TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ADVERSITY AND COMPLIANCE WITH ENVIRONMENTAL HEALTH-BASED THRESHOLDS

I. INTRODUCTION

A. PURPOSE: This paper outlines the U.S. Environmental Protection Agency's (EPA's or Agency's) current thinking about enforcement of Title VI of the Civil Rights Act of 1964 concerning how compliance with environmental health-based thresholds relates to "adversity" in the context of disparate impact claims about environmental permitting.[1]

This paper does not address allegations about intentional discrimination, most non-permitting fact patterns, or technology- and cost-based standards; it is focused on discriminatory effects allegations that relate to the health protectiveness of pollution control permits issued by recipient agencies. In particular, this paper concerns the adversity prong of the *prima facie* case and does not address the other analytical steps necessary to determine whether a violation has occurred. While this paper discusses Title VI, the principles discussed here also apply to the other recipient nondiscrimination statutes,[2] as well as compliance with health thresholds in some non-permitting settings, such as brownfields cleanups.

B. BACKGROUND: The Agency has encountered a number of complex and unique issues of law and policy in the course of Title VI complaint investigations, especially allegations concerning the protectiveness of environmental permits issued by state and local agencies that receive EPA financial assistance. These challenges have been the consequence of the need to merge the objectives and requirements of Title VI with the objectives and requirements of the environmental laws that the Agency implements. The Agency's environmental regulatory mandates require complex technical assessments regarding pollution emissions, exposures, and cause-effect relationships. In addition, the cooperative federalism approach embodied in the federal environmental statutes requires that EPA accomplish its environmental protection objectives in close coordination with state and local environmental regulators. Such issues do not have ready analogues in the context of other federal agencies' Title VI programs.[3]

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[1] Upon finalization of this paper, the policy described herein will supersede the corresponding discussions in the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39,667, 39,678, 39,680-81 (2000) (discussing relevance of recipients' authority and compliance with National Ambient Air Quality Standards) [hereinafter *2000 Draft Guidance*].

[2] *See United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 600 n.4 (1986) (stating that courts have "relied on case law interpreting Title VI as generally applicable to later statutes"). Other relevant recipient nondiscrimination statutes include section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, and section 13 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251.

[3] Nonetheless, EPA continues to review programs and best practices in place in other federal agencies to ensure consistency to the extent applicable and identify approaches that may be transferable to EPA's Title VI program.

The Agency's historical efforts in its Title VI program have been the subject of some criticism over the years. One particular criticism arose in response to the Agency's 1998 *Select Steel* decision -- the origin of the rebuttable presumption addressed below. In *Select Steel*, EPA's Office of Civil Rights (OCR) dismissed an administrative complaint concerning a permit issued by the Michigan Department of Environmental Quality for the Select Steel facility based, in part, on the fact that the applicable National Ambient Air Quality Standards (NAAQS) were already being met, and that the facility's permitted emissions, in combination with other stressors, were not causing an adverse effect.[4] The rebuttable presumption approach was incorporated into the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.[5]

The Agency has elected to reexamine the weight it accords compliance with environmental health-based thresholds because this issue, in particular, sits directly at the crossroads of environmental and civil rights law, and to respond to concerns raised by external Title VI stakeholders.

In examining this issue, EPA is mindful of the broad discretion afforded to federal agencies in the enforcement of federal statutes, including enforcement of federal financial assistance recipients' obligations under Title VI. This discretion applies to how agencies elect to enforce Title VI, including determining which Title VI issues to investigate.[6]

C. TITLE VI LEGAL FRAMEWORK[7]: Many Title VI investigations concern administrative complaints alleging adverse disparate impacts from the issuance of an environmental permit. Such complaints are filed pursuant to EPA's Title VI regulations. When assessing such complaints, EPA first determines whether it has jurisdiction over the complaint.[8]

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[4] In its evaluation of the NAAQS, OCR noted that "[t]he NAAQS for ozone [and lead] 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." Letter from Ann E. Goode, Director, EPA/OCR, to Father Phil Schmitter and Sister Joanne Chiaverini, Co-Directors, St. Francis Prayer Center 3 (Oct. 30, 1998) [hereinafter Goode Letter]. OCR further noted that the NAAQS provides "protection for group(s) identified as being sensitive to the adverse effects of the NAAQS pollutants." Office of Civil Rights, U.S. Environmental Protection Agency, *Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint)* 14 (1998) [hereinafter *Select Steel Report*]. As applied to the complaint, OCR found that the area around the proposed Select Steel facility would attain the NAAQS for ozone and lead, and that there was no evidence suggesting other concerns. As a result, OCR concluded that no adverse impacts occurred with respect to the state's permitting emissions of those pollutants. *See* Goode Letter at 3-4; *Select Steel Report* at 27-33.

[5] *See 2000 Draft Guidance* at 39,680-81.

[6] *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Webster v. Doe*, 486 U.S. 592, 599 (1988); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

[7] The information in this subsection is intended as background. It does not change any of EPA's policies or practices.

[8] The complaint must be in writing, state a claim, be timely, and concern a recipient. *See* 40 C.F.R. § 7.120(b). In addition, EPA evaluates whether the complaint is ripe or moot, whether the complainant has standing, whether the

If so, the Agency then applies the analytical framework for assessing significant adverse disparate impact claims established by the courts:[9]

1. Is there a *prima facie* case? (The following three elements need not be established in order.)
    a. Does the alleged discriminatory act have an adverse impact?
    b. Is that adverse impact suffered disparately?
    c. Is the adverse disparate impact caused by the recipient?
2. Can the recipient offer a substantial legitimate justification for its action?
3. Is there a less discriminatory alternative?

This paper focuses only on a particular issue that may arise in the course of conducting the inquiry described in step 1.a., above. A finding of adversity, by itself, does not amount to a finding of a Title VI violation, which requires inquiry into all three of the steps outlined above, as well as the sub-elements of step 1 (*i.e.*, step 1.b. and 1.c.).[10]

II. CONSIDERATION OF ENVIRONMENTAL HEALTH-BASED THRESHOLDS

In the course of investigating complaints of discrimination arising from the issuance of environmental permits, EPA may need to consider whether a permit that complies with a health-based threshold can nevertheless cause an adverse impact. Such assessments may involve analyses that are complex or, in some cases, simply infeasible with existing technical capabilities. Consequently, the Agency believes that the issue of establishing adversity warrants further consideration as described below.

A. ISSUE: How does compliance with environmental health-based thresholds[11] relate to whether adversity exists in Title VI investigations?

B. CURRENT POSITION: The *2000 Draft Guidance* addresses the question of how to analyze adversity in a case where the NAAQS – which is a health-based standard – is being met. It states that attainment of health-based NAAQS creates a rebuttable presumption that no adverse

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complaint should be referred to another federal agency, and whether clarification is required, among other things. *See* 40 C.F.R. § 7.120(a), (d)(1)(i); Federal Coordination and Compliance Section, U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* 12, 16-21, 37-41 (1998).

[9] *See Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407, 1413 (11th Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984).

[10] *See New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (noting that a *prima facie* case requires "a causal connection between a facially neutral policy and a disproportionate and adverse impact," and dismissing the case because plaintiffs failed to establish causation).

[11] The term "environmental health-based thresholds" is intended to encompass both enforceable regulatory standards (*e.g.*, NAAQS) and, in cases where such standards are not relevant, non-enforceable health-based target levels (*e.g.*, reference doses for noncarcinogenic effects in the Integrated Risk Information System).

impacts are caused by the permit at issue with respect to the relevant NAAQS pollutant(s) for purposes of Title VI. As applied in an investigation involving the NAAQS, EPA would first establish whether the area in question was attaining the NAAQS for the relevant pollutant. If so, EPA would presume that the adversity component of the *prima facie* case was not satisfied (*i.e.*, there is no adversity) and then dismiss the complaint. However, if the investigation produced evidence that significant adverse impacts may be occurring with respect to the NAAQS pollutant despite attainment of the NAAQS, the presumption would be rebutted and EPA would continue to investigate the remaining prongs of the *prima facie* case. While the *2000 Draft Guidance* spoke specifically to NAAQS, EPA has considered the issue of the rebuttable presumption as it might apply to any health-based threshold and the position set forth in this paper is applicable to any complaint in which a health-based threshold is present, not just NAAQS.

C. PROPOSED POSITION: While EPA has had little or no opportunity to apply the rebuttable presumption (that is, this issue has been discussed in the abstract, and has not been applied to any particular case following issuance of the *2000 Draft Guidance*), EPA now intends to eliminate application of the rebuttable presumption when investigating allegations about environmental health-based thresholds. Compliance with a health-based threshold such as a NAAQS is a serious consideration in an evaluation of whether adverse disparate impact exists. As described below, the Agency will also assess other information that may be available and appropriate when investigating whether adverse health impacts exist. While no presumption is established, compliance with a health-based threshold would be considered, along with other information, to enable the Agency to focus on the most significant cases (*i.e.*, those representing the highest environmental and public health risk) and to determine whether adversity exists.

Environmental health-based thresholds are set at levels intended to be protective of public health. While compliance with such thresholds does not guarantee no risk, such compliance strongly suggests that the remaining risks are low and at an acceptable level for the specific pollutant(s) addressed by the health-based threshold. At the same time, EPA believes that presuming compliance with civil rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health.

The approach proposed here differs from the *2000 Draft Guidance*'s rebuttable presumption. Under the latter, complying with the NAAQS created a presumption of no adversity that would stand unless affirmatively overcome. By contrast, this proposal acknowledges the relative significance of compliance with an environmental health-based threshold, while also evaluating a number of other factors, as appropriate, including the existence of hot spots, cumulative impacts,[12] the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health-based threshold. Because EPA believes that the NAAQS (and other health-based thresholds) can be valid and appropriate, and yet not assure in all cases that no adverse impact is created, EPA will no longer presume an absence of adversity if a

[12] The *2000 Draft Guidance* defined "cumulative impacts," *see* 65 Fed. Reg. 39,684, and discussed it further at 65 Fed. Reg. 39,678-81.

NAAQS (or another health-based threshold) is satisfied. Instead, EPA would consider such compliance concurrently with the type of information described above.

While EPA is eliminating the applicability of the rebuttable presumption from its analyses, nevertheless, there may be other features present that may impact EPA's ability to consider other information concurrently with compliance with health-based thresholds. Examples of such features include, but are not limited to, the Agency's existing technical capabilities and the availability of credible, reliable data (given the practical constraints of complaint investigations, EPA expects to gather pre-existing technical data rather than generating new data).[13]

If the assessment of relevant factors fails to establish the adversity element of the *prima facie* case, EPA would ordinarily dismiss the allegation. Alternatively, if the assessment establishes adversity, EPA would then evaluate disparity and complete the other steps in the analysis set forth in Section I.C. To assist in its data collection, the Agency expects to solicit input from both complainants and recipients about these factors during the course of its investigations.

As the Title VI analytical framework described in Section I.C. illustrates, the issue addressed in this paper is not the only question that must be addressed in the investigation process. Others may require elaboration in the future as well. Moreover, there will be further work necessary to develop and implement the policy issue addressed here. Thus, the analysis here does not represent the end point, but rather an important step forward in considering and evaluating these and other policy issues raised in EPA's Title VI work.

[13] The Agency expects to evaluate relevant data from a wide variety of sources, such as Toxics Release Inventory; National Air Toxics Assessment; Comprehensive Environmental Response, Compensation, and Liability Information System; state and local databases; and monitor-specific data.