Center on Race, Poverty & the Environment * The City Project
Community Science Institute * Earthjustice * Maurice & Jane Sugar Law Center for Economic & Social Justice * New Mexico Environmental Law Center
New York Lawyers for the Public Interest * The Public Interest Law Center *
Sierra Club * WE ACT for Environmental Justice

José E. Serrano * Marc Brenman * Eileen Gauna * Maria Savasta-Kennedy *
Vincent Martin * Vernice Miller-Travis

Via Email and First-Class Mail

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Lilian Dorka
Acting Director
Office of Civil Rights
Environmental Protection Agency
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Re: ***Critical Steps to Strengthen the Title VI Compliance and Enforcement Program in this Administration***

Dear Mr. Fritz and Ms. Dorka,

We write with urgency to follow up on previous conversations and comments we have submitted to support critical steps to build and reform EPA's Title VI compliance and enforcement program. We appreciate not only your willingness to engage stakeholder communities but also the effort we have seen to move forward in meaningful ways.

In this spirit, as EPA plans the transition to the next Administration, we ask that EPA take the following actions to protect civil rights in the environmental context in this calendar year:

First, do no harm. Now more than ever, accountability is important. EPA should withdraw its proposed rule, which would rescind deadlines for case handling. *See* Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77,284 (proposed Dec. 14, 2015). We strongly opposed the proposal to remove

deadlines from EPA's Title VI regulations because doing so would weaken accountability for investigating and processing Title VI complaints in a timely way. *See* Comments of ACLU of Wisconsin et al., EPA Docket No. EPA-HQ-OA-2013-0031 (filed Mar. 14, 2016), attached hereto as Ex. 1. As we wrote, "By removing the deadlines, EPA is at best weakening the sole legal recourse that impacted communities have to hold the agency responsible for undertaking a timely, meaningful investigation." *Id.* at 6. Needless to say, such accountability is likely to be even more important in the future.

Second, finalize a policy finally getting rid of the rebuttable presumption. This presumption has undermined Title VI enforcement since the late 1990s: it creates too significant a burden for complainants and sends a message to recipients that they will never be held responsible for disproportionately impacting communities on the basis of race and ethnicity. EPA is alone among agencies in creating such a presumption and it has no place in civil rights enforcement. EPA proposed a new policy and took comments in 2013. *See* Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process, 78 Fed. Reg. 24,739 (Apr. 26, 2013). Many of the undersigned submitted comments on EPA's proposal. *See* Comments of California Rural Legal Assistance Found. et al., EPA Docket No. EPA–HQ–OA–2013–0133 (filed Mar. 22, 2013)), attached hereto as Ex. 2. We implore EPA to retract the rebuttable presumption. Such a step is long overdue and can be taken now.

Next, EPA's Title VI compliance and enforcement program has for too long operated without final programmatic guidance, creating confusion among all stakeholders about what is required of recipients. To this end, EPA should finalize guidance clearly spelling out requirements for Title VI compliance. A toolkit providing examples of "best practices" is not a substitute for programmatic standards. Release of a set of "best practices" will only add to the confusion given that the programmatic requirements are unclear. A set of "best practices" will be used as a shield or defense for recipients who will argue that actions taken consistent with examples of such practices are sufficient, even if EPA includes a disclaimer indicating otherwise. We recognize that time is short but we believe that EPA is capable of producing Title VI programmatic guidance with clear requirements this year. In the absence of clear requirements, however, EPA *should not* release "best practices."

Finally, EPA needs to demonstrate its commitment to enforcement and to conducting compliance reviews by taking decisive action on the issues and cases currently before OCR. EPA should make appropriate findings of discrimination and recommendations for compliance this year, *and* consider the input of complainants when developing such recommendations. The City of Los Angeles presents an opportunity to exercise EPA's affirmative authority: the City, stakeholders, and EPA are engaged in discussions of the City's outstanding request to EPA for brownfield funding along the L.A. River. The goal is a commitment to environmental justice through a straightforward civil rights compliance and equity plan. *See Los Angeles River*, *The* City Project, http://www.cityprojectca.org/los-angeles-river (last accessed Nov. 17, 2016). The City acknowledges disparities in health and park access for people of color along the river and

throughout the City, and there are decades of studies by federal agencies and others documenting these undisputed disparities. This is a perfect opportunity for EPA to take meaningful action now.

Many thanks for your consideration. We welcome the opportunity to discuss these recommendations and to help in any way that we can.

Sincerely,

/s/Marianne Engelman Lado_____
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on behalf of the following signatories:

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* *For identification purposes only*

cc. (email only) Mustafa Ali, Senior Advisor to the Administrator for Environmental Justice, EPA
Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, DOJ
Daria Neal, Deputy Chief, Federal Compliance and Coordination Section, Civil Rights Division, DOJ

EXHIBIT 1

ACLU of Wisconsin * Alaska Community Action on Toxics * Americas for Conservation * Arbor Hill Environmental Justice, Inc. * Ashurst Bar/Smith Community Organization * Asian Pacific Policy & Planning Council * Azul * Bike San Gabriel Valley * Black Belt Citizens Fighting for Health and Justice * California Coastal Protection Network * Californians for Renewable Energy * Cape Fear River Watch * Center for Community Action & Environmental Justice/Centro de Acción Communitaria y Justicia Ambiental * Chicago Area Fair Housing Alliance * Center for Biological Diversity * Center on Race, Poverty & the Environment * The City Project * Clean Water Action * Coastal Carolina Riverwatch * Concerned Citizens of West Badin Community * Conservation Law Foundation * Crystal Coast Waterkeeper * Detroiters Working for Environmental Justice * Earthjustice * Environmental and Climate Justice Committee, NAACP, Houston Branch * Farmworker Justice * Gasp * Golden Gate University School of Law, Environmental Law and Justice Clinic * GreenLatinos * Human Synergy Works * Kingdom Living Temple * Land Loss Project * Lawyers' Committee for Civil Rights Under Law * LatinoJustice PRLDF * League of United Latin American Citizens (LULAC) * Los Angeles Waterkeeper * NAACP Legal Defense & Educational Fund, Inc. * NRDC * New Alpha Community Development Corporation * New Mexico Environmental Law Center * North Carolina Environmental Justice Network * North Shore Waterfront Conservancy of Staten Island * Open Futures Society * Original United Citizens of SW Detroit * PenderWatch & Conservancy * People Organized for Westside Renewal (POWER) * Poverty & Race Research Action Council * Public Interest Law Center of Philadelphia * Rural Empowerment Association for Community Help (REACH) * San Gabriel Mountains Forever * Sierra Club * Southern Alliance for Clean Energy * Southern Environmental Law Center * Surfrider * Waterkeeper Alliance * WE ACT for Environmental Justice * West End Revitalization Association * The Whitney M. Slater Foundation * Woodberry & Associates

Marc Brenman * Robert D. Bullard * Mike Giles * Ellis Long * Gregg Macey * Vernice Miller-Travis * Byron E. Price * Mary Leila Schaeffer * Ellen R. Shaffer * Beatriz Sosa-Prado

March 14, 2016

Velveta Golightly-Howell
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Lilian Dorka
Deputy Director
Jeryl Covington
Environmental Protection Specialist
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Online and by mail

Re: Comments on Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, EPA-HQ-OA-2013-0031

Dear Director Golightly-Howell and the Office of Civil Rights,

The undersigned organizations and individuals submit these comments on Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, Docket ID No. EPA-HQ-OA-2013-0031, 80 Fed. Reg. 77,284 (proposed Dec. 14, 2015). Signatories include community groups that have filed complaints under Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d *et seq.*, with the Office of Civil Rights ("OCR") and have substantial experience with the Environmental Protection Agency's ("EPA") failure to create and implement a meaningful Title VI compliance and enforcement program. Signatories also include residents of communities struggling with multiple sources of contamination that have long ago stopped filing complaints to challenge discriminatory practices, despairing that EPA lacks the political will to enforce the law. We write, collectively, to emphasize the urgent need for OCR to apply its scarce resources to the critical environmental problems affecting countless communities, rather than weakening civil rights enforcement by eliminating key deadlines and increasing agency discretion.

We write in the midst of a crisis in Flint, Michigan, wondering what might have been different had OCR taken effective enforcement action against the Michigan Department of Environmental Quality ("DEQ") in even one of the many complaints filed against that agency.[1] And there are many other communities that are waiting for OCR to take meaningful action to address their complaints, from Uniontown, Alabama, an 87% African American community

[1] *See, e.g.*, *In re Mich Dep't of Envtl. Quality*, EPA File No. 01R-94-R5 (EPA OCR 1994) (open complaint against Michigan DEQ regarding the Genessee Power Station, a new wood-waste energy facility in Flint, Michigan); *In re Mich. Dep't of Envtl. Qual.*, EPA File No. 05R-98-R5 (EPA OCR 1998) (notorious *Select Steel* case against DEQ regarding the decision to permit a steel recycling plant in Flint, for which EPA made a finding of "no adverse impact" despite facility emissions of toxics such as mercury); *In re Mich. Dep't of Envtl. Quality*, EPA File No. 09R-98-R5 (EPA OCR 1998) (complaint regarding DEQ decision to permit incinerator in Dearborn Heights rejected as untimely); *In re Mich. Dep't of Envtl. Quality*, EPA File No. 17R-99-R5 (EPA OCR 1999) (complaint against DEQ regarding hazardous waste injection well, dismissed with a finding of "no disparate impact"); *In re Mich. Dep't of Envtl. Quality*, EPA File No. 18R-99-R5 (EPA OCR 1999) (complaint against DEQ regarding hazardous waste injection wells, rejected as untimely); *In re Mich. Dep't of Envtl. Quality*, EPA File No. 21R-99-R5 (EPA OCR 1999) (complaint against DEQ regarding hazardous injection wells dismissed on other grounds); *see generally* U.S. EPA, Complaints Filed with EPA under Title VI of the Civil Rights Act of 1964, http://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964 (last updated Mar. 2, 2016).

living in the shadow of a mountain of coal ash,[2] to Beaumont, Texas, where an ever expanding refinery has encroached on a historic African American neighborhood,[3] and Chaves County, New Mexico, where Latino New Mexicans worry about whether yet another hazardous waste site will pollute their environment.[4] Communities of color and low-income communities across the nation also lack equal access to parks and resources for recreation and healthy, active living.[5]

We note, also, that many of the concerns outlined today echo expansive comments submitted over the past two decades in response to the publication of the 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) ("Draft Revised Guidance"); Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process, 78 Fed. Reg. 24,739 (Apr. 26, 2013) ("Draft Policy Papers"); and, more recently, the

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[2] *See In re Ala. Dep't of Envtl. Mgmt.*, EPA File No. 12R-13-R4 (EPA OCR 2013)(accepted for investigation on or about June 27, 2013); *see* Letter from Vicki Simons, Acting Dir., EPA OCR, to David Ludder (June 27, 2013).

[3] *See In re Tx. Natural Res. Conservation Comm'n*, EPA File No. 01R-00-R6 (EPA OCR 2000)(accepted for investigation on or about June 2003); *see* Letter from Karen D. Higginbotham, Acting Dir., EPA OCR, to Rev. Roy Malveaux, Exec. Dir., People Against Contaminated Env'ts et al. (June 2003).

[4] *See In re N.M. Env't Dep't*, EPA File No. 09R-02-R6 (EPA OCR 2002)(accepted for investigation on June 27, 2005); *see* Letter from Karen D. Higginbotham, Dir., EPA OCR, to Ron Curry, Sec'y, N.M. Env't Dep't (June 27, 2005).

[5] *See, e.g.*, Penny Gordon-Larsen et al., *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 Pediatrics 417 (2006); Lisa M. Powell et al., *Availability of Physical Activity–Related Facilities and Neighborhood Demographic and Socioeconomic Characteristics: A National Study*, 96 Am. J. Pub. Health 1676 (2006); Lisa M. Powell et al., *The Relationship Between Community Physical Activity Settings and Race, Ethnicity, and Socioeconomic Status*, 1 Evidence-Based Preventive Med. 135 (2004); Robert Garcia, *The George Butler Lecture: Social Justice and Leisure*, 46 J. Leisure Res. 7 (2013); Robert Garcia & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 Stan. J. C.R. & C.L. 143 (2005); Chona Sister et al., *Got Green? Addressing Environmental Justice in Park Provision*, 75 GeoJournal 229 (2010); Jennifer Wolch et al., *Parks and Park Funding in Los Angeles: An Equity-Mapping Analysis*, 26 Urb. Geography 4 (2005); Ming Wen et al., *Spatial Disparities in the Distribution of Parks and Green Spaces in the USA*, 45 Supp. 1 Annals Behav. Med. 18 (2013); Dustin T. Duncan et al., *The Geography of Recreational Open Space: Influence of Neighborhood Racial Composition and Neighborhood Poverty*, 90 J. Urb. Health 618 (2013). Notably, climate change and policies related to climate change also raise significant issues of civil rights compliance and enforcement. *See, e.g.*, Envtl. Justice Leadership Forum on Climate Change, Environmental Justice State Guidance: How to Incorporate Equity & Justice into Your State Clean Power Planning Approach (2016), *available at* http://www.ejleadershipforum.org/wp-content/uploads/2016/01/EJ-State-Guidance-updated-March-7.pdf.

draft "External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020"[6] ("Strategic Plan"); among other documents, and we refer OCR to the many comments from community-based stakeholders in the administrative record of those proceedings. Unfortunately, despite the passage of time and recent steps in the right direction, these comments remain relevant today.[7]

We submit these comments with the hope that EPA has the will to take the additional steps necessary to develop a true "Model Civil Rights Program," which will require EPA to enact a number of critical reforms to finalize legal standards that are consistent with civil rights law; use its affirmative authority to ensure compliance and enforce Title VI and its regulations; bring greater transparency to its work; foster relationships with community stakeholders and adopt practices that are consistent with principles of environmental justice; coordinate Title VI compliance and enforcement with delegated programs, EPA's regional programs, and other federal agencies; and secure remedial measures that achieve compliance.[8] Based on our extensive review, we have concluded that the proposed rulemaking is a diversion from these needed reforms, particularly the resolution of legal standards, and will weaken OCR's civil rights enforcement efforts. Instead, EPA should strengthen its program by clarifying that it will not apply a rebuttable presumption and by finalizing guidance with legal standards that are consistent with civil rights law.[9]

I. THE NOTICE OF PROPOSED RULEMAKING

[6] U.S. EPA, Office of Civil Rights, External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020 (2015), *available at* https://www.epa.gov/sites/production/files/2015-10/documents/strategic_plan.pdf.

[7] *See, e.g.*, Ctr. on Race, Poverty & the Envt. & 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* https://www.hitpages.com/doc/4565208953520128/1 ("CRPE Comments"); Advocates for Envt'l Human Rights et al., Comments on EPA's Draft Plan EJ 2014 Supplement (July 3, 2012), attached hereto as Ex. 1; Cal. Rural Legal Asst. Found. et al., Comments on EPA's Draft Policy Papers(Mar. 22, 2013) ("Comments on Draft Policy Papers"), attached hereto as Ex. 2; Letter from Marianne Engelman Lado, Managing Atty., Earthjustice, to Gina McCarthy, Adm'r, EPA & Gwendolyn Keyes Fleming, Chief of Staff, EPA (Nov. 5, 2013), attached hereto as Ex. 3; Letter from Marianne Engelman Lado, Managing Atty., Earthjustice, to Gina McCarthy, Adm'r, EPA & Gwendolyn Keyes Fleming, Chief of Staff, EPA (Nov. 24, 2014), attached hereto as Ex. 4 ; Ashurst Bar/Smith Cmty. Org. et al., Comments on External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020 (Oct. 27, 2015), attached hereto as Ex. 5.

[8] *See* Stakeholder Comments, *id.*

[9] *See* Comments on Draft Policy Papers, Ex. 2; Draft Papers, 78 Fed. Reg. at 24,740.

A. EPA's Proposal to Rescind Regulatory Deadlines is Arbitrary and Capricious and Serves No Legitimate Purpose.

We strongly oppose the proposal to remove deadlines from EPA's Title VI regulations, because doing so would weaken accountability for investigating and processing Title VI complaints in a timely way. This action will not strengthen the overall process of considering and investigating Title VI complaints and post-award compliance reviews. Given EPA's poor record of resolving Title VI complaints within the current enumerated time frames, replacing mandatory deadlines with greater discretion and a vaguer standard can only be interpreted as an effort to evade accountability rather than improve the timeliness of the agency's responsiveness to complaints.

The existing regulations provide concrete deadlines for processing Title VI complaints and post-award compliance reviews.[10] Within five days, EPA must acknowledge receipt of the complaint.[11] EPA then has twenty days to accept, reject, or refer a complaint to another agency,[12] and 180 days from the start of an investigation to issue preliminary findings, which must include notifying the recipient in writing of such findings, recommendations for achieving compliance, and the recipient's right to engage in negotiations.[13]

EPA has taken a brash step by proposing to completely remove these regulatory deadlines and by inserting instead language requiring only that OCR make a "prompt investigation whenever a complaint indicates a possible failure to comply."[14] EPA claims that this revision will provide "flexibility and discretion" to OCR, a luxury that EPA should not be afforded given its poor record in timely processing Title VI complaints, discussed *infra.* Indeed, according to an independent evaluation prepared by Deloitte Consulting, "Evaluation of the EPA Office of Civil Rights" ("Deloitte Report"), delays at EPA were caused by EPA's failure to develop meaningful compliance guidance, the challenge of mobilizing agency leadership to make final determinations, the need to build skills and competencies, and the diversion of

[10] *See* 40 C.F.R. § 7.120 (2010).
[11] *Id.* § 7.120(c).
[12] *Id.* § 7.120(d)(1)(i).
[13] *Id* § 7.115(c) (2010).
[14] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. at 77,289 .

resources from the Title VI program to the Title VII docket, among other things.[15] Eliminating enforcement deadlines addresses none of these issues and fails to ensure that EPA creates the capacity to conduct timely investigations. To the contrary, regulatory deadlines at least offer much needed accountability by giving plaintiffs a solid basis on which to challenge OCR's unreasonable delays in court. By removing the deadlines, EPA is at best weakening the sole legal recourse that impacted communities have to hold the agency responsible for undertaking a timely, meaningful investigation.

1. EPA's history of delay causes real harm to communities seeking to vindicate their civil rights and work toward cleaner, healthier environments.

EPA has a demonstrated record of noncompliance with the regulatory deadlines, a record that has caused real harm to communities burdened by the effects of environmental harm and deprived of environmental benefits, including access to parks and recreation. These longstanding delays have gone on for decades. The 2003 U.S. Civil Rights Commission Report "Not in My Backyard" found that "[o]f 124 Title VI complaints filed with EPA by January 1, 2002, only 13 cases, or 10.5 percent, were processed by the agency in compliance with its own regulations."[16] Despite the findings and recommendations of the Commission, the record of delay continued. According to the 2011 Deloitte Report, only six percent of the 247 Title VI complaints since 2001 were timely accepted or dismissed within the 20-day time frame, and 50% took over a year for acceptance.[17] A recent investigation by Center for Public Integrity, which summed up two decades of EPA's delay, revealed the following:

> [A review of] 265 complaints filed from 1996 to 2013 shows that the EPA has failed to adhere to its own timelines: On average, the office took 350 days to decide whether to accept a complaint and allowed cases to stretch 624 days from start to finish.[18]

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[15] Deloitte Consulting LLP, Evaluation of the EPA Office of Civil Rights: Final Report at 25–27 (2011), *available at* https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf.

[16] U.S. Comm'n on Civil Rights, Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice 57 (2003), *available at* http://www.usccr.gov/pubs/envjust/ej0104.pdf .

[17] *Id*. at 19, 25 ("Only 6%, or 15 out of 247 [complaints], were moved to either accepted or rejected within 1-month period, in alignment to the EPA targeted 20-day time frame for acknowledgement. In fact, half of the complaints have taken one year or more to move to accepted or dismissed status.").

[18] Talia Buford, *Thirteen Years and Counting: Anatomy of an EPA Civil Rights Investigation*, Ctr. for Pub. Integrity, Aug. 7, 2015, http://goo.gl/qGpYBS.

Indeed, many signatories have experienced the effects of EPA's jurisdictional review process firsthand, frequently waiting more than a year only to have their complaint dismissed on a jurisdictional basis, such as timeliness.[19] This record is simply unacceptable and causes real harm to communities that rely on this enforcement mechanism to vindicate their basic civil rights.

There are several notable instances where EPA's delay has been particularly egregious. In *Padres*, plaintiff groups filed a complaint with EPA's OCR in 1994, alleging that the operation of toxic waste dumps by ten California agencies discriminated on the basis of national origin against Latinos.[20] In total, EPA took *17 years* to resolve this case, despite repeated efforts by plaintiff groups to reach out to EPA.[21] The end result, a dismissal of the complaint, came in 2012, after plaintiffs filed a lawsuit against EPA in 2011.[22] In the words of Senior District Judge Anthony W. Ishii, of the United States District Court for the Eastern District of California, "…17 years to resolve a Title VI complaint is simply deplorable."[23] Judge Ishii noted that between 2006 and 2007, EPA did not process a single Title VI complaint.[24]

In *Angelita C.* – the one and only case in which EPA has made a preliminary finding of discrimination – nearly twelve years passed before EPA made the preliminary finding.[25] While the complaint languished, Latino schoolchildren were exposed on a daily basis to toxic pesticides

[19] *See, e.g., In re Port Auth. of N.Y. & N.J.*, EPA File No. 01R-14-R2 (EPA OCR 2014) (In 2015, OCR withheld a jurisdictional determination on a Title VI complaint filed by the North Shore Waterfront Conservancy of Staten Island against the Port Authority of New York and New Jersey for more than a year while the construction-adjacent community was exposed to inadequately monitored and likely contaminated dust and debris. After a year, EPA concluded that the complaint was "untimely.").
[20] *Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057, 1060 (E.D. Cal. 2013).
[21] *Id*. at 1060.
[22] *Id*. The timing of the dismissal, so soon after the complainants filed litigation, suggests that the lawsuit successfully created pressure on OCR to complete its investigation. It also raises the concern that OCR may have closed the complaint in order to avoid an adverse ruling in court by rendering plaintiffs' claim that OCR unreasonably delayed in resolving the complaint moot. As the Center for Public Integrity's report stated: "[A]s the [EPA's] records reveal, the agency often found allegations 'moot' precisely because of its own inaction…." Kristen Lombardi et al., *Environmental Racism Persists, and the EPA is One Reason Why*, Ctr. for Pub. Integrity, Aug. 3, 2015, updated Sept. 1, 2015, http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why.
[23] *Id.* at 1071 n.9.
[24] *Id*.
[25] See *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 WL 187386 at *2 (N.D. Cal. Jan. 16, 2014), *appeal docketed* No. 14-15494 (9th Cir. Mar. 17, 2014) (discussing the *Angelita C.* case).

and fumigants.[26] By the time EPA made its preliminary finding, EPA's delay meant that multiple generations of schoolchildren endured exposure to pesticides.[27]

Examples of the agency's inaction continue. In 2015, after waiting more than a decade for EPA action, five complainant groups filed litigation against EPA for unreasonably delaying Title VI investigations of their complaints and by failing to issue preliminary findings.[28] At the time they filed suit, the agency's inaction spanned *ten to twenty years* in each of the cases.[29] These complaints include:

- A 1992 complaint alleging that the permitting process of the Genesee Power Station in Flint, Michigan failed to consider the impacts of the facility on a predominantly African American community. Of particular concern was the fact that the facility incinerated materials that release toxic chemicals into the air of this community.
- A second complaint, filed in 2000, concerned the decision to permit two power plants in the already burdened community of Pittsburg, California, where a majority of the non-white residents suffered higher mortality rates, as well as breast cancer and asthma.
- A third complaint, also filed in 2000, alleged that a permit amendment was issued to ExxonMobil without public participation in a contested case hearing, allowing the company to increase its emissions in the community of Beaumont, Texas, which is 95% African American.
- A fourth complaint, filed in 2002, challenged the permitting process of a hazardous waste treatment, storage and disposal facility in Chaves County, New Mexico. The complaint alleged that the New Mexico Environmental Department failed to examine the impact of the facility on the predominantly Spanish-speaking residents of this community, in addition to exhibiting hostility toward the community by failing to include them in the permitting process.

[26] *Id.* at *1.
[27] Ultimately, complainants sued EPA over the agency's handling of the complaint behind plaintiffs' backs. *Id*. at *4 ("Plaintiff Maria Garcia is the mother of plaintiffs David Garcia and Angelica Guzman. David Garcia was 14 years old when Angelita C. was filed and a student at Rio Mesa High School in Oxnard, California. David Garcia now has two children, one- and three-years old, that live in Oxnard in the Rio School District and Oxnard Union School District and will attend Rio Lindo Elementary School, Rio del Valle Middle School, and Rio Mesa High School.").
[28] *See generally* First Amended Complaint for Declaratory and Injunctive Relief, CAlifornians for Renewable Energy v. U.S. Envtl. Prot. Agency, No. 4:15-cv-03292-SBA (N.D. Cal. Jan. 7, 2016).
[29] *Id.*

- Yet another complaint was filed by the Ashurst Bar/Smith Community Organization in 2003, concerning the permitting process for the Stone's Throw Landfill in Tallassee, Tallapoosa County, Alabama, which failed to analyze the discriminatory impact of siting the Landfill in a historic African American community: as a result, the community has endured the impacts of waste received by the Landfill from across Alabama and certain counties in Georgia.

In each of these cases, EPA did not even come close to adhering to the 180-day time frame for making preliminary findings, and let complaints languish. In the meantime, each of these communities has been forced to bear the impacts of the power plants, landfills, or refineries that so affect their lives.

2. Regulatory deadlines provide accountability and are a mechanism for complainants to demand relief when EPA fails to act.

Communities suffering from environmental racism[30] rely on the regulatory deadlines to hold OCR accountable. The U.S. Supreme Court has recognized that "when an agency is compelled by law to act within a certain time period…a court can compel the agency to act. . . ."[31] Under the Administrative Procedure Act ("APA"), complainants can bring actions to "compel agency action unlawfully withheld or unreasonably delayed."[32] However, stripping the

[30] In *Dumping in Dixie: Race, Class, and Environmental Quality*, Robert D. Bullard states:

> *Environmental racism* refers to any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color. Environmental racism combines with public policies and industry practices to provide *benefits* for whites while shifting industry *costs* to people of color. It is reinforced by governmental, legal, economic, political, and military institutions.

Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality 98 (1st ed. 1990) (emphasis in original) (citations omitted); *see also* Energy Justice Network, Environmental Justice/Environmental Racism, Definitions, http://www.ejnet.org/ej/ (last visited Mar. 9, 2016) ("Environmental racism is the disproportionate impact of environmental hazards on people of color.").

[31] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004).

[32] 5 U.S.C. § 706(1); *see, e.g.*, *Rosemere Neighborhood Ass'n. v. U.S. EPA,* 581 F.3d 1169 (9th Cir. 2009) (unreasonable delay litigation).

regulations of the deadlines creates an unnecessary hurdle to justice, as the agency will have less accountability and greater discretion.[33]

EPA counters this assertion by contending that the proposed "promptly" standard, which will replace the deadlines, remains "subject to judicial review."[34] EPA's assertion is misleading, however, given that the removal of clear deadlines will make it exceptionally difficult for complainants to prevail in court, even where their Title VI complaints remain unresolved for a lengthy period of time. Without the regulatory time frames, courts afford agencies greater discretion in determining what constitutes an unreasonable delay.[35] "[W]hen there is no hard deadline imposed on the agency, courts are often reluctant to compel an agency to act and often allow an agency to set its own priorities."[36] Unreasonable delay claims in the absence of deadlines are more unpredictable.[37]

Notably, EPA has been subject to few judicial challenges under the current deadlines. Few complainants have exercised the right to take EPA to court for unreasonable delay under the APA, and EPA has only been sued when complaints have languished for years on end, not one day, one week, or even one month beyond the deadlines. There are no instances of plaintiffs filing an action on the 181st day. EPA characterizes the deadlines as "self-imposed" and "inflexible."[38] However, neither EPA's regulations, nor complainants, nor recipients have bound the agency in a rigid or inflexible way to these deadlines.

3. The proposal to remove regulatory deadlines has no rational basis and suggests that EPA is trying to evade its obligations to enforce civil rights.

[33] 80 Fed. Reg. at 77,285 (The EPA asserts that the proposed rule will give them "flexibility and discretion.").
[34] *Id.*
[35] *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) ("In our opinion, when an agency is required to act—either by organic statute or by the APA—within an expeditious, prompt, or reasonable time, § 706 leaves in the courts *the discretion to decide whether agency delay is unreasonable*. However, when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld.") (emphasis added).
[36] Daniel T. Shedd, Cong. Research Serv., R43013, Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment 1 (2013), *available at* https://www.fas.org/sgp/crs/misc/R43013.pdf.
[37] *Id.* at 4 (citing *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)) ("There is no per se rule as to how long is too long to wait for agency action.")
[38] 80 Fed. Reg. at 77,287.

The proposal to remove regulatory deadlines has no rational basis. Instead of attempting to further loosen its regulatory requirements, EPA should devote its needed resources to reforming its Title VI program to bring practices into line with civil rights law and programs administered by other agencies that conduct investigations in a timely manner. We are concerned that EPA is trying to evade its duty to timely and effectively investigate Title VI complaints. While the *Padres* case was in litigation during 2011, it came to light that EPA was contemplating elimination of the regulatory deadlines.[39] During the pendency of the suit, EPA's then-Region 9 OCR director sent an email to Region 9 employees informing them that Rafael DeLeon, then OCR's director, had received a green light to change the regulations in relation to the 180-day time period.[40] This email was transmitted on July 27, approximately four weeks after the *Padres* plaintiffs filed an unreasonable delay claim under the APA challenging EPA's past and continuing violation of the regulatory deadlines, seeking declaratory and injunctive relief.[41] Such actions suggest that EPA's decision to remove deadlines was not, as it has stated, to "strategically manage its administrative complaint docket,"[42] but rather, to avoid accountability for its delays.

Furthermore, as discussed *infra*, the deadlines are not unique to EPA. The Department of Energy also has regulatory deadlines, for example.[43] In particular, Department of Energy regulations require the Director to complete a jurisdictional determination and, if appropriate, initiate an investigation within 35 days of receipt of a complaint.[44] Department of Energy regulations further direct the agency to advise the recipient in writing of preliminary findings and, where appropriate, recommendations for achieving voluntary compliance within 90 days of

[39] *See* E-mail from Joann Asami, U.S. EPA Region 9, to Patrick Chang, U.S. EPA (July 26, 2011, 09:08am), attached hereto as Ex. 6.
[40] *Id*.
[41] *Padres*, 922 F. Supp. 2d at 1060.
[42] 80 Fed. Reg. at 77,285.
[43] *See* 10 C.F.R. § 1040.104 (2003) (35-day time frame for the Department of Energy to determine jurisdiction and initiate investigation; 90-day time frame from initiation of investigation to make preliminary finding and recommendations for achieving voluntary compliance); *see also* 24 C.F.R. §§ 8.56(d), 8.56(e)(1)(i), 8.56(g), 8.56(h)(3) (HUD regulation establishing 10-day time frame to notify the complainant and recipient of the agency's receipt of a complaint; 20-day time frame to determine jurisdiction; 180-day time frame from receipt of complaint to notify recipient and complainant (if any) of the results of the investigation; and a subsequent 60-day timeframe for the reviewing civil rights official to sustain or modify the letter of finding).
[44] 10 C.F.R. § 1040.104(c)(1).

initiating the investigation.[45] Similarly, the Tennessee Valley Authority ("TVA") has a ten-day regulatory time frame from the receipt of the complaint to determine whether the agency has jurisdiction and to initiate an investigation.[46] TVA shares with EPA the 180-day deadline from the initiation of the investigation to make preliminary findings.[47] Other agencies such as the Department of Transportation ("DOT") and the Department of Justice ("DOJ") have policies and procedures with similar deadlines with respect to handling complaints filed pursuant to Title VI,[48] further reinforcing the reasonableness of the regulatory time frames. Moreover, the 180-day deadline for investigations is not exclusive to implementing regulations under Title VI, but also guides analogous statutory schemes.[49]

According to EPA, a key reason for removing the deadlines is based on the inherent "complexity" of the complaints filed, however no rigorous analysis is required to provide notice of the receipt of a complaint, which is an administrative task.[50] With the prominence of email communication in the present day, EPA should be able to meet this deadline simply by sending the complainant and recipient an email or form letter by U.S. mail. Moreover, twenty days is ample time to make a determination about jurisdiction, and, as such, should not be removed. Finally, the 180-day deadline from the start of a complaint investigation or compliance review is

[45] *Id.* § 1040.104(c)(3).
[46] 18 C.F.R. § 1302.7(c) (2003) (10-day time frame for TVA to determine jurisdiction and initiate investigation; 180-day time frame from initiation of investigation to make preliminary findings).
[47] *Id.*
[48] *See* U.S. Dep't of Transp., DOT 1000.18, External Civil Rights Complaint Processing Manual 11 (2007), *available at* https://www.civilrights.dot.gov/sites/default/files/civil-rights-laws/policies/externalcomplaintmanual-final.pdf (acknowledgement of complaint within 10 days of receipt; 10-day time frame for jurisdictional review; 180-day time frame for resolving all complaints, not only completing an investigation, unless there are extenuating circumstances); 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 (1998), *available at* https://www.justice.gov/crt/investigation-procedures-manual-civil-rights-division#ack (15-day suggested time frame for acknowledgement of the complaint). Although timelines for investigations at DOT and DOJ appear in each agency's complaint processing manual rather than in regulatory text, neither agency shares EPA's record of inaction requiring similar mechanisms for accountability. The time frames established by DOT and DOJ operating procedures, however, are comparable or even stricter than EPA's.
[49] *See, e.g.*, 28 U.S.C. § 2675(a) (under the Federal Tort Claims Act, plaintiffs may file suit at any time after the six months; the six months being the time frame by which federal agencies are charged with making a final disposition of a filed claim).
[50] *See* 40 C.F.R. § 7.120(c).

for *preliminary* findings, not the final disposition of the case.[51] Current time frames are both in line with the regulations, policies and guidance documents at other agencies and feasible.

Time and again, EPA's sister agencies demonstrate that investigations can be completed in a timely way. Most recently, for example, on December 15, 2015, DOT entered into a Voluntary Resolution Agreement with the Texas Department of Transportation, resolving a complaint filed earlier in the same year, on March 13, 2015.[52] EPA's argument that it needs more time to resolve complaints because its cases are somehow more complex than those at other agencies only serves to underscore EPA's failure. Rather than extending time frames for investigation, EPA must clarify its legal standards and revoke the rebuttable presumption that compliance with environmental standards is a defense to a Title VI claim.[53] The presumption has increased EPA's investigatory burden above and beyond the requirements of civil rights law.

Signatories strongly oppose EPA's proposal to remove the regulatory deadlines, which would weaken EPA's Title VI compliance and enforcement program. In the current state of affairs, EPA must take effective action to enforce civil rights, not undermine one of the few mechanisms for accountability.

B. In the Post-*Sandoval* Era, Enforcement by EPA is Often the Only Legal Mechanism to Address Violations of Agency Regulations and Should Not be Foreclosed by Greater Agency Discretion in Case Selection.

EPA proposes to establish that it has discretion to decide which Title VI administrative complaints to accept for investigation by amending 40 C.F.R. § 7.120, which currently requires that EPA promptly investigate "all complaints." EPA proposes to remove this language and substitute text requiring investigation of complaints that "indicate a possible failure to comply."[54] In its Notice of Proposed Rulemaking, EPA claims that this change "clarifies the agency's discretion to pursue a path to resolution in light of the particular facts of each case," noting

[51] *Id.* § 7.115(c).
[52] *See* Voluntary Resolution Agreement between Fed. Highway Admin. & Tx. Dep't of Transp. (Dec. 17, 2015), *available at* https://ccharborbridgeproject.files.wordpress.com/2012/02/voluntary-resolution-agreement-signed.pdf.
[53] *See* 78 Fed. Reg. at 24,739 (Draft Policy Paper proposing to revoke the rebuttable presumption that compliance with environmental standards is a defense to a disparate impact claim); Comments on Draft Policy Papers, Ex. 2.
[54] 40 C.F.R. § 7.120 (currently requiring that OCR "promptly investigate all complaints …unless the complainant and the party complained against agree to a delay pending settlement negotiations"); 80 Fed. Reg. at 77,287.

especially that "[n]ot every complaint…will require the completion of a costly and time-consuming investigation. . . ."[55] As with many of EPA's proposed provisions, this change in language creates new hurdles for communities of color experiencing discrimination rather than dismantling the historic barriers that have long been the focus of the signatories' Title VI advocacy with EPA.[56] Moreover, the proposal is unnecessary if it is intended, as EPA purports, to clarify that EPA has flexibility in case handling rather than to afford EPA more discretion to reject complaints.[57] We strongly oppose this proposal for the reasons laid out below.

OCR already has a number of processes "to prioritize and dedicate resources" to those complaints most likely to reveal a Title VI violation – starting with a strictly enforced jurisdictional review that requires complaints to (1) be in writing; (2) describe the alleged discriminatory act that violates EPA's Title VI regulations; (3) identify the EPA funding recipient that performed the discriminatory act; *and* (4) be filed within 180 days of that discrimination.[58] As highlighted by the Center for Public Integrity's analysis of EPA's Title VI enforcement record, of the 264 complaints filed between 1996 and 2013, EPA's jurisdictional review is anything but *pro forma*: more than 60 percent of complaints were rejected on jurisdictional grounds.[59]

We support EPA's interest in investigating complaints that indicate a Title VI violation; however, rewriting the regulations to establish discretion over which complaints to investigate does nothing to strengthen OCR's authority to act pursuant to the mandates of Title VI. In fact, it will weaken the position of environmental justice communities by requiring complainants to try to navigate an additional, unclear standard governing OCR's acceptance of complaints.[60]

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[55] 80 Fed. Reg. at 77,287.
[56] *See* Exs. 1–5 (comments filed previously by many of the signatories to this letter).
[57] Remarks of Lilian Dorka, Deputy Dir., OCR, Public Meeting (Mar. 1, 2016) (stating that the proposal is not an effort to reject complaints but to provide more flexibility in case handling).
[58] 40 C.F.R. § 7.120(b); 65 Fed. Reg. at 39,672.
[59] Yue Qiu & Talia Buford, *Decades of Inaction*, Ctr. for Pub. Integrity, Aug. 3, 2015, http://www.publicintegrity.org/2015/08/03/17726/decades-inaction.
[60] Notably EPA's jurisdictional review includes an analysis of whether the complaint asserts an allegation that would constitute a violation of the regulations, *see* 40 C.F.R. §7.120(b)(1), a burden made all the more difficult for complainants and OCR reviewers because of the lack of clarity regarding EPA's legal standards. Signatories have repeatedly requested that EPA develop a clear and uniform set of legal standards to guide its Title VI practices rather than relying on the decade-old Draft Revised Guidance, which raises a host of procedural and substantive questions about OCR's legal standards. *See, e.g.*, Ashurst Bar/Smith Cmty. Org. Comments, Ex. 5.

Making this change leaves both environmental justice communities and federal funding recipients with no clarity or criteria to predict which complaints EPA might accept.

Signatories agree that the path to resolution of any given complaint must be tailored to the specific facts of each case and that "such a path may not be identical for every complaint."[61] Yet, OCR's investigative authority has always been flexible and complaint-specific. EPA's current Title VI regulations require OCR to "attempt to resolve complaints informally whenever possible."[62] EPA's 2000 Draft Revised Guidance and, more recently, its Interim Case Resolution Manual ("CRM"), discussed *infra*, include complaint resolution processes that create opportunities for EPA and recipients to reach voluntary compliance agreements and, also, for complainants and recipients to resolve complaint allegations informally.[63] EPA expressly describes alternative dispute resolution ("ADR") as a preferred tool for achieving voluntary compliance, noting that "OCR expects to use ADR techniques to informally resolve" complaints, which "includes a variety of approaches" encompassing third party neutrals and creative problem solving.[64]

Indeed, the rationale underscoring this proposed regulatory amendment – that EPA does not currently benefit from flexibility – is belied by its arguments in *Garcia v.McCarthy*, 3:13-cv-03930-WHO, 2014 WL 187386 (N.D. Cal. Nov. 20, 2013), referenced *supra* nn. 25–27. In *Garcia*, EPA asserted that "agencies [such as itself] *have discretion* to determine how best to enforce the law, subject to regulatory, statutory, and constitutional constraints. . . ."[65] More specifically, EPA argued that its "decision to settle an administrative complaint and, thereby, obviate the need for (further) enforcement action is committed to agency discretion," which it exercised to resolve the Title VI complaint.[66]

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[61] 80 Fed. Reg. at 77,287.
[62] 40 C.F.R. § 7.120(d)(2)(i).
[63] 65 Fed. Reg. at 39,673; EPA OCR, Interim Case Resolution Manual 17–24 (2015), *available at* http://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf.
[64] 65 Fed. Reg. at 39,673; *see also* CRM at 20–24.
[65] Notice of Motion and Motion to Dismiss Amended Complaint at 1, *Garcia v. McCarthy* (Nov. 20, 2013), ECF No. 20 (emphasis added).
[66] *Id.* at 4; *see also id.* at 5–6 (EPA arguing that its discretionary action to settle a Title VI complaint is subject to limited judicial review to ascertain whether it is within the bounds of the law); *id.* at 6 (likening EPA's discretion to settle Title VI complaints with its discretionary authority to decide not to initiate an enforcement action); *id.* at 7 (asserting that EPA has "the discretion to determine the scope of its investigation" and "how to focus its investigations"); *id.* at 8–9 (EPA, in defending the settlement agreement at issue as a good deal, reasoning that "the EPA's decision regarding what consideration to accept in exchange for promising not to take additional enforcement steps is precisely the kind of

EPA's existing "discretion to pursue a path to resolution" is further evidenced by the fact that EPA has never made a formal finding that a recipient has violated Title VI and its regulations in more than twenty years of processing complaints of discrimination in the environmental context.[67] The Center for Public Integrity report also reaches this conclusion, noting that "[e]ven among the small universe of cases" accepted for investigation -- approximately 25 percent of all complaints filed -- an additional 80 percent are eventually dismissed without any resolution or relief for the complainants. [68] "[T]he civil-rights office rarely closes investigations with formal sanctions or remedies" despite having the authority to correct discriminatory actions by withholding funding or overturning decisions.[69] Rather than pursuing a full investigation and making formal findings, EPA almost exclusively relies on the other tools it has available: voluntary agreements between EPA and the party committing discrimination, occasionally making use of ADR, which brings together recipients and complainants for direct negotiations.[70]

EPA's processing of all complaints for investigation is of heightened importance since the U.S. Supreme Court ruled in *Alexander v. Sandoval* that private parties have no private right of action to enforce disparate impact regulations enacted pursuant to Title VI.[71] Since only acts of intentional discrimination under Title VI can open the door to the federal courthouse for private individuals and organizations, it is of paramount importance that EPA reviews complaints from communities of color that suffer disparate exposures to environmental burdens

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discretionary agency choice that [case law] protects"); *see also* Reply Brief in Support of Motion to Dismiss Amended Complaint at 1–6, *Garcia v. McCarthy* (Dec. 20, 2013), ECF No. 25 at 1-6 (EPA refuting plaintiffs' contention that Title VI and EPA's regulations "constrain the exercise of [its] enforcement discretion".). Indeed, the outer confines of this discretion and whether voluntary resolution agreements entered into by EPA must bring the recipient into compliance with Title VI and its regulations are key issues in *Garcia*. *Garcia,* 2014 WL 187386 at *9–10 (discussing plaintiffs' argument that settlement wrongfully failed to require recipients to remedy disparate adverse impacts). Given that these issues are currently pending in the 9th Circuit Court of Appeals, *Garcia v. McCarthy,* No. 14-15494, EPA's proposal to grant itself more discretion creates the impression that its proposal is an attempt to avoid future legal challenges by complainants to EPA's case handling.

[67] *See L*ombardi et al., *supra* note 22 (reviewing the 265 complaints filed between 1996 and 2013).

[68] *Id.*

[69] *Id.*

[70] *Id.* ("Only nine cases have been settled through agreements brokered between agency officials and targets of complaints. Another three cases have been closed through "alternative dispute resolutions," meaning the complainants and the targets hashed out solutions."); *see also*, U.S. EPA, Title VI - Settlements and Decisions http://www.epa.gov/ocr/title-vi-settlements-and-decisions##settlement (last updated Oct. 4, 2015)

[71] *Alexander v. Sandoval,* 532 U.S. at 275.

and deprivation of environmental benefit in the places where they live, work, and play. Such communities often have no other recourse for preserving or enforcing their civil rights when EPA declines to investigate a case under a discriminatory impact standard.

The importance of a well-functioning process for addressing disparate impact claims is exemplified by *South Camden Citizens in Action v. New Jersey Department of Environmental Protection.* After residents challenged the state's decision to permit a cement processing facility in an environmental justice community already overburdened by Superfund sites, sewage treatment and power plants, and historical contamination, among other things, the District Court twice found that community plaintiffs were entitled to relief for their disparate impact claims.[72] However, in both cases, the realization of relief was denied as a result of the Supreme Court's holding in *Sandoval* that Title VI affords no private right of action to enforce regulatory standards prohibiting actions with an unjustified disparate impact.[73] Despite the court's finding that the recipient violated the law in that case, plaintiffs had no recourse other than an administrative complaint to EPA, a path that may prove even more futile if EPA has even greater discretion to reject complaints.

The proposal to increase EPA's discretion over selecting which complaints to investigate will ultimately make EPA's Title VI enforcement process even less transparent and will require environmental justice advocates and impacted communities experiencing discrimination and recipients to predict which cases EPA will accept, a task made more complex since the process can span multiple different administrations. Even if the goal of this administration is to accept every case that meets jurisdictional standards with transparency and consistency, EPA's proposed amendment would eliminate any accountability that might keep future administrations from summarily rejecting those same complaints. EPA should focus on building a strong Title VI enforcement program no matter who is in office, and these proposed regulations fall short.

C. The EPA's Record of Delay in Resolving Discrimination Claims Is an Outlier as Compared to Other Agencies: This Necessitates More, Not Less, Accountability in Resolving Discrimination Claims.

[72] *See S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001) (original holding pre-*Sandoval*), *modified post-Sandoval on other grounds,* 145 F. Supp. 2d 505 (D.N.J. 2001), *on remand* 254 F. Supp. 2d 486 (D.N.J. 2003).
[73] *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 790–91 (3d Cir. 2001).

As discussed above, the EPA's uniquely poor performance in fulfilling its statutory responsibility to enforce anti-discrimination laws is well known and well-documented.[74] Among the nearly 300 complaints filed with EPA's OCR between 1996 and 2013, 162 were rejected without investigation; 38 received no review; 64 were accepted for investigation; only 12 cases were closed with official action, including negotiated settlements; and at least 17 remain pending.[75] That record is unlike other federal agencies that are also charged with enforcing Title VI. For example, in the 2013-2014 fiscal years, the U.S. Department of Education's ("Education") OCR received 4,600 Title VI-related complaints, affirmatively brought 32 Title VI investigations, and provided technical assistance for 216 events on Title-VI related issues.[76] In those same fiscal years, Education's OCR resolved 67 Title VI complaints involving equal educational opportunities.[77] A report published by the U.S. Commission on Civil Rights found that between 1994 and 2003, the U.S. Department of Housing and Urban Development ("HUD") received 2,262 Title VI complaints and, in this same period, conducted 530 Title VI compliance reviews.[78]

Moreover, despite EPA's existing regulatory deadlines for investigating Title VI complaints, including 180 days to complete its investigation, OCR rarely has met this goal. Over a 17-year period from 1996 to 2013, EPA took more than 365 days (*i.e.*, a year), on average, to resolve cases and, in fact, took up to two years to resolve 169 cases; two to five years to resolve

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[74] *See, e.g.*, Qiu & Buford, *supra* note 59 (cataloguing disposition of complaints over 17 year period); Deloitte Report, *supra* note 15 (describing OCR's "record of poor performance"); *see also* U.S. Comm'n on Civil Rights, *supra* note 16, at 31–32 (reporting that "[b]etween September 1993 and July 1998, EPA did not uphold a single Title VI complaint," and that "[d]uring this period, 58 Title VI complaints were filed with the agency, including 50 challenging state or local permitting decisions," and that "[a]s of July 1998, 31 of these complaints had been rejected, 15 were accepted for investigation, and 12 were still pending acceptance); *see also id*. at 56 (reporting that as of February 8, 2002, the EPA's backlog had been reduced from 66 to 41 complaints, and that of these, 34 were then identified as being acceptable for investigation); *id*. at 58 (reporting that as of June 20, 2003, the EPA received 136 complaints, 75 of which were rejected).

[75] Qiu & Buford, *supra* note 59.

[76] U.S. Dep't of Educ., OCR, Protecting Civil Rights, Advancing Equity: Report to the President and Secretary of Education 18 (2014), *available at* http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf.

[77] *Id*. at 19. Education's OCR defines resolved cases as those that resulted in dismissal, administrative closure, a finding of no violation, an early complaint resolution, or a resolution agreement. *Id*. at 45 n.1.

[78] *See* U.S. Comm'n on Civil Rights, Funding Federal Civil Rights Enforcement: 2005 42 tbls. 6.4 & 6.5 (2004) *available at* http://www.usccr.gov/pubs/crfund05/crfund05.pdf.

63 cases; and more than five years to resolve 25 cases.[79] In that regard, EPA is unlike other federal agencies, which have a significantly better record of investigating and even resolving complaints within 180 days of their receipt. For example, in fiscal year 2012, Education's OCR resolved 93% of its 7,491 complaints within 180 days.[80] In the three preceding fiscal years, 2009-2011, the percentage of complaints resolved within 180 days of receipt ranged from 90-92%.[81] The 2005 report by the Commission on Civil Rights found the average age of open cases at HUD in fiscal year 2003 was 143 days.[82]

Compared to its sister agencies, not only has EPA's complaint processing been significantly less timely, but EPA has shown a remarkable lack of will to enforce the law: "In its 22-year history of processing environmental discrimination complaints, *the office has never once made a formal finding of a Title VI violation*."[83] By contrast, for example, the Federal Highway Administration ("FHWA") received an administrative complaint filed on behalf of Leaders for Equality and Action in Dayton on August 10, 2011, and *issued its finding less than two years later* that "African Americans have faced discriminatory impact" as a result of the City of Beavercreek's decision to deny the Regional Transit Authority's application to install bus stops near a mall in the City.[84] FHWA was able to complete its investigation in a timely way despite the fact that complainants raised multiple allegations, including disparate impact claims.[85] Most significantly, FHWA reached its conclusion that the City's action had an "impact" without an

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[79] Qiu & Buford, *supra* note 59*; see* U.S. Comm'n on Civil Rights, *supra* note 16, at 57 ("Of 124 Title VI complaints filed with EPA by January 1, 2002, only 13 cases, or 10.5 percent, were processed by the agency in compliance with its own regulation. None of the 13 complaints processed within the 20-day window were accepted for investigation. All were rejected because EPA assessed that they did not meet the agency's regulatory requirements.")

[80] U.S. Dep't of Educ., OCR, Helping to Ensure Equal Access to Education: Report to the President and Secretary of Education at 21 ex.10 (2012), *available at* http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf.

[81] *Id.* at 21 ex.10. Over the course of four fiscal years, 2009-2012, OCR received over 7,700 Title-VI related complaints, and affirmatively brought 61 Title VI-related investigations. *Id*. at 26.

[82] U.S. Comm'n on Civil Rights, Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations?, *in* An Evaluation of the Departments of Education, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commissions 149 (2004) *available at* http://www.usccr.gov/pubs/10yr04/10yr04.pdf.

[83] Lombardi et al., *supra* note 22 (emphasis added).

[84] Letter from Warren S. Whitlock, Assoc. Adm'r for Civil Rights, FHW, to Michael Cornell, City Manager, City of Beavercreek, Ohio et al. at 15(June 26, 2013), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2014/07/07/DOT_fhwa_decision-_lead_v_city_of_beavercreek_june_2013.pdf. Notably, FHWA *issued a finding* within two years; the investigation was conducted in less time.

[85] *Id*. at 4.

overly burdensome analysis of the impacts – FHWA neither evaluated, for example, how many people might be injured or killed as a result of walking down the highway to reach the mall in the absence of bus stops, nor the precise economic loss individuals might sustain if they were denied the additional access to the mall afforded by bus stops. The letter of findings issued by FHWA reviews the racial composition of the impacted population and then concludes that, based on the statistics, "it is clear that African Americans disproportionately rely on RTA transit service compared with whites. As a result, African Americans are disproportionately affected. . . ."[86]

Similarly, the U.S. Department of Labor ("DOL") received an administrative complaint filed on behalf of the Miami Workers Center on or around November 21, 2011, and issued its initial determination *less than 18 months later* finding that the State's electronic filing system for unemployment insurance benefits had a discriminatory effect on limited English proficient ("LEP") persons and persons with disabilities.[87] Based on these violations, the DOL concluded that the State must take certain corrective actions *or face sanctions*, including termination of DOL funding.[88]

This record of relative timeliness in making Title VI findings and/or reaching voluntary compliance exists across various other federal agencies. Indeed, certain agencies have made findings of discrimination well within 180 days of the receipt of a complaint (*i.e.*, within a week to six months) or not long after 180 days (*i.e.*, between seven to ten months). Even in those cases where agencies have made findings of discrimination after a longer period of time – for example, up to five years – that time period includes not only the investigation but also administrative activities leading to resolution, and often involve more complex "pattern and practice" claims. The following, thus, illustrate the potential for EPA to complete preliminary investigations, make recommendations, and even resolve cases with far greater expediency.

- **DOJ**. *See, e.g.*, U.S. DOJ, Civil Rights Division, Investigation of the New Orleans Police Department ("NOPD") at vi, 33–-34 (2011), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf (*within ten months of opening an investigation* of the NOPD for alleged discriminatory police practices and unlawful conduct, making a finding that the

[86] *Id*. at 11.
[87] Initial Determination at 35, *Miami Workers Ctr. v. Fla. Dep't of Econ. Opportunity, Div. of Workforce Servs., Office of Unemployment Comp.*, CRC Complaint No. 12-FL-048 (Apr. 5, 2013), *available at* http://nelp.3cdn.net/2c0ce3c2929a0ee4e1_wim6i5ynx.pdf.
[88] *Id*. at 53.

NOPD engages in a pattern or practice of discriminatory policing based on race, ethnicity, gender, and sexual orientation, in violation Title VI and other laws).

See also Letter from Thomas Perez, Asst. Att'y Gen., U.S. DOJ, Civil Rights Division, to John W. Smith, Dir., N.C. Admin. Office of the Courts at 1, 4 (Mar. 8, 2012), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2012/03/08/030812_DOJ_Letter_to_NC_AOC.pdf (*within five years* of the complaint making a finding, among others, "*after a comprehensive investigation* that [North Carolina state court's] policies and practice discriminate on the basis of national origin, in violation of [Title VI and other] federal law, by failing to provide limited English proficient (LEP) individuals with meaningful access to state courts proceedings and operations" and providing that "appropriate enforcement action as authorized by Title VI" and other laws will be initiated if there is non-compliance) (emphasis added).

See also U.S. DOJ, Civil Rights Division, Investigation of Shelby County Juvenile Court (2012), *available at* http://njdc.info/wp-content/uploads/2013/12/USDOJ-Report-Investigation-of-the-Shelby-County-Juvenile-Court.pdf (*within five years* of the complaint, making various findings that the Shelby County Juvenile Court violated Title VI, including by failing to provide constitutionally required due process to children of all races, and administering justice that discriminates against Black children).

- **DOT, Federal Highway Administration ("FHWA").** *See, e.g.,*Voluntary Resolution Agreement entered into by FHWA and the Texas Department of Transportation (Dec. 17, 2015), *available at* https://ccharborbridgeproject.files.wordpress.com/2012/02/voluntary-resolution-agreement-signed.pdf (*within eight months* of an administrative complaint filed by complainants alleging that highway project violated Title VI). In recent testimony to the U.S. Commission on Civil Rights, the Lawyers' Committee for Civil Rights Under Law described FHWA's handling of this complaint:

> The processing of the Corpus Christi Title VI complaint by the FHWA is in stark contrast to [the] pattern of enforcement [at EPA] and instructive for any federal agency's Title VI program. The complaint was received by FHWA on March 13, 2015. FHWA began its investigation soon after that and issued a letter accepting the complaint and beginning the investigation on April 3rd. FHWA Office of Civil Rights staff were responsible for the investigation and immediately initiated a proactive investigation, making visits to Corpus Christi several times which included meetings with residents in the impacted neighborhoods to explain the status of the investigation and possible outcomes. FHWA also put the Harbor Bridge Project on hold during

the investigation which created time and leverage for the investigation and negotiations to occur in a timely manner.[89]

- **DOT, Federal Transit Administration ("FTA").**[90] *See, e.g.*, Letter from Peter M. Rogoff, FTA, to Steve Heminger, Exec. Dir.. Metro. Transp. Comm'n & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Jan. 15 2010), *available at* https://www.bart.gov/sites/default/files/docs/BART_MTC_Letter_On_OAC.pdf (*within four months* of receiving a complaint and investigating the failure of the Bay Area Rapid Transit ("BART") to complete a service equity analysis for a planned federally assisted Oakland Airport Connector Project, making a preliminary finding that "BART failed to conduct an equity analysis for service and fare changes for the Project" and, thus, was "in danger of losing federal funding for the project").

- **HUD**. *See, e.g.*, Letter from Charles E. Hauptman, Dir., Office of Fair Housing & Equal Opportunity, HUD, to Mr. Roy Bateman, Cmty. Dev. Coordinator, Marin Cnty. Cmty. Dev. Agency-Fed. Grants Division (Dec. 21, 2010) and attachments thereto *available at* http://www.hud.gov/offices/fheo/library/10-Marin-VCA-final-12-21-2010.PDF (*within a year* of HUD affirmatively investigating Marin County's Community Development Block Grant Program, making a preliminary finding of noncompliance because in a county that is majority white, African American and Latino populations were concentrated in two areas).

  See also Voluntary Compliance Agreement Between HUD and State of Neb. Dep't of Econ. Dev., Title VI Review No. 07-11-R002-6, Sec. 504 Review No. 07-11-R002-4, at 2 (2014), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2014/07/02/Voluntary_Compliance_Agreement_HUD_%26_Nebraska_3-2014.pdf (providing that HUD *affirmatively* investigated Title VI compliance and, *within two years*, issued a finding that Nebraska "has not taken reasonable steps to provide meaningful access to federally funded programs for LEP persons"); *see also* Letter from Betty J. Bottiger, Dir., Region VII Office of Fair Hous. & Equal Opportunity, HUD, to Catherine D. Lang, Dep't Dir., Neb. Dep't of Econ Dev. (May 31, 2013), *available at* http://www.fremontne.gov/DocumentCenter/View/2509.

  See Letter from HUD to Rocky Delgadillo, Deputy Mayor for Economic Development, City of Los Angeles (Sept. 25, 2000), *available at* http://www.cityprojectca.org/ourwork/documents/hud-letter.pdf (*within a week* of receiving community administrative complaint, HUD required the City of Los Angeles to prepare a full environmental impact statement considering the impact on

[89] *See* Lawyers' Comm. for Civil Rights Under Law, Comments to the U.S. Commission on Civil Rights at 5 (Mar. 2, 2016), attached hereto as Ex. 7.

[90] Notably, while the DOT receives relatively few Title VI complaints, it has been able to resolve the claims expeditiously. U.S. Comm'n on Civil Rights, *supra* note 16, at 63, 64 tbl.3 (reporting that from 1995 to 2001, the DOT's U.S. Coast Guard had no complaints and the Federal Aviation Administration's ("FAA") Office of Civil Rights had four complaints, two of which were resolved in approximately two years).

people of color before HUD would issue any federal funding for a proposed warehouse project, citing Title VI and the President's Executive Order 12898 on environmental justice and health).

- **Interior**: *See* Letter from Dep't of Interior, to California Governor Arnold Schwarzenegger (Jan. 27, 2010)[91] (*within seven months* of receiving community administrative complaint under Title VI, Interior wrote to the Governor that proposed actions to close state parks and reduce park services could not be weighted on the basis of race or national origin).

- **Education.** Based on an analysis of 109 Title VI complaints filed with Education's seven regional offices between 2007-2012, of the 100 that were resolved, 58 were the result of early case resolution or voluntary compliance or settlement agreements.[92]

Given EPA's record of inaction over many decades, as compared to other federal agencies charged with Title VI enforcement, accountability and recourse to the courts are even more critical for strengthening EPA's compliance and enforcement program than at other agencies.

D. EPA'S Argument that its Proposals are Animated by an Interest in Aligning its Regulations is Unpersuasive.

EPA's argument that its proposals are animated by an interest in aligning regulations with other agencies is unpersuasive. The proposed changes will not, in fact, bring EPA's regulations into alignment with regulations other agencies; instead, EPA has cherry-picked particular provisions while retaining others that diverge from the norm.

EPA attempts to justify its proposal to remove regulatory deadlines in the name of conforming "to the regulatory text of its sister agencies."[93] Yet EPA is not alone in having deadlines and timeframes in its regulations for processing Title VI complaints and conducting compliance reviews. The Department of Energy also has regulatory deadlines, for example.[94] In

[91] On file with The City Project.
[92] On file with the NAACP Legal Defense & Educational Fund, Inc.
[93] 80 Fed. Reg. at 77,287; *see also* U.S. EPA, OCR, PowerPoint Presentation, The U.S. Environmental Protection Agency's Notice of Proposed Rulemaking (NPRM) to Amend its Nondiscrimination Regulations at slide 6 (Dec. 1, 2015), *available at* http://www.epa.gov/sites/production/files/2015-12/documents/nprm_presentation_final_draft.pdf. ("In order to enable it to create a model civil rights program which can nimbly and effectively enforce civil rights statutes in the environmental context, EPA's regulations will be aligned with those of over 20 other federal agencies.")
[94] *See* 10 C.F.R. §1040.104(c) (35-day time frame to determine jurisdiction, notify recipient, and initiate investigation; 90-day time frame from initiation of investigation to advise recipient of preliminary

particular, Department of Energy regulations require the Director to complete a jurisdictional determination and, if appropriate, initiate an investigation with 35 days of receipt of a complaint.[95] Department of Energy regulations further direct the agency to advise the recipient in writing of preliminary findings and, where appropriate, recommendations for achieving voluntary compliance, within 90 days of initiating an investigation.[96] Similarly, the Tennessee Valley Authority ("TVA") has a 10-day time frame from the receipt of the complaint to determine whether the agency has jurisdiction and to initiate the investigation.[97] TVA shares with EPA the 180-day deadline from the initiation of the investigation to make preliminary findings.[98]

Moreover, the language that EPA proposes is different from the regulations adopted by other agencies. EPA proposes the following regulatory language: "The OCR will make a prompt investigation whenever a complaint indicates a possible failure to comply."[99] While a number of other agencies also require a "prompt investigation," EPA's proposal diverges in a significant way. Regulations promulgated by the Department of Education and many other agencies require the "responsible Department official or his designee" to make a "prompt investigation whenever a *compliance review, report,* complaint, *or any other information* indicates a possible failure to comply…."[100] Whereas under these rules, a prompt investigation is triggered when "a compliance review, report, complaint, *or any other information*" shows a potential failure to comply, under EPA's proposal an investigation is triggered when a complaint, and only a complaint, shows a potential failure to comply – and, significantly, the proposed regulatory

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findings, recommendations for voluntary compliance, and give recipient opportunity to request voluntary compliance negotiations).

[95] *Id.* § 1040.104(c)(1).

[96] *Id.* § 1040.104(c)(3).

[97] *See* 18 C.F.R. § 1302.7(c).

[98] *Id*.

[99] 80 Fed. Reg. at 77,289.

[100] *See, e.g.,* 34 C.F.R. § 100.7(c) (Dep't of Educ.) (emphasis added) ("The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part); *see also* 49 C.F.R. § 21.11 (Dep't of Transp.); 45 C.F.R. § 80.7(c) (Dep't of Health & Human Servs.); 24 C.F.R. § 1.7(c) (HUD); 28 C.F.R. 42.107(c) (Dep't of Justice); 32 C.F.R. § 195.8(c) (Dep't of Defense); 15 C.F.R. § 8.10(a) (Dep't of Commerce); 6 C.F.R. § 21.11(c) (Dep't of Homeland Security); 43 C.F.R. § 17.6(c) (Dep't of Interior); 29 C.F.R. § 31.7(c) (Dep't of Labor); 22 C.F.R. § 141.6(c) (Dep't of State); 38 C.F.R. § 18.7(c) (Dep't of Veterans Affairs).

language omits the possibility that "any other information" might trigger the investigation.[101] EPA's proposal is significantly weaker and isn't "aligned" with the regulations of other agencies.

There are also other significant differences between EPA's regulations and the regulations of other agencies that will remain untouched by EPA's rulemaking, which undermine EPA's claim that the proposed rulemaking is motivated by an interest in alignment. Notably, EPA does not categorically separate regulatory provisions related to Title VI from provisions applicable when processing complaints of discrimination under other federal laws. For example, HUD's Title VI regulations, located at 24 C.F.R. Part 1, specifically apply to Title VI, and as such they are titled "Effectuation of Title VI of the Civil Rights Act of 1964." Other agencies that have this identical regulatory format include the Department of Education,[102] the Department of Transportation,[103] the Department of Health and Human Services,[104] the Department of Defense,[105] the Department of Commerce,[106] the Department of Labor,[107] the Department of State,[108] as well as the Department of Veteran Affairs.[109] EPA's regulations are certainly not in alignment here; unlike these other agencies, EPA's Title VI regulations implement not only Title VI but also section 504 of the Rehabilitation Act and section 13 of the Federal Water Pollution Act,[110] and prohibit discrimination on the basis of race, color, national or sex, where applicable, by programs or activities receiving EPA assistance.[111]

The chart below, comparing EPA's Title VI regulations with those promulgated by three other agencies, highlights additional differences that are critical to Title VI enforcement—such as the required assurance and eligibility for restoration of Title VI funding following the termination or suspension of funding. For example, while EPA's regulations require that applicants submit an assurance that "they will comply with the requirements" and "must also submit any other information that the OCR determines is necessary for preaward review,"[112]

[101] 80 Fed. Reg. at 77,289 (emphasis added).
[102] 34 C.F.R. pt. 100.
[103] 49 C.F.R. pt. 21.
[104] 45 C.F.R. pt. 80.
[105] 32 C.F.R. pt. 195.
[106] 15 C.F.R. pt. 8.
[107] 29 C.F.R. pt. 31.
[108] 22 C.F.R. pt. 141.
[109] 38 C.F.R. pt. 18.
[110] 40 C.F.R. § 7.10.
[111] 40 C.F.R. pt. 7 (Subpart B).
[112] 40 C.F.R. § 7.80(a)(1).

these requirements depart substantively from DOT's provision. DOT's regulations require assurance that the program will be "conducted" or the facility will be "operated" in compliance with "all" requirements "imposed by or pursuant to" the relevant regulations.[113] Without evaluating the nuances of each word, the comparison demonstrates that the language is distinct and that interpretations of these differences may vary significantly. Moreover, DOT requires that states and state agencies applying for continued federal financial assistance also provide or submit an application accompanied by "provision for such methods of administration for the program as are found by the Secretary to give reasonable guarantee" that the recipients will comply with such requirements.[114] The chart lists a selection of EPA regulations with language that varies from Education, DOT, and HUD.

Select Regulatory Differences: EPA Compared to HUD, DOT & Dep't of Ed.

	EPA	**Education**	**HUD**	**DOT**
Application	*"Applicability" 40 CFR 7.15* *-Does not list instances where the part does NOT apply*	"Application of this Regulation" 34 C.F.R. 100.2 - Lists instances where the part does NOT apply	"Application of Part 1" 24 C.F.R. 1.3 - Lists instances where the part does NOT apply	"Application of this Part" 49 C.F.R. 21.3 - Lists instances where the part does NOT apply
Compliance information	*"Requirements for Applicants and Recipients" (Subpart D) → "Recipients" Compare 40 C.F.R. 7.85(a)*	"Compliance Information" 34 C.F.R. 100.6	"Compliance Information" 24 C.F.R. 1.6	"Compliance Information" 49 C.F.R. 21.9
Assurances	*"Requirements for Applicants and Recipients" (Subpart D) → "Applicants"*	"Assurances required" 34 C.F.R. 100.4 - Entire provision	"Assurances required" 24 C.F.R. 1.5 - Entire provision	"Assurances required" 49 C.F.R. 21.7 - Entire provision

[113] 49 C.F.R. § 21.7(a).
[114] *Id.* § 21.7(b).

	40 C.F.R. 7.80(a) *"Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this part."*	outlining detailed information on assurances	outlining detailed information on assurances	outlining detailed information on assurances
Hearings	Lacks specific provision related to hearings Compare 40 C.F.R. 7.130	Contains specific provisions related to hearings, such as right to counsel, procedures, evidence and	Contains specific provisions related to hearings 24 C.F.R. 1.9; 24 C.F.R. Part 180	Contains specific provisions related to hearings, such as right to counsel, procedures, evidence and

		record 34 C.F.R. 100.9		record 49 C.F.R. 21.15
Eligibility for funds/post-termination	*"Procedure for regaining eligibility"* *An applicant or recipient whose assistance has been denied, annulled, terminated, or suspended under this part regains eligibility as soon as it:* *(1) Provides reasonable assurance that it is complying and will comply with this part in the future, and* *(2) Satisfies the terms and conditions for regaining eligibility that are specified in the denial, annulment, termination or suspension order.* 40 C.F.R. 7.135	(g) Post-termination proceedings. (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. 34 C.F.R. 100.10	Does not contain a procedure in Part 1 (Title VI)	(g) Post termination proceedings. (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. 49 C.F.R. 21.17

As this chart demonstrates, with respect to its proposed rulemaking, EPA has selectively chosen certain language to modify, particularly provisions that prescribe time frames for agency action, purportedly to bring EPA into alignment with other agencies also charged with implementing Title VI. However, if EPA's goal were to align its regulations with other agencies, then the proposed rulemaking would be both under and over-inclusive. If EPA's purpose were truly to bring its regulations into alignment, many other modifications to its regulations would have to be made with regard to the regulatory language and the organization of numerous provisions. Instead, EPA cherry-picked, attempting to make only carefully selected changes.

E. EPA's Proposal to Amend its Regulations to Clarify its Affirmative Authority is Unnecessary.

EPA is proposing to amend § 7.85(b) by removing the language, "where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance" in order to clarify that it has affirmative authority to collect compliance data.[115] Through this rule, EPA intends to require recipients to submit compliance reports unrelated to complaint investigations or compliance reviews, but seeks comments on its proposed phased approach to conducting compliance reviews and whether to postpone implementation of provisions governing compliance reports until there are final guidance documents in place related to this process.[116] While we support EPA's endeavor to strengthen its authority to collect information and ensure compliance, the agency already has the affirmative authority under existing regulations to collect data and conduct pre- and post-award compliance reviews. 40 C.F.R. §§ 7.85, 7.110, and 7.115. As such, EPA should immediately start utilizing this authority, rather than phase in compliance reviews or delay any further in anticipation of any clarification or new guidance.

[115] 80 Fed. Reg. at 77,287.
[116] *Id.* at 77,286–87; *see also* EPA Staff Draft, EPA-HQ-OA-2013-0031 at 11(Dec. 1, 2015) ("EPA does not intend to request compliance reports, unrelated to compliance reviews and complaint investigations, from recipients any sooner than 90 says after it has … finalized the guidance.").

Signatories support the removal of the "reason to believe" language in 40 C.F.R. §§ 7.85(b), 7.110(a), and 7.115(a) even though "reason to believe" should not be viewed as a significant barrier to requiring recipients to submit additional compliance data or conduct on-site pre or post-award compliance reviews. The "reason to believe" standard does not require definitive evidence of discrimination; instead the inquiry is focused on whether a reasonable person would conclude, based on available information, that discrimination is occurring.[117]

If EPA goes forward with these clarifications, it should also delete language suggesting that OCR must determine whether information is "necessary" for its review.[118] This language plants the seeds for yet more challenges to the collection of compliance information. Removing the requirement that information be "necessary" goes hand in hand with EPA's proposal to remove the term "reason to believe." Section 7.85(b) as amended would read:

> The OCR may require recipients to submit data and information specific to certain programs or activities to determine compliance or to investigate a complaint alleging discrimination in a program or activity receiving EPA assistance.

If EPA is committed to using its affirmative authority to ensure compliance and move its civil rights program forward, it should also remove the term "necessary."

We strongly oppose EPA's proposal to wait for the issuance of guidance documents before requesting compliance reports, given that EPA already has the authority to request compliance reports and given OCR's poor record of timely producing and finalizing guidance

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[117] *See, e.g.*, Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,271 (Apr. 15, 1994) (describing what constitutes "reason to believe" on lender discrimination in violation of Equal Credit Opportunity Act); *see also* Black's Law Dictionary (10th ed. 2014) (defining "reasonably believe" as "[t]o believe (a given fact or combination of facts) under circumstances in which a reasonable person would believe.").

[118] *See, e.g.*, 40 C.F.R. § 7.80(a) ("Applicants must also submit any other information that the OCR determines *is necessary* for preaward review.") (emphasis added); 40 C.F.R. § 7.85(b) ("*If necessary*, the OCR may require recipients to submit data and information specific to certain programs or activities to determine compliance when there is reason to believe that discrimination may exist. . . .") (emphasis added).

documents.[119] For example, in 1998 EPA issued its "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" ("Interim Guidance") to guide OCR's implementation and enforcement of Title VI regulations.[120] The Interim Guidance was never finalized. In June 2000, EPA then released the Draft Revised Guidance for public comment.[121] Despite significant input from the public, the effort to finalize legal standards languished. In 2005, EPA published the "Draft Final Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs."[122] These guidance documents took years to draft and revise, with only the public involvement guidance finalized, in 2006.[123] With regard to the legal standards EPA uses to evaluate whether a Title VI violation has occurred, to date EPA has still failed to finalize guidance. At this point, rather than finalizing guidance, EPA has announced its intention to address legal issues in a Civil Rights Compliance Toolkit.[124]

Communities cannot afford yet another delay if EPA waits for guidance documents to be finalized on compliance reports. EPA presently has the authority under 40 C.F.R. § 7.85 to ensure that recipients comply with Title VI, and recipients are already on notice that they may be

[119] 80 Fed. Reg. at 77,286–77 (" [T]he EPA does not intend to request compliance reports, unrelated to compliance reviews and complaint investigations, from recipients any sooner than 90 days after it has drafted guidance about such reports, sought stakeholder input on the guidance, put the guidance out for notice and comment, and finalized the guidance.").
[120] U.S. Comm'n on Civil Rights, *supra* note 16, at 32–34.
[121] U.S. EPA, EPA's Title VI – Policies, Guidance, Settlements, Laws and Regulations, http://www.epa.gov/ocr/epas-title-vi-policies-guidance-settlements-laws-and-regulations##polandguid (last updated Feb. 19, 2016).
[122] *Id*.
[123] Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 Fed. Reg. 14,207 (Mar. 21, 2006).
[124] U.S. EPA, Office of Civil Rights, External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020 at 5 (2015), *available at* https://www.epa.gov/sites/production/files/2015-10/documents/strategic_plan.pdf. EPA has also failed to finalize the Draft Policy Paper on Adversity. *See supra* at 2.

required to submit additional information "specific to certain programs or activities."[125] In fact, EPA even acknowledges its affirmative authority in the preamble to the instant proposed rulemaking.[126] For EPA to have an effective "Model Civil Rights Program" it must immediately effectuate its compliance procedures, rather than phasing them in. [127]

F. EPA Should Establish Clear Data Collection and Reporting Requirements, Which are a Necessary Component of a Robust Title VI Compliance Program.

EPA's regulations currently require applicants for federal funds to provide both an "assurance" that they will comply with requirements pursuant to EPA's Title VI regulations and "any other information that the OCR determines is necessary for preaward review."[128] These mandates are too vague to provide guidance to recipients as to what constitutes compliance and what type of information should be collected and maintained. EPA should amend 40 C.F.R. §§ 7.110(a) and 7.80 to require that an applicant for EPA financial assistance demonstrate that it has, and is implementing, an effective Title VI compliance program.

EPA has specifically requested comments on what type of information a recipient will be required to collect and report and, particularly, what type of information recipients will be required to include in compliance reports. As a starting point, EPA should compare the level of specificity set forth in FTA's Circular on Title VI Requirements and Guidelines, Circular, FTA, FTA C 4702.1B, Title VI Requirements and Guidelines for Federal Transit Administration Recipients (Oct. 1, 2012), *available at* http://www.fta.dot.gov/documents/FTA_Title_VI_FINAL.pdf ("FTA Circular"). The Circular contains the following provisions:

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[125] 40 C.F.R. § 7.85(b).

[126] 80 Fed. Reg. at 77,286 ("These changes reaffirm the agency's existing authority to use compliance reviews to identify and resolve compliance concerns with recipients of EPA financial assistance to prevent costly investigations and litigation.").

[127] Although we urge EPA to finalize a guidance on legal standards and finally reject the rebuttable presumption, lack of clarity about the legal standards cannot and should not be used an excuse to postpone the exercise of EPA's affirmative authority and the initiation of compliance reviews. All stakeholders seek greater clarity on EPA's legal standards, but compliance reviews are no different in this regard than investigations. EPA must finalize guidance on its legal standards to provide recipients with meaningful notice of expectations and, also, to provide clarity for complainants and investigators.

[128] 40 C.F.R. § 7.80(a)(1).

- Requirement to provide assurances annually, which are posted on FTA's website.[129]

- Requirement to submit "a Title VI Program," which must be approved by a responsible governing entity, to the FTA regional civil rights officer once every three years. Recipients must submit documentation that the entity has approved the Program.[130]

- Each "Program" must include particular information, such as the recipient's Title VI notice to the public notifying the public of the protections afforded against discrimination; a copy of the instructions to the public regarding how to file a Title VI complaint; a list of investigations, complaints or lawsuits related to Title VI filed with the recipient since the last submission; a public participation plan that includes "an outreach plan to engage minority and limited English proficient populations"; and a copy of a plan for providing language assistance, among other things.[131]

Significantly, this level of specificity ensures that recipients indeed have a Title VI program and that assurances are not just pro forma.

- Requirements to collect and evaluate demographic information include the race and ethnicity of populations served by the program or activity.[132]

EPA's data collection requirements should include these components: robust assurances, with detailed information about Title VI programs – including specific, required information such as complaint procedures; demographic data relevant to the program or activity; and procedures for conducting analysis of whether operations comply with Title VI. All of this information should be updated regularly and be made publicly available.

Tools such as EJSCREEN[133] are now readily accessible to recipients to conduct analyses of compliance with Title VI. As EPA's website states, EJSCREEN "offers a variety of powerful data and mapping capabilities that enable users to access environmental and demographic information, at high geographic resolution, across the entire country; displayed in color-coded maps and standard data reports. These maps and reports show how a selected location compares

[129] FTA Circular § III.2.
[130] *Id.* § III.4.
[131] *Id.* § III.4(a).
[132] *See, e.g., id.* § IV.5 (requirement to collect and report demographic data applicable to transit providers); *id.* § V.2 (requirement to prepare and submit a Title VI program including a demographic profile and demographic maps applicable to states).
[133] *See* EPA, EJSCREEN, Frequent Questions About EJSCREEN, http://www.epa.gov/ejscreen/frequent-questions-about-ejscreen#q1 (last updated Sept. 8, 2015).

to the rest of the nation, EPA region or state."[134] Although EJ Screen is a work in progress – for example, EJSCREEN should incorporate data on the distribution of environmental benefits such as park access[135] – the availability of such online tools allows recipients to more readily access demographic data relevant to their Title VI program.

Moreover, any rulemaking amending provisions regarding data collection, EPA's compliance program and, the Case Resolution Manual (discussed below) should clarify that a violation of Title VI and its regulations is established when a recipient fails to consider the disparate impact of a program or policy, including but not limited to whether the operation of a permitted facility will have a disparate impact on the basis of race, color or national origin.[136] Rulemaking and the CRM, Chapter 5 (Compliance Reviews) should explicitly make clear that recipients have an obligation to evaluate whether their actions, policies or practices have an unjustified disparate impact on the basis of race, color or national origin.

II. INTERIM CASE RESOLUTION MANUAL

Signatories to this letter support the release of the CRM because it responds to the need for a more professional, uniform, and standardized approach to handling environmental justice cases. To be clear, we applaud the intent of the CRM to "provide procedural guidance to OCR case managers to ensure EPA's prompt, effective, and efficient resolution of civil rights cases consistent with science and the civil rights laws."[137] Moreover, we are pleased to know that this CRM and subsequent versions will be posted on EPA's website and also distributed to the public

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[134] *Id.*

[135] *See, e.g., US EPA Include Park Access in EJSCREEN and Support Equal Access to Parks and Recreation*, The City Project Blog (Jan. 6, 2016), http://www.cityprojectca.org/blog/archives/41531; Letter from Claire Robinson, Amigos de los Rios et al., to Gina McCarthy, Adm'r, U.S. EPA & Mustafa Santiago Ali, Sr. Advisor on Envtl. Justice, (July 14, 2015), *available at* http://www.cityprojectca.org/blog/wp-content/uploads/2015/07/USEPA-Public-Comments-20150714-updated-allies.pdf.

[136] *S. Camden Citizens in Action*, 145 F. Supp. 2d at 481 (granting plaintiffs' request for declaratory judgment on this basis); *see also* Letter from Peter M. Rogoff, Adm'r, Fed, Transit Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n, & Dorothy Dugger, Gen Manager, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010), *available at* https://oaklandliving.files.wordpress.com/2010/01/fta-letter-to-mtc-and-bart-on-oakland-airport-connector.pdf (preliminary results of compliance review revealed failure to conduct equity analysis, putting agency in danger of losing federal funds).

[137] CRM, *supra* note 63, at ii. Throughout the CRM, there are repeated referrals to the OCR's intent to have "prompt, effective, and efficient case resolution." *Id.* at 6, 14, 20, 21, 22, 23, 25, 26, 27.

through its network of Deputy Civil Rights Officials.[138] This allows stakeholders of environmental justice complaints, including the impacted communities and recipients of federal funds, to review and comment on this CRM and future versions, and to be informed of the procedural guidance for Title VI complaints.

Consistent with this improved transparency, we urge EPA to timely post on its website other documents referenced in the CRM including: (1) templates of its strategic case management plans, investigation plans, requests for information, and investigation reports; (2) letters of insufficient evidence and non-compliance letters of findings; (3) informal resolution agreements and voluntary compliance agreements and any modifications thereto; (4) post- and pre-award compliance reviews; (5) monitoring reports; (6) documents initiating enforcement proceedings; (7) all regulations and other applicable laws referenced in the CRM; and (8) all acknowledgments of receipt of correspondence which could constitute a complaint and the accompanying complaints and supporting documents. Environmental justice communities seeking information about prior complaints or previous Title VI enforcement efforts should not each be required to request such basic information through public records requests. Such a piecemeal approach is both burdensome for communities and inefficient for EPA.[139]

More generally, we support EPA's articulated goal in this CRM to "promote appropriate involvement by complainants and recipients in the External Compliance complaint process," and other processes.[140] In all case resolution proceedings, we urge OCR to engage with impacted community members to the fullest extent. This engagement should include regularly updating complainants and recipients of the status of case investigations. Indeed, in this and other ways specifically identified below, the CRM does not go far enough to bring Title VI process into alignment with principles of environmental justice and to ensure that those who are most affected by discriminatory practices will have timely information and meaningful opportunities to inform decision-making. Thus, we request that EPA modify the CRM, in all ways possible, including those specifically suggested *infra*, to expand the role of complainants in the Title VI case

[138] *Id*. at ii–iii.

[139] The Center for Public Integrity has been able to post such materials, which they obtained through Freedom of Information Act requests, within a relatively short time frame compared to how long it is taking EPA to make such materials available online. *See* Lombardi et al., *supra* note 22. Stakeholders should not have to rely, however, on the Center rather than EPA for up-to-date information.

[140] CRM at 14. Moreover, voluntary compliance agreements contemplate that the OCR may visit community members, among others, to determine whether a recipient has complied with the terms of such an agreement. *See id*. at 29.

resolution process, consistent with the EPA's espoused policies, such as the 2003 Public Involvement Policy, 2006 Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, and 2015 Guidance on Considering Environmental Justice During the Development of Regulatory Actions.[141]

Below please find comments on specific provisions of the CRM that merit OCR's further consideration.

A. Jurisdiction

The CRM provides that when OCR evaluates whether correspondence is a complaint, it must consider four factors including: "[w]hether [the correspondence] identifies an applicant for, or a recipient of, EPA financial assistance as the entity that committed the alleged discriminatory act."[142] The failure to meet all four factors is a basis for rejecting or referring the correspondence.[143] The CRM provides that "[d]etermining whether an entity classifies as a recipient of EPA financial assistance may require more complex analysis, including, for example, examining the flow-through of federal funds."[144] To the extent that the determination of whether an entity is a federal funding recipient is complex, the CRM should be revised to reflect that EPA is the appropriate entity to conduct that analysis and should not rely solely on the complainant's jurisdictional analysis. The CRM should make clear that if a complainant fails to identify the recipient(s) that are committing the alleged discrimination or that information is incomplete, EPA must conduct its own analysis to determine whether the actor is a recipient of federal funds. This modification is critical since the identification of an EPA recipient is a basis for rejecting or referring correspondence, even if the other factors are met, including that a complainant has alleged acts that may violate EPA's non-discrimination regulations. The burden

[141] U.S. EPA, EPA-233-F-03-004, Introducing EPA's Public Involvement Policy (2003), *available at* http://nepis.epa.gov/Exe/ZyPDF.cgi/100045RR.PDF?Dockey=100045RR.PDF; Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 Fed. Reg. 14,207; U.S. EPA, Guidance on Considering Environmental Justice During the Development of Regulatory Actions (2015), *available at* http://www3.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-final.pdf. All of these policies espouse that both EPA and Title VI recipients provide opportunities for early and meaningful involvement by complainant communities in agency decision-making, as well as transparency in agency decision-making.

[142] CRM at 6–7.

[143] *Id.* at 7.

[144] *Id*. at 9.

at this initial stage of the complaint process certainly should not be on the complainant, who is enduring the discrimination individually or systemically, to make what can be a complex and difficult jurisdictional showing. That burden should be placed on EPA, which has the capacity to conduct that analysis.

Moreover, if a complaint creates a reason to believe that there is discrimination, the CRM should be revised to require that the OCR initiate a compliance review, whether or not the complaint meets all of the other jurisdictional factors or not.[145]

The CRM sets forth a non-exhaustive list of prudential factors that can form the basis for a decision to "administratively close" a complaint.[146] These bases for rejecting a complaint include that the claim is not ripe, is moot, is pending or resolved by another agency, or has been filed against the same recipient.[147] Thus it appears that the CRM contemplates that the jurisdictional review or subsequent consideration will include a screening for standing and ripeness, grafting doctrines developed in the judicial context onto administrative enforcement proceedings, a proposal which many of the signatories to this letter previously criticized.[148] Perhaps most centrally, many Title VI complaints in the environmental context are submitted by community groups without the assistance of lawyers, and EPA should not close complaints on the basis of insufficient information to support such procedural requirements or for inartful drafting, particularly if information outside of the four corners of the complaint indicates that there is reason to believe that the recipient is not complying with Title VI. Moreover, there is no standing requirement to file an administrative complaint and the CRM should not impose one, particularly if it would add impediments to filing a viable complaint for an already overburdened, under-resourced potential complainant. Similarly, the CRM's imposition of a screening for ripeness is vague and has the potential to frustrate meaningful civil rights enforcement. Indeed, timely complaints will often assert allegations that anticipate future actions; ideally, complainants will have the opportunity to challenge actions, policies and practices that are discriminatory before shovels hit the ground and decisions become more costly to reverse. In *Angelita C.*, referenced *infra*, EPA unambiguously stated that the showing of *potential* health effects (depending on their nature and severity) is an adequate basis not just for

[145] *Id*. at 6–7.
[146] *Id.* at 16.
[147] *Id.*
[148] *See* Comments on Draft Policy Papers, Ex. 2, at 14-18.

filing a complaint, but also for a finding of adverse impact.[149] The agency noted that a reasonable cause for concern and, correspondingly, a reasonable basis for filing a complaint based on concern for public health or welfare, can be evidenced by establishing *imminent*, substantial harm or endangerment in a complaint. Consistent with that determination, EPA's CRM should not impose heightened requirements for filing a complaint, particularly a standard that requires that actual harm occurred."[150] EPA's proposal to establish additional bases on which to reject or "close" complaints – and particularly, the imposition of a ripeness standard -- would be a radical departure from the last two decades of Title VI enforcement.[151]

Even when these prudential factors may be relevant in particular cases, EPA's record raises serious concerns about whether EPA will broadly apply them to the detriment of complainants, defeating the purpose of Title VI and its regulations. In 2012, for example, EPA rejected a complaint filed by residents of Uniontown, Alabama, on the prudential ground that a related case had been filed in court[152] because at the time of the complaint there was also a pending case against the permitted facility, Arrowhead Landfill, under state tort law.[153] The litigation filed in state court named the Landfill and contractors as defendants, not the state permitting agency, the Alabama Department of Environmental Management (ADEM), and raised

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[149] *In re Cal. Dep't of Pesticide Regs.*

[150] To be clear, EPA should apply the imminence standard as it did in *Angelita C.* and not apply the ripeness standard that it used to dismiss with prejudice and deny reconsideration of that dismissal in *In re California Air Resources Board*, EPA File No. 09R-12-R9 (EPA OCR 2012) (involving California community groups with members living in close proximity to facilities governed by California's greenhouse gas cap-and-trade program who 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); *see also* Letter from Rafael DeLeon, Dir., OCR, to Brent Newell & Sofia Parino, Ctr. on Race, Poverty & the Envt. (July 12, 2012); Letter from Rafael DeLeon, Dir., OCR, to Brent Newell & Sofia Parino, Ctr. on Race, Poverty & the Envt. (Jan. 25, 2013); Letter from Brent Newell, Ctr. On Race, Poverty & the Envt. to Rafael DeLeon, Dir., OCR (Aug. 6, 2012); Letter from Rafael DeLeon, Dir., OCR, to Brent Newell & Sofia Parino, Ctr. on Race, Poverty & the Envt. at 2 (Jan. 25, 2013).

[151] *See* 65 Fed. Reg. at 39,672 (June 27, 2000) ("[T]he complainants do not have the burden of proving 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.").

[152] *See* CRM at 16 (factors for closing the complaint include "[t]he same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action.").

[153] Complaint and Pet. for Relief or Sanction, *In re Ala. Dep't of Envtl. Mgmt.* EPA File No. 01R-12-R4 (EPA OCR May 30, 2013); Letter from Vicki Simons, Acting Dir., EPA OCR, to David Ludder (June 27, 2013), *available at* http://www.epa.gov/sites/production/files/2014-05/documents/12r-13-r4_accpt_emplt-redacted-0.pdf.

no civil rights claims in that action. Nonetheless, EPA rejected the complaint filed against ADEM under Title VI on the ground that it was related to the tort action and complainants were forced to refile after the tort case was settled, leading to a more than two-year delay in EPA's investigation and any potential remedy.[154] Accordingly, the CRM should be revised to clarify that a complaint should not be dismissed on the prudential grounds of standing or ripeness, or on the tenuous relationship between a civil rights claim against a recipient and other non-civil rights claims filed in another forum against another party. These references to standing and ripeness as other factors to consider after opening an investigation should be removed from the CRM. Simply stated, OCR fails to serve justice when it dismisses a complaint on jurisdictional or such prudential grounds and ignores discrimination.

B. Accepted Cases: Preliminary Investigation and Resolution

The CRM recognizes that "[p]art of effective case planning includes the identification of all legal theories that would be applicable to the issues identified for investigation," and provides three typical categories of legal claims: disparate/different treatment; disparate impact/effects; and retaliation.[155] Throughout the CRM, there also are references to the pertinent legal standards with respect to a case.[156] Notwithstanding, the CRM does not address the need for the clarification of legal standards used by the EPA.[157] Clear legal standards are critical for recipients and complainants alike to understand what actions may give rise to Title VI investigations and enforcement actions.

The CRM further provides for ADR, which "involves the formal mediation of a complaint or complaint allegations between the complainant and recipient, through the use of a

[154] *Id.* at 10–11 (discussing procedural history).
[155] CRM, *supra*, note 63, at 15.
[156] *See, e.g.*, *id*. at 22 (setting forth that a statement of the case where a case has been investigated, but where no finding has been issued, must contain "[a]n explanation of the pertinent legal standard(s)"); *id*. at 24 (referring to OCR's obligation to "ensure that investigations are legally sufficient"); *id*. (providing that the "scope of OCR's investigation and resolution activities will depend upon the particular issue(s) accepted for investigation and applicable legal standards"); *id*. at 25 (providing that an investigation plan should identify "applicable legal theories"); *id*. at 26 (providing that an investigation report should set forth "applicable legal theories"); *id*. at 27 (providing that a non-compliance determination includes an "explanation of the pertinent legal standard(s)").
[157] *Id*. at ii ("The CRM is not intended to *address substantive civil rights policy or legal standards* or processes outside of OCR's jurisdiction and responsibility to enforce the federal civil rights laws …") (emphasis added)

professionally trained mediator."[158] Notwithstanding our appreciation of the potential for ADR to resolve complaints, the process raises several concerns. First, the CRM should be revised to ensure that complainants have similar access to legal and technical resources, including experts, during ADR as are typically available to recipients of federal funding. As EPA has recognized, many complainants are not represented by counsel and have little or no financial capacity to retain counsel and substantive experts to aid them in the ADR process, where they must negotiate with sophisticated and relatively amply funded state or local government or private entities.[159] For example, even when ADR yields results, as in *Greenaction for Health and Environmental Justice v. San Joaquin Valley Air Pollution Control District*,[160] complainants are at a competitive disadvantage in the process. Greenaction, the complainant, lacked counsel while the Air District, the recipient of federal funds, enjoyed in-house attorneys and staff resources.

Moreover, the need for a level playing field becomes all the more important given that once the participants have come to agreement, the CRM calls for OCR to determine that the terms are reasonable, though it fails to establish criteria for this determination.[161] Complainants must be provided with the resources to ensure that the terms are reasonable and to monitor compliance. Indeed, the CRM provides that OCR "will not monitor the implementation of the ADR Resolution Agreement, but will respond to complaints by the parties of Resolution Agreement breaches. . . ."[162] In the case of a breach, "if a new complaint is filed, OCR will not address the alleged breach of the agreement" but will "determine whether to investigate the original allegation," which will be considered timely if it is filed "within 180 calendar days of the date of the last alleged act of discrimination or within 60 calendar days of the date the complainant obtains information that a breach occurred, whichever is later."[163] With a procedure

[158] *Id.* at 20.
[159] EPA has recognized the unequal playing field between complainants and recipients in its Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs. *See supra* note 123, referencing this guidance, which urged that EPA "design 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."; 71 Fed. Reg. at 14,214.
[160] *In re San Joaquin Valley Air Pollution Control Dist. & Cal. Energy Comm'n,* EPA File No. 11R-09-R9 (EPA OCR 2009).
[161] CRM at 20.
[162] *Id.*; *see also id.* at 19 (similar standard for ECR).
[163] *Id.*

reliant on timely complaints, the complainants must have the capacity to conduct monitoring activities.

The CRM further provides that OCR *may* engage in an informal resolution process with the recipient of Title VI finding and, in so doing, based on its enforcement discretion, also *may* "engage complainants who want to provide input on potential [informal] resolution issues" and "potential terms of a resolution agreement between OCR and the recipient."[164] We urge OCR to revise the CRM to *require* that OCR engage complainants during any informal resolution process with respect to potential resolution issues and terms, consistent with environmental justice principles.[165] In the only instance where EPA negotiated a voluntary compliance agreement as a result of making preliminary findings of non-compliance in its history, it did so without notifying the complainants until after EPA negotiated the resolution with the recipient. Specifically, in *Angelita C. v. California Department of Pesticide Regulation*, discussed *infra*, EPA issued a Preliminary Finding of Noncompliance without notifying the complainants. EPA thereafter negotiated a settlement agreement in secret with the recipient and ultimately settled on terms that required additional monitoring by the recipient rather than prohibiting the discriminatory conduct.[166] The complainants learned of the Preliminary Finding months later,

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[164] *Id*. at 21.

[165] EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and polices." U.S. EPA, What is Environmental Justice?, http://www3.epa.gov/environmentaljustice/ (last updated Feb. 22, 2016).

Involving complainants in the information resolution process also is consistent with a protocol developed by the Department of Justice's Environmental and Natural Resources Division, which prioritizes reaching out to stakeholders even in non-civil rights cases, as part of its effort to integrate environmental justice principles into its work. *See* U.S. DOJ, Department of Justice Guidance Concerning Environmental Justice 4–12 (2014), *available at* https://www.justice.gov/sites/default/files/ej/pages/attachments/2014/12/19/doj_guidance_concerning_ej.pdf (outlining how DOJ identifies EJ issues, including "[w]hether individuals, certain neighborhoods, or tribal or indigenous populations have had an equal opportunity for meaningful involvement, as provided by law, in governmental decision-making relation to the distribution of environmental benefits or burden"); *see also* U.S. DOJ, 2014 Implementation Progress Report on Environmental Justice, *available at* https://www.justice.gov/sites/default/files/ej/pages/attachments/2015/02/11/2014-implementation-progress-report.pdf ("Community outreach is one of the key principles upon which the environmental justice movement is founded. Outreach gives communities a meaningful opportunity to have input into environmental decision-making that could affect them and help us to better understand their concerns.")

[166] *In re Cal. Dep't of Pesticide Regs.*

when EPA informed the public of its preliminary findings and settlement agreement. Complainants ultimately sued EPA for violations of their due process rights.[167]

Because complainants are the individuals and communities impacted by the challenged actions of the recipient, their input is necessary when any form of resolution is contemplated to ensure that any harm to them is remedied appropriately and their best interests are served. This is particularly critical since an agreement between OCR and the recipient through the informal resolution process, which has been implemented per the terms, *will* result in OCR closing the case file.[168] And following the U.S. Supreme Court's ruling in *Sandoval*, OCR's administrative proceeding essentially is often the only recourse for overburdened complainant communities disparately impacted by environmental harms.[169]

C. Investigation and Voluntary Compliance

The CRM provides, "When during the course of the investigation of a complaint, OCR identifies new compliance concerns involving unrelated issues that were not raised in the complaint or issues under investigation. . .OCR *may* follow up on those issues and address them within the resolution of the original complaint …."[170] The signatories urge that the CRM be revised to *require* OCR to follow up on any issues that it becomes aware of during investigation of the original complaint. This is consistent with OCR's affirmative obligation to collect data and initiate compliance reviews to address environmental justice issues referenced *infra*.[171]

The CRM also provides that "if an [investigative plan (IP)] has been developed, OCR will *not* release the IP to the complainant or the recipient during the pendency of the investigation," and, similarly, that "if an [investigative report (IR)] has been developed, OCR will *not* release the IR to the complainant or the recipient during the pendency of the

[167] *See Garcia v. McCarthy*, 2014 WL 187386 , at *1,
[168] CRM at 22–23.
[169] 532 U.S. at 275 (holding that "[t]here is no private right of action to enforce disparate-impact regulations promulgated under Title VI).
[170] CRM at 24–25 (emphasis added).
[171] 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).

investigation."[172] In light of our other recommendations for greater, not less, transparency in the case resolution process, as discussed *infra*, we recommend that the CRM be revised to provide that OCR make available the IP and IR to complainants and recipients during the investigation. Doing so will allow complainants and the recipient to provide relevant and timely information to investigators and may also facilitate compliance, since the IP and IR should each include information indicating the discrimination at issue, the evidentiary basis for the identified discrimination, and potential legal liability.[173]

Moreover, as with the informal resolution process, the CRM provides that OCR *may* engage in voluntary compliance negotiations with the recipient and that the "OCR will notify the complainant that it intends to negotiate a voluntary compliance agreement."[174] We urge OCR to revise the CRM to *require* that the OCR not merely notify the complainants during the voluntary compliance agreement process, but also engage complainants during that process, both with respect to potential resolution issues *and* terms, to be consistent with environmental justice principles. As discussed above, in the only instance where EPA issued a preliminary finding of non-compliance in its history, it did so without notifying the complainants until after the EPA negotiated a resolution of the complaint with the recipient.[175] Because complainants are the individuals and communities impacted by the challenged actions of the recipient, their input when any form of resolution is contemplated is necessary to ensure that any harm to them individually and systemically is remedied appropriately and their best interests are served. As mentioned *supra*, OCR's Title VI complaint process is often the only means for complainant communities to achieve redress for environmental injustice following the *Sandoval* decision.[176]

D. Compliance Reviews

The CRM provides that OCR *may* initiate post-award compliance reviews and identifies several factors that it will consider in making this determination.[177] We urge OCR to consider during post-award compliance review whether the recipient was alleged to have violated Title VI in any complaint that raised such a claim, even if EPA closed the case based on a jurisdictional

[172] CRM at 25, 26 (emphasis added).
[173] *Id*. at 25–26.
[174] CRM at 28.
[175] *See supra* note 167 and accompanying text.
[176] 532 U.S. at 275.
[177] CRM at 30–31.

defect. In addition, the rejection on jurisdictional grounds of a complaint that otherwise raises cognizable claims under Title VI should, by itself, prompt OCR to conduct a post-award review of recipient.[178]

E. Monitoring of Informal Resolution Agreements and Voluntary Compliance Agreements

The CRM identifies various means by which it will ensure implementation of remedial agreements, including by interviewing recipients and/or knowledgeable persons.[179] Consistent with principles of environmental justice, we urge EPA to revise the CRM to require OCR to engage the complainants, as well as community members impacted by the recipient's activities.

The CRM provides that "OCR *may* address a new compliance issue(s) identified for the first time during monitoring by providing technical assistance or considering the issue(s) as factors to initiate compliance review."[180] We urge OCR to revise the CRM to *require* OCR to investigate any new compliance issues that arise during the monitoring phase based on EPA's affirmative obligation to remedy individual and systemic violations of Title VI and its regulations.

Moreover, the CRM provides that complainants must be notified in writing of any modification to the substance of any informal or voluntary agreement.[181] We urge EPA to modify the CRM to (1) *require* that OCR provide complainants with the opportunity to comment within a reasonable time-period (e.g., 30-60 days) on any proposed substantive modifications to any agreements *prior* to OCR approving them and that, (2) OCR be *required* to consider and provide documentation of how OCR considered a complainant's response to a proposed modification(s) in its decision to approve or disapprove of the modification.

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[178] Signatories urge EPA to clarify legal standards in order to communicate clearly to all stakeholders – to communities regarding the standards that EPA will apply regarding what constitutes compliance with Title VI, and, also, for EPA to provide meaningful notice to recipients when it pursues enforcement for non-compliance. The failure to clarify and finalize legal standards should not, however, be used as an excuse not to move forward with data collection and compliance reviews. There is no logical distinction between EPA's ability to conduct investigations versus compliance reviews: both require a clear understanding of legal standards. Signatories call on EPA to finalize guidance on legal standards, *see supra* notes 7–9, and, also, immediately to fulfill its compliance and enforcement function, including the use of its affirmative authority to collect data and conduct compliance reviews.

[179] *Id*. at 32.

[180] *Id*. at 33 (emphasis added).

[181] *Id*.

F. Initiation of Enforcement Action

The CRM demonstrates that fund termination is a remedy often preceded by other less drastic forms of corrective action.[182] The signatories urge OCR to revise the CRM to make clear that EPA intends to initiate fund termination or referral to DOJ if a recipient fails to come into compliance. This is critical given that in the *first and only time* that the EPA has formally made a *preliminary finding* of discrimination—in a case that took OCR more than ten years to find that a Title VI recipient allowed toxic chemicals to be applied near schools attending by primarily by Latino school children—the recipient *still* was not in jeopardy of losing Title VI funds.[183] EPA should strengthen the language of the Chapter 7 in the CRM to make clear that OCR will, in fact, enforce the law.

G. Appendices

The CRM provides for "aspirational" target timeframes for resolving Title VI complaints. The CRM provides that these targets are based in part on those included in the notice of proposed rulemaking. As signatories, we have provided comments on those proposed rules and, to the extent that they critique goals or targets, they are incorporated herein.

III. RECOMMENDATIONS AND CONCLUSIONS

In sum, the undersigned recommend the following:

Regarding the Notice of Proposed Rulemaking:

- EPA should withdraw its proposal to eliminate deadlines for investigations and to substitute less definitive language requiring only that OCR "promptly review" complaints. The regulatory deadlines established by 40 C.F.R. § 120 provide clear measures of timeliness and create a modicum of accountability, and they should not be removed.

- EPA should withdraw its proposal to remove the requirement that EPA investigate "all complaints." *See* 40 C.F.R. § 120. Greater discretion to reject complaints has the potential to leave communities with no legal recourse to address violations of Title VI

[182] *Id*. at 34–35.
[183] Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d AND 40 C.F.R. Part 7, *In re Cal. Dep't of Pesticide Regs.*, EPA File No. 16R-99-R9 (EPA OCR Apr. 22, 2011), *available at* http://www.ejnet.org/ej/angelitac-complaint.pdf.

and its regulations, and it will both erode confidence in OCR and undermine compliance with Title VI in the environmental context.

- In order to "create a model civil rights program which can nimbly and effectively enforce civil rights statutes in the environmental context,"[184] EPA must finalize guidance on legal standards and clarify that the rebuttable presumption that compliance with standards established under environmental laws is not a defense to a disparate impact claim. We urge EPA to address the need for clear legal standards that are consistent with civil rights law and to address other concerns about EPA's civil rights compliance and enforcement program that communities have consistently raised over the past two decades.[185]

- OCR already has the affirmative authority to initiate compliance review "when it has reason to believe that discrimination may be occurring"[186] and to require compliance information, and it should immediately begin utilizing this authority.

- EPA should remove the language at 40 C.F.R. § 7.85(b) limiting additional information sought by EPA to instances "where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance" and the requirement that EPA accompany requests from recipients for additional information with a written statement setting forth the basis of the belief if these provisions are barriers to requesting information. EPA should similarly remove the language at 40 C.F.R. § 7.110(a) limiting EPA's authority to conduct an on-site review in the pre-award compliance context to instances "when it has reason to believe that discrimination may be occurring in a program or activity" that is the subject of an application for assistance, and at 40 C.F.R. § 7.115(a) limiting EPA's authority to conduct on-site reviews in the post-award context to instances "when it has reason to believe that discrimination may be occurring in such programs or activities." The "reason to believe" requirement should not have been a significant barrier to requiring recipients to submit additional compliance data or to conduct site visits. If, however, this language has posed a high burden for EPA and it is necessary to reaffirm and clarify the agency's existing authority, EPA should finalize this amendment.

- EPA should remove the qualifier "If necessary" from 40 C.F.R. § 7.85(b) to clarify OCR's authority to require recipients to submit data and information relevant to determining compliance.

[184] 80 Fed. Reg. at 77284.
[185] *See* Exs. 1–5 (comments previously submitted to EPA by many of the signatories and other stakeholders).
[186] 40 C.F.R. § 7.115(a).

- EPA should amend 40 C.F.R. §§ 7.110(a) and 7.80 to require that an applicant for EPA financial assistance demonstrate that it has, and is implementing, an effective Title VI compliance program.

- EPA should devote sufficient resources to conduct, at a minimum, triennial post- award compliance reviews of every financial assistance recipient.

- EPA should use the FTA's Circular as a starting point when considering what type of information EPA should require recipients to collect and report, and what information should be included in compliance reports.

Regarding the Case Resolution Manual:

- EPA should remove standing and ripeness as factors for OCR to consider in determining whether to reject a complaint and should clarify that allegations will not be rejected on the basis of a relationship with claims asserted under laws other than Title VI in other forums. (Section 2.2).

- EPA should revise the CRM to provide that if a complainant fails to identify the Title VI recipient(s) that are committing the alleged discrimination or that information is incomplete, EPA must conduct its own analysis to determine whether or not the actor is a recipient of Title VI funds. (Section 2.4).

- EPA should revise the CRM to bring Title VI process into alignment with principles of environmental justice and to ensure that those who are most affected by discriminatory practices will have timely information and meaningful opportunities to provide EPA with information and to inform decision-making. (Sections 3.1, 3.13). This should include providing complainants and recipients with regular updates on the status of case investigations. In the same vein, EPA should revise the CRM to *require* that OCR engage complainants during any informal resolution process or negotiations to develop a voluntary compliance agreement, with respect to both potential resolution issues and terms. (Sections 3.13, 4.8).

- EPA should revise the CRM to clarify that if a complaint creates a reason to believe that there is discrimination, OCR will initiate a compliance review, whether the complaint meets all jurisdictional and other factors or not. (Sections 2.4, 3.4).

- EPA should revise the CRM to ensure that complainants have access to legal and technical resources, including experts, during ADR as are typically available to recipients of federal funding, as well as access to resources for monitoring compliance. (Section 3.11).

- EPA should revise the CRM to require OCR to follow up on any issues of which it becomes aware of during investigation of the original complaint and address them within the resolution of the original complaint. (Section 4.1).

- EPA should revise the CRM to require OCR to engage complainants whose allegations prompted resolutions (whether informal or voluntary), as well community members impacted by the complained harm, during the monitoring phase of a case. (Sections 6.1-6.4). EPA should also modify the CRM to require that OCR provide complainants with the opportunity to comment within a reasonable time period on any proposed substantive modifications to any agreements *prior* to OCR approving such modifications and to consider and provide documentation of how OCR considered a complainant's response to a proposed modification(s) in its decision to approve or reject the modification. (Section 6.3).

- EPA should revise the CRM to require OCR to investigate any new compliance issues that arise during the monitoring phase of the implementation of an agreement, based on EPA's affirmative obligation to remedy individual and systemic harms. (Section 6.3(2)).

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Thank you for this opportunity to comment on these important issues.

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* For identification purposes only

EXHIBIT 2

California Rural Legal Assistance Foundation * California Rural Legal Assistance, Inc. * Center on Race, Poverty & the Environment * The City Project * Clean Water and Air Matter * Communities for a Better Environment * 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 * Marc Brenman * Denny Larson * Gregg P. Macey

March 22, 2013

Via Electronic Mail

Robert Perciasepe
Acting Administrator and Deputy Administrator
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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.[1]

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.[2]

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[1] *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 ("CRPE Comments").

[2] *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*

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.[3]

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."[4] 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.[5] 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."[6] 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.[7]

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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http://www.fta.dot.gov/legislation_law/12349_14792.html; Fed. Transit Admin., U.S. Dep't of Transp., FTA C 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.

[3] 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.

[4] 42 U.S.C. § 2000d.

[5] 42 U.S.C. § 2000d-1.

[6] Civil Rights Div., DOJ, Title VI Legal Manual § VIII (2001), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.php#I.

[7] *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.[8]

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.[9]

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.[10] 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"[11] 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

[8] 40 C.F.R. § 7.35(b), (c) (emphasis added).

[9] 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).

[10] *See* Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 ("*Select Steel*")

[11] 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."[12] 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."[13] 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."[14] 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[15] may "involve analyses that are…simply infeasible,"[16] is planned for "allegations about environmental *health-based* thresholds,"[17] and will be used to focus on cases

[12] *Id.*

[13] *Id.*

[14] *Id.* at 3 (emphasis added).

[15] *See* OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (1998).

[16] Adversity Paper at 3.

[17] *Id.* at 4 (emphasis added).

"representing the *highest environmental and public health risk*."[18] 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."[19] And EPA declares that it has limited ability to gather "credible, reliable" data in the context of a given Title VI complaint.[20]

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.[21] With rare

[18] *Id.* (emphasis added).

[19] *Id.*

[20] *Id.* at 5.

[21] 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 (11th 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 (9th 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.[22] 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.[23]

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.[24] 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.[25]

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[22] *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).

[23] 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.).

[24] *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_2 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.

[25] *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"[26] by not requiring "recipients to address social and economic issues that they are not authorized to address."[27] 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.[28] 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.[29] 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. [30] 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).

[26] 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.").

[27] *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").

[28] CRPE Comments at 47-48.

[29] 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.

[30] 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.[31] 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.[32] It remains unclear how this hierarchy of *existing* data will influence OCR's attempt to use all "readily available and relevant data."[33] 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.[34]

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[31] 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.

[32] *Id.* at 39,679.

[33] *Id.* at 39,660.

[34] *See* Jill Lindsey Harrison, Pesticide Drift and the Pursuit of Environmental Justice 115 (2011) ("defining an issue as belonging tin 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."[35] 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."[36] 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.[37] 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.[38] 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.

[35] Adversity Paper at 4.

[36] *Id.* at 5.

[37] 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 (last updated Dec. 18, 2012).

[38] *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 Envtl. Health 1 (2009).

near permitted facilities.[39] Given these and other capabilities, OCR's claim that it "expects to gather pre-existing technical data rather than generating new data"[40] 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,[41] 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"

[39] 42 U.S.C. § 7412(f)(2)(A).

[40] Adversity Paper at 5.

[41] *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.

if they are lower than those thresholds?[42] 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.[43] 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.[44]

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[42] 65 Fed. Reg.at 39,680.

[43] Adversity Paper at 1 n.1.

[44] 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?']."[45] 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."[46] This statement reveals a lack of institutional memory, which will limit EPA's ability to competently reform its Title VI process.[47] 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.[48]

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."[49] 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."[50] 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

[45] Adversity Paper at 3.

[46] *Id.*

[47] *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.

[48] *See, e.g.,* Nat'l Advisory Council for Envtl. 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 Envtl. 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 Envtl. L. Rep. 11,144 (2000); Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, 31 Envtl. 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).

[49] 65 Fed. Reg. at 39,654.

[50] *Id.*

creates an area of uncertainty.[51] 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."[52] 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.[53] 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.[54] 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."[55] 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.[56] Though the Adversity Paper asserts that the EPA, as well as other federal agencies,

[51] *EPA at 30*, *supra* note 48, at 10,548.

[52] 65 Fed. Reg. at 39,683.

[53] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[54] *Id*. at 560-61.

[55] 40 C.F.R. § 7.120(a).

[56] 5 U.S.C. § 551, *et. seq*.

has discretion in the enforcement of federal statutes, including how it elects to enforce Title VI,[57] 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.[58] 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.[59] 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.[60]

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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[57] Adversity Paper at 2.

[58] *See* Adversity Paper at 2 n.8.

[59] OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 (2011).

[60] *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.[61] 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.[62] *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.[63] 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.[64]

The Complainants sought reconsideration given EPA's conclusory rejection.[65] 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.[66]

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[61] *See* Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Envt. (July 12, 2012,) attached as Exhibit xxxx; Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Envt. (Jan. 25, 2013).

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

[63] *Id*. at 9-16.

[64] *See* Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Envt. at 2 (July 12, 2012).

[65] *See* Letter from Brent Newell, Ctr. on Race, Poverty & the Envt., to Rafael DeLeon, Dir., OCR (Aug. 6, 2012).

[66] Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Envt. 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.[67] 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,[68] 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.[69] 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

[67] 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).

[68] *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.")

[69] 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."[70]

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,[71] 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.

[70] Adversity Paper at 1 n.3.

[71] 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.[72]

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.[73] 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

[72] *Id.* at 1.

[73] *See* 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).

into traditional spheres of state and local control.[74] 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."[75] 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].[76]

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.[77]

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.[78] 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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[74] See, e.g., *United States v. Jefferson Cnty. Bd. Of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd on reh'g*, 380 F.2d 385 (5th Cir. 1967).

[75] *Id.* at 849.

[76] *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, 88th Cong. 2nd Sess. 1964, at 2393.

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

[78] *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.[79] 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.[80]

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.[81] 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.[82]

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[79] *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).

[80] *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.").

[81] *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.

[82] *Id.* at II-1.

Along similar lines, the community development projects overseen by HUD can have multifaceted impacts that are greatly variable across locations.[83] 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

[83] *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[84] and EPA's 2006 Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs.[85]

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."[86] 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. . ." [87] 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

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

[85] 71 Fed. Reg. 14,207 (Mar. 21, 2006).

[86] Complainant Guidance at 1.

[87] *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.[88] 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.[89] 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

[88] *See* Letter from Rafael DeLeon, Dir., OCR, to Christopher Reardon, Acting Dir., Cal. Dep't of Pesticide Regulation (Apr. 22, 2011).

[89] 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.[90]

> 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.[91]

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.[92]

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[90] 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.

[91] EPA, Public Involvement Policy 2-3 (May 2003).

[92] 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.[93]

Second, EPA should provide complainants with more information than only what is "in its case tracking system."[94] The current case tracking system that EPA provides on its web site contains nothing more than file numbers, recipient information, and status (updated quarterly).[95] 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.[96] Consistent with EPA's Public Involvement Policy's directive that the agency make information available to the public using electronic repositories or dockets,[97] such access could be accomplished by establishing an online document repository for every complaint that EPA accepts for investigation.[98]

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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[93] *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.")

[94] Complainant Guidance at 3.

[95] *See* http://www.epa.gov/ocr/docs/extcom/title-vi-open-complaints.pdf

[96] 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 *Angelia 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.

[97] *See* discussion, *supra* note 94, at 27.

[98] 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.[99] 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,[100] 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.[101] 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

[99] *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/*

[100] *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").

[101] 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."[102] 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."[103] EPA further states that it will "consider complainant's input on potential remedies" and "potential terms of a settlement agreement."[104]

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.[105] 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.[106] Recipients of EPA funding will not take the threat of EPA enforcement seriously if EPA's

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[102] Complainant Guidance at 3 & n.12.

[103] *Id.* at 4.

[104] *Id.*

[105] 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.

[106] 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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