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Earthjustice \* Eastern Environmental Law Center \* Environmental Justice League of Rhode  
Island \* Equal Justice Society \* Farmworker Justice \* Lawyers' Committee for Civil Rights  
Under Law \* Los Jardines Institute (The Gardens Institute) \* Maryland State Commission on  
Environmental Justice and Sustainable Communities \* Natural Resources Defense Council \*  
OPAL Environmental Justice Oregon \* Pesticide Action Network North America \* Poverty &  
Race Research Action Council \* Public Interest Law Center of Philadelphia \* Sierra Club \*  
Tri-Valley CAREs \* West End Revitalization Association \*  
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March 20, 2013

Robert Perciasepe  
Acting Administrator and Deputy Administrator  
USEPA  
Office of Civil Rights  
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**Re: Comments on U.S. Environmental Protection Agency Draft Policy Papers, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards* (Released Jan 24, 2013); *Title VI of the Civil Rights Act of 1964: Draft Role of Complainants and Recipients in the Title VI Complaint and Resolution Process* (Released Jan. 25, 2013)**

Dear Acting Administrator Perciasepe and the Office of Civil Rights,

The undersigned organizations and individuals submit these comments on two U.S. Environmental Protection Agency ("EPA") draft policy papers, EPA, Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards (Jan. 24, 2013) ("Adversity Paper"), and EPA, Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaint and Resolution Process (Jan. 25, 2013) ("Complainant Guidance"). The signatories include community groups that have filed Title VI

complaints with the Office of Civil Rights (“OCR”) and have substantial experience with EPA’s failure to create and enforce a meaningful Title VI enforcement program. We note that many of the concerns outlined today echo the expansive set of comments submitted in response to the publication of Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000) (hereinafter “Revised Guidance Documents”), and we refer OCR to the comments in the administrative record on the Revised Guidance Documents. Unfortunately, despite the passage of time and recent steps in the right direction, those comments remain relevant today.<sup>1</sup>

Today’s comments are focused, particularly, on the Adversity Paper and the Complainant Guidance and address only a few of the issues that our organizations and partners have raised with EPA about strengthening the agency’s Title VI enforcement program and its compliance with Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Jan. 30, 1995) (the “Executive Order”). These include, for example, EPA’s failure to coordinate Title VI enforcement with other agencies, the need for EPA to incorporate the mandates of the Executive Order into its approach to Title VI enforcement, and concerns that complainants and other stakeholders face retaliation. A number of these issues are outlined in “Community Voice: Comments and Recommendations,” submitted to EPA on Wednesday, March 6, 2013 by Omega Wilson, West End Revitalization Association.

We strongly recommend that EPA develop and finalize a comprehensive guidance for implementing Title VI and its regulations, together with the Executive Order. While the piecemeal approach reflected in the two draft documents addresses a few isolated issues, a comprehensive guidance is needed to inform EPA staff, recipients of financial assistance, beneficiaries of such assistance, and the public as to their respective obligations and rights.<sup>2</sup>

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<sup>1</sup> See, e.g., Ctr. on Race, Poverty, & the Env’t and Cal. Rural Legal Assistance Found., Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Aug. 26, 2000), *available at* [http://www.epa.gov/civilrights/docs/t6com2000/t6com2000\\_071.pdf](http://www.epa.gov/civilrights/docs/t6com2000/t6com2000_071.pdf) (“CRPE Comments”).

<sup>2</sup> See Fed. Transit Admin., U.S. Dep’t of Transp., FTA C 4702.1B: Title VI Requirements and Guidelines for Federal Transit Administration Recipients (Oct. 1, 2012), *available at* [http://www.fta.dot.gov/legislation\\_law/12349\\_14792.html](http://www.fta.dot.gov/legislation_law/12349_14792.html); Fed. Transit Admin., U.S. Dep’t of Transp., FTA C

We submit these comments with the hope that the agency has the will to take the additional necessary steps toward truly developing a “Model Civil Rights Program,” as the Final Report of the Civil Rights Executive Committee envisioned.<sup>3</sup>

## I. The Adversity Paper

Title VI prohibits discrimination on the basis of "race, color, or national origin . . . under any program or activity receiving Federal financial assistance."<sup>4</sup> The text of the law explicitly directs each federal department and agency that extends federal financial assistance to effectuate the terms of the statute by issuing rules and regulations to carry out the objectives of the statute.<sup>5</sup> As the Department of Justice (“DOJ”) has stated, “The purpose of Title VI is simple: to ensure that public funds are not spent in a way which encourages, subsidizes, or results in racial discrimination.”<sup>6</sup> Toward that end, most federal agencies have adopted regulations that prohibit recipients of federal funds from using criteria or methods of administration that have the effect of subjecting individuals to discrimination based on race, color, or national origin.<sup>7</sup>

Consistent with other federal agencies, regulations promulgated by EPA in 1984 include the following prohibitions:

A recipient shall not use criteria or methods of administering its program or activity which *have the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

A recipient shall not choose a site or location of a facility that has the purpose or *effect* of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of

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4703.1: Environmental Justice Policy Guidance for Federal Transit Administration Recipients (Aug. 15, 2012), available at [http://www.fta.dot.gov/legislation\\_law/12349\\_14740.html](http://www.fta.dot.gov/legislation_law/12349_14740.html).

<sup>3</sup> Civil Rights Exec. Comm., EPA, Developing a Model Civil Rights Program for the Environmental Protection Agency: Final Report (Apr. 13, 2012), available at [http://www.epa.gov/epahome/pdf/executive\\_committee\\_final\\_report.pdf](http://www.epa.gov/epahome/pdf/executive_committee_final_report.pdf).

<sup>4</sup> 42 U.S.C. § 2000d.

<sup>5</sup> 42 U.S.C. § 2000d-1.

<sup>6</sup> Civil Rights Div., DOJ, Title VI Legal Manual § VIII (2001), available at <http://www.justice.gov/crt/about/cor/coord/vimannual.php#I>.

<sup>7</sup> *Id.*

race, color, or national origin or sex; or with the purpose or *effect* of defeating or substantially impairing the accomplishment of the objectives of this subpart.<sup>8</sup>

EPA regulations, like regulations at other federal agencies, thus already explicitly prohibit actions with a disparate impact. The challenge is to create a strong enforcement program: despite pervasive patterns of inequality in the distribution of contaminated sites, for example, and the disproportionately greater exposure of communities of color to environmental hazards, Title VI enforcement has been noticeably absent.<sup>9</sup>

EPA's Adversity Paper is a welcome and significant attempt to clarify guidance documents that have languished in draft form for more than a decade. We welcome the movement forward, and particularly, the move away from a rebuttable presumption that absent non-compliance with environmental or health standards, EPA will not make a finding of adverse impact.<sup>10</sup> At the same time, the Adversity Paper suffers from a number of critical shortcomings: (A) most fundamentally, it continues to relate a finding of adversity under Title VI to the question whether a recipient has complied with other statutory or regulatory standards, a connection that is neither consistent with Title VI nor workable for complainants or the agency, (B) the Adversity Paper makes no commitment to memorialize EPA's evolved position on the subject of "adversity" in a final guidance or other document, (C) it ignores non-permitting fact patterns and the importance of other stages of the investigative process, which remain poorly developed in the Revised Guidance Documents, (D) by creating new jurisdictional requirements, it imposes new barriers to filing complaints, and, finally, (E) we are concerned that EPA's statement that "the cooperative federalism approach embodied in the federal environmental statutes ... do[es] not have ready analogues in the context of other federal agencies' Title VI programs"<sup>11</sup> reflects confusion about EPA's role as the agency charged with ensuring that recipients of federal funds administered by EPA are not discriminating. Again, we also want to emphasize the need for EPA to develop and finalize a more comprehensive guidance for

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<sup>8</sup> 40 C.F.R. § 7.35(b), (c) (emphasis added).

<sup>9</sup> As Luke W. Cole and Sheila R. Foster wrote, "[N]ational studies conducted to date provide evidence that people of color bear a disproportionate burden of environmental hazards, particularly toxic waste sites. Numerous local studies, with some exceptions, have, on the basis of their assessment of particular cities, counties or regions, similarly concluded that racial disparities exist on the location of toxic waste facilities." Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 58 (2001).

<sup>10</sup> See Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 ("*Select Steel*")

<sup>11</sup> Adversity Paper at 1.

implementing Title VI and its regulations. Clarification of the adversity standard would be only one part of a final Title VI guidance.

**(A) EPA’s Continued Reliance on Statutory and Regulatory Environmental and Regulatory Health Standards for Determining Adversity is Inconsistent with Civil Rights Law and Infeasible.**

In the Adversity Paper, EPA describes the post-*Sandoval* administrative complaint investigative process as “complex and unique,” due to the “need to merge the objectives and requirements of Title VI with the objectives and requirements of [] environmental laws.”<sup>12</sup> At the outset, EPA has built its analysis on the faulty premise that its Title VI enforcement obligations must “merge” with duties and authorities, despite the fact that they are derived from distinct statutes, with different purposes. As the Adversity Paper suggests, environmental laws require “complex technical assessments” of “emissions, exposures, and cause-effect relationships” as well as “close coordination.”<sup>13</sup> The agency should be clear: EPA has an independent set of duties and obligations pursuant to civil rights law, including its responsibility to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

The Adversity Paper nonetheless continues to tie the analysis of adversity to standards of environmental degradation and harm to health pursuant to other statutes, each itself the product of deliberation in light of independent statutory mandates and, therefore, makes only a minor commitment to change its approach to the adversity question. Regarding whether EPA should treat compliance with an environmental standard as triggering a rebuttable presumption of no adverse impact, EPA states that it “*may* need to consider whether a permit that complies with a health-based threshold can nevertheless cause an adverse impact.”<sup>14</sup> Moreover, EPA backpedals from even this minor shift away from the rebuttable presumption in the very next sentence and elsewhere in the Adversity Paper. EPA states that its departure from the rebuttable presumption of no adverse impact<sup>15</sup> may “involve analyses that are... simply infeasible,”<sup>16</sup> is planned for “allegations about environmental *health-based* thresholds,”<sup>17</sup> and will be used to focus on cases

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3 (emphasis added).

<sup>15</sup> See OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (1998).

<sup>16</sup> Adversity Paper at 3.

<sup>17</sup> *Id.* at 4 (emphasis added).

“representing the *highest environmental and public health risk*.”<sup>18</sup> EPA also reiterates its longstanding justification for the presumption of no adversity when health-based standards are met – it argues that compliance with standards means that “remaining risks are low and at an acceptable level.”<sup>19</sup> And EPA declares that it has limited ability to gather “credible, reliable” data in the context of a given Title VI complaint.<sup>20</sup>

Historically, EPA has interpreted its Title VI responsibilities and authorities through the lens of traditional environmental regulation—if the environmental statutes are complied with, according to this line of thinking, then there is adequate protection for communities. Simply put, this approach has failed to eliminate the adverse or disparate impacts to environmental justice communities that EPA’s Title VI regulations seek to forbid. We strongly urge EPA to move away from the traditional environmental regulatory approach and address Title VI issues through a civil rights lens. A final guidance should make clear that technical compliance with environmental laws is not the measure of whether programs or activities have an “adverse impact.” While the framework for assessing whether a recipient is in violation of the discriminatory effects standard in EPA’s Title VI implementing regulations includes a determination of whether the impact of a recipient’s programs or activities is both “adverse” and borne disproportionately by a group of persons based on race, color, or national origin, compliance with environmental laws and standards is not the ruler for civil rights compliance.

Title VI is a civil rights statute, and it is independent of environmental laws and standards. Before *Alexander v. Sandoval*, 532 U.S. 275 (2001), when cases of disparate impact were adjudicated in court, the threshold for establishing adverse impact was low.<sup>21</sup> With rare

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<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 5.

<sup>21</sup> The DOJ Title VI Legal Manual states, “Under the disparate impact theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. The elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law.” Civil Rights Div., DOJ, Title VI Legal Manual § VIII.B (2001) (citing *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995)). Given the origin of the analysis, the precise quantification of impact was more relevant to remedy than the prima facie case. See, e.g., *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1420 (11<sup>th</sup> Cir. 1993) (“we believe that the zone-jumping of white students has increased the racial identifiability of the Training School . . . thus zone-jumping may be said to have produced a disparate impact on black students in Talladega County”); *Larry P. v. Riles*, 495 F. Supp. 926, 941-42 (N.D. Cal. 1979) *aff’d in part, rev’d in part sub nom. Larry P. By Lucille P. v. Riles*, 793 F.2d 969 (9<sup>th</sup> Cir. 1984) (improper placement in so-called educable mentally retarded classes has a definite adverse effect, in that such classes are dead-end classes that de-emphasize academic skills and stigmatize children improperly placed in them).

exception, the crux of the inquiry focused on whether or not the impact was felt disproportionately on the basis of race or national origin, not on the magnitude of the impact itself.<sup>22</sup> In one of the few cases to question whether plaintiffs had established the impact prong of the *prima facie* case, *U.S. v. Bexar Cnty.*, 484 F. Supp. 855, 859-60 (W.D.Tex. 1980), the court was concerned about whether traveling for what the court presumed would be superior health care once a hospital facility moved from an urban center to the suburbs constituted cognizable harm, not whether the level of impact met a technical standard imposed by the U.S. Department of Health & Human Services or pursuant to another statute.<sup>23</sup>

In particular, the final guidance should remove any confusion caused by *Select Steel*. Compliance by recipients with standards adopted pursuant to the Clean Water Act, Clean Air Act, or other environmental laws does not mean that persons are not adversely affected by the recipients' programs or activities. Environmental statutes, regulations, and standards are the outcome of political and administrative processes, which take account of an array of competing interests and criteria. As was the case with *Select Steel*, these standards may involve averaging emissions over large geographical areas that, if viewed in isolation, can hide disparities. They are, again, not the benchmark for a determination of "impact." Among other things, environmental standards do not fully capture harms to public health and the environment. These standards change over time, for instance.<sup>24</sup> Many health-based standards are not currently implemented (particularly in the area of toxic pollutants), and existing standards are rarely updated to account for the progress of science.<sup>25</sup>

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<sup>22</sup> See Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in *Civil Rights Litigation and Attorney Fees Annual Handbook* 186 (B. Wolvovitz et al. eds. 1995).

<sup>23</sup> Indeed, as many of the signatories have previously emphasized, the standard for measuring impact is "adversity," not "significant" adverse impact, as the Revised Guidance Documents would suggest. Analysis of significance has traditionally been applied to the question of disproportionality. See, e.g., *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 101-102 (N.Y. Sup. Ct. 2001) (New York court applying Title VI analysis in school equity case finding that "money is a crucial determinant of educational quality" and turning to statistical analysis of the disproportionality of the impact.).

<sup>24</sup> See *In re Shell Gulf of Mexico, Inc.*, 2010 WL 5478647 (EAB 2010). In *Shell*, the Environmental Appeals Board concluded that EPA erred when it relied solely on compliance with the then-existing annual NO<sub>2</sub> National Ambient Air Quality Standard ("NAAQS") as sufficient to find that the Alaska Native population would not experience "adverse human health or environmental effects from the permitted activity." *Id.* at \*2. Though this decision arose in the context of Executive Order 12898 and turned on the fact that the NAAQS was under revision, it is clear that current compliance with an environmental standard is not determinative of whether an action or policy has a health impact.

<sup>25</sup> See, e.g., Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 Tex. L. Rev. 1701, 1721-1725 (2008) (standards such as new source performance standards

We note, also, that the Revised Guidance Documents already contain some language clarifying that “[c]ompliance with environmental laws does not constitute per se compliance with Title VI.” 65 Fed. Reg. at 39,680. Though the move away from the rebuttable presumption is a step in the right direction, the continued reliance on environmental laws is in error. Noncompliance with an environmental or health standard is relevant to a finding of adverse impact, but compliance with a federal, state, or local standard does not negate otherwise valid evidence of adversity.

EPA’s continued reliance on environmental standards also poses the following problems. First, the Revised Guidance Documents erred when limiting cognizable harms to those within EPA’s or a recipient’s expertise or “authority”<sup>26</sup> by not requiring “recipients to address social and economic issues that they are not authorized to address.”<sup>27</sup> The Adversity Paper fails to reverse these errors. As many of the undersigned emphasized in 2000, such an approach ignores the many aesthetic, cultural, economic, and social impacts experienced by communities.<sup>28</sup> For example, the approach leaves out odor, segregatory effects, and interference with enjoyment of property, as well as other economic impacts, such as the effect of polluting sources on property values. An analysis of whether a recipient’s action, policy, or practice has an adverse impact cannot ignore such a broad swath of impacts.<sup>29</sup> We are deeply concerned that the Adversity Paper continues a policy of willfully choosing to ignore real impacts affecting communities.

Notably, Title VI prohibits recipients from excluding, denying the benefits of a program or activity, or subjecting people to discrimination on the basis of race, color, or ethnicity.<sup>30</sup> The

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under the Clean Air Act and effluent standards under the Clean Water Act are on average twenty years old, more than fifty percent have never been revised, and most others have been revised once).

<sup>26</sup> 65 Fed. Reg. at 39,670 (“[I]n determining whether a recipient is in violation of Title VI or EPA’s implementing regulations, the Agency expects to account for the adverse disparate impacts... within the recipient’s authority.”).

<sup>27</sup> *Id.* at 39,691. See Letter from Center on Race, Poverty and the Environment and Other Environmental Justice Organizations and Individuals to Carol Browner and Anne Goode, EPA (Aug. 26, 2000) (calling for EPA to consider social, cultural, and economic impacts of recipient actions) (hereinafter “Letter to Carol Browner”).

<sup>28</sup> CRPE Comments at 47-48.

<sup>29</sup> OCR adopted this narrow approach, for example, in *Padres*. See OCR, EPA, Investigative Report for Title VI Administrative Complaint, File No. 01R-95-R9 69-70 (Aug. 30, 2012) (finding that the recipient did not have authority to address a range of impacts and, thus, discounting any such impacts in the adversity analysis). An analysis of the *adverse impacts* of a recipient’s action is conceptually distinct from whether it would be outside of a recipient’s authority to mandate a particular remedy, which might be relevant to the content of a voluntary compliance agreement but should not limit the adversity analysis.

<sup>30</sup> 42 U.S.C. § 2000d.

statutory language contemplates the full range of potential impacts — including, for example, acknowledging that a segregatory effect is a cognizable form of injury. The Adversity Paper should make clear that adverse impacts may involve harms to health, damage to the environment, reduction in property values, and social harms, among others, and are not limited to measurable environmental or health effects. In addition, the investigation of adverse impacts should not be constrained by gaps in scientific knowledge about exposure, exposure pathways and health effects, or more broadly, the expertise of EPA or the recipients.<sup>31</sup> Evidence of any adverse impact is relevant to a finding of discrimination.

Second, the Adversity Paper does not change the “hierarchy” of data on adverse impacts developed in the Revised Guidance Documents. In those guidance documents, EPA stated that “data may not be readily available for many types of impacts,” and created a hierarchy of existing data that OCR would use to determine adversity: (1) ambient monitoring data, (2) modeled exposure concentrations or surrogates, (3) known releases of pollutants or stressors, (4) quantities of chemicals and their potential for release, and (5) the existence of certain sources or activities.<sup>32</sup> It remains unclear how this hierarchy of *existing* data will influence OCR’s attempt to use all “readily available and relevant data.”<sup>33</sup> There is no mention of OCR’s view on the relevance of citizen monitoring data, or local knowledge that may be less quantifiable than the data at the top of OCR’s hierarchy.<sup>34</sup>

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<sup>31</sup> The Revised Guidance Documents contain additional language that may be interpreted as limiting analysis of effects to a subset of impacts and requires clarification. *See, e.g.*, 65 Fed. Reg. at 39,660 (in a section entitled “Relevant Data,” the Revised Guidance Documents lay out an “order of preference” of relevant data to be used to conduct the analysis of adverse impact. The list starts with “[a]mbient monitoring data” and “[m]odeled ambient concentrations.” Notably, the list does not specifically identify outcome data—for example, high asthma or cancer rates. The list itself and the prioritization of items on the list reinforce an impression that a finding of adverse impact is contingent on environmental laws and standards and, also, that non-environmental harms will be ignored.); 65 Fed. Reg. at 39,661 (“Generally, the risk or measure of impact should first be evaluated and compared to *benchmarks* provided under relevant environmental statutes, regulations or policies.”); 65 Fed. Reg. at 39,680 (The “[e]xample of adverse impact benchmarks,” relies on hazard indices that are developed for other purposes and should not be the markers for identifying adverse impacts under Title VI); 65 Fed. Reg. at 39,680 (“[W]here the area in question is attaining that [NAAQS] standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.”). The Adversity Paper should clarify that while violations of environmental standards are evidence of harm, lack of such data does not negate other indicia or evidence of impact.

<sup>32</sup> *Id.* at 39,679.

<sup>33</sup> *Id.* at 39,660.

<sup>34</sup> *See* Jill Lindsey Harrison, *Pesticide Drift and the Pursuit of Environmental Justice* 115 (2011) (“defining an issue as belonging in the realm of science rather than politics . . . is attempting to remove the issue from public debate”; to do so obscures data gaps, industry privilege, and other material factors that minimize official assessments of the problems such as pesticide drift, which disproportionately affects Latino farmworkers and their families). We note

Third, in light of EPA's concerns about its capacity and the availability of existing data, the approach to evaluating adverse impact suggested by the Adversity Paper is impracticable. EPA notes that in deciding whether a permit is in compliance with health-based standards, OCR may consider the "existence of hot spots, cumulative impacts, the presence of particularly sensitive populations...misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact."<sup>35</sup> But the Paper then indicates that compliance with ambient standards will under a variety of circumstances continue to operate as a presumption of no adverse impact, because "the Agency's existing technical capabilities and the availability of credible, reliable data" "may impact EPA's ability to consider other information concurrently with compliance with health-based thresholds."<sup>36</sup> In fact, if EPA continues to rely on such standards to measure adversity, it has a variety of platforms available that can provide, at reasonable cost, near-real-time, ground-level spatial data on emissions from permitted facilities. Its VIPER wireless system, for example, is in use throughout the country, and can be set up on short notice to gather new data on facility grounds or within residential communities through use of handheld sensors.<sup>37</sup> The agency could deploy these systems to gather baseline data at permitted facilities and ensure that increases over baseline do not pose a risk to public health. And it could partner with a variety of organizations, including other agencies such as the Centers for Disease Control and Prevention, to gather baseline biomonitoring data from residents who may be exposed to new emissions.<sup>38</sup> Such data are relevant for other existing programs administered by the agency, including EPA's Risk and Technology Review program that promulgates industry-specific residual risk standards based on maximally exposed individuals

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that devaluing the experience of affected communities and anecdotal information has been a longstanding environmental justice concern. Moreover social issues like poverty, language barriers, and legal obstacles make environmental justice problems such as pesticide drift "more difficult to accurately quantify." *Id.* at 30.

<sup>35</sup> Adversity Paper at 4.

<sup>36</sup> *Id.* at 5.

<sup>37</sup> EPA, VIPER Wireless Monitoring, Presentation at VIPER Data Workshop (Dec. 21, 2011); *see also* Evaluate Air Sensors Developed During EPA's Air Sensor Evaluation and Collaboration Event, EPA, [www.epa.gov/nerl/features/sensors.html](http://www.epa.gov/nerl/features/sensors.html) (last updated Dec. 18, 2012).

<sup>38</sup> *See, e.g.*, Ctrs. for Disease Control and Prevention, Dep't of Health and Human Servs., Third National Report on Human Exposure to Environmental Chemicals (2005); Rachel Morello-Frosch et al., *Toxic Ignorance and Right-to-Know in Biomonitoring Results Communication: A Survey of Scientists and Study Participants*, 8 *Env'tl. Health* 1 (2009).

near permitted facilities.<sup>39</sup> Given these and other capabilities, OCR’s claim that it “expects to gather pre-existing technical data rather than generating new data”<sup>40</sup> seems inapposite. Without new data, meaningful investigations are likely to be stymied. OCR should commit to make use of all resources available to EPA, especially those that are cost-effective (such as wireless sensors and bio-monitoring).

Moreover, as discussed below, to the extent that technical capabilities for establishing a baseline and/or evaluating the cumulative impacts, the presence of particularly sensitive populations, misapplication of environmental standards, or a site-specific demonstration of other adverse impact are, in fact, inadequate, such limitations should not preclude a finding of adversity. The agency proposes to create too high a burden, based on another set of laws and regulations, rather than determining whether there is an adverse impact on the basis of race, color or national origin. The lack of such data on contamination affecting overburdened communities is a reflection of long-standing societal priorities, which, if allowed to defeat a finding of adversity, perpetuates discriminatory patterns. Given constraints on resources, it is neither realistic nor reasonable to expect complainants to hire the experts and pull together the data that the government has failed to collect. And with thousands of grantees, and thousands of sub-grantees,<sup>41</sup> EPA cannot feasibly build a Title VI enforcement program working on the premise that each investigation would have to meet this high a burden on the issue of adversity. Both the Revised Guidance Documents and the Adversity Paper raise the bar for a demonstration of adversity beyond the realm of feasibility, so that it will largely be out of reach for low-income communities of color that experience the disproportionate burden of contamination.

Fourth, to the extent that a finding of adversity remains tethered to environmental and health-based standards, the Adversity Paper fails to clarify whether OCR will rely on risk-based proxies for “adverse” impacts caused by a recipient of agency funds. How will EPA use thresholds (e.g., cancer risks of less than one in one million or non-cancer risks of less than one on the hazard index) to determine “adversity”? Will the agency consider impacts “not adverse”

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<sup>39</sup> 42 U.S.C. § 7412(f)(2)(A).

<sup>40</sup> Adversity Paper at 5.

<sup>41</sup> See Prime Award Spending Data: EPA, USA Spending, [http://www.usaspending.gov/?tab=By+Agency&fromfiscal=yes&fiscal\\_year=2013&overridecook=yes&carryfilters=on&q=explore&maj\\_contracting\\_agency=6800&maj\\_contracting\\_agency\\_name=Environmental+Protection+Agency](http://www.usaspending.gov/?tab=By+Agency&fromfiscal=yes&fiscal_year=2013&overridecook=yes&carryfilters=on&q=explore&maj_contracting_agency=6800&maj_contracting_agency_name=Environmental+Protection+Agency).

if they are lower than those thresholds?<sup>42</sup> How will risks above those thresholds be determined to be “adverse”? Under what circumstances will EPA view differential exposure an “adverse” impact for purposes of making a *prima facie* finding of a Title VI violation? And how will it combine risk-based determinations with assessments of other health- and non-health-related stressors from a permitted facility’s operations as well as departures from normal operations?

**(B) The Adversity Paper Makes No Commitment to Memorialize EPA’s Position in a Final Guidance and is Likely to Create Confusion for Recipients, Stakeholder Communities, and Investigators.**

The Adversity Paper states, “Upon finalization of this paper, the policy described herein will supersede the corresponding discussions” in the Draft Revised Investigation Guidance.<sup>43</sup> A robust Title VI compliance program requires that EPA finalize guidelines to ensure clarity, transparency, standardization, and accountability. The footnote leaves vague the relationship between this new policy, for example, and the Draft Recipient Guidance. Moreover, by addressing legal standards one at a time, and then memorializing them in multiple documents, EPA is creating unnecessary complexity for communities, recipients, and investigators.

**(C) The Adversity Paper Represents Part of a Piecemeal Approach to Addressing Longstanding Problems with EPA’s Legal Standards and Fails to Address Either Non-Permitting Fact Patterns or The Fact That Other Stages in the Investigative Process Remain Poorly Developed.**

EPA limits the scope of the Adversity Paper to the question of “adversity,” a single step in its framework for analyzing Title VI claims for only one kind of decision by a recipient of federal funds: the decision to issue or renew an environmental permit. EPA’s failure to address the standard for assessing adversity in “most non-permitting fact patterns” can only lead to additional confusion and conflict about the appropriate standard to apply in these other contexts.<sup>44</sup>

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<sup>42</sup> 65 Fed. Reg. at 39,680.

<sup>43</sup> Adversity Paper at 1 n.1.

<sup>44</sup> In 2000, many of the signatories to this letter raised concern about EPA’s failure to address the range of activities conducted by recipients of federal financial assistance that implicate Title VI, including, for example the clean-up of contaminated sites and the enforcement (or lack of enforcement) of environmental laws. *See* CRPE Comments at 10.

Moreover, EPA makes clear that it chose to focus its attention on only a narrow portion of the investigative process: “This paper focuses only on a particular issue...described in step 1.a. [’Does the alleged discriminatory act have an adverse impact?’].”<sup>45</sup> Apart from clarifying a limited set of circumstances that may lead to a finding of adverse impact, EPA ignores the remainder of the investigative process for establishing a *prima facie* Title VI violation in the Adversity Paper, offering that “[o]ther[ steps] may require elaboration in the future.”<sup>46</sup> This statement reveals a lack of institutional memory, which will limit EPA’s ability to competently reform its Title VI process.<sup>47</sup> Over more than ten years, comments filed before the agency, widely-cited journal articles in the wake of *Select Steel*, arguments in litigation against EPA, and findings of a federal advisory committee *convened* by EPA raised and repeated concerns with every stage of the investigative process.<sup>48</sup>

For example, the Adversity Paper leaves in place a lack of clarity about what constitutes a sufficient “substantial legitimate justification” to rebut a *prima facie* case of discrimination and the standards for evaluating less discriminatory alternatives. The Revised Guidance Documents call for a recipient’s decision to be “reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient’s institutional mission.”<sup>49</sup> Yet there is confusion about which goals are “integral” to a recipient’s mission. In the Revised Guidance Documents, EPA states that OCR will administer this test by “likely consider[ing] broader interests, such as economic development.”<sup>50</sup> As Professor Eileen Gauna has suggested, the tension between the requirement that a goal must be “integral” to a recipient’s mission and this “broader” approach

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<sup>45</sup> Adversity Paper at 3.

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

<sup>47</sup> See Deloitte Consulting LLP, Evaluation of the EPA Office of Civil Rights (Mar. 21, 2011), *available at* [http://www.epa.gov/epahome/pdf/epa-ocr\\_20110321\\_finalreport.pdf](http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf).

<sup>48</sup> See, e.g., Nat’l Advisory Council for Env’tl. Policy and Tech., Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs (1999); Luke W. Cole, *Wrong on the Facts, Wrong on the Law: Civil Rights Advocates Excoriate EPA’s Most Recent Title VI Misstep*, 29 Env’tl. L. Rep. 10,775 (1999); Bradford C. Mank, *The Draft Recipient Guidance and the Draft Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 Env’tl. L. Rep. 11,144 (2000); Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, 31 Env’tl. L. Rep. 10,528 (2001) (hereinafter “*EPA at 30*”); *Padres Hacia Una Vida Mejor v. Jackson*, No. 1:11-cv-1094, 2013 WL 459289 (E.D. Cal. Feb. 5, 2013).

<sup>49</sup> 65 Fed. Reg. at 39,654.

<sup>50</sup> *Id.*

creates an area of uncertainty.<sup>51</sup> The Revised Guidance Documents also fail to provide clarity on the circumstances under which EPA will consider cost a substantial legitimate justification or a sufficient reason to reject a less discriminatory alternative, stating only “OCR will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives.”<sup>52</sup> A recipient’s ability to justify disparate impacts by appealing to broader economic interests will sharply limit Title VI enforcement. The signatories to this letter urge EPA to close this loophole and adopt a more appropriate standard of justification.

**(D) The Adversity Paper Indicates That Complaints Are Screened for Standing and Ripeness, Imposing New Barriers to Title VI Enforcement.**

Footnote 8 of the Adversity Paper indicates that EPA’s jurisdictional review of complaints includes a screening for standing and ripeness, imposing new and unnecessary barriers to Title VI enforcement. The doctrine of standing, for example, serves to set apart cases and controversies that are justiciable and properly before the courts.<sup>53</sup> A plaintiff in federal court must meet a three-part test requiring demonstration of (1) injury in fact, (2) a causal connection between the injury and conduct that is the source of the complaint, and (3) redressability, i.e. that the injury can be redressed by the outcome of the court’s decision.<sup>54</sup> There is no standing requirement to file an administrative complaint under Title VI. Indeed, EPA’s regulations state that a person may file a complaint if he or she “believes that he or she *or a specific class of persons* has been discriminated against in violation of this part.”<sup>55</sup> There is no prerequisite that the complainant suffer direct or personal injury in fact, economic or otherwise, or be a member, representative, or organization representing a class of persons that suffers such harm. Pursuant to the Administrative Procedures Act, standing is *only* necessary when seeking judicial review, not when filing an administrative complaint or participating in the informal adjudication process.<sup>56</sup> Though the Adversity Paper asserts that the EPA, as well as other federal agencies,

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<sup>51</sup> *EPA at 30, supra* note 48, at 10,548.

<sup>52</sup> 65 Fed. Reg. at 39,683.

<sup>53</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>54</sup> *Id.* at 560-61.

<sup>55</sup> 40 C.F.R. § 7.120(a).

<sup>56</sup> 5 U.S.C. § 551, *et. seq.*

has discretion in the enforcement of federal statutes, including how it elects to enforce Title VI,<sup>57</sup> any such discretion should not be exercised by the agency to add extra impediments to filing a viable complaint for an already overburdened, under-resourced, potential complainant. A new standing requirement further tips the scale in favor of the recipient by increasing the risk of discriminatory actions going unnoticed, and consequently unmitigated, at the expense of the health of many Americans.

Similarly, EPA's statement that its jurisdictional review includes a screening for "whether the complaint is ripe" also frustrates the goal of inclusive, comprehensive stakeholder involvement.<sup>58</sup> In *Angelita C*, EPA unambiguously stated that the showing of *potential* health effects (depending on their nature and severity) is an adequate basis not just for filing a complaint, but also for a finding of adverse impact.<sup>59</sup> The agency noted that a reasonable cause for concern, and correspondingly, a reasonable basis for filing a complaint based on that concern for public health or welfare can be evidenced in the establishment of an *imminent*, substantial harm or endangerment in a complaint:

...the decisional precedent demonstrates that an endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken, keeping in mind that protection of the public health, welfare and the environment is of primary importance.<sup>60</sup>

Imminent harm can be shown before a regulation or action is enforced. If a complainant knows that a law or action is forthcoming, that should be a reasonable enough cause for concern to file a complaint before the law or regulation is enacted. Because a complaint is not a request for judicial review, but rather a request that something be done before judicial review is necessary, EPA should loosen instead of tighten the requirements for filing a complaint in order to encourage resolution without the expense and time of going to court. As mentioned earlier, Title VI complainants typically have far fewer resources to devote to judicial proceedings than recipients of federal funds.

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<sup>57</sup> Adversity Paper at 2.

<sup>58</sup> See Adversity Paper at 2 n.8.

<sup>59</sup> OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 (2011).

<sup>60</sup> *Id.* at 27.

EPA applied a ripeness standard in its decision to dismiss without prejudice *Coalition for a Safe Environment v. California Air Resources Board*, EPA File No. 09R-12-R9.<sup>61</sup> In *Safe Environment*, California community groups with members living in close proximity to facilities governed by California's greenhouse gas cap-and-trade program alleged that the California Air Resources Board violated Title VI by allowing carbon trading, which denied overburdened populations the benefit of co-pollutant reductions in their communities.<sup>62</sup> *Safe Environment* alleged that the recent adoption of cap-and-trade inflicted imminent adverse impacts consistent with the *Angelita C.* preliminary finding and the Clean Water Act Enforcement Guidance.<sup>63</sup> EPA dismissed the complaint on ripeness grounds, stating:

OCR finds that this complaint is not ripe for review. The allegations in the complaint are speculative in nature and anticipate future events that may not occur. The actions to be taken in response to the new compliance obligations and the results of those actions are unknown and unpredictable. As a result, a meaningful review cannot be conducted at this time. Therefore, OCR rejects your complaint and its allegations.<sup>64</sup>

The Complainants sought reconsideration given EPA's conclusory rejection.<sup>65</sup> Six months later and just *two days after* EPA proposed the Adversity Paper, including footnote 8, EPA responded to the *Safe Environment* petition.

Like the Complaint, your request lacks specific information that CARB either discriminated against "communities of color" in promulgating the Cap and Trade program, or that their actions in taking the preparatory steps to initiate the Cap and Trade program have resulted in harm to the complainants, either at the time the complaint was filed or now. Moreover, your request did not include any facts about the actual, real-world implementation of the program that would help to assess whether adverse, disparate impacts will occur.<sup>66</sup>

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<sup>61</sup> See Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Evt. (July 12, 2012,) attached as Exhibit xxxx; Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Evt. (Jan. 25, 2013).

<sup>62</sup> See *Coalition for a Safe Environment v. California Air Resources Board*, EPA File No. R09-12-R9, filed June 8, 2012.

<sup>63</sup> *Id.* at 9-16.

<sup>64</sup> See Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Evt. at 2 (July 12, 2012).

<sup>65</sup> See Letter from Brent Newell, Ctr. on Race, Poverty & the Evt., to Rafael DeLeon, Dir., OCR (Aug. 6, 2012).

<sup>66</sup> Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Evt. at 2 (Jan. 25, 2013).

EPA's implementation of footnote 8 in *Safe Environment* demonstrates that EPA is radically altering the timing of when a complainant must file a complaint, shifting the burden of proof to the complainant, and imposing an "actual harm" threshold from the implementation of a discriminatory act. First, complainants have only 180 days to file a Title VI complaint, or EPA routinely dismisses such complaints without invoking its authority to investigate a complaint on its own prerogative.<sup>67</sup> Under *Safe Environment* and footnote 8, a complainant must not only track when the act of the recipient took place, but also wait until the ax falls. The decision hints that, in the case of a regulatory program, a complainant must obtain knowledge of the specific date or dates of a recipient's implementation of that program and evidence of resulting harm to the complainants. Many regulatory programs have multiple stages of implementation, as regulations frequently phase in compliance obligations. EPA has thus injected significant uncertainty into the key date from which a short statute of limitations begins to run.

Second, during that short statute of limitations period with an uncertain beginning, a complainant now seems to bear the burden of proof in demonstrating actual harm to EPA. This reflects, again, a radical departure from the last two decades of Title VI enforcement,<sup>68</sup> and allows EPA to dismiss complaints on procedural grounds without expending resources on costly investigations. In implementing this policy, EPA could determine that a complainant has not met its threshold burden to demonstrate harm, regardless of the allegations in the complaint.<sup>69</sup> As EPA recognized in the Revised Guidance Documents, it is EPA, not the complainants, who should investigate and determine whether or not a recipient of federal funding is discriminating.

EPA should abandon its proposed stance toward, and recent application of, standing and ripeness, because such EPA determinations do not further the enforcement of civil rights or environmental justice, obligations EPA has under the law and the Executive Order, but rather

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<sup>67</sup> EPA's Title VI regulations make clear that the agency has affirmative authority to enforce Title VI, authority that is not limited to responding to complaints: "The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities." 40 C.F.R. § 7.115(a).

<sup>68</sup> See 65 Fed. Reg. at 39672 (June 27, 2000) (" . . . [T]he complainants do not have the burden of proving that their allegations are true, although their complaint should present a clearly articulated statement of the alleged violation. It is OCR's job to investigate allegations and determine compliance.")

<sup>69</sup> The complaint in *Safe Environment* included extensive allegations, supported by fact, of disparity and adversity. See *Coalition for a Safe Environment v. California Air Resources Board* at 9-28, EPA File No. R09-12-R9, filed June 8, 2012.

place complainants in untenable positions against powerful agencies and sometimes insurmountable burdens of proof merely to file a complaint.

Moreover, if potential complainants do in fact fall into the category of what EPA has called “tipsters,” discussed below at Part II.A, and are not aggrieved persons, directly affected by the recipient’s action, then requiring ripeness, much less standing, can have a chilling effect on the possibility that they will speak up against a harm that may have a devastating impact on others in their communities. Thus to require ripeness before a person can file a complaint is unduly burdensome and possibly unjust for far too many people who are potentially impacted, and goes against the EPA’s past practices and self-declared value of inclusivity of all stakeholders, making an already historically difficult and challenging process that much harder.

With this in mind, we hope the agency will remove references to jurisdictional review of standing and ripeness in any final version of the adversity guidance.

**(E) Notwithstanding EPA’s Other Duties and Authorities, the Agency is Charged with Enforcing Title VI and Must Have the Political Will to Ensure Compliance, Even in the Context of Cooperative Federalism.**

We support the dual importance of robust discrimination protections and effective governance, which should both constructively inform Title VI policies. In particular, administrative enforcement has the highest potential for success when agencies build on each other’s experience and on the resources already invested in developing best practices. For this reason, we were glad that EPA noted the importance of continuing “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.”<sup>70</sup>

However, we recommend that the final guidance take a more proactive and rigorous stance in seeking to match the best Title VI practices developed by other agencies,<sup>71</sup> as well as striving for EPA to itself become a model. We hope that EPA will take concerted steps to identify elements of Title VI enforcement frameworks that have been maximally effective in ensuring that federal assistance does not reinforce or support discrimination—and will adapt those to be even more effective in the environmental regulatory context.

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<sup>70</sup> Adversity Paper at 1 n.3.

<sup>71</sup> In particular, we commend the Title VI guidance documents developed by the Federal Transit Administration as one example. *See, e.g.*, discussion *infra* note 83, at 22.

The Adversity Paper, in contrast, reflects an overly hesitant approach that undermines the value of cross-agency resources. In particular, the Adversity Paper guidance states:

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.<sup>72</sup>

We appreciate that each agency, including EPA, encounters unique challenges in Title VI program design. However, the tone of EPA exceptionalism set by this draft paragraph raises concerns that the guidance will foster a defeatist perspective toward efforts to mine other agencies' successes, as well as suggesting a relatively low standard for EPA's Title VI performance.

We address below the specific issues raised by this draft paragraph, but we would also emphasize that its premise runs contrary to fundamental Title VI objectives. While agencies must adapt Title VI procedures and enforcement to the fields they regulate (and the specific burdens and benefits encountered there), the legislation was clearly not intended to yield a tiered model in which some agencies incorporate its directives less fully than others due to inflexible program design or existing agency-recipient dynamics. Rather, Title VI was intended as a consistent and overarching mandate that the government divest itself of discrimination across all programs and activities: a way to “insure the uniformity and permanence to the nondiscrimination policy” and avoid a piecemeal approach.<sup>73</sup> Indeed, the challenges of federalism gave rise to civil rights laws, including Title VI, and are endemic to civil rights enforcement. Many of the pioneering Title VI cases, for example, brought to desegregate school systems throughout the country, carried this crucial federal prohibition against discrimination

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<sup>72</sup> *Id.* at 1.

<sup>73</sup> See 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).

into traditional spheres of state and local control.<sup>74</sup> As the Fifth Circuit Court of Appeals stated in one such case, “Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation.”<sup>75</sup> Citing legislative history, the Court continued:

[T]itle VI is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.... It is not healthy nor right in this country to require the local residents of a community to carry the sole burden and face alone the hazards of commencing costly litigation to compel school desegregation. After all, it is the responsibility of the Federal Government to protect constitutional rights [such as those undergirding Title VI].<sup>76</sup>

Given the inequitable distribution of environmental hazards on the basis of race, color, and national origin across the United States, and the devastating effects of contamination, including the impact of exposure to carcinogens, neurotoxins, endocrine disruptors, and other health hazards, the mandate of the federal government is no less crucial today.<sup>77</sup>

This message was reinforced by Executive Order 12898, which heightened the procedural requirements for many agencies, including EPA, and called for increased cross-agency collaboration.<sup>78</sup> The hazards of discrimination are certainly no less important in the environmental sphere than elsewhere, and equal or greater safeguards are merited.

More specifically, this section of the Adversity Paper posits that the technical nature of environment regulation, and the priorities set by the cooperative federalist scheme, may prevent EPA from importing strong Title VI standards or setting its own. Yet other agencies face comparable challenges. EPA’s fellow agencies also grapple with an intricate range of statistical assessments, causality determinations, competing mandates, unclear valuations, and injury predictions. These agencies must evaluate potential health, economic, and other impacts that may require complex determinations.

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<sup>74</sup> See, e.g., *United States v. Jefferson Cnty. Bd. Of Educ.*, 372 F.2d 836 (5<sup>th</sup> Cir. 1966), *aff’d on reh’g*, 380 F.2d 385 (5<sup>th</sup> Cir. 1967).

<sup>75</sup> *Id.* at 849.

<sup>76</sup> *Id.* at 849 n.17, citing House Judiciary Committee Report No. 914, to Accompany H.R. 7152, 2 U.S. Code Congressional and Administrative News, 88<sup>th</sup> Cong. 2<sup>nd</sup> Sess. 1964, at 2393.

<sup>77</sup> For an annotated bibliography of studies and articles documenting the disproportionate impact of environmental hazards on the basis of race and/or income, see Cole and Foster, *supra* note 9, at 167-83.

<sup>78</sup> See Exec. Order No. 12898, 59 Fed. Reg. 7629 (Jan. 30, 1995).

The challenges posed by cooperative federalism are not native only to environmental regulation. Federal programs such as Medicaid, for instance, are federal-state partnerships, and Medicaid is administered by state agencies.<sup>79</sup> Additionally, numerous other agencies must navigate relationships with recipients whom they both oversee and rely upon—both for the oversight of sub-recipients and for the implementation of other critical programs. For example, the U.S. Department of Housing and Urban Development (“HUD”) is charged with the compliance of state and local housing and community development agencies, which administer block grants as well as subsidies.<sup>80</sup>

Federal-state partnerships of all kinds exist across federal agencies, and other federal agencies that enforce Title VI also wear multiple hats. For example, federally assisted transportation recipients must attend to the racially disparate effects of transit service plans, fare policies, and environmental and social benefits and burdens.<sup>81</sup> The Federal Transit Administration has identified objectives for Title VI evaluations encompassing the need to:

- a. Ensure that the level and quality of transportation service is provided without regard to race, color, or national origin;
- b. Identify and address, as appropriate, disproportionately high and adverse human health and environmental effects, including social and economic effects of programs and activities on minority populations and low-income populations;
- c. Promote the full and fair participation of all affected populations in transportation decision making;
- d. Prevent the denial, reduction, or delay in benefits related to programs and activities that benefit minority populations or low-income populations;
- e. Ensure meaningful access to programs and activities by persons with limited English proficiency.<sup>82</sup>

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<sup>79</sup> See, e.g., *Frazier v. Bd. of Trustees of Nw. Miss. Reg’l Med. Ctr.*, 765 F.2d 1278 (5th Cir. 1985), *modified on other grounds*, 777 F.2d 329 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986) (finding hospital contractor directly subject to Title VI because of receipt of Medicaid funds).

<sup>80</sup> See 24 C.F.R. § 1.4 (providing for nondiscrimination in housing programs); 28 C.F.R. § 42.408(c) (DOJ coordinating regulation providing that “[w]here a federal agency requires or permits recipient to process Title VI complaints, the agency shall ascertain whether the recipients’ procedures for processing complaints are adequate.”).

<sup>81</sup> See Fed. Transit Admin., U.S. Dep’t of Transp., C 4702.1A: Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients (May 13, 2007), *available at* [http://www.fta.dot.gov/documents/Title\\_VI\\_Circular\\_4702.1A.pdf](http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf).

<sup>82</sup> *Id.* at II-1.

Along similar lines, the community development projects overseen by HUD can have multifaceted impacts that are greatly variable across locations.<sup>83</sup> For all agencies, the difficulties incumbent in assessing racially discriminatory harms should prompt efforts to render Title VI reviews and procedures *more* accessible, so that community impacts are better understood, while informing staff training and research investments.

While keeping in mind its obligations to the community at large, including vulnerable individuals and populations, any agency negotiating these relationships will need to consider the impact of enforcement on the recipient's beneficiaries and the continuing working relationship between federal and state entities—and Title VI and DOJ's Coordinating Regulations contemplate this concern across the board. *See* 42 USC §2000d-1; *Bd. of Pub. Instruction v. Finch*, 414 F.2d 1068, 1075 n.11 (5th Cir. 1969) (voluntary compliance should be sought and the termination of funds is a last resort, due to concerns for beneficiaries of federal assistance); *but see* 28 C.F.R. § 42.411(a), balancing this concern with the requirement that the agency ensure responsive action or then proceed to stronger enforcement measures.

EPA's role as a leading federal agency charged with protecting public health and the environment may be unique, but in our cooperative federalist system the challenges posed by the dual roles of agencies in policing recipients for compliance with Title VI and working cooperatively with them to implement federal laws and programs are shared by all federal agencies. The cooperative federalist model is no excuse for limiting EPA's Title VI enforcement program.

## **II. The Complainant Guidance**

EPA's Complainant Guidance plainly responds to the criticism the environmental justice community has levied against EPA following EPA's exclusion of the complainants during the resolution of *Angelita C. v. California Department of Pesticide Regulation*, EPA File No. 16R-99-R9. Despite what appear to be good faith efforts by EPA, the Complainant Guidance neither provides anything beyond what the agency already does nor bestows any procedural

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<sup>83</sup> *See, e.g., Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (finding that the procedures HUD followed in approving a change in an urban renewal plan that altered a plan for owner-occupied dwellings to a plan for rental dwellings with rent supplement assistance failed to make any inquiry into the effect of the change in type of housing on the racial concentration in the renewal area or in the city as a whole, and were not in adequate compliance with Title VI or the Fair Housing Act.)

rights on those filing complaints or suffering discrimination. Moreover, the Complainant Guidance fails to adhere to important principles set forth in EPA's 2003 Public Involvement Policy<sup>84</sup> and EPA's 2006 Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs.<sup>85</sup>

EPA's Complainant Guidance suffers from several major deficiencies. First, EPA's labeling of those filing complaints or suffering discrimination as "Tipsters" is insulting to communities of color experiencing the impacts of environmental injustice. If EPA is serious about reforming its Title VI program, then EPA must institutionally change how it views and treats complainants and community stakeholders – people living and working in proximity to permitted facilities and toxic sites – more generally. Second, EPA must meaningfully involve those suffering discrimination in the investigation of their complaints, including proactively involving them in the investigation, providing full and free access to documents, and providing the resources to even the playing field during Alternative Dispute Resolution ("ADR"). Third, a complainant should receive immediate notice of a preliminary finding of discrimination, be included in any voluntary compliance negotiations on equal footing with the discriminating recipient, and be allowed to offer and receive settlement terms that actually remedy the discrimination suffered.

**(A) Title VI Complainants Should Receive Dignified and Protective Treatment from EPA.**

EPA's use of the term "tipster" in the Complainant Guidance denigrates those who suffer from unlawful discrimination. EPA justifies the use of that term because a "complainant is not like a plaintiff in court."<sup>86</sup> EPA asserts, "[r]ather, a complainant's role is more like that of a tipster, who reports what he or she believes is an act violating Title VI. . ."<sup>87</sup> EPA is correct that a complainant need not actually be a victim of discriminatory actions by a recipient to be eligible to file a Title VI complaint. *See* 24 C.F.R. § 7.120(a) ("A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a

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<sup>84</sup> EPA, Public Involvement Policy (May 2003), *available at* <http://www.epa.gov/publicinvolvement/pdf/policy2003.pdf>

<sup>85</sup> 71 Fed. Reg. 14,207 (Mar. 21, 2006).

<sup>86</sup> Complainant Guidance at 1.

<sup>87</sup> *Id.*

complaint. The complaint may be filed by an authorized representative.”) However, more often than not, those who file Title VI complaints are directly harmed by the discriminatory actions of a recipient. For example, the children on whose behalf their parents filed a Title VI complaint in the *Angelita C.* case suffered discrimination from unhealthy short-term and long-term exposures to methyl bromide.<sup>88</sup> Those parents and others who are the victims of discriminatory conduct are not merely dropping a dime on a criminal or snitching. Instead, they seek to protect their right to be free from discrimination on the basis of race, color or national origin. EPA should delete all references to the term “tipster” in its final complainant guidance.

**(B) EPA Must Provide Complainants a Meaningful Opportunity to Participate in the Title VI Complaint Process.**

Rather than proposing new procedural protections, EPA instead offers to use its discretion to decide whether to include complainants in the investigation and resolution of their civil rights complaints. While EPA claims the Complainant Guidance “enhance the roles and opportunities for complainants . . . to participate in the complaint and resolution process,” the agency retains its discretion to exclude complainants when “appropriate” from complaint investigation and resolution, and appears to claim that such discretion is not subject to judicial review.<sup>89</sup> Because EPA proposes to use its discretion to decide whether to involve complainants, this Complainant Guidance does little, if anything, to enhance the role of complainants in the Title VI complaint process.

EPA’s failure to expand the role of complainants in the Title VI complaint process flies in the face of the agency’s 2003 Public Involvement Policy and 2006 Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs. In general, those documents dictate that both EPA and recipients provide opportunities for early and meaningful community involvement in agency decision-making, as

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<sup>88</sup> See Letter from Rafael DeLeon, Dir., OCR, to Christopher Reardon, Acting Dir., Cal. Dep’t of Pesticide Regulation (Apr. 22, 2011).

<sup>89</sup> Complainants Guidance at 1. Ironically, while EPA considers complainants to be “tipsters,” the agency routinely dismisses complaints for a variety of procedural defects, such as the statute of limitations, without using EPA’s authority to investigate the alleged discrimination. Moreover, we are not aware of any instance in which EPA used its discretion to waive a statute of limitations defect and investigate a complaint notwithstanding that defect.

well as transparency in agency decision-making. Below are relevant excerpts from EPA's 2003 Public Involvement Policy, which expressly applies to all EPA programs and activities.<sup>90</sup>

Agency officials should strive to provide for, encourage, and assist public involvement in the following ways:

- Involve the public early and often throughout the decision-making process
- Identify, communicate with and listen to affected sectors of the public (Agency officials should plan and conduct public involvement activities that provide equal opportunity for individuals and groups to be heard. Where appropriate, Agency officials should give extra encouragement and consider providing assistance to sectors, such as minority and low-income populations, small businesses, and local governments, to ensure they have full opportunity to be heard and, where possible, access to technical or financial resources to support their participation.)
- Involve members of the public in developing options and alternatives when possible and, before making decisions, seek the public's opinion on options or alternatives
- Use public input to develop options that facilitate resolution of differing points of view
- Make every effort to tailor public involvement programs to the complexity and potential for controversy of the issue, the segments of the public affected, the time frame for decision making and the desired outcome
- Develop and work in partnerships with state, local and tribal governments, community groups, associations, and other organizations to enhance and promote public involvement.<sup>91</sup>

The Policy also contains provisions regarding the principles of environmental justice, providing information to the public in a timely way, the availability of relevant documents, and the need to ensure that stakeholder groups participating in ADR are highly involved and informed.<sup>92</sup>

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<sup>90</sup> EPA's 2006 Title VI Public Involvement Guidance applies to recipients of federal financial assistance, as opposed to EPA. In promulgating that Guidance, EPA observed that "[t]he fundamental premise of EPA's 2003 Public Involvement Policy is that 'EPA should continue to provide for meaningful public involvement in all its programs, and consistently look for new ways to enhance public input.' . . . OCR suggests that EPA recipients consider using a similar approach when implementing their environmental permit programs." 71 Fed. Reg. at 14,210.

<sup>91</sup> EPA, Public Involvement Policy 2-3 (May 2003).

<sup>92</sup> The Policy also includes the following provisions:

Consistent with the provisions of EPA's 2003 Public Involvement Policy, below we set out recommendations for regulatory reform, which accords complainants their proper role in the investigation and resolution of Title VI complaints.

First, EPA's Title VI regulations should specifically mandate that complainants have a meaningful role in the complaint process. Such a role would include the opportunity to respond to a proposed EPA decision by submitting evidence and briefing in response to the proposed decision, a benefit recipients already enjoy. Often, a Title VI complainant lacks the resources to

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This Policy complements and is consistent with EPA's environmental justice efforts. . . . This includes ensuring greater public participation in the Agency's development and implementation of its regulations and policies. (Memorandum from EPA Administrator Christine Todd Whitman, dated August 9, 2001, "EPA's Commitment to Environmental Justice.") (See also, Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," dated February 11, 1994.) Thus, ensuring meaningful public involvement advances the goals of environmental justice. . . .

Whenever possible, Agency officials should:

- Provide the public with adequate and timely information concerning a forthcoming action or decision
- Provide policy, program, and technical information to the affected public and interested parties at the earliest practicable times, to enable those potentially affected or interested persons to make informed and constructive contributions to decision making
- Provide information at places easily accessible to interested and affected persons and organizations
- To the extent practicable, provide the public with integrated, on-line, user-friendly access to health and environmental data and information and to the extent practicable, enable communities, including minority, low-income and underserved populations, to have access to relevant data and information. . . .

Repositories or Dockets:

The Agency should provide one or more central collections of documents, reports, studies, plans, etc. relating to controversial issues or significant decisions in a location or locations convenient to the public. Suitable locations will depend on the nature of the action. For national rules a single central docket is generally appropriate, but local repositories may be preferable when decisions relate to individual facilities or sites. . . . Agency officials are encouraged to determine the accessibility to the interested public and feasibility of electronic repositories that take advantage of the Internet to reach directly into homes, libraries and other facilities throughout a community and across the nation. . . . EPA's EDOCKET is an online public docket and comment system initially designed to expand public access to documents in EPA's major program dockets, eventually to include the other EPA dockets. EDOCKET allows the public to search available dockets online, submit or view public comments, access the index listing of the contents of the docket, and to access, download and print those documents in the docket that are available electronically. . . .

ADR is most effective when there are a few highly involved and informed stakeholder groups who agree to participate in a dialogue through which they raise their concerns and seek to resolve a particular issue by consensus. The Agency can use facilitation and ADR processes to encourage conflict prevention or resolution at any time during a decision-making process.

*Id.* at 5, 11, 13-14, 17.

produce the type of technical and scientific evidence EPA demands. EPA has recognized this, and should affirm that EPA does the factual investigation and it is not the complainants' burden to produce evidence to prove a Title VI violation.<sup>93</sup>

Second, EPA should provide complainants with more information than only what is “in its case tracking system.”<sup>94</sup> The current case tracking system that EPA provides on its web site contains nothing more than file numbers, recipient information, and status (updated quarterly).<sup>95</sup> EPA's regulations should provide complainants with full and no-cost access to the case file, so that complainants do not have to request those documents formally via the Freedom of Information Act, and pay any fees for such access.<sup>96</sup> Consistent with EPA's Public Involvement Policy's directive that the agency make information available to the public using electronic repositories or dockets,<sup>97</sup> such access could be accomplished by establishing an online document repository for every complaint that EPA accepts for investigation.<sup>98</sup>

Third, EPA should guarantee the basic due process rights of complainants. Recipients of EPA funding enjoy administrative appeal rights should EPA ever go so far as to find a Title VI violation and rescind federal funding, which EPA has never done. Complainants enjoy no such basic due process rights. To provide complainants with procedural rights and due process, EPA's regulations should, at a bare minimum, provide complainants with the right to administratively appeal any adverse EPA decisions, and the right to seek judicial review of such decisions under the Administrative Procedures Act. Given the fact that *Sandoval* bars civil

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<sup>93</sup> See 65 Fed. Reg. 39650, 39672 (June 27, 2000) (“... [T]he complainants do not have the burden of proving that their allegations are true, although their complaint should present a clearly articulated statement of the alleged violation. It is OCR's job to investigate allegations and determine compliance.”)

<sup>94</sup> Complainant Guidance at 3.

<sup>95</sup> See <http://www.epa.gov/ocr/docs/extcom/title-vi-open-complaints.pdf>

<sup>96</sup> Access to documents in a complainant's file is unreasonably difficult under EPA's current policy and treatment of complainants as “tipsters.” Counsel for the complainants in *Padres Hacia una Vida Mejor* and *Angelita C.* sought such records, had their fee waiver partially granted, and had to file a lawsuit to compel EPA to turn over the documents. It has been seventeen months since EPA received those FOIA requests, and EPA has partially turned over *Padres* records but has not provided any of the *Angelita C.* records.

<sup>97</sup> See discussion, *supra* note 94, at 27.

<sup>98</sup> EPA should also establish a separate repository for complaints that EPA chooses not to investigate, which would consist of two sets of documents: complaints received, with any supporting documentation, and letters from EPA informing complainants of the status of the case and the agency's decision not to accept the complaint for investigation.

actions except those alleging intentional discrimination, it is of paramount importance that those suffering discrimination not have their complaints dismissed without agency or judicial review.

Finally, we support the use of ADR to resolve complaints but urge EPA to amend its regulations to ensure that complainants have similar access to legal and technical resources during ADR as do recipients of federal funding. Many complainants are not represented by counsel, or else have little or no financial capacity to retain counsel and substantive experts to aid them in the ADR process. A credible ADR process requires a level playing field for negotiations between complainants and respondents. Even when ADR yields a positive result, as was the case recently with *Greenaction for Health and Environmental Justice v. San Joaquin Valley Air Pollution Control District*, EPA File No. 11R-09-R9, complainants are at a competitive disadvantage.<sup>99</sup> Greenaction lacked counsel while the Air District enjoyed its own in-house attorneys and ample staff resources. EPA has already recognized this unequal playing field in its Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs,<sup>100</sup> and should do so again by amending its Title VI regulations and the Complainant Guidance.

**(C) EPA Must Simultaneously Notify Complainants, Respondents and the Public of any Preliminary Findings of Noncompliance.**

EPA has only issued one Preliminary Finding of Noncompliance in its entire history, and did so without notifying the complainants until after the agency negotiated a resolution of the complaint with the respondent. On April 22, 2011, EPA issued a preliminary finding in *Angelita C.* finding that the complaint established a *prima facie* violation of Title VI.<sup>101</sup> Despite the preliminary finding of noncompliance, and without notifying the complainants, EPA then negotiated a settlement agreement in secret with the respondent, and the agreement merely required additional monitoring rather than prohibiting the discriminatory conduct. The

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<sup>99</sup> See Greenaction Reaches Agreement with San Joaquin Valley Air District to Enhance Public Involvement in Permit Actions, Greenaction, <http://greenaction.org/greenaction-reaches-agreement-with-san-joaquin-valley-air-district-to-enhance-public-involvement-in-permit-actions/>

<sup>100</sup> See 71 Fed. Reg. at 14214 (listing, as one example of an action that can contribute to a successful ADR process, “design[ing] a process that will allow all parties to provide necessary information in good faith and in some cases secure independent technical expertise to assist some of the parties prior to any negotiations”).

<sup>101</sup> OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 (2011).

complainants learned of the preliminary finding three months later, when on August 25, 2011, EPA informed the public of its preliminary finding and settlement agreement.

EPA's refusal to include the complainants in resolution of the complaint demonstrates the serious need for regulatory reform. The Complainant Guidance state that EPA "intends to notify complainant of said finding" but "retains the discretion to contact the recipient first."<sup>102</sup> EPA's proposal would still allow the agency to do exactly what occurred in *Angelita C.*: keep everything secret until EPA and the discriminating recipient negotiate without the knowledge, participation, or input of the complainant. Furthermore, the Complainant Guidance proposes that EPA, once again at its "discretion, when appropriate ... engage complainants who want to provide input on potential remedies" and that "EPA will determine based on its discretion when such engagement may occur during the process."<sup>103</sup> EPA further states that it will "consider complainant's input on potential remedies" and "potential terms of a settlement agreement."<sup>104</sup>

EPA should amend its regulations to require simultaneous notification of a preliminary finding of noncompliance to the complainant, respondent, and the general public. The regulations should also mandate the complainant's participation, if the complainant so chooses, in voluntary compliance negotiations.<sup>105</sup> Both EPA's Public Involvement Policy and basic principles of transparency and environmental justice require these reforms. EPA should not have the sole and unfettered discretion to deem when it is or is not "appropriate" to involve the complainant or notify the public.

Furthermore, revisions of EPA's regulations should require that EPA only settle a complaint through a voluntary compliance agreement if that agreement fully remedies the discriminatory conduct and prevents the discriminatory conduct from continuing or recurring.<sup>106</sup> Recipients of EPA funding will not take the threat of EPA enforcement seriously if EPA's

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<sup>102</sup> Complainant Guidance at 3 & n.12.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.*

<sup>105</sup> As with ADR, EPA must ensure that complainants can participate in the settlement process on an even playing field with a well-armed recipient of federal funding. As Luke W. Cole and Sheila R. Foster have stated, the environmental justice struggle challenges, "first and foremost, the legitimacy of the decision-making process and the social structures that allow ... decisions to be made without the involvement of those most intimately concerned." Cole & Foster, *supra* note 9, at 14.

<sup>106</sup> In *Angelita C.*, for example, the voluntary compliance agreement did little, if anything, to remedy the discriminatory effects of permitting the application of toxic pesticides in close proximity to school grounds. OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 37-38 (2011).

compliance assurance and enforcement efforts amount to nothing more than a slap on the wrist. If other Title VI complaints demonstrate merit, as *Angelita C.* did, and EPA does not demand compliance with Title VI, then recipients of federal funding will ignore Title VI to the detriment of affected communities nationwide.

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Thank you for this opportunity to comment on EPA's draft Title VI documents. Again, we appreciate EPA's recognition of the importance of Title VI enforcement, and the time and effort devoted to improving EPA's standards and practices.

Sincerely,

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