permit proceeding. To use a simple but telling hypothetical suggested by an academic member of the Committee, suppose that an African American neighborhood supports the burden of 200 units of pollution, while the reference area to which it is compared has a one-unit burden. The company seeking a permit renewal contributes ten of those 200 units. It can operate legally under existing regulations without reducing those emissions. Denying the permit and shutting down the facility would not eliminate the disparity,

and would be objectionable and arguably unfair to the facility owner. To complicate the scenario, suppose that the sources contributing the remaining 190 units include facilities regulated by federally-funded programs, as well as facilities that are either unregulated or regulated under programs with different sources of support.

The *Interim Guidance* addresses this dilemma by suggesting consideration of "Supplemental Mitigation Projects" (SMPs) that "address" the disparate impact without eliminating it. See *Interim Guidance* attached as Appendix F, pages 10-11. But the guidance does not articulate further criteria for developing such projects, other than to say that they could address matters "outside those considerations ordinarily entertained by the permitting authority." *Id.* at 11. This comment suggests that SMPs will more often than not be the result of voluntary agreements negotiated with the permit applicant, since it is not clear how a permitting agency could compel their adoption. SMPs are modeled on the "Supplemental Environmental Projects" (SEP) policy used by EPA and the states in the context of enforcement actions. The policy is intended to channel resources into remediation that delivers direct benefits in the area where violations occur.

However, environmental justice advocates on the Committee strongly object to use of the SEP model in the development of Title VI mitigation because the model does not provide for adequate public participation. Instead, they argue, SEPs are developed in negotiations between EPA and the permittee, with the community consigned to comment on, but not approve, the measure. These members of the Committee believe that the community must be a participant in the negotiation. They recommend that the development of a SEP occur either in the context of a formal legal proceeding, where no parties could communicate with the regulators without

notifying all other parties, or in the context of a formal mediation, where all parties are at the negotiating table on an equal footing, with adequate technical resources and a neutral mediator.

Beyond these important issues of a fair process, the Committee has found no easy answer to the dilemma of mitigating adverse effects caused by multiple sources. Some members returned to the Clean Air Act non-attainment model, urging consideration of bubbling, offset, and emissions trading approaches. Others, including some industry representatives, advocate a "proportional contribution" approach that would require reductions that reflect the permit applicants share of the problem as a whole (in the above example 10:199 units). Still others apply a narrow implications interpretation of the statute, arguing that the permittee's compliance with existing regulatory requirements should defeat the complaint in the first instance.

The dilemma of how to fashion a fair remedy when many sources contribute to a disproportionate adverse impact may be easier to resolve in the context of preventive, or Track 1, programs that are not confined to individual permit decisions. By anticipating the problems that may arise in individual permitting proceedings, the states, local governments, industry, and affected communities would have an opportunity to fashion more equitable remedies and avert a complaint when the permitting decision must be made.

Even if programs are created to encourage the negotiation of solutions, the contribution of unregulated sources to the overall pollution load remains very difficult to address. If a facility is only asked to make a proportional contribution, how should the overall universe of sources be defined for the purpose of calculating its fair share? Is it fair to the community to include unregulated sources that will never contribute to the achievement of complete mitigation? On the other hand, is it fair to industry to exclude unregulated sources, thereby raising the level of

the reductions that permitted facilities must produce? The complexity of these issues inevitably leads to consideration of "moderate" and "loose" nexus proposals.

The moderate nexus approach to mitigation would allow remedies that do not eliminate the disparity, but nevertheless address its fundamental effects. Requiring facilities to initiate pollution prevention measures, monitor and control fugitive emissions, conduct additional research into the cumulative risks and synergistic effects of their emissions, or provide the community with free medical monitoring or treatment, are examples of moderate nexus remedies. Presumably, such remedies would be characterized as Supplemental Mitigation Projects under the *Interim Guidance.*

Members of Workgroup II ultimately endorsed a "hybrid" approach that combines moderate and narrow nexus mitigation, requiring that mitigation measures be as narrowly tailored as reasonable and practicable, but endorsing moderate nexus requirements when narrow nexus mitigation is difficult or impossible to achieve. The main point of divergence within the Workgroup was the difficult issue of how to address adverse health effects that have a disparate impact, with some members arguing that only narrow nexus mitigation should be permissible under Title VI, while others contend that moderate nexus mitigation should also be considered in that context.

Workgroup II also developed several important consensus recommendations that support and clarify its endorsement of a moderate-to-narrow nexus hybrid model. Thus, the Workgroup concluded that mitigation measures that require actions over time and deliver benefits in the future are a valid form of mitigation but must be enforceable, by the permitting agency and the community. Second, the Workgroup concluded that meaningful community involvement was

not only a desirable policy goal, but was an essential component of mitigation policy and requirements. Third, the Workgroup found that the reasonableness of moderate nexus mitigation turns on its ability to deliver substantially greater overall benefits to the community. The Committee did not have time to address these conclusions in depth, and refers EPA to the Workgroup II draft report that is included as Appendix D.

As Workgroup II points out in its report, the point at which moderate nexus mitigation becomes "loose" depends to a large extent on how the scope of adverse effects is defined. Under a narrow implications interpretation of Title VI, efforts to address such problems as the safety problems caused by increased truck traffic, changes in property values, or deterioration in the neighborhood's overall quality of life would all constitute loose nexus mitigation. For those who view these problems as central concerns of Title VI, efforts to ameliorate them are at least moderate, and perhaps narrow, nexus mitigation.

In the end, it may not matter from a public policy perspective what any of these remedies are labeled, although such categories could take on real significance as a legal matter when EPA or the courts are asked to judge the merits of a Title VI complaint. Once an adverse effect is found to be discriminatory, the courts may well decide that the only acceptable mitigation is the elimination of the disparity, and therefore the discriminatory effect. Thus, while EPA, the states, and local governments may be tempted to develop more creative and equitable approaches to such remedies, the possibility that claims will become formal complaints weighs in favor of a narrow-to-moderate nexus approach, as recommended by the Committee's Workgroup II. While the Committee did not achieve consensus on whether to endorse a narrow to moderate nexus approach, members representing industry, academia, and environmental justice advocates agreed

that this approach, on balance, was the most promising from both a policy and a legal perspective.

How, then, does the Committee reconcile this conclusion with its endorsement of negotiations to address the community's true concerns, both early on in the permitting process and in the context of Track 1, preventive programs? If no limits are placed on the topics that can be raised and addressed during such discussions, what happens if community representatives request relief that is loose nexus at best? If a settlement is reached with the facility owner, and a Title VI complaint is nevertheless filed, what significance should such negotiated remedies have as a legal or policy matter?

Some members of the Committee believe that a community's right to self-determination should prevail. As one member put it, the specter of national groups dictating to local communities what their needs should be is unappealing and a system that allows such results is unlikely to resolve tensions between industry and communities of people of color any time soon. Another member of the Committee argues that the right to self-determination is constitutional, and that communities should be given every opportunity to decide their own fate, however misguided the resolution might appear to outsiders. Under this view, it would be possible for a community to accept mitigation for disparate adverse health effects in the form of increased aid to local public schools. As long as the decision was made "democratically," this member argues, the negotiated settlement would block a subsequent Title VI complaint against the regulated entity. (The issue of how to determine whether such decisions are made democratically is beyond the scope of this report.)

Other members of the Committee, including representatives of grassroots community

groups, strongly disagree with these views. While they do not object to efforts to negotiate practical resolutions of disputes and they recognize that communities might use the leverage of a possible Title VI claim to win other concessions from a facility owner, they reject the argument that loose (or non-) nexus remedies should ever be deemed a sufficient response to a formal Title VI complaint. They also point out that there is no place in the current legal system for what would amount to a waiver of applicable legal standards by local citizens. "Government has to be at the table," one community representative stated. "The whole purpose of having government is to protect the public good." They add that Title VI protects political minorities from majoritarian impulses and that, although a majority of a community might "sign off" on a particular agreement with industry would not mean that others in the community would be barred from filing a Title VI complaint.

Some industry representatives agree with the importance of having government "at the table" and limiting the concept of legal mitigation to the issues addressed by underlying environmental laws. They worry that in the absence of an enforceable set of standards, negotiations with the community could veer off course into areas that have nothing to do with environmental quality and human health, exposing facility owners to unreasonable demands and the prospect that if these demands are not satisfied, necessary permits will be delayed.

On the other hand, one industry representative suggests that if the community accepts a mitigation proposal, EPA should consider this arrangement a "voluntary resolution" of the dispute and allow it to stand. He notes that the earlier in the dispute that such resolutions are negotiated, the easier it will be for EPA to follow this principle. Once a potential case has progressed to the point where considerable data documenting adverse effects has been developed,

the opportunities for voluntary resolution may become more severely circumscribed.

A second industry representative agrees with this view, and suggests that early efforts to find mutual solutions offer incentives for both the community and the permittee. If the parties fail to reach a voluntary solution to their dispute, the community faces the likelihood that its real concerns will remain unaddressed due to constraints of the permitting process and the permittee runs the risk that it will be compelled to install expensive technology that affords little environmental benefit. This member of the Committee believes that a Title VI complaint filed to challenge the mitigation afforded by an early settlement should succeed only if the agreement is shown to be a "sham" (e.g., the community was not fairly represented by those negotiating the agreement) or the person filing the complaint suffers a "unique and unfairly adverse" injury.

There remains the issue of translating mitigation into a legally binding written agreement. One obvious approach is to write required mitigation measures right into the permit, to be enforced by the permitting agency using its existing authority. However, depending on the nature of the mitigation and the attitude of the agency, incorporating such remedies into the permit may not be possible. The alternative is a contract between the community and the permittee. If a private contract is the vehicle of choice, provisions allowing communities to monitor compliance by the permittee and to enforce breaches of the agreement may be necessary.

Justification

Under the *Interim Guidance*, the recipient of federal funding is given an opportunity to "justify" a decision to issue a permit "notwithstanding the disparate impact," based on its "substantial, legitimate interests." See page 11 of *Interim Guidance,* attached to this report as

Appendix F. A "mere" demonstration that the permit otherwise complies with applicable environmental regulations is not a sufficient justification under the guidance and no justification will be accepted if a "less discriminatory alternative exists." *Id.* Less discriminatory alternatives include "mitigation measures" that "lessen or eliminate" adverse impacts or, in the terminology developed by the Committee, narrow-to-moderate nexus mitigation. *Id.*

The *Interim Guidance* does not specify any examples of what would constitute sufficient justification, although it mentions the "articulable value to the recipient" of the permitted activity, noting that the value of a permit renewal for an existing facility would generally be easier to demonstrate than the "speculative" value of a new facility. *Id.* This example implies that the economic value of an industrial facility to its owner (e.g., contribution to a profitable bottom line) or to the community (e.g., job creation) may constitute acceptable justification under the guidance.

EPA did not invent the concept of using economic necessity to justify discrimination. Especially in the employment context, the courts have recognized an employer's need to apply "necessary" criteria in screening applicants, on the basis that only applicants meeting those criteria can perform a job efficiently. See pages 33-44 of the memorandum prepared by the EPA Office of General Counsel, attached to this report as Appendix J. Whether these precedents can be used to support a test based on such economic benefits as the preservation of existing jobs or increased profitability is more controversial, however, because such a test, loosely applied, could justify virtually any disparate impact that would cost significant amounts to mitigate.

Members of the Committee understand the implications of this "slippery slope" and some are uncomfortable with the idea of any form of economic justification. Others support economic

justification that rises to the level of business necessity – i.e., the facility owner would not be able to operate if mitigation was required. They especially favor this approach with respect to existing, as opposed to new, facilities.

An academic member of the Committee drew an analogy between a stringent test of economic justification for Title VI and the takings doctrine that a property owner is entitled to compensation if the proposed government action deprives the owner of any economically viable use of the property. He recommends that EPA explore the analysis used by the courts in applying this doctrine for insight into how Title VI environmental justification might be defined.

Another member of the Committee proposes that economic justification be limited to instances where economic benefits will be delivered directly to "proximate" communities, in the form of jobs or other measurable improvements in the standard of living.

Several members of the Committee believe that the overall social good contributed by the facility should serve as justification for its disproportionate adverse effects, offering as examples a permit covering a facility that is necessary to national defense or a permit renewal application for an existing sewage treatment plant. In the second example, the social good of avoiding waterborne disease could not be satisfied by facilities at a greater distance from the community of concern and the disparate impact posed by the facility would therefore be justified. But other members of the Committee opposed the idea of using either economic benefits or the broader public good to justify discrimination in any context, arguing that the health of a community comprised of a protected class should never be sacrificed to secure more attenuated benefits for society at large.

Finally, some members of the Committee believe that the correct test of acceptable

justification is a negative one: discrimination is only justified if there is no practical way to mitigate the disproportionate adverse impact. This test would be stringent -- i.e., a failure to mitigate is only justified if there is no effective pollution control technology that would reduce emissions and it is impossible to lower their localized effects through trading regimes.

Other members of the Committee disagree with this legal interpretation, contending that the case law dictates that state and local governments must be allowed to justify alleged disparate impacts early in the process, prior to any requirement that they propose -- much less apply -- mitigation. These members further argue that the *Interim Guidance* does not reflect this approach and urge EPA to revisit the issue when it revises the guidance.

A local government representative on the Committee proposes that beyond establishing substantive standards for acceptable justification, EPA should require that state or local agencies potentially subject to a Title VI complaint must take two additional steps. First, the agency should make "findings" that document the steps it took to avoid disparate adverse impacts, including alternative siting or other measures considered during the permitting process and, second, it should be required to certify that all feasible and reasonable mitigation has been undertaken. Only after these two steps are accomplished should justification suffice as a defense to a Title VI complaint.

CONCLUSION

The Committee commends EPA for realizing the importance of an ongoing dialogue with its stakeholders as it struggles to develop a fair and transparent policy for implementing Title VI. Each of us is committed to continuing this dialogue, with the Agency and with each other. We

worked hard together, but we recognize that there is much more work to be done. We hope that EPA will find that this report makes it easier for the Agency to do what we managed to do with each other: talk straight, respect differences, and remain dedicated to the importance of fighting discrimination in the most effective way possible.

March 1, 1999

NOTE RE: APPENDICES

Two kinds of documents are included as appendices to this report: (1) additional views filed by members of the Committee following its approval of the final report (numbered appendices) and (2) additional resource materials that are referenced in the body of the report (lettered appendices). The resource materials, unless indicated otherwise in the final report, have been included at the suggestion of one or more members because they may prove helpful to those reviewing the report or further considering the issues debated by the Committee and do not necessarily reflect endorsement by the full Committee.

APPENDICES