Report

of the

Title VI Implementation Advisory Committee

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

March 1, 1999

Appendices 1 - 3, A - G

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

EPA'S TITLE VI IMPLEMENTATION FEDERAL ADVISORY COMMITTEE AND THE PERPETUATION OF STRUCTURAL INEQUALITY AND ENVIRONMENTAL INJUSTICE

AN ADDENDUM TO THE FINAL REPORT OF THE TITLE VI IMPLEMENTATION COMMITTEE BY ENVIRONMENTAL JUSTICE AND ACADEMIC REPRESENTATIVES

We, the undersigned members of the Title VI Implementation Subcommittee of the NACEPT, file the following addendum to the Report of our subcommittee. We file it to point out for the record the procedural deficiencies in the federal advisory committee process, deficiencies which seriously limited the participation of community-based environmental justice advocates. We also file this report with the hopes that EPA will address the structural issues identified here when constituting and operating other federal advisory committees.

I. The Title VI Federal Advisory Committee and the Perpetuation of Structural Inequality

Perhaps ironically, given the subject matter of the Title VI Implementation Subcommittee's work, its very creation and operation perpetuated the structural inequalities that are at the heart of communities' Title VI complaints. The structural inequalities of the Title VI committee were found in almost every aspect of its process and work, from selection of members to travel to attending meetings to drafting the final report to commenting on that report.

Committee membership. As members of the public and the committee pointed out at its first meeting in May 1998, the Title VI committee as initially constituted had almost no representation of those most affected by environmental justice problems and those most experienced in using Title VI in environmental justice struggles: residents of polluted communities. After environmental justice advocates made this an issue at the first meeting, three new committee members were added: two community advocates and a mayor. Unfortunately, one of the two community members selected (John Gibson of Mississippi) never participated in the committee, for unknown reasons, and so the committee had the benefit of input from only one community advocate who had actually used Title VI, Susana Almanza of Austin, Texas.

Travel and accommodations. EPA did not seem to realize that its policy of forcing all committee members to pay for hotels, meals, taxis and in some cases plane flights up front, and then await reimbursement months later, could easily have precluded community representation. Many residents of low-income communities do not have credit cards, cannot afford to spend

$138 a night (for several nights) on a hotel room, and cannot afford to buy a $300 plane ticket. Some committee members surmise that this economic barrier may have been what kept John Gibson of Mississippi from participating: had he showed up at the airport to find he had to purchase his ticket on the spot (as several committee members, including environmental justice and state representatives, did), he may well have turned around and gone home. Nor can such participants afford to loan the EPA hundreds of dollars for months at a time, as all committee members were required to do. The very structure of the committee's travel and accommodation process had an impact on community participation.

Meeting attendance. Unlike states and industry, many environmental justice advocates do not have the ability to devote significant amounts of time to non-paid federal advisory committee work, and thus cannot afford to take the time off to attend each committee meeting. And, unlike states and industry, community representatives and other environmental justice advocates do not have entire staffs to delegate work on the committee to, or to send in our stead if we are unable to attend a particular committee meeting. Examining the attendance at the meetings, it is clear that environmental justice advocates' lack of proxy staff hurt their representation at the meetings. A quick tally of absentees at each meeting, found in Table I, confirms this point: overall, no state and only one industry member was unrepresented at any meeting. At the same time, at almost every meeting there were environmental justice activists who were unable to make the meeting, so at each meeting the environmental justice stakeholders were under-represented. The sacrifices and difficulties of serving on a federal advisory committee are eloquently set forth in Susana Almanza's letter to the committee:

TABLE I:
Absentees at Title VI FACA Meetings

May 1998: Barry McBee (represented by Jody Hennecke)

July 1998: John Gibson, Tom Goldtooth, Walter Handy, Lillian Kawasaki (2 environmental justice, 2 local government)

October 1998: Susana Almanza, Cherae Bishop, John Gibson, Jane Nishida (represented by Art Ray), Gerald Torres (2 environmental justice, 1 academic, 1 industry)

January 1999: Robert Bullard, John Gibson, Bob Shinn (represented by Nancy Milsten), Gerald Torres (1 environmental justice, 2 academic)

March 1999: Susana Almanza, Robert Bullard, John Gibson, Tom Goldtooth, Charles Lee (resigned), Richard Monette, Haywood Turrentine (5 environmental justice, 1 academic, 1 tribal)

Overall: 10 environmental justice, 4 academic, 2 local government, 1 industry, 1 tribal.

> We have taken time away from our local work. We have taken time away from fundraising for our organization that struggles to survive from one year to the next. And we have taken time away from our families and friends to participate in this process. We do not have the luxury of sending our lawyers and our consultants to participate for us as does industry. We do not have the luxury of having engineers and analysts under our employ to review and analyze things for us as our counterparts in state government. We have had to do this on our own.[1]

The Drafting Group. At the FACA's Tucson meeting, the contractors worked to appoint a "Drafting Group" which was charged with working with Rena Steinzor to come up with the final report. The initial Drafting Group was selected with sector balance in mind, and included Sue Briggum (industry), Eileen Gauna (academic), Lillian Kawasaki (local government), Richard Lazarus (academic), Charles Lee (environmental justice), Lang Marsh (state government), Peggy Shepard (environmental justice), and Richard Monette (tribal). However, it was announced that anyone who wished could join the Group, and John Chambers (industry), Dell Perelman (industry) and Bob Shinn (state government) signed up, skewing the group markedly. When this was pointed out in our January 1999 meeting by an environmental justice representative, the contractors scrambled to convince Susana Almanza to join the Group, which she did. However, the Drafting Group still was heavily weighted toward industry and the states.

The process for commenting on the Draft Report. The process for commenting on the Draft Report placed a huge strain on environmental justice representatives on the committee. The turnaround time for comments on some documents was a short as 24 hours. Community group representatives, who have full workloads outside of the committee process and unlike other participants do not get paid for their work on the committee, cannot set aside other work to devote the significant time necessary to review and comment on draft documents. As Susana Almanza pointed out, such committee members, unlike state and industry representatives, do not have staffers to read, analyze and comment on the documents for them. Several environmental justice representative did not have the time to fully review the documents, and this led to Ms. Almanza abstaining from voting on the final report. Her reasoning is simple, and damning of the committee process: "On a very basic level, we have simply not been given enough time to review and comment on the many drafts of the final report which have been circulated since the beginning of the year. While this is reason enough for our abstention, our decision is further necessitated due to the fact that our resources are so completely and utterly out-matched by those of industry and state government."[2]

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[1] Letter from Susana Almanza to Ann E. Goode re: Abstention from Vote on Final Committee Report, February 28, 1999.

[2] *Id.*

II. The Cost of Missing Community Participation

The exclusion of community members means that the Title VI committee did not have the full range of information before it in our deliberations and in making recommendations to the EPA. The cost of excluding those most affected by environmental injustice is demonstrated by considering some of the suggestions which emerged from a 10-hour "listening session" EPA held in Dallas, Texas in February with environmental justice advocates from around the country. The session, designed to give EPA individual input on its civil rights policies in general and, in part, on the Draft Report of the Title VI Subcommittee, elicited a number of excellent ideas on Title VI and its implementation. The conversation was wide-ranging, but resulted in a number of specific recommendations from individuals to the EPA.

The comments from the Dallas meeting demonstrate the ideas which would have been available to the Title VI committee had it had increased community participation; some of these ideas were independently developed by the committee, but many were not articulated with the level of sophistication found in the Dallas meeting. We note that these comments were the result of a single "listening session" held over two days; had this group held five meetings over a dozen days, as the Title VI subcommittee did, the ideas could have been fleshed out considerably.

The following points, in no particular order, are taken from Luke Cole's notes from the Dallas meeting, and reflect the input of grassroots activists:

- Technical assistance grants for communities in the permitting process.
- Hold permitting process hearings at convenient times.
- There should be a thorough testing of the impacts of existing facilities (rather than modeling) before renewal or expansion.
- Moratorium on new facilities in over-burdened communities.
- One facility in one community can have a disproportionate impact; there does not need to be a pattern.
- We need EPA leadership to defend Title VI.
- No deference to the states.
- No moving the goal posts: first we had to show proximity, then we had to show exposure, then toxicity, then actual health impact.
- There needs to be an appeal provision for complainants whose complaint is rejected; states have six or seven different places in the process to have complaints dismissed, communities have no recourse.
- There should be a presumption that a state is violating Title VI if it does not follow the model public participation guidelines.
- There should be a presumption that a state is violating Title VI if it retaliates against community residents or their representatives.
- There should only be a narrow nexus for mitigation measures.
- Companies should pay for technical experts to assist communities during the permitting process.
- There can be no compromise of Title VI as it is a federal civil right.

• The Guidance only applies to the Office of Civil Rights, but should apply to the entire EPA.

• The states' call for deference is a rehash of the "states' rights" arguments of the 1950s and 1960s. The federal government needs to respond now as it did then, by protecting peoples' civil rights.

• The FACA Report has much too much deference to state governments.

• There is no discussion of procedural inequity in the FACA report; what happens if someone violates the process?

• There are no teeth in the FACA report.

• There is no environmental justice representation on almost all of EPA's Federal Advisory Committees.

• The template for the state is all procedural and does not require a lessening of the injustice in our communities.

• States are not protecting our rights, that's why we are forced to use Title VI.

• ECOS is trying to move Title VI toward an environmental model which would allow some pollution.

• It is betraying civil rights to equate civil rights with a regulatory mitigation model.

• Don't devolve Title VI to the states – it is state abuses that caused Title VI to be passed in the first place.

• EPA is not currently enforcing federal environmental law against the states, so why would we expect it to in the civil rights context? EPA is not using the tools they have.

• Justification only applies to the agency, not the permit applicant.

• There is nothing in the FACA document on penalties.

• Loose nexus mitigation is unacceptable.

• EPA programs don't work.

• Supplemental Environmental Projects don't work; Los Angeles car scrapping offered as an example.

• The FACA document's tone is deferential toward the states.

• There is no process for communities to deal with adverse decisions.

• The FACA document provides incentives to states to do nothing.

• There are all kinds of ways for states to appeal throughout the Interim Guidance, but none for community.

• Public participation must be substantive.

• There were not enough women on the FACA.

• Impacts like smells, light, noise and traffic must be addressed.

• There is not one size that fits all.

• Why is *Select Steel* mentioned in the FACA document, and not *Shintech*, on which vastly more resources and time was spent?

• The structure of the FACA was not representative and excluded community groups with direct knowledge to Title VI.

• It was a mistake not to increase the number of community representatives on the FACA.

• EPA and the target of the complaint can resolve the complaint without the complainant; this should be redressed.

• There are seven different steps before funding to states is cut off – too many hurdles for

community residents.

• Reductions in pollution levels in permit renewals can still have a disparate impact.

• Public participation should be mandatory, and if the states don't do it there should be a presumption of Title VI violation.

• There needs to be teeth in the Guidance, such as 1) presumption against the state for not following public participation guidance or retaliating against complainants; 2) recission of delegated programs; 3) compliance reviews.

• Industry is heavily represented on the Science Advisory Board, meaning that clearly biased people took part in the review of OCR's methodology.

• The Science Advisory Board recommended consideration of acute impacts, which the Guidance and *Select Steel* ignore, and also of noise, odors and accidents.

• Arizona is working on a methodology for analyzing the risk of accidents.

• Risk of accidents, traffic (as a child hazard), light pollution, psychological impact, stigma, and aesthetic degradation all are impacts.

• FACA should have brought in Title VI experts to inform its work.

• Members of the Science Advisory Board get corporate research money.

• What is baseline health of community? Run data by diagnoses code to find evidence of exposure – e.g., chloracne comes from chlorine exposure.

• Communities want a medical model (preventative) rather than a regulatory model.

• Mitigation should not involve pollution trading because of the potential environmental justice impacts.

• Polluters as part of the Science Advisory Board replicates the flaws found in states.

• The FACA report does not lay out any impacts outside of health.

• The FACA report relies on existing EPA programs that do not work.

• The Interim Guidance doesn't deal with policy or programmatic Title VI complaints.

• In considering the new vs. renewed permit, look at zoning law and non-conforming use precedent, where it must be brought up to full compliance when renewed.

• Look to Department of Transportation guidance for definition of community; don't reinvent the wheel.

• Dust, odors, property values, noise, all must be considered impacts.

• Don't treat new and renewed permits differently.

• There should be a moratorium on new facilities in areas that are already disproportionately impacted.

• How do *Select Steel* and *Shintech* have an impact on EPA process, and why is only *Select Steel* mentioned in the FACA report?

• The Interim Guidance does not take into account patterns of discrimination.

• Justification defeats the purpose of Title VI and should not be allowed.

• The Guidance should cover enforcement and clean-up.

• We don't have the ability to effectively engage in the processes; grants from EPA would help.

• Model state plans should cross jurisdictional boundaries and force state agencies to address communities' problems as a whole.

• This process [Dallas meeting] is too late in the game and is similar to the last-minute inclusion of community residents in permitting processes.

• Just because most of the complaints are in the permitting context does not mean that other areas are not important.

• Participation here [Dallas meeting] reminds participant of industry process – too little, too late.

• Even if facility is reducing its emissions, from a community perspective it may still have a disproportionate impact.

• Violations by a company override "state of the art" equipment and call into question EPA's assumptions.

• Why weren't the comments of the Southwest Network for Environmental and Economic Justice addressed by the FACA?

• The model state program gives too much deference to state agencies.

• Communities are filing Title VI complaints because states aren't doing their job.

• Regulations are created by industry and don't protect communities.

• No deference to the states – the feds can't surrender Constitutional rights.

• Can't incentivize civil rights – can't reward perpetrators.

• For population bearing the impact, follow exposure plume.

• No deference to the states.

• "I want to be in the room when policy makers have their rap session with industry before a plant is even proposed."

• Justification should not be based on economics.

• No justification should be allowed.

• Lack of enforcement by states means that assumptions underlying "no impact" determination (like Select Steel) are not real or verifiable.

• Lack of enforcement is part of disparate impact.

• We need resources to take part in public participation process – need to be trained in this to be effective.

• Need information in appropriate languages.

• We need problem-solving beyond jurisdictional boundaries of agencies.

• The terms in the Guidance and the FACA report are not well defined.

• States aren't going to do anything until EPA forces them to.

• Language on Title VI compliance could be written in to Performance Partnership Agreements.

• Performance Partnership Agreements are not working now.

• Can't look at either/or in deciding radius vs. exposure – there are many different impacts which need to be looked at in different ways.

• Need to make explicit what public participation means.

The Title VI committee did not have the benefit of these issues and perspectives during its deliberations, and was thus unable to flesh out several excellent suggestions which arose out of the Dallas meeting. EPA has thus deprived itself of important input from those with the most knowledge of pollution's impacts on communities – residents of those communities.

III. Conclusion

All of us have taken part in this federal advisory committee in the hopes that we can help EPA develop a credible civil rights policy. It is unfortunate that some of the very hurdles to achieving environmental justice with which we struggle in our communities on a daily basis were replicated in the committee process, and we hope that EPA addresses these issues in the future.

Signature: Susana Almanza Name: Susana Almanza

Signature: Luke Cole Name: Luke Cole

Signature: Eileen Gauna Name: EILEEN GAUNA

Signature: Richard Marette Name: Richard Marette

Signature: Richard Moore /ks Name: Richard Moore

Signature: Peggy Shepard /ks Name: Peggy Shepard

Signature: Gerard Torres Name: GERARD TORRES

Signature: Haywood Turrentine Name: Haywood Turrentine

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Southwest Network for Environmental and Economic Justice

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October 16, 1998

Carol Browner, Administrator
U.S. EPA
401 M. Street SW
Washington, DC 20460
FAX (202) 260-4852

Dear Ms. Browner:

We are writing on behalf of the Southwest Network for Environmental and Economic Justice regarding the Title VI Interim Guidance.

The Southwest Network comprises over seventy (70) grassroots, community based, student, native, and labor organizations throughout the Southwest and Western US and border states of Mexico, formed to address environmental degradation and other social, racial, and economic injustices that threaten our communities.

As many studies have shown and as our personal realities reveal, people of color and indigenous communities are often disproportionately impacted by environmental hazards. These situations have come about through the development of unjust land use and economic development policies as well as through the unjust application and enforcement of environmental laws.

Discriminatory policies and practices have given rise to the movement for environmental justice which to date has seen many significant victories at the national level, including the passage of the Executive Order on Environmental Justice and the creation of the National Environmental Justice Advisory Council, as well as at the local level, including the recent defeat of the proposed Shintech Plant near Convent, Louisiana.

However, in almost 50 other cases nation-wide, community leaders have filed complaints under Title VI of the Civil Rights Act to confront environmental injustice in their communities with no fruition. Because of EPA's slow processing of these complaints, several pending complaints still remain unresolved, leaving those communities in the pitfalls of insidious industrial development. We feel that implementation of a policy that would process Title VI complaints in a more accelerated and effective manner would provide a more suitable mechanism for protection in our communities.

Furthermore, towards the development of a more equitable implementation process, we feel that the voices from those communities most affected are fundamental. In view of this, we express our utmost concern about current community input and how it is being incorporated into the development of the guidance policy. Several Southwest Network affiliates have given testimony, expressed concerns, and made comments and recommendations on the guidance at the last two Title VI Advisory Committee meetings. How are these recommendations being included in the guidance policy?

The following are the Southwest Network's comments and recommendations on the Title VI Interim Guidance and on the Findings of the Title VI Implementation Advisory Committee for your consideration.

Regarding the Title VI Interim Guidance, EPA Should:

- Develop a guidance policy for complaints outside the permitting context (for example, enforcement, clean-up, etc.), since the Guidance only covers issues involving permitting.

- Adopt a more flexible definition of "final agency action" for beginning the statute of limitations.

- Bar permits from taking effect while a Title VI complaint is pending. EPA must ensure that a facilit is not constructed between the time a complaint is filed and a final determination is made.

- Include the complainant and affected community in the investigation and processing of the complai as well as in the development of any mitigation measures. The Guidance should clearly set out the complainant and the affect community's role in the process.

- Require states to compile relevant demographic information on permits or provide demographic analyses of their entire permitting programs as part of their Title VI obligations.

- Take no action on pending complaints until the flaws in the interim guidance are addressed and a final guidance is issued.

- Recognize that "exposure to pollutants" constitutes an impact which can be acted upon under Title of the Civil Rights Act (in other words, the risk of an adverse health effect and not just an actual heal effect should be considered an impact).

- Resolve complaints within the time limits specified in the Guidance once it has been finalized.

- Specify which analytic methods are to be used for resolving Title VI complaints or work with complainants and the affected community to choose the analytic method to be used.

- Apply the Guidance to all of EPA, not just the Office of Civil Rights.

- Remove from the Guidance the language "relevant under permitting program" which may by used limit the facilities considered when determining whether there is disparate impact.

- Eliminate the requirement that complainants (or EPA) have to examine the entire universe of facilit permitted by an agency to prove a prima facie (on its face) case of disparate impact. In addition to placing a heavy burden on the complainant (or EPA), it mischaracterizes this approach as the only w of proving disparate impact.

- Provide technical assistance grants for groups filing Title VI complaints so that they may hire demographers, statisticians and technical experts.

- Revise the Guidance in order to incorporate the many suggestions provided by community groups and environmental justice advocates.

- Define the process by which the Guidance will be updated and specify what additional opportuniti for comment the public will have..

Eliminate the requirement that a Title VI complaint be refused if it is filed before the decision to grant the permit or other authorization is made. A complaint filed before a permit is granted should trigger some sort of environmental justice analysis to be completed before the permit is granted. If the

decision that is anticipated in the complaint is ultimately made, EPA should begin processing the complaint and not require that the complaint be resubmitted.
- Prepare a citizen's guide which explains the procedures for filing Title VI complaints.

- Specify who will administer particular types of federal funds if funding is revoked as a result of a Title VI complaint. There is a concern that our communities will suffer if funds such as CDBG are revoked.

Regarding Title VI Implementation Advisory Committee Findings, EPA Should:

- Provide grassroots environmental justice organizations that have not been able to participate on the committee or attend committee meetings an opportunity to comment on the findings of the committee before a final report is issued. Grassroots organizations do not have the resources that industry and states have to participate in processes such as this and should be given an opportunity to voice their opinions regarding these issues.

- Please provide the Southwest Network with a copy of the Draft Findings of the Title VI Implementation Advisory Committee so that we may comment on them before a final report is issued.

Lastly, the Southwest Network Indigenous affiliates have had several discussions where concerns have been expressed regarding the legal issues and issues of sovereignty associated with the applicability of Title VI to Tribes and Indigenous people. We recommend that grassroots Indigenous organizations and Tribes be included in any discussions initiated by EPA to craft a consultation process on Title VI's applicability to Tribes.

In conclusion, we ask that you please forward these comments to the Title VI Implementation Advisory Committee and inform us as to how these comments will be included in the guidance policy.

Thank you for your anticipated consideration. We look forward to hearing from you within the next two weeks. If you have any questions concerning this matter or would like more information concerning our issues, please do not hesitate to call our regional office at (505) 242-0416.

Sincerely,

Raul Alvarez

Raul Alvarez, Chair
EPA Accountability Campaign

Rose Augustine

Rose Augustine, Chair
EPA Accountability Campaign

Sylvia Ledesma, Administrative Coordinator
SW Network Regional Office

Richard Moore, Coordinator
SW Network Regional Office

Southwest Network U.S. affiliate and associate organizations signees:

Action for Grassroots Empowerment & Neighborhood Development Alternatives: AGENDA (CA)
Alianza Indígena Sin Fronteras (AZ))
Asian Immigrant Women Advocates: AIWA (CA)
California Indians for Cultural & Environmental Protection: CICEP (CA)
Casa de Colores Resource Center (TX)
Chinese Progressive Association: CPA (CA)
Citizens for Improved Community-Police Relations: CICPD (AZ)
Colorado River Native Nations Alliance (CA)
Comadres (AZ)

Comisión de Acción Revolucionaria de Latinos Organizados Para Siempre: CARLOS (CA)
Comité Organizacíon de Padres de Aztlan (AZ)
Committee for Environmental Justice Action: CEJA (TX)
Communities at Risk Project of CRLA: CARP (CA)
Concerned Citizens of South Central Los Angeles (CA)
Concerned Citizens of Sunland Park (NM)
Cultural Liberation Coalition: CLC (CA)
Denver Neighbors for a Toxic Free Community (CO)
El Pueblo Para Aire Y Agua Limpia (CA)
Environmental Health Coalition: EHC (CA)
Escuela de la Raza Unida (CA)
Fuerza Unida (TX)
Hondo Empowerment Committee: HEC (TX)
Guardians of the Grand Canyon, Havasupai Tribe (AZ)
Korean Immigrant Workers Advocates: KIWA (CA)
La Sierra Foundation (CO)
Labor/Community Strategy Center (CA)
Laguna-Acoma Coalition for a Safe Environment (NM)
Madres del Este de Los Angeles - Santa Isabel: MELA-SI (CA)
Movimiento Estudiantil Chicanos de Aztlan, University of New Mexico: MEChA-UNM (NM)
New Start for a Better Environment (TX)
Nindakin - People of Color for Environmental Justice (CA)
Organizacíon en California de Lideres Campesinas (CA)
Padres Hacia Una Vida Mejor (CA)
People Organized in Defense of Earth and her Resources: PODER (TX)
People Organizing to Demand Environmental Rights!: PODER! (CA)
People United for a Better Oakland: PUEBLO (CA)
Petroglyph Monument Protection Coalition (NM)
Pilipino Workers Center (CA)
San Antonio Coalition for Environmental & Economic Justice: CEJA (TX)
San Francisco Bay Advocates for Environmental Rights!: SAFER! (CA)
SouthWest Organizing Project: SWOP (NM)
Southwest Public Workers Union: SPWU (TX)
Tonatierra Community Development Institute (AZ)
Tucsonians for a Clean Environment: TCE (AZ)
Ujima Security Council (CA)
Union de Trabajadores Agricolas Fronterizos: UTAF (TX)
Union Sin Fronteras (CA)
West County Toxics Coalition: WCTC (CA)
Yeuani (CA)

cc: Angela Chung, Assistant to the Administrator on EJ
USEPA, Office of the Administrator

Bob Knox, Acting Director
USEPA, Office of Environmental Justice

Greg Cooke, Regional Administrator
USEPA, Region 6

Elliot Laws, Chair
Title VI Implementation Advisory Committee

Haywood Turrentine, Chair
National Environmental Justice Advisory Committee

Ann E. Goode, Director
USEPA, Office of Civil Rights

Felicia Marcus, Administrator
USEPA, Region 9

People Organized in Defense of Earth and her Resources

February 28, 1999

Post-it® Fax Note 7671	Date 3-1-99	# of pages ▶ 3
To Sylvia Lazos	From Susana Almanza	
Co./Dept. SNEES	Co. PODER	
Phone # (505) 242-1416	Phone # 472-9921 (512)	
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Ann E. Goode, Director
Office of Civil Rights (1201)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Re: Abstention from Vote on Final Committee Report and Request that PODER's Reasons for Abstaining as Outlined in this Document be Reflected in the Final Report of the Title VI Implementation Advisory Committee

Dear Ms. Goode:

PODER abstains from any vote on the final report of the Title VI Implementation Advisory Committee. On a very basic level, we have simply not been given enough time to review and comment on the many drafts of the final report which have been circulated since the beginning of the year. While this is reason enough for our abstention, our decision is further necessitated due to the fact that our resources are so completely and utterly out-matched by those of industry and state government.

As noted in our 2/12/99 comments on the 1/4/99 Draft of the Report of the NACEPT Title VI Implementation Advisory Committee, this has been a very difficult process for our organization. Our city is growing at a remarkable rate which has really created an overwhelming situation in terms of the local work of our organization. Things are only made worse by the fact that our city officials and the state and federal agencies which have jurisdiction over the issues on which we work only seem to make our struggle more difficult.

We have taken time away from our local work. We have taken time away from fundraising for our organization that struggles to survive from one year to the next. And we have taken time away from our families and friends to participate in this process. We do not have the luxury of sending our lawyers and our consultants to participate for us as does industry. We do not have the luxury of having engineers and analysts under our employ to review and analyze things for us as our counterparts in state government. We have had to do this on our own.

Although we did provide comments on the 1/4/99 Draft Committee Report, our comments were incomplete. The document we were asked to review was very lengthy (about 75 pages) and was very difficult to understand. This was a document prepared not by our hand but by the hand of the "experts" you have hired, and they have prepared a document written in a language understandable to other "experts" and not necessarily to the people who will be most impacted by the recommendations of this committee. Somewhat troubling is the fact that the report presents the drafters' impressions of the deliberations of all the working groups of which only those of mitigation working group are familiar to us. Further, it was not possible for us to complete our review of the report because a revised section of the document (i.e., The Template of State Programs) was released only two weeks prior to the comment deadline and was considerably longer than the section that we were initially given to review. It is unclear to us why such a change was even allowed.

While we did not so much as have an opportunity to prepare comments on "The Template of State Programs," our counterparts in state government (through ECOS) actually submitted their own template for a model state environmental justice program. Thus, it is our fear that this section of the report will be particularly skewed in favor of industry and state government. While the grassroots Title VI Technical meeting held in Dallas, Texas last week was a good first step toward inclusion of grassroots groups, they too were reviewing the Title VI Implementation Advisory Committee report at a disadvantage. Grassroots environmental justice organizations need resources to review such impacting documents as a group.

A final note on process. Numerous grassroots environmental justice organizations have submitted comments to this committee at various stages of the process. Specifically, there are comments which the Southwest Network for Environmental and Economic Justice (SNEEJ) submitted which do not seem to be adequately reflected in the report. To ignore the comments of these types of organizations is not just irresponsible but a show of utter disrespect to these communities.

While we do want to express our sincere gratitude for allowing us to serve on this committee, we feel that the process which has been undertaken thus far is fundamentally flawed for the reasons outlined above. Because we cannot in good conscience vote to approve this report, we therefore choose to abstain.

Sincerely

Susana Almanza

Susana Almanza - PODER
Member, NACEPT Title VI Implementation Advisory Committee

cc: Elliot Laws, Chair/ Title VI Implementation Advisory Committee
Haywood Turrentine, Chair/National Environmental Justice Advisory Committee

Carol Borwner, Administrator US EPA
Members of NACEPT Title VI Implementation Advisory Committee
Richard Moore, SNEEJ
Tom Goldtooth, Indigenous Environmental Network
Connie Tucker, Southern Organizing Committee

People Organized in Defense of Earth and her Resources

March 10, 1999

Ann E. Goode, Director
Office of Civil Rights (1201)
US Environmental Protection Agency
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Washington, DC 20460

Re: Additional Comments for Final Report of the Title VI Implementation Advisory Committee to include in appendices

Dear Ms. Goode:

PODER is submitting two additional comments to be added to the appendices of the Title VI Implementation Committee final report.

First, there is great concern that demographics for communities bringing Title VI complaints be fair and accurate. There are many ways that the racial demographics of an area can be characterized and it is crucial that the community be involved in the process of analyzing the demographics of their own area.

Second, the Select Steel decision revealed a lack of due process for community members bringing a Title VI complaint. Citizens were not given an opportunity to review or rebut evidence of Civil Rights in their decision depended largely on information and testimony furnished by the state agency, which the citizens had no chance to review or comment on.

Both the above issues will have a large impact on how our Title VI complaints are resolved. I have discussed these issues with others representing Title VI communities who agree they are important points to be raised.

There must be a total commitment by the Office of Civil Rights US EPA to environmental justice.

Sincerely

Susana Almanza

Susana Almanza- PODER
Member, NACEPT Title VI Implementation Advisory Committee

Appendix 2: Additional Views

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Members of the Title VI Implementation Advisory Committee

Mr. Elliott Laws, Chair
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Mrs. Sue Briggum, Director
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Mrs. Alexandra Dunn, Counsel
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Mr. Dell Perelman, Senior Assistant General Counsel
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Mr. Barry McBee, Commissioner
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Mrs. Peggy Shepard, Executive Director
West Harlem Environmental Action, Inc.
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Mr. Robert Shinn, Commissioner
New Jersey Department of Environmental Protection
Trenton, New Jersey

Mr. Gerald Torres, Associate Dean for Academic Affairs
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Austin, Texas

Mr. Haywood Turrentine
Laborers' District Council of Education and Training Trust Fund
Exton, Pennsylvania

The Honorable Rosemary Corbin, Mayor
City of Richmond, California

Mrs. Susana Almanza, Director
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National Advisory Council for Environmental Policy and Technology

Federal Advisory Committee

Appendix C: Workgroup I Membership List and Draft Report on Assessment

WORKGROUP I: ASSESSMENT

REPORT

October 20, 1998

Title VI Implementation Advisory Committee: Workgroup I

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Exton, Pennsylvania

(OCTOBER 19, 1998)

REPORT OF WORKGROUP I: ASSESSMENT

I. INTRODUCTION

Workgroup I had two overarching principles that guided its approach to developing a set of recommendations regarding an assessment process for dealing with potential Title VI situations.

First, it is in everyone's (all stakeholders')[1] interest to have an accessible, predictable, precise, and transparent system for addressing situations with potential Title VI complaints. Clarity and uniformity on assessment frameworks, definitions, protocols, and thresholds are critical to making this possible. Second, it is important to focus on a prospective strategy; the committee strongly urges the development of a proactive program that would identify and avoid potential impacts and thus prevent or significantly lessen the likelihood of Title VI complaints.

Assessment questions play a key role in making these two principles a reality for state and local environmental permitting agencies.[2] The logic for this is compelling; the more we are able to successfully identify a potential hotspot, and determine and implement the proper form of intervention, the less likely a potential hotspot will develop into a situation where complaints would be filed or litigation required.

In the committee's opinion, questions of assessment are critical for two significant reasons. First they form the basis for basic understandings and working definitions of what constitutes a protected group, an impacted community and disparate impact. Specifically, the Committee has developed a set of factors or criteria[3] for determining the applicability of Title VI to a proposed facility or the renewal of a permit for an existing facility. In addition, a second product is a set of indicators of when a community meets the profile of a potentially "impacted community." This product offers programmatic and administrative guidance for developing and maintaining a coherent outreach and networking effort along with an effective early warning system for the state and local permitting agencies.[4] Second, assessment is an important element of any operational program because it provides the thresholds and benchmarks for triggering certain types of actions.

---

[1] In the Title VI context, most prominent stakeholders include but are not limited to affected communities, business, government (federal, state, local), and others.

[2] The committee wishes to emphasize that similar principles apply to federal regulatory programs as well as programs of potential applicant groups, either individual corporations, trade associations or others.

[3] Get definition of factor, criteria, and standard. (Other words are principles, measure,

[4] We need some language on purpose of a set of factors. We also need language on purpose of having a set of indicators for profile of an impacted community.

The Committee has developed a framework that makes use of two approaches -- prospective and retrospective -- to help all stakeholders assess potential Title VI cases. The prospective approach is designed to be used by permitting agencies and permit applicants before a project is permitted, to identify and avoid potential Title VI problems. The retrospective approach is designed to help guide EPA in its assessment of actual Title VI complaints should such complaints be filed.

The prospective approach involves two levels of assessment or screening, the general screening for potential communities of concern based on demographics and overall environmental burden, and a site-specific screening of such communities for actual impact. These levels of assessment are discussed in more detail in Section V, below.

The prospective approach uses broader definitions and casts a wider net than the retrospective approach, with the idea that "an ounce of prevention is worth a pound of cure." By broadly defining concepts such as "community" and "impact" on the front end, the goal is to identify, examine, mitigate and avoid potential impacts to protected classes which might otherwise develop into a Title VI complaint. Because the prospective approach is undertaken by permitting agencies (and permit applicants), the definitions used in it are different from those narrower definitions that might be used in the retrospective approach once a case has entered legal review.

II. BASIC PRINCIPLES FOR UNDERSTANDING THE ASSESSMENT OF POTENTIAL COMMUNITIES OF CONCERN

GENERAL: At each level of assessment (of the community, and of the actual and potential impacts) it is important to recognize that there is not a "one size fits all" approach that will work in every one of the myriad of situations across the country. Thus, in defining "community" and "impacts," and assessing them, EPA should provide several examples to offer guidance to all stakeholders as to how these terms might be used in the assessment process.

The definition and assessment of communities and impacts is both a quantitative and qualitative exercise; each approach is important, and each has limitations. The definition should be site specific.

In the prospective assessment, it is critical and is in the interests of all stakeholders to recognize and respond to the interests of the affected community as early as possible, before stakeholders (including community residents) become hardened into rigid positions.

IMPACT. Impacts must be discrete, identifiable and traceable to a specific permitting action. It is important in some situations to look at cumulative impacts across different media (air, water, etc.).

There was consensus on the committee that the following impacts, if they are under the jurisdiction of the permitting agency, should be examined in the prospective approach; a ___ of the committee felt that the impacts were cognizable if they were caused by a permitting agency whether or not they were within the jurisdiction of that agency. This report does not

purport to address the threshold question of law whether permitting agencies are responsible for impacts outside their jurisdiction which may result from their actions. Our doing so, however, should in no way be seen as reflecting workgroup consensus on that legal issue. The workgroup simply decided to postpone consideration of that difficult issue and to move on to the related policy issues so as to avoid the difficulty of the former preventing us from providing EPA with possibly valuable input regarding the latter. Impacts to be examined in the prospective approach may include the following:

> Human health impacts caused by an agency's action, including actual illness or injury, risk of illness. Psychological and mental health impacts were agreed to by [Luke, Charles, Rosemary, Haywood and Richard]; not agreed to by [Russ, Dell and Art].
>
> Environmental impacts, including air, water, land, noise, traffic, aesthetics, odor and blight.
>
> Direct or indirect destruction or disruption of natural resources, including species.
>
> Impacts to cultural, religious, spiritual and archaeological resources.
>
> [to be discussed:] Cumulative, multiple and synergistic impacts.

DISPARATE IMPACT: Understanding of the concept of disparate impact requires the application of common sense that is based upon the appreciation and direct knowledge of the local conditions of the affected community. Disparate impact almost never occurs in isolation; therefore, it is necessary to carry out a holistic analysis. As well as environmental impacts, disparate impact can refer to the exclusion of a community from the permitting process, from the decision-making process, or both. The process for measuring disparate impact should be predictable, precise, inclusive, transparent and accessible. The committee has defined "disparate impact" in the glossary.

ASSESSMENT TOOLS. A variety of tools should be developed that would serve to examine different situations that might arise. The tools for measurement might include the use of geographic information systems, community impact analysis, proximity and exposure modeling, or a combination of all of these and other tools. The two prevailing methods now being used by EPA and a number of communities for measuring disparate impact are proximity analysis and exposure modeling. Regardless of which method is used, as much real data (as opposed to projections, estimations or modeling) as possible should be used. The tools must be accessible to potential complainants as well as to industry seeking permits and to state and local government regulators; the measurement analysis process should meet the needs of permitting agencies, applicants and affected communities. In designing the analysis, it is important to have appropriate and effective approaches to involving the community up front. The early inclusion of the community in the measurement analysis will enhance the accuracy and predictability of the process.

Further discussion is necessary to determine how best to include the affected community (not to the exclusion of other stakeholders).

The assessment tools -- for measuring disparate impacts and cumulative impacts, among others -- should be based on sound, scientifically valid methodology, developed through a peer reviewed process meaningfully involving and accessible to all stakeholders. The scientific peer review process for measurement analysis should be balanced and objective.

III. FACTORS FOR IDENTIFYING "COMMUNITIES OF CONCERN"

There are two basic factors which come into play when identifying communities of concern for purposes of determining potential applicability to Title VI, i.e., 1. Demographic factor, and 2. Environmental impact (or burden) factor.

A. Demographic Factor

The first step is to identify minority communities for which Title VI concerns might arise. Several approaches have been suggested for how to do this.

> (1) The minority percentage of the population within the area affected by the facility exceeds the average minority percentage within the reference area, in most cases the jurisdiction of the permitting agency.
>
> (2) The minority percentage of the population is 25% or more greater than the average minority population within reference area, again the jurisdiction of the permitting agency. (I.e., if the state average minority population is 10%, than any community with a minority representation of 12.5% or greater would be a "community of concern.")
>
> (3) Does CEQ call for a different standard?
>
> Discuss relative strong and weak points of the different above approaches?

B. Environmental Impact/Burden Factor

Second, the permitting agency would determine whether any of the communities identified in #1 above are currently under a substantial environmental burden. (For the prospective approach, this burden need not meet a standard for *disparate impact*, should one be established. Such a standard would be important for the retrospective evaluation.) Again, some standards for environmental burden have been suggested.

Language from CEQ Environmental Justice Guidance:
Disproportionately High and Adverse Human Health Effects: When determining whether human health effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

> Whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and

Whether the risk or rate of hazard exposure to an environmental hazards by a protected population is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and

Whether health effects occur in a protected population affected by cumulative or multiple adverse exposure from environmental hazards.

Disproportionately High and Adverse Environmental Effects: When determining whether environmental effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

Whether there is or will be an impact on the natural or physical environment that significantly (as employed by NEPA) and adversely affects a protect group. Such effects may include ecological, cultural, human health, economic or social impacts on protected communities when those impacts are interrelated to impacts on the natural or physical environment; and

Whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on protected populations that exceeds or is likely to appreciably exceed those of the appropriate reference group; and

Whether the environmental effects occur or would occur in a protected community affected by cumulative or multiple adverse exposure from environmental hazards.

It is the combination of these two factors that will lead to a determination of a community of concern.

The workgroup recommends the implementation of early intervention strategies, including proactive outreach to communities of concern regarding any proposed new facility or permit renewal for existing facilities. The purpose of the outreach will be to address any community concerns, whether or not they rise to the level of disparate impact or other legally determined issues. Such outreach/involvement strategies will require permitting agency initiatives and support to permittees.

IV. INDICATORS WHEN A COMMUNITY MEETS PROFILE OF POTENTIALLY IMPACTED COMMUNITY

Introductory explanation

List of examples

The purpose of this set of indicators is to provide a useful diagnostic tool for state and local permitting agencies. [sentence needed] In another words, this set of indicators is not meant

to establish a legal test of whether or not a community situation violates Title VI. Rather it is meant to help the permitting agency more effectively realize when a potential Title VI situation may exist and thus fashion an effective early intervention.

This list of potentially cognizable impacts will then become the list of indicators of when a community meets the profile of a potentially "impacted community." And thus offer programmatic and administrative guidance for developing and maintaining a coherent outreach and networking effort along with an effective early warning system for the states.

V. OPERATIONALIZING THE ASSESSMENT PROCESS

In order to operationalize the above definitions and understandings, we also need to develop an administrative/programmatic framework into which these can become operationalized. We need to step back and define the purpose for which we are developing these definitions and fit the definitions into an administrative/programmatic framework that is compatible with the principles, needs and constraints of state, federal or other environmental justice programs.

The group agreed to develop a framework that makes use of two assessment approaches, one prospective and the other retrospective. The committee makes a distinction between administrative/programmatic (prospective) vs. legal (retrospective) purposes. The committee makes a distinction in its approaches between the prospective approach -- to be used by permitting agencies and permit applicants -- and the retrospective approach, to be used by EPA if a Title VI complaint is filed. The goal of the prospective approach is to obviate the need for Title VI complaints, by broadly defining potential communities of concern, discovering potential problems, and addressing them in the context of the permitting process so that complaints are not filed.

The prospective approach consists of two steps, the first a general screen based on community demographics and overall environmental burden, and the second a screen based on actual impact to a community.

A. Prospective Approach

1. Tier 1: General Screening. The purpose of the general screening is to identify environmentally overburdened minority areas (as well as other environmental justice areas). This is an ongoing process of data collection and maintenance--both quantitative (e.g., census data) and qualitative (e.g. "cursory" community profiles)--for purposes of having a full understanding of the terrain and screening for identifying areas which warrant further examination.

Tier 1 refers to the pre-permitting process. The *general screening* refers to an on-going process of quantitative and qualitative data collection *for the purposes of having a full understanding of the terrain and screening for identifying areas which warrant further examination.* While the committee does not advocate a mandatory process, it does note that such a screening process must be in place in order to coherently address communities with potential Title VI complaints. Such an ongoing process is critical for developing a coherent methodology could be developed for community outreach and networking. The general

screening should function as an early warning system. Finally, it is useful for strategic planning, deployment of staff and resources.

Objectives/Activities:

* Develop basic demographic information system and accumulate information on areas with high environmental burdens or other potential problems.
* Use information of education of key staff and integration into day to day activities (as outreach and early warning system).
* Develop statewide Geographic Information System (GIS) capacity.
* Develop standard set of community profiles.
* Develop a coherent methodology for community outreach and networking.

2. Tier 2: Site Specific Intervention.

Tier 2 refers to in-depth site-specific assessment for the purposes of designing and implementing interventions. This involves in-depth site-specific assessment for purposes of designing and implementing interventions

a. Objectives/Activities:

Outreach/relationship building
Site visits/community meetings/hearings
Detailed community profiles
Ongoing monitoring
Dispute resolution and mediation activities
Pilot projects and other interventions
Proximity and exposure modeling
Cumulative impact analysis
Early or special notification procedures

b. Assessment parameters

+ proposed by Charles Lee: (See Assessment parameters for Tier 1 and add the following criteria.)

Imminent endangerment to public health and environment, formal complaint from community, or another event deemed worthy of triggering such intervention.

+ proposed by Russell Harding:

The action will cause an increase over the actual documented emissions and discharges over the average for the past three years across all media.

There are documented adverse health impacts in the minority pollution from a substance included in the emission or discharge authorized by the action.

The retrospective approach refers to an in-depth, scientifically peer-reviewed, comparative assessment for purposes of making a determination of violation of Title VI and/or EPA's regulations implementing Title VI.

1. Objectives/Activities

* To provide EPA a process for evaluating and deciding Title VI complaints filed with the agency.

* By providing such input, making the complaint resolution process a predictable, timely and inclusive process for all involved parties.

2. Assessment parameters

Disproportionate impact: A prima facie case of disproportionate impact can be made by demonstrating that the disparity between the affected community and the reference population is three standard deviations or greater. A presumption of disproportionate impact can be established by demonstrating that the disparity is greater than two standard deviations.

VI. OTHER CONSIDERATIONS (To Be Written)

This section will address some of the following issues

Summary of Proposed Questions For Further Discussion (From Minutes)

Should health based (or other stressors) indicators such as those proposed by Jerome Balter be used as parameters? (There are both policy and technical aspects of this question.) How does one deal sensitively with concerns about a community being stigmatized if it has designation as a potential environmental justice area?

Regarding Tier 1: *Should health-based (or other stressors) indicators such as those proposed by Jerome Balter be used as parameters?* (There are both policy and technical aspects of this question.) *How does one deal sensitively with concerns about a community being stigmatized if it has designation as a potential environmental justice area?*

Regarding Tier 3: *What constitutes harm and to what extent does this figure in a determination of disparate impact? Is a proximity and exposure analysis sufficient to establish some standard of harm?*

Regarding Tiers 1-3: *What assessment parameters should be used? What are the principles for conducting Tier 1 and 2?*

In the area of definitions:

General questions: *What are these definitions to be used for? What constitutes a legal determination of a violation of the law?*

Disparate impact. The following factors are important and require further discussion and definition:

Human health and ecological impacts, cultural impacts, religious impacts, historical and cultural impacts on Native American communities, decreases in property values, rising noise levels, psychological impacts, and other quality of life concerns. How do we apply the *discrete, identifiable, traceable* criteria to measuring each of them, if they can be measured?

How do we further define the terms *disparate impact* and *harm*?

There is a tension between assessment of the specific permitting action and analysis of cumulative impacts within a community. How can innovative ways of responding to both be encouraged?

3. Impacted community.

How would these communities be defined (geographically, linguistically, culturally, via religious practices, etc.)?

What methods or approaches should be used to identify and to determine the interests of the impacted community? Central to this is the role of public participation, which needs to be better understood, defined and applied.

How can we look more effectively at community-wide impact, not just facility impact?
4. Plausible approaches for measuring disparate impact. *How can we ensure the involvement of an accurate representation of the community throughout the process?*

5. Cumulative Risk.

What does the business community consider when it does a cumulative risk analysis?

What are the factors that define predicted impact?

Is the risk assessment done correctly and how can local government and the local community play a major role?

VII. BASIC DEFINITIONS/GLOSSARY

There are certain basic concepts that require definition. For the purposes of this report, these should be viewed as beginning definitions that a set of factors and indicators helps to refine. Since the subject matter referred to is a unique we do not believe that there are a "one size fits all" definition and argues against using a perfunctory approach towards defining the entities in question. The following are thus working definitions.

Aggregation:

American Indian: All indigenous populations, regardless of their affiliation with a federally-recognized Tribe.

Centroid Pull: A procedure for grouping census data; all data units (such as block groups) with centroids (geometric centers) that fall within a defined radius from a central point are included in the analysis.

Community: A community is either a group of individuals living in geographic proximity to one another, or a set of individuals (such as migrant workers or Native Americans), which experiences common conditions.

Protected Group or Community: Communities/groups protected under Title VI of the Civil Rights Act of 1964 are those which have a substantial population of persons who are members of the following population groups: American Indian or Alaskan Native; Asian or Pacific Islander; African American, not of Hispanic origin; or Hispanic.

The selection of the appropriate unit of geographic analysis maybe a governing body's jurisdiction, a neighborhood, census tract, or other similar unit that is to be chosen so as to not artificially dilute or inflate the affected population group (minority or protected group) in question. A [minority] population also exists if there is more than one minority group present and the minority percentage, as calculated by aggregating all [minority] persons, meets one of the above-stated thresholds.

Reference Area/Population: The reference population to be used in the assessment described in this document is the population within the jurisdiction of the permitting agency. For example, if the permitting agency is a state agency, the reference population is the state's population; if the permitting agency is a county, the reference population is the county's population.

Geographic Information System:

Impact:

Environmental Impact: Environmental impacts (burdens) are adverse human health or environmental effect on a particular community or segment or the population related to a specific source or sources, resulting from cumulative or area-wide sources, and/or resulting from inadequate or inappropriate application of government authorities.

Disparate Environmental Impact:[5] The Council on Environmental Quality captures this

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[5] A concise definition for this has yet to be developed. I included the above CEQ definition in full because I wanted the Workgroup to see it in full. I placed brackets around the term [low-income population or Indian tribe]. Title VI does not apply to income; nor is it clear exactly how Title VI applies to Indian tribes. In addition, there are other references which must be changed. I placed this definition here as well as in the section on Factors For Identifying Communities Of Concern. The above is really a set of factors to consider and would more appropriately be placed under the Factors

concept in the following definition provided:

Disproportionately High and Adverse Human Health Effects: When determining whether human health effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

Whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and

Whether the risk or rate of hazard exposure to an environmental hazards by a protected population is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and

Whether health effects occur in a protected population affected by cumulative or multiple adverse exposure from environmental hazards.

Disproportionately High and Adverse Environmental Effects: When determining whether environmental effects are disproportionately high and adverse, agencies are to consider the following three factors to the extent practicable:

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Whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on protected populations that exceeds or is likely to appreciably exceed those of the appropriate reference group; and

Whether the environmental effects occur or would occur in a protected community affected by cumulative or multiple adverse exposure from environmental hazards.

Low-income population: Low-income populations in an affected area should be identified with the annual statistical poverty thresholds from the Bureau of the Census Current Population Reports, Series P-60 on Income and Poverty. In identifying low-income populations, agencies may consider as a community either a group of individuals living in geographic proximity to one another, or set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions of environmental exposure or effect. (CEQ Environmental Justice Guidance)

Process impacts: Process impacts can include process violations, including no or inadequate

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Section. However, a more concise definition based upon this and other ideas needs to be developed.

notice, linguistic exclusion or discrimination, or disparate treatment in the permitting process.

VIII. APPENDICES

Loren Hall Presentation
Region V EJ Policy Summary
Region II EJ Policy Summary
Presentation on Cumulative Impact Analysis

IX. LEGAL QUESTION FOR EPA TO RESOLVE:

Are permitting agencies responsible for impacts outside their jurisdiction which may result from their actions? For example, would a state granting a hazardous waste permit be liable under Title VI for the discriminatory impacts of traffic patterns.

National Advisory Council for Environmental Policy and Technology

Federal Advisory Committee

Appendix D: Workgroup II Membership List and Draft Report on Mitigation

WORKGROUP II: MITIGATION

REPORT

The Role of Mitigation in EPA's Guidance for Title VI Administrative Complaints Challenging Permits

November 16, 1998

Title VI Implementation Advisory Committee: Workgroup II

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Mrs. Peggy Shepard, Executive Director
West Harlem Environmental Action, Inc.
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Mr. Robert Shinn, Commissioner
New Jersey Department of Environmental Protection
Trenton, New Jersey

Mr. Gerald Torres, Associate Dean for Academic Affairs
University of Texas Law School
Austin, Texas

November 16, 1998

WORKGROUP II REPORT

The Role of Mitigation in EPA's Guidance for Title VI Administrative Complaints Challenging Permits

I. Introduction and Background

In EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, EPA discusses at some length the role of "mitigation." The Guidance states in pertinent part:

> EPA expects mitigation to be an important focus in the Title VI process, given the typical interest of recipients in avoiding more draconian outcomes and the difficulty that many recipients will encounter in justifying an "unmitigated," but nonetheless disparate impact. In some circumstances, it may be possible for the recipient to mitigate public health and environmental considerations sufficiently to address the disparate impact. The sufficiency of such mitigation should be evaluated in consultation with experts in the EPA program at issue. OCR may also consult with complainants. Where it is not possible or practicable to mitigate sufficiently the public health or environmental impacts of a challenged permit, EPA will consider 'supplemental mitigation projects" ("SMPs"), which, when taken together with other mitigation efforts, may be viewed by EPA as sufficient to address the disparate impact. An SMP can, for example, respond to concerns associated with the permitting of the facility raised by the complainant that are not otherwise redressable under Title VI (i.e., because they are outside those considerations ordinarily entertained by the permitting authority).

EPA's Interim Guidance, page 11.

Although the guidance is somewhat ambiguous, EPA seems to be using the term "mitigation" in two different ways. The first kind of mitigation appears to involve measures that directly "address" the disparate impact itself by mitigating the "public health and environmental considerations" that are themselves the source of that disparate impact. The mitigation, in effect, eliminates the disparity.

The second kind of mitigation appears to be more broad-based. It takes the form of "SMPs" that "respond to ***concerns*** associated with the permitting of the facility..." (emphasis added). As characterized by EPA, these concerns extend to "considerations" that are "outside

those" within the ordinary scope of factors relevant to the permitting authority. Presumably, such considerations may extend to other kinds of actions that address the affected community's "public health and environmental" concerns. They might also extend, in theory, to considerations other than public health and environmental concerns. EPA states that such mitigation measures "may be viewed by EPA as sufficient" to address the disparate impact. Presumably, EPA chose the "may be viewed" language deliberately in order to obscure that this second kind of mitigation measure does not in fact eliminate the disparate impact.

Finally, in discussing the development of mitigation options, EPA's interim guidance discusses procedures for determining their sufficiency. The guidance states that EPA "should" consult with "experts" within the Agency. And the guidance provides that EPA staff "may" also consult with the "complainants."

The workgroup identified several issues related to mitigation policy. Some of those issues related to the lawfulness, in the first instance, of the entire notion that any mitigation short of an actual elimination of the disparate impact itself could be sufficient to render lawful what would otherwise amount to a violation of EPA Title VI regulations' nondiscrimination mandate. Other issues relate to the secondary question whether, assuming that mitigation can play a lawful role within the context of Title VI regulations, it is sound policy for EPA to do so. These policy issues, in turn, relate to both the substance and procedure of sound mitigation policy, including the proper scope of valid mitigation measures as well as the procedures that should be followed to ensure meaningful and active community involvement in the development of those measures and in their implementation.

An important issue, related to mitigation procedure, concerns whether the filing of a Title VI complaint with EPA should stay the effectiveness of a permit pending resolution of the complaint. The absence of any such stay plainly limits the types and effectiveness of mitigation measures that might be available in the event that EPA concludes that the permitted facility otherwise presents a disparate impact. On the other hand, the automatic imposition of a stay could adversely affect the interests of the entity seeking a permit. The questions whether a Title VI complaint should always, never, or only when specified criteria are met (*e.g.*, complaint formally accepted by EPA), stay the effectiveness of a permit that is the subject of the complaint are clearly extremely important matters for the Agency to address. But while the EPA's answer to these legal and policy issues are important for mitigation, it remains a threshold matter the relevance of which extends far beyond mitigation alone. For this reason, we do not address the issue further in this report other than to emphasize its potential significance for mitigation policy and to urge the Agency to consider that relationship in deciding whether the filing of a Title VI complaint should be deemed to stay the effectiveness of those permit(s) being challenged.

Nor does this report purport to address the threshold questions of ***law*** whether mitigation policy is lawful under Title VI and EPA's implementing regulations or whether EPA may, consistent with Title VI, consider the issue of "justification" prior to the availability of "mitigation." For the purposes of this memorandum, the lawfulness of each will be assumed. Our doing so, however, should in no manner be seen as reflecting workgroup consensus on either

of these legal issues. The workgroup simply decided to postpone consideration of these issues and to move on to the related policy issues so as to avoid the difficulty of their preventing us from providing EPA with possibly valuable input regarding the latter. In addition, it was the general consensus of the workgroup that its expertise lies more in providing EPA with advice regarding sound policy than in purporting to be "legal experts" advising the Agency about the bounds of the law. The purpose of this report, therefore, is to discuss the merits of alternative ways of addressing various secondary, ***policy*** issues regarding sound mitigation policy based on the assumption that some mitigation policy is lawful.

This report is accordingly, divided into three parts. The first part discusses the pros and cons of different approaches to the possible substantive scope of mitigation policy. And, the second part discusses the pros and concerns of different approaches to procedural issues related to mitigation policy. The final part of the report presents areas of agreement reached by the workgroup. These points of consensus are expressed in terms of both specific findings and recommendations. Because, moreover, the workgroup identified several threshold legal issues that, while outside the scope of our inquiry, were nonetheless relevant to mitigation policy, each of these issues is reiterated in the final, conclusory section of the report in either our findings or recommendations.

II. Substantive Scope of Mitigation

There are, of course, infinite ways in which one could define the substantive scope of acceptable mitigation policy. For the purposes of this report, however, it is helpful to select out several of the more obvious approaches in order to compare and contrast their relative advantages and disadvantages. These approaches range from very narrowly-defined mitigation measures to more sweeping, flexible approaches. Three such possible approaches are described below and then some of the relevant considerations in choosing one rather than another are outlined.

A. Possible Approaches For Defining Permissible Mitigation -- From Narrow to Broad

The principal characteristic distinguishing the three approaches described in more detail below is the extent to which each requires that the mitigation measure address the source of the disparity in impact that serves as the basis for the Title VI complaint. This relationship between the mitigation measure and the disparity in impact can be referred to as the "nexus." Simply stated, the most narrow approach demands that the mitigation measure address that impact most directly. In other words, the required nexus between the mitigation measure and the initial disparity is very tightly drawn. By contrast, the broader approaches are less demanding in their requirements of a narrowly-drawn nexus. They are much more willing to accept as proper mitigation measures those that address concerns of the community other than those that serve as the basis of the disparity.

But for this same reason, the extent to which a "narrow" approach differs as a practical matter from a "broad" approach necessarily turns on the scope of the impacts that are relevant in deciding whether a disparity exists in the first place. For example, if the scope of impacts relevant to deciding whether a disparity exists is very broadly defined, then even a very narrowly-defined mitigation policy would necessarily allow for broad-based mitigation measures. It is relatively easy to establish a nexus between the mitigation measure and the disparity if the disparity itself is broadly defined. And, conversely, if the disparity is narrowly defined, it is that much harder to claim that a mitigation measure directly addresses it.

There is, accordingly, an unavoidably elusive quality to any discussion of mitigation policy so long as EPA has not yet clearly decided on the scope of concerns relevant to the central "disparate impact" inquiry. A distinct, but related over-arching concern, is the lack of a clear definition of what constitutes the adversely-affected "community" for purposes of determining whether the impact is "disparate" and in fashioning community participatory rights. The workgroup has identified these fundamental problems, but decided not to allow their existence to prevent our undertaking analysis of mitigation issues. Our concern is that the entire FACA process would otherwise be paralyzed as consideration of each issue would be postponed until the other was first resolved.

1. *Narrow Nexus Approach*

The narrowest approach to mitigation policy would be to propose that the only viable mitigation is that which directly addresses the disparity in impact that is the basis of the discrimination claim. The mitigation measure would, moreover, have to eliminate the disparity and do so more immediately.

If, therefore, the disparity is that the community would suffer greater adverse health effects from exposure to certain pollution, then the validity of a proposed mitigation measure would turn on whether it eliminated the disparity (or at least its own contribution to that disparity) in adverse health effects from that same pollution. Or, if the disparity was in the community's exposure to high levels of pollutants (without any need to demonstrate actual adverse health effects), then the mitigation measure would have to reduce the levels of pollutants. In either scenario (adverse health effects or pollutant levels), any other less direct and absolute tradeoff would be unacceptable because it would, in effect, allow discrimination to continue.

2. *Moderate Nexus Approach*

A more moderate approach to mitigation policy would be to propose that mitigation measures must relate to the same type of concerns that are the source of the disparate impact. The mitigation measure need not, however, either eliminate that impact altogether or address it directly. The mitigation measure might also deliver its benefits less immediately than under the narrow approach.

For instance, if the disparity in impact relates to risks of adverse health effects caused by

elevated levels of pollution, then any mitigation measure that reduces the health risks faced by the community could be acceptable. The proposed mitigation might seek to reduce health risks caused by other kinds of pollutants or even other kinds of activity. Or the mitigation might even seek to provide better health care facilities, treatment, or screening in order to reduce the risks associated with the operation of the facility seeking a permit. Or the mitigation might require steps to minimize, more than legally required, the possibility of permit noncompliance, if such noncompliance is a source of the risks of concern to the community. The latter might include measures that enhanced the community's ability to participate in an advisory group to monitor and make recommendations regarding the facility's operation and regulatory compliance.

Similarly, if the disparity in impact relates to adverse environmental effects caused by elevated levels of pollution or more direct physical impacts on the environment of the activity seeking a permit, then any mitigation measure that sought to reduce those effects or otherwise improve the environmental quality of the community might be acceptable. It could be to improve the quality or the community's enjoyment of the same resource, or the same type of resource, or perhaps even a different environmental amenity in the community.

Finally, mitigation and the benefits that it offers may sometimes occur over time. There is, in other words, a *temporal* dimension to mitigation. A mitigation measure might be addressing a long term problem, which is not susceptible to an immediate solution with immediate benefits. The measure may instead require a longer term planning process that generates benefits only after many years. The tradeoff, accordingly, may depend on the community's willingness to accept a short term increase in risk in return for a promise of substantial benefits over the longer term.

3. *Loose Nexus Approach*

The broadest approach to mitigation policy would be to accept any kind of mitigation measures that address community concerns, regardless of their relationship to that impact, so long as the benefits to the community of those mitigation measures outweighed the facility's adverse disparate impact. The community would, in effect, be allowed to trade off a discriminatory impact for some other, presumably more weighty, community concern. Unlike the moderate nexus approach, the mitigation measure would not need to address the same general type of concerns that are the source of the disparate impact.

Under such a loose (or arguably nonexistent) nexus approach, mitigation of a disparate impact related to elevated levels of pollution could be funds for better schools, better recreational facilities, housing, health care facilities, job training, increased employment opportunities, or higher wages. The bottom line would simply be to address the community's serious needs whether or not those needs happen to coincide with the specific problems implicated by that aspect of the facility that requires an environmental permit. The community might likewise be more open to the acceptability of mitigation measures that provide benefits less immediately and more over the longer term.

B. Some of the Advantages and Disadvantages of Alternative Approaches

The most obvious tradeoff in going from narrow to loose nexus requirements in mitigation policy is between, on the one hand, strict adherence to the nondiscrimination principle and, on the other hand, a desire to address the broader needs of a disadvantaged community. Title VI, and the implementing regulations of federal agencies such as EPA, provide a nondiscrimination mandate. As a practical matter, however, they provide the community protected by that nondiscrimination mandate with significant legal leverage over a proposed economic activity requiring a permit. And while that leverage may sometimes be used to prevent the issuance of the permit altogether, the leverage also offers the opportunity for a bargain to be struck that inures to the needs of the community. That is especially so to the extent that the terms "discrimination" and "disparate impact" are unavoidably ambiguous.

For some, any notion of a tradeoff is wholly out of bounds. A nondiscrimination mandate should not be the subject of a bargain. That would be tantamount to allowing the right to discrimination to be purchased. A mitigation policy that allowed such a tradeoff would, accordingly, be no less than an improper legal sanctioning of economic blackmail. Those who hold that position will likely be most attracted to the narrow, more demanding nexus approach to Title VI mitigation policy.

For others, though, such a characterization of Title VI, its implementing regulations, and the permitting process, ignores both legal and practical realities. It is not always clear what discrimination is and what it is not in the context of Title VI regulations and disparate impact analysis. It is therefore not at all clear that what is being bargained away is what would otherwise amount to a legal prohibition if the community instead sought a strict enforcement of its legal rights. The courts might, in other words, reject such a lawsuit as lacking any legal merit.

Alternatively, those resisting a narrow nexus approach might focus on what they view to be the practical realities. They might contend that the practical reality is that the community has substantial, immediate and long term, compelling needs and it may be more advantageous to the community to take full advantage of the disparate impact analysis in negotiating with a company seeking to site a facility in the community. And, one effective way to do so, they might further argue, is to extract commitments, concessions, services, and outright transfer of funds from the activity requiring a permit. Advocates of this position would posit that the community must, in other words, be ready to use those few legal advantages that it possesses in the most effective manner possible. Someone who embraced this characterization of the regulatory permitting process might well be attracted to the loose nexus approach to mitigation policy.

By its nature, the more middle-ground, "moderate nexus" approach has some of the advantages and some of the disadvantages of the narrower and looser nexus approaches that lie on either side of it. By seeking to split the difference, however, the moderate approach arguably lacks the purity of purpose that the other two contrasting views supply. For related reasons, it also has the disadvantage (perhaps also the advantage) of obscuring the nexus requirement and

thereby providing both the Agency and the affected community with more discretion to determine on a case-by-case basis what kind of mitigation should be considered.

Finally, there is a further policy argument in favor of EPA's declining to adopt a "one size fits all" approach to mitigation. Assuming still that any one of the three approaches is legally permissible,[1] there is no rigid requirement that EPA's guidance prescribe one approach to all situations. EPA could, for instance, embrace a hybrid approach that formally adopts one nexus approach but allows for either looser or tighter nexus requirements under specified circumstances.

The workgroup considered formally stating that a narrow nexus requirement always had to be used whenever the disparate impact presented an imminent and substantial endangerment to human health. A consensus developed regarding the relative advantages of one hybrid approach. This approach allows for mitigation measure that satisfy a moderate nexus requirement but nonetheless mandates that mitigation measures should always be as narrowly tailored as reasonable and practicable.

The workgroup also discussed the possibility of EPA's simply concluding in its guidance that it is up to the permitting authority and the affected community to decide which approach was most sensible in the circumstances of a particular facility. This kind of decentralized approach to mitigation would have one possible advantage from an environmental justice perspective. It would potentially provide affected communities with more authority to decide for themselves the proper role for mitigation, rather than have that policy issue decided nationally and imposed uniformly on all communities.

A final variation considered by the workgroup is for EPA's guidance seeking to distinguish between different kinds of Title VI claims and suggest that some warrant a narrower nexus approach while others warrant a moderate or looser nexus requirement. For instance, EPA might distinguish between circumstances depending on the source of the disparity, *i.e.*, whether the disparity in impact results from industrial facilities that are (or are not) permitted by the state agency subject to EPA's Title VI regulations. The larger the universe of facilities that one subjects to disparate impact analysis, the more justifiable it might be to adopt a looser nexus approach. A looser disparate impact inquiry, in short, may justify a looser nexus approach.

Of course, whether such a distinction is itself appropriate depends on how EPA ultimately resolves the threshold legal question regarding the scope of facilities relevant to the disparate impact inquiry. That legal issue is quite controversial. States generally contend that facilities not permitted by the state agency that is the subject of the Title VI challenge are outside the scope of disparate impact analysis. Many community groups advance a contrary view. All

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[1] Please recall that this memorandum assumes away legal issues relating to mitigation and addresses only the policy implications of choosing between alternative mitigation policies based on that threshold assumption that each option -- narrow, moderate, and loose -- is legally permitted by Title VI and its implementing regulations. See page 2 above.

this workgroup can do, however, is identify the legal issue and, as we have done, point out its relevance to EPA's fashioning of mitigation policy. We cannot purport to resolve it.

III. Procedural Issues

The procedural issues pertaining to mitigation are three-fold. First, they relate to the development of mitigation measures that might eliminate the disparity in impact altogether. Second, they relate to the development of supplemental mitigation projects ("SMPs") that address the disparity, but do not purport to eliminate it. And, finally, they relate to ensuring that mitigation measures, once adopted, are in fact implemented and achieve their intended beneficial results.

Each of these three procedural matters raises important environmental justice concerns because of the need for meaningful, ongoing community involvement in decisions affecting the community's essential interests. The long-standing, persistent mistake made by government regulators and by those in the regulated community is the failure to provide for community involvement in the permitting process. The upshot is poorer permitting decisions, greater misunderstandings, and greater controversies at the expense of the interests of all, but especially the legitimate interests of the affected community. This is no less true for the mitigation dimension to permitting decisions. Indeed, because the asserted purpose of mitigation in the Title VI context is to identify and address the community needs, community involvement is all the more indispensable.

At least on its face, however, EPA's interim Title VI guidance does not affirmatively provide for such enhanced community involvement on issues related to mitigation. Quite the opposite is true. The precise wording of the document appears to downgrade the relative importance of consultation with the community. While the guidance instructs that the "sufficiency of such mitigation *should* be evaluated *in consultation with experts in the EPA program* at issue[,"] it simultaneously provides only that EPA's Office of Civil Rights "*may* also consult with *complainants.* ". For community representatives, however, they are themselves the "experts" that should be consulted on issues of mitigation.

Of course, EPA's guidance can be read more benignly. The consultation to which the guidan refers may be intended to relate simply to technical matters regarding the ability of a proposed mitigation measure to work. Even so, however, the guidance is lacking for neglecting to address explicitly the need for community involvement on those mitigation issues about which the community does unquestionably possess the most relevant expertise.

The most logical starting point for EPA in rethinking its approach to community involvement would be to consult and incorporate into its Title VI guidance the public participation model developed by the Public Participation and Accountability Subcommittee of EPA's National Environmental Justice Advisory Council (NEJAC). That guidance addresses many of the essential participatory issues, including, but not limited to the need for notice to the community, identification of community interests, timing and scope of public participation, and

communication with the community. The very purpose of this model is to facilitate meaningful public participation in agency decision making affecting the community's interests. Decisions relating to mitigation appropriate in the Title VI context implicate just such core community environmental concerns and raise each of the issues addressed in the NEJAC Model.

There is, moreover, a palpable need for active and ongoing community involvement in both the threshold decision whether any mitigation is appropriate in a particular instance and, if so, what measures constitute acceptable mitigation. After all, mitigation is designed, to some extent, to address the complaining party's concerns in order to defuse the controversy in a manner not unlike a settlement. Unless, however, the complaining party is allowed to participate actively in the development of mitigation measures, those measures ultimately selected are unlikely to accomplish that settlement objective. Because the complaining party in the Title VI permitting context are typically community members who are aggrieved as a result of the possibility of a disparate impact, their entitlement to meaningful participatory rights is all the more compelling.

EPA should also look to its recently-issued guidance on public participation in the development of supplemental environmental projects ("SEPs") in the settlement of EPA enforcement actions. The Agency's 1995 interim revised SEP guidance was criticized for failing to provide for sufficient community involvement in the fashioning of SEPs and the Agency responded in its final 1998 guidance with more significant opportunities for community involvement.[2]

The parallels between SEPs and SMPs, moreover, are obvious. A SEP is a project that an alleged violator of an environmental protection requirement agrees to undertake in settling an enforcement action brought against it. Such projects typically provide benefits directly to the community (not the plaintiff) that was adversely affected by the violation. Although SEPs and SMPs are fundamentally different in certain respects,[3] the need for community involvement in deciding on what kind of mitigation projects are the most appropriate is compelling in both types of mitigation measures.

Indeed, the case for active public participation in SMPs is actually far stronger than it is for SEPs. EPA's public participation requirements for SEPs apply to cases where the *Agency* is settling its own enforcement action. Where a Title VI administrative complaint has been filed, however, the initial complainant are typically *representatives of the affected community*, not the Agency itself. For this reason, those community representatives would seem plainly entitled to

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[2] The 1998 guidance section on "Community Input" is reproduced in Appendix A.

[3] SEPs involve the alleged violator agreeing to do something beneficial for the environment above and beyond what the law requires (which is what justifies an associated reduction in civil penalties that would otherwise apply to the violation). It is less clear whether SMPs are otherwise required by law, like SEPs, or are instead more properly viewed as what the law (*i.e.*, Title VI regulations) requires.

even greater involvement in the development of mitigation measures than they are in SEPs where they may be the primary beneficiaries of the litigation, but not its formal instigators. They should be actively involved in any decision-making process designed to develop acceptable mitigation measures. Under EPA's preliminary Title VI guidance, however, community representatives have even fewer participatory rights than they do in the development of mitigation measures for SEPs.

IV. Workgroup Tentative Findings and Recommendations

In a series of conference calls, the workgroup discussed the various issues described in this report. Not surprisingly, there were areas of substantial disagreement. Even when some degree of consensus was apparent on advantages and disadvantages of possible approaches, there was often disagreement both on their relative weight and how the ultimate policy balance should be struck. There were nonetheless some areas of common ground, at least with respect to findings and even with regard to some specific recommendations. They are described below.

A. Findings

The workgroup makes the following findings:

1. A series of threshold legal issues need to be resolved more definitively before issues relating to mitigation can themselves be resolved because the answers to those threshold issues determine, in effect, the scope of permissible mitigation. These issues include:

a. Whether, as a matter of law, the impacts relevant to a "disparate impact" inquiry are strictly confined to the environmental effects that are relevant under the particular environmental law creating the permit requirement or instead extend to all the actual social, economic, and environmental effects of a decision to grant a permit.

b. Whether, as a matter of law, mitigation short of measures that actually eliminate a source's creation of, or contribution to, a disparate impact can validly allow for the permitting of that pollution source.

c. Whether, and under what circumstances, the filing of a Title VI complaint with EPA, stays, as a matter of law, the effectiveness of a permit pending resolution of that complaint.

d. Whether, as a matter of law, EPA may consider the availability of measures designed to mitigate a disparate impact prior to determining whether that disparate impact is justified.

2. Assuming that mitigation need not, as a matter of law, eliminate the disparate

impact to be created by the entity seeking a permit, or that entity's contribution to a pre-existing disparate impact, there are a series of competing advantages and disadvantages that warrant consideration in deciding whether EPA should, as a matter of policy, embrace a broader rather than narrower mitigation policy.

3. The primary characteristic distinguishing possible EPA mitigation policy relates to the extent to which the mitigation measures must address the source of the disparity in impact that serves as the basis for the Title VI complaint, which is referred to as the "nexus" requirement.

a. A "narrow nexus" mitigation policy would provide that the only viable mitigation is that which directly addresses the disparity in impact that is the basis of the discrimination claim and that immediately eliminates the disparity (or at least the source's contribution).

b. A "moderate nexus" approach would provide that mitigation must relate to the same type of concerns that are the source of the disparate impact, but need not eliminate that impact or provide mitigating benefits as immediately.

c. A "loose nexus" approach would find acceptable any mitigation measures that address community concerns, regardless of their relationship to that impact, so long as their benefits to the community outweigh the facility's adverse disparate impact.

4. There are policy advantages and disadvantages relevant to selecting between a "narrow," "moderate," or "loose" nexus approach, with strict adherence to a nondiscrimination principle favoring the first, the retention of maximum discretion to address the broad needs of a community favoring the last, and a rough compromise of those two more extreme views favoring the middle position.

5. A hybrid approach that allows for mitigation measures that satisfy a moderate nexus requirements but nonetheless mandates that mitigation measures should always be as narrowly tailored as reasonable and practicable combines several of the advantages of each of those nexus approaches.

6. There may be grounds for EPA's distinguishing between different kinds of Title VI claims, based on the source of the disparity, in deciding whether a narrow, moderate, or loose nexus policy is the most appropriate.

7. Mitigation measures that require actions over time and deliver their benefits in the future are a valid form of mitigation but must be combined with measures designed to ensure that the mitigation in fact occurs, including measures that provide for monitoring of the progress of mitigation and for the enforceability of the promised mitigation.

8. Meaningful community involvement is an essential component of any Title VI mitigation policy applicable to permitting.

9. EPA's Interim Guidance for Investigating Title VI Administrative Complaints for Challenging Permits fails to provide for meaningful community involvement. The guidance provides for even less community involvement than the Agency's final guidance respecting "community input" in the development of supplemental environmental projects (SEPs), although the need for community involvement in the Title VI context is even greater than they are for SEPs.

10. The Public Participation Model developed by EPA's National Environmental Justice Advisory Council provides a useful starting point for the fashioning of procedures intended to ensure community involvement in Title VI mitigation policy in the permitting context.

11. There are several different opportunities for public participation relevant to mitigation, including (i) pre-filing of a formal Title VI administrative complaint, (ii) post-filing/pre-acceptance of a complaint, and (iii) post-acceptance of a complaint.

12. Mitigation measure that requires action in the future for the delivery of the promised mitigation must include community capacity (including adequate resources and technical knowledge) to monitor implementation and enforcement of the mitigation.

B. Recommendations

The workgroup makes the following recommendations:

1. EPA's Office of General Counsel needs, in consultation with the Department of Justice, to reach a final resolution of the four threshold legal issues described in Finding #1 above.

2. To minimize the instances when a Title VI administrative complaint needs to be filed with the Agency, EPA should promote the initiation of early, informal consultative processes among the permitting authority, permit applicant, and potentially affected members of the community and their representatives.

3. If EPA concludes that a narrow nexus mitigation policy is not required as a matter of law, then the Agency should adopt a mitigation policy that allows for mitigation measures that satisfy the "moderate nexus" approach described in Finding #3(b) above, but based on the following further restrictions:

a. mitigation measures must nonetheless always be as narrowly tailored to

the disparate impact as is both reasonable and practicable;

b. the reasonableness of mitigation measures that address the disparate impact less precisely depends on their ability to provide substantially greater benefits to the community;

c. mitigation measures that require actions over time and deliver their benefits in the future must be combined with measures designed to ensure that the mitigation in fact occurs, including measures that provide for monitoring of the progress of mitigation (*e.g.*, timelines with specific dates) and for the enforceability of the promised mitigation in an appropriate binding legal document (*e.g.*, formal permit conditions, memoranda of understanding); and

d. a fair process for developing mitigation measures must include meaningful public participation by potentially affected community interests, including those who initiated the Title VI complaint.

4. EPA should not adopt a "loose nexus" approach to Title VI mitigation policy.

5. EPA's Title VI guidance should provide for public participation in the fashioning of mitigation measures that:

a. meets the minimum requirements for meaningful community involvement set forth in the NEJAC's Public Participation Model;

b. surpasses the extent of community input set forth in EPA's final guidance relating to supplemental environmental projects in the settlement of EPA enforcement actions;

c. generally addresses the need to provide an up-front, pre-development process, including procedures for early dispute resolution, for identifying, preventing, and addressing any disparate impacts;

d. establishes a consultative process within which the complainants, community representatives, the permit applicant, and other relevant stakeholders are part of the decision-making processes in the fashioning of any mitigation measures that are developed after the time that a Title VI complaint is filed;

e. provides that mitigation measures include provisions that ensure that the community is provided with the capacity (including resources) to monitor implementation of the mitigation measures, especially those promising the adoption of mitigation in the future; and

f. for mitigation measures that are both adopted after EPA's formal acceptance of a Title VI administrative complaint and that depend on the permit applicant's taking actions in the future, the measures should provide for the establishment of a citizen advisory board with the capacity for monitoring implementation of those mitigation measures.

APPENDIX A: SECTION ON COMMUNITY INPUT FROM EPA FINAL 1998 SEP GUIDANCE

In appropriate cases, EPA should make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations. Soliciting community input into the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility. Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

When soliciting community input, the EPA negotiating team should follow the four guidelines set forth below.

1. Community input should be sought after EPA knows that the defendant/respondent is interested in doing a SEP and is willing to seek community input, approximately how much money may be available for doing a SEP, and that settlement of the enforcement action is likely. If these conditions are not satisfied, EPA will have very little information to provide communities regarding the scope of possible SEPs.

2. The EPA negotiating team should use both informal and formal methods to contact the local community. Informal methods may involve telephone calls to local community organizations, local churches, local elected leaders, local chambers of commerce, or other groups. Since EPA may not be able to identify all interested community groups, a public notice in a local newspaper may be appropriate.

3. To ensure that communities have a meaningful opportunity to participate, the EPA negotiating team should provide information to communities about what SEPs are, the opportunities and limits of such projects, the confidential nature of settlement negotiations, and the reasonable possibilities and limitations in the current enforcement action. This can be done by holding a public meeting, usually in the evening, at a local school or facility. The EPA negotiating team may wish to use community outreach experts at EPA or the Department of Justice in conducting this meeting. Sometimes the defendant/respondent may play an active role at this meeting and have its own experts assist in the process.

4. After the initial public meeting, the extent of community input and participation in the SEP development process will have to be determined. The amount of input and participation is likely to vary with each case. Except in extraordinary circumstances and with agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations. This restriction is necessary because of the confidential nature of settlement negotiations and because there is often no equitable process to determine which community group should directly participate in the negotiations.

National Advisory Council for Environmental Policy and Technology

Federal Advisory Committee

000049

Appendix E: Workgroup III Membership List and Draft Report on a State and Local Government Template

WORKGROUP III: OPERATIONS

REPORT

A Template for State Environmental Justice Programs

November 13, 1998

Title VI Implementation Advisory Committee: Workgroup III

Mrs. Sue Briggum, Director
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Dr. Walter Handy, Jr., Assistant Commissioner
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Cincinnati, Ohio

Mr. Barry McBee, Commissioner
Texas Natural Resource and Conservation Commission
Austin, Texas [Resigned from Committee]

Mrs. Jody Henneke, Director
Office of Public Assistance
Texas Natural Resources and Conservation Commission
Austin, Texas [Replaced Mr. McBee on Committee]

Mr. Langdon Marsh, Director
Oregon Department of Environmental Quality
Portland, Oregon

10/20/98
(includes WH revision 11/13)

Report of the

National Advisory Council
for
Environmental Policy and Technology

Title VI Implementation Advisory Committee

WORKGROUP III: OPERATIONS

A Template for State Environmental Justice Programs

INTRODUCTION

The Mission of Workgroup III

Webster's Third International Dictionary defines a template as a "pattern or guide" used to "produce a desired profile." The mission of Workgroup III is to develop a template for state environmental justice programs, describing both the structure and the key elements of the process that states could use to ensure environmental justice and to identify, prevent, and resolve claims of discriminatory treatment.

The template described in this report is intended as a model for states concerned about these issues. It is not intended as the basis for a mandatory requirement that the states adopt such programs. However, the Workgroup urges EPA to create strong incentives for states to implement programs modeled on the principles described here by establishing a presumption in favor of state decisions when it evaluates Title VI complaints against states that implemented these principles in good faith.

Although Workgroup III devoted considerable effort to the framework and procedures presented in this report, the template is not yet complete. Before the template can be used to establish a **presumption in favor of state programs**[1], substantive guidance must be added that defines such crucial concepts as the factors and methodology involved in identifying adversely affected populations and the harm they have suffered, as well as the content of any acceptable justifications for such results and actions that can be taken to mitigate them. The Title VI Advisory Committee includes two other workgroups that are addressing these issues, and Workgroup III anticipates that their final product will be read in conjunction with this report.

Two Paths to Justice

Workgroup III was fortunate to have the active participation of the directors of three state environmental agencies: New Jersey, Texas, and Oregon. As we studied the efforts they have made to develop proactive environmental justice programs, it became clear that the states approach the issues from two distinct directions. First, the programs address potential discrimination against communities that results from permitting decisions made with respect to individual facilities. Second, such programs explore and attempt to remedy the imposition of a disproportionate burden of adverse environmental effects on minority communities without regard to the constraints of the permitting process. Both tracts holds promise because of their

[1] What incentives or "presumptions in favor of state programs" can be offered or created by EPA that will offset the additional state resources necessary to comply with tract 2 "paths to justice" of these recommendations. The same question may be asked with respect to businesses and industry and their role in tract 2 recommendations.

more proactive response to community concerns. However, the second tract goes beyond the dictates of Title VI and may pose resource concerns.

The template we have developed assumes that state environmental justice programs could develop along both tracks. Thus, cumulative effects that are difficult to address effectively in single-facility permitting proceedings would be identified and addressed by other activities of the state program.

State Flexibility

Although Workgroup III developed a strong consensus regarding the desirability of a two-track structure for states and the importance of EPA deference to state decisions as an incentive for states to adopt the template, members diverged on the question of **how much flexibility states should be given to translate the principles contained in the template into an operational protocol**.[1] One state representative described the template as a "menu" of options for the states, while another participant urged that the template contain as much prescriptive detail as possible. An industry representative reiterated the need for clarity and certainty so that the consideration of environmental justice concerns could proceed at the same time as permits are processed, eliminating inordinate delays. As EPA refines the template, the Workgroup recommends that it achieve a balance between the need to establish a clear floor for state programs while still giving the states the flexibility to adapt these principles to their own local circumstances.

The Workgroup recognizes that some states believe that EPA should delegate the resolution of Title VI claims to the states, leaving appeals of the decisions made at the state level to the judicial system. The Workgroup, however, recognizes the EPA's continuing obligation as arbiter of such claims.

The Best Context for Environmental Justice Programs

The Workgroup recommends that EPA and the states make explicit the relationship between effective environmental justice programs and other initiatives that address the fundamental sources of such concerns. For example, programs that address pollution on a watershed or air shed basis have the potential to define and ameliorate the cumulative effects of emissions on minority communities more effectively than individual permit decisions. Similarly,

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[1] The question of minimum and maximum flexibility from state to state needs to be addressed by the Committee. Too much variability from state to state may be very confusing to national organizations (NGO's and businesses and industries). The question of flexibility here seems directly connected with the question of incentives or "presumptions" referenced above in #1. I believe that agreed upon minimum and maximum flexibilities have to be established by the workgroup or the Committee.

EPA and state efforts to develop cross-media programs may provide better opportunities for mitigating the adverse effects of emissions on minority communities. Finally, EPA's efforts to develop and make accessible to the public data regarding environmental indicators will prove extremely helpful in bolstering the transparency of the public participation process envisioned by this template.

EPA and state policy statements regarding environmental justice, cross media regulation, watershed and air-shed protection, and efforts to improve environmental information should describe these interrelationships and encourage coordination between these activities.

Next Steps for EPA

The Workgroup recommends that EPA take the recommendations produced by this Advisory Committee and give them substantial weight in its efforts to produce final guidance on environmental justice issues. We anticipate that EPA will consult with other constituencies and experts in the course of preparing final guidance, and that the guidance will be published for public comment before it is issued in final form.

The Workgroup further urges EPA to develop and make available to the states and the public the tools necessary to implement the programs envisioned by the template we have proposed. For example, EPA has made strides in developing models and other tools for assessing the cumulative effects of exposure to environmental releases. The Agency has also made efforts to help states 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 has pioneered the development of methodologies that help industry and mineral extractive sectors identify and implement pollution prevention opportunities. It is also developing mobile sensor technology that allows measurements of ambient air quality in communities, a category of information that is often requested by community groups. EPA could also consider developing a checklist or inventory of the sources that are most prevalent in minority communities for use by citizens and the states in assessing cumulative exposures. All of these tools are vital building blocks in the implementation of effective environmental justice programs, and the Workgroup recommends that EPA devote significant resources to making them readily available to state agencies, industry, tribes and the public.

In addition to continuing its consultations with the states regarding Title VI issues, the Workgroup recommends that EPA initiate consultations with industry groups to explain the goals of its environmental justice guidance. It is the sense of the Workgroup that although the chemical and waste management industries are aware of the issues, other elements of the manufacturing sector may not understand how such considerations can affect their business. We would particularly encourage proactive efforts to educate the smaller business community.

Road Map to This Report

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

1. Identify Title VI issues proactively, with a community-based focus.

2. **Define relevant pollution sources** to be addressed by state Title VI programs accurately and inclusively, taking into consideration cumulative health and environmental effects. [1]

3. 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. In that context, ensure that states have **adequate legal authority** to carry out their programs.[2]

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

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

6. Create and identify incentives for permittees to address community concerns voluntarily.

7. Build community monitoring capacity.

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[1] Who will define these sources? Will the definitions and selection of these sources also take into consideration cultural and other "quality of life" concerns?

[2] Is it more advantageous for states to develop this legal authority for themselves, or may EPA develop federal law or administrative code that can be delegated to the states.

THE SEVEN PRINCIPLES

Proactive Problem Solving

Identify Title VI issues proactively, with a community-based focus.

Perhaps the single most important characteristic of the template proposed by this report is early and proactive efforts to identify and address environmental justice issues. This principle is especially important in the context of the permitting process for individual facilities, but it applies as well to the second track of state environmental programs -- efforts to address the aggregate effects of pollution on minority communities.

With regard to the permitting tract, the Workgroup strongly recommends that EPA, the states, 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 netting transaction or determination to renew, modify, or acquire a new permit). The Workgroup further recommends that at these initial stages, the siting entity and state environmental agency officials conduct community outreach to identify parties potentially interested in the decision at issue. Informal discussions with the community, as well as all state and local officials that may play a role in the decision, should begin as soon as possible once these parties are identified. *(Lang Marsh is concerned about statutory authority and resource requirements at a state level implied by this language and may provide new language here.)*

The Workgroup further believes that 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 the new or existing facility 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.

The Workgroup recognizes that state officials and facility sponsors may not agree that the community's concerns are covered by the environmental permitting process. **We further understand that state officials and facility sponsors may wish 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.**[1] Nevertheless, the benefits of reaching early agreements that effectively address the community's most significant

[1] Will there be any consistency between states for parameters of these agreements?

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 we recommend early intervention, we mean just that. Ideally, a dialogue would begin even before zoning decisions are made to allow construction or expansion of the facility and would be underway before the permit process officially begins. 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, second tract approach.

As for the second track of environmental justice programs, the Workgroup believes that over time, as efforts to address disproportionate pollution burdens in minority communities become more sophisticated and extensive, the level of controversy provoked by individual permitting decisions will recede. Thus, the second track is important as an alternative to resolution of such concerns within the permitting process and hopefully will be embraced by all stakeholders.

Members of the Workgroup recognize that pre-identification of adversely affected communities in the context of the second track may have an impact upon development. Use of the term "redlining" to describe this effect may be misleading and is not viewed as helpful.

A final issue considered by the Workgroup 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? [1]

The Workgroup agrees that it is not the role of a state environmental justice program to organize opposition to permitting decisions. However, we also believe that the second 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

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[1] Will it be sufficient here for states or municipalities to develop and disseminate multimedia indicators of environmental quality?

cumulative effects, amelioration of disproportionate burdens will become an integral part of the overall mission of federal and state environmental agencies, with or without public complaints.

Addressing Cumulative Effects

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

As noted above, the Workgroup achieved strong consensus on one crucial point: states should implement programs that 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. Under this second track, states would pre-identify communities with a significant "pollution load" and a minority population, and would work with industry and community organizations to find methods for decreasing such exposures. States should also consider developing compliance outreach, and technical assistance to respond to such situations or special enforcement if appropriate.

The Workgroup further agreed that state programs should 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 "exceptions" and a tiered public participation process would occur primarily in the context of permit reviews conducted with respect to individual facilities. The Workgroup recognizes that states 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.

Potential criteria suggested by members of the Workgroup for either defining exceptions or applying different levels of procedure include:

* the size of the facility;
* the types, amounts, and duration of emissions from the facility;
* the amount of unregulated toxic pollutants emitted by the facility;
* the nature of the adverse effects caused by such emissions;
* the nature of the permit at issue: (e.g., applications for simple renewals could be given less scrutiny than applications requesting expansions or the construction of a new facility);
* other harms caused by the facility (e.g., changed property values, offensive odors, infringement of cultural values);
* the size and qualifications of the entity sponsoring the facility;
* the existence of alternative locations for the facility; or

* significant amount of public controversy (e.g., the public typically reacts to landfills, incinerators, or medical waste disposal facilities with more intensity than manufacturing facilities).

It is crucial to note that the Workgroup did not reach consensus on whether any or all of these criteria are appropriate, and they are offered for illustrative purposes only. [1]

While these two points of consensus are important and noteworthy, the Workgroup did not reach consensus on two closely related and equally important issues: how should environmental justice programs take into consideration the cumulative impact of neighboring sources when making permitting decisions for a single facility? Should the process and procedures of environmental justice analysis differ with respect to new and existing facilities under permit by permit approach? *(There are a range of tools to identify cumulative impact. There are also tools for addressing cumulative impact. The "offset" approach is a concept that they could look at in the tract one approach. This approach has a number of problems that the committee is aware of however. In addition, a budget approach is in a tract two (relational). Identifying remediation strategies. The committee also wishes to acknowledge that these analyses may involve different scope and intensity of review depending upon whether the facility is new or making a major modification of their work processes. We support EPA's efforts to develop tools in this regard. Eileen will work on language in this arena as these are just exploratory approaches at the present.)*[2]

The Workgroup has committed to continuing discussion of the answers to both questions, with some members arguing that cumulative effects were an illegal consideration in permitting any facility under existing environmental law and others arguing that such effects not only should be considered, but should affect permitting decisions for new and existing facilities equally. One member noted 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 acknowledged, 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.

Members of the group further disagreed on the concept of zero-based permitting that would scrutinize permit renewals under the same standards as applications for new permits. Many members felt that this approach was either unfair or impractical, and could not be implemented at

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[1] Are we any closer to consensus here?

[2] I understand that EPA is presently planning to publish on the internet health modeling data based upon TRI information about "air pollution." Is any of that work applicable here?

the state level without great disruption. But some argued that zero-based permitting was fundamental to the elimination of discrimination because it was essential to the reduction of disproportionate pollution loads. While the resolution of these issues may be achieved by other workgroups, we do not believe that it is necessary to achieve consensus in order to design the aspects of the template that are the mission of Workgroup III.

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 a timely, efficient, and predictable manner.

The Workgroup strongly recommends that the first track of state environmental justice programs -- evaluation of 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.

The Workgroup recognizes that state laws contain different definitions of state agency authority with respect to the terms and conditions of environmental permits, with some statutes granting state agencies the authority to change the standards that apply to a given facility in order to address cumulative effects. In general, the Workgroup urges state 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, we did not address the complicated issue of the extent to which state agencies should seek new legal authority in order to implement their environmental justice programs. Some members of the Workgroup felt that adequate legal authority was essential to an effective program, while others expressed concern about politicizing the process in a legislative context. EPA may wish to consider addressing this issue in more detail. [1]

Transparent Process

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

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[1] See comments for reference note #4 here.

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

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

The Workgroup has attached to this report the public participation guidelines prepared by the National Environmental Justice Advisory Council (NEJAC), as well as ASTM E-50.03 -- *Standard Guide to the Process of Sustainable Brownfields Redevelopment*. The Department of Energy also has within its procurement program a procedure by which businesses seeking contracts must enter into a constructive dialog with the effect community. These documents give helpful guidance to states in achieving these goals. The Workgroup would make 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 Workgroup 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 minority communities, even when no decisions are before them. In a similar vein, Oregon is contemplating expanding its outreach efforts to local churches and community meetings.

Industry representatives agree 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 Workgroup also recommends that states consider developing citizen 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. Citizens with this base of knowledge are more likely to participate meaningfully in the consideration of

disproportionate burdens and cumulative risk, whether those issue arise in the first or second track of a state environmental justice program.

The Workgroup 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 we believe 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 environmental implications of the permitting decision. EPA can assist the states 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 Workgroup 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 programs should ensure that important documents are translated into languages other than English as appropriate. Permit proceedings can involve extensive documentation, and state agencies should make their best efforts to impose a reasonable burden on permittees.

Last but not least, the Workgroup believes that state agencies 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 should think through the process of enforcement and review ability of this process.)*

Participation by Government

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

The Workgroup recognizes that a hallmark of successful environmental justice programs is to avoid extensive delays and inconsistent results as the permit applicant traverses the web of state and local agencies that must approve the process. 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, or in ensuring that existing facilities remain where they are and prosper.

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 may benefit.

As important as it is to include all relevant state and local officials in the outreach effort, we believe that state environmental agencies must remain firmly in charge of the process. Where possible, environmental justice concerns should be integrated into the permitting process and handled by the same staff that will conduct a technical review of the permit. However, we recognize that some states have found it more effective to establish a separate office to address environmental justice concerns, and we urge EPA to give the states the management flexibility to adopt the approach that will work best for them.

Incentives

Create and identify incentives to address community concerns voluntarily.

The Workgroup agrees that finding suitable incentives for industry, the public and private sector, individuals, and small and large businesses to participate in environmental justice programs is an important condition for their long-term success. Of course, states can make such participation a condition of receiving a permit. But to the extent that permit applicants can be convinced that the process is likely to reduce delays and last-minute "surprises" and will improve industry relations with adjacent communities, their participation is likely to prove significantly more fruitful.

Avoidance of the extensive delays that accompany the filing of a Title VI complaint is the most obvious incentive for industry participation. Another possible incentive is more rapid processing of permit applications. EPA and the states should also consider recognizing 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 some other permit condition. Finally, it may prove worthwhile to study emerging brownfield reclamation programs for examples of incentives that encourage industry participation in an affirmative manner. (The committee will

seek additional examples of incentives to motivate tract one and tract two sectors. The Regulatory Reinvention Committee of NACEPT is currently exploring this issue.)

Community Monitoring

Build community monitoring capacity.

The Workgroup recommends that states consider initiatives that allow communities to continue to assess the compliance of permitted facilities after environmental justice issues have been resolved. Building community capacity to monitor permittee performance may prove very effective in assuaging community anxiety about the health and environmental risks posed by individual facilities.

The Workgroup believes that monitoring and other information reported to the government should be readily accessible by the community.

The Workgroup further believes that consideration should be given to confirming commitments made by permit applicants to address environmental justice issues in readily understandable, binding contracts with the state agency and the community, giving community representatives the assurance that the relief they negotiated is clear to other participants and will in fact be delivered.

The Workgroup 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 felt that citizen enforcement was an important supplement to government authority, and would give citizens the sense that they are "empowered" to address future concerns. (Additional concerns were raised at the plenary session on how to evaluate the effectiveness of such this programming on the impacted communities.)

Conclusion

The Workgroup recognizes that EPA has a difficult task ahead in balancing communities' need for protection against discriminatory effects, state requests for flexibility, and industry's desire for expeditious and predictable decision making. We believe, however, that this task is of the utmost importance and urge 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 the American system.

APPENDIX

New Jersey has pioneered the development of "one-stop permitting," which allows a facility to obtain all necessary permits from one central office. In that context, New Jersey is considering a program that would create three separate procedures for new, modified, and renewal permits. The first step for all three processes is to put the application through an "justice screen" designed to determine whether the operations covered by the permit affect a "burdened" community. This screening is accomplished by a separate staff that specializes in environmental justice issues.

If the screening concludes that the permit will not burden a minority community, the application is processed under traditional rules. However, if the screening concludes that the permit will impose a disproportionate burden, the permit applicant, affected community residents, and other state and local officials are notified. The permit applicant is then given a choice: it can either volunteer to go through a mediation process aimed at resolving environmental justice concerns, or take the risk that its permit will be denied at the end of the process in order to avoid a Title VI complaint.

If the applicant chooses to participate, New Jersey officials undertake an "interest-based negotiation" that is facilitated by staff experts concurrently with the technical review of the permit application. The goal of these negotiations, which consider any issue the community wishes to raise, are the signing of a "memorandum of understanding" or a "quality of life document." If the parties cannot agree at this stage of the process, New Jersey would refer the matter to a more formal dispute resolution process, in which a mediator attempts to hammer out a solution that all can accept. If those efforts fail, the state must determine whether there is a disparate impact that violates Title VI, requiring it to deny the permit, or whether it should deny the application. Once again, every effort is made to ensure that the technical review of the permit proceeds concurrently with the mediation of environmental justice disputes.

The Workgroup believes that the New Jersey program could provide useful guidance to states in drafting the details of a process for integrating environmental justice concerns into the normal permitting process.

INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

Introduction

This interim guidance is intended to provide a framework for the processing by EPA's Office of Civil Rights (OCR) of complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI),[1] alleging discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding.

In the past, the Title VI complaints filed with EPA typically alleged discrimination in access to public water and sewerage systems or in employment practices. This interim guidance is intended to update the Agency's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discrimination in the environmental permitting context.

As reflected in this guidance, Title VI environmental permitting cases may have implications for a diversity of interests, including those of the recipient, the affected community, and the permit applicant or permittee. EPA believes that robust stakeholder input is an invaluable tool for fully addressing Title VI issues during the permitting process and informally resolving Title VI complaints when they arise.

Background

> *No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*
>
> – Title VI

On February 11, 1994, President Clinton issued Executive Order 12,898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations." The Presidential memorandum accompanying that Order directs Federal agencies to ensure compliance with the nondiscrimination requirements of Title VI for all Federally-funded programs and activities that affect human health or the environment. While Title VI is inapplicable to EPA actions, including EPA's issuance of permits, Section 2-2 of Executive Order 12,898 is designed to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. Accordingly, EPA is committed to a policy of nondiscrimination in its own permitting programs.

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[1] 42 U.S.C. §§ 2000d to 2000d-7.

Title VI itself prohibits intentional discrimination. The Supreme Court has ruled, however, that Title VI authorizes Federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory *effects*. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating.[2] Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is show that they are justified and that there is no less discriminatory alternative.

EPA awards grants on an annual basis to many state and local agencies that administer continuing environmental programs under EPA's statutes. As a condition of receiving funding under EPA's continuing environmental program grants, recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants. EPA's Title VI regulations define a "[r]ecipient" as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient ...."[3] Title VI creates for recipients a nondiscrimination obligation that is contractual in nature in exchange for accepting Federal funding. Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as any EPA funding is extended.[4]

Under amendments made to Title VI by the Civil Rights Restoration Act of 1987,[5] a "program" or "activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance.[6] Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the

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[2] Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, *The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964*, (July 14, 1994).

[3] 40 C.F.R. § 7.25 (1996). Title VI applies to Indian Tribes as EPA recipients only when the statutory provision authorizing the Federal financial assistance is not exclusively for the benefit of Tribes. Otherwise, Tribes are exempt from Title VI.

[4] 40 C.F.R. § 7.80(a)(2)(iii)(1996).

[5] Pub. L. No. 100-259, 102 Stat. 28 (1988); S. Rep. No. 64 at 2, 11-16, 100th Cong., *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3-4, 13-18.

[6] 42 U.S.C. § 2000d-4a.

actions they take under programs that do not derive their authority from EPA statutes (*e.g.*, state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA.

In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding.[7] EPA also may use any other means authorized by law to obtain compliance, including referring the matter to the Department of Justice (DOJ) for litigation.[8] In appropriate cases, DOJ may file suit seeking injunctive relief. Moreover, individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies.[9]

Overview of Framework for Processing Complaints

While this guidance is directed at the processing of discriminatory effects allegations, as a general proposition, Title VI complaints alleging either discriminatory intent and/or discriminatory effect in the context of environmental permitting will be processed by OCR under EPA's Title VI regulations at 40 C.F.R. Part 7. The steps that the Agency will follow in complaint processing are described below. EPA's Title VI regulations encourage the informal resolution of all complaints with the participation of all affected stakeholders (see step 8 below).

1. Acceptance of the Complaint

Upon receiving a Title VI complaint, OCR will determine whether the complaint states a valid claim. If it does, the complaint will be accepted for processing within twenty (20) calendar days of acknowledgment of its receipt, and the complainant and the EPA recipient will be so notified. If OCR does not accept the complaint, it will be rejected or, if appropriate, referred to another Federal agency. 40 C.F.R. § 7.120(d)(1).

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[7] 40 C.F.R. §§ 7.115(e), 7.130(b)(1996); Id. at 7.110(c).

[8] 42 U.S.C. § 2000d-1; 40 C.F.R. § 7.130(a).

[9] Chester Residents Concerned for Quality Living v. Seif No. 97-1125, U.S. App. LEXIS 36797 (3d Cir. Dec. 30, 1997).

2. Investigation/Disparate Impact Assessment

Once a complaint is accepted for processing, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population. If, based on its investigation, OCR concludes that there is no disparate impact, the complaint will be dismissed. If OCR makes an initial finding of a disparate impact, it will notify the recipient and the complainant and seek a response from the recipient within a specified time period. Under appropriate circumstances, OCR may seek comment from the recipient, permittee, and/or complainant(s) on preliminary data analyses before making an initial finding concerning disparate impacts.

3. Rebuttal/Mitigation

The notice of initial finding of a disparate impact will provide the recipient the opportunity to rebut OCR's finding, propose a plan for mitigating the disparate impact, or to "justify" the disparate impact (see step 4 below regarding justification). If the recipient successfully rebuts OCR's finding, or, if the recipient elects to submit a plan for mitigating the disparate impact, and, based on its review, EPA agrees that the disparate impact will be mitigated sufficiently pursuant to the plan, the parties will be so notified. Assuming that assurances are provided regarding implementation of such a mitigation plan, no further action on the complaint will be required.

4. Justification

If the recipient can neither rebut the initial finding of disparate impact nor develop an acceptable mitigation plan, then the recipient may seek to demonstrate that it has a substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact. Even where a substantial, legitimate justification is proffered, OCR will need to consider whether it can be shown that there is an alternative that would satisfy the stated interest while eliminating or mitigating the disparate impact.

5. Preliminary Finding of Noncompliance

If the recipient fails to rebut OCR's initial finding of a disparate impact and can neither mitigate nor justify the disparate impact at issue, OCR will, within 180 calendar days from the start of the complaint investigation, send the recipient a written notice of preliminary finding of noncompliance, with a copy to the grant award official (Award Official) and the Assistant Attorney General for Civil Rights. OCR's notice may include recommendations for the recipient to achieve voluntary compliance and, where appropriate, the recipient's right to engage in voluntary compliance negotiations. 40 C.F.R. § 7.115(c).

6. Formal Determination of Noncompliance

If, within fifty (50) calendar days of receipt of the notice of preliminary finding, the recipient does not agree to OCR's recommendations or fails to submit a written response demonstrating that OCR's preliminary finding is incorrect or that voluntary compliance can be achieved through other steps, OCR will issue a formal written determination of noncompliance, with a copy to the Award Official and the Assistant Attorney General for Civil Rights. 40 C.F.R. § 7.115(d).

7. Voluntary Compliance

The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance within which to come into voluntary compliance. 40 C.F.R. § 7.115(e). If the recipient fails to meet this deadline, OCR will start procedures to deny, annul, suspend, or terminate EPA assistance in accordance with 40 C.F.R. § 7.130(b) and consider other appropriate action, including referring the matter to DOJ for litigation.

8. Informal Resolution

EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable. 40 C.F.R. § 7.120(d)(2). Therefore, OCR will discuss, at any point during the process outlined above, offers by recipients to reach informal resolution, and will, to the extent appropriate, endeavor to facilitate the informal resolution process and involvement of affected stakeholders. Ordinarily, in the interest of conserving EPA investigative resources for truly intractable matters, it will make sense to encourage dialogue at the beginning of the investigation of complaints accepted for processing. Accordingly, in notifying a recipient of acceptance of a complaint for investigation, OCR will encourage the recipient to engage the complainant(s) in informal resolution in an effort to negotiate a settlement.

Rejecting or Accepting Complaints for Investigation

It is the general policy of OCR to investigate all administrative complaints that have apparent merit and are complete or properly pleaded. Examples of complaints with no apparent merit might include those which are so insubstantial or incoherent that they cannot be considered to be grounded in fact.

A complete or properly pleaded complaint is:[10]

1) in writing, signed, and provides an avenue for contacting the signatory (*e.g.*, phone number, address);

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

3) filed within 180 calendar days of the alleged discriminatory act(s)[11]; and

4) identifies the EPA recipient that took the alleged discriminatory act(s).

EPA's Title VI regulations contemplate that OCR will make a determination to accept, reject, or refer (to the appropriate Federal agency) a complaint within twenty (20) calendar days of acknowledgment of its receipt. 40 C.F.R. § 7.120(d)(1). Whenever possible, within the twenty-day period, OCR will establish whether the person or entity that took the alleged discriminatory act is in fact an EPA recipient as defined by 40 C.F.R. § 7.25. If the complaint does not specifically mention that the alleged discriminatory actor is an EPA financial assistance recipient, OCR may presume so for the purpose of deciding whether or not to accept the complaint for further processing.

Timeliness of Complaints

Under EPA's Title VI regulations a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). EPA interprets this regulation to mean that complaints alleging discriminatory effects resulting from issuance of a permit must be filed with EPA within 180 calendar days of issuance of the final permit. However, OCR may waive the 180-day time limit for good cause. 40 C.F.R. § 7.120(b)(2).

OCR will determine on a case-by-case basis whether to waive the time limit for good cause. EPA believes that, in order to encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process, thereby fostering early resolution of Title VI issues, it is appropriate to consider in making a good cause determination a complainant's pursuit

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[10] EPA's Title VI regulations require that the complaint be in writing, describe the alleged discriminatory acts that violate the regulations, and be filed within 180 calendar days of the alleged discriminatory act(s). 40 C.F.R. § 7.120(b)(1),(2). The criteria listed above satisfy these regulatory requirements.

[11] Also, see discussion below on Timeliness of Complaints.

of its Title VI concerns through the recipient's administrative appeal process. Under such circumstances and after considering other factors relevant to the particular case, OCR may waive the time limit if the complaint is filed within a reasonable time period (*e.g.*, 60 calendar days) after the conclusion of the administrative appeal process.

In addition, it is OCR's policy not to reject automatically complaints challenging permits where such complaints are filed prior to final permit issuance by the recipient. Rather, OCR should provide the recipient with the information contained in the complaint for consideration in the permit issuance process. OCR also may notify the complainant that the complaint is premature, but that OCR is keeping the complaint on file in an inactive status pending issuance of a final permit by the recipient. Should the recipient issue a final permit, OCR could initiate an investigation if OCR or the complainant believe that issuance of the final permit may be discriminatory.

Permit Modifications

EPA believes that permit modifications that reduce adverse impacts and improve the environmental operation of the facility should be encouraged. Similarly, the Agency does not want to discourage merely administrative modifications, such as a facility name change, or otherwise beneficial modifications that are neutral in terms of their impact on human health or the environment. Because such modifications do not cause or add to adverse impacts, Title VI discriminatory effects claims based on them are likely to be dismissed.

Permit modifications that result in a net increase of pollution impacts, however, may provide a basis for an adverse disparate impact finding, and, accordingly, OCR will not reject or dismiss complaints associated with permit modifications without an examination of the circumstances to determine the nature of the modification.

In the permit modification context (as opposed to permit renewals), the matter under consideration by the recipient is the modified operation. Accordingly, the complaint must allege, and, to establish a disparate impact OCR must find, adverse impacts specifically associated with the modification.

Investigations of Allegedly Discriminatory Permit Renewals

Generally, permit renewals should be treated and analyzed as if they were new facility permits, since permit renewal is, by definition, an occasion to review the overall operations of a permitted facility and make any necessary changes. Generally, permit renewals are not issued without public notice and an opportunity for the public to challenge the propriety of granting a renewal under the relevant environmental laws and regulations.

Impacts and the Disparate Impact Analysis

Evaluations of disparate impact allegations should be based upon the facts and totality of the circumstances that each case presents. Rather than use a single technique for analyzing and evaluating disparate impact allegations, OCR will use several techniques within a broad framework. Any method of evaluation chosen within that framework must be a reasonably reliable indicator of disparity.

In terms of the types of impacts that are actionable under Title VI in the permitting context, OCR will, until further notice, consider impacts cognizable under the recipient's permitting program in determining whether a disparate impact within the meaning of Title VI has occurred. Thus, OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program.[12]

The general framework for determining whether a disparate impact exists has five basic steps.

Step 1: Identifying the Affected Population

The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity. The impacts investigated must result from the permit(s) at issue.

The adverse impacts from permitted facilities are rarely distributed in a predictable and uniform manner. However, proximity to a facility will often be a reasonable indicator of where impacts are concentrated. Accordingly, where more precise information is not available, OCR will generally use proximity to a facility to identify adversely affected populations. The proximity analysis should reflect the environmental medium and impact of concern in the case.

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[12] Even where a recipient's authority to regulate is unclear concerning cumulative burden or discriminatory permitting pattern scenarios (see step 3 below), OCR will nonetheless consider impacts measured in these terms because Title VI is a Federal cross-cutting statute that imposes independent, nondiscrimination requirements on recipients of Federal funds. As such, Title VI, separate from and in addition to the strictures of state and local law, both authorizes and requires recipients to manage their programs in a way that avoids discriminatory cumulative burdens and distributional patterns. Thus, while Title VI does not alter the substantive requirements of a recipient's permitting program, it obligates recipients to implement those requirements in a nondiscriminatory manner as a condition of receiving Federal funds.

Step 2: Determining the Demographics of the Affected Population

The second step is to determine the racial and/or ethnic composition of the affected population for the permitted facility at issue in the complaint. To do so, OCR uses demographic mapping technology, such as Geographic Information Systems (GIS). In conducting a typical analysis to determine the affected population, OCR generates data estimating the race and/or ethnicity and density of populations within a certain proximity from a facility or within the distribution pattern for a release/impact based on scientific models. OCR then identifies and characterizes the affected population for the facility at issue. If the affected population for the permit at issue is of the alleged racial or ethnic group(s) named in the complaint, then the demographic analysis is repeated for each facility in the chosen universe(s) of facilities discussed below.

Step 3: Determining the Universe(s) of Facilities and Total Affected Population(s)

The third step is to identify which other permitted facilities, if any, are to be included in the analysis and to determine the racial or ethnic composition of the populations affected by those permits. There may be more than one appropriate universe of facilities. OCR will determine the appropriate universe of facilities based upon the allegations and facts of a particular case. However, facilities not under the recipient's jurisdiction should not be included in the universe of facilities examined.

If in its investigation OCR finds that the universe of facilities selected by the complainant is not supported by the facts, OCR will explain what it has found and provide the complainant the opportunity to support the use of its proposed universe. If the complainant cannot adequately support the proposed universe, then OCR should investigate a universe of facilities based upon the facts available and OCR's reasonable interpretation of the theory of the case presented. Once the appropriate universe(s) of facilities is determined, the affected population for each facility in the universe should be added together to form the Total Affected Population.

Ordinarily, OCR will entertain cases only in which the permitted facility at issue is one of several facilities, which together present a cumulative burden or which reflect a pattern of disparate impact.[13] EPA recognizes the potential for disparate outcomes in this area because most permits *control* pollution rather than prevent it altogether. Consequently, permits that satisfy the base public health and environmental protections contemplated under EPA's programs nonetheless

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[13] In some rare instances, EPA may need to determine whether the impacts of a single permit, standing alone, may be considered adequate to support a disparate impact claim. While such a case has not yet been presented to EPA, it might, for example, involve a permitted activity that is unique (*i.e.*, "one of a kind") under a recipient's program.

bear the potential for discriminatory effects where residual pollution and other cognizable impacts are distributed disproportionately to communities with particular racial or ethnic characteristics. Based on its experience to date, the Agency believes that this is most likely to be true either where an individual permit contributes to or compounds a preexisting burden being shouldered by a neighboring community, such that the community's cumulative burden is disproportionate when compared with other communities; or where an individual permit is part of a broader pattern pursuant to which it has become more likely that certain types of operations, with their accompanying burdens, will be permitted in a community with particular racial or ethnic characteristics.

Step 4: Conducting a Disparate Impact Analysis

The fourth step is to conduct a disparate impact analysis that, at a minimum, includes comparing the racial or ethnic characteristics within the affected population. It will also likely include comparing the racial characteristics of the affected population to the non-affected population. This approach can show whether persons protected under Title VI are being impacted at a disparate rate. EPA generally would expect the rates of impact for the affected population and comparison populations to be relatively comparable under properly implemented programs. Since there is no one formula or analysis to be applied, OCR may identify on a case-by-case basis other comparisons to determine disparate impact.

Step 5: Determining the Significance of the Disparity

The final phase of the analysis is to use arithmetic or statistical analyses to determine whether the disparity is significant under Title VI. OCR will use trained statisticians to evaluate disparity calculations done by investigators. After calculations are informed by expert opinion, OCR may make a *prima facie* disparate impact finding, subject to the recipient's opportunity to rebut.

Mitigation

EPA expects mitigation to be an important focus in the Title VI process, given the typical interest of recipients in avoiding more draconian outcomes and the difficulty that many recipients will encounter in justifying an "unmitigated," but nonetheless disparate, impact. In some circumstances, it may be possible for the recipient to mitigate public health and environmental considerations sufficiently to address the disparate impact. The sufficiency of such mitigation should be evaluated in consultation with experts in the EPA program at issue. OCR may also consult with complainants. Where it is not possible or practicable to mitigate sufficiently the public health or environmental impacts of a challenged permit, EPA will consider "supplemental mitigation projects" (SMPs), which, when taken together with other mitigation efforts, may be viewed by EPA as sufficient to address the disparate impact. An SMP can, for example, respond

to concerns associated with the permitting of the facility raised by the complainant that cannot otherwise be redressed under Title VI (*i.e.*, because they are outside those considerations ordinarily entertained by the permitting authority).

Justification

If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to "justify" the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient. While determining what constitutes a sufficient justificatio will necessarily turn on the facts of the case at hand, OCR would expect that, given the considerations described above, merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity. Because the interests of a state or local environmental agency are necessarily influenced and informed by the broader interest of the government of which it is a part. OCR will entertain justifications base on broader governmental interests (*i.e.*, interests not limited by the jurisdiction of the recipient agency). While the sufficiency of the justification will necessarily depend on the facts of the cas at hand, the types of factors that may bear consideration in assessing sufficiency can include, but are not limited to, the seriousness of the disparate impact, whether the permit at issue is a renewa (with demonstrated benefits) or for a new facility (with more speculative benefits), and whether any of the articulated benefits associated with a permit can be expected to benefit the particular community that is the subject of the Title VI complaint.

Importantly, a justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations. Less discriminatory alternatives should be equally effective in meeting the needs addressed by the challenged practice. Here, again, mitigation measures should be considered as less discriminatory alternatives, including additional permit conditions that would lessen or eliminate the demonstrated adverse disparate impacts.

* * * * * *

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the Unite States. EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised without public notice to reflect changes in EPA's approach to implementing the Small Business Regulatory Enforcement Fairness Act or the Regulatory Flexibility Act, or to clarify and update text.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 30 1998

OFFICE OF
CIVIL RIGHTS

RETURN RECEIPT REQUESTED

Father Phil Schmitter, Co-Director
Sister Joanne Chiaverini, Co-Director
St. Francis Prayer Center
G-2381 East Carpenter Road
Flint, Michigan 48505

Russell Harding, Director
Michigan Department of Environmental Quality
Hollister Building
P.O. Box 30473
Lansing, Michigan 48909-7973

Re: EPA File No. 5R-98-R5 (Select Steel Complaint)

Dear Fr. Schmitter, Sr. Chiaverini, and Mr. Harding,

On August 17, 1998, the Office of Civil Rights (OCR) accepted for investigation an administrative complaint filed on June 9, 1998 by Father Phil Schmitter and Sister Joanne Chiaverini pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq. (Title VI), and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint alleges that the Michigan Department of Environmental Quality's (MDEQ) issuance of a Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) permit to the Select Steel Corporation of America for a proposed steel recycling mini-mill in Genesee Township would lead to a discriminatory impact on minority residents and that the MDEQ permitting process was conducted in a discriminatory manner. In addition to the allegations contained in the complaint filed with OCR, the Complainants also submitted written information regarding alleged discrimination related to the permitting of the proposed Select Steel facility in an April 22, 1998 letter from Fr. Schmitter and Sr. Chiaverini to the Sugar Law Center, an April 29, 1998 letter to David Ullrich, Acting Regional Administrator for Region V, and a June 9, 1998 petition to EPA's Environmental Appeals Board (EAB).

Title VI prohibits discrimination based on race, color, or national origin under programs or activities of recipients of federal financial assistance. EPA has adopted Title VI implementing regulations that prohibit unjustified discriminatory *effects* which occur under federally-assisted programs or activities. 40 C.F.R. Part 7. Discrimination can result from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless they are justified and there are no less discriminatory alternatives.

MDEQ is a recipient of EPA financial assistance; therefore, MDEQ is subject to the requirements of Title VI and EPA's implementing regulations. Section 7.35(b) prohibits recipients from administering their programs in a manner that would have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Section 7.30 of EPA's Title VI regulations provides that no person may be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin.

The June 9, 1998 Title VI complaint filed with OCR refers generally to the "unfair and disparate burden of pollution [which] will fall on a group of minority . . . people." However, in other information provided to EPA in writing and during interviews, the Complainants also raised specific concerns about the facility's potential emissions of volatile organic compounds (VOCs), lead, air toxics, and dioxin.

As previously mentioned, OCR accepted the complaint for investigation in August 1998, and has completed its review of the allegations raised. In analyzing the Complainants' concerns regarding air quality and public health effects, EPA has determined that this facility would not pose an "adverse" effect on the community. In this case, EPA did not base its finding on whether the effects would be disparate since the effects did not rise to the level of "adverse." After reviewing all the facts in this case, OCR has found that neither the Complainants' concerns regarding air quality nor those regarding the opportunity for public participation rise to the level of a discriminatory effect within the meaning of Title VI and EPA's implementing regulations. Therefore, OCR dismisses Complainants' allegations in this case. The basis for this determination is explained below.

The Investigation

EPA investigated this matter consistent with its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Interim Guidance). EPA has attempted to conduct this investigation expeditiously, taking into account the need for certainty in the regulatory process associated with permitting new facilities, while at the same time seriously reviewing the concerns expressed by the Complainants.

EPA's ability to expeditiously render this decision was facilitated significantly by the record of decision developed by the State in this case. In addition, analyses of the kind credibly undertaken by the State to address concerns raised during the permitting process not only substantially enhance the probability that State-issued permits will withstand scrutiny under Title VI, but also enables expeditious processing by EPA of administrative complaints filed under Title VI. Such analyses early in the permitting process may also facilitate the State's early identification and development of possible solutions to address potential Title VI concerns.

Alleged Discriminatory Effect Resulting from Air Quality Impacts

As outlined in EPA's *Interim Guidance*, EPA follows five basic steps in its analysis of allegations of discriminatory effects from a permit decision. "The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity." *Interim Guidance* at 8. If there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations. In order to address the allegation that MDEQ's issuance of a PSD permit for the proposed Select Steel facility would result in a discriminatory effect, EPA first considered the potential adverse effect from the permitted facility using a number of analytical tools consistent with EPA's *Interim Guidance*. It is important to note that EPA believes that the evaluations of adverse, disparate impact allegations should be based upon the facts and totality of the circumstances each case presents.

VOCs

To evaluate the impact of VOCs, EPA examined the permit application submitted by Select Steel and a variety of analyses conducted by MDEQ. With that information, EPA considered VOCs in their role both as precursors to ozone and, for some VOCs, as toxic air pollutants (see discussion below concerning air toxics). In examining VOCs as ozone precursors, EPA studied the additional contribution of VOCs from the proposed Select Steel facility and has determined those emissions will not affect the area's compliance with the national ambient air quality standards (NAAQS) for ozone.

The NAAQS for ozone is a health-based standard which has been set at a level that is presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area; therefore, there is no affected population which suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations associated with VOCs as ozone precursors.

The Complainants also have alleged that failure to require immediate VOC monitoring for the proposed Select Steel facility will result in a discriminatory effect. Select Steel's permit condition regarding VOC monitoring allows Select Steel one year from plant start-up to

implement a continuous emissions monitoring system ("CEMS") for VOCs. MDEQ is not required to prescribe immediate VOC monitoring because EPA's regulations allow the permitting authority to impose post-construction monitoring as it "determines is necessary." 40 C.F.R. § 52.21(m)(2). As discussed above, there would be no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For this reason, EPA finds that, with regard to VOC monitoring, MDEQ did not violate Title VI or EPA's implementing regulations.

Lead

Similarly, to evaluate potential lead emissions from the facility, EPA studied the additional contribution of airborne lead emissions from the proposed Select Steel facility and has determined those emissions will not affect the area's compliance with the NAAQS for lead. As with ozone, there is a NAAQS for lead that has been set at a level presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the attainment area. Therefore, there would be no affected population which suffers "adverse" impacts within the meaning of Title VI resulting from the incremental lead emissions from the proposed Select Steel facility. Accordingly, EPA finds no violation of Title VI or EPA's implementing regulations.

In this case, MDEQ also appropriately considered information concerning the effect of the proposed facility's lead emissions on blood lead levels in children in response to community concerns. EPA reviewed this information along with other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility. EPA considered this additional information in response to the Complainants' concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. Overall, EPA found no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by emissions from the proposed facility. Furthermore, EPA concurs with the State's finding that lead emissions from the proposed Select Steel facility would have at most a *de minimis* incremental effect on local mean blood lead levels and the incidence of elevated levels.

Air Toxics

For airborne toxics, EPA conducted its review based on information presented in the permit application, existing TRI data, and MDEQ documents. EPA reviewed MDEQ's analysis of Select Steel's potential air toxic emissions for evidence of adverse impacts based on whether resulting airborne concentrations exceeded thresholds of concern under State air toxics regulations. EPA also considered the potential Select Steel air toxic emissions together with air toxic emissions from Toxics Release Inventory (TRI) facilities, the Genesee Power Station, and other major sources in the surrounding area. EPA's review of air toxic emissions from both the proposed site alone, as well as in combination with other sources, found no "adverse" impact in

the immediate vicinity of the proposed facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations.

Dioxin

The information gathered from the investigation concerning the monitoring of dioxin emissions is consistent with EAB's analysis of the issue.[1] No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect associated with MDEQ's decision not to include monitoring requirements for dioxin and that MDEQ did not violate Title VI or EPA's implementing regulations.

Alleged Discriminatory Public Participation Process

To assess the allegations of discrimination concerning public process, EPA evaluated the information from interviews with Complainants and MDEQ, and from documents gathered from the parties. The first allegation was that the permit was "hastily sped through" by MDEQ to avoid permitting requirements (*i.e.*, conduct a risk assessment; provide opportunity for public comment on risk assessment; provide meaningful opportunity for all affected parties to participate in the permit process) imposed by a State trial court that are under appeal. The five months between receipt of the complete permit application and permit approval is actually slower than the average time of one and a half months for the past twenty-six PSD permits approved by MDEQ. EPA's review found that the public participation process for the permit was not compromised by the pace of the permitting process. MDEQ satisfied EPA's regulatory requirements concerning the issuance of PSD permits.

The Complainants also alleged that the relationship between an employee of Select Steel's consultant who is a former MDEQ employee and MDEQ led to improprieties in the permitting process. Neither the documents nor the interviews revealed any improper or unlawful actions by MDEQ and Select Steel's consultants during the permitting of Select Steel. Without any such evidence, EPA cannot find any impropriety existed that contributed to an alleged discriminatory process.

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[1] In the EAB's analysis of Complainants' PSD appeal concerning monitoring of dioxin, the Board similarly concluded that "MDEQ's decision is not clearly erroneous." *In re Select Steel Corporation of America*, Docket No. PSD 98-21, at 5 (EAB Sept. 10, 1998). That holding was based, in part, on the fact that the Complainants made "no argument and points out no data to refute MDEQ's judgment." *Id.*

The Complainants alleged that the manner of publication of the notice of the permit hearing also contributed to the alleged discriminatory process. The Complainants allege that publication in newspapers was insufficient to inform the predominantly minority community because few community members have access to newspapers -- something the Complainants allege was brought to MDEQ's attention during the permitting process for another facility in Genesee Township. EPA's regulations for PSD permitting require that notice of a public hearing must be published in a weekly or daily newspaper within the affected area. 40 C.F.R. § 124.10(c)(2)(i). In this case, MDEQ went beyond the requirements of the regulation and published notices about the hearing in three local newspapers.

Complainants also state that MDEQ's failure to provide individual notice of the hearing to more members of the community also contributed to the alleged discriminatory process. In addition to newspaper notice, EPA's regulations require that notice be mailed to certain interested community members. 40 C.F.R. § 124.10(c)(1)(ix). MDEQ mailed hearing notification letters a month in advance to Fr. Schmitter, Sr. Chiaverini, and nine other individuals in the community who had expressed interest in the Select Steel permit -- an action which is consistent with the requirements of EPA's regulations. The mailing list that MDEQ developed was adequate to inform the community about the public hearing, in part, because the Complainants took it upon themselves to contact other members of the community.

The Complainants also alleged that the location of the public hearing (Mount Morris High School) made it difficult for minority members of the community to attend. Complainants felt that the hearing should have been held at Carpenter Road Elementary School. Both schools are approximately two miles from the proposed Select Steel site; however, the elementary school is located in a predominantly minority area, while the high school is in a predominantly white area.[2] MDEQ explored other possible locations and chose the high school, among other reasons, because of its ability to accommodate the expected number of citizens and its close proximity to the proposed site. The high school also is accessible by the general public via Genesee County public transportation.

For all of these reasons, EPA finds that the public participation process for the Select Steel facility was not discriminatory or in violation of Title VI or EPA's implementing regulations.

Conclusion

After reviewing all of the materials submitted and information gathered during the investigation, EPA has not found a violation of Title VI and EPA's implementing regulations.

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[2] No concerns were raised about the manner in which the public hearing itself was conducted. *See* Telephone Interview with Complainants (September 17, 1998).

Accordingly, EPA is dismissing the complaint as of the date of this letter. Please note that the closure of this case does not affect your right to file a complaint with OCR in the future.

Although EPA has dismissed this complaint, we believe that the Complainants raised serious and important issues that merited a careful review. To the extent the Complainants have identified general concerns about pollution in their community, including existing elevated blood lead levels in children, EPA encourages the State to continue activities to address these concerns. EPA is available to provide technical assistance in these efforts. EPA also encourages the State to continue working with this community to improve understanding of regulated activities in their local environment and the Agency is available to facilitate these efforts should the parties so desire.

More broadly, EPA believes that many of the issues raised in the context of Title VI administrative complaints could be better addressed through early involvement of affected communities in the permitting process. Such consultations will better ensure that communities are fairly and equitably treated with respect to the quality of their environment and public health, while providing State and local decision makers and businesses the certainty they deserve.

In conclusion, please be aware that Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected under Title VI. 40 C.F.R. § 7.100. Any individual alleging such harassment or intimidation may file a complaint. 40 C.F.R. § 7.120(a). The Agency would seriously consider and investigate such a complaint if warranted by the situation.

Furthermore, under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that we receive such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

Sincerely,

Ann E. Goode
Director

cc: Mr. Robert Bosar, Vice President
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Scott Fulton
Acting General Counsel
U.S. EPA

David Ullrich
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Region V
U.S. EPA

U.S. Environmental Protection Agency
Office of Civil Rights

INVESTIGATIVE REPORT

for

Title VI Administrative Complaint File No. 5R-98-R5
(Select Steel Complaint)

I. INTRODUCTION

On August 17, 1998, the United States Environmental Protection's ("U.S. EPA") Office of Civil Rights ("OCR") accepted for investigation an administrative complaint filed on June 9, 1998 by Father Phil Schmitter and Sister Joanne Chiaverini against the Michigan Department of Environmental Quality ("MDEQ") pursuant to Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq. ("Title VI"), and EPA's implementing regulations, 40 C.F.R. Part 7. The complaint alleged that MDEQ's issuance of a Clean Air Act ("CAA") prevention of significant deterioration ("PSD") permit to the Select Steel Corporation of America for a proposed steel recycling mini-mill in Genesee County would lead to a discriminatory impact on minority residents and that the MDEQ permitting process was conducted in a discriminatory manner. *See* Letter from Fr. Phil Schmitter and Sr. Joanne Chiaverini, Co-Directors, St. Francis Prayer Center, to Diane [sic] E. Goode, Director, US EPA OCR (June 9, 1998) ("Title VI Complaint").[3]

In addition, Fr. Schmitter and Sr. Chiaverini provided information in an earlier letter to Kary Moss of the Maurice & Jane Sugar Law Center. Letter from Fr. Schmitter and Sr. Chiaverini to Kary Moss (April 22, 1998). That letter was transmitted to the EPA and it expressed a number of concerns over the proposed Select Steel facility.

Fr. Schmitter and Sr. Chiaverini also submitted information regarding alleged discrimination in an earlier letter to EPA Region V. Letter from Fr. Schmitter and Sr. Chiaverini to David Ullrich, Acting Regional Administrator, EPA Region V (April 29, 1998) ("April 29th Letter"). This letter enclosed the testimony that Fr. Schmitter and Sr. Chiaverini provided to MDEQ at its April 28, 1998 public hearing on the proposed Select Steel permit. On May 15, 1998, David Ullrich forwarded the April 29th Letter to EPA because it expressed concerns about Title VI matters which are the responsibility of EPA to resolve.

Fr. Schmitter and Sr. Chiaverini also alleged that MDEQ violated Title VI in a June 9, 1998 petition to EPA's Environmental Appeals Board ("EAB"). Letter from Fr. Schmitter and Sr. Chiaverini to EAB (June 9, 1998) ("EAB Petition"). The EAB denied review of the Title VI claim on jurisdictional grounds citing EPA's responsibility for ensuring Agency compliance with Title VI. *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (Sept. 10, 1998) ("EAB Decision"). The EAB also denied review of the other claims regarding the alleged deficiencies of the Select Steel permit because the petition identified neither clear error in

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[3] The complaint filed by Fr. Schmitter and Sr. Chiaverini is supported by the community group Flint-Genesee United for Action, Justice, and Environmental Safety. Letter from Lillian Robinson, President, and Janice O'Neal, Spokesperson, Flint-Genesee United for Action, Justice, and Environmental Safety, to Patrick Chang, U.S. EPA (August 1, 1998); Telephone Interview with Fr. Schmitter, Sr. Chiaverini, and Ms. O'Neal (Sept. 17, 1998).

MDEQ's decision making processes nor an important policy consideration that justified EAB review. 40 C.F.R. § 124.19(a).

The MDEQ has received, and continues to receive, EPA financial assistance and, therefore, is subject to the requirements of Title VI and EPA's implementing regulations.[4]

[4] The $2.3 million in air grants for FY98 were awarded by EPA to MDEQ via grant A005711-98 (awarded on Sept. 30, 1997). There were three amendments: A005711-98-1 (Feb. 3, 1998); A005711-98-2 (April, 24, 1998); and A005711-98-3 (Sept. 21, 1998).

II. ALLEGATIONS

A. Allegation Regarding Air Quality Impacts

In the Title VI Complaint, Fr. Schmitter and Sr. Chiaverini allege that MDEQ's issuance of the Select Steel permit will result in "grievous discriminatory effects" and that a "disparate burden of pollution will fall upon a group of minority . . . people." Title VI Complaint at 1.

In their April 29th letter, Fr. Schmitter and Sr. Chiaverini stated they were sending the information "out of deep concern that another Title VI Civil Rights Violation is in the making, as the Michigan Department of Environmental Quality rushes to grant" the Select Steel permit in an "area near high concentrations of minority . . . residents." In that same letter, Fr. Schmitter and Sr. Chiaverini request relief from "the disregard the MDEQ has for considering high concentrations of minorities around potential sources of pollution."

In their EAB petition, Fr. Schmitter and Sr. Chiaverini make the general allegation that MDEQ's decision to grant this permit violates Title VI of the Civil Rights Act because "the vast majority of the people within 3 miles of the proposed site are minority Americans and will be burdened with a disparate impact of pollution in an already deeply polluted area." EAB Petition at 1.

In the testimony enclosed in the April 29th Letter, in their EAB petition, and during EPA's September 17th and 29th interviews, Fr. Schmitter and Sr. Chiaverini raised the following concerns about the disparate impact resulting from specific potential emissions from the proposed Select Steel facility:

1. volatile organic substances ("VOCs") (April 29th Letter, EAB Petition, Interview with Fr. Schmitter, Sr. Chiaverini, Ms. O'Neal, in Flint, MI (Sept. 29, 1998));

2. lead, including the effect of increased emissions will have on the children of Flint (April 29th letter, EAB Petition, Interview with Complainants (Sept. 29, 1998));

3. manganese (Interview with Complainants (Sept. 29, 1998));

4. mercury (Interview with Complainants (Sept. 29, 1998)); and

5. dioxin (April 29th letter, EAB Petition, Interview with Complainants (Sept. 29, 1998)).

B. Allegation Regarding Discrimination in Public Participation

1. Timing of permit issuance

Complainants felt that the permit was "hastily sped through, and shepherded by the DEQ permit process" to avoid a potentially adverse decision in ongoing litigation over another facility in the area, the Genesee Power Station ("GPS").[5] Title VI Complaint. In the GPS case, MDEQ appealed a trial court's order that (1) a risk assessment must be performed before a major air pollution source may be permitted, (2) notice of the risk assessment and an opportunity to comment must be provided, and (3) all affected parties must be given a meaningful opportunity to participate in the permit process. *NAACP-Flint Chapter v. MDEQ*, No. 95-38228-CV (Mich. Cir. Ct. Genesee Cnty. July 28, 1997) (order granting plaintiffs' motion for a permanent injunction). Complainants in the Select Steel case, then, argued that MDEQ issued the PSD permit to Select Steel on an expedited basis to avoid having to perform those tasks in the event the Court of Appeals upheld the trial court's decision. *See* Title VI Complaint; Interview with Complainants (Sept. 29, 1998).

They indicated that the initial news about the proposed Select Steel facility came from an article published in The Flint Journal on December 6, 1997. Tom Wickham, *Steel Mill Eyes Local Site*, The Flint Journal (December 6, 1997). The story raised some concerns for the Complainants, so in January or February 1998, they contacted MDEQ's Thermal Process Unit Supervisor. During the course of that conversation, Complainants allege that the Supervisor said that the Select Steel permit process would take "a long time." Based on that conversation, Complainants felt that MDEQ misled them into thinking it would be at least a year until the permit was issued, but it was ultimately issued four months later, on May 27, 1998, shortly before the June 9, 1998 oral argument in the GPS case.

2. Relationship Between Select Steel and MDEQ

Complainants also believed that the integrity of the permitting process was compromised because Select Steel retained Dhruman Shah, a former MDEQ employee, as their consultant. From 1979 to 1995, Mr. Shah was employed by MDEQ in various positions in which he reviewed permit applications for compliance with state and federal requirements. After leaving MDEQ, Mr. Shah became a Senior Project Engineer for NTH Consultants, Ltd. Select Steel hired NTH Consultants to prepare and submit their PSD application to MDEQ. NTH

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[5] Flint-Genesee United for Action, Justice, and Environmental Safety, and the NAACP-Flint Chapter filed an action in the Circuit Court for the County of Genesee against MDEQ concerning the issuance of a permit for the construction of GPS, a wood waste fired steam electric plant. MDEQ appealed. The Michigan Court of Appeals accepted the case and a stay of the Circuit Court's decision was issued. *NAACP-Flint Chapter v. MDEQ*, No. 205-264 (Mich. Ct. App. Oct. 2, 1997) (ordering stay of permanent injunction pending outcome of appeal).

Consultants, in turn, selected Mr. Shah as one of its engineers on the Select Steel project. Complainants felt that the relationship between Select Steel's consultant and MDEQ led to some improprieties in the permitting process. *See* Telephone Interview with Complainants (Sept. 17, 1998).

3. Notice of Public Hearing

In addition, Complainants raised issues about the notice for the public hearing on the Select Steel permit application conducted by MDEQ. MDEQ published notices about the public hearing in The Flint Journal on March 27, 1998 and March 28, 1998, in The Suburban News on March 29, 1998, and in The Genesee County Herald on April 1, 1998. Complainants felt that notifications published in newspapers were not sufficient to inform their community about the public hearing. Complainants stated that few members of their community receive newspapers because they cannot afford to subscribe and because no one would deliver the newspapers to those areas. Moreover, Complainants alleged that MDEQ was aware of the insufficiency of newspaper notice because Complainants noted that members of the community did not have ready access to newspapers during the course of the GPS litigation. *See* Telephone Interview with Complainants (Sept. 17, 1998). Consequently, Complainants felt that MDEQ should have done more to notify the community about the public hearing. *See id.*

MDEQ mailed letters to some members of the community, including Fr. Schmitter and Sr. Chiaverini, notifying them about the public hearing. Complainants argued that MDEQ should have conducted a broader mailing that encompassed larger portions of the community. *See id.*

4. Location of Public Hearing

Complainants also alleged that the location of the public hearing made it difficult for minority members of the community to attend. MDEQ held the hearing at the Elizabeth Ann Johnson (Mount Morris) High School, 8041 Neff Road, Mount Morris, which is located approximately two miles from the site of the proposed facility. Complainants felt that the hearing should have been held at Carpenter Road Elementary School, 6901 Webster Road, Flint, Michigan, which is also located approximately two miles from the proposed site. *See* Telephone Interview with Complainants (Sept. 17, 1998). Carpenter Road Elementary School, however, is located south-east of the proposed site in a predominantly minority area, whereas Mount Morris High School is located north-west of the proposed site in a predominantly white area.[6]

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[6] No concerns were raised about the manner in which the public hearing itself was conducted. *See* Telephone Interview with Complainants (September 17, 1998).

III. METHODOLOGY

In order to assure that EPA had the necessary information to assess the allegations raised by Complainants, the Agency undertook a comprehensive effort to collect data. That effort began by gathering all of the information that the Agency had in its possession relevant to the complaint. Then, an investigator conducted a telephone interview on September 17, 1998 with Complainants, including Fr. Phil Schmitter and Sr. Joanne Chiaverini, Co-Directors, St. Francis Prayer Center; Lillian Robinson, President, Flint-Genesee United for Action, Justice, and Environmental Safety; and Janice O'Neal, Spokesperson, Flint-Genesee United for Action, Justice and Environmental Safety.

That was followed-up by a visit to Genesee County, Michigan and another interview with Fr. Schmitter, Sr. Chiaverini, and Janice O'Neal on September 29, 1998. That same day, investigators conducted an interview with representatives of the local health department, including Brian McKenzie, Jan Hendricks, and Toni McCrumb, Genesee County Health Department. The next day, the investigators collected documents from the Complainants.

On October 15, 1998, investigators visited Lansing, Michigan and collected documents from MDEQ. The next week, on October 21, 1998, investigators returned to Lansing and interviewed employees of MDEQ, including Brian Culham, Environmental Quality Analyst, Air Quality Division District Office; Dennis Drake, Chief, MDEQ Air Quality Division; Susan Robertson, State Assistant Administrator, MDEQ; Hien Nguyen, Permit Engineer, MDEQ; Lynn Fiedler, Supervisor, MDEQ Air Quality Division Permit Section; Robert Sills, Toxicologist, MDEQ; and Jeff Jaros, Modeling and Meteorology Unit, MDEQ.

Throughout the information collection effort, EPA was performing analyses on the available data. Regarding VOC-related concerns, EPA undertook a two-pronged approach that considered VOCs in their role both as precursors to ozone and, for some VOCs, as hazardous air pollutants. For the former approach, EPA examined the surrounding region to determine whether it satisfied the federal ambient air quality standards for ozone. Then, the Agency studied the additional contribution of ozone precursors from the proposed Select Steel facility to determine how those emissions would affect the region's compliance with the National Ambient Air Quality Standards ("NAAQS"). For the latter approach, reviewed MDEQ's analysis of Select Steel's potential air toxic emissions for evidence of adverse impacts based on whether resulting airborne concentrations exceeded thresholds of concern under State air toxics regulations. EPA also considered the potential Select Steel air toxic emissions together with air toxic emissions from Toxics Release Inventory facilities, the Genesee Power Station, and other major sources in the surrounding area.

Similarly, for other hazardous air pollutants, an analysis of the distribution of airborne toxic emissions was conducted, based on the information presented in the permit application and MDEQ documents.

To evaluate lead emissions, EPA evaluated the contribution of airborne lead from the proposed facility and the NAAQS for lead. In addition, EPA examined health data from the community surrounding the proposed facility. Particular attention was paid to children's lead exposures based on Complainants' allegation that "'the children of Flint are already 'maxed out' on lead and are 50% above the national average of lead blood levels for children'." EAB Petition (quoting Dr. Rebecca Bascomb, M.D.). The Genesee County Health Department submitted information about blood lead levels in local children. MDEQ provided an analysis of lead deposition that they conducted in response to comments received during the permitting process. EPA gathered that data and analyzed it in light of the complaint.

To assess the allegations concerning public process, EPA evaluated the information from interviews with Complainants and MDEQ, and from documents gathered from the parties. The Agency then organized the information to determine how the process had been conducted and whether any problems arose.

IV. POSITION STATEMENT FROM THE RECIPIENT

A. Allegation Regarding Air Quality Impacts

MDEQ responded to the Title VI complaint on September 18, 1998. *See* Michigan Department of Environmental Quality's Response to the St. Francis Prayer Center Title VI Complaint of June 9, 1998 Regarding Select Steel at 1 (Sept. 18, 1998) ("MDEQ Response to Complaint"). MDEQ argued that an analysis of the air quality impacts of the proposed Select Steel facility should be limited to the impacts that fall within one mile of the site. Beginning from that position, MDEQ found that the population within 0.5 miles of the site is 88.5-93.1% white and 4.4-7.7% black. Within one mile, MDEQ found that the population is 93.3-94.3% white and 3.8-4.2% black. MDEQ stated that inclusion of populations beyond one mile was "virtually irrelevant." *Id.* at 2. MDEQ noted that the 0.5 mile and one mile population number show no disparate impact and that Michigan's population is 83.4% white and 13.3% black. In addition, MDEQ argued that "the levels of pollution emitted by Select Steel are safe for everyone."[7] *Id.* MDEQ concluded that "there is no evidence that the granting of a permit for Select Steel has had any disparate impact on minorities." *Id.* at 3.

1. VOCs

In their EAB petition and in the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini raise concerns that the Select Steel permit will allow VOC emissions to go unmonitored for the first eighteen months of the mill's operation. MDEQ felt that VOC emissions would not pose a problem. The Permit Engineer believed that VOC emissions from the proposed facility would be comparable to VOC emissions from one-gallon of paint. *See* Interview with Hien Nguyen (Oct. 21, 1998).

2. Lead

In their EAB petition, Fr. Schmitter and Sr. Chiaverini alleged that Select Steel's permit was deficient because it lacks a monitoring requirement for lead. In response to the EAB Petition, MDEQ stated the technology that would allow continuous monitoring of lead emissions does not exist. In the absence of such technology, MDEQ chose to ensure Select Steel's compliance with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies the requirements of best available control technology ("BACT").

MDEQ determined that "even with the addition of the lead proposed to be emitted by Select Steel, the lead concentrations would be more than ten times lower than the National Ambient Air Quality Standards" of 1.5 micrograms per cubic meter (quarterly average). Response of the

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[7] MDEQ noted, "'Safe' does not mean risk free," citing *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). MDEQ Response to Complaint at 2 n.2.

Michigan Department of Environmental Quality to the Petition of the St. Francis Prayer Center at 2, *In re Select Steel Corporation of America*, Docket No. PSD 98-21 (Aug. 19, 1998) ("MDEQ Response to PSD Appeal").

In the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini alleged that blood lead levels in children living in the vicinity of the proposed steel mill are already 'maxed out' on lead and are 50% above the national average of lead blood levels for children." EAB Petition at 1. In response, MDEQ, however, cites a blood lead level study it conducted that indicates the "level of concern" for lead is 10 micrograms per deciliter ("μg/dL"). Robert Sills, MDEQ, *Evaluation of the Potential Dry Deposition and Children's Exposures to Lead Emissions from the Proposed Select Steel Facility*, at 2 (May 15, 1998) ("*BLL Study*"). At blood lead levels above this threshold, children's development and behavior may be adversely affected. *See id.*

MDEQ stated that it conducted the *BLL Study* to estimate the potential for air deposition of lead from Select Steel into soil around the proposed facility. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead present in house dust (high, medium, and low). MDEQ then analyzed the differences between children's environmental lead exposure under these three scenarios, in each instance comparing current estimated background blood lead levels (alternative "a") to estimated blood lead levels after adding in Select Steel's projected emissions (alternative "b"). *See id.*

3. Manganese

In the permit application, Select Steel proposed a manganese emission limit of 0.24 lb/hr which resulted in ambient air impacts greater than the initial threshold screening level (ITSL) of Michigan Air Toxics Rule 230. Mich. Admin. Code r. 336.1230 ("Air toxics from new and modified sources"). The ITSL for manganese is 0.05 micrograms per cubic meter on a 24 hour basis. MDEQ notified Select Steel of this deficiency in a letter dated February 5, 1998. To correct this deficiency, Select Steel proposed to enclose the roof monitor above the electric arc furnace ("EAF"), and install a hood and vent the captured emissions to the EAF baghouse. Letter from John F. Caudell, NTH Consultants, to Hien Nguyen, MDEQ (Feb. 20, 1998). The size of the baghouse was increased from 350,000 actual cubic feet per minute ("acfm") to 400,000 acfm to accommodate the added flow from the new hood. In addition to the added control equipment, MDEQ imposed a BACT emission limit of 0.054 lbs/hr based on stack test data contained in another permit application (Republic Steel). The proposed changes resulted in a maximum impact on the ambient air of 0.03 micrograms per cubic meter, which is below the level specified by the State of Michigan as protective of human health for manganese. Air Quality Division, MDEQ, *Select Steel Corporation of America, Questions-and-Answers Document*, at 2 (April 28, 1998). MDEQ felt that those requirements for manganese from steel and iron mills are very strict. Interview with Hien Nguyen (Oct. 21, 1998).

4. Mercury

MDEQ stated that as a result of public comments, it requested additional analysis of mercury emissions. Briefing on Select Steel Air Use Permit (undated); Interview with Dennis Drake (Oct. 21, 1998). Because the facility is in the Mott Lake Watershed and could impact mercury levels in fish, the analysis supported the reduction of the mercury emission limit from 0.05 pound per hour in the draft permit to 0.005 pound per hour in the final permit. MDEQ personnel indicated that the mercury emission limit is the lowest of any permit issued for mini-mills and noted that most permits in EPA's Best Available Control Technology/Lowest Achievable Emissions Rate (BACT/LAER) Clearinghouse have no mercury limits at all. Interview with Hien Nguyen (Oct. 21, 1998).

5. Dioxin

In their EAB petition and in the materials enclosed in the April 29, 1998 letter to EPA Region V, Fr. Schmitter and Sr. Chiaverini alleged that the permit allows dioxin emissions to be unmonitored for the first eighteen months of the mill's operation. MDEQ responded that it did not require dioxin monitoring because continuous emissions monitoring systems ("CEMS") for dioxin do not exist. MDEQ Response to PSD Appeal at 6. MDEQ also claimed that EPA conducted research on American electric arc furnaces and concluded that dioxin emissions are not a concern in the operation of such furnaces. EPA reportedly found that American electric arc furnaces do not use chlorinated solvents in the melting process, that the electric arc furnaces are operated at very high temperatures, and that radiant heat from electricity (rather than coke combustion) is used to melt the scrap metal.[8] MDEQ Response to PSD Appeal at 7; Air Quality Division, MDEQ, *Select Steel Corporation of America, Response to Comments Document* at 8 (May 27, 1998).

B. Allegation Regarding Discrimination in Public Participation

1. Timing of permit issuance

MDEQ argues that Complainants' allegation that it accelerated the issuance of the permit in order to avoid consequences of a potentially adverse decision the GPS case is incorrect because (1) the Circuit Court's decision in the GPS case "expressly dismissed all disparate impact claims against the MDEQ" and (2) the Michigan Court of Appeals stayed the Circuit Court's decision pending the outcome of the appeal. MDEQ Response to Complaint at 1.

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[8] The U.S. EPA has stated, in part, "No testing of CDD/CDF emissions from U.S. electric arc furnaces has been reported upon which to base an estimate of national emissions." Exposure Analysis and Risk Characterization Group, U.S. EPA, *The Inventory of Sources of Dioxin in the United States*, at 7-14 (April 1998).

In addition, according to MDEQ staff, the five months that lapsed between the submission of the permit application and the issuance of the permit was fairly typical. Among the last twenty-six PSD permits approved by MDEQ, the average time between receipt of the application and approval of the permit was 242 days. The average time between the receipt of a complete application and approval was only 49 days. Message transmitted by facsimile from Lynn Fiedler to Richard Ida, at 4 (Oct. 28, 1998) (providing table of PSD permit processing times for last three years).

2. Relationship Between Select Steel and MDEQ

Some MDEQ employees, including Dennis Drake, Director, MDEQ Air Quality Division, noted their awareness of Mr. Shah's job with NTH Consultants, but were not aware that Mr. Shah was involved in the Select Steel application. Interviews with Dennis Drake and Robert Sills (October 21, 1998). Those MDEQ employees who knew about Mr. Shah's role in developing the Select Steel permit, including the Permit Engineer and Thermal Process Unit Supervisor, stated that no special treatment was given to Mr. Shah or to the Select Steel permit application. Interview with Hien Nguyen and Lynn Fiedler (October 21, 1998).

3. Notice of Public Hearing

MDEQ argued that it went beyond the requirements of the regulation and published notices about the hearing in three local newspapers: The Flint Journal on March 26, 1998, and March 27, 1998; The Suburban News on March 29, 1998; and The Genesee County Herald on April 1, 1998. Regarding direct notification about the hearing, MDEQ limited its mailings because they believed that Fr. Schmitter and Sr. Chiaverini would act as the contact point for their community and alert other interested parties about the proceedings. Interview with Lynn Fiedler (Oct. 21, 1998).

4. Location of Public Hearing

To select a site for the public hearing, MDEQ considered a number of criteria: (1) proximity to proposed facility, (2) sufficient capacity for attendees, (3) rental cost, (4) other accommodation-related considerations (*e.g.*, lighting, acoustics, adjacent rooms), and (5) availability. Interviews with Lynn Fiedler and Brian Culham (Oct. 21, 1998). For the public hearing on the Select Steel permit application, MDEQ expected up to 200 attendees, which limited the possible venues for the hearing. Interview with Susan Robertson (Oct. 21, 1998).

A MDEQ memorandum indicates that "there would be . . . a public hearing in the local area - either Carpenter Road school or another school close to the facility." Memorandum from Lynn Fiedler to the file (Dec. 8, 1997). The Air Quality Division Hearing Officer indicated that the first location she contacted was the Carpenter Road School. Other MDEQ employees felt that Carpenter Road School did not have adequate facilities for the Select Steel public hearing. Interviews with Brian Culham and Lynn Fiedler (Oct. 23, 1998). MDEQ also contacted the

Beecher High School and its feeder schools. Telephone Interview with Judy Williams, Parent Involvement Coordinator, Beecher School District (Oct. 26, 1998). MDEQ felt that the administration of those schools seemed averse to hosting a controversial hearing. Interviews with Susan Robertson and Lynn Fiedler (Oct. 21, 1998). MDEQ ultimately held the public hearing at Mount Morris High School, approximately two miles from the proposed facility, which they believed was a reasonable site. Interview with Lynn Fiedler (Oct. 21, 1998).

V. FINDINGS OF FACT AND STATUTORY/REGULATORY PROGRAMS

A. Allegation Regarding Air Quality Impacts

1. Background

a. Proposed Select Steel Corporation of America Facility

The proposed Select Steel facility is a steel mini-mill which is expected to produce 43 tons per hour of specialty steels. It will process scrap steel by "melting the scrap" in an electric arc furnace. The liquid steel is then transferred into a ladle furnace where it is reheated and chemically adjusted to required specifications. The molten steel is then cast and water-cooled in a mold to the desired shape.

The proposed Select Steel facility will be located near the boundary of census tract 122.01 within a 53 acre land parcel at the southwest corner of the intersection of Lewis Road and East Stanley Road, in Genesee County, Michigan, 48485. The facility will be located in Genesee County, Air Quality Control Region 122, *see* 40 C.F.R. § 81.195, less than one mile from the northern boundary of the city of Flint, Michigan at a latitude of 43° 6 '9" and longitude of 83° 40' 48".

The Select Steel facility is a major stationary source with the "potential to emit" 100 tons per year or more of the criteria pollutants, oxides of nitrogen ("NOx"), carbon monoxide ("CO"), particulate matter ("PM"), and lead. The facility is subject to the PSD regulations, 40 C.F.R. § 52.21, which require the installation of BACT for the four pollutants mentioned above. The facility is also subject to MDEQ rule 702 and 230 which requires the installation of BACT for VOC's.

The Select Steel Corporation of America submitted its initial PSD permit application under the Clean Air Act to MDEQ for the proposed mini-mill on December 30, 1997. MDEQ reviewed the application and sent a letter of deficiencies in the permit application on February 5, 1998, and requested additional information be submitted. Select Steel submitted their response on February 20, 1998. Changes and selection of BACTs for the criteria pollutants were made, including provisions to address the ambient air impacts of toxic air contaminants as required by MDEQ rule 230. Select Steel selected BACT for PM/PM10, NOx, CO, and VOCs. EPA reviewed the permit and supporting information (*e.g.*, staff report, BACT analysis, previous BACT determinations) and submitted comments during the public comment period. MDEQ approved the Select Steel permit on May 27, 1998.

b. Proximate Population Characteristics

In the 1990 Census, the total population of Michigan was 9,295,297 with 17.6 % minority population. The complaint alleges that minority populations within 3 miles of the proposed Select Steel will bear a "disparate impact of pollution." At one mile from a point location

representing the approximate center of the facility land parcel, the population is 13.8% minority, at two miles it is 37.2% minority, at 3 miles it is 51.1% minority, at 4 miles it is 55.2% minority. See Table II: EPA Estimates of Population Characteristics Near Proposed Site.

c. Air Quality Regulatory Programs

i. Overview of National Ambient Air Quality Standards

The Clean Air Act ("CAA") requires the Administrator of U.S. EPA to publish primary and secondary NAAQS for criteria air pollutants. Section 109 of the CAA, 42 U.S.C. § 7409. NAAQS are health-based standards which are established by the Administrator as necessary to "protect the public health" and must allow for an adequate margin of safety. Section 109(b) of the CAA, 42 U.S.C.§7409(b).

Under section 107(d) of CAA, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality meets or does not meet the NAAQS for each listed pollutant, or where the air quality cannot be classified due to insufficient data ("unclassifiable"). An area that meets the NAAQS for a particular pollutant is termed an "attainment" area, and an area that does not is termed a "nonattainment" area. Among the listed criteria air pollutants are ozone and lead.

NAAQS, when met, provide public health protection with an adequate margin of safety, including protection for group(s) identified as being sensitive to the adverse effects of the NAAQS pollutants. EPA recognizes that there is no discernible threshold of physiological effects identified for any of the NAAQS pollutants and that there is a wide variability of responsiveness among individuals. EPA further recognizes, however, that setting of the NAAQS ultimately requires public health policy judgments of the Agency as to when physiological effects become medically significant and a matter of public health concern.

ii. Overview of Prevention of Significant Deterioration (PSD) Standards

The Clean Air Act's PSD program applies to all areas of the country designated as "attainment" or "unclassifiable" relative to the NAAQS. CAA section 161, 42 U.S.C. § 7471. Genesee County is classified as an attainment area for all criteria pollutants except ozone. Genesee County was initially designated as a nonattainment area for the old 1-hour ozone standard. 43 Fed. Reg. 8962 (March 3, 1978); 45 Fed. Reg. 37188 (June 2, 1980). Genesee County demonstrated compliance with the old 1-hour ozone standard based upon three years of air quality data. 63 Fed. Reg. 31014 (June 5, 1998). In practical terms, this means that the old classification of "nonattainment" has been superseded by a determination that Genesee County was meeting the old ozone standard.

Under the Clean Air Act, each state must include a PSD program in its state implementation plan. CAA sections 110(a)(2)(C) and 161; 42 U.S.C. §§ 7410(a)(2)(C) and 7471. Among other things, a PSD program must ensure that new major stationary sources employ the best available control technology to minimize the emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. §§ 52.21(j)(2) and 51.166(j)(2). The statute gives permitting authorities substantial discretion to determine BACT in a manner consistent with the environmental protection goals of the PSD program, requiring consideration of "energy, environmental, and economic impacts." CAA section 169(3); 42 U.S.C. § 7469(3).

If a state does not submit an approvable PSD program, the federal PSD regulations at 40 C.F.R. § 52.21 governing permit issuance apply. EPA may in turn delegate its authority to the state to issue federal PSD permits. *See* 40 C.F.R. § 52.21(u). Whether EPA or a delegated state actually issues the permit, the appeal of a federal PSD permit is governed by the regulations at 40 C.F.R. Part 124.

Because Michigan's state implementation plan lacks an approved PSD program, the applicable requirements governing the issuance and appeal of PSD permits in Michigan are the federal PSD regulations at 40 C.F.R. § 52.21 and Part 124. *See* 40 C.F.R. § 52.1180. On September 10, 1979, pursuant to 40 C.F.R. § 52.21(u), EPA Region V delegated its authority to implement and enforce the federal PSD program to the State of Michigan. *See* 45 Fed. Reg. 8348 (1980). Although EPA Region V delegated administration of the PSD program in Michigan to the State, PSD permits issued by MDEQ follow the requirements in 40 C.F.R. § 52.21 and Part 124.

Having delegated its authority to administer the federal PSD program to Michigan, the relationship between EPA Region V and the MDEQ is an arms-length one. EPA Region V exercises careful oversight of the PSD program by reviewing permit applications and commenting where appropriate. Where the state issues a deficient permit, EPA Region V may appeal the permit to the Environmental Appeals Board.

The proposed Select Steel facility is a major stationary source with the "potential to emit" 100 tons per year or more of a regulated pollutant. In addition, the facility is proposed to exceed the "significant emission rate" as defined in the federal regulations for NOx, CO, PM, and lead. *See* 40 C.F.R. § 52.21(b)(23). Since Genesee County is designated attainment for these pollutants, the Select Steel facility is subject to PSD review for these pollutants. 40 C.F.R. § 52.21(i). The proposed Select Steel facility also has the potential to emit 38 tons per year of VOCs and sulfur dioxide. These levels of emissions are <u>not</u> considered "significant" under the PSD regulations. 40 C.F.R. § 52.21(b)(23). As a result, the facility need not undergo PSD review for these pollutants.

Select Steel submitted a BACT analysis as part of its December 30, 1997 PSD permit application. The analysis included a "top down" approach consisting of five steps to evaluate and determine BACT:

1. Identify all control technologies;
2. Eliminate technically infeasible options;
3. Rank remaining control technologies;
4. Evaluate most effective controls and document results; and
5. Select BACT.

2. Specific Criteria Pollutants of Concern

Air dispersion modeling was conducted by the Select Steel facility to support a December 1997 PSD permit application filed with MDEQ. Some changes were made to the permit at the request of MDEQ, and subsequent modeling was conducted by MDEQ. The air quality model and the methodology used followed the recommendations in EPA's Guideline on Air Quality Models (Revised), codified at 40 C.F.R. Part 51, Appendix W. The modeling conducted for the criteria pollutants (*i.e.*, NOx, SO2, PM10, and CO) showed predicted impacts well below the NAAQS.

The largest point of particulate air releases at the plant will occur at the electric arc furnace air pollution control equipment, described as the electric arc furnace or "melt shop" baghouse. Most fugitive emissions occurring within this area are captured and ducted to the baghouse for treatment. Other sources of criteria pollutants in the facility include: the lime silo; the baghouse dust silo; the boiler and the reheat furnace; nearby sources including the ladle dryer, preheaters, and dump station; tundish dump area, and material handling operation baghouses; and fugitive emissions from roads and the slagging operations. The location of the baghouse in at the northeast corner of melt shop. Carbon monoxide and VOC emissions will occur primarily at the output of the direct evacuation system canopy exhaust.

a. Volatile Organic Compounds

i. General Information

Volatile organic compounds are common reactive hydrocarbons which, together with nitrogen oxides, form ozone. The formation of ozone is a complex function of emissions and meteorological patterns and is the result of two coupled processes: (1) a physical process involving the dispersion and transport of the precursors (*i.e.*, VOCs and NO_x); and (2) the photochemical reaction itself. Both processes are strongly influenced by meteorological factors such as dispersion, solar radiation, temperature, and humidity. At ground-level, ozone is the prime ingredient of smog.

Short-term (1-3 hours) and prolonged (6-8 hours) exposures to ambient ozone concentrations have been linked to a number of health effects of concern. For example, increased hospital

admissions and emergency room visits for respiratory causes have been associated with ambient ozone exposures.

Exposures to ozone can make people more susceptible to respiratory infection, result in lung inflammation and aggravate preexisting respiratory diseases such as asthma. Other health effects attributed to short-term and prolonged exposures to ozone, generally while individuals are engaged in moderate or heavy exertion, include significant decreases in lung function and increased respiratory symptoms such as chest pain and cough. Children active outdoors during the summer when ozone levels are at their highest are most at risk of experiencing such effects. Other at-risk groups include outdoor workers, individuals with preexisting respiratory diseases such as asthma and chronic obstructive lung disease, and individuals who are unusually responsive to ozone. In addition, long-term exposures to ozone present the possibility of irreversible changes in the lungs which could lead to premature aging of the lungs and/or chronic respiratory illnesses. *See* U.S. EPA, National Air Pollutant Emission Trends, 1900-1996, EPA-454/R-97-011 (1997) ("Trends Report").

EPA promulgated a new NAAQS for ozone on July 18, 1997 (62 Fed. Reg. 38856). The new ozone standard is set at 0.08 parts per million and is calculated over an 8-hour averaging period. It replaces the old ozone standard of 0.125 parts per million based on a 1-hour averaging period.

Genesee County was initially designated as a nonattainment area for the old 1-hour ozone standard. 43 Fed. Reg. 8962 (March 3, 1978); 45 Fed. Reg. 37188 (June 2, 1980). Genesee County demonstrated compliance with the old 1-hour ozone standard based upon three years of air quality data. 63 Fed. Reg. 31014 (June 5, 1998). In practical terms, this means that the old classification of "nonattainment" has been superseded by a determination that Genesee County was meeting the old ozone standard.

On July 18, 1997, EPA established a new standard, effective on September 16, 1997, based on an 8-hour average. 62 Fed. Reg. 38856 (July 18, 1997). EPA examined recent air monitoring data (from 1995-97) from Genesee County in the context of investigating this complaint and has determined that Genesee County is also currently meeting the new 8-hour ozone standard (although official designations will not be made until the year 2000 and will be based on monitoring data from 1997, 1998, and 1999).

ii. Select Steel Permit Conditions for VOCs

The proposed Select Steel facility's potential to emit VOC's is <u>not</u> considered "significant" under the PSD regulations. However, the proposed facility is also subject to MDEQ rules 702 and 230 which requires the installation of BACT for VOCs.

In response to MDEQ concerns set forth in the deficiency letter of February 5, 1998, Select Steel reviewed additional information in EPA's Best Available Control Technology/Lowest Achievable Emissions Rate (BACT/LAER) Clearinghouse ("the Clearinghouse") and found an

emission factor lower than initially proposed in the permit application. As a result of this finding, the VOC emission estimate was lowered to 32 ton/yr from the electric arc furnace. Additional controls to reduce carbon monoxide emissions will also serve to reduce VOC emissions. MDEQ approved the BACT determination in permit condition 19. EPA Region V did not object to the BACT determination.

The permit issued by MDEQ gives Select Steel one year from plant start-up to implement a continuous emissions monitoring system ("CEMS") for VOCs. The regulations give the permitting authority discretion in implementation of post construction monitoring. 40 C.F.R. § 52.21(m)(2). Pre-application monitoring of VOCs is not mandatory because Select Steel's potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the permitting authority determines it necessary to track the effect VOC emissions may have or are having on air quality. 40 C.F.R. § 52.21(m)(2).

b. Lead

i. General Information

Lead accumulates in the blood, bones, and soft tissues and can also adversely affect the kidneys, liver, nervous system, and other organs. Excessive exposure to lead may cause neurological impairments such as seizures, mental retardation, and/or behavioral disorders. Even at relatively low doses lead exposure is associated with changes in fundamental enzymatic, energy transfer, and homeostatic mechanisms in the body, and fetuses and children may suffer from central nervous system damage. Recent studies show that lead may be a factor in high blood pressure and subsequent heart disease and also indicate that neurobehavioral changes may result from lead exposure during a child's first years of life. *See* Trends Report.

In its 1978 final decision of the lead NAAQS, EPA estimated a maximum safe blood lead level and stated, ". . . the Agency should not attempt to place the standard at a level estimated to be at the threshold for adverse health effects but should set the standard at a lower level in order to provide a margin of safety. EPA believes that the extent of the margin of safety represents a judgment in which the Agency considers the severity of reported health effects, the probability that such effects may occur, and uncertainties as to the full biological significance of exposure to lead." 43 Fed. Reg. 46247 (Oct. 5, 1978).

Since the lead NAAQS was set in 1978, ambient air concentrations of lead have declined by 97 percent, which tracks well with the decline of 98 percent in overall emissions since 1975. *See* Trends Report. Most decreases in emissions were the result of the phase-out of leaded gasoline.

ii. Select Steel Permit Conditions for Lead

The significance threshold for lead emissions under PSD is 0.6 tons per year ("tpy"). The proposed Select Steel facility's controlled maximum lead emissions based on continuous operations would be 0.66 tpy, and would thus be significant for purposes of PSD. Select Steel concluded that 2.8% of the particulate emissions from the electric arc would be lead. MDEQ chose to ensure Select Steel's compliance with the lead emissions limit by requiring the company to install a baghouse for the melt-shop that MDEQ determined satisfies BACT. The permit also mandates monitoring of baghouse operating parameters to ensure proper functioning, performance of a stack test to verify that lead emissions do not exceed the permit limit, visible emissions monitoring, and several maintenance and contingency measures. The lead BACT emission limit of 0.15 pounds per hour was approved by MDEQ in permit condition 18.

iii. Other Local Assessments of Lead in the Environment

In its review, MDEQ conducted an analysis of the impact of lead emissions from the proposed facility in addition to the NAAQS determination. This analysis assessed the impact on children who might be exposed to soil or household dust whose concentrations of lead would increase as a result of atmospheric emissions. MDEQ conducted this analysis based on issues raised during the permit public comment period and at the public hearing, MDEQ Response to PSD Appeal at 2, and published the results in its *BLL Study*, dated May 15, 1998.

The MDEQ analysis used a model of exposure to lead from several pathways (inhalation as well as ingestion of soil, house dust and water) to predict what fraction of a hypothetical group of children would have elevated blood lead levels under both baseline (existing) conditions and with the increase of emissions resulting from the operations of the proposed facility. EPA reviewed the MDEQ analysis of the predicted baseline incidence of elevated blood lead levels, and the incremental increase predicted to result from the new facility.

EPA, in addition to reviewing the assumptions used in the MDEQ lead modeling, also reviewed other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility. EPA conducted this additional review to respond to Complainant's concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. *See* EAB Petition at 1.

iv. Background on Lead Exposures and Levels of Concern

Human exposure to lead now occurs mainly through ingestion of lead in household dust, water, food, and soil, as well as inhalation. Currently, the most likely pathways of lead exposure in young children are ingestion of interior house dust. A significant immediate source of lead in soil and dust is from deteriorating paint used before 1978, especially if unprotected renovation or remodeling activities have been conducted. Lead in exterior soils may migrate indoors on

residents' clothing and via winds. Other major historical sources of lead in soils include deteriorating exterior paint and rainwater runoff from structures, as well as atmospheric deposition from industry or historical use of leaded gasoline.

The Centers for Disease Control and Prevention (CDC) and EPA have identified a blood lead concentration of 10 μg/dL as a level of concern for sensitive populations (in particular young children) and have established health policy goals to limit the risk that young children would have blood lead levels above this value. According to the most recent CDC estimates, 890,000 U.S. children age 1-5 (or approximately 4.4% overall) have elevated blood lead levels, while more than one-fifth of African-American children living in housing built before 1946 have elevated blood lead levels.

v. Impacts from Proposed Facility - MDEQ's Lead Dispersion/Deposition Modeling

Using estimates of the modeled atmospheric concentrations of lead, the *BLL Study* assessed the likely impact of deposition of lead to nearby soil. MDEQ estimated background levels of lead in air and soils and combined those figures with three different estimates of the amount of lead already present in house dust (high, medium, and low). MDEQ then analyzed the differences between children's environmental lead exposure under these three scenarios using the Integrated Exposure Uptake Biokinetic Model for Lead in Children ("IEUBK"). In each scenario, MDEQ compared current estimated background blood lead levels (scenario alternative "a") to estimated blood lead levels after adding in Select Steel's projected emissions (scenario alternative "b"). MDEQ's findings are presented in Table 4 of the *BLL Study*.

vi. IEUBK Model

As previously mentioned, the MDEQ *BLL Study* attempts to predict blood-lead concentrations (blood lead levels) for children exposed to lead in their environment. The model allows the user to input relevant absorption parameters (*e.g.*, the fraction of lead absorbed from water), as well as rates for intake and exposure. Using these inputs, the IEUBK then rapidly calculates and recalculates a complex set of equations to estimate the potential concentration of lead in the blood for a hypothetical child or population of children (six months to seven years).

The IEUBK estimates exposure using age-weighted parameters for intake of food, water, soil, and dust. The model simulates continual growth under constant exposure levels (on a year-to-year basis). In addition, the model also simulates lead uptake, distribution within the body, and elimination from the body.

The IEUBK is intended to:

> Estimate a typical child's long-term exposure to lead in and around his/her residence based on inputs concerning the presence of lead in various environmental media;

Provide an accurate estimate of the geometric average blood lead concentration for a typical child aged six months to seven years;

Provide a basis for estimating the risk of elevated blood lead concentration for a hypothetical child;

Predict likely changes in the risk of elevated blood lead concentration from exposure to soil, dust, water, or air following activities which might increase or decrease such exposure.

A site-specific risk assessment requires information on soil and dust lead concentrations for the particular site in question. Variables affecting any consideration of lead exposure from soil and dust include: soil to indoor dust transfer; ingestion parameters for soil and dust (*i.e.*, how much soil or dust a typical child may ingest or inhale over a set period of time); and the amount of lead that can be absorbed from the soil. The model is quite sensitive to these parameters–that is, changing one variable can significantly affect the results. The IEUBK is designed to facilitate calculating the risk of elevated blood lead levels, and is helpful in demonstrating how results may change under different assumptions of inputs.

vii. MDEQ Inputs to the IEUBK Model

In its analysis, MDEQ used the point of maximum off-site atmospheric quarterly average concentration estimated to occur from lead releases from Select Steel. This maximum concentration point was located within about a hundred meters south and west from the facility fenceline, generally in an area listed on as U.S. Geological Survey ("USGS") map as being occupied by waste ponds. This level was used to estimate the dry deposition to soil, and in subsequent modeling of the potential effects on a population of children which were assessed as if they were exposed to soils containing the deposited lead at the maximum level.

The deposition estimate involved multiplying the quarterly maximum ambient lead concentration, determined by dispersion modeling, by a dry deposition velocity. The deposition velocity assumed was 5 centimeters per second. Although the preferable approach for calculating deposition flux values is through the use of the Industrial Source Complex ("ISC") model, the velocity assumed in the MDEQ seems reasonable and is comparable to a settling velocity for lead calculated using equation 1-55 in Volume II of the User's Guide for the Industrial Source Complex ("ISC2") Dispersion Models (a velocity of 6.8 cm/s can be calculated using the conservative assumption that all the particles were 10 microns in diameter). Wet deposition was not considered in MDEQ's assessment apparently due to the lack of precipitation data. Wet deposition can account for a significant portion of the total deposition with impacts often occurring much closer to the facility than the dry deposition impacts. The modeling of soil and air impacts methodology detailed in the MDEQ report is reasonable as an estimation of dry deposition of lead.

The *BLL Study* estimated the deposition rate at the point of maximum concentration, and assumed a constant deposition at that rate over a 30 year period. After mixing with the top 1 cm of soil, this would increase the estimated soil lead concentration by about 14 parts per million ("ppm"). At further distances and directions from the facility emission source, the predicted concentration and deposition would decrease, so the estimate of deposition at inhabited areas may be somewhat less.

viii. Results of the MDEQ IEUBK Model

The *BLL Study* found that the blood lead impacts from the facility would be small. The maximum air lead concentrations from the facility were estimated to result in changes in geometric mean (typical) blood lead levels of about 0.1 μg/dL. EPA's review identifies some refinements that would be appropriate in similar model applications in the future. However, EPA concurs that the predicted impacts on blood lead levels would be small.

3. Overview of Air Toxics

The CAA and state programs provide protection against the effects of toxic air pollutants. Title III of the CAA identifies 189 hazardous air pollutants ("HAPs") and establishes a regulatory program to control HAP emissions from many industrial sources. The federal program also controls air toxics from mobile sources and from area sources in urban areas. In addition, individual states, including Michigan, have developed and implemented air toxics legislation and regulatory programs.

EPA promulgates regulations for HAPs under section 112 of the CAA. 42 U.S.C. § 7412. This federal air toxics program requires maximum achievable control technology ("MACT") in its first phase and an assessment and control of residual risk remaining after the application of MACT. Those provisions, however, are not applicable to the proposed Select Steel facility. For section 112, the source category (electric arc furnaces) that includes steel recycling mini-mills was delisted because "there are no existing facilities which qualify as a major source,"[9] 61 Fed. Reg. 28,197 (1996), and, as a result, those sources will not be regulated under section 112. Section 129 only concerns solid waste incineration units, *see* 42 U.S.C. § 7429(a), and would not apply to Select Steel.

Michigan's Rule 230 requires permit applicants to install best available control technology for certain sources of air toxics ("T-BACT") and to perform a modeling analysis and compare those results with the initial risk screening levels. Rule 230 also allows MDEQ to establish a lower maximum emission limit if they determine T-BACT does not protect the public or the environment adequately.

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[9] A major source is a stationary source "that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1).

Potential emissions of toxic air contaminants were estimated by Select Steel using the average emission factors from similar facilities previously issued permits by the MDEQ and the Air and Waste Management Association compilation of baghouse dust compositions. Toxic air contaminants associated with mini-mills include metals and toxic components of VOCs. The toxic metals of concern were identified in the permit application to be cadmium, chromium, manganese, mercury, and nickel.

Modeling done by Select Steel's consultant indicated that the ground level impacts of air toxics were below the MDEQ screening levels for all air toxics of concern except manganese. As a result of the MDEQ review and public comment, permit changes were made to further reduce the emissions and impact of two of air toxics of concern to Complainants, namely manganese and mercury.

a. Select Steel Permit Conditions for Manganese

After the Select Steel permit application was submitted, additional stack test data was submitted to MDEQ in another permit application for Republic Steel (also a proposed steel mini mill) which indicated manganese emissions may be lower than previously predicted. Based on this information, a revised lower emission rate of 0.05 lb/hr was established for Select Steel. This emission limit along with closing the roof monitor and additional hooding resulted in predicted ambient air impacts below the MDEQ screening levels. The revised emission limit of 0.05 pounds per hour was approved by MDEQ as T-BACT in permit condition 25.

b. Select Steel Permit Conditions for Mercury

After an MDEQ review of other sources of data including the Ohio EPA's stack testing database, MDEQ determined that the prospective mercury emission levels outlined in the permit application were not representative of T-BACT. In a letter dated April 24, 1998, Select Steel agreed to reduce the mercury emission limits by a factor of 10. The draft permit was changed and the emission rate for mercury was lowered from 0.05 pound per hour to 0.005 pound per hour. The exhaust gas concentrations for mercury were also reduced by a factor of 10 to 3.84 micrograms/dscf, as specified in permit condition 25. In addition, permit condition 51 was added to require a further assessment of the impact of mercury emissions from the facility on the Mott Lake watershed, unless source testing reveals that the mercury emissions are less than 0.0004 lbs/hr.

c. Other Air toxics

To assess air toxics emissions from the proposed Select Steel facility, EPA assessed both the facility's air toxics emissions, as well as the existing level of air toxics in the surrounding area. Data on other sources of air toxics comes from EPA's Toxics Release Inventory ("TRI").

The facilities reporting to the 1996 Toxics Release Inventory (U.S. EPA 1998) are currently those facilities which are manufacturing facilities in Standard Industrial Classification ("SIC") codes 20-39 and employ at least 10 people. They must report annual releases and transfers of chemicals which are on the TRI list and which are manufactured, processed or otherwise used above threshold amounts. TRI reports include separate information on releases to each environmental medium (*e.g.*, air, water, land) and offsite transfers for treatment or disposal, as well as chemicals recycled, used in energy recovery, and present in waste streams. The list of chemicals subject to reporting in 1996 (the most recent year for which data are available) included approximately 650 chemicals and chemical classes. The TRI database contains a wide range of manufacturing facility types, including chemical, rubber, plastics, and petroleum refineries, food processing (*e.g.*, sugar refineries), electronics manufacturing, and other miscellaneous facilities, such as soft drink bottling facilities. Many sources of air toxics, including small sources (*e.g.*, dry cleaners or gasoline service stations) and non-manufacturing sources (*e.g.*, waste treatment facilities and energy generation plants) were not required to report even if they met the chemical quantity thresholds.

Should the Select Steel facility operate, it is expected to report to TRI. Sixteen TRI facilities are located withing 12 miles from the approximate center of the proposed Select Steel facility. Two had zero air releases reported to TRI in 1996; therefore they were not included in the modeling analysis.

4. Dioxin Monitoring

a. General Information

Chlorinated dibenzo-*p*-dioxins and related compounds (commonly known simply as dioxins) are contaminants present in a variety of environmental media. Human studies demonstrate that exposure to dioxin and related compounds is associated with subtle biochemical and biological changes whose clinical significance is as yet unknown and with chloracne, a serious skin condition associated with these and similar organic chemicals. Laboratory studies suggest the probability that exposure to dioxin-like compounds may be associated with other serious health effects including cancer.

EPA promulgates regulations for dioxin emissions under sections 112 and 129 of the Clean Air Act. 42 U.S.C. §§ 7412, 7429. Those provisions, however, are not applicable to the proposed Select Steel facility. For section 112, the source category that includes steel recycling mini-mills was delisted because "there are no existing facilities which qualify as a major source," 61 Fed. Reg. 28,197 (1996), and, as a result, those sources are not expected to be regulated at this time under section 112. Section 129 only concerns solid waste incineration units, *see* 42 U.S.C. § 7429(a), and would not apply to Select Steel.

In addition, EPA has no emissions data for American mini-mills to either support or contradict MDEQ's belief. A recent inventory of dioxin sources indicates that information has not yet been

developed to determine whether dioxin is a pollutant of concern from facilities like Select Steel. Exposure Analysis and Risk Characterization Group, U.S. EPA, *The Inventory of Sources of Dioxin in the United States*, at 7-14 (April 1998).

To the extent that any regulations may be applicable to dioxin in other circumstances, no continuous emission monitoring system has been proven for use with dioxin by EPA. *See* 40 C.F.R. Parts 60, 61, 63, and 64.

b. Select Steel Permit Conditions for Dioxin

The permit contains no monitoring or any other requirement for dioxin.

B. Allegation Regarding Discrimination in Public Participation

According to EPA's regulations for issuance of PSD permits, 40 C.F.R. Part 124, Subpart A, MDEQ is required to provide public notice that a draft permit has been prepared, 40 C.F.R. § 124.10(a)(1)(ii), with at least 30 days for public comment. 40 C.F.R. § 124.10(b). In addition, MDEQ must hold a public hearing whenever they find a significant degree of public interest based on requests for a hearing. 40 C.F.R. § 124.12(a). Public notice of the hearing must be given at least 30 days prior to the hearing. 40 C.F.R. § 124.10(b)(2). That notice must be provided by (1) mailing a copy of the notice to certain interested parties, (2) publishing in a weekly or daily newspaper within the affected area, and (3) any other method reasonably calculated to give actual notice. 40 C.F.R. § 124.10(c).

In this case, MDEQ published notices about the draft permit in The Flint Journal on March 26, 1998, and March 27, 1998, in The Suburban News on March 29, 1998, and in The Genesee County Herald on April 1, 1998. In the same notices, MDEQ indicated that a public hearing would be held on April 28, 1998, beginning at 7:00 p.m. at the Mount Morris High School. Mt. Morris High School is located approximately two miles from the proposed site. MDEQ also mailed the notice to Fr. Schmitter, Sr. Chiaverini, and several other individuals in the community who had expressed interest in the permit.

The permit applicant, Select Steel, and local government officials also held two informational meetings prior to MDEQ's public hearing. The first was held February 12, 1998, at Kearsley High School, 4302 Underhill Drive, Flint, Michigan, and the second was held February 19, 1998, at Mount Morris High School. These meetings were not required by any state or federal statute or regulation, and were held without the participation of MDEQ.

VI. ANALYSIS AND RECOMMENDED DETERMINATION

A. Allegation Regarding Air Quality Impacts

The environmental laws that EPA and the states administer generally do not prohibit pollution outright; rather, they treat some level of pollution as "acceptable" when pollution sources are regulated under individual, facility-specific permits, recognizing society's demand for such things as power plants, waste treatment systems, and manufacturing facilities. In effect, Congress--and, by extension, society--has made a judgment that some level of pollution and possible associated risk should be tolerated for the good of all, in order for Americans to enjoy the benefits of a modern society--to have electricity, heat in our homes, and the products we use to clean our dishes or manufacture our wares. Similarly, society recognizes that we need facilities to treat and dispose of wastes from our homes and businesses (such as landfills to dispose of our trash and treatment works to treat our sewage), despite the fact that these operations also result in some pollution releases. The expectation and belief of the regulators is that, assuming that facilities comply with their permit limits and terms, the allowed pollution levels are acceptable and low enough to be protective of most Americans.

EPA and the states have promulgated a wide series of regulations to effectuate these protections. Some of these regulations are based on assessment of public health risks associated with certain levels of pollution in the ambient environment. The NAAQS established under the Clean Air Act (CAA) are an example of this kind of health-based ambient standard setting. Air quality that adheres to such standards is presumptively protective of public health. Other standards are "technology-based," requiring installation of pollution control equipment which has been determined to be appropriate in view of pollution reduction goals. In the case of hazardous air pollutants under the CAA, EPA sets technology-based standards for industrial sources of toxic air pollution. The maximum achievable control technology standards under the Clean Air Act are examples of this kind of technology-based standard setting. After the application of technology-based standards, an assessment of the remaining or residual risk is undertaken and additional controls implemented where needed.[10]

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[10] Clean Air Act § 112(f)(2)(A)(1) states ". . . If standards promulgated pursuant to subsection (d) and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such category." 42 U.S.C. § 7412(f)(2)(A)(1).

Title VI and EPA's implementing regulations[11] set out a requirement independent of the environmental statutes that all recipients of EPA financial assistance ensure that they implement their environmental programs in a manner that does not have a discriminatory effect based on race, color, or national origin. If recipients of EPA funding are found to have implemented their EPA-delegated or authorized federal environmental programs (*e.g.*, permitting programs) in a manner which distributes the otherwise acceptable residual pollution or other effects in ways that result in a harmful concentration of those effects in racial or ethnic communities,[12] then a finding of an adverse disparate impact on those communities within the meaning of Title VI may, depending on the circumstances, be appropriate.

Importantly, to be actionable under Title VI, an impact must be both "adverse" and "disparate." The determination of whether the distribution of effects from regulated sources to racial or ethnic communities is "adverse" within the meaning of Title VI will necessarily turn on the facts and circumstances of each case and the nature of the environmental regulation designed to afford protection. As the United States Supreme Court stated in the case of *Alexander v. Choate*, 469 U.S. 287 (1985), the inquiry for federal agencies under Title VI is to identify the sort of disparate impacts upon racial or ethnic groups which constitute "sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." *Id.* at 293-94 (emphasis added).

The complaint in this case raises air quality concerns regarding several NAAQS-covered pollutants, as well as several other pollutants. With respect to the NAAQS-covered pollutants, and as explained more fully below, EPA believes that where, as here, an air quality concern is raised regarding a pollutant regulated pursuant to an ambient, health-based standard, and where the area in question is in compliance with, and will continue after the operation of the challenged facility to comply with, that standard, the air quality in the surrounding community is presumptively protective and emissions of that pollutant should not be viewed as "adverse" within the meaning of Title VI. By establishing an ambient, public health threshold, standards like the NAAQS contemplate multiple source contributions and establish a protective limit on cumulative emissions that should ordinarily prevent an adverse air quality impact.

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[11] Title VI of the Civil Rights Act of 1964, as amended, provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance." 42 U.S.C. section 2000d et seq. EPA's Title VI implementing regulations provide that recipients of EPA financial assistance "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination" because of their race, color, or national origin. 40 C.F.R. § 7.35(b)

[12] For example, scenarios involving the combined impacts of multiple pollutants, multiple pathways, and multiple plants.

With respect to the pollutants of concern in the complaint which are not covered by the NAAQS, Title VI calls for an examination of whether those pollutants have become so concentrated in a racial or ethnic community that the addition of a new source will pose a harm to that community. Because EPA has determined that there is no "adverse" impact for anyone living in the vicinity of the facility, it is unnecessary to reach the question of whether the impacts are "disparate."

1. Volatile Organic Substances

a. VOCs as Ozone Precursor

Based on the information that was made available, EPA technical experts determined that MDEQ's regulatory modeling was generally conducted in accordance with EPA's Guideline on Air Quality Models. The proposed maximum allowable emissions for VOCs from the proposed Select Steel facility are 38.5 tpy. Sources with potential VOC emissions of less than 40 tons per year are not considered a significant source under federal PSD regulations. 40 C.F.R. § 52.21(b)(23)(i).

Genesee County has been effectively determined to meet the NAAQS for ozone (the pollutant of concern from VOC emissions) for both the old 1-hour standard and the new 8-hour standard. *See* 63 Fed. Reg. 31014 (June 5, 1998). Select Steel's maximum modeled impacts from the criteria pollutants of concern to the Complainants are below the NAAQS. In particular, for ozone, the proposed Select Steel facility's emissions are not expected to cause an increase in concentrations above a level deemed presumptively protective of public health. Accordingly, since the NAAQS for ozone is a health-based standard, which has been set at a level necessary to protect public health and allows for an adequate margin of safety for the population within the attainment area, there would be no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For this reason, with regard to VOC emissions as ozone precursors, it is recommended that EPA find that MDEQ did not violate Title VI or EPA's implementing regulations.

b. VOC Monitoring

In response to the Complainants' allegation that the permit allows VOC emissions to go unmonitored for the first eighteen months of the mill's operation, the EAB found that this was "somewhat of a misreading of the permit." EAB Decision at 5. Permit condition 33 allows Select Steel to operate for one and possibly up to two years before it must begin VOC monitoring. MDEQ stated that because Select Steel's potential to emit VOCs is not significant, "VOC emissions monitoring is not required under federal law." MDEQ Response at 7. The EAB found that statement, while "technically true, is [was] somewhat misleading." EAB Decision at 5. The EAB stated that "*pre-application* monitoring of VOCs is not mandatory because Select Steel's potential to emit is less than the significance level, but MDEQ nonetheless retains authority under the federal PSD program to require *post-construction* monitoring of VOCs. *See* 40 C.F.R. § 52.21(m)(1)(i)(a), (m)(2). Such monitoring can be required if the

permitting authority determines it necessary to track the effect VOC emissions may have or are having on air quality. 40 C.F.R. § 52.21(m)(2)." *Id.* at 6.

MDEQ's permit condition regarding VOC monitoring allows Select Steel one year from plant start-up to implement a CEMS for VOCs.. However, Select Steel may choose to install an alternative monitoring system, called "parametric monitoring," instead of the CEMS. If Select Steel does so, MDEQ must first review, test, and accept the system. If MDEQ rejects the parametric system, the permit states that Select Steel must install CEMS within two years of plant start-up. The EAB noted that "MDEQ does not explain why Select Steel is given up to two years to bring VOC emissions monitoring on-line. However, the regulations give the permitting authority discretion in implementation. 40 C.F.R. § 52.21(m)(2)." EAB Decision at 6.

MDEQ is not required to prescribe immediate VOC monitoring because EPA's regulations allow the permitting authority to impose post-construction monitoring as it "determines is necessary." 40 C.F.R. § 52.21(m)(2). Moreover, as discussed elsewhere, there would be no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. For these reasons, it is recommended that EPA find that, with regard to VOC monitoring, MDEQ did not violate Title VI or EPA's implementing regulations.

2. Lead

Genesee County has been determined to meet the NAAQS for lead. Based on the available information, EPA technical experts determined that MDEQ's lead modeling was generally conducted in accordance with EPA's Guideline on Air Quality Models. Overall, the maximum predicted impacts from the Select Steel facility are generally very close in to the facility; either at or near the fenceline.

The significance threshold for lead emissions under PSD is 0.6 tpy. The proposed Select Steel facility maximum lead emissions based on continuous operations would be 0.66 tpy, and would thus be significant for purposes of PSD. MDEQ chose to ensure Select Steel's compliance with the permit's lead emissions limit of 0.15 pounds per hour by requiring the company to install a baghouse that MDEQ determined satisfied BACT.

Select Steel's maximum modeled impacts from lead are below the NAAQS. Accordingly, the proposed Select Steel facility emissions are not expected to cause an increase in lead concentrations above a level deemed presumptively protective of public health. Since the NAAQS for lead is a health-based standard which has been set at a level necessary to protect public health and allows for an adequate margin of safety for the population within the attainment area, there would no affected population that suffers "adverse" impacts within the meaning of Title VI resulting from the incremental lead emissions from the proposed Select Steel facility. As discussed more fully below, EPA's analysis of data on blood lead levels in the vicinity of the facility does not suggest a different conclusion. For these reasons, it is

recommended that EPA find that, with regard to lead emissions, MDEQ did not violate Title VI or EPA's implementing regulations.

a. EPA's Review of the MDEQ *BLL Study*

In response to public concerns about lead in the local environment, MDEQ appropriately undertook an examination of children's blood lead levels in the area. EPA found that the *BLL Study* was a conscientious attempt to address the impact of air emissions from the facility on children's blood lead levels and that MDEQ's use of the IEUBK model in the report was generally applied in a reasonable manner. EPA determined that MDEQ did not explicitly consider one particular pathway of exposure, namely the additional lead in house dust directly resulting from increased lead concentrations in the atmosphere (*i.e.*, from emissions by proposed facility), but this fact did not affect EPA's conclusions regarding the integrity of the study.

EPA reviewed the MDEQ IEUBK report's conclusions, including the assertion that "the modeling of blood lead levels under these scenarios demonstrated little or no differences due to the proposed facility's maximum potential impact, for each scenario." *BLL Study* at 9. EPA concurs that any impacts would be small and found no reason to conclude that these results were not valid. Based on the available information concerning the releases, the additional deposits of lead in soil and dust from Select Steel are likely to have a *de minimis* incremental effect on local mean blood lead levels and the incidence of elevated levels.

b. EPA's Review of Other Available Data on the Incidence and Likelihood of Elevated Blood Lead Levels in Genesee County

As previously mentioned, EPA also reviewed other available data on the incidence and likelihood of elevated blood lead levels in Genesee County, particularly in the vicinity of the site of the proposed facility, in view of complainant's concerns that the existing incidence of elevated blood lead levels in children in the vicinity of the proposed facility were already high. EAB Petition at 1.

EPA reviewed available county health data for children with measured elevated lead levels. The overall county average in 1997 was approximately 8%. In zip code 48458, which contains the site of the proposed facility and the expected maximum ambient lead concentration resulting from plant emissions, the incidence rate above 10 μg/dL in 1997 was about 3%, which is similar to the CDC estimate for the national average (4.4%).

In addition, EPA reviewed more specific geographic information than the zip code area totals because zip code areas are relatively large and may contain areas of high and low incidence which together combine in an average. For example, in 1995, when the Genesee County Health Department offered free testing to residents in the neighborhood of the Genesee Power Station facility at the Carpenter Road School, twenty-nine children under age 15 were tested, and none were found to have elevated levels of lead.

Further, EPA assessed another indicator of elevated lead levels: age of housing. The HUD national survey of lead in housing found a correlation among lead in interior house dust, the presence of lead paint, and age of housing (*e.g.*, built prior to 1950) (CDC, Screening Young Children for Lead Poisoning, 1997). While the presence of older housing units has been identified as an indicator of elevated blood lead levels, there is no explicit guidance as to the proportions which would be of concern. Interpreting these data can be informed by recent guidance on what levels might warrant a significant public health testing effort.

The Centers for Disease Control and Prevention ("CDC") and the American Academy of Pediatrics guidance on conducting testing of children in geographic areas suggests that, depending on the presence of several factors, either universal or targeted screening may be recommended. CDC suggests conducting universal screening if the prevalence of housing units built prior to 1950 in an area is above the national average (27%), or if the prevalence of measured blood lead levels above 10 μg/dL in 1- and 2-year olds is greater than 12%, then all children in the area should be routinely screened. If these criteria are not met, children should be screened on the basis of information collected about their specific situation (*e.g.*, for Medicaid recipients, children living in older (pre-1950) housing units, children present during a renovation of pre-1978 housing unit).

The zip code containing the proposed facility covers a large area, and includes Mt. Morris township, which contains a larger proportion of older housing than most of the county. On average, the percentage of pre-1950 housing in zip code 48458 is about 22%, or below the CDC suggested level which would trigger universal screening of blood lead levels in young children.

Overall, EPA found no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by lead emissions from Select Steel. EPA also concluded that lead emissions from the proposed Select Steel facility are unlikely to have significant impacts on blood lead levels of children living in the vicinity. While EPA believes that airborne lead emissions from the Select Steel facility are neither actionable under Title VI nor cause for particular concern, this does not mean that there is not a broader lead concern in Genesee County that warrants attention separate and apart from Title VI. EPA has noted that blood lead data available for Genesee County provide a basis for an ongoing lead exposure assessment. Approximately 8% of children screened for blood lead in Genesee County in 1997 exceeded the federal blood lead goal of 10 μg/dL. The available screening data also indicate a greater risk of elevated blood lead levels among African-African children. (Four percent of African-American children screened between July 1995 and June 1998 had blood lead levels greater than 15 μg/dL, while 1% of white children exceeded this level. Data tabulated by race were not available for all blood lead levels exceeding 10 μg/dL.) Under these circumstances, EPA believes that, separate and apart from this case, further locally focused efforts are warranted to reduce existing prevalence of elevated blood lead levels.

Public health efforts to mitigate existing blood lead risks can include:

- continued blood lead screening, outreach, and intervention efforts directed to at-risk populations;
- generation of additional data on patterns of the occurrence of damaged lead-based paint and elevated levels of lead in residential soils and dusts;
- focused educational and assistance programs to aid residents and dwelling owners in reducing existing sources of lead exposure.

EPA supports continued local efforts to assess and reduce potential lead exposures in children, and is prepared to provide assistance in the planning of intervention efforts and in the identification of resources to support this work.

3. Air Toxics

In its review of the permit for the proposed Select Steel facility, MDEQ used air models to estimate atmospheric concentrations and compare them to screening thresholds defined by the state. Modeled levels of air toxics emissions from the issued permit for the proposed facility did not exceed state thresholds of concern. These MDEQ assessments were performed on a chemical-specific basis, and did not attempt to aggregate the impacts of all releases combined.

EPA's approach to analyzing air toxics had some elements in common with MDEQ's NAAQS review, in that it used air models to evaluate potential concentrations of air emissions from multiple sources. It also extended this approach to include multiple chemicals, whose potential impacts were combined on the basis of similar health effects. Chemicals that may cause cancer were considered separately from those which may only cause other chronic toxic effects, because combining these different types of effects may significantly increase uncertainties. Acute effects were not considered in the analysis because neither appropriate emissions data nor toxicity data were available. For these air toxic releases, no ambient concentration regulatory standards are generally available, either singly or in combination. The EPA approach used the modeled concentration estimates along with residential population information for Census blocks to estimate exposures, and health based benchmarks to project risks of potential impacts.

a. Technical approach for air toxics evaluation

EPA conducted an analysis of the distribution of airborne toxic emissions from TRI facilities in the same area as the proposed facility. EPA modeled average concentrations at each inhabited Census block within six miles of the proposed site as a reasonable assumption of the likely maximum geographic extent of potential impacts. To assure that the contributions of the facilities outside the six-mile radius to blocks inside the circle were considered, all facilities in the analysis included those within an additional six miles (*i.e.*, all those within twelve miles) of the proposed Select Steel site.

The proposed Select Steel facility's air toxics emissions were obtained from MDEQ documents listing maximum permitted limits. Modeled chemicals included arsenic, barium, cadmium, chlorine, chromium, manganese, mercury, nickel oxide, and zinc oxide, as well as lead.

In addition to the proposed facility, a total of 16 facilities were modeled, composed of 15 TRI facilities plus Genesee Power Station ("GPS") (which was permitted to release lead and a number of other metals). Of the chemical-specific air toxics emissions listed, methyl pyrrolidone and benzo(a)pyrene (GPS only) were not modeled due to lack of available toxicity data. The proposed facility's emissions of vanadium pentoxide and aluminum chloride were also not modeled due to lack of available EPA toxicity information. If the MDEQ ambient concentration screening levels were used to rank the potential degree of toxicity of the permitted chemicals, the ranks for these substances would be the second and third least toxic of the 10 considered, or of slightly higher concern than zinc. This ranking would also place them nearly five orders of magnitude (or a factor of 100,000) less toxic than arsenic or cadmium, which were included in the analysis.

Table X: List of Additional Facilities Modeled

TRI Facility ID	Facility Name	Address	City
48423FRNCN300SO	Fernco Inc.	300 S. Dayton St.	Davison
48458NVRSL1167W	Universal Coating Inc	1167 W. Frances Rd.	Mount Morris
48503CMMRC711W1	Oil Chem Inc.	711 W. 12th St.	Flint
48503MCDNL609CH	McDonald Dairy	609 Chavez Dr.	Flint
48505LCKHR4701T	Lockhart Chemical Co	4302 James P. Cole	Flint
48505PPGND3601J	PPG Industries Inc	3601 James P. Cole	Flint
48506BBPNT2201N	B & B Paint Co	2201 N. Dort Hwy.	Flint
48506MDSTT624KE	Mid State Plating Co Inc	602 Kelso St.	Flint
48550BCFLN902EH	GMC -Buick Motor Div	902 E. Hamilton	Flint
48551GMCTRG3100	GMC Truck & Bus Group	G-3100 Van Slyke Rd.	Flint
48552CPCFLG3248	GM-CPC-Flint Engine Plt	G-3248 Van Slyke Rd	Flint
48553GMCTRG2238	GMC Metal Fabricating Div. Flint	G-2238 W. Bristol Rd	Flint
48554GMSRV6060W	GMC Motor Service Parts Ops.	6060 W. Bristol Rd.	Flint
48555CFLNT300NO	GMC AC Delco Systems Div Wes	300 N. Chevrolet Ave	Flint
48556CSPRK1300N	AC Spark Plug GMC	1300 N. Dort Hwy.	Flint
NA	Genesee Power Station	5300 Energy Drive	Genesee Township

EPA's analysis was performed both with and without Select Steel to examine incremental effects, using an approach that is similar to one developed earlier for Title VI investigations and that is undergoing scientific peer review by EPA's Science Advisory Board ('SAB").[13] Modifications were made to address suggestions from the SAB.

To determine how permitted air toxic emissions are distributed geographically and on the basis of population subgroups, EPA used 1990 Census data and modeled average air concentrations on a census block level. The TRI air release data used was for 1996, the most recent year for which TRI data is available. The concentrations of chemicals in the various Census blocks were examined relative to known chemical-specific values such as Unit Risk Factors or Reference Concentrations ("RfCs"), and for those chemicals where these values have not yet been established, the *OPPT's Risk Screening Environmental Indicators* (dated April 28, 1998) tables were used. As a conservative screening method, the carcinogenic risk estimates for all carcinogens in each block were added together as an indication of possible cumulative effects on cancer probability.

Because the probability of contracting cancer is not generally assumed to have a threshold level (*i.e.*, there is some probability, however small, at any level of exposure), the decision regarding a level necessary to cause an adverse effect is a matter of policy. In the past, EPA has based regulatory actions at a wide spectrum of levels, generally in the range of 10^{-6} (one in one million) to 10^{-4} (one in ten thousand) lifetime cancer risk.[14] Estimated lifetime individual risks below 10^{-6} have rarely been found to be sufficient basis for action, while in most cases, levels above 10^{-4} have resulted in some form of action, although not necessarily regulation.

Similarly, on the non-cancer side, the 1986 EPA guidelines for dealing with chemical mixtures discusses the concept of hazard index, where a level below 1 means that untoward effects are thought unlikely to occur. Because of the use of safety factors in determining the RfCs used to construct a hazard index, the meaning of a hazard index above 1 cannot be used to predict that unwanted health effects *will* occur. There are usually safety factors of from 3 to 1000 times between calculated RfC levels, which are used as screening thresholds here, and concentrations found to cause adverse effects in animals or humans. Scientists have not agreed, at this point, on a scheme for predicting if and when effects will occur based on the hazard index values between 1 and the lowest concentrations found to cause adverse health effects, often considerably higher.

Major uncertainties in this kind of analysis include the specific chemicals' toxicity potencies, which are not always based on a comparable amount or quality of information, and may include significant "safety factors" to reflect uncertainties in the degree of potency. Other uncertainties

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[13] The approach presented for SAB review was called the Enhanced Relative Burden Analysis.

[14] *See, e.g.*, CAA § 112(f)(2)(A); 42 U.S.C. § 7412(f)(2)(A).

include not being able to account for all significant sources, since mobile and area sources of certain air toxics may be as significant as point sources, especially in urban areas. The point source TRI emissions information used was based on industry-reported data which can be derived using a variety of approaches with varying degrees of accuracy, and in the case of two facilities, the maximum permitted emission levels. In interpreting combined effects of multiple chemical exposures, hazard ratios based on additive combinations of chemicals whose predicted effects are on different parts of the human body may significantly overestimate potential impacts.

Adding carcinogenic risk and construction of hazard indexes for multiple chemicals both involve "adding" various health effect "endpoints" that may result from entirely different biological mechanisms and therefore may not be strictly additive in a biological sense. In this methodology, the chemicals are added as a worst case assumption, and if added levels do not raise concern when compared to benchmarks such as a cancer risk level or a hazard index, an assumption would be that they would not be of concern if a more detailed methodology were applied.

b. Results of Air Toxics Analyses

The analysis focuses on whether the permitted Select Steel emissions—either in and of themselves or in combination with other emissions in the area—result in concentrations that may adversely impact the health of the residents in the surrounding area. The analysis found that the locations of the blocks with the maximum predicted impacts from the Select Steel Facility were very close in to the facility, near the fence line. None of the Census blocks were found to be significantly adversely impacted solely by projected emissions from the proposed facility. The Census block with the highest projected potential risk from potential carcinogens was estimated to have a lifetime risk of just above 10^{-6} (1 in 1 million) associated with emissions from the proposed facility. The hazard index for all blocks in the six-mile circle due to the Select Steel emissions was well below the screening threshold of 1, the highest block being about 0.03. The analysis does not support, therefore, the allegation that the proposed Select Steel facility emissions themselves, as permitted, will be the cause of health effects in the surrounding area. In addition, the levels from the Select Steel facility are also projected to be fairly low compared to the levels contributed by the other TRI sources collectively.

The cumulative results for the entire six-mile circle indicate the lifetime carcinogenic risk estimates for the highest single block is about $6x10^{-5}$. While the estimates for several blocks fall within the 10^{-5} range, these estimates are thought to be quite conservative for the following reason. Virtually all the blocks where risk is above the low 10^{-6} range are dominated by the release of chromium. The methodology makes two very conservative assumptions regarding chromium: first, that all releases are assumed to be the more toxic chromium VI valence state, as opposed to the significantly less toxic chromium III; and second, that the released particles are small enough to be carried with the wind dispersion and not fall to earth and be substantially removed through dry or wet deposition. The ratio of chromium VI to total chromium in emissions is usually much less than 1, with estimates in the 10% range not uncommon. Were

this ratio factored into the methodology, none of the blocks would have shown an estimated risk above the 10^{-6} range. Even so, the conservatively derived levels are not such that they go above the 10^{-4} level.

On the non-cancer side, most of the blocks within the six-mile circle are below the hazard index of 1, even with all non-carcinogenic chemical effects combined. There are a substantial number of blocks, however, which have hazard indexes between one and 10, and some—just under 6%—which have hazard indexes between 10 and 80. In all of the blocks with hazard indices above 1, glycol ethers[15] is the predominant cause. Therefore, uncertainties that might arise from adding different chemicals together largely do not apply.

There is considerable uncertainty about the meaning of the estimated hazard indices here, for several reasons. First, as previously discussed, scientists have not yet agreed on how to interpret hazard index values above 1. Second, the value used for glycol ethers in this screening methodology was not a formally established RfC, but a value derived from an similar type of toxicity study which used oral rather than inhalation exposure, introducing some additional uncertainty. Third, there are usually uncertainty factors applied to any RfC or reference dose calculation, so values above 1 cannot be easily (or at all) translated into predictions of probabilities of adverse health effects. At this point, these values can be termed "not necessarily safe," but neither can there be adverse health effects definitely predicted upon this basis alone. In any event, the analysis suggests that Select Steel's emissions will contribute minimally, if at all, to the possibility of adverse health effects.

Overall, the EPA analysis does not support the contention that the combined modeled emissions in the six mile area near the proposed facility indicate the likelihood of adverse health impacts. For all of these reasons, with regards to air toxic releases, it is recommended that EPA find no violation of Title VI or EPA's implementing regulations.

4. Dioxin Monitoring

The information gathered from the investigation concerning the monitoring of dioxin emissions is consistent with EAB's analysis of the issue.[16] No performance specifications for CEMS have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source.

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[15] Glycol ethers are industrial solvents used in paints and other products.

[16] In the EAB's analysis of Complainants' PSD appeal concerning dioxin monitoring, the Board similarly concluded that "MDEQ's decision is not clearly erroneous." *In re Select Steel Corporation of America*, Docket No. PSD 98-21, at 5 (EAB Sept. 10, 1998). That holding was based, in part, on the fact that the Complainants made "no argument and points out no data to refute MDEQ's judgment." *Id.*

In addition, MDEQ believed dioxins are not emitted by steel recycling mini-mills. EPA has no emissions data for American mini-mills to either support or contradict MDEQ's belief. *The Inventory of Sources of Dioxin in the United States* indicates that information has not yet been developed to determine whether dioxin is a pollutant of concern from facilities like Select Steel.

Furthermore, at this time, EPA does not expect to regulate air toxic emissions from steel recycling mini-mills under CAA section 112. Without regulations or other guidance to direct the Agency's review of this issue, EPA is not in a position to contradict the conclusions of MDEQ.

For these reasons, a finding of no disparate impact associated with MDEQ's decision not to include monitoring requirements for dioxin in the permit is recommended.

B. Allegation Regarding Discrimination in Public Participation

The evidence indicates that the permitting process for the proposed Select Steel facility's PSD permit did not violate Title VI or EPA's implementing regulations. The investigation's results as to each of the allegations are detailed below.

1. Timing of Permit Issuance

EPA reviewed a variety of documents from MDEQ concerning the timing of the permitting process for the proposed Select Steel facility and interviewed the MDEQ employees who participated in that process. Neither the documents nor the interviews revealed anything indicating that MDEQ expedited the permitting process for Select Steel in order to preempt an adverse holding in the GPS case or for any other improper reason. In addition, EPA's review found that the public participation process for the permit was not compromised by the pace of the permitting process.

The five months that lapsed between the submission of the permit application and the issuance of the permit appears to be normal. Among the last twenty-six PSD permits approved by MDEQ, the average time between receipt of the application and approval of the permit was eight months, but the average time between the receipt of a complete application and approval was only one and a half months. Message transmitted by facsimile from Lynn Fiedler to Richard Ida, at 4 (Oct. 28, 1998) (providing table of PSD permit processing times for last three years). Judging by those averages, delays that may occur in the issuance of PSD permits could be attributed to incomplete applications. In this case, significant pre-application discussions occurred before the application was received on December 30, 1997. *See, e.g.*, Memorandum from Lynn Fiedler to the file (December 8, 1997). As a result, MDEQ was able to perform a completeness determination the same day the application was submitted, thereby shortening the time required to process the application.

In addition, during a pre-application meeting with Select Steel on December 2, 1997, rather than attempting to ignore the Circuit Court's holding in the GPS litigation, the Thermal Process Unit Supervisor said she provided a copy of the decision to the applicants. She went on to note that MDEQ "is a neutral party and . . . we would be following the process as required by the state and federal regulations." Memorandum from Lynn Fiedler to the file (December 8, 1997).

Although Complainants may have gotten the initial impression that the permit process would take over one year based on Ms. Fiedler's alleged comment that it would take "a long time," subsequent communication between Complainants and MDEQ should have clarified the timetable for Complainants. On February 17, 1998, Fr. Schmitter and Ms. Fiedler discussed the timing of the hearing. Ms. Fielder indicated that it would be at least 30-45 days away. Notes from Lynn Fiedler (Feb. 17, 1998).

Moreover, nothing in the public participation process was compromised by the pace of the permit process. MDEQ satisfied EPA's regulatory requirements concerning the issuance of PSD permits. *See infra* discussion about notice and location of public hearing. For all of these reasons, it is recommended that EPA find that the circumstances surrounding the timing of the Select Steel PSD permit issuance did not violate Title VI or EPA's implementing regulations.

2. Relationship Between Select Steel and MDEQ

EPA reviewed a variety of documents from MDEQ concerning the relationship between MDEQ and Mr. Shah, and interviewed the MDEQ employees who participated in the permitting process. Neither the documents nor the interviews revealed anything indicating improper or unlawful actions by the MDEQ, NTH Consultants, or Mr. Shah in their interactions during the permitting of Select Steel. Some MDEQ employees, including Dennis Drake, Director, MDEQ Air Quality Division, noted their awareness of Mr. Shah's job with NTH Consultants, but were not aware that Mr. Shah was involved in the Select Steel application. Interview with Dennis Drake (October 21, 1998). Those MDEQ employees who knew about Mr. Shah's role in developing the Select Steel permit, including Hien Nguyen, Permit Engineer, and Lynn Fiedler, stated that no special treatment was given to Mr. Shah or to the Select Steel permit application. Interview with Hien Nguyen and Lynn Fiedler (October 21, 1998).

In some government organizations, regulations prescribe certain limitations on post-employment interactions with the former government employee. In this case, Michigan does not appear to have any such regulation. *See, e.g.*, Mich. Stat. Ann. Title 4, Part 7, Chapter 31c (1998) (Standards of Conduct); Michigan Civil Service Commission Rules § 2-12 (Retirement) and § 2-21 (Conflict of Interest). Notwithstanding the absence of state regulations, the circumstances of this situation do not indicate any impropriety. Mr. Shah was never involved in the permitting of the Select Steel facility during his tenure at MDEQ because he resigned from MDEQ approximately two years prior to the submission of Select Steel's application. Telephone Interview with Dhruman Shah (Oct. 23, 1998). Furthermore, even if the federal rules concerning subsequent employment had applied to this situation, Mr. Shah would have been free to participate in the Select Steel permit. *See* 5 C.F.R. §§ 2637.201 to 2637.204 (regulations concerning post-employment conflict of interest).

Without some evidence of impropriety in the relationship between the permit authority and the permittee, EPA cannot assume that any such impropriety existed. Accordingly, it is recommended that EPA find that nothing about the relationship between MDEQ, Select Steel, NTH Consultants, and Mr. Shah violated Title VI or its implementing regulations.

3. Notice of Public Hearing

EPA reviewed a variety of documents from MDEQ concerning the notice provided for the public hearing and interviewed the MDEQ employees who were involved in providing that notice. Neither the documents nor the interviews revealed anything indicating a violation of Title VI of

the Civil Rights Act of 1964, as amended, or EPA implementing regulation, by the MDEQ in providing notice for the public hearing.

EPA's regulations for PSD permitting require that notice of a public hearing must be published in a weekly or daily newspaper within the affected area. 40 C.F.R. § 124.10(c)(2)(i). In this case, MDEQ went beyond the requirements of the regulation and published notices about the hearing in three local newspapers: The Flint Journal on March 26, 1998, and March 27, 1998; The Suburban News on March 29, 1998; and The Genesee County Herald on April 1, 1998.

EPA's regulations also require that notice be mailed to certain interested community members. 40 C.F.R. § 124.10(c)(1)(ix). MDEQ mailed letters dated March 25, 1998 to Fr. Schmitter, Sr. Chiaverini, and nine other individuals in the community who had expressed interest in the permit. That letter was also transmitted by facsimile machine to Fr. Schmitter and Sr. Chiaverini on March 25, 1998. Nonetheless, Complainants believed that MDEQ should have mailed the notice to more members of the community, particularly in light of the alleged inadequacy of the notice mentioned in the GPS case. MDEQ, however, believed that Fr. Schmitter and Sr. Chiaverini would act as the contact point for their community and alert other interested parties about the proceedings. Interview with Lynn Fiedler (Oct. 21, 1998). More importantly, the mailing list prepared by MDEQ included individuals who had expressed interest in the Select Steel permit application and who had participated in other permitting decisions that involved the area, consistent with the requirements of EPA's regulations. *See* Select Steel Mailing List (undated).

The information examined during the investigation indicates that MDEQ provided sufficient notice of its public hearing. In terms of newspaper publication, MDEQ went beyond the requirements of EPA's regulations and issued the notice in three, rather than just one, local newspapers. The mailing list that MDEQ developed also met EPA's requirements and was not inadequate to inform the community about the public hearing, in part, because the Complainants took it upon themselves to contact other members of the community. Consequently, it is recommended that EPA find that the method of notification for the public hearing did not violate Title VI or its implementing regulation.

4. Location of Public Hearing

EPA reviewed a variety of documents from MDEQ concerning the location of the public hearing and interviewed the MDEQ employees who were involved in selecting that location. Neither the documents nor the interviews revealed anything indicating a violation of Title VI of the Civil Rights Act of 1964, as amended, or EPA implementing regulation, by the MDEQ in selecting a location for the public hearing.

Complainants wanted the hearing held at Carpenter Road Elementary School. It is not clear whether MDEQ contacted the school in its search for a hearing site. A MDEQ memorandum indicates that "there would be . . . a public hearing in the local area - either Carpenter Road

school or another school close to the facility." Memorandum from Lynn Fiedler to the file (Dec. 8, 1997). The Air Quality Division Hearing Officer indicated that she contacted the Carpenter Road School. Interview with Susan Robertson (Oct. 21, 1998). The Principal of Carpenter Road Elementary School, however, has no recollection of being contacted about such a hearing and said that he normally welcomes such events. Telephone Interview with Charles Atwater (Oct. 23, 1998).

MDEQ contacted the Beecher High School and its feeder schools. Telephone Interview with Judy Williams, Parent Involvement Coordinator, Beecher School District (Oct. 26, 1998). MDEQ ultimately held the public hearing at Mount Morris High School, approximately two miles from the proposed facility.

Notwithstanding the uncertainty about Carpenter Road Elementary School, the location chosen for the public hearing is in close proximity to the proposed site. In addition, it is accessible by the general public. The Genesee County Metropolitan Transit Authority provides public transportation (*e.g.*, "Your Ride") to the location. Telephone Interview with Ronda Jenkins, Customer Service Representative, Genesee County Mass Transit Authority (Oct. 28, 1998). It is recommended that EPA find that MDEQ's decision to host the hearing at Mount Morris High School does not raise to the level of a violation of Title VI or its regulations.

C. Conclusion

Having analyzed all of the materials submitted and information gathered during the investigation regarding each allegation, it is recommended that EPA not find any violations of Title VI and EPA's implementing regulations by MDEQ.

Report

of the

Title VI Implementation Advisory Committee

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

March 1, 1999

Appendices H - N

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

PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA

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October 15, 1998

Anne E. Goode
Director
Office of Civil Rights (1201)
US EPA
401 "M" Street, SW
Washington, DC 20460

Dear Ms. Goode:

The problem of environmental injustice has been recognized for many years but a workable protocol to advance environmental justice has yet to be developed.

There are some who contend that a program to advance environmental justice is a program in conflict with the goal of converting our hazardous brownfields into beneficial usefields: They are wrong. The eradication of brownfields in minority and low income urban areas is an important aspect of environmental justice.

To help achieve the complementary goals of environmental justice and eradication of brownfields, the Public Interest Law Center of Philadelphia has been developing an "Environmental Justice Protocol" designed to protect residents in substandard health communities (minority and low income) from environmental pollution while empowering such communities to say "yes" to proposals for developments which would be beneficial to community interests.

We are enclosing a copy of our "Environmental Justice Protocol" (10/1/98). The protocol remains subject to revision or amendment based on your comments and advice. Please let us have your reaction and comments.

Yours sincerely,

Jerome Balter
Environmental Project

JB/jm
attachments

10/19/98

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Appendix H: Environmental Justice Protocol proposed by Public Interest Law Center of Philadelphia

ENVIRONMENTAL JUSTICE PROTOCOL

Proposed by Public Interest Law Center of Philadelphia
October 1, 1998

INTRODUCTION

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (Section 601) prohibits recipients of federal financial assistance from discriminating against persons because of race, color or national origin. Thus, state agencies such as the Pennsylvania Department of Environmental Protection (DEP) are subject to the requirements of Title VI.

Title VI also authorizes federal agencies, such as the Environmental Protection Agency (EPA) to promulgate regulations designed to prevent such discrimination. 42 U.S.C. §2000 d-1 (Section 602).

Pursuant to Section 602, the EPA in 1984 promulgated Title VI regulations. 40 CFR §7.01 et seq. Unfortunately, they were only procedural in nature and did not include any guidance for determining whether particular actions of a recipient of EPA funds constituted violations of the Civil Rights law.

Environmental injustice has been recognized as a national problem for more than 20 years but it was not until February, 1994 that the President issued an Environmental Justice Executive Order requiring the EPA and other federal government agencies to develop programs to overcome environmental injustice in minority and low income communities. And EPA required another four (4) years, until February, 1998, to publish its "*Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*" (Interim Guidance).

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In 1998 the EPA organized an Implementation Advisory Committee (IAC) representing stake holders from across the country to make recommendations for improving the Interim Guidance. The Public Interest Law Center of Philadelphia (Law Center) presented comments on the *Interim Guidance* to the IAC at its first meeting on May 18, 1998 in Arlington, VA. The Law Center noted that the EPA's *Interim Guidance* was very complex and included too many factors open to conflicting opinion for the Guidance to serve as a useful tool for advancing environmental

justice. The EPA's investigation of the proposed Shintech facility in Louisianna illuminates that complexity.

In an attempt to provide constructive assistance to the IAC, the Law Center presented a substitute Protocol for IAC's consideration. Since the IAC's meeting of May 18th, the Law Center has presented its substitute Protocol at numerous meetings including meetings of the Pennsylvania Department of Environmental Protection (DEP) and the Philadelphia City Solicitors Office.

In contrast to the EPA's *Interim Guidance* which is based on complex disparate cumulative impact analysis, the Law Center's substitute Protocol is based on a comparative public health analysis utilizing official state public health data.

It is well recognized that residents of minority and low-income communities suffer from substandard public health. This was recognized in the President's Executive Order of February 1994. The Law Center's substitute Protocol is designed to protect substandard health communities from polluting facilities thereby fulfilling the purposes of environmental health protection law and civil rights law.

The substitute Protocol requires the pollution control permitting agency to promulgate regulations that would make civil rights protection an intrinsic part of the permit application review process. Such a requirement would greatly reduce the number of civil rights complaints to the EPA after the issuance of pollution control permits.

And the substitute Protocol empowers the local community to override the permit prohibition through the use of a local referendum financed by the permit applicant, affording local residents control of community development.

Over the past few months the Law Center has presented its substitute Protocol to numerous audiences and has received some very positive feedback. The substitute protocol (Environmental Justice Proposal) attached reflects the constructive comments presented to the Law Center.

Environmental Justice Protocol

Public Interest Law Center of Philadelphia

October 1, 1998

1. No state or local agency, receiving federal financial assistance, shall grant a pollution control permit to construct or operate a new facility or to construct or operate an enlargement of the capacity of an existing facility in any Affected area where the public health of the residents of the Affected area is determined to be Substandard.

2. The Affected area of a proposed new facility or of an enlargement of an existing facility shall be the area within a circle one-half mile in radius except that the radius shall be increased so that the area within the circle contains 1000 residents. The center of the circle shall be located at the center of the operational structure of the proposed facility

3. Public health shall be determined from government health department records for the most recently published five (5) year period at the time of the permit application.

4. Government health department records are to be used for assessing public health in respect to the following health factors:

(a) Age adjusted mortality rates

(b) Age adjusted cancer mortality rates

(c) Infant mortality rates

(d) Low birth weight rates

5. (a) Standard public health rates shall be the rates of each of the health factors for the entire population within the jurisdiction of the agency which issues the pollution control permits in the Affected area.

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(b) The Affected area shall be deemed to be a Substandard Health Area when there is a deviation of at least 20% in any of the health factors between the Standard Public Health rate and the rate in the Affected area.

6. Residents of the Affected area shall have the right and power to override the prohibition of grant of permit under paragraph 1 by means of a referendum among the residents of the Affected area, the cost of the referendum to be paid by the applicant for the pollution control permit.

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ENVIRONMENTAL JUSTICE PROTOCOL

Public Interest Law Center of Philadelphia

Draft 2/8/99

INTRODUCTION

The Public Interest Law Center of Philadelphia (Law Center) herein presents a Draft of an Environmental Justice Protocol for use by the EPA and by State environmental protection agencies to determine whether proposed permit applications are in compliance with the Civil Rights Act of 1964, Title VI and with the goals of environmental justice.

This is a Draft. It is recognized that adjustments will be needed in response to comments and suggestions, all of which are welcome.

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1. No State or local environmental protection agency which receives federal financial assistance shall grant a pollution control permit to construct or operate a new facility or to enlarge an existing facility in any Affected area where the Public Health of the residents is determined to be Substandard; except that such prohibition may be overridden by a referendum of the residents of the Affected area (see paragraph 7).

2. The Affected area of a proposed new facility or of a proposed enlargement of an existing facility shall be the area within a circle of radius _____(Distance) except that the radius shall be increased so that the Affected area contains a minimum of (_____) residents. The center of the circle shall be the center of the property owned or leased by the permit applicant for the operation of the proposed facility.

3. The Public Health of residents of a geographical area shall be determined from the records of state or local health departments for the five (5) year period preceding the time of the permit application and the most recent records published by the U.S. Census Bureau.

4. The following factors shall be used to determine the Public Health of residents of any geographical area:

a. Age adjusted mortality rates per 100,000 population;

b. Age adjusted cancer mortality rates per 100,000 population

c. Infant mortality rates per 1000 live births

d. Low Baby Birth Weight Rate (under 2500 grams) per 1000 live births

5. Standard Public Health shall be determined from the health factors for the population of the entire state or county in which the Affected area exists.

6. The Affected area shall be deemed to have Substandard Public Health when there is a deviation of at least (___ %) in (each, all) of the health factors in the Affected area as compared to the Standard Public Health.

7. Residents of an Affected area determined to be a Substandard Public Health area shall have the right to override a permit prohibition by a referendum, paid for by the permit applicant.

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Responsible Care®

Appendix I: Materials on CMA
Responsible Care Program

Guiding Principles

These statements of the philosophy of Responsible Care® outline each CMA member and Partners commitment to environmental, health and safety responsibility in managing chemicals. Members and Partners pledge to manage their businesses according to these principles:

- To recognize and respond to community concerns about chemicals and our operations.
- To develop and produce chemicals that can be manufactured, transported, used and disposed of safely.
- To make health, safety and environmental considerations a priority in our planning for all existing and new products and processes
- To report promptly to officials, employees, customers and the public, information on chemical-related health or environmental hazards and to recommend protective measures.
- To counsel customers on the safe use, transportation and disposal of chemical products.
- To operate our plants and facilities in a manner that protects the environment and the health and safety of our employees and the public.
- To extend knowledge by conducting or supporting research on the health, safety and environmental effects of our products, processes and waste materials
- To work with others to resolve problems created by past handling and disposal of hazardous substances.
- To participate with government and others in creating responsible laws, regulations and standards to safeguard the community, workplace and environment.
- To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport or dispose of chemicals.

10 Elements of Responsible Care®

Guiding Principles

These statements of the philosophy of Responsible Care® outline each CMA member and Partner's commitment to environmental, health and safety responsibility in managing chemicals. Members and Partners pledge to manage their businesses according to these principles.

Codes of Management Practices

At the heart of the Responsible Care® initiative are the six Codes of Management Practices. The Codes focus on management practices in specific areas of chemical operations. Members and Partners must make continuous progress in attaining the goals of each Code.

- The Community Awareness and Emergency Response (CAER) Code promotes emergency response planning and calls for ongoing dialogue with local communities;
- The Pollution Prevention Code commits industry to the safe management and reduction of wastes;
- The Process Safety Code is designed to prevent fires, explosions and accidental chemical releases;
- The Distribution Code focuses on reducing employee and public risks from the shipment of chemicals and applies to the transportation, storage, handling, transfer and repackaging of chemicals;
- The Employee Health and Safety Code protects employees and visitors at company sites; and
- The Product Stewardship Code makes health, safety and environmental protection an integral part of designing, manufacturing, marketing, distributing, using, recycling and disposing of products.

Public Advisory Panel

A group of environmental, health and safety thought leaders assists the industry in identifying and developing programs and actions that are responsive to public concerns.

Self-Evaluations

Members and Partners submit reports annually on their progress in implementing each of the Codes. These self-evaluations provide a measure of company progress and are a valuable management tool for CMA and individual companies in directing assistance efforts.

Measures of Performance

Recognizing the need for measurement that goes beyond self-evaluations, performance measures are being developed for each of the Codes. Through these measures, the industry and the public will gain a better appreciation for the progress CMA members and Partners are making in carrying out Responsible Care®.

Management Systems Verification

The Management Systems Verification process assists members and Partners in their management and implementation of Responsible Care®. The process provides participating companies with an external view of the effectiveness of their management systems for carrying out Responsible Care® and helps demonstrate the integrity of the initiative to key audiences.

Executive Leadership Groups

Senior level support for Responsible Care® continues to be an essential ingredient of the initiative's success. Regular regional meetings provide a forum for senior executives to share experiences and take action on advancing the implementation of Responsible Care®.

Mutual Assistance

Direct company-to-company mutual assistance has surfaced as one of the most effective methods for advancing Responsible Care®. Members and Partners at the executive contact, Responsible Care® Coordinator and practitioner levels regularly share information through the mutual assistance network, often through state chemical associations, which are vital to the success of the network.

Partnership Program

The Partnership Program provides an opportunity for those who otherwise may not be eligible for membership in CMA to participate directly in the Responsible Care® initiative. Companies that take ownership or possession of chemicals and chemical related associations are eligible for membership in the Responsible Care® Partnership Program.

Obligation of Membership

CMA Bylaws obligate member companies to participate in Responsible Care® as defined by the Board. This includes ascribing to the Guiding Principles, participating in the development of the initiative and making good faith efforts to implement the program elements of the Responsible Care® initiative.

Community Awareness and Emergency Response Code Of Management Practices

Purpose

The goal of the Community Awareness and Emergency Response (CAER) Code of Management Practices is to assure emergency preparedness and to foster community right-to-know. It demands a commitment to openness and community dialogue. The Code has two major components: first, to assure that member facilities that manufacture, process, use, distribute or store hazardous materials initiate and maintain a community outreach program to openly communicate relevant, useful information responsive to the public's questions and concerns about safety, health, and the environment; and second, to help protect employees and communities by assuring that each facility has an emergency response program to respond rapidly and effectively to emergencies.

The community outreach component will communicate program activities and performance under all codes of management practices and will promote an open, ongoing dialogue with employees and the community. Information should be provided about such activities as waste minimization, emission reduction, health effects of chemicals, and efforts to ensure the safe transport of chemicals.

The CAER Code of Management Practices is supported by, and will build on, CMA's CAER process. CAER supports the community's right to know about chemical industry operations and their effect on safety, health, and the environment. CAER originally was a voluntary initiative focused on emergency response issues. The new CAER Code of Management Practices broadens the facility-community dialogue to cover the full range of safety, health and environmental issues.

Relationship to Guiding Principles

The Code helps achieve several of the Responsible Care® Guiding Principles:

- To recognize and respond to community concerns about chemicals and our operations.
- To report promptly to officials, employees, customers, and the public, information on chemical-related health or environmental hazards and recommend protective measures.
- To participate with government and others in creating responsible laws, regulations, and standards to safeguard the community, workplace and environment.
- To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport, or dispose of chemicals.

Management Practices

A. Community Awareness and Outreach

Member facilities that manufacture, process, use, distribute or store hazardous materials shall have a community outreach program that includes:

For Employees:

1. An ongoing assessment of employee questions and concerns about the facility.
2. Communications training for key facility and company personnel who communicate with employees and the public concerning safety, health, and environmental issues.
3. Education of employees about the facility's emergency response plan and safety, health, and environmental programs.
4. An ongoing dialogue with employees to respond to their questions and concerns and involve them in community outreach efforts.
5. A regular evaluation of the effectiveness of the ongoing employee communications efforts.

For the Community:

6. An ongoing assessment of community questions and concerns about the facility.
7. An outreach program to educate responders, government officials, the media, other businesses and the community about the facility's emergency response program and risks to the community associated with the facility.
8. A continuing dialogue with local citizens to respond to questions and concerns about safety, health, and the environment, and to address other issues of interest to the community.
9. A policy of openness that provides convenient ways for interested persons to become familiar with the facility, its operations, and products, and its efforts to protect safety, health, and the environment.
10. A regular evaluation of the effectiveness of the ongoing community communications efforts.

B. Emergency Response and Preparedness

Member facilities that manufacture, process, use, distribute or store hazardous materials shall have an emergency response program that includes:

1. An ongoing assessment of potential risks to employees and local communities resulting from accidents or other emergencies.
2. A current, written facility emergency response plan which addresses, among other things, communications and the recovery needs of the community after an emergency.
3. An ongoing training program for those employees who have response or communications responsibilities in the event of an emergency.
4. Emergency exercises, at least annually, to test operability of the written emergency response plan.
5. Communication of relevant and useful emergency response planning information to the Local Emergency Planning Committee.
6. Facility tours for emergency responders to promote emergency preparedness and to provide current knowledge of facility operations.
7. Coordination of the written facility emergency response plan with the comprehensive community emergency response plan and other facilities. If no plan exists, the facility should initiate community efforts to create a plan.
8. Participation in the community emergency response planning process to develop and periodically test the comprehensive community emergency response plan developed by the Local Emergency Planning Committee.
9. Sharing of information and experience relating to emergency response planning, exercises, and the handling of incidents with other facilities in the community.

Approved by CMA's Board of Directors on November 6, 1989.

Pollution Prevention
Code Of Management Practices

Purpose

This Code is designed to achieve ongoing reductions in the amount of all contaminants and pollutants released to the air, water, and land from member company facilities. These reductions are intended to respond to public concerns with the existence of such releases, and to further increase the margin of safety for public health and the environment.

The Code is also designed to achieve ongoing reductions in the amount of wastes generated at facilities. These reductions are intended to help relieve the burden on industry and society of managing such wastes in future years.

In implementing the Code, each company should strive for annual reductions, recognizing that production rates, new operations, and other factors may result in increases. Despite these fluctuations, however, the goal is to establish a long-term, substantial downward trend in the amount of wastes generated and contaminants and pollutants released. Quantitative reduction goals will be established for giving priority to those pollutants, contaminants and wastes of highest health and environmental concern.

This Code also includes practices that address the broader waste management issues beyond source reduction and other waste and release reduction efforts. Each member company must manage remaining wastes and releases in a manner that protects the environment and the health and safety of employees and the public.

This Code complements, and should be implemented in conjunction with current and future Codes of Management Practices. Key terms are defined in the Glossary, which should be consulted for assistance in interpreting the provisions of this Code.

Relationship to Guiding Principles

The Code helps achieve several of the Responsible Care® Guiding Principles:

- To recognize and respond to community concerns about chemicals and our operations.
- To develop and produce chemicals that can be manufactured, transported, used and disposed of safely.
- To make health, safety, and environmental considerations a priority in our planning for all existing and new products and processes.
- To report promptly to officials, employees, customers and the public, information on chemical-related health or environmental hazards and to recommend protective measures.
- To operate our plants and facilities in a manner that protects the environment and the health and safety of our employees and the public.
- To extend knowledge by conducting or supporting research on the health, safety, and environmental effects of our products, processes, and waste materials.
- To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport, or dispose of chemicals.
- To work with others to resolve problems created by past handling and disposal of hazardous substances.
- To participate with government and others in creating responsible laws, regulations and standards to safeguard the community, workplace and environment.
- To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport or dispose of chemicals.

Management Practices

Each member company shall have a pollution prevention program which shall include:

1. A clear commitment by senior management through policy, communications, and resources, to ongoing reductions at each of the company's facilities, in releases to the air, water, and land and in the generation of wastes.
2. A quantitative inventory at each facility of wastes generated and releases to the air, water, and land, measured or estimated at the point of generation or release.
3. Evaluation, sufficient to assist in establishing reduction priorities, of the potential impact of releases on the environment and the health and safety of employees and the public.
4. Education of, and dialogue with, employees and members of the public about the inventory, impact evaluation, and risks to the community.
5. Establishment of priorities, goals and plans for waste and release reduction, taking into account both community concerns and the potential health, safety, and environmental impacts as determined under Practices 3 and 4.
6. Ongoing reduction of wastes and releases, giving preference first to source reduction, second to recycle/reuse, and third to treatment. These techniques may be used separately or in combination with one another.

7. Measurement of progress at each facility in reducing the generation of wastes and in reducing releases to the air, water, and land, by updating the quantitative inventory at least annually.
8. Ongoing dialogue with employees and members of the public regarding waste and release information, progress in achieving reductions, and future plans. This dialogue should be at a personal, face-to-face level, where possible, and should emphasize listening to others and discussing their concerns and ideas.
9. Inclusion of waste and release prevention objectives in research and in design of new or modified facilities, processes, and products.
10. An ongoing program for promotion and support of waste and release reduction by others, which may, for example, include:
    a. Sharing of technical information and experience with customers and suppliers;
    b. Support of efforts to develop improved waste and release reduction techniques;
    c. Assisting in establishment of regional air monitoring networks;
    d. Participation in efforts to develop consensus approaches to the evaluation of environmental, health, and safety impacts of releases;
    e. Providing educational workshops and training materials;
    f. Assisting local governments and others in establishment of waste reduction programs benefiting the general public.
11. Periodic evaluation of waste management practices associated with operations and equipment at each member company facility, taking into account community concerns and health, safety, and environmental impacts and implementation of ongoing improvements.
12. Implementation of a process for selecting, retaining, and reviewing contractors and toll manufacturers taking into account sound waste management practices that protect the environment and the health and safety of employees and the public.
13. Implementation of engineering and operating controls at each member company facility to improve prevention of and early detection of releases that may contaminate groundwater.
14. Implementation of an ongoing program for addressing past operating and waste management practices and for working with others to resolve identified problems at each active or inactive facility owned by a member company taking into account community concerns and health, safety, and environmental impacts.

Glossary of Terms

As used in this Code, key terms are defined as set forth below. Note that these definitions may be broader than regulatory definitions, and that adherence to this Code does not relieve a company of the obligation to meet Federal, state and local regulatory requirements.

Facility - A site used for chemical manufacturing, processing, refining, packaging, R&D, distribution or related commercial activity.

Recycle - A practice which regenerates or processes a material from a process to recover a useable product or material for reuse.

Release - Any emission, effluent, spill, discharge or disposal to the air, land, or water, of any pollutant or contaminant, whether routine or accidental, at or from a facility. The term does not include shipment or distribution of chemical product, nor release to the environment as part of normal and intended use of a product by the consumer.

Reuse - A practice that reemploys a material from a process either as an ingredient in a process to make a product, or as an effective substitute for a commercial product in a particular function or application.

Source Reduction - A practice that reduces the amount of any release or waste generated at the source, including closed loop recycle and reuse before exit from a process. The term includes among other practices: equipment and technology modifications, process and procedures modifications, reformulation and redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training and inventory control.

Treatment - A practice, other than recycle or reuse, that alters the physical, chemical, or biological characteristics or the volume of a waste through a process or activity separate from the production of a commercial product or the provision of a service.

Waste - Any gas, liquid, or solid residual material at a facility, whether hazardous or non hazardous, that is not used further in the production of a commercial product or provision of a service and which itself is not a commercial product.

Approved by CMA's Board of Directors April 6, 1991 and September 5, 1991.

Process Safety
Code Of Management Practices

Purpose

The Process Safety Code is designed to prevent fires, explosions and accidental chemical releases. The Code is comprised of a series of management practices that reflect this goal, with the expectation of continuous performance improvement for each management practice. The practices are based on the principle that facilities will be safe if they are designed according to sound engineering practices, built, operated and maintained properly and periodically reviewed for conformance.

Process safety is an interdisciplinary effort. Consequently, the Code is divided into the following four elements: management leadership, technology, facilities and personnel. Each element is composed of management practices. Individually, each practice describes an activity or approach important to preventing fires, explosions and accidental chemical releases. Collectively, the practices encompass process safety from the design stage through operation, maintenance and training. The scope of this Code includes manufacturing, processing, handling and on-site storage of chemicals. This Code must be implemented with full recognition of the community's interest, expectations and participation in achieving safe operations.

The process safety management program in each facility is complemented by workplace health and safety programs, as well as waste and release reduction programs which address and minimize releases and waste generation. These three programs, and others, will help assure that CMA member facilities are operated in a manner that protects the environment and the health and safety of personnel and the public.

Relationship to Guiding Principles

The Code helps achieve several of the Responsible Care® Guiding Principles:

- To recognize and respond to community concerns about chemicals and our operations.
- To make health, safety and environmental considerations a priority in our planning for all existing and new plants and processes.
- To operate our plants and processes in a manner that protects the environment and the health and safety of our employees and the public.

Management Practices

Each member company shall have an ongoing process safety program that includes:

Management Leadership

1. Leadership by senior management through policy, participation, communications and resource commitments in achieving continuous improvement of performance.
2. Clear accountability for performance against specific goals for continuous improvement.
3. Measurement of performance, audits for compliance and implementation of corrective actions.
4. Investigation, reporting, appropriate corrective action and follow-up of each incident that results or could have resulted in a fire, explosion or accidental chemical release.
5. Sharing of relevant safety knowledge and lessons learned from such incidents with industry, government and the community.
6. Use of the Community Awareness and Emergency Response (CAER) process to assure public comments and concerns are considered in design and implementation of the facility's process safety systems.

Technology

7. Current, complete documentation of process design and operating parameters and procedures.
8. Current, complete documentation of information relating to the hazards of materials and process technology.
9. Periodic assessment and documentation of process hazards, and implementation of actions to minimize risks associated with chemical operations, including the possibility of human error.
10. Management of changes to chemical operations to maintain or enhance the safety originally designed into the facility.

Facilities

11. Consideration and mitigation of the potential safety effects of expansions, modifications and new sites on the community, environment, and employees.
12. Facility design, construction and maintenance using sound engineering practices consistent with recognized codes and standards.

13. Safety reviews on all new and modified facilities during design and prior to start-up.
14. Documented maintenance and inspection programs that ensure facility integrity.
15. Sufficient layers of protection through technology, facilities and employees to prevent escalation from a single failure to a catastrophic event.
16. Provision for control of processes and equipment during emergencies resulting from natural events, utility disruptions and other external conditions.

Personnel

17. Identification of the skills and knowledge necessary to perform each job.
18. Establishment of procedures and work practices for safe operating and maintenance activities.
19. Training for all employees to reach and maintain proficiency in safe work practices and the skills and knowledge necessary to perform their job.
20. Demonstrations and documentation of skill proficiency prior to assignment to independent work, and periodically thereafter.
21. Programs designed to assure that employees in safety critical jobs are fit for duty and are not compromised by external influences, including alcohol and drug abuse
22. Provisions that contractors either have programs for their own employees consistent with applicable sections of this Code or be included in the member company's program, or some combination of the two.

Glossary

This Code uses key terms in a context that may be broader than their associated regulatory definitions. However, adherence to this Code does not relieve a company of the obligation to meet Federal, state and local regulatory requirements.

Process Safety - The application of management and engineering principles to prevent fires, explosions and accidental chemical releases at chemical process facilities.

Sound Engineering Practice - The application of mandatory codes and standards supplemented by the use of voluntary codes, standards and guidelines, tempered by professional judgment.

Safety Critical Jobs - Jobs, activities and tasks, if improperly performed, that have the potential to significantly increase the risk of a fire, explosion or accidental chemical release.

Accidental Chemical Release - Unplanned, sudden releases of chemicals from manufacturing, processing, handling and on site storage facilities to the air, water or land. It does not include permitted or other releases

Approved by CMA's Board of Directors on September 11, 1990.

Distribution
Code of Management Practices

Purpose

The purpose of the Distribution Code of Management Practices is to reduce the risk of harm posed by the distribution of chemicals to the general public; to carrier, distributor, contractor and chemical industry employees; and to the environment. Adherence to the Code will lead to continually safer chemical distribution and help member companies to:

- evaluate the risks associated with chemical distribution and methods to reduce those risks;
- meet or exceed all regulations and industry standards governing chemical distribution;
- provide emergency advice and/or assistance to people on the scene in the event of a chemical distribution emergency;
- develop new technologies and methods to improve chemical distribution safety

The Code will also promote improvements in:

- employee preparedness and awareness in preventing distribution emergencies;
- the safety performance of carriers and other providers of distribution services;
- the public's preparedness in responding to chemical distribution emergencies;
- the public's understanding of, and confidence in, industry efforts to improve chemical distribution safety.

The Distribution Code of Management Practices applies to all modes of transportation (highway, rail, marine, air and pipeline) and to the shipment of all chemicals, including chemical waste. The Code also applies to distribution activities (storage, handling, transfer and repackaging) while chemicals are in transit between member companies and their suppliers and customers. The implementation of a number of practices of the Code will vary according to the characteristics of the chemical being distributed, the mode of transportation and the type of distribution activity involved.

Relationship to Guiding Principles

The Code helps achieve several Responsible Care® Guiding Principles:

- To recognize and respond to community concerns about chemicals and our operations.
- To make health, safety and environmental considerations a priority in our planning for all existing and new products and processes.
- To counsel customers on the safe use, transportation, and disposal of chemicals.
- To operate our plants and facilities in a manner that protects the environment and the health and safety of our employees and the public.
- To participate with government and others in creating responsible laws, regulations and standards to safeguard the community, workplace and environment.
- To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport or dispose of chemicals.

Management Practices

Each member company shall have an ongoing chemical distribution safety program that includes senior management commitment through policy, communications and resources to improvements in chemical distribution safety. The program should include the following elements:

1. Risk Management
   - 1.1 Regular evaluations of chemical distribution risks which consider the hazards of the material, the likelihood of accidents/incidents and the potential for human and environmental exposure from release of the material over the route of transport.
   - 1.2 Implementation of chemical distribution risk reduction measures that are appropriate to the risk level.
   - 1.3 Internal reporting and investigation of chemical distribution accidents/incidents, and implementation of preventive measures.
2. Compliance Review and Training
   - 2.1 A process for monitoring changes and interpretations of new and existing regulations and industry standards for their applicability to the company's chemical distribution activities, and for implementing those regulations and standards.
   - 2.2 Training for all affected company employees in the proper implementation of applicable regulations and company requirements.

2.3 A program for providing guidance and information to carriers, distributors and contractors who perform distribution activities for the company on the company's training and compliance requirements for the activities.

2.4 Regular reviews of company employee, carrier, distributor and contractor compliance with applicable regulations and company requirements.

3. Carrier Safety

3.1 A process for qualifying carriers of all modes and types (common, contract, private and customer controlled) that transport chemicals to and from company facilities that emphasizes carrier safety fitness and regulatory compliance, and includes regular reviews of their performance and compliance.

3.2 Feedback to carriers on their safety performance and suggestions for improvement.

4. Handling and Storage

4.1 Documented procedures for the selection and use of containers that are appropriate for the chemical being shipped, in compliance with testing and certification requirements, and free of leaks and visible defects.

4.2 Documented procedures for loading chemicals at company facilities that will reduce emissions to the environment, protect personnel and provide securement of the lading during transit.

4.3 Documented procedures for unloading chemicals at the company's facilities that will reduce emissions to the environment, protect personnel, and provide for safe unloading into proper storage facilities.

4.4 Defined criteria for the cleaning and return of tank cars, tank trucks, marine vessels, and returnable/refillable bulk and semi-bulk containers, and for the proper disposal of cleaning residues.

4.5 A program for providing guidance and information to customers, distributors, and other receivers on proper procedures for unloading and storing the company's chemicals.

4.6 A process for selecting distributors and other facilities that store or handle the company's chemicals in transit that emphasizes safety fitness and regulatory compliance and includes regular reviews of their performance and compliance.

4.7 Feedback to distributors and operators of other facilities that store or handle chemicals in transit on their safety performance and suggestions for improvement.

5. Emergency Preparedness

5.1 A process for responding to chemical distribution accidents/incidents involving the company's chemicals.

5.2 Documented procedures for making information about the company's chemicals in distribution available to response agencies.

5.3 A program for making facilities and/or training materials available to emergency response agencies.

5.4 Dialogue with state and local emergency planning organizations on the distribution and hazards of the company's chemicals to improve community preparedness to respond to chemical distribution emergencies.

5.5 Dialogue with the public on their concerns about chemical distribution safety, actions taken by the industry and the company to improve the safety of chemical distribution, and the effectiveness of emergency preparedness and emergency response assistance.

Approved by CMA's Board of Directors on November 1, 1990.

Employee Health and Safety Code of Management Practices

Purpose

The goal of the Employee Health and Safety Code of Management Practices is to protect and promote the health and safety of people working at or visiting member company work sites.

To achieve this goal, the Code provides management practices designed to continuously improve work site health and safety. These practices provide a multidisciplinary means to identify and assess hazards, prevent unsafe acts and conditions, maintain and improve employee health, and foster communication on health and safety issues.

Implementation of the Employee Health and Safety Code, together with other Codes of Management Practices, can enable member companies to operate in a manner that further protects and promotes the health and safety of employees, contractors, and the public, and protects the environment.

Relationship to Guiding Principles

The Code helps achieve several of the Responsible Care® Guiding Principles:

- To recognize and respond to community concerns about chemicals and our operations.
- To make health, safety, and environmental considerations a priority in our planning for all existing and new products and processes.
- To operate our plants and facilities in a manner that protects the environment and the health and safety of our employees and the public.
- To extend knowledge by conducting or supporting research on the health, safety, and environmental effects of our products, processes, and waste materials.

Management Practices

Each member company shall have an ongoing occupational health and safety program that includes:

Program Management

1. Commitment by all levels of management to protecting and promoting the health and safety of people working at or visiting member company work sites, through: published policies; accountability for implementation; and provision of sufficient resources, including qualified health and safety personnel.
2. Opportunities for employees to participate in developing, implementing, and reviewing health and safety programs.
3. Provisions, including selection criteria, to confirm that on-site contractors' programs are consistent with applicable Management Practices of this Code.
4. Written, up-to-date health and safety programs and procedures appropriate to the facility.
5. Means to verify that health and safety programs and procedures are effective and that actual practices are consistent with these programs and procedures.
6. Systems for maintaining records and analyzing data to evaluate health and safety performance, determine trends, and identify areas for improvement.

Identification and Evaluation

7. Methods to identify and evaluate potential health and safety hazards in planned or existing facilities, including facilities to be modified.
8. Exposure assessments and safety analyses to evaluate health and safety hazards to employees from processes; equipment; potentially hazardous chemical, physical, or biological agents; or other work site conditions.
9. Health assessments to determine employee medical fitness for specific job tasks.
10. Employee occupational medical surveillance programs tailored to work site hazards.

Prevention and Control

11. Mechanisms for reviewing the design and modification of facilities and job tasks, taking into account the following hierarchy of controls: inherent safe design, material substitution, engineering controls, administrative controls, and personal protective equipment.
12. Systems to verify that health and safety equipment is properly selected, maintained, and used.
13. Preventive maintenance and housekeeping programs to maintain the safety of facilities, tools, and equipment.
14. Timely investigation of work site illnesses, injuries, and incidents; corrective actions to prevent recurrence; and evaluation of the effectiveness of corrective actions taken.
15. Security procedures and systems to control entry and exit of personnel and materials at the work site and restricted areas.
16. Provisions for emergency medical assistance for people at work sites.

Communications and Training

17. Communication of health and safety information that is relevant to specific job tasks and the work site.
18. Health and safety training programs, including documentation of these programs, and methods to evaluate the effectiveness of both training and communications activities.

Approved by CMA's Board of Directors on January 14, 1992.

Product Stewardship
Code Of Management Practices

Purpose and Scope

The purpose of the Product Stewardship Code of Management Practices is to make health, safety and environmental protection an integral part of designing, manufacturing, marketing, distributing, using, recycling and disposing of our products. The Code provides guidance as well as a means to measure continuous improvement in the practice of product stewardship.

The scope of the Code covers all stages of a product's life. Successful implementation is a shared responsibility. Everyone involved with the product has responsibilities to address society's interest in a healthy environment and in products that can be used safely. All employers are responsible for providing a safe workplace, and all who use and handle products must follow safe and environmentally sound practices.

The Code recognizes that each company must exercise independent judgment and discretion to successfully apply the Code to its products, customers and business.

Relationship to Guiding Principles

The Code helps achieve several of the Responsible Care® Guiding Principles:

- To make health, safety and environmental considerations a priority in our planning for all existing and new products and processes.
- To develop and produce chemicals that can be manufactured, transported, used and disposed of safely.
- To extend knowledge by conducting or supporting research on the health, safety and environmental effects of our products, processes and waste materials.
- To counsel customers on the safe use, transportation and disposal of chemical products.
- To report promptly to officials, employees, customers and the public, information on chemical-related health or environmental hazards and to recommend protective measures.
- To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport or dispose of chemicals.

Management Practices

Each company shall have an ongoing product stewardship process that:

Management Leadership and Commitment

1. **Leadership:** Demonstrates senior management leadership through written policy, active participation and communication.
2. **Accountability and Performance Measurement:** Establishes goals and responsibilities for implementing product stewardship throughout the organization. Measures performance against these goals.
3. **Resources:** Commits resources necessary to implement and maintain product stewardship practices.

Information and Characterization

4. **Health, Safety and Environmental Information:** Establishes and maintains information on health, safety, and environmental hazards and reasonably foreseeable exposures from new and existing products.
5. **Product Risk Characterization:** Characterizes new and existing products with respect to their risk using information about health, safety, and environmental hazards and reasonably foreseeable exposures. Establishes a system that initiates re-evaluation.

Risk Management

6. **Risk Management System:** Establishes a system to identify, document, and implement health, safety and environmental risk-management actions appropriate to the product risk.
7. **Product and Process Design and Improvement:** Establishes and maintains a system that makes health, safety and environmental impacts including the use of energy and natural resources key considerations in designing, developing and improving products and processes.
8. **Employee Education and Product Use Feedback:** Educates and trains employees, based on job function, on the proper handling, recycling, use, and disposal of products and known product uses. Implements a system that encourages employees to feed back information on new uses, identified misuses or adverse effects for use in product risk characterization.

9. **Contract Manufacturers:** Selects contract manufacturers who employ appropriate practices for health, safety and environmental protection for the operations under contract, or works with contract manufacturers to help them implement such practices. Provides information and guidance appropriate to the product and process risk to foster proper handling, use, recycling and disposal. Periodically reviews performance of contract manufacturers.
10. **Suppliers:** Requires suppliers to provide appropriate health, safety and environmental information and guidance on their products. Factors adherence to sound health, safety, and environmental principles, such as those contained in Responsible Care® into procurement decisions.
11. **Distributors:** Provides health, safety and environmental information to distributors. Commensurate with product risk, selects, works with and periodically reviews distributors to foster proper use, handling, recycling, disposal and transmittal of appropriate information to downstream users. When a company identifies improper practices involving a product, it will work with the distributor to improve those practices. If, in the company's independent judgment, improvement is not evident, then the company should take further measures — up to and including termination of the business relationship. This Management Practice should be implemented in conjunction with the Distribution Code of Management Practices.
12. **Customers and Other Direct Product Receivers:** Provides health, safety and environmental information to direct product receivers. Commensurate with product risk, works with them to foster proper use, handling, recycling, disposal, and transmittal of appropriate information to downstream users. When a company identifies improper practices involving a product, it will work with the product receiver to improve those practices. If, in the company's independent judgment, improvement is not evident, then the company should take further measures — up to and including termination of product sale.

Approved by CMA's Board of Directors on April 14, 1992.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT - 5 1998

OFFICE OF
CIVIL RIGHTS

Dear Title VI Implementation Advisory Committee Member,

At the July 1998 meeting, the Title VI Implementation Advisory Committee (Committee) requested EPA's Office of General Counsel (OGC) provide information on relevant case law that might assist you in your work. Attached is the draft case digest prepared by OGC in response to Committee's request. As is noted in the attached transmittal memorandum, the case summaries are provided for information and do not reflect EPA's interpretation of the holdings. I look forward to seeing you in Tucson

Sincerely,

Ann E. Goode

Attachment

Appendix J: EPA Office of General Counsel Summary of Other Civil Rights Precedents

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT - 5 1998

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

TO: Ann E. Goode
Director
Office of Civil Rights

FROM: Mary M. O'Lone
Civil Rights Law Office

SUBJECT: Response to EPA's Title VI Implementation Advisory Committee (Title VI Committee) Request for Legal Research

Attached is a draft of the digest of legal research requested by EPA's Title VI Implementation Advisory Committee (Title VI Committee) from the Office of General Counsel at the Title VI Committee's meeting in Philadelphia in July 1998. The request for information was broad and not limited to Title VI of the Civil Rights Act of 1964 (Title VI) or civil rights case law. Due to time and resource constraints, and the desire to provide information on the topics requested in advance of the October Title VI Committee meeting in Tucson, the research and digesting focused primarily on Title VI case law, then Titles VII, IX and other areas of civil rights law.

As you know, EPA has begun work on a comprehensive and representative Tribal consultation process regarding the applicability of Title VI to Tribes. In an August 31, 1998 letter to Haywood Turrentine, Chairman of EPA's National Environmental Justice Advisory Committee, Kathy Gorospe, the Director of EPA's American Indian Environmental Office, outlines EPA's efforts and plans for the consultation process (attached). Therefore, the digest does not focus on the questions related to Title VI and Native Americans.

The enclosed digest is draft and provided at the request of and as a service to Title VI Committee members to help direct them to cases that might be useful in their work. The case summaries are provided for information only and do not reflect EPA's interpretation of the holdings. The case digest has not been approved by the Department of Justice and should not be cited or quoted for other purposes. The digest does not necessarily represent all case law relevant to each of the questions asked nor concerning each of the identified areas of law. Should Title VI Committee

members know of other cases that they believe EPA should be aware of, they should be encouraged to contact me at (202) 260-1487.

Attachments (2)

cc: Scott Fulton
Acting General Counsel

Rafael DeLeon
Acting Associate General Counsel
Civil Rights Law Office

Response to EPA's Title VI Implementation Advisory Committee Request for Legal Research

DISPARATE IMPACT

A. What constitutes "disparity"; how much must the difference be?

Title VI

Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996). Court rejected Plaintiffs' Title VI disparate impact claim that the opening of a non-traditional school to address the needs of "at risk" and minority students disparately impacted Hispanic students, on the ground that there was no disparate effect. The experimental school's enrollment was approximately 50% Hispanic "compared with approximately the same proportion of students" in the school district.

New York Urban League v. New York, 71 F.3d 1031 (2d Cir. 1995). The Metropolitan Transit Authority (MTA) operates New York City's bus and subway, and commuter rail systems. The bus and subway systems carry 1.5 billion passengers per year and the rail system carries 135 million passengers per year (the court did not break that down any further). MTA proposed to increase bus and subway fares by 20%. Plaintiffs alleged that bus and subway riders, who were predominantly minorities, paid a higher percentage of the cost of operating that system (i.e., "farebox recovery ratio"), than did commuter rail users, who were predominantly white. The court held, in part, that the farebox recovery ratio is not a sufficient basis for a finding of disparate impact, thereby reversing the district court's preliminary injunction. The two transit systems are so fundamentally different in terms of operating schedules, maintenance, subsidies, etc., that the court felt comparisons of farebox recovery ratios were not meaningful.

Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995). The Older Americans Act (OAA), 42 U.S.C. 3001-3058ee, directed the federal government to distribute funds to the states in order to provide services to "older individuals" (i.e., over 60 years of age). The State of Illinois developed a formula to allocate its money among the local jurisdictions. That formula considered, among other things, the number of older individuals who are members of minority groups, who live in rural areas, and who are at least 75 years of age. The City of Chicago claimed that the latter two factors discriminated against minorities because older individuals living in rural areas are 98% non-minority and 13.7% of the state's older individuals are minorities, but only 10.7% of them are over 75.

The court concluded that no disparate impact existed, affirming the district court's summary judgment against plaintiffs on Title VI. The court found that Chicago actually received a disproportionately large share of the OAA money because Illinois' formula provides additional distributions for minority areas like Chicago. Moreover, even if Illinois' formula had not lead to a favorable result for Chicago, Title VII precedent does not indicate a disparate impact here. In Connecticut v. Teal, 457 U.S. 440, 450-51 (1982), the Supreme Court found that use of a test to

screen out candidates for promotion caused a disparate impact on minorities because it created a "discriminatory bar to opportunities," notwithstanding the fact that a higher percentage of black employees ultimately received promotions. In this case, Illinois' formula benefitted minorities by including an explicit factor for minorities and it never deprived minorities of any opportunity for benefits.

Larry P. ex rel. Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1984). In the mid-1960s, the state of California established a program for students with educational problems. Students were placed in various parts of the program on the basis of I.Q. tests. Plaintiffs alleged that the program discriminated against black students as evidenced by the disproportionately high percentage of blacks in the "educable mentally retarded" (EMR) program. Students classified as EMR would not return to the schools' mainstream program. The court agreed with plaintiffs on the basis of the statistical data. Specifically, the court noted that black students comprised about 9% of the state school population, but they accounted for 27% of the EMR population, and that the likelihood of a color-blind system leading to such a result was one-in-a-million. Id. at 973. Ultimately, the court found the state in violation of Title VI. Id. at 983.

NAACP (Georgia State Conference) v. Georgia, 775 F.2d 1403 (11th Cir. 1985). Plaintiffs, 35 black schoolchildren, allege that the use of achievement grouping in Georgia public schools was intended to achieve or resulted in segregation. The court did not reach the district court's analysis of disparity and instead affirmed the district court's conclusion that sufficient justification existed. Id. at 1417. The court did, however, note, "[T]he elements of a disparate impact claim [under Title VI] may be gleaned by reference to cases decided under Title VII, 42 U.S.C. § 2000e et seq." Id.

Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 121 (S.D. Ohio 1984). Plaintiffs alleged that the city of Columbus, the state of Ohio, and the federal government failed to assess the disproportionate impact on minorities caused by the extension of a highway. The court felt that plaintiffs had established that the construction would have a disparate impact on minorities for the following reasons: (1) the highway would be built through neighborhoods with 50-90% minority populations; (2) nearly 75% of the people displaced by the construction would be minorities; and (3) the disruptions and negative impacts caused by construction and operation of the highway would fall primarily on minority neighborhoods. Id. at 127. The court, however, ultimately found that defendants justified the location of the highway for nondiscriminatory reasons. Id. at 127-29.

Title VII

Watson v. Ft. Worth Bank & Trust, 487 U.S. 997, 101 L. Ed. 2d 827 (1988). The Court established the general principle that the statistical disparity must be sufficiently substantial that it raises an inference that the allegedly discriminatory act caused the alleged detrimental effect on members of a protected group because of their membership in that group. The Court refused to

set a rigid mathematical formula for determining a discriminatory disparity and held that case-by case determination of substantial significance is appropriate with consideration of all surrounding facts and circumstances. The Court recognized that Courts of Appeals have sometimes used the mathematical "Standard deviation" (S/D) analysis (explained in case summary of *Ottaviani, infra*) as guidance in applying this general principle to specific cases. However, the Court emphasized that neither this formula, nor any alternative formula can be determinative in establishing a sufficiently substantial disparity to raise an inference of discrimination and make out a *prima facie* case of disparate impact based on the disparity alone.

Standard Deviation Analysis ("S/D")

Casteneda v. Partida, 430 U.S. 482, 496 n.17, 51 L. Ed. 2d 498 (1977). (Jury selection case which courts have applied in Title VII context.) The Court recognized that for a large sample, where the actual selection rate for the protected group is greater than 2-3 S/Ds from the expected rate, the selection procedure is suspect. For a 11-year period, 870 Mexican-American residents were summoned for jury duty in a Mexican-American population of at least 120,766. Statistical disparities between white residents summoned and Mexican-American residents summoned which ranged from 12 S/Ds to 29 S/Ds was sufficiently substantial to establish a *prima facie* case of discrimination.

Hazelwood School Dist. v. U.S., 433 U.S. 299, 309-311, 53 L.Ed. 768, 778-79 (1977). Court recognized that the standard deviation analysis is useful as a method for interpreting statistical evidence in employment discrimination cases. First, the Court examined statistics comparing the numbers of teachers on Hazelwood's staff for two school years with the numbers of qualified black teachers in the relevant labor market. By the end of the 1972-73 school year, 16 of 1107 staff teachers were black, and at the end of the 1973-74 school year 22 of 1231 staff teachers were black. There were 19,000 qualified teachers in the St. Louis area's workforce, 15.4% of whom were black. Hazelwood contended that statistics concerning the racial composition of qualified teachers in city of St. Louis should be excluded from the relevant labor market resulting in a market which was only 5.7% black. (The Court adopted the 5.7% figure *arguendo*.) In analyzing these statistics, the Court recognized the *Castanenda* "greater than two or three standard deviations" rule for statistical significance and found that differences between the expected and actual number of black teachers on staff in the Hazelwood School district given the percentage of qualified black teachers in the relevant labor market for 1972-73 school year of more than 6 S/Ds and for 1973-74 school year of more than 5 S/Ds were "on their face substantial."

Secondly, the Court examined statistics which compared the percentage of black teachers hired of the total number of teachers hired in the two school years with the percentage of black qualified teachers in the relevant labor market. Of 280 new teachers hired in 1972-73 school year 10 (or 3.52%) were black, and of the 123 new teachers hired in the 1973-74 school year 5 (or 4.1%) were black. Combining the statistics for the two years: of the 405 new teachers hired, 15 or (3.7%) were black. The Court held that if the 5.7% figure for the number of black teachers in

the relevant labor market were used for these statistics (yielding results of less than 2 S/Ds for 1972-73, less than 1 S/D for 1973-74, and less than 2 S/Ds for 1972-74) this statistical evidence would weaken the Government's other proof of discrimination. On the other hand if the 15.4% figure was used (yielding results of more than 5 S/Ds for 1972-73, more than 3 S/D for 1973-74, and more than 6 S/Ds for 1972-74) this statistical evidence would strengthen the Government's other proof of discrimination. The Court remanded the case for consideration of the appropriate comparative figures. (There is no record of the remanded case.)

Ottaviani v. State University of New York at New Paltz, 875 F.2d 365 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). (Disparate treatment case relied upon by some disparate impact cases.) The Second Circuit explained that the standard deviation method is commonly used to calculate whether a statistical disparity raises an inference of discrimination in a disparate treatment case. This method measures the probability that the difference between an actual result and predicted result is random: the greater number of standard deviations between an actual and a predicted result, the less likely that chance alone is the cause of the disparity and the more likely that the disparity is caused by other factors.

A standard deviation of "2" (approximately a .05 probability) means that there is a 1 in 20 chance that the explanation for the difference between actual and predicted result is random and a 19 in 20 chance that the disparity was caused by other factors. A finding of 2-3 S/Ds is approximately one in 384 chance that the result is random. An S/D of 4-5 corresponds to a probability of 1 chance in 15,786 to 1 chance in 1,742,160. [The Court refers to M. Abramowitz & I. Steigan, *Handbook of Mathematical Functions*, National Bureau of Standards, U.S. GPO, Applied Mathematics Series No. 55 (1966) tables 26.1, 26.2 for these calculations] The Court recognized that federal courts have generally held that a showing of more than two standard deviations allows the plaintiff to establish a *prima facie* case of discriminatory treatment based on the statistical disparity alone. Although the Court agreed that a result of 2-3 S/Ds CAN BE highly probative of discriminatory treatment, it refused to establish any minimum threshold of statistical significance mandating a finding that a *prima facie* case has been made.

Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995). Court explained that the standard deviation formula used in Hazelwood School District v. United States was as follows:

NUMBER OF STANDARD DEVIATIONS= O-NP/ $\sqrt{NP(1-P)}$
O= Number of blacks who received a promotion
N=Number of workers who received a promotion
P=Probability of a black being promoted from the relevant population

Waisome v. Port Authority of New York and New Jersey, 948 F.2d 1370 (2d Cir. 1991). Court recognized the rule that a *prima facie* case of disparate impact can be shown either by (1) showing a gross statistical disparity or (2) statistically significant disparity coupled by other evidence of discrimination (does not specify what is a "gross" disparity as opposed to a

"significant" disparity- and does not describe what types of other evidence is acceptable). Court stated "Statistical evidence may be probative where it reveals a disparity so great that it cannot be accounted for by chance." Generally, a finding of 2-3 S/Ds is highly probative of discrimination (citing *Ottaviani*), but there is no minimum threshold which mandates a finding that Title VII is violated. Other considerations are necessary: (1) sample size must be considered (the larger the sample size, the more reliable the statistical disparity is in showing discrimination because when a sample is relatively small, a difference in the status of one or two members of the protected class can determine whether the result is statistically significant), and (2) whether the groups analyzed are the proper groups. In this case, the court found that a standard deviation of 2.68 was statistically significant but did NOT establish a sufficiently substantial disparity because the statistics were of a limited magnitude: if two more black candidates had passed the examination at issue, the statistical result would no longer be significant. Six hundred seventeen persons took the test, 508 of whom were white and 65 of whom were black. Of the 539 persons who passed the test, 455 were white and 50 were black. The white passage rate was 89.57% and the black passage rate was 78.13% Thus the black pass rate was 87.23% of the white pass rate. (The court also used the 80% EEOC rule described on p.12, *infra*, to find no inference of discrimination.)

Emanuel v. Marsh, 897 F.2d 1435, 1442 (8th Cir. 1990), *reh'g denied*, 1990 U. S. App. LEXIS 7869 (8th Cir. 1990). Employer used receipt of performance awards as one factor in promotions. Nine hundred nineteen performance awards were granted. Black employees received 22 or 18.2% of the performance awards granted. However, blacks employees constituted 30.5% of the workforce or 1022 of 4187 total employees, and thus the expected number of awards to be granted to black employees was 55. The actual number of awards granted to black employees differed from the expected number by 4.9 S/Ds. The court found that this disparity was statistically significant and, in light of evidence of past discrimination against the plaintiff, made out a *prima facie* case that use of the performance awards had a disparate impact.

Bridgeport Guardians, Inc v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir.1991), *cert. denied*, 502 U.S. 924 (1991). The Second Circuit stated: "[I]f a given pattern can be expected to occur at least five times in 100 (i.e., once in 20 times [or approximately 2 S/Ds]) it can reasonably be attributed to chance; a pattern of test results that would be expected to occur less often is considered to be statistically significant." Of the 170 persons who took the test, 115 were white, 28 were Hispanic, and 27 were black. Of the 99 persons who passed the test, 78 were white, 13 were Hispanic and 8 were black. The Second Circuit accepted the results of a "Mann-Whitney analysis" (statistical analysis used for small samples which is not explained in the case and which is not specifically cited by more that a few court decisions) of this data which determined that the likelihood of the actual black versus white test results occurring by chance was 1 in 10,000 and the actual Hispanic versus white test results occurring by chance was 2 in 10,000. The Second Circuit held that both results were statistically significant and demonstrate a *prima facie* case of disparate impact.

Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1556 (11th Cir. 1994). Reverse-discrimination case. Eighty-six firemen were hired. Court held that where the difference between the expected and actual percentage of hiring of Hispanics in fire department, given the percentage of age-eligible population was 17.6 S/Ds (the result would occur once in one billion cases by chance), the statistics inferred race-based selection. (Population sample size unavailable.)

Rivera v. City of Wichita Falls, 665 F.2d 531, 536 (5th Cir.1982). Court held that a disparity of 9 S/Ds between the actual and expected passage rates of Mexican-American test-takers was sufficient to raise a compelling inference that language test had a disparate impact on Mexican-Americans since a result of more than 2-3 S/Ds is generally sufficient. Of 422 test takers, 35 were Mexican American and 387 were white. Of the 35 persons who failed, 14 were Mexican American and 21 were white.

Rendon v. AT&T Technologies, 883 F.2d 388 (5th Cir. 1989). The court examined 122 promotions. Court held that a disparity of 2.9 S/Ds between the expected and actual number of promotions of black and Hispanic employees was sufficient evidence of discrimination. Court rejected the Defendant's argument that there must be at least 3 S/D before an inference of discrimination to arise.

Ratios--And Other Common Sense Judgments of Sufficient Substantiality

(Most of the ratios included below were calculated by Schlei and Grossman (designated by "S&G") in the treatise, *Employment Discrimination Law*, Second Ed. at p. 99 (1976). This treatise is repeatedly cited by court opinions and law review articles. The ratios were computed according to the following formula:

S1/S2 = Selection Ratios where X/NP= S1 and Y/P= S2

X= Total number of non-protected persons selected
NP= Total number of non-protected persons in the pool
S1= Percentage of non-protected persons selected
Y= Total number of protected persons selected
P= Total number of protected persons in the pool
S2= Percentage of protected persons selected

Dothard v. Rawlinson, 433 U.S. 321 (1977). Alabama's minimum height and weight requirements for hire of correctional counselors had an actionable disparate impact on women where: (a) the height requirement excluded 33.29% of the women in the U.S., but only excluded 1.28% of the men in the U.S.; (b) the weight requirement excluded 22.29% of women and only 2.35% of men; and (c) only 58.87% of the women in the U.S. met both the height and the weight requirements while 99% of the males in the U.S. met both requirements.

Griggs v. Duke Power Co., 401 U.S. 425 (1971). Court addressed employer's requirement of high school degree and passage of general intelligence test as conditions of hire and transfer. Court held that where 32% of white males in state had completed high school while only 12% of black males in state had completed high school, the high school diploma requirement had a sufficiently substantial disparate impact on blacks. Court also held that where 58% of whites passed the general intelligence test while only 6% of blacks passed the test, the requirement of a passing score had a sufficiently substantial disparate impact on blacks. (Sample size is not available.)

Chance v. Board of Examiners of the City of New York, 458 F.2d 1167, 1171-73 (2d Cir. 1972). From a survey of 6000 applicants who took a supervisory school licensing test, where the test passage rate of non-protected group was 1.5 times the passage rate of the protected group, a sufficiently substantial disparity was shown. S&G noted that this may be the lowest disparity held to constitute the required "sufficiently substantial"disparity for a *prima facie* disparate impact case. See *Employment Discrimination Law*, Second Ed. at p. 99.

Fraiser v. Garrison ISD, 980 F.2d 1514 (5th Cir. 1993). Court held that a difference of 4.5% in the teacher competency passage rates of blacks vs. whites was not a sufficiently substantial disparity to make out a *prima facie* case. (Sample and pool sizes are unavailable.)

Bunch v. Bullard, 795 F.2d 384, 395 (5th Cir. 1986). Court found sufficiently substantial disparity where 12 of 14 white test-takers passed test while only 3 of 13 black test-takers passed the test. No other evidence of discrimination was presented. The court explained that although the S/D analysis is often helpful as a measure of disparate impact, it is not the only measure, especially where, as in this case, sample sizes are too small to subject to S/D analysis.

Bushey v. New York State Civil Service Commission, 733 F.2d 220, 225-26 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985). Court held that where a test passage rate of non-minority group was twice the passage rate of the minority group, the required "sufficiently substantial"disparity was shown. Of the 275 total test takers, 243 were non-minority and 32 were minority. Of the 127 test takers who passed, 119 were non-minority and 8 were minority.

Craig v. County of Los Angeles, 626 F.2d 659, 661-62 (9th Cir.1981), cert. denied, 450 U.S. 919 (1981). Court found that the following statistics constituted a sufficiently substantial disparity to make out a *prima facie* case: For one hiring test, 45% of the Mexican-Americans who took the test failed while only 23% of whites failed. For a second test, 33% of Mexican-Americans failed while only 13% of whites failed. (Sample and pool sizes are unavailable.)

United States v. County of Fairfax, 629 F.2d 932 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). Court found a sufficiently substantial disparity where passage ratios (all S&G) for several tests were:

1.77:1-- Of 624 test takers, 422 of 544 whites passed (77.6%), and 35 of 80 blacks passed (43.8%)

1.84:1--Of 174 test takers, 153 of 166 whites passed (92.2%), and 4 of 8 blacks passed (50%)

1.28:1--Of 460 test takers, 264 of 325 whites passed (81.2%), and 85 of 135 blacks passed (63 %)

1.67:1--Of 1274 test takers, 300 of 324 whites passed (92.6%), and 525 of 950 blacks passed (55.3%)

7.49:1--Of 360 test takers, 184 of 346 whites passed (53.2%), and 1 of 14 blacks passed (7.1%)

However, the court remanded for consideration of the Defendant's "bottom line defense." [It is unclear whether the court would have considered the 1.28:1 ratio to be sufficiently substantial if it were considered separately from the other greater disparities.]

Moore v. Southwestern Bell Tel. Co., 593 F.2d 607, 608, n.1, 2 (5th Cir. 1979). A test passage rate differential of 7.1% (S&G's ratio of 1.08:1) was not sufficiently substantial disparity. Of the 746 persons taking the test, 469 were white and 277 were black. Of the 701 persons who passed the test, 453 (or 96.6%) were white and 248(or 89.5%) were black.

Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 510 n.4 (8th Cir. 1977), *cert. denied*, 434 U.S. 819 (1977). Firefighter exam passage ratio (S&G) of 1.71:1 was sufficiently substantial disparity. Twenty-five and one half percent of blacks taking test passed, and 43.65% of whites taking test passed. (Sample size is unavailable.)

United States v. City of Chicago, 549 F.2d 415,429 (1977), *cert. denied*, 434 U.S. 875 (1977). Potential promotion ratios (S&G) of 2:1 and 3.17:1 were sufficiently substantial disparities. Of 6555 persons who took patrolman's exam, 1298 were black or Hispanic and 5257 were not. Of the 1918 patrolman who passed the test only 400 had a realistic chance of promotion, 29 of whom were black or Hispanic (2.23% of the 1298 who passed) and 371 of whom were white. Only 1.77% of the blacks who passed the test had a realistic chance of promotion.

Watkins v. Scott Paper Co., 530 F.2d 1159, 1186 (1976), *cert. denied*, 429 U.S. 861 (1976). Hiring test passage ratio (S&G) of 1.37:1 was not sufficiently substantial disparity. Of the 68 test takers, 7 were black and 61 were white. Of the 26 persons who passed, 2 were black (or 28.6% of the blacks taking the test) while 24 were white (39.6% of the whites taking the test). Court also stated that even if disparity was larger, the sample size was too small for the statistics to have meaning.

Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1335 (2d Cir. 1975). Court examined policeman's written exam passage rates. Of 644 exam takers, 568 (88.2%) were white and 76 (11.8%) were black or Hispanic. Of the 342 test takers who passed, 329 (58%) of the white test takers passed while only 13 (17%) of the black and Hispanic test takers passed. Thus the passing rate for white test takers was 3.5 times the passing rate for black and Hispanic test takers. Court held that this disparity was sufficiently substantial.

Smith v. Troyan, 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976). Hiring ratio (S&G) of 1.14:1 was not sufficiently substantial disparity. Thirty-three percent of the applications received were from blacks and 29% of hirees (7 of 24) were black. (Total number of applicants is not available.)

Douglas v. Hampton, 512 F.2d 976, 982 (D.C. Cir. 1975). Test passage ratios (S&G) of 4.85:1 and 5.1:1 were both sufficiently substantial disparities. In colleges which were 95% black, the test passage rate was 12.4% as compared to a 60.2% passage rate for schools which were 95% white. In colleges which were 99% black, the test passage rate was 11.5% as compared to a 57.8% passage rate for schools which were 99% white. Sample size: 50,000 students.

Yuhas v. Libby Owens Ford Co., 562 F.2d 496 (7th Cir. 1972), *cert. denied*, 435 U.S. 934 (1978). Court found that no-spouse hire rule caused sufficiently substantial disparity where 71 of 74 applicants who were disqualified by the rule were female.

Castro v. Beecher, 459 F.2d 725, 735 (1st Cir 1972). Of 80 black applicants who took policeman civil service exam, only 20 (or 25%) passed. Only 10% of the Spanish-surnamed applicants passed, and 65% of all other applicants passed. Court held that this result showed a sufficiently substantial disparity.

"Inexorable Zero"

International Brotherhood of Teamsters v. US, 431 U.S. 324, 342 n.23 (1977). Evidence that no member of a protected class were hired by an employer in a population containing a sizable number of the members of the protected class is highly probative of discrimination. This statistical result is known as the "inexorable zero."

NAACP v. Town of East Haven, 70 F.3d 219 (2d Cir. 1995). Second Circuit found that where a town with sizable black population had never hired a black full time employee, a high probability of discrimination existed.

EEOC v. Steamship Clerks Union Local 1066, 48 F.3d 594, 605 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995). Union policy, which required that new applicants be sponsored by an existing union member sponsor new applicants, caused sufficiently substantial disparate impact where no black or Hispanics had been granted union membership while the local labor force was 21% black and 6% Hispanic.

EEOC v. O & G Spring Wine Farms, 38 F.3d 872, 878 (7th Cir. 1994), *cert denied*, 131 L. Ed. 2d 148 (1994). Court held that the defendant could not overcome the inference of discrimination established by evidence showing that it had no black employees despite the fact that applicant pool was 20% black.

Newark Branch of NAACP v. Harrison, 940 F.2d 792 (3d Cir.1991). Where police department had no black employees and traditionally hired from a geographic area containing 214,747 black residents, the Eighth Circuit found that a discrimination was at least suggested.

Carter v. Gallagher, 452 F.2d 1167, 1171 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Where no member of the protected groups were employed by a fire department having 535 employees, adverse impact was found.

29 U.S.C. 1607 (4D) Standard

Some cases use the EEOC Uniform Guidelines on Employment Selection Procedures as a "rule of thumb" in determining whether a disparity is significantly substantial to raise an inference of discrimination. See *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 997, 995 n.3 (1988), and authority cited therein. The Guidelines provide that discrimination will generally be inferred where, assuming a sufficiently large sample, the members of a protected group are selected at less than 4/5 or 80% of the rate of selection of members of the group with the highest selection rate. (EEOC 80% or 4/5 rule.) Conversely, discrimination will generally not be inferred where the members of a protected group are selected at more than 4/5 or 80%, although smaller differentials may infer adverse impact where they are significant in statistical and practical terms. See *Waisome*, 948 F.2d 1370, 1376 (2d Cir. 1991) (evidence that pass rate of black candidates was more than 4/5 of the pass rate of white candidates is "highly persuasive proof" that the adverse impact was not substantial and did not support finding of disparate impact). This 80% formula has been criticized on technical grounds, as noted in *Watson* (487 U.S. at 997, 995 n.3 and authority cited therein).

Other Considerations

Bazemore v. Friday, 478 U.S. 385, 400 n.9 (1986). The Court found that to be probative of discrimination, a plaintiff's statistics need not take into account all of the measurable variables, but only those major factors that are potentially responsible for any disparity.

Mozee v. American Commercial Marine Service Co., 940 F.2d 1036, 1037 (7th Cir. 1991), *cert. denied*, 506 U.S. 872 (1992). Court found that a hiring rate of whites that was six times the hiring rate of blacks was statistically significant. But the court noted that even where the disparity is statistically significant, the court must take into account variables that one might expect would account for the disparity.

Coates v. Johnson & Johnson, 756 F.2d 524, 532-33 (7th Cir. 1985). The court found that to be probative of discrimination, a plaintiff's statistics must account for the most common non-discriminatory explanations for any disparity.

Thomas v. Metroflight, 814 F.2d 1506, 1509 (10th Cir. 1987). Where "no-spouse" hiring rule was only enforced in two instances, and in both instances a female was excluded from hiring process, this statistical evidence alone was insufficient to establish a *prima facie* case of disparate impact because "a sample of 2 is too small to make even 100% impact rate significant."

Harper v. TWA, 525 F.2d 409 (8th Cir. 1975). Evidence that 4 of 5 applicants rejected because of no-spouse rule were female was inadequate without other evidence to show disparate impact of rule on females because sample size was too small.

Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975). Court held that sample size of 7 was too small to yield a significant statistical disparity.

Morita v. Southern California Permanente Medical Group, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977). Court held that sample size of 8 persons who received promotions was too small to yield a significant statistical disparity in promotions even where only one of the eight was black.

Drake v. City of Ft. Collins, 927 F.2d 1156, 1161 (10th Cir. 1991). Court held that sample of one is too small to yield a significant statistical disparity.

Title VIII

Edwards v. Johnston Cnty. Health Dep't, 885 F.2d 1215 (4th Cir. 1989). The Johnston County Health Department (JCHD) issued permits to operate housing facilities for migrant farm workers, 90% of whom are minorities in Johnston County (the number of workers in the county is not mentioned). Owners of two farms received permits from JCHD, but their facilities failed to satisfy JCHD's standards. Plaintiffs, six black migrant farm workers, alleged violations of Title VIII, the Fair Housing Act of 1968, by JCHD for issuing permits to substandard facilities. To determine whether minorities suffered a greater adverse impact, the court looked at "whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied." Id. at 1223 (citation omitted). Plaintiffs had to prove that JCHD's actions affected minorities to a greater degree than white. Id. For example, if JCHD approved substandard housing for minorities, but not for whites, the court would have found their argument compelling. Id. at 1224. Plaintiffs, however, were only able to show a "statistical imbalance" (court did not define that term), which the court found to be inadequate and, therefore, they upheld the district court's dismissal of plaintiffs' claims. Id. at 1223. The court's opinion did not delve into statistics other than to note that more minorities than whites would be affected by the living conditions simply because 90% of migrant farm workers were minorities.

Title IX

Cohen v. Brown University, 991 F.2d 888, 894 (1st Cir. 1993). Court held that, in athletic discrimination suits, a Title IX violation may not be found solely on the basis of a disparity between the gender composition of the institution's student body on the one hand and the gender composition of those students actively participating in athletics on the other. Statistical evidence must be accompanied by further evidence of discrimination such as unmet need amongst the members of the disadvantaged gender. However, the court held that there is no Title IX disparity when an institution distributes athletic opportunities in numbers which are "substantially proportionate" to the gender composition of the student body-- substantial proportionality provides a "safe harbor" for schools. In this case, the court found that an 11.6% disparity (females had 36.6% of the athletic opportunities, but comprised 48% of the student body) "did not even approach" the substantially proportionate threshold. No sample size is given for the student body. Before the University cut four varsity teams (the act challenged in the case), there were 328 females participating in varsity sports and 566 males participating in varsity sports at the University. The court did not specify the number of male and female students who participated in varsity sports after the four teams were cut, but found that the relative percentages of participation did not change significantly.

Pederson v. LSU, 912 F. Supp. 892 (M.D. La. 1996). Court expressly disagreed with *Cohen* in holding that there is no "safe harbor" for schools which distributes athletic opportunities in "substantially proportionality" to the gender composition of the student body. Even where a school's athletic program is precisely proportionate, it could still violate Title IX if it disparately accommodates the desire and abilities for athletic opportunity between the two genders. In this case, 51% of student body was male while 71% of LSU's athletic participants were male. This evidence in combination with evidence showing that LSU was not accommodating at least those females who wanted to play collegiate softball, suggested that LSU had violated Title IX. (Sample and pool sizes are unavailable.)

Beasley v. Alabama State University, 966 F. Supp. 1117, 1125 (M.D. Ala. 1997). Court held that plaintiff's allegation of a 32% disparity between numbers of female students who actively participated in athletics and numbers of females enrolled was sufficient to state a claim under Title IX. (Sample and pool sizes are not available.)

Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa. 1993). Court noted that where 37.77% of a university's intercollegiate athletes were female and the university's student body was 55.61% female, the university did not provide substantially proportionate athletic opportunities. (Sample and pool sizes are not available.)

Roberts v. Colorado State University, 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part and reversed on other grounds*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004, 126 L.

Ed. 470 (1993). Court held that a 14.1% average disparity (over a 12-year period) between numbers of female students who actively participated in athletics and numbers of females enrolled was not substantially proportionate. Court also held that three-year disparities of 7.5%, 12.5% and 12.7% demonstrated that athletic opportunities were not substantially proportionate, and that a one-year disparity of 10.6% was not substantially proportionate. (Sample and pool sizes are not available.)

Cook v. Colgate University, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated on other grounds*, 992 F.2d 17 (2d Cir. 1992). Court held that University which spent fifty times the financial support on the men's varsity hockey team that it spent on the women's club hockey team and afforded male athletes other amenities not afforded to female athletes, did not provide equal athletic opportunities under Title IX. Total annual expenditure on male hockey players was $238,561, and total annual expenditure on female hockey players was $4600. Total enrollment was 2690: 1450 or 52% male and 1240 or 47% female.

Sharif By Salahuddin v. New York State Education Department, 709 F. Supp. 345 (S.D.N.Y. 1989). Court found a disparate impact Title IX violation where using SAT scores as sole criteria in awarding scholarships yielded an actual number of female receiving scholarships which differed from the expected number by 15.8 S/Ds for Empire State scholarship and 31.7 S/Ds for Regents scholarship. Court recognized that the level of statistical significance for a disparity was .05 probability (approximately 2 S/Ds). Twenty-five thousand Regent scholarships were awarded in the year studied, and 1000 Empire State Scholarships were awarded. While males were 47% of the scholarship competitors, males received 57% of the Empire State Scholarships and 72% of the Regents Scholarships. (Total number of competitors not given.)

Heffer v. Temple University, 678 F. Supp. 517, 530 (E.D. Pa. 1987). Court held that a genuine issue of fact existed as to whether university that spent $2100 more per male athlete than per female athlete and had a student body which was 50% female while only 1/3 of its athletes were female violated Title IX by not providing substantially proportionate athletic opportunities. (Sample and pool sizes are unavailable.)

Other Analogous Areas of Federal Civil Rights Law

Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979). The Texas Department of Health (TDH) approved a permit for Southwestern Waste Management Corp. to operate a landfill in Houston and neighboring Harris County. The target area, an area roughly conforming to the local school district and City Council district, was 70% minority. Plaintiffs alleged TDH's decision was motivated by racial discrimination in violation of 42 U.S.C. § 1983 and sought a preliminary injunction. In order to prevail, the court noted that plaintiffs had to show that TDH's decision "is attributable to an intent to discriminate on the basis of race." Id. at 677. That can be proven by statistical data or supplemental proof. Id. The court concluded that

plaintiffs had not provided sufficient evidence of discriminatory intent.

First, plaintiffs tried to prove that Southwest's permit was part of a pattern or practice of discrimination by TDH. Supporting data, however, showed that 59% of the sites operating in Houston with TDH permits were located in census tracts with 25% or less minority population. Moreover, in the target area, the only other TDH facility was located in a census tract with less than 10% minorities at the time it opened. Id. at 677-78.

Second, plaintiffs sought to show that TDH's approval constituted discrimination in the context of existing landfills and the history of Southwest's application. Plaintiffs first noted that both of Houston's type I municipal landfills were in the target area. The court, however, felt that the location of two facilities was not statistically significant and that, in any case, the other facility was in a census tract with only 18% minorities. Plaintiffs then indicated that the target area contained 15% of Houston's solid waste sites, but comprised only 7% of its population. The court pointed out that half of those solid waste sites were in census tracts with more than 70% Anglo population. Finally, plaintiffs showed that 68% of Houston's solid waste sites were located in eastern Houston, which is where 62% of the minority population resides. The court looked at the local surroundings of each facility and found that 42% were in minority tracts (i.e., more than 39% minorities) and 58% were in Anglo tracts (i.e., more than 61% Anglos). Id. at 678-80. In the end, the court concluded that the issuance of Southwest's permit was "both unfortunate and insensitive," but that plaintiffs had not established a substantial likelihood of proving intentional racial discrimination. Id. at 680.

B. What constitutes relevant "impact"; must it be kind of impact that is the primary focus of the permitting agency or can it be any impact that would be proximately caused by the facility's operation (i.e., can it extend to social and economic concerns that result from the permitting facility, but are not the authorized basis of the permitting authority's decision whether to grant a permit for the activity)?

Title VI

Allen v. Wright, 468 U.S. 737 (1984). Plaintiff alleged that the IRS's failure to adopt sufficient standards and guidelines to enforce a tax code provision that denied tax-exempt status to racially discriminatory private schools violated Title VI. The Court stated that a diminished ability of minority students to receive an education in a racially integrated school because of the tax exemptions granted to schools that discriminate is a legally cognizable injury while finding that the injury in this case was not "fairly traceable" to the challenged government's conduct. Moreover, the Court commented that stigma caused by racial discrimination "is one of the most serious consequences of discriminatory government action" and is also a legally cognizable injury.

Rozar v. Mullis, 85 F.3d 556 (11th Cir. 1996). The County Board of Laurens County, Georgia voted to construct a new landfill in a "mixed racial neighborhood" by a vote of 3-2, in which the

only black member of the Board voted against the site. A local community association sued the county and state alleging the facility would have a discriminatory impact under Title VI by harming the black residents' property values, health, and welfare. The court upheld the district court's summary judgment for defendants and concluded that plaintiff's claim against the county was time-barred, id. at 562-63, and that plaintiffs failed to produce any evidence of intentional discriminatory conduct by the state. Id. at 564-65.

Grimes ex rel. Grimes v. Cavazos, 786 F. Supp. 1184 (S.D.N.Y. 1992). Plaintiffs, students of the New York City school system, alleged that the City curriculum favored European culture, thereby implying that African-Americans are inferior, which lead to a variety of social problems such as high crime and dropout rates among African-American youth. Plaintiffs claimed the curriculum violated Title VI. The court noted that an action that "singles out and stigmatizes plaintiffs on account of their race" is sufficient to constitute injury for standing. Id. at 1186. The court, however, dismissed the claim because plaintiffs failed to assert intentional discrimination as required under the statute.

Later, in *Grimes ex rel. Grimes v. Sobol*, 832 F. Supp. 704 (S.D.N.Y. 1993), *aff'd*, *Grimes ex rel. Grimes v. Sobol*, 37 F.3d 857 (2d Cir. 1994), plaintiffs amended their earlier complaint to allege that defendant violated DOEd's Title VI regulations. A violation of the regulations occurs when the "criteria or methods of administration" have the effect of discriminating on the basis of race. The court held that the regulations do not encompass curricular content, based on DOEd's conclusion that its own Title VI and IX regulations did not apply to curriculums.

Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996). Court rejected plaintiffs' claim that the closing of two schools and the transferring of the students to various other schools resulted in a disparate impact on Hispanic students. The alleged impact was the deprivation of the high quality education formerly provided by the closed schools and the subjection of the relocated students to overcrowded classrooms and poorer quality education of the transferee schools. The court affirmed the district court's finding, as not clearly erroneous, that there was no adverse effect on the transferred students since (1) the transferee schools had facilities comparable to the closed schools, (2) there was no evidence that the transferee schools would be overcrowded, (3) the transferred students who had participated in a special educational program while at the closed could continue to participate at the tranferee school, and (4) that the closed schools and the transferee schools had similarly high percentages of at-risk and minority students.

Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987). Court reversed district court grant of 12(b)(6) motion on the grounds that, *inter alia*, a private plaintiff had stated a viable disparate impact under the Title VI regulations. The impact alleged was the denial of transitional bilingual educational services caused by the Board of Education's failure to provide proper guidelines for identifying students with limited English proficiency.

Goshen Road Envtl. Action v. U.S. Dep't of Agric., 891 F. Supp. 1126 (E.D.N.C. 1995). The city of Pollocksville constructed a water treatment facility with loans and grants from the Farmers Housing Administration by condemning land belonging mainly to low to moderate income African-Americans. Plaintiffs, who reside adjacent to Pollocksville, alleged that the site was selected for discriminatory reasons. The plaintiffs contend that proximity of the facility to the plaintiffs' homes (less than 500 feet) posed "environmental concerns of possible leaks and other damages." Id. at 1128. The court never reached the merits of this case, but instead, asked for additional briefs on a variety of issues. The case was ultimately affirmed without an opinion. Goshen Road Envtl. Action Team v. U.S. Dep't of Agric., 103 F.3d 117 (4th Cir. 1996).

Title VII (Terms and Conditions of Employment)

Disparate Impact Cases

Garcia v. Spun Steak Co., 998 F.2d 1480, 1484 (9th Cir. 1993), *reh'g en banc* denied, 13 F.3d 296 (1994), *cert. denied*, 512 U.S. 1228 (1994). Ninth Circuit held that a policy must disparately impact members of a protected group with respect to either (1) their opportunities for hiring and promotion or (2) a term, condition, or privilege of employment in order to violate Title VII-- a bare assertion that the policy has harmed members of a protected group is not sufficient even if it disproportionately harms members of the protected group. The plaintiff must prove (a) that the policy has adverse effects, (b) that the impact of the policy is on a term, condition or privilege of employment, (c) that the adverse effects are significant, and (d) that the employee population in general is not affected by the policy.

In this case, the court held that being able to converse with co-workers at work was a privilege of employment and that a English-only rule could have an adverse impact prohibited by Title VII for employees who cannot speak English, but not on bilingual employees. The court also recognized that work environment is a condition of employment, and held that where a policy disparately causes members of the protected group to feel "inferior, isolated, and intimidated" based on their protected characteristic to such a degree that the work environment becomes infused with discrimination, the policy adversely impacts a condition of employment and is actionable under Title VII. However, in this case, the plaintiffs had not shown that the English-only rule caused feelings of severe inferiority, isolation, or intimidation among members of the protected group.

Sherr v. Woodland School Comm'n Council Dist. No. 50, 867 F.2d 974, 983 (7th Cir. 1988). Court held plaintiff could make out a *prima facie* case of disparate impact based on the maternity leave policy of the employer since leave is a term, condition, or privilege of employment.

Wambheim v. J.C. Penney, Inc., 705 F.2d 1492, 1494, (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). Court held that employer's policy of providing medical care coverage to the spouses of employees only if the employee was a head of household (the employee earns more

than 50% of the combined family income) disparately affected female employees (far fewer female employees qualified as a head of household than did male employees) and was actionable under Title VII.

Disparate Treatment Cases

What is an Actionable Adverse Effect

[A showing of an adverse effect caused by intentional discrimination is one element of a disparate treatment case. The definition of "adverse effect" (as described in the following disparate treatment cases) is useful in disparate impact cases because it is this same adverse effect which may be addressed by the disparate impact theory if caused by a facially neutral policy, and if disparately borne by a protected group.]

Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1985). Court held that in order for sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Lederberger v. Stangler, 122 F.3d 1142 (8th Cir. 1997). Court held that in order to constitute an actionable adverse employment action, the action must have a material (as opposed to a tangential) adverse impact on a term, condition, or privilege of employment. Here, employer's action of reassigning employee's staff, which allegedly caused employee a loss of status and prestige, did not effect a material change in the terms or conditions of her employment.

Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996). The court held that adverse employment action must materially affect terms or conditions of employment in order to be actionable. The action must be more disruptive than causing inconvenience or alteration of job responsibilities. The court gives the following examples of actionable adverse employment actions: termination, demotion accompanied by decrease in pay, given less distinguished title, material loss of benefits, or significantly diminished job responsibilities. Here, decrease in job performance rating from "exceptional" to "fully successful" where worst consequence thereof was to foreclose employee from the opportunity to receive a discretionary $600 bonus was not actionable adverse employment action. Court also found that not permitting plaintiff to start work early and sending plaintiff away when the EEOC investigator visited the employer were not actionable adverse employment actions.

Jefferies v. State of Kansas, 1998 U.S. App. Lexis 12952, 77 FEP Cases 28. Court holds that 10th Circuit does not have the "materiality" requirement, and instead takes a case-by-case approach to determining whether a given employment action is adverse.

Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993). Court found that reassignment of plaintiff against her wishes was an adverse employment action. Court did not employ a

"materiality" requirement.

Berry v. Stevenson Chevrolet, 74 F.3d 980, 986-87 (10th Cir. 1996). Court held that employer's reporting of plaintiff as suspected of a crime causing employee humiliation was an adverse employment action actionable under Title VII's retaliation provision.

Greaser v. State of Missouri, 145 F.3d 979 (8th Cir. 1998). Court found that threatening and sarcastic comments made by director of corrections center to the plaintiff was not actionable adverse employment action since the conduct did not have a material impact on a term, condition, or privilege of employment.

Harlston v. McDonald Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994). The court held that reassignment to a different and more stressful position did not constitute actionable adverse employment action.

Seely v. Runyon, 966 F. Supp. 1060, 1064 (D. Utah 1997). The court held that where plaintiff could not show that the alleged actions of her employer, which made her feel threatened, embarrassed, and humiliated, effected a material change in the terms or conditions of her employment, she could not make out a Title VII case. Actions that have a tangential effect on employment do not rise to the level of ultimate employment actions that are actionable under Title VII.

Flaherty v. Gas Research Inst., 31 F.3d 451, 457 (7th Cir. 1994). Court held that employer's action of changing employee's title thereby causing embarrassment to the employee was not actionable adverse employment action since pay and benefits remained the same.

Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied* 406 U.S. 95 (1972). Fifth Circuit held that Title VII's protections extend beyond the economic aspects of employment to the full range of the expansively defined "terms, conditions or privileges of employment" including work environment. The court held that employer's practice of providing discriminatory service to Hispanic customers which, in turn, created a hostile and offensive work environment for Hispanic employees was actionable under Title VII.

Impact Must Be Caused by a Specific Employment Policy/Practice

Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984), *overruled on other grounds as noted in* Beard v. Whitley County REMC, 840 F.2d 405 (7th Cir. 1988). Court notes, in a Title VII case, that the disparate impact model "was developed as a form of pretext analysis to handle specific employment practices not obviously job related...." The court explains that the disparate impact model was meant to be applied where a clearly delineated employment policy has been adopted by an employer that has the discretion not

to adopt the policy or to adopt alternatives to the policy. The court holds that the disparate impact model is not suited for a "wide ranging attack on the cumulative effects of a company's employment practices" because where the plaintiff is not challenging a discreet policy instituted via an exercise of independent business judgment, the disparate impact analysis is too vague to be applied and there is a substantial risk that the employer will be held liable for disparities which it has not caused. For example, in the instant case, the plaintiff challenged the employer's use of competitive market prices to set wages. The court found that this was not a discrete policy instituted by the employer exercising independent business judgment, and thus the employer should not be liable for any disparity caused.

This case has been cited by the State of Michigan's response to the Select Steel complaint as support for its claim that the disparate impact model is also not suited for evaluating permitting decisions in Title VI litigation because (1) a decision to grant a permit to an applicant who has met EPA health and welfare standards does not, itself, cause any disparity and (2) since there are so many legitimate non-discriminatory reasons for the permitting decision, the mere existence of a substantial disparate impact does not justify an inference that the impact is borne by the residents because of their minority status.

Title IX

Trent v. Perrit, 391 F. Supp. 171 (D.C. Miss.1975). Court held that a high school grooming code, which prohibited only male students from wearing hair below ear, was not sex discrimination even where male students who violate this policy are not allowed to attend school.

Hall v. Lee College, Inc., 932 F. Supp. 1027 (E.D. Tenn. 1996). Court held that private college's policy of suspending students (male or female) who engage in premarital sex did not violate Title IX absent proof that females were treated differently under the policy than were males. [This holding suggests that a school policy which does have a disparate impact on one gender with respect to discipline concerning the private affairs of its students may violate Title IX.] Court also recognizes that 34 C.F.R. Sec 106 prohibits discrimination on basis of sex with respect to rules of behavior.

Other Analogous Areas of Federal Civil Rights Law

Alexander v. Choate, 469 U.S. 287 (1985). Plaintiffs claimed that (1) a state's reduction of Medicare coverage for hospital visits from 20 to 14 days per year and (2) a state's imposition of any annual limit on the number of Medicaid-covered hospital days would disproportionately deny health care adequate to meet the increased health care needs of disabled persons. The Court held that although Section 504 of the Rehabilitation Act and/or its implementing regulations prohibit some disparate impact discrimination (which the Court did not define), the alleged disparate impact alleged in this case was not actionable because the purpose of the Medicaid program is not to provide the precise level of health care adequate to meet the particular needs of its

beneficiaries. Instead, the Medicaid program "is a particular package of health care services....[that] has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered-- not 'adequate health care.'"

Court also recognized that Title VI delegated to federal agencies "in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."

R.I.S.E. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991). King and Queen County sought to construct a new landfill in a predominantly black community. Plaintiffs, local residents who opposed the landfill, claimed that it would deprive them of equal protection of the laws under the 14th Amendment by (1) reducing quality of life by increasing noise, dust, and odor, (2) decreasing property values, (3) interfering with activities at a local church, (4) requiring major road improvements, and (5) blighting the community. The court reviewed the case under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which requires a finding of intentional racial discrimination, and found that the Board acted in a responsible and conscientious manner with no intentional discriminatory motivation.

Aiello v. Browning-Ferris, Inc., 244 ELR 20771 (N.D. Ca. 1993). Court addressed plaintiffs' challenge under 42 U.S.C. Sections 1983 and 1985, to a decision of the defendant county to locate and approve a landfill near a high proportion of the county's minority residents. Plaintiffs' alleged that the decision caused dust, toxic substances, odors, and excess to afflict their residences and has reduced their property values. Court dismissed the plaintiff's claims for lack of ripeness and for being untimely, but did not find that a constitutional claim of discrimination could not be based on such effects.

Laramore v. Illinois Sports Facilities Authority, 722 F. Supp. 443 (N.D. Ill. 1989). The Illinois Sports Facilities Authority ("the Authority") sought to build a new stadium for the Chicago White Sox at a site in which the "residents were almost exclusively black." Id. at 446. Plaintiffs, residents of the areas adjacent to the site, alleged violations of the Equal Protection clause and Title VI. They claimed that they would suffer a variety of injuries from construction of the stadium including: (1) increased noise and light; (2) increased rent and tax; (3) reduced employment base; and (4) isolation and segregation from neighboring areas. Considering those effects, the court held that plaintiffs adequately alleged a racially disparate impact under the Equal Protection clause and 42 U.S.C. § 1983, thereby denying part of defendant's motion to dismiss. Id. at 449. As for Title VI, however, the court concluded that plaintiffs failed to allege that defendant was a recipient of federal funds, thereby granting part of defendant's motion to dismiss. Id. at 451.

NEPA

NOTE: The National Environmental Policy Act (NEPA) may be of limited usefulness in interpreting Title VI because NEPA is essentially a procedural, not substantive, statute.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). Supreme Court notes that "NEPA itself does not mandate particular results, but simply prescribes the necessary process."

Statute

The policy established by NEPA is to use all practicable means and measures to, among other things, "fulfill the social, economic, and other requirements of present and future generations of Americans." NEPA § 101(a). The general ends of NEPA include ascertaining for all Americans:

> [S]afe, healthful, productive, and esthetically and culturally pleasing surroundings; . . . the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; . . . an environment which supports diversity and variety of individual choice; . . . [and] a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.
>
> NEPA § 101(b).

Regulations

The Council on Environmental Quality's (CEQ) NEPA regulations note that "environmental effects" or "impacts" that must be considered under NEPA include historic, cultural, economic, and social effects. 40 C.F.R. § 1508.8.

Further, 40 C.F.R. § 1508.14 states that effects on the "[h]uman environment" include social and economic impacts when interrelated to natural and physical environmental effects and that social or economic impacts do not by themselves require preparation of an environmental impact statement.

Case law

Metropolitan v. PANE, 460 U.S. 766, 773 (1982). Congress intended NEPA to focus on impacts to the physical environment and natural resources.

Como-Falcon Community v. Dept of Labor, 609 F.2d 342, 345 (8th Cir. 1979). Numerous courts note that socioeconomic effects do not need to be considered if there is no primary impact

on the physical or natural environment (citing cases).

Nonetheless, several courts have noted that under NEPA 102(2)(C), socioeconomic effects must be considered if there is some primary physical impact on the environment. *Hanley v. Mitchell*, 460 F.2d 640 (2d Cir. 1972); *NAGE v. Rumsfield*, 418 F. Supp. 1302 (E.D. Pa. 1976); *McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975).

MITIGATION

A. Is the only relevant mitigation that which directly reduces the disparate impact itself?

Title VI

Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980). The court addressed a Title VI challenge to a closing of a city hospital located in Harlem. The court first noted that Title VI does not explicitly require a federal fund recipient to consider alternatives to a proposed placement or closure of a public facility. The Court explained that unlike in the Title VII context where mere selection procedures are at issue, and the comparable alternatives inquiry is focused on other selection devices, in the Title VI context the less discriminatory alternative inquiry "could frequently become open-ended." In the instant case, the court found that Title VI did not require the defendant to consider alternatives to address New York City's financial crisis beyond "an assessment of all the municipal hospitals in order to select one or more for closing." The court held that to require a more extensive consideration of alternatives would result in the court's "assessing the wisdom of competing political and economic alternatives." This result was to be avoided since it would mean that "such policy choices would be made without broad public participation and without sufficient assurance that the alternative selected will ultimately provide more of a benefit to the minority population."

However, the court also noted that a Title VI defendant might be required to consider alternatives which have "obvious advantages" to the option of closing a facility which has a significant disproportionate racial impact. The alternatives proposed by the plaintiffs (hospital mergers, increasing Medicare reimbursement to hospital, increase health care provided by hospital) were best suited for the political process, not the courts.

Finally, the court mentioned in a footnote, but did not consider in its decision, that the defendant had agreed to mitigate the racial impact of the hospital closing by setting aside money for a 5-year project to provide health care to Harlem residents, including allowing a community group to lease the closed hospital for $1 per year in order to operate a drug and alcohol treatment center.

NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981). Plaintiffs challenged defendant's decision to relocate medical center from inner city to outlying suburban areas as, *inter alia*, having a disparate impact on racial minorities. The district court ordered HEW to perform a departmental review and HEW found a disparate impact. The defendant then entered into an agreement with HEW to mitigate this impact by (1) providing free transportation to the new location from the inner city, (2) appointing an ombudsman to process discrimination complaints, (3) creating in-patient service plans to prevent racial identifiability and (4) operating the remaining inner city medical center and the new medical center on a unitary basis. The court noted that other cases (including Bryan) did not require a Title VI defendant to search for less discriminatory alternative before attempting to establish its business necessity defense, and indicated its agreement with this principle. However, the court noted that the district court in the instant case did require the defendant to go forward with evidence showing that it has chosen the least discriminatory alternative. The court found that the district court's holding that the defendant met this burden by considering 50 alternative plans, each of which it rejected for *bona fide* reasons was not clearly erroneous. The Third Circuit also noted that the district court, itself, also examined five alternatives, none of which would serve the defendant's needs. The Third Circuit also relied upon its assumption that the defendant would abide by its agreement with HEW in affirming the district court's holding.

The dissent criticized the majority's assumption that the defendant would comply with the HEW agreement because it "short-circuit[ed] the process of reasonable accommodations which Title VI is designed to foster" by obviating the need to rebut the plaintiffs' alleged major impacts. The dissent argues that had the majority not short-circuited the process, the defendant might have tried to meet the plaintiffs' *prima facie* case by mitigating the alleged disparate impacts by, for example, replacing the general promise to provide free transportation with a specific allocations of funds for expanded service, by adjusting services at the new medical center, or by creating a contingency plan which satisfied plaintiffs' concerns.

Title VII

Less Discriminatory Alternative ("LDA")/Alternative Employment Practice ("AEP")

The Civil Rights Act of 1991 ("1991 CRA") provides that an unlawful employment practice based on disparate impact is established only when (1) the plaintiff establishes a disparate impact on the basis of race color, etc., and the defendant fails to demonstrate that the challenged practice is job-related and "consistent with business necessity," or (2) the plaintiff demonstrates the existence of an alternative employment practice and the defendant refuses to adopt such alternative employment practice. 42 U.S.C. Section 2000e-2(k)(1)(A). The 1991 CRA specifically provides that the concept of an "alternative employment practice" should be defined in accordance with case law preceding *Wards Cove*. Generally, before *Wards Cove*, an alternative employment practice was defined as a practice that had a less undesirable racial effect than the

challenged practice and serves the legitimate interest established by the defendant. (See *Albemarle*, below.)

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Court defined alternative employment practices (AEP) as: "...tests or selection devices, without a similarly undesirable racial effect, [and which would] also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" The Court also noted that a showing of an AEP by the plaintiff "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." (Citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (a disparate treatment case)). The Court did not reach the issue of whether an AEP existed in the case.

Ballor v. Alcona County Road Comm'n, 1997 U.S. Dist. LEXIS (E.D.N.Y. 1997). Court defined an alternative employment practice (the existence of which a plaintiff must prove to overcome the employer's proof of business necessity) as one which has a lesser disparate impact that would serve the employer's legitimate interests. The court noted the following factors for determining whether an AEP exists: (1) subsequent practices adopted by the employer, (2) policies of comparable businesses, (3) marginal cost of the proposed AEP and (4) the safety implications for public safety of the proposed AEP. In this case the court found that the plaintiff failed to identify a specific discriminatory employment practice and failed to identify an AEP.

Levin v. Delta Air Lines, Inc., 730 F.2d 994, 1000 (5th Cir. 1984). Court held that an AEP is a practice which (1) serves the employer's legitimate purpose, and (2) has a discriminatory effect on fewer of the protected group or has a less severe effect on the protected group (even if the same number of protected group members are effected). Here, airline's policy of removing pregnant flight attendants from duty was job-related and was a business necessity since policy promoted safety of airline passengers. Furthermore airline was not required to implement proposed alternative of transferring pregnant flight attendants to ground crew since training for flight attendants was significantly different than training for ground crew.

Mosley v. Clarksville Mem. Hosp., 574 F. Supp. 224 (M.D. Tenn. 1983). Court noted that an AEP must be "without an adverse effect" and must serve the employer's legitimate interest.

Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 773 (5th Cir. 1983), *reh'g. denied*, 705 F.2d 450 (1983), *cert. denied*, 464 U.S. 991 (1983). Court held that an AEP is a practice that is less discriminatory than the challenged practice.

Zuniga v. Kleburg County Hosp., 692 F.2d 986 (5th Cir. 1982). Court found hospital's practice of firing pregnant X-ray technicians violated Title VII even though hospital showed a business necessity for the policy. An alternative policy of laying the plaintiff off, instead of firing her, was available and would have a less severe impact.

Neloms v. Southwestern Elec. Power Co., 440 F. Supp. 1353, 1370 (W.D. La. 1977). Court held that an AEP is a practice without the undesirable racial impact of the challenged practice that would also serve the employer's legitimate interest in efficient and trusty workmanship. The court stated: "an employer may not even use a job-related selection device if there is another device that will accomplish the same result without the undesirable racial impact."

5th Amendment Due Process Clause/ 14th Amendment Equal Protection Clause

Adarand Constructors, Inc v. Pena, 515 U.S. 200 (1995). Court reviewed a Federal government affirmative action program for government contracting. Court holds that all governmental race-based classifications must be subjected to a strict scrutiny analysis under the 5th Amendment's Due Process Clause (Federal government action) or under the 14th Amendment's Equal Protection Clause (state and local government action). Strict scrutiny requires that the racial classification at issue both serves a compelling governmental interest and is narrowly tailored to further that interest. Remedying the effects of past discrimination against minority groups may be a governmental interest compelling enough to justify a racial classification, as long as the classification is narrowly tailored to fulfill this need. Court noted that factors to consider in determining whether the classification is "narrowly tailored" include: (1) whether the government considered the use of race neutral means of satisfying the compelling interest and (2) whether the racial classification is limited in scope so that it "will not last longer than the discriminatory effects it is designed to eliminate."

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Court held that in order for a government to establish that a racial classification furthers a need or remedies past discrimination, it must show a "strong basis in evidence for its conclusion that remedial action was necessary." The "strong basis in evidence" required is generally a showing approaching a prima facie case of discrimination not of general societal discrimination, but of discrimination caused by the parties implementing the racial classification. Court repeatedly noted that in the instant case, the weak predicate of discrimination could not justify the rigid racial quota at issue, suggesting that the less compelling the interest, the more narrow tailoring is required and, conversely, the more compelling the interest, the less narrow tailoring is required.

United States v. Paradise, 480 U.S. 149, 171 (1987). Court held that the following factors were relevant to a "narrowly tailored" analysis in the employment context : (1) whether the government considered race neutral criteria before adopting the racial classification, (2) whether race is one factor to be used as a criterion or whether race is the sole or dominant factor, (3) whether there is a reasonable and non-arbitrary relationship of the racial classification to the size of the disparity which it has been adopted to reduce, (4) the scope of the racial classification program, (5) the duration of the racial classification program, and (6) the impact of the racial classification program on minorities.

B. What kind of guidance exists from other areas of law (SEPs?) for how tightly (or broadly) the nexus must be?

Supplemental Environmental Projects (SEPs)

Environmental Statutes Penalty Provisions

Typically, administrative civil penalty enforcement provisions in EPA statutes direct that the Administrator may impose a civil penalty for violation of the statute, up to a specified dollar amount either per violation or per day of violation (*e.g.*, Emergency Planning and Community Right to Know Act (EPCRA) §325(b)(1), 42 U.S.C. §11045(b)(1)). Judicial civil penalty provisions are similar (*e.g.*, Clean Water Act (CWA) §309(d), 33 U.S.C. §1319(d)).

Accordingly, EPA has discretion to assess a penalty for an amount less than the maximum amount specified in the statutes. Courts defer to agency determinations on penalties:

NL Indus., Inc. v. Dep't of Transp., 901 F.2d 141 (D.C. Cir. 1990), administrative agency is entitled to substantial deference in assessing civil penalty appropriate for violation of its regulations.

Cox v. U.S. Dep't of Agric., 925 F.2d 1102 (11th Cir. 1991), *cert. denied* 112 S. Ct. 178 (1991). Assessing penalties for violation of the Animal Welfare Act was an exercise of a discretionary grant of power by USDA, and review by the court is limited.

Mendelson v. Macy, 356 F.2d 796, 799 n.4 (D.C. Cir. 1966). Court suggests that penalty assessments within the range authorized by statute are virtually unreviewable.

Many of EPA's statutes include penalty assessment provisions that set out criteria that EPA or the court must consider in determining the appropriate penalty. EPCRA § 325(b)(1)(C) is typical of those penalty provisions:

> In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.
>
> 42 U.S.C. §11045(b)(1) (Class I administrative penalties).

Supplemental Environmental Projects (SEPs) Policy

In the settlement context, EPA generally follows these criteria in exercising its discretion to establish an appropriate settlement penalty. To further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be part of the settlement. EPA's Final Supplemental Environmental Projects Policy, effective as of May 1, 1998, sets forth the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which they may become part of a settlement.

EPA considered two Comptroller General opinions (*In the Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties* (NRC opinion) (B-238419), 70 Comp. Gen. 17 (1990); *In the Matter of: Commodity Futures Trading Commission* B-210210 (Sept. 1983) (CFTC opinion.) in developing the Final SEP Policy. Both matters involved agencies proposing to allow violators to donate money to educational institutions for research in lieu of civil penalties, and in both instances, the Comptroller General thought that the agencies would be improperly augmenting appropriations by such actions.

In a July 7, 1992 letter (B-247155) (unpublished) responding to Congressman John D. Dingell, the Comptroller General concluded that EPA did not have authority to settle mobile source air pollution enforcement actions under §205 of the Clean Air Act by allowing violators to fund certain public awareness projects and that EPA's enforcement authority did not extend to these remedies which were unrelated to correction of the violation.

EPA's Final SEP Policy has addressed the Comptroller General's concerns. General public educational or public environmental awareness projects, (*e.g.*, sponsoring seminars public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community), are not acceptable SEPs. The Final SEP Policy requires that all projects advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. "Nexus" is defined in the Final SEP Policy as the relationship between the violation and the proposed project, and exists only if:

> the project is designed to reduce the likelihood that similar violations will occur in the future; or the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

C. What is the role of mitigation? Must states use mitigation before attempting to show "legitimate" justification for the disparity? Can it be used to justify a "legitimate" justification for the disparity?

Title VI

Mitigation

Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980). The court addressed a Title VI challenge to a closing of a city hospital located in Harlem. The court first noted that Title VI does not explicitly require a federal fund recipient to consider alternatives to a proposed placement or closure of a public facility. The Court explained that unlike in the Title VII context where mere selection procedures are at issue, and the comparable alternatives inquiry is focused on other selection devices, in the Title VI context the less discriminatory alternative inquiry "could frequently become open-ended." In the instant case, the court found that Title VI did not require the defendant to consider alternatives to address New York City's financial crisis beyond "an assessment of all the municipal hospitals in order to select one or more for closing." The court held that to require a more extensive consideration of alternatives would result in the court's "assessing the wisdom of competing political and economic alternatives." This result was to be avoided since it would mean that "such policy choices would be made without broad public participation and without sufficient assurance that the alternative selected will ultimately provide more of a benefit to the minority population."

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other cases (including Bryan) did not require a Title VI defendant to search for less discriminatory alternative before attempting to establish its business necessity defense, and indicated its agreement with this principle. However, the court noted that the district court in the instant case did require the defendant to go forward with evidence showing that it has chosen the least discriminatory alternative. The court found that the district court's holding that the defendant met this burden by considering 50 alternative plans, each of which it rejected for *bona fide* reasons was not clearly erroneous. The Third Circuit also noted that the district court, itself, also examined five alternatives, none of which would serve the defendant's needs. The Third Circuit also relied upon its assumption that the defendant would abide by its agreement with HEW in affirming the district court's holding.

The dissent criticized the majority's assumption that the defendant would comply with the HEW agreement because it "short-circuit[ed] the process of reasonable accommodations which Title VI is designed to foster" by obviating the need to rebut the plaintiffs' alleged major impacts. The dissent argues that had the majority not short-circuited the process, the defendant might have tried to meet the plaintiffs' *prima facie* case by mitigating the alleged disparate impacts by, for example, replacing the general promise to provide free transportation with a specific allocations of funds for expanded service, by adjusting services at the new medical center, or by creating a contingency plan which satisfied plaintiffs' concerns.

Less Discriminatory Alternatives

Elston v. Taladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993), *reh'g en banc denied*, 7 F.3d 242 (11th Cir. 1993). Court held that defendant met its burden to show that building a new school in a predominately white neighborhood instead of expanding an existing school in a predominately black neighborhood was "necessary to meeting a goal that was legitimate, important, and integral to the defendant's institutional mission" by demonstrating that there was not enough land at the existing school site to accommodate the new school. The court did not require that the defendant consider less discriminatory alternatives before deciding on the location of the school, nor did the court require that the defendant mitigate the disparate impact which the court assumed *arguendo* was caused by the siting decision. Furthermore, the court found that the plaintiffs did not propose alternative sites for the school that would have had a less discriminatory impact, or propose a solution to the lack of space at the existing school site. The court also found that since there was no evidence that discriminatory animus motivated the school's decision, the plaintiffs could not show that the location decision was pretextual.

Young v. Montgomery County, 922 F. Supp. 544 (M.D. Ala. 1996). Court held that the defendant school board successfully established that the goal of preventing athletic recruiting was a substantial legitimate justification for a policy which required students transferring schools to sit out of interscholastic sports for one year after transfer. The plaintiffs proposed use of the existing grievance procedure of the state athletic association as an alternative to the policy which would not have a disparate impact on black students. Court found that the defendant would not have to

adopt the proposed alternative since it had been shown to be ineffective in preventing athletic recruiting in the past. Furthermore, the court did not require the school board to have considered this alternative or any other alternative before establishing the existence of their substantial legitimate justification.

Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (D.C. Ohio 1984). Plaintiffs claimed that a city's decision to locate a highway through predominately minority neighborhoods caused a disparate adverse impact on minorities. Citing *Bryan* and *NAACP v. Medical Center*, the Court noted that there is some question whether Title VI requires a fund recipient to consider alternatives with less disparate impact before making the decision at issue. However, in the instant case, the court found that it was unnecessary to answer the question since (1) FHWA regulations required consideration of alternatives, (2) the city did, in fact consider a mass transit alternative, at the plaintiffs urging which was designed to minimized the disparate racial impact, and rejected this alternative, and (3) the plaintiffs failed to proposed any appropriate alternatives to be considered.

Title VII

Less Discriminatory Alternative ("LDA")/Alternative Employment Practice ("AEP")

SEE ALSO CASES DIGESTED IN JUSTIFICATION SECTION

There is disagreement among federal courts as to whether or not Title VII (as amended by the 1991 CRA) requires the defendant to search for and/or use every existing AEP or LDA before attempting to show that the challenged practice is "job-related" and is "consistent with business necessity." The 1991 CRA clearly places the burden of establishing the existence of an AEP/LDA on the plaintiff.

Dothard v. Rawlinson, 433 U.S. 321 (1977). Alabama's minimum height and weight requirements for hire of correctional counselors was not shown to be significantly related to job performance so as to justify the requirements' disparate impact on women. The Court rejected employer's argument that the requirements were justified because they have a "relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor" noting that "the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance." The Court then stated that "if the job-related quality that the appellants identify is bona fide", the employer could have adopted a test to directly measure strength instead of relying on height and weight statistics. However, the Court indicates that the plaintiff has the burden of proof of showing the existence of other selection devices which would serve defendant's goals of

"efficiency and trustworthy workmanship" without a "similarly undesirable racial effect."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Court held that it is plaintiff has the burden of proof of showing the existence of other selection devices which would serve defendant's goals of "efficiency and trustworthy workmanship" without a "similarly undesirable racial effect."

Donnelly v. Rhode Island Bd. of Governors, 929 F. Supp. 583 (D.R.I. 1996). The court noted that if the defendant was required to prove that it had no alternative to the challenged practice in order to establish business necessity, then no AEP could possibly exist and the plaintiff would have nothing to prove. Thus, section 2000e-2(k)(A)(ii) of the 1991 CRA, which places the burden of establishing the existence of an AEP on the plaintiff would be meaningless.

Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993). Court held that under *Griggs*, in order for a defendant to show a substantial business justification for the challenged practice, it must show (a) the practice has a "manifest relationship to the employment in question" and (b) a compelling need to maintain the practice and that there is no alternative to the challenged practice.

Levin v. Delta Air Lines, 730 F.2d 994 (5th Cir. 1984). Court suggests that where a LDA is apparent and easily utilized and yet a defendant does not adopt it, the defendant may have difficulty establishing a business necessity defense. On the other hand, where an LDA is less apparent and not as easy to utilize, the burden may be on the plaintiff to identify and prove the existence of an LDA.

Wright v. Olin Corp., 697 F.2d 1172 (4th Cir 1982). Court subjected employer's fetal protection policy to a disparate impact analysis. (NOTE: Fetal protection policies are now usually analyzed under the disparate treatment standard.) Court held that the defendant could show a *prima facie* business necessity defense with proof that (1) the risk of harm which the policy attempts to lessen or eliminate must be sufficiently compelling to overcome the disparate effect which the practice causes, and (2) the policy effectively avoids the harm and is reasonably necessary to avoid the harm. The Court noted that the defendant must prove a business necessity objectively: defendant's belief that the policy is necessary is not sufficient. However, defendant is not required to show a general consensus among experts on the degree of risk of harm and necessity of the policy to address the risk, but only "a considerable body of opinion" such that "an informed employer could not fail to act on the assumption that the opinion is an accurate one."

The Court also overruled its decision in *Robinson v. Lorillard*, 444 F.2d 791 (4th Cir 1971) insofar as it held that the defendant, in establishing its business necessity defense, must prove that no acceptable alternatives exist. The Court noted that while the Supreme Court has never explicitly repudiated this aspect of the *Lorillard* decision, the Court's decisions in *Beazer*, *Albemarle*, and *Dothard* "have so clearly indicated that proof of 'acceptable alternatives' is the claimant's burden in 'rebuttal' that we must consider *Lorillard's* formulation to that extent no

longer authoritative."

Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981). The district court rejected the defendant's business necessity defense for a two-year experience hiring requirement because although the defendant showed a compelling business necessity for the employment in question, the defendant had not shown the unavailability of alternative hiring practices which would have less of a disparate impact. The Sixth Circuit reversed on the grounds that the lower court improperly placed burden of proving the existence of an AEP on the defendant. The Sixth Circuit explained that the district court "unjustifiably collapsed the three-step [disparate impact] test employed in Griggs into a two-step examination in which the defendant was burdened with proving . . . that its hiring requirements would have the least disparate impact of all conceivable requirements which satisfactorily measure applicants for employment," making the third step superfluous. The Sixth Circuit noted that although many court opinions interpret "business necessity" to require that the challenged practice is absolutely necessary or inherently essential, this interpretation has not been adopted by the Supreme Court. Instead, the Supreme Court's articulation of the business necessity test in *Griggs* [manifestly related to employment and necessary to safe and efficient job performance] should be followed. "The Sixth Circuit expounds on the *Griggs* standard stating: "For a practice to be necessary . . . it need not be the sine qua non of job performance; indispensability is not the touchstone. Rather, the practice must substantially promote the proficient operation of the business." The Sixth Circuit cites *Board of Trustees v. Sweeney*, 439 U.S. 27 (1978) in support of its holding explaining that in *Sweeney*, the Supreme Court found that collapsing the three-step disparate treatment analysis into a two-step analysis by requiring the defendant to prove absence of pretext was improper.

Clanton v. Orleans Parish School Bd., 649 F.2d 1084, 1098 (5th Cir. 1981). Court held that the defendant's attempt to establish a business necessity justification "fails as a matter of law" because of the existence of less discriminatory alternatives. The court found decisive that the defendant school board admitted that achievement of its fiscal objective did not require it to use pregnancy as a basis for determining who to retain and that less discriminatory alternatives such as (1) filling available positions on the basis of seniority or other objective factors, (2) laying off teachers by random selection, or (3) deferring the return of teachers on leave.

Conteras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1980), *cert. denied*, 455 U.S. 1021 (1982). Court held that placing the burden of establishing the non-existence of an AEP/LDA on the employer clearly misallocates the AEP burden of proof. Once a defendant shows that the challenged practice is job-related, the plaintiff must show that an LDA would satisfy the employer's legitimate interests. The plaintiff in this case failed to establish that using oral interviews for hiring is an AEP/LDA to using written examinations because he did not show that oral interviews would satisfy the city's civil service hiring needs. Evidence that oral interviews were used in hiring in other city department was not relevant to show that oral interviews would satisfy needs of the new department at issue.

Kirby v. Colony Furn. Co., 613 F.2d 696 (8th Cir. 1980). Court held that to prove job-relatedness and business necessity, the defendant must show that there is a compelling need for the maintenance of the practice and that there is no alternative to the challenged practice.

Neloms v. Southwestern Elec. Power Co., 440 F. Supp. 1353, 1370 (W.D. La. 1977). Court held that in order for a defendant to show a business necessity and thus relieve itself from liability for a practice which causes a disparate impact, the practice must be "essential to safety and efficiency" and "[t]here must be no other alternative to achieve the same result as the test in question, and the result desired from the test in question must be essential to the operation of the business." The court further stated: "an employer may not even use a job-related selection device if there is another device that will accomplish the same result without the undesirable racial impact."

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *reh'g denied*, 583 F.2d 132, *cert. denied*, 441 U.S. 968 (1978). To establish business necessity, defendant must show (1) that practice is essential to goals of safety and efficiency, (2) there is no acceptable alternative that will accomplish these goals equally well with a lesser differential racial impact.

JUSTIFICATION

A. What legal precedent is there from other areas of civil rights law for "justifying" what would otherwise be an impermissible disparity?

Title VI

Coalition of Concerned Citizen Against I-670 v. Damian, 608 F. Supp. 110 (D.C. Ohio 1984) Although a proposed highway project to relieve traffic congestion disparately impact predominantly African American neighborhoods, the court found that defendants met their burden of justifying the disparity by articulating legitimate nondiscriminatory reasons for the chosen location. The court also ruled that the less discriminatory alternatives articulated by the plaintiff failed to meet the project's program objectives and therefore did not constitute a Title VI violation.

Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). African American students were disproportionately placed in low level achievement groupings. The court found that Defendant's achievement groupings bore a manifest demonstrable relationship to classroom education and were justified by lowering student-teacher ratios, improving class manageability, and student motivation.

Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984), A school system used an intelligence test that disproportionately placed African American students in classes for the learning disabled. The

court found that the unvalidated test was not an educational justification under Title VI.

Elston v. Talladega County Bd. Of Educ., 997 F.2d 1394 (11th Cir. 1993), Plaintiffs alleged that a school board's decision to place a new school in a predominantly white neighborhood increased the racial identifiability of the formerly segregated school system. The court found that even if the new school increased the racial identifiability of the school system, the siting decision was justified by the absence of adequate land in the African American neighborhood.

N.A.A.C.P. v. Medical Ctr., Inc., 657 F.2d 1322, 1332 (3rd Cir. 1981). A city hospital decided to relocate to a suburban area to gain the financial profits needed to improve the quality of care and keep the hospital's educational accreditation. The court found that the defendant's plan to relocate was a substantial legitimate justification for the racial disparity it created. The court also found that the provision of shuttle bus service between the old location and the new hospital mitigated much of the racial disparity created by the plan.

New York Urban League v. New York, 71 F.3d 1031 (2d Cir. 1995). Users of New York's public transit system alleged that subsidies provided to commuter rail users disparately benefitted the predominantly white commuter rail users. The court found that the benefits that commuter rail subsidies produced for the city (minimized road congestion, decreased pollution, increased subway and bus rider ship) constituted a substantial legitimate justification for the disparate rates payed by the different transit system users.

Linton By Arnold v. Carney By Kimble, 779 F. Supp. 925 (M.D. Tenn. 1990), The court found that the defendant's explanation that "self-selection preferences" of minorities, based upon reliance upon the extended family, lack of transportation, and fear of institutional care are inadequate justification for the minority under representation in nursing homes.

Meek v. Martinez, 724 F. Supp. 888 (S.D. Fla. 1987), A funding mechanism used by Florida to provide assistance for elderly residents disproportionately benefitted white residents. The court found no justification for disparity in funding where the defendant failed to show that the intrastate funding formula used by Florida bore a "manifest demonstrable relationship" to achieving the goals mandated by the Older Americans Act.

Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518 (M.D. Ala 1991). The requirement that college entrants achieve a minimum score on the American College Test (ACT) disproportionately excluded minority students from college entrance . The court found that the State Board of Education requirement of a college entrance examination was not justified as essential to participation in college.

Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995). The Older Americans Act (OAA), 42 U.S.C. 3001-3058ee, directed the federal government to distribute funds to the states in order to provide

services to "older individuals" (*i.e.*, over 60 years of age). The State of Illinois developed a formula to allocate its money among the local jurisdictions. That formula considered, among other things, the number of older individuals who are members of minority groups, who live in rural areas, and who are at least 75 years of age. The City of Chicago claimed that the latter two factors discriminated against minorities because older individuals living in rural areas are 98% non-minority and 13.7% of the state's older individuals are minorities, but only 10.7% of them are over 75. The court found that the disparity caused by the rural factor in Illinois' formula was justified by the language of the OAA requiring a minimum spending amount for elderly persons residing in rural areas.

Grimes ex rel. Grimes v. Sobol, 832 F. Supp. 704 (S.D.N.Y. 1993), *aff'd*, Grimes ex rel. Grimes v. Sobol, 37 F.3d 857 (2d Cir. 1994), plaintiffs amended their earlier complaint to allege that defendant violated DOEd's Title VI regulations. A violation of the regulations occurs when the "criteria or methods of administration" have the effect of discriminating on the basis of race. The court held that the regulations do not encompass curricular content, based on DOEd's conclusion that its own Title VI and IX regulations did not apply to curriculums.

Young v. Montgomery County, 922 F. Supp. 544 (M.D. Ala. 1996). Plaintiffs, African American student athletes seeking to transfer through a minority to majority program, challenged the discriminatory effect caused by a board of education policy requiring them to forego one year of athletic involvement. The court found that the policy was not adverse in that it benefitted the minority schools that students were transferring from. The court also stated that the Board of Education's intent to prevent athletic recruiting from majority high schools served as a substantial legitimate justification of the adverse impact experienced by transferring students.

Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980), Closing a hospital which served a 98% minority population for financial reasons did not show discriminatory intent. Even assuming a disparate impact - the city showed "appropriateness" (fiscal realities) of closing hospital which was justified on the grounds that the closure would reduce expenditures and increase efficiency within the municipal hospital system. Dissent (in part) argued that the city had made no showing that closing this hospital was the result of a "rational decision making process." Among the criteria evaluated by the court was a comparison of each of the municipal hospitals with regard to (a) hospital size, scope of patient services, and extent of usage; (b) patient access to comparable alternative facilities; (c) quality of plant and operations; and (d) present and predicted fiscal performance. Summarized in *Grant v. New York State Office of Mental Health*, 646 N.Y.S.2d 1018, 1023 (N.Y. Sup. 1996).

Gomez v. Chody, 1987 WL 9574, *5 (N.D. Ill. 1987). Assuming that plaintiffs had made a showing of discrimination based on national origin, the court concluded that the evidence establishes a legitimate nondiscriminatory purpose in displacing the residents. The Grove Street Apartments had been declared a public nuisance, living conditions were unsafe and generally

intolerable. Condemnation proceedings had begun, and the apartments were going to be torn down in any event. The documented "uninhabitability" of the apartments provides ample justification for Defendants' targeting the site for either demolition or rehabilitation.

African American Legal Defense Fund, Inc. v. New York State Dep't of Educ., 1998 Lexis (S.D.N.Y. 1998), Substantial legitimate justifications were "obvious and essentially not disputed" where legislation provided for state wide distribution of financial aid to public schools on the basis of student attendance rather than enrollment (resulting in greater dollars per pupil of state aid to non-city public schools). The state has an interest in paying only for those students who actually attend classes in order to encourage schools to improve attendance and spend funds effectively. Here, the court found no disparate impact under Title VI where differences resulted from societal factors having a disproportionate impact on minorities.

Sandoval v. Hagan, 7 F. Supp.2d 1234, 1264 (M.D. Ala. 1998). The policy and regulation of Alabama Department of Public Safety under which driver's license examinations were administered only in English had impermissible disparate impact on basis of national origin in violation of Title VI. It was not supported by substantial legitimate justification, which may be that the challenged policy was necessary to meeting a goal that was legitimate, important, and integral to defendant's institutional mission. Alleged safety concerns did not provide substantial legitimate justification because non-English speakers with valid licenses from other states and countries were allowed to drive in Alabama, nothing indicated that deaf or illiterate English-speaking drivers, for whom accommodations were made, posed any less of a safety risk, and utilization of international highway symbols meant that non-English speakers could drive safely in Alabama. Alleged administrative concerns did not provide substantial legitimate justification since Department had in the past successfully administered examinations in 14 foreign languages for over a decade, and Department expended substantial resources making accommodations for deaf or illiterate English speakers who took examination.

Scelsa v. City University of New York, 806 F. Supp. 1126, 1140 (S.D.N.Y. 1992), While CUNY may be able to proffer non-discriminatory reasons for discrete actions and for employment decisions taken with respect to specified individuals, plaintiffs may still prove their case if CUNY cannot legitimate an employment regime in which almost two decades of stated commitment to increase the representation of Italian-Americans has yielded no significant progress. Defendants have not presented any reason, legitimate or not, as to why this is the case. Secondly, defendants have provided no reasons for the current low employment percentage of Italian-Americans in the CUNY staff and faculty workforce. When defendants in a civil rights case such as this can provide no reasons for the under-representation of a protected class within a workforce, the inference is that the only rational way to explain the disparity is discrimination.

Williams v. City of Dothan, 818 F.2d 755 (11th Cir. 1987). Plaintiffs were minority residents who claimed that city improvement projects had discriminatory impact because projects in

predominantly white areas received higher percentage of municipal funds than projects in black areas. The court of appeals found that the effect of the project at issue was that blacks had to pay a higher cost of the improvements than whites had to pay for similar improvements in past projects. The court also rejected the district court's finding of "surrounding circumstances" which canceled out any discriminatory effect the improvement project may have had on the city's black citizens. One such circumstance was the fact that whites owned 50% of the property in the improvement area and would be responsible for the assessments on those properties. While the court agreed that this fact was relevant, it noted that ultimately blacks would be responsible for these costs as most of the property in the area was at least occupied by blacks, if not owned by them. Overall, the percentage of blacks living in the project area was much higher than the percentage of blacks in the population. The court found that the plaintiffs had carried their burden of showing a disparate impact and remanded the case to the district court for a determination and award of appropriate relief.

Title VII

"Business Necessity/Job-relatedness"

SEE ALSO CASES DIGESTED IN MITIGATION SECTION

The Civil Right Act of 1991 ("1991 CRA") provides, that when a plaintiff in a disparate impact case has shown that a particular practice causes a disparate impact, the defendant has the burden of proving "that the challenged practice is job-related for the position in question and is consistent with business necessity." 42 U.S.C. Sec. 2000e-2(k)(1)(A)(i).

Wards Cove Packing v. Antonio, 490 U.S. 642 (1989). Court generally described a policy or practice which is justified by "business necessity" and/or " job-relatedness" as one which serves, in a significant way, the legitimate interest of the employer, but which is not necessarily essential or indispensable to the employer's interests. Note: There is some doubt that this holding is still good law since the 1991 CRA specifically overruled *Wards Cove* as to the allocation of the burden of proving business necessity and as to the definition of an "alternative employment practice," but did not specifically overturn *Ward Cove's* definition of business necessity or even define business necessity in a way that is obviously inconsistent with *Wards Cove's* definition. However, some recent court decisions hold that the history of the 1991 CRA indicates that "Section 2000e-2(k)(1)(A) was designed to codify the concepts of 'business necessity' and 'job relatedness' as they existed before . . . *Wards Cove* [*i.e.*, the definitions articulated in *Griggs v. Duke Power Co.* and *NYC Transit Authority v. Beazer, infra*]." *See also Donnelly v. Rhode Island Board of Governors*, 929 F. Supp. 583, 593 (D.R.I. 1996).

NYC Transit Authority v. Beazer, 440 U.S. 568, 587 (1979). Employer rule excluding use of all narcotics, barbituates, amphetamines, and most methadones is justified as job-related in that it

promotes legitimate employer goals of safety and efficiency. The Court agreed with the District Court that these goals are "significantly served by--even if they do not require--[defendant's rule] . . . . The record thus, demonstrates that the . . . [defendant's] rule bears a 'manifest relationship to the employment in question.' *Griggs*, 401 U.S. at 432. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)."

Griggs v. Duke Power Co., 401 U.S. 424 (1971). Court held that to meet its burden of establishing "job relatedness" or "business necessity," a defendant has "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." Applying this standard, the Court held that the employer's requirement of a high school degree and passage of general intelligence test as conditions of hire and transfer was not shown to be significantly related to job performance so as to justify the requirement's disparate impact on blacks.

Dothard v. Rawlinson, 433 U.S. 321 (1977). Alabama's minimum height and weight requirements for hire of correctional counselors was not shown to be significantly related to job performance so as to justify the requirements' disparate impact on women. The Court rejected employer's argument that the requirements were justified because they have a "relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor" noting that "the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance." The Court then stated that "if the job-related quality that the appellants identify is bona fide", the employer could have adopted a test to directly measure strength instead of relying on height and weight statistics. However, the Court indicated that, an argument (not made by the employer) that apparent strength, rather than actual strength (which might be measured by height and weight statistics) could be sufficiently necessary to the position of correctional counselor so as to justify disparate impact on women.

Daley v. City of Omaha, 107 F.3d 587 (8th Cir. 1997). Court held that city's purpose in reclassifying library positions to (1) bring employees' wages into conformity with wages paid in comparable cities and (2) promote fairness were valid business justifications for the disparate impact on female employees caused by the reclassification. [Note: this case applies the *Wards Cove* definition of business necessity and not the standard as articulated by the 1991 Civil Rights Act because the Civil Rights Act was not retroactive, so it did not apply to the case.]

Donnelly v. Rhode Island Bd. of Governors, 929 F. Supp. 583 (D.R.I. 1996). Court finds that the history of the 1991 Civil Rights Act indicate that "Section 2000e-2(k)(1)(A) was designed to codify the concepts of 'business necessity' and 'job relatedness' as they existed before . . . *Wards Cove* [*i.e.*, the definitions articulated in *Griggs v. Duke Power Co.* and *NYC Transit Authority v. Beazer, supra*]." The court noted that a previous version of the 1991 CRA used the phrase "required by necessity," but was replaced by the language "consistent with business necessity" suggesting that Congress "meant to require something less than a showing of indispensability."

The court also noted that if a demonstration of business necessity required defendant to show that the practice was indispensable, then no alternative less discriminatory practice could exist and the provision of the 1991 CRA which places the burden of establishing the existence of an alternative employment practice on the plaintiff would be meaningless. The court concludes that "What the [1991 CRA] appears to require [from defendants] is proof that the challenged practice is reasonably necessary to achieve an important business objective." In this case, the court found that the defendant showed that a three-tiered system of minimum salaries for its teachers, while not absolutely necessary to any business goal, was justified as reasonably necessary to achieve the important business purpose of maintaining the highest quality professors at a relatively low cost.

EEOC v. Steamship Clerks Union Local 1066, 48 F.3d 594, 605 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995). Court addressed a union policy which required that new applicants be sponsored by an existing union member. The court rejected the Union's argument that the policy was necessary to "continue family traditions" and held that the disparate impact on black applicants caused by this policy was not justified since continuing family traditions was not necessary to the business of steamship clerks.

Long v. First Union Corp. of Virginia, 894 F. Supp. 933, 941 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (1995). Court held that employer established business justification for its English-only rule where the rule was enacted to prevent bilingual employees from intentionally speaking in Spanish in order to isolate and intimidate members of other ethnic groups. Court also held that the employer's revocation of the rule did not establish that the rule was not necessary for business.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118-19 (11th Cir. 1993). City's prohibition of shadow beards on firefighters was job-related as necessary to protect the firefighters from a health and safety risk. However, the court emphasized that an employer must do more than merely recant a safety reason in order to establish business necessity or job-relatedness; the employer must prevent convincing evidence that the challenged practice is required to protect employees or third parties from documented hazards.

Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795 (8th Cir. 1993). Court held that the 1991 CRA's standard for establishing business necessity requires a defendant to show (a) that the practice at issue have a manifest relationship to the employment in question; (b) that there is a compelling need to maintain the practice; and (c) that there is no alternative to the challenged practice. Applying this standard, the court found that the defendant pizza place failed to justify a "no beard rule" which disparately impacted black males as necessary to its business.

Newark Branch of NAACP v. Harrison, 940 F.2d 792 (3d Cir.1991). Court addressed a residency requirement for uniformed and non-uniformed employees of town police department that had a substantial disparate impact on blacks. Court rejected Town's argument that the requirement was justified for uniformed employees because (a) it promoted quick response to

emergencies, (b) the employees would know the neighborhood better and would be more diligent in protecting it due to their increased loyalty as residents, and (c) allowing non-residents to apply would dramatically increase the number of applications received and would cost the Town too much to process. The court also rejected the Town's argument that the residency requirement was necessary for non-uniformed employees because residents would have more loyalty to the police department. The court ultimately held that the residency requirement, which prevented any blacks from being hired, was not justified as a business necessity or as job-related.

Nash v. Consolidated City of Jacksonville, 905 F.2d 355, 358 (11th Cir. 1990), *cert. denied*, 498 U.S. 1098 (1991). City failed to establish that examination qualification for firefighters was justified as business necessity or as sufficiently job-related.

Stephen v. PGA Sheraton Resort, 873 F.2d 276 (11th Cir. 1989). Court held that business justification existed for termination of non-English speaking employee since language barrier prevented employee from adequately performing his job as a deliverer of supplies.

Chambers v. Omaha Girls Club, 834 F.2d 697 (8th Cir. 1987), *reh'g denied en banc*, 840 F.2d 583 (1988). Court held that "role-model" rule which banned single parent pregnancies among staff members was justified by business necessity since there was a manifest relationship between the Club's fundamental purpose (to provide girls with positive life options) and the rule.

Craig v. Alabama State University, 804 F.2d 682 (11th Cir. 1986). Assuming ASU's study leave policy, which granted hiring preferences to current employees, caused a sufficiently substantial disparate impact on women (since it tended to freeze the status quo), it was not justified as a business necessity. The court held that ASU's argument, that the policy promoted a better qualified staff, was not supported by competent evidence.

Davis v. Richmond, 803 F.2d 1322 (4th Cir. 1986). City's requirement that applicants for apprentice engineer positions must have previous train experience, was not justified as business necessity since persons without train experience could do well in apprentice program.

Aguilera v. Cook County Merit Board, 760 F.2d 844 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 237 (1985). County requirement that its corrections officers have a high school diploma or equivalency certificate was sufficiently job-related so as to justify any disparate impact on Hispanics.

Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1972 (1986). Prerequisites for police academy applicants of (a) 45 semester hours of college; (b) no recent or excessive marijuana use; and (c) no recent hazardous driving convictions were sufficiently job-related because the prerequisites tend to ensure that police (a) will have "professionally maturity"; (b) will enforce laws in unbiased manner; (c) and will have safe driving habits. Court also

reasoned that the prerequisites were justified because there is an extraordinary risk involved in having unqualified police officers.

Hawkins v. Bounds, 752 F.2d 500, 502 (10th Cir. 1985). Court held that no business necessity justified adverse impact created by employer's policy of assigning employees to temporary positions and then weighing experience in these temporary assignments heavily when hiring for permanent positions.

Merwine v. State Inst. of Higher Learning Bd. of Trustees, 754 F.2d 631 (5th Cir. 1985), *cert. denied*, 474 U.S. 823 (1985). Court held that requirement that applicants for faculty librarian position hold master's degree was justified as business necessity.

Crawford v. Wester Elec. Co., 745 F.2d 1373 (11th Cir. 1984), reh'g en banc denied, 751 F.2d 394. Employers wholly subjective employee evaluation system which had no written standards for evaluation, no requirement that reasons for promotions be documented, and did not require that decision makers keep written records of the quality and efficiency of employee's work was not justified by business necessity.

Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984). Court held that disparate impact caused by university's professor selection criteria which included consideration of accomplishment and skills in scholarship as judged by peers was justified since these selection criteria were job-related.

Carpenter v. University of Wisconsin Sys. Bd. Of Regents, 728 F.2d 911 (7th Cir. 1984). Court found that tenure criteria which included demonstration of reasonable likelihood of future growth, performance in teaching, research and scholarly writing, service to the community, and at least a minimal level of competence were job-related.

Caviale v. Wisconsin Dep't of Health and Social Serv., 744 F.2d 1289, 1294 (7th Cir. 1984). Court held that the disparate impact on women caused by State's policy of hiring only persons who participated in a Career Executive Program was not justified because policy was not job-related.

Wright v. Olin Corp., 697 F.2d 1172 (4th Cir 1982). Court subjected employer's fetal protection policy to a disparate impact analysis. (NOTE: Fetal protection policies are now usually analyzed under the disparate treatment standard.) Court held that the defendant could show a *prima facie* business necessity defense with proof that (1) the risk of harm which the policy attempts to lessen or eliminate must be sufficiently compelling to overcome the disparate effect which the practice causes, and (2) the policy effectively avoids the harm and is reasonably necessary to avoid the harm. The Court noted that the defendant must prove a business necessity objectively; defendant's belief that the policy is necessary is not sufficient. However, defendant is not required to show a general consensus among experts on the degree of risk of harm and necessity of the

policy to address the risk, but only "a considerable body of opinion" such that "an informed employer could not fail to act on the assumption that the opinion is an accurate one."

Bonilla v. Oakland Scavenger Co., 697 F.2d 1297,1303 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984). Court found that nepotism is not a legitimate business justification for policy limiting share ownership to employees of Italian ancestry who were related to or were close friends of current share holders and then giving better jobs and more hours to the shareholder employees which had a disparate impact on black and Spanish-surnamed employees.

Wambheim v. J.C. Penney, Inc., 705 F.2d 1492, 1494 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984). Court held that employer's policy of providing medical care coverage to spouses only if the employee was a head of household (the employee earns more than 50% of the combined family income) which disparately affected female employees (far fewer female employees qualified as a head of household than did male employees) was justified as business necessity because the policy sought to provide medical insurance to employees most in need of coverage (the spouse who earns more than 50% of the family's combined income will usually have the better medical policy thus the only employees who need spouse coverage are those who earn more than his/her spouse) while keeping costs of the plan as low as possible.

Colby v. J.C. Penney Co., Inc., 811 F.2d 1119 (7th Cir. 1987). Seventh Circuit criticized Ninth Circuit's finding in *Wambheim* that business justification existed for Penney's "Head of Household" policy. The Seventh Circuit argues that if Penney is correct in assuming that an employee who earns less than his/her spouse does not need coverage since he/she would be covered under the plan of his/her higher paid spouse, the employee would not elect coverage anyway, and thus the cost of the medical program would not be affected by abrogating the head of household rule. However, since the parties had not addressed the issue of business necessity, court did not decide the issue.

Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981). The district court rejected the defendant's business necessity defense for a two-year experience hiring requirement because although the defendant showed a compelling business necessity for the employment in question, the defendant had not shown the unavailability of alternative hiring practices which would have less of a disparate impact. The Sixth Circuit reversed on the grounds that the lower court improperly placed burden of proving the existence of an AEP on the defendant. The Sixth Circuit explained that the district court "unjustifiably collapsed the three-step [disparate impact] test employed in *Griggs* into a two-step examination in which the defendant was burdened with proving . . . that its hiring requirements would have the least disparate impact of all conceivable requirements which satisfactorily measure applicants for employment," making the third step superfluous. The Sixth Circuit noted that although many court opinions interpret "business necessity" to require that the challenged practice is absolutely necessary or inherently essential, this interpretation has not been adopted by the Supreme Court. Instead, the Supreme Court's

articulation of the business necessity test in *Griggs* [manifestly related to employment and necessary to safe and efficient job performance] should be followed. The Sixth Circuit expounds on the *Griggs* standard stating: "For a practice to be necessary . . . it need not be the sine qua non of job performance; indispensability is not the touchstone. Rather, the practice must substantially promote the proficient operation of the business."

Burwell v. Eastern Airlines, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). Court held that airline's policy of forbidding flight attendants to fly while pregnant was business necessity and job-related since it promoted goal of passenger safety which goal was sufficiently compelling to overcome the disparate impact.

Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1019 (2d Cir. 1980). Court held that nepotism was not legitimate business justification for policies which had a disparate impact on protected groups by maintaining the status quo.

Horace v. Pontiac, 624 F.2d 765 (6th Cir 1980). Mandatory height requirement of 5ft 8in for police officers was not justified by business necessity. Court rejected employer's argument that requirement was necessary since there was a greater likelihood that a shorter police officer would be assaulted on the street than would a taller one.

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *reh'g denied*, 583 F.2d 132, *cert. denied*, 441 U.S. 968 (1978). To establish business necessity, defendant must show (1) that practice is essential to goals of safety and efficiency, and (2) there is no acceptable alternative that will accomplish these goals equally well with a lesser differential racial impact. Court remanded case for determination under this standard.

Spurlock v. United Airlines, Inc. 475 F.2d 216 (10th Cir. 1972). Prerequisites for commercial pilot training of: (a) a commercial pilot license, (b) 500 logged flight time, and (c) college degree was justified as job-related since pilots require a high degree of skill, and an unqualified pilot causes a significant risks. The court stated: "When a job requires a small amount of skill and training, and the consequences of hiring an unqualified applicant are insignificant, the court should examine closely any pre-employment standards which discriminate against minorities . . . . [But] when a job clearly requires a high degree of skill and the economic and human risks involved are great, employers bear a corresponding lighter burden to show that its employment criteria are job-related."

White v. Carolina Paperboard Co., 564 F.2d 1073 (4th Cir. 1977) and *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *reh'g denied*, 581 F.2d 267 (1978), *cert. denied*, 439 U.S. 1115 (1979). Employer's policy of promotion based on "lines of progression" justified as business necessity where employer can show by competent evidence that progression was functionally related to job.

Title IX

Cases discussing the justification issue under Title IX do not set out a standard for what might justify a disparate impact. Rather, the few cases that address the issue merely reject the specific argument of Defendants attempting to justify the disparate impacts found. The message seems to be that nothing can justify a disparity under Title IX.

Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part and reversed on other grounds*, 998 F.2d 824 (10th Cir 1993), *cert. denied*, 510 US 1004, 126 L. Ed. 470 (1993). Court held that school's financial crisis did not justify gender discrimination under Title IX.

Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (1993). Court held that school could not justify elimination of women's gymnastics program by showing that NCAA did not sponsor a women's gymnastic championship.

Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia, 877 F. Supp.634 (D.D.C 1994), *vacated in part, modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995), *vacated, in part, on other grounds, remanded*, (D.C. Cir. 1996), *cert. denied*, 137 L. Ed.2d 701 (1997). Disparity between education and work programs available to male and female prisoners was not justified by the following purported reasons: (a) female prisoners might need greater supervision if working along side of male prisoners; (b) female prisoners are more often victims of sex abuse; (c) female prisoners have more problems with substance abuse; or (d) female prisoners have greater responsibility for children.

STANDING

A. What is the nature of injury required to maintain a Title VI cause of action?
B. What is the nature of injury required for communities to maintain a Title VI cause of action?

Bryant v. N.J. Dep't of Transp., 998 F. Supp. 438 (D.N.J. March 18, 1998) Residents of minority community alleged harm from construction of bridge and tunnel to facilitate access to the site of a future casino was discriminatory in that their homes would be subject to condemnation. Plaintiff's interests fall within zone of interests Title VI is designed to protect--*i.e.*, persons being discriminated against by the administration of a federally funded program. Court applied Supreme Court rule from Nat'l Credit Union rejecting the intended beneficiary doctrine. Court also relies upon regulations promulgated by DOT.

Sandoval v. L.N. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998). Plaintiff challenged Department of Public Safety's policy of administering driver's license examination in English only. Court

applied the *Lujan* standing test and found that Plaintiff suffered particularized injury, that a causal connection exists between injury complained of and Defendants' actions, and that plaintiff's injury is capable of redress via a favorable court decision. Court states that plaintiff was an intended beneficiary, and thus the confusion caused by Nat'l Credit Union does not affect plaintiff's standing.

Jackson v. Katy Independent School Dist., 951 F. Supp. 1293 (S.D. Tex. 1996). Parents allege school district discriminated against biracial student in adverse discipline administered; parents lacked standing to assert damages under Title VI in their own right, as they were not intended beneficiaries of or participants in federally funded program, but could bring action on behalf of their son who, as intended beneficiary of school district, had standing to assert claim of racial discrimination under Title VI.

Neighborhood Action Coalitions v. City of Canton, Ohio, 882 F. 2d 1012 (6th Cir., 1989). Citizens and association allege inferior provision of services to minority neighborhoods resulting in diminution of property values and challenges application of HUD Block Grants. Residents had standing to sue under Title VI in their own right, while organization had standing to seek injunctive relief, but did not have standing to seek damages.

De Jesus-Keolamphu v. Village of Pelham Manor, 999 F. Supp. 556 (S.D.N.Y., 1998). Residents of neighborhood challenge placement of residential home for mentally retarded. Residents contend that mentally retarded residents would be disadvantaged by being located in a minority community. Quotes from Supreme Court precedent that plaintiffs may not claim standing to vindicate the constitutional or statutory rights of third parties unless 1) third parties have suffered an "injury in fact," 2) plaintiff has a "close relation" to the third parties such that the plaintiff will effectively represent the third parties' interests, and 3) the third parties are hindered in their ability to protect their own interests. The court did not apply the Supreme Court's rejection of the intended beneficiary doctrine in *National Credit Union, supra.*

Alabama State Univ. v. Baker & Taylor, 998 F. Supp. 1313, 1315 (M.D. Ala. 1998) State universities are "state instrumentalities" and thus lacks standing to seek an injunction under Title VI. *See also Dekalb County School District v. Schrenko*, 109 F.3d 680, 689 (11th Cir. 1997) (school district, as political subdivision, cannot sue same state for breach of Title VI; also , for standing, taxpayers must allege an injury in fact distinct from that suffered by all or a large class of citizens under *Warth v. Seldin*, 422 U.S. 490 (1975)). *But see City of Chicago v. Lindley*, 66 F.3d 819, 828 n.11 (7th Cir. 1997) (city has standing to raise Title VI because it has been harmed directly by discriminatory funding formula, and because it is an advocate under a program specific statute for its residents/beneficiaries).

Freedom Republicans, Inc., v. Federal Election Comm'n, 13 F.3d 412 (D.C. Cir. 1994). Plaintiffs do not sufficiently allege a causal nexus between Federal agency actions and the

allegedly discriminatory actions of recipient. Also, no adequate likelihood that injury could be redressed.

Laramore v. Illinois Sports Facilities Authority, 722 F. Supp. 443 (N.D. Ill. 1989). Residents of area adjoining site selected for new baseball stadium alleged adverse impact on minority neighborhood--*i.e.*, forced from their homes because of increased living costs. Plaintiffs not intended beneficiaries of federal tax exemptions for bonds sold by stadium authority.

Jaimes v. Toledo Metro. Housing Authority, 758 F.2d 1086, 1100 (6th Cir. 1985). Plaintiffs did not establish standing under Title VI because they failed to demonstrate a personal, particularized injury inflicted by defendants by not demonstrating a substantial probability that but for defendants' alleged violations, plaintiffs would have been able to obtain low-rent public housing outside Toledo.

GENERAL TITLE VI BURDEN OF PROOF

Elston v. Taladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993), *reh'g en banc denied*, 7 F.3d 242 (11th Cir. 1993). Court recognized the following shifting burdens of proof for a disparate impact case brought pursuant to Title VI regulations:

> "A plaintiff must first demonstrate that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. If the plaintiff makes such a showing, the defendant then must prove that there exists a substantial legitimate justification for the challenged practice in order to avoid liability. If the defendant carries this burden, the plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that the defendant's proffered justification is a pretext for discrimination." Citing *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

The court also noted that "in deciding Title VI disparate impact claims we borrow from standards formulated in Title VII disparate impact cases," and that although *Wards Cove* shifted the burden of persuasion on the issues of the justification prong to the plaintiff, the Civil Rights Act of 1991 shifted the persuasion burden of the justification prong back to the Defendant. Thus, the court implies that all Title VI cases decided after the effective date of the Civil Rights Act of 1991 should follow the Act's burden of proof allocations.

Young v. Montgomery County, 922 F. Supp. 544 (M.D. Ala. 1996). Court, in education context, recognized the following shifting burdens of proof for a disparate impact case brought pursuant to Title VI regulations:

> "Initially, a plaintiff must show by a preponderance of the evidence that a facially neutral

educational practice has a racially disproportionate adverse effect. *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). If the plaintiff makes such a showing, the burden shifts to the defendant to prove a valid justification for the practice. *Id.* Should the defendant prove a valid justification, the plaintiff may still prevail by proffering an equally effective alternative practice which results in less racial disproportionality or by presenting evidence that the legitimate practice is a pretext for discrimination. See *id.*"

Request from Title VI Committee

Jurisdictional Legal Issues Warranting Further Background Information

I. Disparate Impact

A. What constitutes "disparity": how much must the difference be?
   1. prior Title VI precedent (outside environmental area)
      a. judicial decisions
      b. agency guidance/decisions
   2. prior Title VII precedent
   3. prior Title IX precedent (?)
   4. other analogous areas of federal civil rights law

B. What constitutes relevant "impact": must it be kind of impact that is the primary focus of the permitting agency or can it be any impact that would be proximately caused by the facility's operation (*i.e.*, can it extend to social and economic concerns that result from the permitting facility but are not the authorized basis of the permitting authority's decision whether to grant a permit for the activity)
   1. prior Title VI precedent (outside environmental area)
      a. need not involve a "permit"
      b. issue arises anytime a federally-funded entity disburses the benefits of that federally-funded program (like awarding of grants, construction of facilities)
   2. prior Title VII precedent ("terms and conditions of employment"?)
   3. prior Title IX precedent (?)
   4. other analogous areas of federal civil rights law (statutory and constitutional)
   5. NEPA and SEPAs

II. Mitigation

A. Is the only relevant mitigation that which directly reduces the disparate impact itself?
   1. prior use in other areas of civil rights law
   2. prior use in other areas of environmental law
   3. prior use in any other area of law

B. If answer to "A" is no (*i.e.*, tradeoffs need not be so direct), what kind of guidance exists from other areas of law (SEPs?) for how tightly (or broadly) the nexus must be?

C. What is the role of mitigation?
   1. Must states use mitigation before attempting to show "legitimate" justification for the disparity?
   2. Can it be used to justify a "legitimate" justification for the disparity?

III. **Justification**

A. What legal precedent is there from other areas of civil rights law for "justifying" what would otherwise be an impermissible disparity?
   1. Title VI or Title VII ("business necessity," etc.)
   2. equal protection? (substantially related to compelling state interest and no less restrictive alternative)
   3. any other precedent in constitutional/statutory civil rights law

B. If justifications are valid, what precedent exists for discerning legitimate scope?
   1. emergency
   2. public health
   3. national security
   4. economic profit?
   5.

IV. **Native American**

A. Are tribal members individuals protected from discrimination by Title VI?

B. Are tribes the recipients of federal funds subject to Title VI's nondiscrimination mandate?

V. **Standing**

A. What is the nature of injury required to maintain a Title VI cause of action?
B. What is the nature of injury required for communities to maintain a Title VI cause of action?

VI. **General Questions of Proof (for I-III)**

A. What difference is there between proving prima facie case and actual proof of discrimination?

B. What level of evidence is used to decide?

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Appendix K: Draft Preliminary Report on Incentives Prepared for the NACEPT Committee on Reinvention

12/1/98 DRAFT

NACEPT Reinvention Committee
Draft Preliminary Report on Incentives
(Communities and Individuals)
September 28-29, 1998

Introduction

EPA's Reinvention efforts are part of an overall strategy aimed at making the federal government work better, cost less, and get better environmental results. At EPA, reinvention means streamlining and innovating within existing programs, but it also means testing more integrative, holistic approaches with the potential to better address unresolved environmental problems.

As part of its reinvention efforts, EPA is interested in exploring the use of incentives for achieving greater environmental stewardship. Traditionally, EPA has relied upon regulatory approaches that are often viewed as disincentives or negative incentives. There are, however, positive incentive structures, as well, that can be used to motivate environmental improvements on the part of businesses, communities, states, and individuals. While a number of EPA programs have been increasing their reliance on different types of incentives, there is no explicit conceptual framework or policy regarding how incentives are employed or relate more broadly to the Agency's mission.

Charge to the NACEPT Committee

EPA has asked the NACEPT Committee on Reinvention to advise the Agency on its use of incentives. The committee's charge includes helping the Agency understand how incentives can be used most successfully to inspire industry, communities, and individuals to go beyond mere compliance with existing regulations and to begin the process of addressing outstanding environmental problems. In particular, EPA is interested in the following questions:

- What opportunities exist for EPA to use incentives to promote environmental stewardship in industry, states, local communities, and the general public? (i.e., what is needed to create an incentive structure that will drive continuous environmental improvement?)
- How can EPA evaluate the effectiveness of incentives to encourage environmental stewardship that lead to improved environmental results?
- What can EPA do to ensure that incentives promote and enhance public confidence?
- How can EPA measure the impact that incentives have on public confidence?
- What criteria should be used to decide whether the use of incentives is appropriate?

- How can the concept of performance ladders be used to tailor incentives most effectively?

Definition of Incentives

EPA defines incentives very broadly. Anything that motivates a company, an individual, a community, a state, or any other organization or institution to make changes in the direction of improved environmental protection is considered an incentive. Within this context, incentives can include both negative and positive motivators. Negative incentives may include penalties, fines, or even criminal prosecution. Positive incentives are often harder to define and categorize, but may include such things as public recognition and certification, environmental information and education, regulatory flexibility, permit expedition, or compliance assistance.

The Committee has decided not to devote substantial effort to developing precise definitions or taxonomies for incentives. Both EPA and the Committee agree that the primary issue of interest is how EPA can better employ what are generally viewed as positive incentives. However, the Committee would note that positive incentives usually cannot and should not be separated from negative incentives. In many instances, the negative incentives embodied in traditional regulatory requirements, in fact, create the opportunity to establish positive incentives. For example, incentives such as expedited or flexible permits, are possible only because the regulatory system requires such permits in the first place. Secondly, positive and negative incentives must be viewed in tandem because the Agency needs both kinds. The value and effectiveness of these various incentives may depend upon the industry sector, the level of motivation and knowledge, the environmental problem to be solved, or a variety of other factors.

Committee Overview

The Committee has agreed to structure its deliberations by focusing on the use of incentives in four different arenas: communities, individuals, industry, and states. Separate meetings will be devoted to each of these sectors, with presentations at each meeting that offer information and perspective from a variety of different programs and experiences. The Committee's schedule is:

September 28, 1998	Individuals
September 29, 1998	Communities
December 8-9, 1998	Industry
March 1999	States

In general, it should be noted that the Committee supports EPA's efforts to seek opportunities to use incentives because the Committee believes that incentives can be useful tools for improving environmental quality when used within the existing regulatory framework, as a complement to the regulatory system, and in addressing environmental problems that are not amenable to regulatory approaches.

This report presents the Committee's preliminary conclusions regarding EPA's use of incentives for individuals and communities. These two sectors were the focus of the Committee's September 28-29, 1998 meeting. In the future, the Committee will provide recommendations regarding EPA's use of incentives with industry and states, as well as a more comprehensive conceptual framework that addresses the relationship among incentives of various types.

Incentives for Individuals

General Conclusion: There are opportunities that EPA should pursue to use incentives to help individuals make the connection between their behavior and environmental results.

The committee concludes that in pursuing the use of incentives for individuals, EPA should:

1. Understand what motivates individual behavior

EPA has traditionally focused its attention on industry and businesses that it regulates. The Agency is beginning to be more sophisticated in understanding what motivates businesses to change their behavior. However, there is less attention being paid to understanding what motivates individuals. The large number of individuals in the U.S. and their cumulative environmental impacts make them an important population to recognize. Because of their importance, the Agency needs to begin to understand what motivates individuals to both learn and act. In particular, **EPA should involve behavioral scientists in the design of its incentive programs and incorporate the lessons learned from behavioral research. Funds spent on social science research at EPA is insufficient; more funding is needed to research the avenues that might be used to motivate individuals. Don't assume you know what motivates people; ask them.**

It is important for EPA to think of the individual as a consumer. To a large extent, individuals make decisions as consumers, based on the value that they receive for a certain product or set of products. **As a group, individuals as consumers play a large role in influencing companies from which they buy. Thus, if EPA can influence decisions that individuals make as consumers, it can also influence industry.**

Consumers gain information about products from the products themselves. They gain information about its value from the price of the product and from its label. One way EPA can influence consumers is by affecting labels on the products that they buy. Making adequate information available on a label is one way to motivate consumer choices. Through the Consumer Labeling Initiative, EPA's Pollution Prevention Division has found that an effective way to determine how to motivate consumers with labels and other information is to hold panels and focus groups composed of consumers.

One important lesson from the Consumer Labeling Initiative is that motivating information is effective only if it comes from sources that individuals trust. For example, private citizens tend to trust people and institutions with similar value sets - their churches, their neighbors, etc. They may not trust government agencies or business advertisements. Therefore, EPA should consider how to deliver information to individuals using sources that they trust.

One example of identifying motivators for individuals comes from the German recycling system. Germans found two major incentives for individuals to recycle: fees for disposal of garbage, and ease of recycling. One incentive captures those with no prior interest in recycling, and one simply eliminates a barrier that exists for those who are already motivated.

Research conducted by Resources for the Future shows that individuals are more willing to pay for individual pollution than societal pollution. For example, they are more willing to pay a tax on the miles that they drive their own car than they are willing to pay a general air pollution tax.

2. Recognize that education is more than information

Environmental education (EE) is one of the most direct ways to motivate private citizens to take action or change their behavior in environmentally beneficial ways. EE can help motivate individuals who are not already motivated to be environmentally responsible by making them aware of new issues, or it can enable those who are already motivated to take action by giving them information about how to act.

Environmental education needs to be more than just giving information. Many times, information is out of context for the individual, they cannot make sense out of it, or it strikes them as unimportant. EPA's Office of Environmental Education is working to broaden EPA staff's understanding of how to present environmental information in a meaningful way. **Information is most helpful when it is accompanied by suggested action strategies and helps to develop investigative and problem-solving skills. EE should be based upon recognition of the following continuum:**

- **awareness of issue**
- **information gathering**
- **attitude development**
- **problem solving and critical thinking**
- **participation in actions to help protect the environment**

Simple information about environmental problems is usually not enough to help individuals progress up this continuum and get to the point of taking action. EPA needs to ensure that it provides education that is meaningful for individuals at all points of the continuum.

3. Be sensitive to different needs and circumstances

It is important to understand what types of information an individual needs to know and when he or she needs to know it. Everyone does not have the same values, economic circumstances, or level of knowledge. Thus, different people will want and need different information at different times. People invariably pay more attention to information that they are looking for than to unsolicited information that may appear irrelevant.

For example, focus group data from the Consumer Labeling Initiative (CLI) indicates that consumers read product labels for information about danger that the product may pose to themselves, their children, or their pets. They do not pay much attention to other information about potential danger to the environment. Therefore, EPA needs to be aware of the type of information that is important to different segments of society and convey information with that in mind. Also, EPA needs to think about when consumers need to hear information about products. They look for certain information when purchasing a product, but different information when they are getting ready to use it. EPA needs to learn more about the needs of consumers and ensure that those needs are met with appropriate information.

4. Work in partnership

EPA neither is, can, nor should be the sole motivator of human environmental stewardship behavior. Other organizations or institutions are often more credible or effective messengers. It is more likely that consumers will pay attention to information given to them by organizations they are familiar with than it is that they will pay attention to information put out by EPA. Therefore, EPA should seek opportunities to work with others and look for "pathways" for offering incentives to individuals. For example, EPA teamed up with industries who own household cleaning products to bring information to individuals in a new way. In addition, EPA can learn a great deal about marketing and reaching individuals from working with businesses that depend upon good marketing for survival.

5. Build in evaluations

When new incentive approaches are initiated, whether on broad scales or as pilots, an evaluation component must be included in the program. Evaluating whether incentives are having the desired affect and whether there are unanticipated secondary results is critical. Not only should such evaluations help to determine if the incentive is effective, but they should be used to compare incentives to alternative approaches that could be used to achieve the same goal.

In addition, understanding and communicating the efficacy of incentives will help to ensure public confidence. Given that the use of incentives (particularly those that involve "rewards" such as regulatory flexibility) can engender distrust, it is critical that EPA be able to demonstrate the value of incentives in more than a theoretical way.

6. Integrate incentives into packages
Incentives are not, in and of themselves, the best nor most effective approach to achieving environmental goals. They should be integrated into comprehensive strategies and not used in isolation. It is important to realize that incentives can be used in many different contexts. There are opportunities to use incentives in both regulatory and voluntary programs. And there are opportunities to use incentives to address both regulated and non-regulated areas (e.g, urban sprawl, climate change, individual resource consumption). It is the synergy of regulation, reward, and education that must be recognized and used to create more effective integrated approaches.

7. Acknowledge and challenge constraints
EPA may often encounter constraints or limitations on its ability to employ incentives. Some of those constraints may be legal, but others may be more subtle, coming in the form of agency cultural aversions to innovation, administrative barriers, or lack of understanding and knowledge. One of the specific examples of an administrative barrier that has come to the Committee's attention are the OMB regulations regarding surveys. Requirements for Information Collection Requests (ICRs) can be so onerous that they deter collection of information regarding such things as consumer habits and motivational factors. In addition, the traditional command-and-control culture at EPA can be a barrier to effectively employing other incentive-based approaches. Whether the constraint is an internal one related to EPA culture or whether it is an externally imposed constraint, EPA should explicitly acknowledge such limitations and seek ways to either eliminate or change them.

Incentives for Communities

General Conclusion: EPA should pursue opportunities to use incentives that will help communities link solutions to environmental problems with the achievement of economic, quality of life, or other community goals.

Most communities in the U.S. are faced with myriad issues demanding their attention: building the tax base, employment, crime, housing, schools, public health, water and wastewater treatment, waste disposal, roads .... environmental concerns are but one among many problems. For several reasons, the most promising avenue for making progress on environmental concerns lies in solutions that can help communities address environmental and other concerns in tandem with other community issues.

First, many environmental problems arise from other pressures facing a community. For example, proposals for residential or industrial development may spur concerns about loss of habitat or lack of adequate drinking water or sewage facilities. Alternative proposals that allow development while ameliorating environmental concerns can help a community achieve multiple goals.

Second, most community organizations and decision-making processes are not oriented around environmental issues. Utilizing existing community structures, organizations and processes to address environmental and other issues can be more efficient than trying to create new forums for discussion and decision-making, and can link environmental solutions to other goals.

Finally, citizen involvement is key to effective environmental decision-making. More citizens will be involved, and will be involved more productively, if they believe they are helping to solve the key issues of concern to their community.

In using incentives to help communities integrate environmental concerns with other community issues, EPA should:

1. Promote and support "bridge" organizations

Given the vast number of local units of government in the U.S., EPA cannot possibly be directly involved in many of those communities, nor should it try to be. EPA can be most effective if it focuses on working with "bridge" organizations -- states, regional governmental organizations, and national and regional public interest organizations -- that already have connections to community organizations.

EPA's primary role in working with bridge organizations, or directly with some communities, should be that of facilitator. EPA should not lead the process nor set the agenda. As facilitator, EPA should focus on providing assistance (environmental data in useful formats, analysis tools, information on different technologies and options, etc.) that will support, rather than guide, community decision-making.

Many projects have demonstrated that collaboration across all levels of government can work, and in fact is necessary to successfully address community environmental concerns. For example, EPA has supported a series of projects in states and localities to compare risks and set environmental priorities. These "comparative risk" projects typically involve representatives from all relevant state and local agencies, as well as public interest organizations and members of the public. By involving all levels of government in a project -- from the problem assessment phase to the final phase of implementation -- EPA can support a strategic process that harmonizes with regulatory requirements and is more likely to lead to lasting solutions.

To support community decision-making, EPA should look for opportunities to work with existing organizations. Such organizations can provide links to local communities and can serve as channels for environmental education and information. It will often be important to work with community-based organizations that focus on issues such as housing, crime, or economic development, to identify and address environmental issues as well. For example, community leaders in a Boston neighborhood brought their concerns about drug-dealing and other criminal activities occurring on vacant lots to the attention of a local environmental justice advocacy group -- which led to a coordinated effort to address the problem.

2. Be responsive to the varying levels of understanding and motivation in different communities.

Levels of environmental understanding and motivation for action vary widely from community to community. EPA and bridging organizations need to respect these differences and develop educational approaches, analysis tools, and information in useful formats, that are appropriate for differing community needs.

Many communities are not yet actively dealing with significant environmental issues. In such circumstances, EPA can help to build awareness about environmental issues and potential solutions by linking environment issues to the communities' other concerns. EPA can provide and encourage the use of assessment tools, such as simple mapping techniques, geographic information systems, and risk assessment methodologies. EPA can support educational initiatives ...

Communities that are already motivated to tackle their environmental issues may need different types of incentives to take constructive action. EPA should support these communities in addressing the needs they have identified. Information and tools that will help them analyze problems and evaluate options are likely to be most valuable.

3. Focus on environmental performance and results.

As NAPA emphasized in its recent report on the future of environmental protection[1], environmental management approaches that focus on performance are superior to the more prescriptive approaches that are typical of the current regulatory system. Performance-based approaches encourage innovation and the development of more cost-effective solutions. In supporting communities in their efforts to make sound environmental decisions, EPA should focus on community goals and achievements -- and should avoid imposing EPA's criteria for success on communities.

Community decision-making involves both knowledge and judgment. EPA can be helpful in building knowledge by educating and informing decision-makers, for example by providing scientific, economic and other information about environmental problems. EPA can also provide help with the process and analytical tools that communities can use to determine priorities and set clear goals. But decisions about what problems are priorities, and what solutions are appropriate, are made by the community blending information about environmental issues with its values and judgements.

EPA needs to demonstrate a commitment to helping communities solve the problems of local concern. In fact, EPA needs to acknowledge that sometimes EPA's media-based regulations obstruct the achievement of solutions to cross-cutting problems, and EPA should be willing to work to find ways to implement needed solutions. In many cases, EPA's media-based organization (air, water, waste, toxics) still poses very real difficulties for solving the multi-

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[1] National Academy of Public Administration, Resolving the Paradox of Environmental Protection, 1997.

media problems that communities are struggling with. EPA's regional offices need to develop strong, cross-media capabilities for facilitating environmental problem-solving in communities. EPA "field staff, " permanently located in communities where EPA does not have a regional office, can be useful in this regard.

In some cases, EPA is directly involved in communities, for example in making decisions about cleaning up hazardous waste sites. In these situations, EPA needs to ensure that the decision-making process includes meaningful public involvement and is responsive to that public input. The decision-making process must be transparent to the public and there must be a commitment to implementing the decisions made in public processes.

4. Provide information and education that can help communities solve environmental problems.

As several of the previous recommendations suggest, provision of information and education is perhaps the most important incentive that EPA can provide to communities to make responsible environmental decisions. EPA is making significant strides to improve the accessibility of the information it collects, but greater effort is needed to make this -- and more -- information available to environmental decision makers in communities.

Communities need to know the potential environmental impacts of their actions, the potential alternatives, and the costs and benefits of different alternatives. What are the environmental impacts of continued development of greenfields? What are the alternatives to that development? For many communities, developers are the only source of information regarding the costs and benefits of development. EPA, working with partners, could serve as a source or clearinghouse of information for local communities on alternatives, and costs and benefits, addressing issues such as the relative costs of new infrastructure to support different residential development densities. Also, EPA could provide accurate cost information on alternatives to help communities answer questions like, "Can subsidies for water-conserving appliances reduce consumption sufficiently so that a community could avoid construction of a new water or wastewater treatment plant?"

EPA should provide information about the environment in ways that are meaningful to communities. The definition of "environment" in a community may differ significantly from EPA's definitions under the Clean Air Act, Clean Water Act, Superfund, etc. EPA can support communities in efforts to adopt and publicize environmental indicators that measure what is truly important to a community. For example, in Seattle, polls have consistently demonstrated that citizens are willing to pay for efforts to restore salmon in Puget Sound. Salmon and related environmental quality measures are important environmental indicators for that community and can be used to inform the public about progress in protecting their environment.

EPA can also provide tools that help communities make sense of information. For example, simple mapping or more complex GIS tools can help a community develop a picture of their

community, including the location of environmentally sensitive areas and potential threats. Creating such a picture can help a community develop a sense of priorities and spur action.

5. Develop and use a broad range of incentives appropriate for different community circumstances.

While providing information that communities can use is critical, by itself, information is insufficient. EPA needs to develop a range of incentives that can be made available to communities. For example:

Funding is always at the top of the list for cash-strapped localities struggling to solve environmental problems. Beyond the state revolving funds for water and wastewater treatment, and the Superfund for clean-up of hazardous waste sites, EPA has very limited funds that can go directly to communities. Most frequently, EPA has small amounts of funding that can be used to fund projects in a handful of communities. An important lesson is that even a small amount of funding is valuable to a community, in so far as it can often be used as seed funding to garner additional funding from other sources.

Training is another potential incentive that EPA should emphasize. EPA could sponsor training targeted to personnel in potential "bridge" organizations on how to support informed community decision-making on environmental issues. Such training should be broad-based and include all stakeholder perspectives. (In addition to offering training as an incentive to community organizations, it is important that EPA also train its own staff who deal with community leaders. That training should include, among other things, how to identify and help empower community-based environmental leaders.)

Technical assistance. EPA should focus more of its staff resources on providing assistance to communities to promote understanding environmental problems and options for solving them. Such assistance can be particularly important for community-based advocates and concerned members of the public who are impacted by agency decision-making, but lack adequate resources or information to be meaningfully engaged in the decision-making process.

Dependable partnerships. Once EPA gets involved in a specific community, it needs to remain a dependable partner throughout the process.

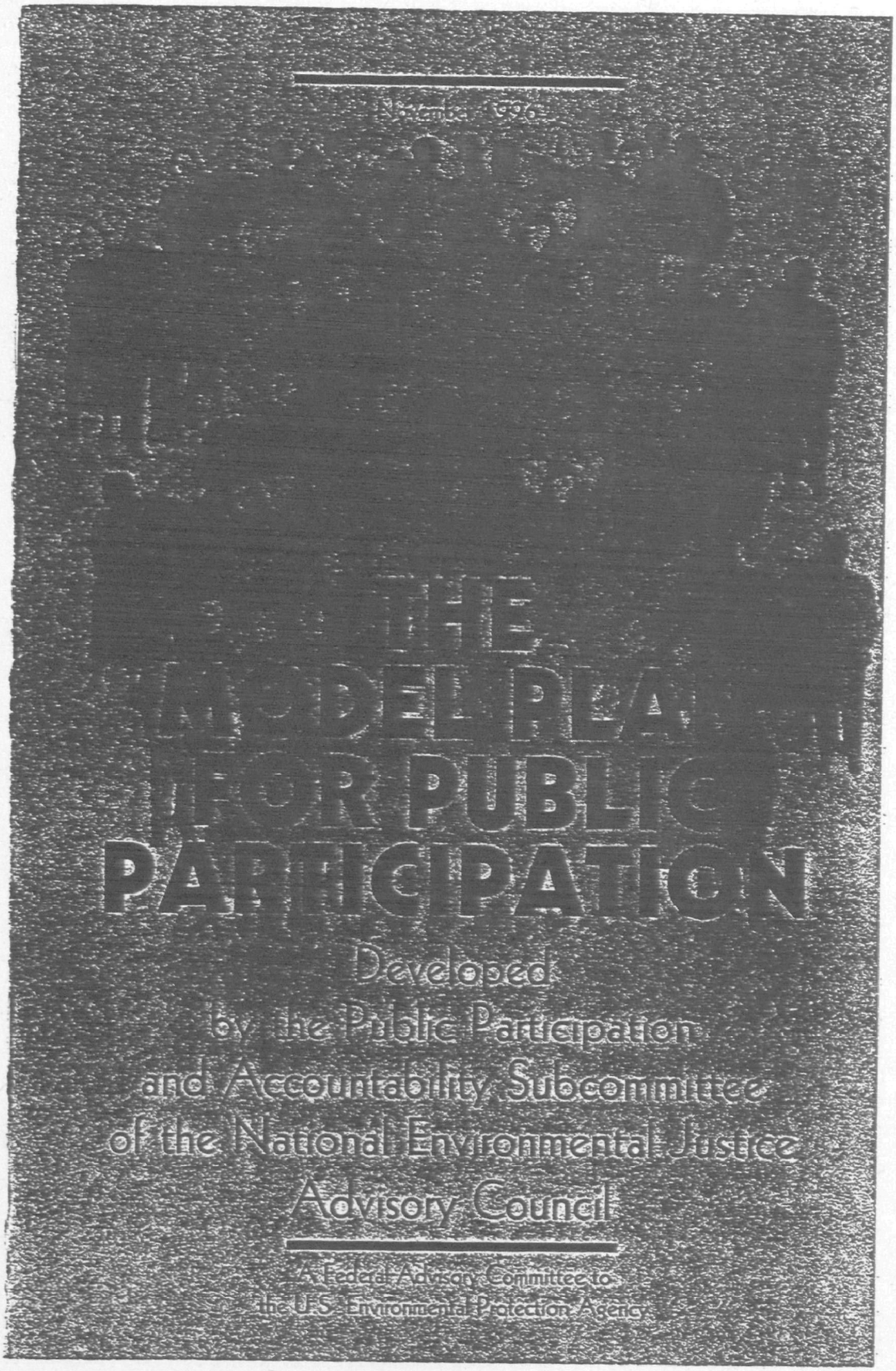
Support networks of change agents. An important outgrowth of EPA's comparative risk projects has been the development of "peer networks" so that community practitioners can support one another and share lessons learned.

Flexibility. Allowing communities to identify and solve environmental problems in their own way can, itself, be an incentive.

An instructive example is provided by the new directions underway in The Nature Conservancy, a non-profit organization dedicated to the preservation of biodiversity.

Traditionally, TNC has focused on buying land to create nature preserves in ecologically valuable areas. Recently, TNC has recognized that this approach is insufficient -- its nature preserves are affected by what goes on in the surrounding watersheds, and buying entire watersheds is not a feasible solution. TNC is now turning to community-based environmental protection, and is working with communities through strategic planning processes to ensure environmentally and economically compatible development.

What are the lessons for EPA here? A "command and control" approach is insufficient for protection of the environment. To complement national programs, a collaborative approach with communities offers great promise for improving environmental protection. Working as partners with communities means integrating environmental concerns with local concerns about economic security and quality of life. And, reinvention of a large national organization is possible -- and necessary -- if we are to realize continued gains in protection of our health and our natural resources.



Appendix L: NEJAC Public Participation Guidelines

EPA National Environmental Justice Advisory Council

Dear Colleagues and Friends:

The National Environmental Justice Advisory Council (NEJAC) considers public participation crucial in ensuring that decisions affecting human health and the environment embrace environmental justice. To facilitate such public participation, the NEJAC requested that its Public Participation and Accountability Subcommittee develop recommendations for methods by which EPA can institutionalize public participation in its environmental programs. In 1994, the Public Participation and Accountability Subcommittee developed the Model Plan for Public Participation. The plan is based on two guiding principles and four critical elements. The NEJAC adopted the model plan as a living document to be reviewed annually and revised as needed.

We are pleased to send you a copy of the Model Plan for Public Participation. We also have enclosed the Core Values for the Practice of Public Participation developed by *Interact: The Journal of Public Participation* and the Environmental Justice Public Participation Checklist developed by the Interagency Working Group on Environmental Justice for use by Federal and State agencies. We invite you to consider the model plan as a tool that will guide the public participation process. Please share this document with others who may be interested in encouraging broader community participation in the environmental decision-making process.

Please forward any written comments to:

NEJAC Public Participation and Accountability Subcommittee
c/o U.S. Environmental Protection Agency
Office of Environmental Justice
401 M Street, SW (Mail Code: 2201A)
Washington, DC 20460
Phone: (202) 564-2515
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Sincerely,

Richard Moore, Chairman
National Environmental Justice
Advisory Council

BACKGROUND

The National Environmental Justice Advisory Council (NEJAC) is a federal advisory committee that was established by charter on September 30, 1993, to provide independent advice, consultation, and recommendations to the Administrator of the U.S. Environmental Protection Agency (EPA) on matters related to environmental justice. The NEJAC is made up of 25 members, and one designated federal official (DFO), who serve on a parent council that has six subcommittees—Enforcement, Health and Research, Indigenous Peoples, International, Public Participation and Accountability, and Waste and Facility Siting. Along with the NEJAC members who fill subcommittee posts, an additional 34 individuals serve on the various subcommittees. The NEJAC has held meetings in locations across the United States, including Washington, D.C., Albuquerque, New Mexico, Herndon, Virginia, Atlanta, Georgia, Arlington, Virginia, and Detroit, Michigan.

As a federal advisory committee, the NEJAC is bound by all requirements of the Federal Advisory Committee Act (FACA) of October 6, 1972. Those requirements include:

- Members must be selected and appointed by EPA
- Members must attend and participate fully in meetings of the NEJAC
- Meetings must be open to the public, except as specified by the Administrator
- All meetings must be announced in the Federal Register
- Public participation must be allowed at all public meetings
- The public must be provided access to materials distributed during the meeting
- Meeting minutes must be kept and made available to the public
- NEJAC must provide independent judgment that is not influenced by special interest groups

Each subcommittee, formed to deal with a specific topic and to facilitate the conduct of the business of the NEJAC, has a DFO and is bound by the requirements of FACA. Subcommittees of the NEJAC meet independently of the full NEJAC and present their findings to the NEJAC for review. Subcommittees cannot make recommendations independently to EPA. In addition to the six subcommittees, the NEJAC has established a Protocol Committee, the members of which are the chair of NEJAC and the chairs of each subcommittee.

EPA's Office of Environmental Justice (OEJ) maintains transcripts, summary reports, and other material distributed during the meetings. Those documents are available to the public upon request.

Comments or questions can be directed to OEJ through the Internet. OEJ's Internet E-mail address is: **environmental.justice.epa@epamail.epa.gov.**

Executive summaries of the reports of the NEJAC meetings are available on the Internet at OEJ's World Wide Web home page: **http://es.inel.gov/oeca/oej.html.**

TABLE OF CONTENTS

GUIDING PRINCIPLES

A. PUBLIC PARTICIPATION

I. Encourage public participation in all aspects of environmental decision making.

Communities, including all types of stakeholders, and agencies should be seen as equal partners in dialogue on environmental justice issues. In order to build successful partnerships, interactions must:

- Encourage active community participation
- Institutionalize public participation
- Recognize community knowledge
- Utilize cross-cultural formats and exchanges

II. Maintain honesty and integrity in the process and articulate goals, expectations, and limitations.

CRITICAL ELEMENTS

A. PREPARATION

I. Developing co-sponsoring and co-planning relationships with community organizations is essential to successful community meetings. To ensure a successful meeting, agencies should provide co-sponsors the resources they need and should share all planning roles. These roles include:

- Decision making
- Development of the agenda
- Establishment of clear goals
- Leadership
- Outreach

II. Educating the community to allow equal participation and provide a means to influence decision making.

III. Regionalizing materials to ensure cultural sensitivity and relevance.

IV. Providing a facilitator who is sensitive and trained in environmental justice issues.

B. PARTICIPANTS

I. As the NEJAC model demonstrates, the following communities should be involved in environmental justice issues:

- Community and neighborhood groups
- Community service organizations (health, welfare, and others)
- Educational institutions and academia
- Environmental organizations
- Government agencies (federal, state, county, local, and tribal)
- Industry and business
- Medical community
- Nongovernment organizations
- Religious communities
- Spiritual communities

II. Identify key stakeholders, including:

- Educational institutions
- Affected communities
- Policy and decision makers (for example, representatives of agencies accountable for environmental justice issues, such as health officials, regulatory and enforcement officials, and social agency staff).

C. LOGISTICS

I. Where:

- The meetings should be accessible to all who wish to attend (public transportation, child care, and access for the disabled should be considered).
- The meeting must be held in an adequate facility (size and conditions must be considered).
- Technologies should be used to allow more effective communication (teleconferences, adequate translation, equipment, and other factors).

II. When:

- The time of day and year of the meeting should accommodate the needs of affected communities (evening and weekend meetings accommodate working people, and careful scheduling can avoid conflicts with other community or cultural events).

III. How:

- An atmosphere of equal participation must be created (avoid using a "panel" or "head table").
- A two-day meeting, at a minimum, is suggested. The first day should be reserved for community planning and education.
- The community and the government should share leadership and presentation assignments.

D. MECHANICS

- Maintain clear goals by referring to the agenda, however, do not be bound by it.
- Incorporate cross-cultural exchanges in the presentation of information and the meeting agenda.
- Provide a professional facilitator who is sensitive to, and trained in, environmental justice issues.
- Provide a timeline that describes how the meeting fits into the overall agenda of the issues at hand.
- Coordinate follow-up by developing an action plan and determining who is the contact person who will expedite the work products from the meeting.
- Distribute minutes and a list of action items to facilitate follow-up.

CORE VALUES FOR THE PRACTICE OF PUBLIC PARTICIPATION

1. People should have a say in decisions about actions which affect their lives.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. The public participation process communicates the interests and meets the process needs of all participants.
4. The public participation process seeks out and facilitates the involvement of those potentially affected.
5. The public participation process involves participants in defining how they participate.
6. The public participation process communicates to participants how their input was, or was not, utilized.
7. The public participation process provides participants with the information they need to participate in a meaningful way.

Source. *Interact The Journal of Public Participation,* Volume 2, Number 1, Spring 1996. *Interact* is published by the International Association of Public Participation Practitioners, a non-profit corporation established in 1990 to serve practitioners throughout the world seeking practical experience designing and conducting public involvement programs.

ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION CHECKLIST FOR GOVERNMENT AGENCIES

Please note that this checklist was developed by Federal agencies for use by Federal and State agencies. It serves as an example of a process to be followed and does not include regulatory requirements. Please contact the U.S. Environmental Protection Agency Office of Environmental Justice for more information about the public participation process, within the regulatory framework.

☑ 1. Ensure that the Agency's public participation policies are consistent with the requirements of the Freedom of Information Act, the Emergency Planning and Community Right to Know Act and the National Environmental Policy Act.

☑ 2. Obtain the support of senior management to ensure that the Agency's policies and activities are modified to ensure early, effective and meaningful public participation, especially with regard to Environmental Justice stakeholders. Identify internal stakeholders and establish partnering relationships.

☑ 3. Use the following Guiding Principles in setting up all public meetings:

- Maintain honesty and integrity throughout the process
- Recognize community and indigenous knowledge
- Encourage active community participation
- Utilize cross-cultural formats and exchanges

☑ 4. Identify external Environmental Justice stakeholders and provide opportunities to offer input into decisions that may impact their health, property values and lifestyles. Consider at a minimum individuals from the following organizations as appropriate:

- Environmental organizations
- Business and trade organizations
- Civic/public interest groups
- Grassroots/community-based organizations
- Congress
- Federal agencies
- Homeowner and resident organizations
- International organizations
- Labor unions
- Local and State government
- Media/Press
- Indigenous people
- Tribal governments
- Industry
- White House
- Religious groups
- Universities and schools

☑ 5. Identify key individuals who can represent various stakeholder interests. Learn as much as possible about stakeholders and their concerns through personal consultation, phone or written contacts. Ensure that information-gathering techniques include modifications for minority and low-income communities (for example, consider language and cultural barriers, technical background, literacy, access to respondents, privacy issues and preferred types of communications)

☑ 6. Solicit stakeholder involvement early in the policy-making process, beginning in the planning and development stages and continuing through implementation and oversight.

☑ 7. Develop co-sponsoring/co-planning relationships with community organizations, providing resources for their needs.

☑ 8. Establish a central point of contact within the Federal agency to assist in information dissemination, resolve problems and to serve as a visible and accessible advocate of the public's right to know about issues that affect health or environment.

☑ 9. Regionalize materials to ensure cultural sensitivity and relevance. Make information readily accessible (for example, access for the handicapped and sight- and hearing-impaired) and understandable. Unabridged documents should be placed in repositories. Executive summaries/fact sheets should be prepared in layman's language. Whenever practicable and appropriate, translate targeted documents for limited English-speaking population.

☑ 10. Make information available in a timely manner. Environmental Justice stakeholders should be viewed as full partners and Agency customers. They should be provided with information at the same time it is submitted for formal review to State, Tribal and/or Federal regulatory agencies.

☑ 11. Ensure that personnel at all levels in the Agency clearly understand policies for transmitting information to Environmental Justice stakeholders in a timely, accessible and understandable fashion.

☑ 12. Establish site-specific community advisory boards where there is sufficient and sustained interest. To determine whether there is sufficient and sustained interest, at a minimum, review correspondence files, review media coverage, conduct interviews with local community members and advertise in local newspapers. Ensure that the community representation includes all aspects and diversity of the population. Organize a member selection panel. Solicit nominations from the community. Consider providing administrative and technical support to the community advisory board.

☑ 13. Schedule meetings and/or public hearings to make them accessible and user-friendly for Environmental Justice stakeholders. Consider time frames that do not conflict with work schedules, rush hours, dinner hours and other community commitments that may decrease attendance. Consider locations and facilities that are local, convenient and represent neutral turf. Ensure that the facility meets American with Disabilities Act Statements about equal access. Provide assistance for hearing-impaired individuals. Whenever practical and appropriate, provide translators for limited-English speaking communities. Advertise the meeting and its proposed agenda in a timely manner in the print and electronic media. Provide a phone number and/or address for communities to find out about pending meetings, issues, enter concerns or to seek participation or alter meetings agendas.

☑ 14. Consider other vehicles to increase participation of Environmental Justice stakeholders including:

- Posters and Exhibits
- Participation in Civic and Community Activities
- Public Database and Bulletin Boards
- Surveys
- Telephone Hotlines
- Training and Education Programs, Workshops and Materials

☑ 15. Be sure that trainers have a good understanding of the subject matter both technical and administrative. The trainers are the Ambassadors of this program. If they don't understand — no one will.

☑ 16. Diversity in the workplace: whenever practical be sure that those individuals that are the decision makers reflect the intent of the Executive Order and come from diverse backgrounds, especially those of a community the Agency will have extensive interaction with.

☑ 17. After holding a public forum in a community, establish a procedure to follow up with concrete action to address the communities' concerns. This will help to establish credibility for your Agency as having an active role in the Federal government.

☑ 18. Promote interagency coordination to ensure that the most far reaching aspects of environmental justice are sufficiently addressed in a timely manner. Environmental problems do not occur along departmental lines. Therefore, solutions require many agencies and other stakeholders to work together efficiently and effectively.

☑ 19. Educate stakeholders about all aspects of environmental justice (functions, roles, jurisdiction, structure and enforcement).

☑ 20. Ensure that research projects identify environmental justice issues and needs in communities, and how to meet those needs through the responsible agencies.

☑ 21. Establish interagency working groups (at all levels) to address and coordinate issues of environmental justice.

☑ 22. Provide information to communities about the government's role as it pertains to short-term and long-term economic and environmental needs and health effects.

☑ 23. Train staff to support inter-and intra-Agency coordination, and make them aware of the resources needed for such coordination.

☑ 24. Provide Agency staff who are trained in cultural, linguistic and community outreach techniques.

☑ 25. Hold workshops, seminars and other meetings to develop partnerships between agencies, workers and community groups. (Ensure mechanisms are in place to ensure that partnerships can be implemented via cooperative agreements, etc.)

☑ 26. Provide effective outreach, education and communications. Findings should be shared with community members, with an emphasis on being sensitive and respectful to race, ethnicity, gender, language, and culture.

☑ 27. Design and implement educational efforts tailored to specific communities and problems. Increase the involvement of ethnic caucuses, religious groups, the press, and legislative staff in resolution of Environmental Justice issues.

☑ 28. Assure active participation of affected communities in the decision-making process for outreach, education, training and community programs -- including representation on advisory councils and review committees.

☑ 29. Encourage Federal and State governments to "reinvent government" -- overhaul the bureaucratic in favor of community responsive.

☑ 30. Link environmental issues to local economic issues to increase level of interest.

☑ 31. Use local businesses for environmental cleanup or other related activities.

☑ 32. Utilize, as appropriate, historically Black Colleges and Universities (HBCU) and Minority Institutes (MI), Hispanic Serving Colleges and Universities (HSCU) and Indian Centers to network and form community links that they can provide.

☑ 33. Utilize, as appropriate, local expertise for technical and science reviews.

☑ 34. Previous to conducting the first Agency meeting, form an agenda with the assistance of community and Agency representatives.

☑ 35. Provide "open microphone" format during meetings to allow community members to ask questions and identify issues from the community.

Bibliography:

"Interim Report of the Federal Facilities Environmental Restoration Dialogue Committee," February 1993, U.S. Environmental Protection Agency and the Keystone Center.

"Community Relations in Superfund: A Handbook," January 1992, U.S. Environmental Protection Agency, Documents # EPA-540-R-92-009 and # PB92-963341.

DRAFT "Partnering Guide for DoD Environmental Missions," July 1994, Institute for Water Resources, U.S.A.C.E.

"Improving Dialogue with Communities: A Short Guide for Government Risk Communications," September 1991, Environmental Communications Research Program, New Jersey Agricultural Experiment Station, Cook College, Rutgers University.

NOTES

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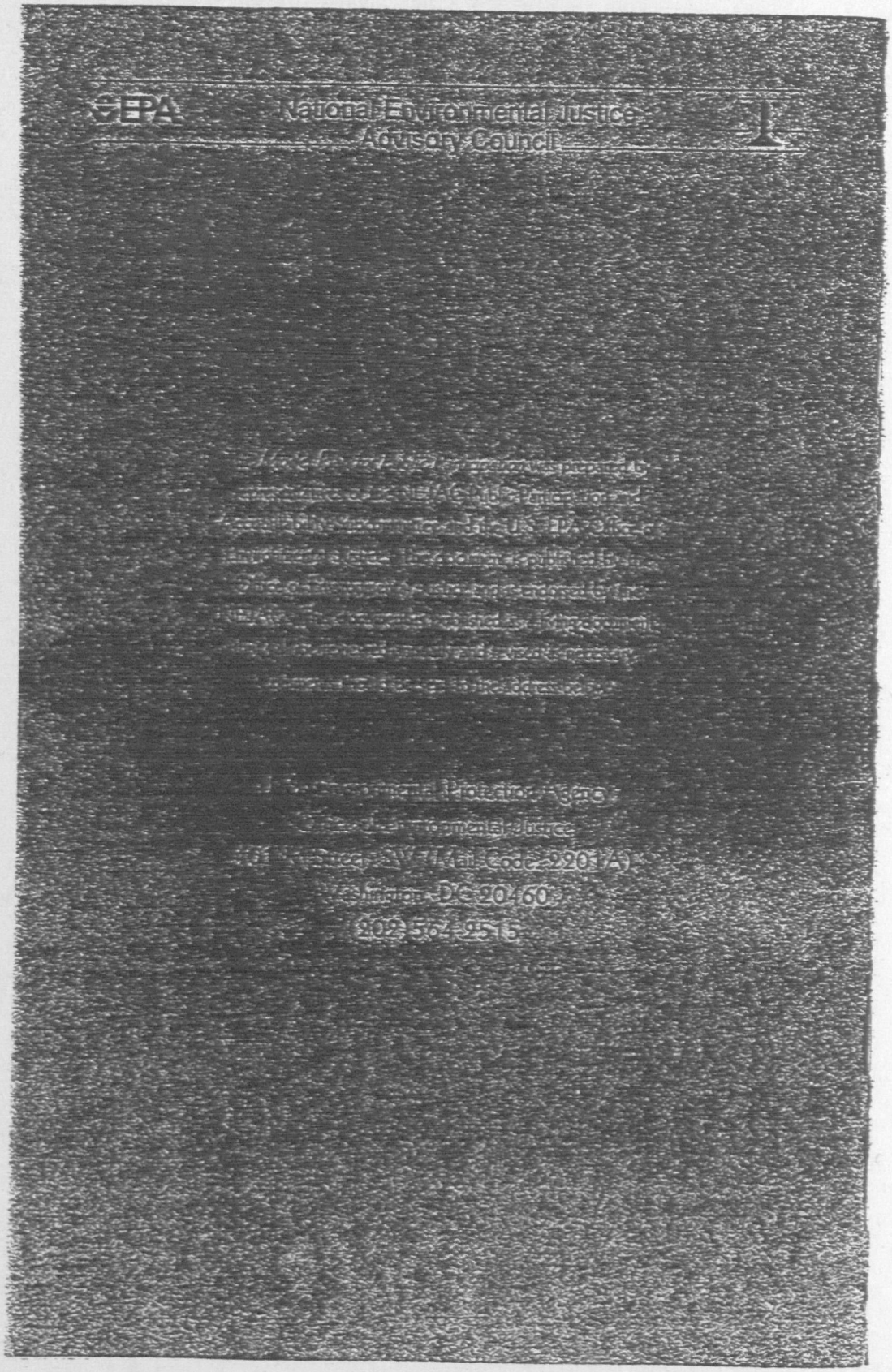
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June 15, 1998

ITEM 3

To: Committee E-50; Subcommittee E-50.03

From: Bill Gulledge

RE: Concurrent Ballot of "Standard Guide to the Process of Sustainable Brownfields Redevelopment"

An earlier version of this document was balloted in January, 1998. All comments received on that ballot and additional suggestions provided and approved at task group meetings in April, 1998, and May, 1998, were incorporated into the attached revised, ballot draft. We are encouraged by the active, positive contributions of all task group members and comments to the document. I believe the standard is substantially improved in this recent revision.

Please respond by the due date shown on the ballot form. Comments received will be considered at our next task group meeting in Austin in September. Please feel free to contact me 703-716-3627, Mike Taylor 203-270-3413, or Jim Rocco 216-586-6706, if you have any questions. We look forward to seeing you in September.

Appendix M: ASTM E-50.03 – Standard Guide to the Process of Sustainable Brownfields Redevelopment

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ITEM 3

ASTM E-50.03
Standard Guide to the Process of Sustainable Brownfields Redevelopment

Table of Contents

ASTM E-50.03

Standard Guide to the Process of Sustainable Brownfields Redevelopment

1.0 Scope

This document is to act as a guide for all stakeholders with an interest in redevelopment of a Brownfields property. The guide identifies impediments to Brownfields development and suggests solutions to facilitate redevelopment. Both government and community groups are concerned with the quality of Brownfields redevelopment and wish to ensure that the redevelopment will not only protect public health and environment, but also be economically viable and benefit the community. The sustainable Brownfields redevelopment process is a voluntary effort that actively engages property owners, developers, government agencies and the community in conducting corrective action, economic evaluation and other actions to promote the long-term productive reuse of a Brownfields property. The process can make great strides toward sustainable redevelopment since it encourages economic vitality of an area which in turn can reduce other social problems at Brownfields properties including poverty, unemployment and crime.

It is the intent of this guide to encourage a sustainable Brownfields redevelopment process through responsible private/public investment and redevelopment of Brownfields properties. Brownfields redevelopment is not strictly an environmental issue. In some cases, the environmental issues may be a minor component of the redevelopment project. The interrelated financial, regulatory, and community participation aspects of Brownfields redevelopment should also be addressed. Decisions made in one of these areas may affect responses in other areas. For example, a community's goals for the ultimate use of a property may affect corrective action and the cost of potential remedial action that, in turn, may enhance the redevelopment.

This guide is intended to describe a highly flexible process. This process is not linear and not every project requires full use of all components of the process for effective implementation. The key to the process is the active engagement of government, developers and the community to ensure successful sustainable Brownfields redevelopment process.

2.0 Referenced Documents

2.1 ASTM Standards

2.1.1 E-1739-95 Risk Based Corrective Action Applied at Petroleum Release Sites
2.1.2 E-XXXX Remediation by Natural Attenuation
2.1.3 E-50.01 Guide for Vertical Horizontal Assessment of Sites for Petroleum Contaminants (Phase III)
2.1.4 E-XXXX Provisional Guide for Risk Based Corrective Action for Chemical Release Sites
2.1.5 E 1527-94 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process

2.1.6 E 1528-93 Standard Practice for Environmental Site Assessments: Transaction Screen Process
2.1.7 E-XXXX Guide for Accelerated Site Characterization

3.0 Terminology

3.1 The following definitions are quoted directly from the July 1995 revision of Regulations Governing ASTM Technical Committees. As definitions developed by the Committee on Standards (COS), these definitions are provided for informational purposes only, and are not subject to ballot or revisions under this Standard Guide.

3.1.1 Standard - as used in ASTM, a document that has been developed and established within the consensus principles of the Society and that meets the approval requirements of ASTM procedures and regulations.

> Discussion - The term "standard" serves in ASTM as an adjective in the title of documents, such as test methods or specifications, to connote specified consensus and approval. The various types of standard documents are based on the needs and usages as prescribed by the technical committees of the Society.

3.1.2 Guide - an organized collection of information or series of options that does not recommend a specific course of action.

> Discussion - A guide increases the awareness of information and approaches in a given subject area.

3.1.3 Practice - a definitive set of instructions for performing one or more specific operations that does not produce a test result.

> Discussion - Examples of practices include, but are not limited to: application, assessment, cleaning, collection, decontamination, inspection, installation, preparation, sampling, screening, and training.

3.1.4 Test Method - a definitive procedure that produces a test result.

> Discussion - Examples of test methods include, but are not limited to: identification, measurement, and evaluation of one or more qualities, characteristics, or properties.

3.2 Description of terms specific to this standard:

3.2.1 Brownfields - Abandoned, idled or under utilized properties where expansion or redevelopment is complicated by the potential or confirmed existence of chemical(s) of concern environmental media.

3.2.2 Brownfields Redevelopment Coordinator - a local or regional government official, economic development agency or non-profit organization responsible for facilitating Brownfields redevelopment.

Discussion - The Brownfields redevelopment coordinator is generally associated with local government. However, the Brownfields redevelopment coordinator can be an official of a regional, state or federal government agency

3.2.3 Chemical(s) of Concern - Specific constituents and their breakdown products that are identified for evaluation in the risk assessment process.

Discussion - Identification can be based on their historical and current use at a property, detected concentrations in environmental media and their mobility, toxicity, and persistence in the environment. Chemical(s) of concern may include, but be not limited to, petroleum, metals and chemicals related to industrial activities.

3.2.4 Community - The individuals living and or working within the area that may be affected by Brownfields redevelopment.

Discussion - The community should be defined on a property-specific basis.

3.2.5 Corrective Action - The sequence of actions that include property assessment and investigation, interim remedial action, remedial action, operation and maintenance of equipment, monitoring of progress, and termination of the remedial action.

3.2.6 Developer - A private or public entity that intends to redevelop a Brownfields property and may provide all, part, or none of funds.

Discussion - The developer of a Brownfields property is often an organization or company whose primary business is typically unrelated to redevelopment of Brownfields properties. As an example, a developer may be the owner of a company that wants to purchase an adjacent parcel of property for expansion of the existing business.

3.2.7 Exposure Pathway - The course a chemical(s) of concern takes from the source area(s) to an exposed organism. An exposure pathway describes a mechanism by which an individual or population is exposed to a chemical(s) of concern originating from a property.

Discussion - Each exposure pathway includes a source or release from a source, a point of exposure, and an exposure route. If the exposure point is not at the source, a transport/exposure medium (e.g., air or water) also is included.

3.2.8 Remedial Action - Activities conducted to protect human health and the environment by meeting acceptable risk-based site-specific target levels by using any combination of actions such as natural attenuation, institutional controls, source removal, engineering controls and design, maintenance and operation of remedial action equipment.

Discussion - For Brownfields properties the agreed upon remedial action may require a combination of active removal and exposure management methods that are protective of human health while allowing cost-effective property redevelopment.

3.2.9 Representation - a statement of past or present fact, true on the date made, given by one party to induce another to enter into a contract

3.2.10 Risk-Based Corrective Action - a framework in which exposure and risk assessment practices are integrated with property assessment activities and remedial action selection to ensure that the chosen action is protective of human health and the environment

3.2.11 Site-Specific Target Level (SSTL) - Risk-based target levels for chemical(s) of concern for human receptors developed for all applicable media of concern on a Brownfields property

3.2.12 Stakeholders - Individuals, organizations or other entities that directly affect or are directly affected by the Brownfields property or its redevelopment.

Discussion - Stakeholders include, but are not limited to owners, buyers, developers, lenders, insurers, government agencies and community groups.

3.2.13 Sustainable Brownfields Redevelopment Process - A voluntary effort that actively engages property owners, developers, government agencies and the community in conducting corrective action, economic evaluation and other actions to promote the long-term productive reuse of a Brownfields property

3.2.14 Transferee - The buyer, other recipient by deed or lessee of the Brownfields redevelopment property.

3.2.15 Transferor - The seller or lessor of the Brownfields redevelopment property.

3.2.16 Warranty - A representation made by one party to a second party of a contract of the existence of a fact upon which the second party may rely (e.g., that the property is in compliance with certain laws) thus relieving the second party of establishing that fact.

4.0 Significance and Use

This document guides the stakeholder through a process for Brownfields redevelopment that incorporates regulatory, community and transactional issues. Given the economic and social benefits of sustainable restoration of Brownfields properties, guidance on a process for Brownfields redevelopment could be most useful in insuring the acceptability, and therefore viability, of such redevelopment.

Sustainable Brownfields Redevelopment can be achieved through the productive reuse of properties that have been abandoned or idled. This reduces the need to develop new land by satisfying the needs of the present without compromising the ability of the future generations to meet their own needs. Both the current environmental conditions and the future use of the property need to be considered in order to ensure sustainability. Following the process and concepts discussed in this guide will provide the user with a sound framework for decision making and assist the user in balancing the needs of both the present and future generations through involvement of all of the stakeholders in the process. However, this guide does not give specific criteria for assessing the sustainability of a Brownfields redevelopment project.

It is recognized that certain communities have already formulated their own, effective, processes. It is not the purpose of this document to impose a set of guidelines where successful formulae exist. Indeed, elements of successful models from around the country have been integrated within this Standard Guide. The audience for this document is all potential stakeholders.

Redevelopment of underutilized properties is a key objective of federal, state, and local environmental agencies in environmental policy. Many states have developed Brownfields legislation to facilitate this redevelopment effort. State voluntary corrective action programs play an important role in implementing an effective Brownfields regulatory policy. Many states have applied risk-based decision making concepts to their voluntary corrective action programs. Some of the Brownfields redevelopment projects will involve voluntary corrective action while other corrective actions may be mandated by government order. Risk-based decision making may be a viable option for corrective action at many Brownfields redevelopment properties.

This document is intended to provide a framework for the sustainable Brownfields redevelopment process and identify critical functions and impediments that need to be overcome in order to achieve sustainable development. In this respect the Standard Guide can be used by state and local government to establish and operate a viable redevelopment program for their communities.

5.0 Sustainable Brownfields Redevelopment Process

There are four main components in the sustainable Brownfields redevelopment process: Initiation, Evaluation, Transaction and Implementation (see Table 1). In addition, a sustainable Brownfields redevelopment process requires the involvement of a variety of stakeholders. Some stakeholders remain at the core of the process as one component develops into the next. Other stakeholders will move closer to or further away from the core during the process. Thus, stakeholders will bring a different perspectives or agendas to each component of the process. The sustainable Brownfields redevelopment process is not linear and not every project requires full use of all components of the process for effective implementation. It works best when the interests of all stakeholders are identified early on and the parties work together as a team to satisfy each of the party's interests using an open, non-adversarial approach to negotiations. Those components and the stakeholders' goals are described in the following sections and in Figure 1.

Table 1: An Example of the Stakeholders that Could be Associated with the Basic Components in the Sustainable Brownfields Redevelopment Process

Initiation	Evaluation	Transaction	Implementation
Community Government Owner/Transferor Prospective Transferee Developer	Community Government Owner/Transferor Prospective Transferee Developer Insurers	Community Government Owner/Transferor Prospective Transferee Developer Insurers Lenders	Community Government Owner/Transferor Developer Transferee Insurers Lenders

Note: Stakeholders who have an interest in the Brownfields redevelopment are listed in Table 2. Some stakeholders have notable cash or cash equivalents at risk. While other stakeholders have an interest in assuring sustainable development goals are achieved and maintained.

6.0 Initiation

The sustainable Brownfields redevelopment process begins with a vision of the redevelopment and reuse of a property or properties. The process is initiated when a stakeholder recognizes a need or a business opportunity. The process can be initiated by a number of different stakeholders either individually or as part of a team effort. One of the critical activities of the initiation component is the identification of the potential stakeholders. The form of initiation will depend upon the stakeholders' goals (see Table 2).

Table 2: Example of Stakeholder Goals during the Initiation Component.

STAKEHOLDER	GOAL
Community	Improvement of physical and aesthetic conditions; Community and economic revitalization
Government	
- Redevelopment Agencies	Economic revitalization; Increased tax base
- Environmental & Health Agencies	Compliance with environmental, health and safety requirements, Identification of concerns and potential areas for improvement
Transferor/Transferee	Enhancement of property value and achieve less costly and faster approaches to corrective action, Identify options to reduce and transfer risk and liability
Prospective transferee	Better understanding of the opportunities and barriers, Opportunities to purchase a property with potential return on investment or to achieve a benefit to the community, Manage liability for environmental condition(s) that they did not cause
Developer	Opportunity to add value to the property, Manage liability for environmental condition(s) that they did not cause

6.1 Initiate Process

The sustainable Brownfields redevelopment process can be initiated by any one or more of the potential stakeholders.

6.1.1 Owners, Prospective Transferees and Developers

Owners, prospective transferees and/or developers may initiate the sustainable Brownfields redevelopment process by identifying a property or properties for redevelopment based upon their belief that the project will yield an appropriate return on investment and/or community benefit.

6.1.2 Not-for-Profit Organization

A not-for-profit organization may act as a facilitator, investor or partner in the redevelopment of a particular Brownfields property or properties.

6.1.3 Community

The community may initiate the process through dialogue with owners, prospective transferees or government agencies. Community groups often have a vision, plan and expectations for redevelopment in their place of residence and business. This vision may be based in history

and tradition particular to the neighborhood and may include expectations of improved economic opportunities and physical surroundings

6.1.4 Local Government

Government may initiate the sustainable Brownfields redevelopment process as a developer, owner, potential transferee, and investor or otherwise facilitate Brownfields redevelopment by providing technical expertise, financial incentives and/or community education.

6.2 *Identifying the Stakeholders*

It is incumbent upon the Brownfields Redevelopment Coordinator and/or the stakeholder(s) initiating the process to carefully evaluate the project and identify key stakeholders before proceeding in the redevelopment process. The stakeholders are determined by more than the physical proximity to a Brownfields property slated for redevelopment, the percentage of capital invested in a particular property, or the effect a Brownfields redevelopment may have on them as a particular group or as individuals. It is crucial that the identification of the stakeholders include all parties that have a stake in the outcome of the redevelopment process.

6.2.1 Owner, Prospective Transferee or Developer

The owner, prospective transferee or developer should typically consider a number of factors in deciding on whether or not to invest in a Brownfields property. These factors may include:

6.2.1.1 Planned use of the property
6.2.1.2 Cost of corrective action and associated liability
6.2.1.3 Potential time delays associated with corrective action
6.2.1.4 Potential return on investment
6.2.1.5 Surrounding land use and economic viability of surrounding properties
6.2.1.6 Infrastructure - roads, sewers, water availability, public transportation, utilities
6.2.1.7 Environmental condition within and adjacent to the Brownfields redevelopment property
6.2.1.8 Security
6.2.1.9 Physical surroundings (parks, view, consistency with neighborhood character)
6.2.1.10 Education/training facilities for employees
6.2.1.11 Commitment of the local government to an area-wide development plan
6.2.1.12 Property taxes and financial incentives

6.2.2 Community

The community includes local residents, workers, organizations and institutions. Community involvement is a critical component of the Brownfields process. Even with the best of intentions, what seem to be the best plan may not meet with acceptance and success. Those charged with the responsibility of conducting the community outreach may need to get help in identifying who the relevant community and its leaders are and in designing a meaningful public participation process. The sustainable Brownfields redevelopment process can only occur through a constructive dialogue that acknowledges the needs and expectations of the community. It is important to consider a variety of public participation techniques for different size projects and avoid a one-size-fits-all approach. In some cases, the project may not be

big enough or complex enough to warrant extensive or lengthy public involvement. Other components of community involvement may include:

6.2.2.1 Community education
6.2.2.2 Community input on the proposed development and potential corrective action
6.2.2.3 Presentation of the conceptual plan to the community
6.2.2.4 Recognition of community leadership
6.2.2.5 Local political realities
6.2.2.6 Effective community outreach
6.2.2.7 Other community characteristics

6.2.2.7.1 Status of the infrastructure
6.2.2.7.2 Alternative or additional properties for redevelopment
6.2.2.7.3 Adjacent communities' experience with Brownfields redevelopment

6.2.3 Government

6.2.3.1 Local Government

The local government is key to the sustainable Brownfields redevelopment process. Local government weighs the benefits and concerns of economic development on the community. Local government may be the Brownfields coordinating agency whose functions may include:

6.2.3.1.1 Information source on environmental conditions at Brownfields properties,
6.2.3.1.2 Community outreach
6.2.3.1.3 Planning for area wide development
6.2.3.1.4 Advocate for both the developer and the community,
6.2.3.1.5 Solicitor of developers and financial institutions, and
6.2.3.1.6 Coordinator ensuring all relevant governing and approval agencies work together toward a common goal of redevelopment.

6.2.3.2 State Government

State government can assist with economic development and meeting environmental objectives. The state government may consider:

6.2.3.2.1 Streamlining in permitting
6.2.3.2.2 Flexibility and streamlining in the corrective action process to achieve environmental objectives including use of:

6.2.3.2.2.1 Risk-based decision making
6.2.3.2.2.2 Property-specific land use and ground water use as a basis for corrective action decisions
6.2.3.2.2.3 Streamlined assessment processes
6.2.3.2.2.4 Flexible approach to determining remedial action alternatives including institutional and engineering controls
6.2.3.2.2.5 Property-specific exposure assumptions when establishing future exposure scenarios
6.2.3.2.2.6 Mechanisms for release of liabilities or covenants not to sue.

6.2.3.2.3 Assisting local governments in redevelopment efforts through provision of technical expertise, assessment and remedial action technologies, grants and loans to local government for property assessment, demolition and remedial action at a Brownfields redevelopment property, and community education on environmental issues

6.2.3.2.4 Providing funding or assisting in obtaining funding, grants and loans to local government for Brownfields redevelopment property assessment, demolition and remedial action.

6.2.3.2.5 Covenants not to sue or releases from liability or comfort letters under state statutes.

6.2.3.2.6 Legislative and regulatory changes to facilitate Brownfields redevelopment.

6.2.3.3 *Federal Government*

The federal government may assist with economic development and meeting environmental objectives by supporting risk-based decisions in corrective action for Brownfields properties and consider:

6.2.3.3.1 Funding or assisting in obtaining funding, grants and loans for Brownfields redevelopment property assessment, demolition and remedial action.

6.2.3.3.2 Assessments, revolving loans and tax incentives,

6.2.3.3.3 Use of risk-based decisions for corrective action tied to reasonably anticipated land and ground water use.

6.2.3.3.4 Where state voluntary corrective action programs exist, delegation of federal corrective action oversight to the state under the voluntary corrective action program and allowing for release from liability

6.2.3.3.5 Prospective purchaser agreements for releases from liability or comfort letters under federal statutes.

6.2.3.3.6 Legislative and regulatory changes to facilitate Brownfields redevelopment.

6.2.4 Lending Institution

In some cases, lending institutions become involved in Brownfields redevelopment. They may provide part of the necessary funding for development and thus take on a portion of the financial risk associated with a project. Neighborhood economic and social stability are often motivators, since a healthier neighborhood economy is beneficial to lending institutions in the area. In addition, banks can access and invest Federal Community Reinvestment Act (CRA) funds for Brownfields redevelopment.

6.2.5 Other Interested Parties

Some parties may not be considered stakeholders at this point due to the limited extent to that party may be affected by activity at the redevelopment property or the redevelopment process. However, such interested parties often play important roles in the process and the involvement of these parties will depend on the needs and interests of the various stakeholders. Therefore, other interested parties who are actually involved should be determined by the stakeholders.

7.0 Evaluation

The purpose of the evaluation component is to determine the viability of proceeding with the Brownfields redevelopment. In addition to traditional real estate issues, a number of environmental and legal issues should be evaluated.

Table 3: Example of Stakeholder Goals for the Evaluation Component

STAKEHOLDER	*GOAL*
Community	Participate in the evaluation process and the development of appropriate options for improvement of the Brownfields property.
Government - Redevelopment Agencies - Environmental & Health Agencies	Community understanding of the economic considerations planned use Ensure corrective actions are protective of human health and the environment; ensure community understanding of these objectives, ensure requirements of multiple regulatory programs are satisfied
Transferor/Transferee	Find a solution that enhances the property value; achieves less costly and faster approaches to corrective action; identifies options to reduce and transfer risk and liability.
Prospective transferee	Better understanding of the opportunities and barriers; understand the financial/liability risk management options
Developer	Better understanding of the opportunities and barriers and reducing the uncertainty associated with time to complete and costs of completion
Insurer	Understanding the factors that could influence financial and environmental risk

7.1 *Determine Project Viability*

As the project warrants a comprehensive analysis may be undertaken to determine the viability of the envisioned redevelopment and other alternative uses. Factors that may be considered include:

7.1.1 the current and future land use of the Brownfields property
7.1.2 the impact of existing and potential future land use in the surrounding area
7.1.3 needs of the community
7.1.4 demographics
7.1.5 access to markets
7.1.6 return on investment
7.1.7 financing including:

7.1.7.1 Traditional lending sources
7.1.7.2 Community redevelopment fund
7.1.7.3 federal, state and local grant and loan programs
7.1.7.4 existing and new insurance products.

7.2 *Identifying Environmental Risks*

The successful implementation of the sustainable Brownfields redevelopment process is dependent on a clear understanding of the environmental condition and associated economic impact on the property or properties. This is critical to the risk management process.

7.2.1 Property Assessment

The primary objective of the property assessment is to collect information necessary to identify and determine the completeness of both human and ecological exposure pathways and to determine the likely distribution of a chemical(s) of concern. The collection of these data is necessary to make a determination of the potential environmental condition of the property. Normally, the property assessment is composed of two activities, a non-intrusive evaluation and an intrusive evaluation. The community may be an important resource and should be consulted for information for determining historical use and potential exposure pathways.

7.2.1.1 Non-Intrusive Evaluation

A non-intrusive evaluation of the historical and current uses of the property and area surrounding the property is conducted to identify source areas (i.e., areas where chemical(s) of concern is likely to be present) and potential receptors that may come in contact with a release from the property. E 1527-94 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process and E 1528-93 Standard Practice for Environmental Site Assessments: Transaction Screen Process are examples of non-intrusive evaluations. The evaluation may include:

7.2.1.1.1 Defining the area that will be investigated;
7.2.1.1.2 Identifying current and reasonable potential future receptors, fate and transport mechanisms, exposure routes and point(s) of exposure,
7.2.1.1.3 Identifying potential sources, including a review of the property or property history to determine areas that may require investigation,
7.2.1.1.4 Identifying chemical(s) of concern,
7.2.1.1.5 Identifying potential source area(s),
7.2.1.1.6 Identifying the media to be sampled,
7.2.1.1.7 Determining current and reasonable potential future land use,
7.2.1.1.8 Determining current and reasonable potential future ground water use.

7.2.1.2 Intrusive Investigation

An intrusive field investigation is conducted to determine if a release has occurred, to identify the source(s) and source area(s) and to collect sufficient data on the distribution and concentration of chemical(s) of concern in the media. This information is necessary to document the environmental condition of the property and to determine the appropriate remedial action options. ASTM E1739-95 Standard Guide for Risk-Based Corrective Action at Petroleum Release Sites and ASTM EXXXX Provisional Guide for Risk-Based Corrective Action at Chemical Release Sites are examples of intrusive investigations. The intrusive field investigation may be used to:

7.2.1.2.1 Determine the presence and concentrations of the chemical(s) of concern in environmental media including:

7.2.1.2.1.1 Collect empirical data,
7.2.1.2.1.2 Characterize the potential source area(s),
7.2.1.2.1.3 Develop and evaluate a site conceptual exposure model,
7.2.1.2.1.4 Conduct initial response actions, as appropriate;
7.2.1.2.1.5 Identify any interim remedial actions that may be appropriate

7.2.2 Determining Risk and Assess Remedial Action Alternatives

Risk assessment and any resulting remedial action(s) should be designed and implemented as part of the Brownfields redevelopment of the property. Based on the information and data compiled during the property assessment, the potential risks associated with the chemical(s) of concern and reasonable potential future land use should be evaluated for potential human and relevant ecological receptors. If these assessments reveal potential unacceptable risks, then potential remedial action options should be evaluated to determine those options that can be implemented as part of the Brownfields redevelopment. Remedial action options may include active or passive methods or some combination including source removal, treatment, and containment technologies, natural attenuation, exposure pathway elimination, engineering controls and institutional controls. The applicability of remedial options to a Brownfields redevelopment property may vary from state to state. The remedial option(s) selected should incorporate features of the proposed Brownfields redevelopment as much as possible to allow for the most cost-effective remedial action.

Each potential remedial action option should be evaluated for its effectiveness, implementability, acceptability and costs. Remedial action options that meet these criteria are then subject to a more rigorous assessment of long-term, financial requirements and liabilities. This financial risk analysis is an integral part of reaching agreement on a protective and cost effective remedial option for redevelopment of the Brownfields property.

7.2.3 Risk Communication

The success of a Brownfields project is often dependent on how effectively current and future risks posed by the property are communicated to the community and other interested parties. It is important to acknowledge that risk communication should take place through-out the redevelopment process. Some general guidelines regarding risk communication are included in the ASTM E-XXXX Provisional Guide for Risk Based Corrective Action at Chemical Release Sites. This standard guide should also be referred to for a description of a framework for making risk-based decisions for corrective action.

It is essential to understand perceptions of risk in order to plan and design communications that foster cooperation rather than confrontation. The objective is to provide the opportunity for all parties involved to have an understanding of the risks and the plans to mitigate them. Trust and credibility are key factors in gaining cooperation, and are fostered by actively engaging the community in the decision making, thereby providing a greater sense of control over the situation. The burden of risk communication should not rest solely on the shoulders of the developer. The entire stakeholder group should work together to address concerns of the community and other interested parties. Communication methods may include printed information pamphlets (including easy-to-read charts and tables), public forums, news media (both print and TV), trade association meetings, labor unions, and the Internet.

In communicating the risk associated with a Brownfields project, the following issues need to be addressed:

7.2.3.1 Current and reasonable potential future use of the Brownfields redevelopment property
7.2.3.2 Current and reasonable potential future human exposure and ecological concerns at the property

7.2.3.3 Current and reasonable potential future uses of the area near the property
7.2.3.4 Interests and concerns of the stakeholders
7.2.3.5 Corrective action and property management options
7.2.3.6 Health concerns associated with the corrective action and property management options
7.2.3.7 Applicable laws and regulations

7.3 Determine Applicable Laws and Regulations

The successful implementation of the Brownfields redevelopment project is dependent upon a clear understanding of the legislative and regulatory requirements and policy issues critical to the risk management process. Identification and determination of these requirements and policy issues is necessary prior to beginning the process. It should also be recognized that more than one regulatory program may apply to a Brownfields redevelopment property and more than one regulatory agency may need to be involved in addressing the environmental condition(s) at a Brownfields redevelopment property.

7.3.1 The legislative and regulatory requirements and policy issues include, but are not limited to:

7.3.1.1 Permitting, regulatory agency approval and oversight requirements.
7.3.1.2 Criteria for selecting point(s) of exposure, point(s) of compliance and exposure pathway(s).
7.3.1.3 Criteria for use of institutional controls and engineering controls.
7.3.1.4 Criteria for selecting appropriate remedial actions.

7.3.2 Some of the policy issues reflect political, economic and societal factors and are not always based strictly on scientific principles. The applicability of the following need to be determined:

7.3.2.1 Local, state and federal laws
7.3.2.2 Permits and certifications
7.3.2.3 Pending enforcement actions
7.3.2.4 Pending claims, litigation and liens

7.4 Financial Risk Analysis

Financial risk analysis is an evaluation of the financial consequences of the project including environmental risk identified by a property assessment and review of applicable laws and regulations (See Section 7.1 to 7.4). Unlike environmental risk assessments and due diligence, financial risk analyses does not necessarily have to be repeated by different parties if insurance is involved during the Evaluation stage, the underwriter's risk analysis may serve for other parties involved in the transaction.

7.4.1 Such analysis can serve many purposes in the sustainable Brownfields redevelopment process including:

7.4.2.1 If a transaction is involved, alerting the transferee or lender to any environmental conditions that may need to be managed or remedied after closing. It can be used

to document conditions at closing and allow environmental risks to be managed and allocated as part of a property transaction (see Section 8.1.3).

7.4.2.2 Allowing investment bankers, underwriters and others financing the project to make determinations concerning the acceptability of the financial risk and make proper disclosures in offering documents.

7.4.2.3 Allowing insurance underwriters to determine the acceptability of the financial risk, determine specific insurance needs, and set appropriate premiums.

8.0 Transaction

Ownership often changes during this component. Frequently permits are transferred and new consent orders for voluntary corrective actions or covenants not to sue are established between the new owner and the regulatory agency. These permits, orders, or actions should provide for unencumbered resolution of disputes. It is sometimes advantageous for the title to a Brownfields property to a local government entity or economic development corporation for purposes of being eligible to receive state or federal grants or loans for property assessment, demolition or remedial action. The property may then be sold or leased to a developer.

Table 4: Example of Stakeholder Goals for Transaction Component

STAKEHOLDER	GOAL
Community	The transaction meets the redevelopment goals of the community
Government	
- Planners	The transaction meets the redevelopment goals of the stakeholders; Approval of the land use
- Regulatory Agency	The transaction satisfies the environmental and public health goals
Transferor/Transferee	The transaction meets their financial and liability goals
Prospective transferee (New Owner)	The transaction meets their financial and liability goals Cost-effective corrective action with limited long term liability
Developer	The transaction meets their project requirements
Insurers	Configure and price policy
Lenders	Configure and price loan

8.1 Preliminary Issues

8.1.1 Environmental Liability Concerns

Negotiation of the environmental provisions of any transaction involved in the sustainable Brownfields redevelopment process is driven principally by the real or perceived potential liabilities for corrective action of the property and, to a lesser extent, by concern with liability for bodily injury or property damage. E 1527-94 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process and E 1528-93 Standard Practice for Environmental Site Assessments: Transaction Screen Processprovide a discussion of the general potential environmental liability that may arise in real estate transactions.

8.1.1.1 Transferee's Objectives

Transferees of a property may be concerned with perceived or real liability under state and/or federal statutes for pre-existing environmental liabilities. Transferees may seek:

8.1.1.1.1 Liability protection from potential third party claims
8.1.1.1.2 Full disclosure of current environmental conditions related to the property
8.1.1.1.3 An indemnification or other environmental risk transfer mechanism covering any liabilities arising out of pre closing operation(s) or condition(s).
8.1.1.1.4 To get transferor to bear costs of investigation
8.1.1.1.5 To ensure property is suitable for contemplated use(s)
8.1.1.1.6 To obtain control over implementation of the remedial action(s)

8.1.1.2 Transferor's Objectives

Transferors of a property may be concerned with perceived or real liability under state and/or federal statutes for a release of a chemical(s) of concern on the land while they owned the property or discovery of a chemical(s) of concern on the land during their ownership (even if there was no disposal during that time) where they failed to disclose the environmental condition to a transferee. In addition, the transferor may also be liable to the transferee for failure to disclose a known environmental condition(s). The transferor may seek:

8.1.1.2.1 To obtain releases and indemnities from prospective transferee.
8.1.1.2.2 To shift responsibility for identifying risks to transferee (e.g., by eliminating or severely restricting representations and warranties),
8.1.1.2.3 Where transferor retains responsibility for pre-closing environmental liabilities, to:

8.1.1.2.3.1 require notice of or limit subsequent actions by the transferee that may contribute to or complicate the transferors liability or corrective action requirements and costs for pre-existing conditions
8.1.1.2.3.2 require the transferee to cooperate (including granting access to the property) as necessary for transferor to successfully address liability for past acts or regulatory violations
8.1.1.2.3.3 require the transferee to grant transferor rights to mitigate environmental conditions giving rise to retained liability

8.1.1.3 Lenders

Generally, the lenders may seek, based on the property investigation, to minimize their risk of liability for corrective action, maintain the collateral value of the redevelopment property and to obtain protection from borrowers defaulting or a weakening of the borrower's financial position due to its environmental liability.

8.1.1.4 Common Objective: Protection from Liability

Both the transferee and the transferor in any transaction seek regulatory protection from environmental liability. Many states offer protection against liability to parties that voluntarily complete corrective action pursuant to voluntary corrective action programs.

8.2 Preliminary and Pre-closing Agreements

A number of preliminary and pre-closing agreements may be appropriate. The number and type of preliminary and pre-closing agreements that are necessary will depend on the transaction. Preliminary agreements are agreements that are reached early in the process of negotiating a transaction that may include agreements on the necessary representations and warranties, indemnities and changes in the transaction structure or withdrawal from the transaction should the investigation identify unacceptable environmental risks. Pre-closing

agreements are agreements are that reached further along in the negotiating process that may include property access agreements and corrective action agreements.

8.3 Allocating Financial Risk through Provisions in Transaction Documents

In order to make the property marketable, some method(s) should be found to manage or allocate environmental liability. Such method(s) may be found within or outside of the transaction documents.

8.3.1 Representations and Warranties

Even if no environmental condition(s) is discovered on the property before closing (or the transaction is still attractive and financially sound in spite of the presence of an environmental condition), potential environmental liabilities may be minimized by securing appropriate representations and warranties in the purchase and sale agreement. Representations and warranties can be tied to an indemnification agreement supported by holdbacks, bonds, letters of credit or environmental insurance to cover the risk that chemical(s) of concern may turn up later on the property. Express warranties and representations include the disclosure and consideration of:

8.3.1.1 The existence of necessary permits, registrations, approvals, land use restrictions, and licenses

8.3.1.2 Compliance with environmental laws, rules and regulations

8.3.1.3 Any pending, threatened or anticipated claims, lawsuits, administrative actions or investigations or notice of any of these

8.3.1.4 Disclosure of the presence of known chemical(s) of concern and reports of releases of such chemical(s) of concern

8.3.1.5 Disclosure of environmental studies or reports conducted regarding the property.

8.3.1.6 The existence of underground storage tanks or underground pipelines.

8.3.2 Environmental Covenants

The transferee may establish a covenant to complete corrective action of the property, to maintain adequate investment to complete the redevelopment of the property or to maintain insurance policies to benefit the transferor. A covenant creates a case-specific continuing obligation. In a sale or loan transaction an important pre-closing covenant is that the transferee or transferor will maintain the property in compliance with all environmental laws and will re-affirm accuracy of the representations and warranties as of the closing date. A covenant requiring that action not be taken is a negative covenant. In some cases, a transferor may want to obtain negative covenants, limiting the prospective transferee's ability to create specific hazards. Post-closing covenants may be required for a transferee in a loan transaction, or a tenant in a lease transaction.

8.3.3 Indemnification

A transferor that believes no significant risk exists should be willing to indemnify a prospective transferee against liability for any pre-existing environmental condition(s). However, there are inherent limitations to such indemnities. The legal effect may be unclear, the indemnity may be only as good as the financial worth of indemnitor or the indemnity operates after the fact (cash flow problems). Indemnification agreements can be supported by holdbacks, letters of credit or insurance.

8.3.4 Environmental Insurance

8.3.4.1 Environmental insurance may be an alternative means of transferring liability. Insurance is a means for parties to the transaction to address balance sheets concerns. Insurance policies may offer substantial capitalization multiple year policies, flexibility in policy wording and realistic pricing of coverage.

8.3.4.2 Insurance policies can be used as a stand alone risk transfer mechanism or to supplement an indemnity agreement. Insurers can offer support services such a claims handling and loss control. Liabilities or conditions that may need insurance coverage in a Brownfields transaction are

8.3.4.2.1 Third party bodily injury and property damage, on-property and off-property.
8.3.4.2.2 Environmental remedial action costs, on-property and off-property.
8.3.4.2.3 Legal defense expense.
8.3.4.2.4 Business interruption and costs of project delay.
8.3.4.2.5 Environmental remedial action cost cap or stop loss.
8.3.4.2.6 Collateral value or secured creditor loss.
8.3.4.2.7 Environmental condition(s) at third party disposal sites that may have resulted from wastes generated at the Brownfields redevelopment property.

8.3.4.3 Types of Insurance

8.3.4.3.1 Commercial insurance policies, especially:

8.3.4.3.1.1 Premises pollution (or property-specific) policies that can provide coverage for the environmental liabilities (see section 8.3.4.2).
8.3.4.3.1.2 Pollution coverage for construction and consulting operations such as contractor's pollution liability and environmental consultant's professional liability policies.

8.3.4.3.2 Surety and bonds
A surety is a person or organization that contractually guarantees to one party that another party will perform as promised. Some insurers act as sureties by issuing bid and performance bonds for environmental contractors.

8.3.4.3.3 Environmental Risk Management Programs, including

8.3.4.3.3.1 Finite risk programs
8.3.4.3.3.2 Pooling arrangements including risk retention groups

8.3.4.3.3.3 Risk purchasing groups.
8.3.4.3.3.4 Captive reinsurance programs

8.3.4 3.4 Negotiating and Drafting of Coverage Forms

Changes to the basic policy form should be drafted and negotiated in the context of the transaction. Insurance may need to be considered from the beginning of the transaction so that appropriate policies will be available on a timely basis, to transfer the liability most completely and efficiently and to avoid duplication of the risk analysis and quantification process (See Section 7.4). The forms need to identify and actually cover the environmental exposure, the property and the parties needing the coverage.

8.4 Allocating Financial Risk outside the Transaction Document

8.4.1 Environmental Risk Control Transfers

The risk of loss itself, as well as the financial consequences of the loss, may be transferred to another party. The prospective transferee may be able to insulate themselves from environmental liabilities; however, the transaction should be structured carefully and risks assessed in light of potential regulatory agency efforts to impose liability on a responsible party. The transferee or lender can insist that the Brownfields redevelopment property giving rise to the chemical(s) of concern or environmental liability remain the responsibility of the transferor.

8.4.2 Corrective Action Prior To Closing

The transferee or lender can require that an agreement be reached that certain chemical(s) of concern or environmental risks be eliminated prior to closing. This requires an analysis of the availability of other parties who may also be liable for corrective action costs and the likely response of federal, state and local regulatory authorities, and the community to any planned corrective action activity. The corrective action may be conducted pursuant to a state voluntary corrective action program (See Section 7.2.2). If the transferee decides to undertake corrective action, it should consider requiring the owner to share the risk of uncertainty regarding how much an acceptable corrective action will cost.

9.0 Implementation

Demolition, renovation and corrective action occur during this component. The corrective action may be based on an integrated land use scenario where remedial action may be tied to a land use restriction or to a development with unrestricted land use (see Table 5).

Table 5: Example of Stakeholder Goals for the Implementation Component

STAKEHOLDER	GOAL
Community	Positive benefits from the redevelopment property
Government	
- Planners	The redevelopment project meets stakeholders objectives
- Regulatory Agency	The redevelopment project meets environment and human health objectives
Transferor/Transferee	Timely completion of the redevelopment project and acceptable return on investment
Developer	Timely completion of the redevelopment project and acceptable return on investment
Insurers	The redevelopment project is consistent with the insured conditions
Banks	The redevelopment project meets the financial objectives

9.1 *Permitting*

Local, state and federal entities may issue permits based upon agreements reached with stakeholders in previous components of the sustainable Brownfields redevelopment process. If the Brownfields redevelopment process has been carried forward successfully, the permitting process is made more efficient.

9.2 *Remedial Action*

Remedial action is an integral part of the sustainable Brownfields redevelopment process. Remedial action can occur prior to redevelopment, during redevelopment or as part of a long-term risk reduction program. Stakeholder buy-in and institutional controls may be necessary to insure a sustainable restoration process is begun but time frames should be flexible to ensure that the most cost-effective solution that provides long-term risk reduction is implemented. Economic development that provides sustainable benefits to the community is the common goal of all stakeholders.

9.3 *Exit Strategy*

The goal of all the stakeholders is to keep this component as short as possible. It is important to establish a clear exit strategy to the sustainable Brownfields redevelopment process to ensure that the property does not remain a Brownfields property in the future. Key issues that need to be resolved in order that the property exit the sustainable Brownfields redevelopment process include:

9.3.1 Redevelopment is underway
9.3.2 Remedial action is implemented
9.3.3 Institutional and engineering controls, as appropriate, are in place and maintained (i.e., implementation of land use restrictions, financial performance mechanisms)
9.3.4 Local, state and federal regulation requirements have been met

The sustainable Brownfields redevelopment process is a multi-stakeholder process. Because each Brownfields redevelopment property is different (e.g., variant levels of a chemical(s) of concern, different community settings, multiple forms of reuse) each Brownfields redevelopment project may involve different components. The process outlined is a framework for the components of a sustainable Brownfields redevelopment process.

Appendix A – The Roles of Local Government in Sustainable Brownfields Redevelopment

Local governments are ideally situated to facilitate and promote the successful reuse of Brownfields redevelopment properties. Local officials and municipal managers often play an integral role in bringing together all of the diverse interests involved in a Brownfields redevelopment project. Their role as facilitators is often difficult, given the many different groups involved and the complexity of the issues. For example, the regulatory framework that determines the fate of many Brownfields redevelopment properties falls under the jurisdiction of federal and state agencies, most of the necessary capital to fund development is controlled by private financial institutions, and many decisions about property reuse will be in the hands of the property owner. Local governments also have an important role in helping to ensure that community organizations and citizen groups directly affected by a Brownfields redevelopment project have sufficient access and influence in the corrective action and reuse decisions.

The following are examples of the roles that local governments can play in the redevelopment of a Brownfields redevelopment project. They are not intended to be used as an all-inclusive guide, as there is not the "one" model for the decisions of a local government. Each local government has differing concerns and attributes that play a role in Brownfields redevelopment.

A-1 Integrating Brownfields Redevelopment with Other Community Priorities

Local governments are in a unique position to look at Brownfields redevelopment in the context of the community's broader plans and needs. Because of this perspective, they can act to encourage redevelopment projects that fit into these plans. For example, the city of Minneapolis provided financial support for the development of a shopping center with a full-service grocery store in the northwest area of town. This shopping center delivered an important benefit to residents, who previously had to drive outside the neighborhood or pay high prices at convenience stores. A local government also can assist in identifying high-priority sections of the city and focus efforts for Brownfields redevelopment and other development on those areas.

A-2 Involving Community Residents in Brownfields Redevelopment Plans

Early involvement of the community in the reuse planning process is important to successful Brownfields redevelopment and also helps to ensure that a community can achieve its long-term redevelopment goals. Local government officials should engage citizens in the decision-making process, provide them with good and timely information, and seriously consider their input. To do this, local governments often establish advisory or "ad hoc" community groups or utilize existing community groups to address Brownfields redevelopment. Collaborative planning and consensus-building approaches ensure equitable and meaningful community input. For example, local officials in New Orleans established a Brownfields redevelopment consortium consisting of community organizations, local government officials, and developers to learn and make decisions about the Brownfields redevelopment process.

A-3 Brokering Reuse

Local governments can help match properties with prospective reusers. This can be done both through general efforts to provide information on the properties and by identifying specific potential reusers for particular Brownfields redevelopment properties. The city of Trenton, New

Jersey, for example, was looking for a way to reuse a portion of a former electrical component factory. At the same time, the city was working with a local swimming pool cover company that was considering leaving the area. The city was able to facilitate an agreement under which the company moved into the vacant factory.

A-4 Providing Funding

Local governments can use their own resources to fund portions of Brownfields redevelopment costs. This funding is particularly useful if it is used for up-front costs such as for property inventory, assessment, remedial action, and preparation of properties. Local governments often have the resources to locate the owner of a Brownfields redevelopment property who has the potential to provide funds for cleanup. By paying for assessment and remedial action, the city of Chicago's Brownfields Pilot Program spurred private companies to invest in and reuse a number of Brownfields redevelopment properties. Other types of financial benefits, such as tax incentives, can also be used to encourage reuse. Cook County, Illinois, allows owners of some Brownfields redevelopment properties to pay reduced property taxes during remedial action and redevelopment.

A-5 Coordinating Public Funding and Resources

Both state and federal governments have programs that can pay for some of the costs of Brownfields redevelopment property reuse. Local governments can inform private-sector parties about these programs, apply for programs that require local government involvement, and look for ways to integrate different funding sources. Creative use of state funding helped Lawrence, Massachusetts, reuse the property of an old paper factory. By shifting the location of an already planned roadway by 100 feet, the city was able to use state highway funds for demolition and improvements to the Brownfields redevelopment property.

A-6 Acting as a Liaison with Environmental Regulators

Local governments can serve as a link between private companies and community groups, as well as state and federal environmental agencies. Local governments also can work with agencies to ensure that they handle regulatory issues promptly and in a way that reflects local concerns. For example, the redevelopment of a property in Louisville, Kentucky, was blocked by a lien that the U.S Environmental Protection Agency (EPA) held on the property as a result of remedial action costs the agency had absorbed eight years earlier. After the city asked that the lien be released, EPA discovered that the statute of limitations had expired and forgave the lien.

A-7 Assuring Liability for Environmental Condition

In some cases, it may make sense for local governments to agree to take on liability for remedial action at properties where the perception of liability is preventing development. This can quickly remove the primary deterrent to reuse. Because it could be extremely costly, this step should be taken with a great deal of caution. Wichita, Kansas found that redevelopment plans for much of its downtown seemed to have been derailed by the discovery of chemical(s) of concern in ground water. The city entered into an agreement under which it divided responsibility for remedial action costs with the principal potentially responsible party (PRP).

A-8 Brownfields Prevention

To ensure that Brownfields redevelopment properties are prevented in the future, local governments can implement controls such as ground water use restrictions; offering incentives that discourage development of Greenfields; changing mixed-use zoning laws in low-income, residential neighborhoods; and assisting state and federal agencies in monitoring compliance during the operation and closure of industrial complexes.

Appendix B – Community Interaction

B-1 Community Involvement

Generally, the earlier the community is brought into the process, the better it is for all stakeholders involved. Involving the community in a Brownfields redevelopment project can pose some interesting challenges. Some people may be skeptical about the Brownfields redevelopment process. They may question whether they will have a real opportunity to be involved in and influence local land use decisions. One challenge for sponsors of Brownfields redevelopment projects is to determine how to convince the community that active involvement is worthwhile and to provide them with an opportunity to have direct and meaningful impact on decisions.

B-2 Community Education prior to any specific development proposal

A presentation of the facts concerning a Brownfields redevelopment property through straightforward discussions and open forums for the developer and the community to express their concerns and solutions should be part of the process. Brownfields redevelopment sponsors in conjunction with public health officials should educate the community and other stakeholders on the current risks, if any, posed by the Brownfields redevelopment properties and compare these risks to other risks in the community. This will allow the community and other stakeholders to reach a balanced decision on development of the property.

B-3 Community Technical Assistance

The community may not have the technical or financial resources to assess the technical factors involving a Brownfields redevelopment property. This is often the case where public health considerations come into play. The community should have the opportunity to influence the process based on data that are correctly interpreted and meaningful for the situation at hand. Independent technical assistance should be provided to the community (individuals or groups) that will enable it to make an informed analysis. The point is to inform the community about the range of issues at hand and the resources available for the interpretation of data. The financial resources needed by the community should be determined, and will be influenced by a number of factors, including the size of the Brownfields redevelopment property, the amount of financial resources already available for the project, and the interest present within the community.

While community groups may need information about technical issues, the developer, government officials and other stakeholders may need training in communicating site-specific technical information to community groups. The communication process should include a thorough explanation of technical aspects of a project prior to its implementation.

B-4 Designing a Community Participation Program

Whether designing an effective community participation program from a private developer, local, state or federal officials' perspective, it is best to consider the following guiding principles[1]:

[1] Principles developed by the Public Participation and Accountability Subcommittee of the National Environmental Justice Advisory Council, The model Plan for Public Participation, U.S.EPA, November, 1996

B-4.1 Encourage active community participation in all aspects of environmental decision-making. The community should be seen as equal partners in dialogue on Brownfields redevelopment. They need to know all pertinent details about the project to evaluate its importance, costs and benefits. Through continued, early interaction, community support needs to be built.

B-4.2 Maintain honesty and integrity in the process. From the earliest stages, articulate realistic goals, expectations and limitations of the project.

B-4.3 Consider using a variety of public participation techniques for different sized Brownfields redevelopment projects. The single, one-size-fits-all approach will not work for all situations.

B-4.4 Conduct active and extensive outreach to the public. It is better to be as inclusive as possible generating a rich mix of ideas and approaches. The community has much to offer about effective interactions and approaches. Traditional and non-traditional outreach means should be attempted. Presentations in print and voice media are effective means of communication as are bulletin boards at community focal points (e.g., houses of worship, grocery stores, laundromats and community centers). Other methods such as using the Internet should also be considered.

B-5 Implementing a Community Participation Program

The following steps are suggested approaches for setting up and implementing an effective community participation program[1].

B-5.1 Identify individuals to be contacted, including those directly affected by a Brownfields redevelopment project. Determine who else is directly and indirectly affected, as well as those groups who have shown past interest in local land use planning and developmental efforts. Look for groups who do not traditionally participate, such as minority and low-income communities.

B-5.2 Establish education programs and/or means to access data so that groups or individuals can obtain timely, accurate information to enable them to have meaningful input in decision-making.

B-5.3 Regionalize materials to ensure cultural sensitivity, language diversity and geographic relevance. Provide a facilitator to public meetings who is sensitive and trained in dealing with cross-cultural exchanges.

B-5.4 Develop co-sponsoring and co-planning relationships with community groups allowing them shared roles in agenda development, goal setting, leadership and outreach.

B-5.5 Plan meetings that are accessible and accommodating. Meetings should be close to public transportation. Consideration should be given to such issues as child care, access for the disabled, and language interpreters. Plan schedules to accommodate

[1] Ibid

needs of the affected communities. Schedule meetings on evenings and weekends to avoid conflicts with community or cultural events. Create an atmosphere of equal participation. Avoid a "head table" and ensure that the public shares in assignments.

B-5.6 Maintain clear goals by setting an agenda. Coordinate follow-up and develop an action plan. Facilitate follow-through by distributing minutes and list of action items.

B-6 Community Leadership

Most neighborhoods have institutions that are respected and viewed as voices for the Community. These can be block clubs, neighborhood economic development organizations, religious or educational institutions, and local chambers of commerce. It is not uncommon for more than one Leader to emerge. Good rapport should be maintained with the Leader or Leaders of the community to gain their cooperation in information gathering and dialogue stages of the sustainable Brownfields redevelopment process.

For effective interaction, the community's characteristics should be assessed. The community demographics, organizational structure, and local governmental jurisdictions should be determined. The research should include collection of information on the area's infrastructure, alternative or additional properties considered for Brownfields redevelopment, and identification of adjacent communities with Brownfields redevelopment experience..

Once the research is complete and incorporated, the active dialogue process should begin because the actual Brownfields redevelopment project may need to be refined and discussed with the community. At this point, any community outreach strategy already in place should be broadened to include the majority of stakeholders. Simultaneously, creative partnerships for both the short and long term need to be formed. The ultimate goal for the dialogue sessions is to establish mutual acceptance of responsibilities to the process.

B-7 Politics

The political realities of each area should be assessed and incorporated into the sustainable Brownfields redevelopment process. For example, in some cities, requests for zoning changes are channeled through the local government representatives. Thus, any plans for Brownfields redevelopment need approval by local government officials.

Other political considerations may include how the municipality views industrial retention and job creation. In addition, a Brownfields redevelopment property may lie within an Empowerment Zone, a Tax Increment Financing (TIF) area, or a historically designated district. These are all political considerations that need to be researched and woven into the process for redevelopment.

B-8 Mutual Acceptance of Responsibilities to Process

With straightforward and honest communication between all parties, responsibilities to the process should be easy to establish and accept. These responsibilities should be clear and consistent. Any changes in responsibilities should be discussed and agreed upon. A simple, easy to read document should be posted prominently and disseminated widely. Some items of mutual responsibilities can include:

B-8.1 Community involvement as early and often as possible
B-8.2 Communication with all affected parties
B-8.3 Promotion of project plans
B-8.4 Involvement in meetings as agreed upon
B-8.5 Effort at cooperation
B-8.6 Cognizance and acceptance of community vision and developer vision
B-8.7 Effort put forth to consolidate these two visions

After mutual acceptance of responsibility to the process and the establishment of effective communication a final re-evaluation is necessary in order to determine whether to proceed with plans as originally envisioned, to adjust plans, or to forego the project altogether.

Figure B-1 and Figure B-2 show decision trees from the viewpoints of both developer and community. These figures are meant to provide general guidance with the understanding that there is no "one size fits all" model for success. While these decision trees are presented linearly, some steps may not be appropriate in all cases while other steps may be more appropriately accomplished in a different sequence than shown. In the end, it will be the cooperation and straightforward honest communication of all stakeholders in an effort that will lead to sustainable Brownfields redevelopment process.

Appendix C - Additional Information Resources

Toolkit of Information Resources for Brownfields Investigation and Cleanup, U.S EPA Office of Solid Waste and Emergency Response, Technology Office, Washington, D.C., EPA 54 2-B-97-001

Department of Energy and Rocky Mountain Institute, "Greening the Building and the Bottom Line," (1994)

Battelle Memorial Institute, Pacific Northeast Lab, "Protocol for Identifying and Assessing Potential Benefits of Green Buildings" (1998).

Environmental Protection Agency, National Brownfields Web Site,
http://www.epa.gov/brownfields

Environmental Protection Agency Region 2, Brownfields Economic Redevelopment Initiative,
EPA Region 2 Brownfields Web Site,
http://www.epa.gov/region02/superfnd/brownfld/bfinelnpg.htm

Figure 1
The Brownfields Redevelopment Process

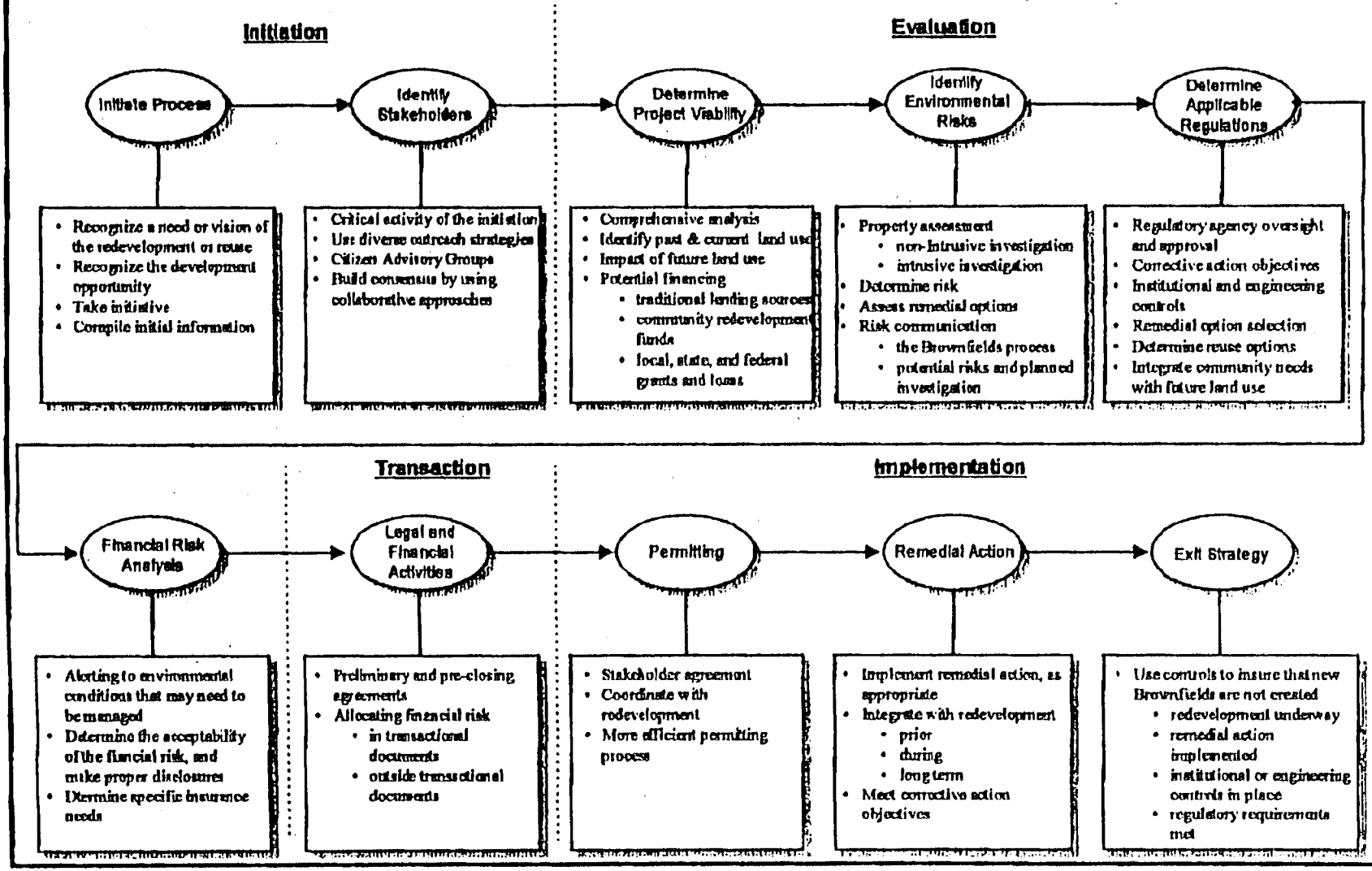
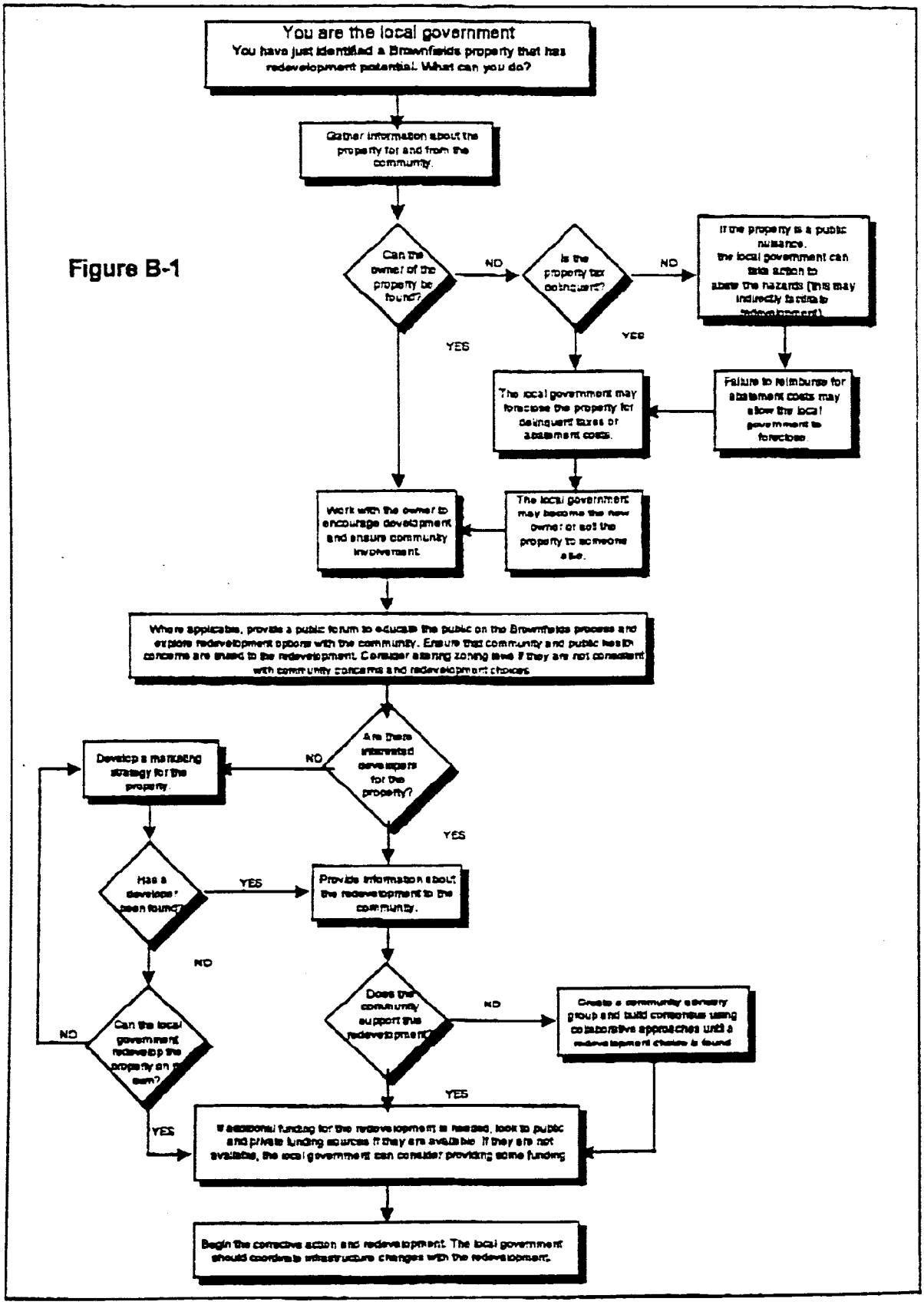


Figure B-1


You are the local government
You have just identified a Brownfields property that has redevelopment potential. What can you do?
Gather information about the property for and from the community.
Can the owner of the property be found?
NO
Is the property tax delinquent?
NO
If the property is a public nuisance, the local government can take action to abate the hazards (this may indirectly facilitate redevelopment)
YES
YES
The local government may foreclose the property for delinquent taxes or assessment costs.
Failure to reimburse for abatement costs may allow the local government to foreclose.
Work with the owner to encourage development and ensure community involvement.
The local government may become the new owner or sell the property to someone else.
Where applicable, provide a public forum to educate the public on the Brownfields process and explore redevelopment options with the community. Ensure that community and public health concerns are linked to the redevelopment. Consider altering zoning laws if they are not consistent with community concerns and redevelopment choices.
Are there interested developers for the property?
NO
Develop a marketing strategy for the property.
YES
Has a developer been found?
YES
Provide information about the redevelopment to the community.
NO
Does the community support this redevelopment?
NO
Create a community advisory group and build consensus using collaborative approaches until a redevelopment choice is found
Can the local government redevelop the property on its own?
NO
YES
YES
If additional funding for the redevelopment is needed, look to public and private funding sources if they are available. If they are not available, the local government can consider providing some funding
Begin the corrective action and redevelopment. The local government should coordinate infrastructure changes with the redevelopment.

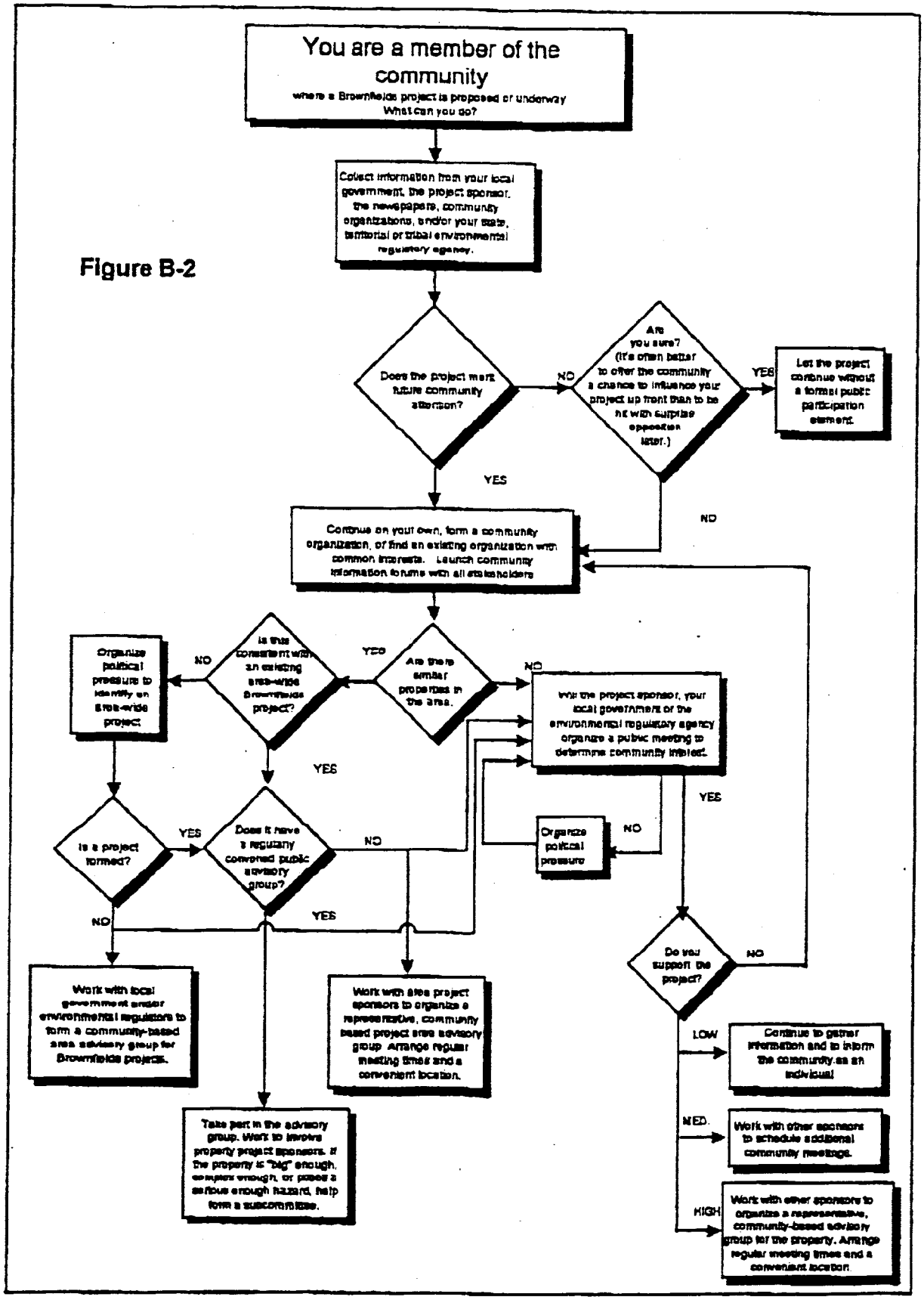


Figure B-2

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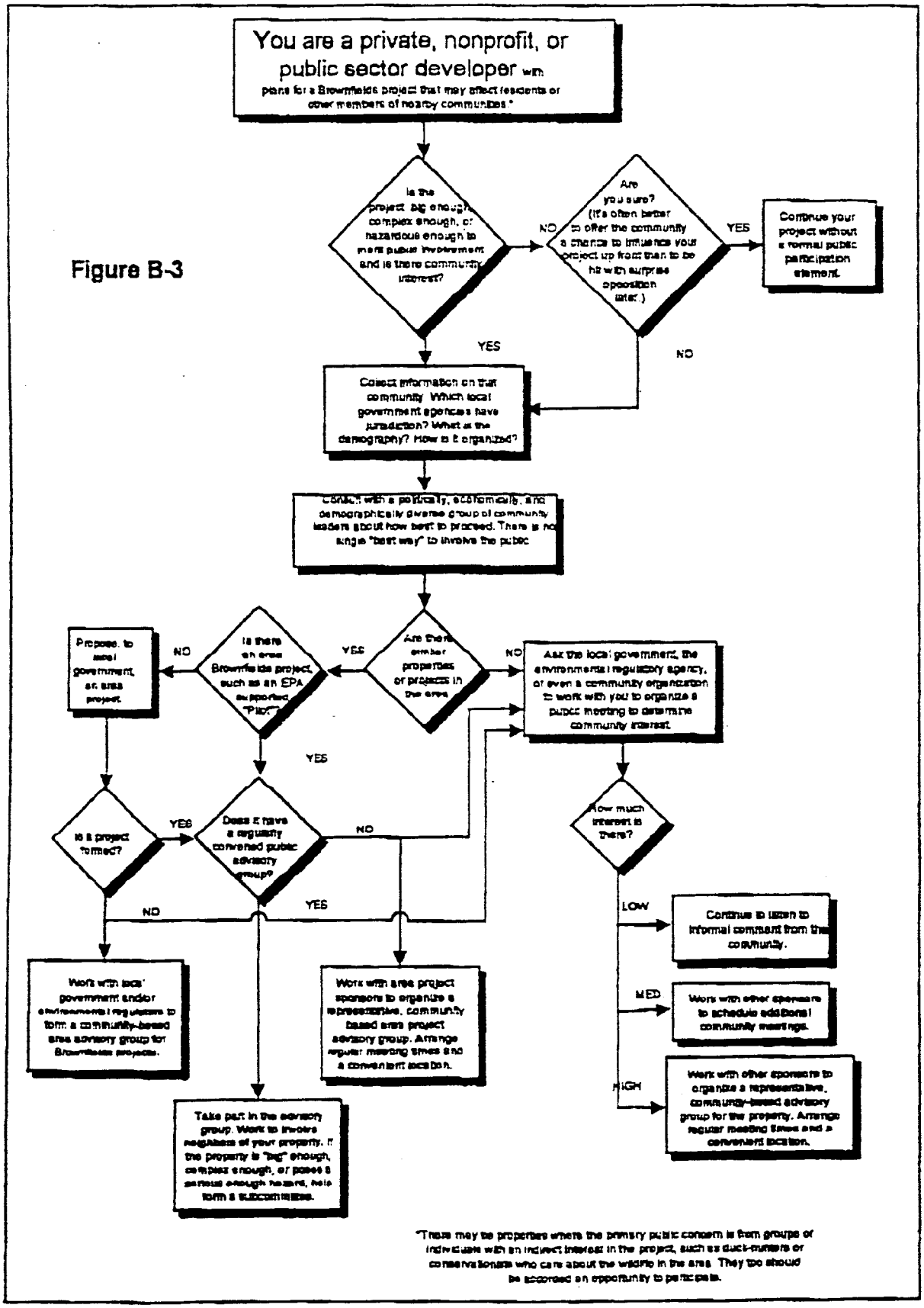
Figure B-3



*There may be properties where the primary public concern is from groups or individuals with an indirect interest in the project, such as duck-hunters or conservationists who care about the wildlife in the area. They too should be accorded an opportunity to participate.

Draft Memorandum -- Not For Quotation Or Citation In Any Manner

MEMORANDUM ON INTEGRATING ENVIRONMENTAL JUSTICE INTO EPA PERMITTING AUTHORITY

Prepared by the
Subcommittee on Enforcement of the
National Environmental Justice Advisory Council
Deeohn Ferris, Chair

A recurrent issue in the discussions of both the National Environmental Justice Advisory Council (NEJAC) and its Subcommittee on Enforcement has been the extent to which EPA possesses the authority to condition on environmental justice grounds permits that the Agency (and States with federally-approved programs) issues to regulated entities pursuant to the various federal environmental protection laws administered by EPA. A related question is the extent to which the permitting authority (state or federal) may *deny* a permit altogether solely on environmental justice grounds.

The purpose of this memorandum is to question the apparent assumption of many that no such permit conditioning or denial authority exists relating to environmental justice concerns. The memorandum is concerned exclusively with the issue whether EPA possesses *authority* that it has not yet chosen to exercise. The memorandum does not comprehensively address the distinct question whether EPA is *required* under existing statutory provisions to impose such conditions or deny such permits. Plainly, EPA's statutory authority is broader than its statutory obligations. The Agency possesses wide ranging authority. The question posed is to what extent may EPA, in its discretion, exercise such authority in the permitting process to promote environmental justice concerns. But, of course, if one concludes that such discretionary authority does exist, there will inevitably be circumstances in which the failure to exercise such discretion would amount to abuse of discretion and therefore be unlawful.

The memorandum is divided into four parts. First, the memorandum describes, in general terms, both what kinds of factors might be implicated in the permitting context by "environmental justice" and the types of conditions that might be imposed in response to those concerns. Second, the memorandum describes and discusses the four EPA Environmental Appeals Boards decisions that have addressed the relevancy to EPA's permitting authority of environmental justice concerns. Third, the memorandum surveys various federal environmental laws for statutory and regulatory language that might provide a legal basis for EPA conditioning permits, or denying them altogether, on environmental justice grounds. Included in this discussion is a brief analysis of certain provisions within each of the laws that readily lend themselves to injecting environmental justice concerns into the environmental protection standards themselves. Presumably, EPA is currently already doing so as part of its overall effort to comply with the President's executive order. Finally, there is a brief conclusion.

Appendix N: NEJAC Paper on Federal and State Legal Authority

Draft Memorandum -- Not For Quotation Or Citation In Any Manner

I. The Meaning of "Environmental Justice" in the EPA Permitting Context

In the context of an EPA permitting decision, environmental justice's core expression is likely that EPA should take into account the racial and/or socioeconomic makeup of the community most likely to be affected adversely by the environmental risks to be created by the activity seeking a permit. Notwithstanding the common misapprehension of many, taking into account the makeup of the community does not mean that EPA must automatically deny a permit solely because the affected area is a community of color or a low-income community. The Agency's inquiry into the character of the community – *i.e.*, whether it is a community of color or a low-income community – is instead necessary to allow the Agency to make an informed permitting decision regarding the actual environmental and health effects of a permit applicant's proposed activity.

For example, because EPA knows that certain communities are more likely to be exposed to cumulative environmental and health risks from varied sources than are other communities, EPA can take that relevant fact into account in deciding whether, or to what extent, to permit additional risks from the newly-proposed activity. The bottom line for EPA's permitting decision remains environmental and health risks. Knowledge of the character of the community is necessary for the permitting agency to apprehend fully what those risks actually are – to consider those risks in aggregation. Risks that may seem acceptable in isolation may be more properly seen as being unacceptably high when the broader social context, including associated health and environmental risks, are accounted for in a total aggregation. Hence, one question is whether EPA's statutory authority allows the permitting authority to consider the true cumulative impact of the activity seeking a permit – in aggregation with other sources of risks -- or instead confines the Agency to considering solely the risks of the permitted activity.

A distinct inquiry concerns the Agency's authority to take into account equity or disproportionality concerns. The disproportionality issue is plainly related to the unacceptably high aggregation (or cumulative impact) issue. Aggregation is the fundamental cause of disproportionality. And, in many circumstances, aggregation and disproportionality occur simultaneously – for instance, when accounting for aggregation makes it possible for the Agency to realize that one community is exposed to unacceptably high levels of risk and another community is not.

But, for many, equity is a legitimate consideration, regardless of whether aggregation of risk violates EPA's established environmental or human health norms for what constitutes acceptable risk. They would like to see EPA deny or condition a permit based on the fact that the affected community would otherwise be subject to a disproportionate share of environmental risk. Proof of disproportionality would be sufficient. There would be no additional need to establish that the level of risk being imposed was otherwise unacceptably high from either a strictly health or environmental perspective. In short, disproportionality would, by itself, be presumptively unreasonable or perhaps even *per se* unreasonable, absent mitigating permit

conditions.

A third aspect of environmental justice of possible relevance to a permitting decision relates to community enforcement and compliance assurance. Congress deliberately included citizen suit enforcement provisions in federal environmental protection laws because of its awareness that government enforcement resources would necessarily be insufficient (and unreliable) to establish the credible enforcement threat needed to promote compliance. One of the central teachings of environmental justice, however, is that environmental justice communities have historically lacked the resources needed to monitor polluting facilities in their neighborhoods for possible violations and, when found, negotiate their correction, persuade federal or state enforcement officials to take action, or, if necessary, to bring a citizen suit enforcement action against the facility in violation. Promoting community enforcement capacity is, accordingly, a central goal of the Enforcement Subcommittee. To that end, permit conditions might be designed to redress this resource deficiency by providing communities with greater oversight and enforcement capacity. Conditions could range from making monitoring reports more readily available to the community to the more ambitious possibility of providing community access for inspection or even the funding of a community oversight operation.

These three examples of environmental justice considerations relevant to permitting -- accounting for risk aggregation, redressing risk disproportionality, and promoting community enforcement capacity -- are merely illustrative. No doubt there are many other ways in which environmental justice considerations could be factored into Agency permitting decisions. For the purpose of this memorandum, however, the list need not be exhaustive. What this memorandum seeks to address is the threshold issue whether environmental justice can in any manner be relevant to EPA's exercise of its permitting authority under the various environmental laws. These three examples offer a basis for addressing that threshold issue. If the answer is in the affirmative -- permitting agencies may deny or condition permits on such grounds -- consideration of the full reach of environmental justice in the permitting context may then be ripe.

II. USEPA Environmental Appeals Board Decisions Regarding the Relationship of Environmental Justice to EPA Permitting Authority

Apparently, neither the EPA Administrator nor her General Counsel has spoken directly to the question addressed by this memorandum. Each has emphasized their commitment to fulfilling the mandates of Executive Order 12898 as well as their overall support for reforming Agency practices as necessary to promote environmental justice concerns. But neither has considered the extent to which EPA might affirmatively use its permitting authority to promote environmental justice. (Or if either has, they have not done so publicly).

Unfortunately, the issue has instead arisen before the Agency only on a case by case basis

and in a defensive posture. A Regional EPA Office or a State environmental agency with permitting authority pursuant to a federal environmental law has initially refused to account for environmental justice factors in exercising its permitting authority. Disappointed environmental justice advocates have challenged those negative determinations before EPA's Environmental Appeals Board. And, in all four cases, the Environmental Appeals Board has rejected the appeals and affirmed the permitting authority's negative rulings.

The disadvantages of the Agency's considering the issue only in this posture are considerable. First, case by case adjudication does not readily lend itself to the kind of broad, systemic Agency reforms required for the promotion of environmental justice. In a more adversarial setting, the natural impulse for most Agency decisionmakers is to deny the existence of a legal obligation – in this context, the obligation to consider environmental justice in a permitting decision. There is also a substantial risk that in making that argument, agency personnel will take the further step of denying *authority*. Although "authority" and "legal obligation" are legally distinct concepts, one can always buttress one's denial of the latter by extending it to a denial of the former. And, conversely, any admission of "authority" makes it harder to deny that such authority may, in some circumstances, become a "legal obligation" based, for example on a party's claim of abuse of discretion. There is reason to expect, therefore, that the tendency of case by case adjudication will be to make systemic reform promoting environmental justice more difficult. Overcoming this tendency will require top-down directives that the Agency wants to exercise its discretionary authority to promote environmental justice, extending beyond what the Agency is legally obligated to do.

A closer look at each of the four Environmental Appeals Board decisions underscores these limits of case by case adjudication. It also hints at how the Agency might, through the exercise of permitting authority, exploit currently untapped avenues for furthering the environmental justice goals of Executive Order 12898.

A. ***In the Matter of Genesee Power Station Limited Partnership*, PSD Appeal Nos. 9-1 through 93-7 (September 8, 1993) (*Genesee I*), order on motion for clarification (October 22, 1993) (*Genesee II*)**

In this matter, a local environmental justice community organization (the Society of Afro-American People) challenged a state agency's decision to grant a Prevention of Significant Deterioration (PSD) Permit under the Clean Air Act. The citizen group contended, *inter alia*, that the decision to locate the facility in a predominantly Afro-American community reflected environmental racism.

In its initial ruling, the Appeals Board concluded that the state agency lacked authority under the provisions of the federal Clean Air Act the agency was administering to consider community opposition and, therefore, its failure to do so, was entirely appropriately and, therefore, could not be deemed evidence of racially discriminatory intent. The state agency's

inquiry is properly confined under the federal statute, the Appeals Board stated, to the question whether the facility would meet federal air quality requirements. A matter such as community opposition, the Board reasoned, would normally be a matter for consideration by a local zoning board.

The Appeals Board further found that even if the state agency had authority under some state law to consider community opposition -- and the Appeals Board had authority to review the state's compliance with that state law -- the state agency's actions in this cases were not discriminatory. The Board rejected the community group's claim of disparate impact, which was based on the state agency's having denied a permit to an incinerator opposed by white residents. The Board found that there were "legitimate, nondiscriminatory reasons" for denying the permit in that other case, but not in the instant case (*e.g.*, local zoning approval had been denied, the incinerator's proximity to a wetland would violate the federal Wild and Scenic Rivers Act, and the facility would not comply with state law). And, while noting that the citizen plaintiffs had not proven the state agency's intent to discriminate, as required to make out an Equal Protection claim, the Board also specifically declined to reach that constitutional issue.

EPA's Office of General Counsel (OGC) responded to the Appeals Board ruling by filing a Motion for Clarification, in which OGC requested that the Board revise its reasoning, but not the results. Specifically, OGC challenged the Board's rationale that a state agency (acting as a PSD permitting authority under federal delegation) lacks authority to consider community opposition to the proposed facility location so long as the air quality impacts of the facility meet federal requirements. Although the Board responded in a hostile fashion to the OGC's motion -- "The Board does not view its function as that of making its legal views consistent with those of program and Regional offices * * * * for the Board was created in part to ensure that the controversies pending before it are decided fairly and impartially" -- the Board ultimately agreed to excise the portions of the initial opinion considered objectionable by OGC. The excised portions included the Board's statements that the permitting authority lacked authority under federal clean air legislation to consider community opposition. The Board reasoned that excision was appropriate because these were issues of national importance that deserved greater attention.

The two *Genesee Power* administrative rulings illustrate the pitfalls of having environmental justice addressed, in the first instance, in case by case adjudication. Both the state agency and EPA -- in the form of the Appeals Board -- followed their natural impulse to deny the legitimacy of a new claim, here, one promoting environmental justice concerns. Rather than look for ways to read statutory authorities expansively, they instead read them narrowly, presumably in order to insulate agency decisionmaking from secondguessing by outsiders.

Juxtaposing the two decisions, however, also illustrates the potential for positive reforms should EPA take the initiative outside the adjudicatory process to read its authorities more expansively. Because the Office of General Counsel in this case took the initiative, the Appeals Board's modified its reasoning so as not to preclude the Agency from embracing a more

proactive approach to environmental justice in the future. The challenge the Agency faces, however, is now to fill the gap currently existing in the law regarding the relevancy of environmental justice concerns in permitting decisions before those gaps are filled in a manner unsympathetic to environmental justice by agency employees and state environmental agencies interpreting relevant authorities in adjudicatory settings. For, once the government has "dug in" to a legal position, it will be far harder to effectuate needed reforms.

Finally, there is one more lesson to take away from the *Genesee Power* case -- the significance of community enforcement capacity. The Board concluded that there were "legitimate nondiscriminatory reasons" for why the state had denied the permit to be located in the white community but granted the permit for the facility to be located in the African American community. Perhaps so. But perhaps not, if similar violations of state law might have been developed had the African American community had the legal resources and political power necessary to do so. But, absent such a level playing field, even what appears to be entirely "legitimate nondiscriminatory reasons" may in fact be the product of yet a different kind of inequity.

B. *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeals Nos. 95-2 & 95-2 (June 29, 1995)

In this matter, local citizens challenged on environmental justice grounds EPA Region V's decision to grant a permit to a landfill pursuant to Section 3005 of the Resource Conservation and Recovery Act. 42 U.S.C. 6925. The Region held an informational meeting with concerned citizens and industry representatives to discuss, among other items, environmental justice issues. And, the Region also prepared a demographic study (based on a one-mile radius around the facility).

The citizens' challenge included several arguments based explicitly on environmental justice. The citizens claimed that the Region had acted in a clearly erroneous fashion and had abused its discretion in seeking to implement Executive Order 12898 in the absence of the Agency's having promulgated a national environmental justice strategy. And, they contended that the demographic study was clearly erroneous, because of its restricted one-mile radius scope and because the Region had ignored certain evidence regarding the racial and socio-economic composition of the affected area and the impacts of the permitted facility.

The Appeals Board rejected both contentions. The Board concluded, at the outset, that Executive Order 12898 "does not purport to, and does not have the effect of changing the substantive requirements for the issuance of a permit under RCRA and its implementing regulations." The Board further concluded that "if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community."

The Appeals Board then sought to temper what otherwise appeared to be a blanket rejection of any statutory authority to consider environmental justice concerns in the permitting context. First, the Board held that "when a Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process. The Board, therefore, supported enhancing avenues for public participation when environmental justice concerns are raised.

The more significant part of the opinion, however, is when the Board went beyond procedural requirements to consider the possible substantive significance to environmental justice of the omnibus clause under Section 3005(c)(3), which provides:

> Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

42 U.S.C. 6925(c)(3). The Board agreed that this clause requires that the Agency condition, and if necessary deny altogether, a permit "if the operation of a facility would have an adverse impact on the health or environment of the surrounding community * * * as necessary to prevent such impacts." The Board concluded that EPA was permitted under RCRA to take "a more refined look at its health and environmental impacts assessment" in response to environmental justice claims. And, the Board specifically acknowledged that an assessment that looked only at a "broad cross-section of the community * * * might mask the effects of the facility on a disparately affected minority or low-income segment of the community." Accordingly, the Board held, "when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion under Section 3005(c)(3) to include within its health and environmental impacts assessment an analysis focusing particularly on the minority or low-income community whose health or environment is alleged to be threatened by the facility."

Finally, the Board stressed that the omnibus clause of Section 3005(c)(3) could not be used as a statutory basis for injecting into the analysis factors other than "ensuring the protection of the health or environment or low-income populations. "The Region would not have discretion to redress impacts unrelated or only tenuously related to human health and the environment, such as disproportionate impacts on the economic well-being of a minority or low-income community."

Notwithstanding the stark terms of the Board's threshold suggestion that "the racial or socio-economic composition of the surrounding community" are irrelevant to a the permitting authority under RCRA, the Board's opinion leaves substantial room for EPA to exercise its

authority to promote environmental justice in exercising its permitting authority under RCRA. It allows for the Agency to engage in the kind of risk aggregation analysis upon which environmental justice claims are frequently bottomed. This includes both a closer examination of the cumulative impacts of various risk producing facilities affecting community as well as the possibility that certain subpopulations may be especially susceptible to being harmed by environmental pollutants. The Board also suggested a potentially low threshold trigger for the preparation of such analysis: "a superficially plausible claim * * * [of] disproportionate impact on a minority or low-income segment of the affected community."

Perhaps even more significantly, the Board seems to have ruled that permit conditions or denials need not depend on the showing of a violation of some pre-established environmental standard. The Board opinion provides that EPA has authority to condition a permit whenever "the operation of a facility would have an adverse impact on the health or environment of the surrounding community * * * as necessary to prevent such impacts." The Board does not make clear what it means by "an adverse impact" and how it intends to square this aspect of its opinion with its initial admonishment that "if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit." Presumably, though, they are reconciled by the Administrator being given discretion in Section 3005(c)(3)'s omnibus provision to determine what constitutes an adverse impact warranting a condition (or possibly a permit denial). The Board, therefore, does not deny the Administrator authority in RCRA permitting to take account of the socio-economic or racial composition of a community *so long as she does so only in the first instance* as a reason to take a closer look at the human health and environmental effects of the facility seeking a permit. The final permit condition or denial must rest on those human health and environmental effects and not simply on the socio-economic or racial composition of the community.

C. *In re Puerto Rico Electric Power Authority*, PSD Appeal No. 95-2 (Dec. 11, 1995)

In this matter, a citizen group in Puerto Rico sought review of Region II's issuance of a Prevention of Significant Deterioration (PSD) permit to the Puerto Rico Electric Power Authority (PREPA). The group claimed, among other things, that PREPA and Puerto Rico should have prepared an epidemiological study of the area surrounding the proposed facility and that their failure to do so violated Executive Order 12898 and the federal Constitution. The Board rejected the claim, relying on Region II's explanation that it had fully responded to environmental justice issues raised during the comment period, including the preparation of demographic analysis of the affected area. The Region had concluded that the facility "would cause no disproportionate adverse health impacts to lower-income populations. Finally, the Board likewise rejected the citizen group's contentions that the Region had relied on flawed meteorological data and had failed adequately to consider PREPA "history of violations" in the past.

The precedential significance of this decision is fairly limited because the citizen group's petition for review appears to have been too cursory (two-pages) to be persuasive. The matter is nonetheless significant because it underscores both the limited resources available to most community-based environmental justice organizations and the importance of EPA's taking a more proactive view of its affirmative ability to promote environmental justice in the permitting context. It is no great surprise that where, as in this case, the EPA Regional Office declines to actively pursue the environmental justice concerns of an affected community, the Appeals Board will almost always affirm that ruling. Unless the local community group has managed to obtain substantial legal expertise and resources, they are unlikely to be able to articulate their concerns in a manner likely to prompt the Appeals Board to second guess the Region. As stressed by the Appeals Board in this matter, the Board will not grant a petition for review "unless to decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review."

Effective promotion of environmental justice will instead turn mostly on a Region's willingness to respond to a local community group's concerns by exercising its discretion to take the initiative to become closely engaged with those in the community. Where, as in this matter, the issue becomes what the Agency is required to do, those promoting environmental justice will most often lose. And, as here, one cannot really know wherein lie the merits of the group's claim. Because, without EPA's active and affirmative support, citizen groups were unlikely to be able to make the case necessary to overturn EPA, once the Agency had initially decided to grant PREPA the PSD permit.

D. *In re Envotech, L.P.*, UIC Appeals Nos. 95-2 through 95-37 (February 15, 1996)

In this matter, local residents and nearby municipalities challenged EPA Region V's decision to grant two Underground Injection Control (UIC) permits under the Safe Drinking Water Act. The permits authorize the permittee, Envotech, to drill, construct, test, and operate two hazardous waste injection wells in Washtenaw County, Michigan. The local opposition raised many contentions, including the permittee's poor history of environmental compliance, the unsafe and unproven nature of underground injection, the absence of necessary state and local governmental approvals, flawed geological assessments, errors in characterizations of the hazardous wastes to be received by the facility, and failure to provide required waste minimization certification. The residents also raised distinct environmental justice claims.

The Appeals Board rejected all the claims except for the claim that a waste minimization certification is required. The Board specifically denied the contention of a community organizations opposed to the facility, Michigan Citizens Against Toxic Substances, that local opposition provides a basis for UIC permit denial. The Board reasoned that "local opposition alone is simply not a factor that the Region may consider in its permit decision" and that "[m]ore fundamental issues, such as siting of the wells, are a matter of state or local jurisdiction rather

than a legitimate inquiry for EPA."

The Board also rejected opposition to the permit that was based on the past compliance (or lack thereof) with environmental requirements of companies affiliated with the permittee. The Board concluded that such a concern "simply does not present a link to a condition of the UIC permits at issue here sufficient to invoke the Board's authority to review the permit decision." The Board similarly found no basis for relief in any of the environmental justice claims, which focussed on the fact that the area surrounding the facility was already host to numerous burdensome land uses.

The Appeals Board, however, used the matter as another opportunity to state its views on the significance of environmental justice in the permitting context. Citing to its earlier ruling in *Chemical Waste Management of Indiana (CWM)*, previously discussed, the Board stated that, as with RCRA permitting under Section 3005, "if a UIC permit applicant meets the requirements of the SDWA and UIC regulations, the "'Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.'" (citing *CWM*, at 9). But, as in *CWM*, the Board went on to identify "two areas in the UIC permitting scheme in which the Region has the necessary discretion to implement the mandates of the Executive Order."

The "two areas" described by the Board as existing within the Safe Drinking Water Act UIC program are virtually the same as those described by the Board in *CWM* as existing within RCRA. The first is the right to public participation, allowing the Region to "exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process." The second area of discretionary authority the Board derived from "regulatory 'omnibus authority' contained in 40 C.F.R. 144.52(a)(9)," which authorizes "permit conditions 'necessary to prevent migration of fluids into underground source of drinking water." The Board reasoned that "there is nothing in the omnibus authority that prevents a Region from performing a disparate impacts analysis when there is an allegation that the drinking water of minority or low-income communities may be particularly threatened by a proposed underground injection well. Finally, the Board concluded that the Region should exercise its discretionary authority to undertake such an analysis "when a commenter submits at least a superficially plausible claim that a proposed underground injection well will disproportionately impact the drinking water of a minority or low-income segment of the community in which the well is located."

Applying this framework to the Region's actions in this case, the Appeals Board concluded that the Region took adequate steps to implement the Executive Order 12898. The Board took note of the two days of informal hearings convened by the Region to allow surrounding communities to voice their concerns and the demographic analysis performed of the area surrounding the site. The Board upheld the Region's decision to base that analysis on a two-mile area, rejecting community opponent arguments that the subject area was too small

The Appeals Board's ruling is positive for environmental justice advocates to the extent that it demonstrates the Board's willingness to find that the Agency can base discretionary authority to promote environmental justice in its regulations and, therefore, presumably need not rely on statutory language in the first instance. In *CWM*, the omnibus authority was contained in statutory language. Second, the omnibus language upon which the Board relied on in *Envotech* was less obviously expansive than that construed in *CWM* (Section 3005(c)(3) of RCRA). The Board's willingness to find such broad based authority in the regulatory language "necessary to prevent migration of fluids" increases the possibility that similar omnibus authority can be found in other environmental statutes and regulations. As footnoted by the Board, the Board has already indicated that "necessary" could "arguably extend to imposition of more-stringent financial responsibility requirements than are generally prescribed for UIC permittees." If so, "necessary" might likewise extend to more stringent monitoring and reporting requirements, or even enhancement of community enforcement capacity, for those facilities located where there is reason to believe that absent such a condition, there will not be the kind of oversight necessary for compliance assurance.

The more sobering assessment of the Board's opinion in *Envotech* is its reiteration that EPA's exercise of expansive permit authority to promote environmental justice will most likely occur only if the Agency takes the initiative. As in *Envotech* (and *CWM*), neither the Appeals Board or a reviewing court is very likely to order EPA to take such action (either by denying or conditioning a permit). The Board's decision not to do so here is entirely consistent with its repeated characterization of EPA's authority as "discretionary" and the narrow scope of the Board's review of a Region's permitting determination. Hence, the challenge EPA now faces is to persuade the Regions and delegated state permitting authorities to seize and exploit the discretionary authority that the Board has now made clear they possess to fulfill Executive Order 12898's mandates.

III. Survey of Federal Environmental Statutory Provisions Authorizing Permit Conditions or Denials Based On Environmental Justice Considerations

The history of environmental law is replete with examples of instances in which broadly worded statutory language or regulations have been successfully enlisted in support of arguments that EPA has authority beyond that initially contemplated by the regulated entities, environmentalists, affected communities, or even the Agency itself. The Refuse Act's restrictions on water pollution, NEPA's strict procedural requirements, the Clean Air Act's PSD program, and, more recently, Section 401 of the Clean Water Act, are all very much products of such innovative and expansive interpretations of existing statutory language.

The issue now before the Agency is whether existing statutory and regulatory language can similarly be resurrected on behalf of environmental justice. Notwithstanding their generally rigid outlook, the Appeals Board opinions discussed above set forth two possibilities: the omnibus clause contained in Section 3005(c)(3) of RCRA, discussed in *CWM of Indiana*, and

the omnibus clause contained in the Safe Drinking Water Act regulation, 40 C.F.R. 144.52(a)(9), discussed in the *Envotech*. What this portion of this memorandum seeks to accomplish is to examine the statutory language of each of the several environmental protection laws, one statute at a time, in an effort to identify other clauses that might similarly support expansive understandings of EPA's authority to promote environmental justice through permit conditions and denials. This review does not purport to be exhaustive of all possibilities. The hope is instead that this memorandum may serve as a catalyst to prompt others, especially those far more familiar with the statutory and regulatory intricacies of the various programs, to find other examples as well.

A. Clean Air Act

Within the Clean Air Act, there are plainly many opportunities to infuse environmental justice concerns more into the Act's substantive standards than the Agency has historically done. For instance, determination of National Ambient Air Quality Standards (NAAQS) under Section 109 are supposed to be based on subpopulations that are especially sensitive to the adverse effects of pollutants. 42 U.S.C. 7409; see Lead Industries Assoc. v. EPA 647 F.2d 1130 (D.C. Cir. 1980). Looking more to the subpopulations having the characteristics of those residing in low-income communities and communities of color, which often have the most sensitive subpopulations, would make those air pollution control standards more responsive to the teachings of environmental justice. Air quality criteria, upon which the NAAQS are based are supposed to include information on "those variable factors * * * which of themselves or in combination with other factors may alter the effects on public health or welfare." 42 U.S.C. 7408. These "variable factors" should likely include many of the kinds of characteristics of environmental justice communities that render the harmful effects of pollutants on those already environmentally stressful communities even more harmful.

The Clean Air Act's nonattainment provisions also offer several opportunities. An explicit objective of the Subchapter D's Nonattainment Program is "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of *all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process*." 42 U.S.C. 7470. Prior to any redesignation of any nonattainment area, there must be notice and a public hearing in the areas proposed to be redesignated. And, prior to that hearing, "a satisfactory description and analysis of the health, environmental, economic, *social*, and energy effects of the proposed redesignation shall be prepared." *Id.* Environmental justice concerns naturally fall within the legitimate scope of such analysis. Sanctions for failure to meet nonattainment requirements would likewise seem to offer a basis for redressing environmental-justice concerns. Such sanctions extend to "such additional measures as the Administrator may reasonably prescribe," which seems sufficiently open-ended to extend to environmental justice concerns in appropriate circumstances. 42 U.S.C. 7509(d)(2).

Another example of a Clean Air Act provision potentially allowing for greater importation of environmental justice's concern with risk aggregation is the waiver provision for innovative technological systems of continuous emission reduction applicable to Section 111's new source performance standards. A condition for determining whether an applicant for a waiver from certain requirements otherwise applicable to a person proposing to own or operate a new source is "demonstrat[ion] to the satisfaction of the Administrator that the propose system *will not cause or contribute to unreasonable risk to public health.*" 42 U.S. C. 7411j(1)(A)(iii). The statutory emphasis on public health and inclusion of "contribute to" would seem to permit the Administrator to take into account the cumulative public health impact of the facility on the affected community.

EPA's enforcement authority under the Clean Air Act likewise allows the Agency to take account of environmental justice in allocating its enforcement resources. EPA's decision to maintain a civil or criminal enforcement action is generally a matter of administrative agency discretion to exercise as the Administrator deems "appropriate." There is reason to believe that historically federal and state enforcement of environmental protection laws has not occurred at a level commensurate with the environmental risks presented in environmental justice communities. Under the statute, EPA has the discretion to reallocate its enforcement resources in a manner that more actively promotes those communities for government oversight and enforcement.

Even more specifically, the Clean Air Act's penalty assessment criteria would seem to allow the Administrator to take account of the special need for a credible enforcement threat in those communities that have not generally benefited from enforcement in the past. Section 113 provides that "in determining the amount of any penalty to be assessed," the Administrator shall take into consideration several specific factors and "such other factors as justice may require." 42 U.S.C. 7413. The Administrator could deem environmental justice concern with the absence of government enforcement in the past and the lack of community resources to oversee a facility's compliance as cause of enhanced penalties for violations in certain communities.

For the purposes of this memorandum, the Clean Air Act provisions of greatest interests are those that may allow the permitting authority greater discretion to take into account environmental justice concerns in the permitting process, including use of the permitting process to build community enforcement capacity. Section 504 would seem to confer on EPA just such authority. Subsection (a) provides that "[e]ach permit issued under this subchapter shall include * * * such other conditions as are necessary to assure compliance with applicable requirements of this chapter." A major component for achieving compliance assurance under the Clean Air Act is the citizen suit component of that statute. For, absent a credible enforcement threat, there will be no compliance assurance. Subsection (a), therefore, would seem to authorize EPA to impose as a condition on those receiving Clean Air Act permits that they take certain steps in order to enhance the affected community's ability to ensure the permitted facility's compliance with applicable environmental protection laws. Steps could range from simply providing more

ready access to the information necessary to oversee the permitted facility's operation and compliance to even perhaps working to enhance the resources of a citizen group charged with overseeing environmental enforcement and compliance assurance. To that same effect, subsection (b) authorizes the Administrator to prescribe "procedures and methods for determining compliance" and subsection (c) requires that each permit "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assurance compliance." EPA could make the enhancement of community enforcement capacity an explicit objective of the requirements that the Agency establishes pursuant to these subsections.

Finally, Section 128 of the Act, 42 U.S.C. 7428, provides the Administrator with authority to ensure that state permitting boards and pollution control enforcement authorities are more likely to take environmental justice concerns into account. Section 128 mandates that state implementation plans require that "any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest * * *." The "public interest" standard could allow the Administrator to require that persons with concerns about environmental justice and/or representative of those communities be included on state boards or bodies with permitting or enforcement authority.

B. Clean Water Act

As with the Clean Air Act, there are multiple opportunities within the Clean Water Act for EPA to modify the environmental standards themselves to respond better to environmental justice concerns. Section 302, for instance, confers authority on the Administrator to promulgate restrictions supplemental to the Act's technology-based controls if, absent such additional restrictions, the discharges "would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies * * *." Although the Agency has historically been wary of invoking Section 302, the provision does provide EPA with some statutory authority beyond technology-based controls to address environmental justice concerns related to public health, public water supplies, and other water quality objectives. The Administrator also possesses similarly-worded statutory authority in developing individual control strategies for toxic pollutants under Section 304(l)(1)(A)(ii).

The Clean Water Act also confers authority on the Administrator to promote environmental justice in imposing monitoring and reporting requirements on owners and operators of point sources. In order to assist the Administrator in developing pollution control effluent limitation or standard or in determining whether there has been a violation of a limitation or standard, Section 308 authorizes the Administrator to require point sources to maintain records, make reports, use monitoring equipment, sample effluent, and "provide such other information as he may reasonably require." 33 U.S.C. 1318(a). It further provides that the Administrator "or his authorized representative" shall have right to reasonable access and inspection." Here, too, the Administrator could invoke these authorities creatively to promote

community enforcement capacity. Monitoring reports and general compliance information could be directed to community groups in the first instance, obviating the need to travel to inconvenient locations. In appropriate circumstances, a local community organization might also become an "authorized representative" of the Administrator, which would allow the organization a right of entry and inspection.

In addition to providing EPA with discretionary authority to target its resources in enforcing the Clean Water Act in a manner more responsive to the needs of environmental justice communities, the Clean Water Act also permits administrative and civil penalties to take into account environmental justice concerns, perhaps as a reason for increasing the fine (in order to ensure compliance in an area long subject to noncompliance). Section 309(d) provides that civil penalties may be calculated based on several factors including "such other matters as justice may require" and subsection (g), regarding administrative penalties, includes identical language. 33 U.S.C. 1319(d), (g). The use of "justice" in this context confers on EPA considerable discretionary authority beyond that provided in those instances where the exclusive statutory touchstone is "health and the environment." Environmental justice's distinct concern with disproportionality and equity easily falls within the "justice" rubric.

Section 402 of the Act, however, is likely the most significant potential source of permit conditioning authority. Section 402 provides that the Administrator may issue a permit for the discharge of any pollutant

> upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, *such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.*"

42 U.S.C. 1342(a)(1). Clause (B) would seem to confer on the Administrator wide ranging authority to impose permit conditions promoting environmental justice. There are two limitations: (1) the authority exists only prior to taking of certain implementing actions; and (2) the conditions must carry out the provisions of this Act. But, both could be met. The Administrator has most certainly not taken all implementing actions under several provisions, including, for instance, Section 302 discussed above. And, because the purpose of the condition would be to protect public health, public water supplies, promote compliance assurance, and the like, it should not be difficult to fashion permit conditions that both promote environmental justice, including community enforcement capacity, risk aggregation, and that "carry out the provisions of this chapter."

C. Resource Conservation and Recovery Act

The Resources Conservation and Recovery Act (RCRA) includes many provisions the broad wording of which leaves EPA with substantial authority to take environmental justice

concerns into account in the Agency's implementation of this law. The touchstone for the Agency's promulgation under RCRA of regulations applicable to generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities is the same: "as may be necessary to protect human health and the environment." 42 U.S.C. 3002(a), 3003(a), 3004(a). Because, as discussed in Part I above, one of the major lessons of environmental justice is that EPA's past failure to account for the effects of aggregation of risks and cumulative impacts has caused EPA's existing standards not to protective of human health and the environment" in certain communities, EPA's authority under RCRA to correct this problem cannot be gainsaid. The relevant statutory language specifically directs the Agency to do what it can only do by considering the actual human health and environmental effects of managing hazardous waste on disparately affected low-income communities or communities of color.

Section 3004 of RCRA, which applies to owners and operators of hazardous waste treatment, storage, and disposal facilities, further elaborates on the kinds of standards that EPA may promulgate. Several have significant implications for environmental justice. For instance, Section 3004(a) provides that EPA standards shall include requirements respecting:

> (2) satisfactory reporting, monitoring, and inspection * * *;
>
> (4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;
>
> (5) contingency plans for effective action to minimize unanticipated damage * * *;
>
> (6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, * * * training for personnel as may be necessary or desirable * * *.

EPA could fashion "reporting, monitoring, and inspection" requirements in a manner more responsive to the needs of environmental justice communities, which tend to have fewer resources to engage in effective oversight of a regulated facility's compliance with environmental performance standards. EPA is authorized to impose requirements relating to the "location" of facilities, which would seem to permit the Agency at the very least to account for risk aggregation in the siting of such facilities. The reference to "contingency plans" would seem to allow EPA to require contingency plans that reflect the needs of environmental justice communities that, because of their own limited resources, may require the owner and operator to invest more of its own resources into the community to develop and implement such plans. Finally, EPA could consider the socio-economic, racial, and ethnic makeup of a community in promulgating requirements regarding "qualifications of ownership" and "training for personnel." A major problem in the past has been the lack of adequate training in bridging the gap between the community and a regulated facility located within that community. Special training may be

needed for personnel operating facilities within communities, including, quite possibly, the hiring of more individuals who are themselves residents of the affected community.

EPA also possesses under RCRA the authority to target its enforcement resources in a manner more responsive to the needs of environmental justice communities. RCRA is different from the Clean Air Act and Clean Water Act because it does not similarly include an express provision that the penalty may be based on "justice," but the Administrator is instructed to account for the "seriousness of the violation" in calculating the appropriate penalty in a compliance order. In many circumstances, environmental justice concerns could relate to the "seriousness" of a particular violation.

EPA's inspection authority is likewise susceptible to being implemented in a manner more responsive to environmental justice. EPA has inspection authority, but so too does a "duly designated * * * representative" of the Agency. 42 U.S.C. 6927(a). Records, reports, or other information obtained by EPA pursuant to its inspection authority is also supposed to be made publicly available. 42 U.S.C. 6927(b). EPA could strive to ensure that such information is meaningfully available to those who reside in communities who might otherwise not have ready access to documents that are "available" only in name. EPA is also authorized to "distinguish between classes and categories of facilities commensurate with the risks posed by each class or category" in ensuring thorough and adequate inspection of regulated facilities. 42 U.S.C. 3007(e)(1). Arguably, one class or category of facilities warranting special attention are those located in environmental justice communities.

With regard to permit conditions, EPA has considerable authority to take environmental justice concerns into account in its permitting decisions by considering the possibility that a particular community is being subject to disparate environmental risks. As described by the Environmental Appeals Board in *CWM of Indiana*, Section 3005(c)(3) provides that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C. 6925(c)(3). As in Sections 3002, 3003, and 3004, already discussed, this language in the permitting provision permits the Agency to "tak[e] a more refined look at its health and environmental impacts assessment in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environmental of low-income or minority populations." Such a closer examination could justify permit conditions (or presumably denials) based on adverse effects on a disparately affected community that would otherwise be "mask[ed]" if the regulator undertook only an "analysis of a broad cross-section of the community."

Permit conditions could, however, be more far ranging. Protection of human health and the environmental turns on compliance assurance and permit conditions might, accordingly, extend to those needed to promote community enforcement capacity. As previously discussed, such enforcement capacity is essential to the statute's accomplishments of its objectives,

especially in low-income communities and communities of color that, lacking that capacity in the past, have been the repeated victims of environmental noncompliance.

Finally, one other RCRA provision worthy of special mention is Section 4002, which governs the federal guidelines for state solid waste management plans. Among the considerations relevant to the promulgation of those guidelines are "the political, economic * * * problems affecting comprehensive solid waste management." 42 U.S.C. 6942(c)(9). There are many disagreements regarding the meaning and portent of claims of environmental injustice. There can be little dispute, however, that environmental justice presents a major "political * * * problem[] affecting solid waste management."

D. Safe Drinking Water Act

The Safe Drinking Water Act includes much of the same kinds of opportunities already mentioned in the context of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act. The Administrator retains the usual significant discretion to target enforcement based on environmental justice factors and civil penalties are assessed based on several factors including "such other matters as justice may require." 42 U.S.C. 300h-2.

In some respects, though, the Safe Drinking Water Act may be especially susceptible to infusion of environmental justice concerns because of the statute's broad wording. For instance, the Act directs the Administrator, in promulgating national primary drinking water regulations to consider several specific factors, but then also "other factors relevant to protection of health." 42 U.S.C. 300g-1(b)(7)(C)(i). The kinds of risk aggregation and cumulative impacts disparately affecting environmental justice communities would seem to be such a relevant factor. In addition, in establishing the list of contaminant level goals, the Administrator forms an advisory working group that must include members from several specified offices (e.g., Office of Drinking Water, Pesticides, Toxic Substances) "and any others the Administrator deems appropriate." 42 U.S.C. 300g-1(b)(3)(B). In light of Executive Order 12898, the Office of Environmental Justice could now easily be considered another "appropriate" office for this advisory working group.

Likewise, although the Act permits a State with primary enforcement to grant variances in certain circumstances, the statute further provides that any such variance "shall be conditioned on such monitoring and other requirements as the Administrator may prescribe." Here, too, the Administrator could strive to fashion conditions that reflect the kinds of risks of noncompliance faced especially by many environmental justice communities.

Finally, although this memorandum does not purport to undertake an exhaustive review (let alone any meaningful review) of Agency regulations in search of those providing the Agency with open-ended authority relevant to environmental justice, the Appeals Board has already identified one such regulation implementing the Safe Drinking Water Act. In *Envotech*, the

Board ruled that EPA possesses substantial discretionary authority deriving from "regulatory 'omnibus authority' contained in 40 C.F.R. 144.52(a)(9). As described by the Board, that regulation "authorizes permit conditions 'necessary to prevent migration of fluids into underground source of drinking water.'" The Board reasoned that "there is nothing in the omnibus authority that prevents a Region from performing a disparate impacts analysis when there is an allegation that the drinking water of minority or low-income communities may be particularly threatened by a proposed underground injection well."

E. Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) is one of the few environmental laws to include an explicit environmental justice program, albeit of a quite limited scope. The provisions dealing with technical and grant assistance to the States for radon programs expressly target "homes of low-income persons" for such assistance. 15 U.S.C. 2665(a)(6), 2666(i)(2). Although the assistance provisions of the other laws do not include such a mandate, they do not preclude such a preference and, based on the Executive Order, EPA plainly has the authority to provide it.

Like the other environmental laws, TSCA's substantive standards are responsive to environmental justice. Environmental justice is implicated in testing and data gathering under TSCA. TSCA also looks to "cumulative" and "synergistic effects" in determining the regulatory border between reasonable and "unreasonable risk to health or the environment" (15 U.S.C. 2603(a), (b)(2)(A)), which are precisely those effects that environmental justice teaches have been too often overlooked in considering risks imposed on low-income communities and communities of color.

Finally, TSCA is significant because Congress instructed the Administrator to "carry out" the law by considering the "environmental, economic and *social impact* of any action the Administrator takes * * *." 15 U.S.C.2601(c). Hence, wholly apart from the Executive Order, the EPA possesses wide ranging authority in implementing TSCA to consider environmental justice concerns in fashioning and enforcing the Act's requirements.

F. Federal Insecticide, Fungicide, and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act confers substantial authority on the Administrator to address environmental justice concerns. EPA's principal responsibility in administering FIFRA is in its registration of pesticides to guard against "unreasonable adverse effects on the environment." 7 U.S.C. 136a. Environmental justice is concerned with FIFRA's administration for many reasons, but one major reason is because of the substantial threat to the health of farmworkers posed by unreasonably dangerous use of pesticides. FIFRA provides EPA with significant authority to eliminate these unreasonable risks, including use and disposal restrictions, labeling requirements, registration denials, and conditional registrations. EPA's

authority is broadly worded, thereby leaving the Agency with significant discretionary authority to take into account wide ranging concerns in implementing FIFRA. Environmental justice concerns with risk accumulation, cumulative effects, worker notice, all fall easily within the core of the Agency's regulatory authority under FIFRA. See 7 U.S.C. 136a.

CONCLUSION

This memorandum is intended merely as an opening salvo in an effort to prompt EPA to strive more systematically to use its considerable permitting authority to promote environmental justice. As stressed at the outset, this memorandum does not purport to set forth for discussion all of the many authorities that EPA possesses. Its purpose is far more modest: to survey some of the provisions of the major laws for examples of open-ended statutory language capable of infusing environmental justice concerns more into the lawmaking and permitting process. There are undoubtedly significant provisions missing from this presentation. The memorandum, moreover, barely begins to explore the potential presented by similarly open-ended authorities created by EPA *regulations* rather than by congressional statutes. And, conversely, there may well be statutory provisions that have been included that, upon further reflection, would prove capable of carrying the weight that this memorandum may too optimistically assign to them (at least without changes in existing Agency regulations).

But whatever the risks of under- and overinclusiveness inherent in this memorandum, what remains clear is that EPA has considerable authority to promote environmental justice through permit conditions and denials (and registration conditions and denials) that the Agency has yet to enlist effectively. One area plainly ripe for exploitation is EPA's substantial authority to account better for the aggregation and accumulation of risks in environmental justice communities in the Agency's permitting decisions. EPA has far more authority than it has historically acknowledged to restrict and deny the operation of environmentally risky facilities based on the factor that the community to be exposed is already disparately subject to such risks from other sources. EPA also possesses considerable authority to use its permitting authority to condition permits in a manner that requires the regulated entity itself to help the exposed community to build the community enforcement capacity necessary for the community to oversee and ensure the facility's compliance with applicable environmental laws. Nor is there anything untoward or improper about requiring the regulated facility to do so. Indeed, quite the opposite is true. Such community enforcement is an indispensable element of the statutory scheme enacted by Congress and a necessary element of any executive branch program intended to fulfill the President's environmental justice mandate in Executive Order 12898.