

## EPA Issues Draft Guidance Documents Addressing Title VI Discrimination Complaints

EPA recently published for comment two draft guidance documents relating to EPA's "disparate impact" regulations under Title VI of the Civil Rights Act of 1964. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("Draft Recipient Guidance") and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Draft Investigation Guidance"), 65 Fed. Reg. 39,650 (June 27, 2000). According to EPA, the Draft Recipient Guidance was prepared at the request of the states and is intended to provide suggestions to state and local permitting agencies on how to address Title VI concerns. The Draft Investigation Guidance, when finalized, will replace EPA's heavily criticized Title VI Interim Guidance issued in February 1998.

Below we provide a brief overview of some important features of the two draft guidance documents.

### Purpose

As EPA acknowledges, "[s]takeholders raised concerns that the [1998] *Interim Guidance* was vague, lacked clarity and definitions, and failed to provide direction on critical issues." 65 Fed. Reg. at 39,651. Thus, the stated purpose of the Draft Recipient Guidance and the Draft Investigation Guidance is "to clarify for agencies and citizens the compliance requirements of Title VI of the Civil Rights Act . . . [T]he first guidance . . . explains how to effectively deal with the types of concerns that often lead to complaints of discrimination." 65 Fed. Reg. at 39,650.

However, the two documents are written at a high level of generality and are intended to preserve EPA's flexibility to the maximum extent possible. As a result, they leave unresolved many critical issues that would provide certainty and predictability for all stakeholders. In particular, the two guidances fail to define which disparate impacts EPA will view as violations of Title VI by the funding recipients.

The documents are issued as guidance to avoid potentially binding EPA's hands in particular disputes, but EPA has solicited public comments on them. Thus, EPA will arguably have immunized its guidance from judicial challenge based on the failure to provide adequate notice and comment, even if the guidances were to be viewed by a court as legislative rules, rather than procedural rules, interpretive rules, or mere guidance.

### Scope

The two guidance documents do not address intentional discrimination but only EPA's disparate impact regulations, and then only in the context of administrative complaints arising from permit decisions made by state environmental agencies. The Draft Investigation Guidance applies to *any* permit issued, reissued, renewed, or modified by a state regulatory agency receiving federal funds from EPA (although EPA suggests different approaches for permit modifications that result in lower emissions).

As with the February 1998 Interim Guidance, the Draft Investigation Guidance focuses on individual permit actions as triggers for review of state programmatic activities. Unlike the Interim

Guidance, however, the Draft Investigation Guidance in a number of places strongly suggests that individual permit actions, although triggers for evaluation, are *not* the appropriate focus of Title VI investigations. Instead, entire permit programs are the proper focus. For example, the Draft Investigation Guidance states that “[i]t will likely be a rare situation where the permit that triggered the complaint is the sole reason discriminatory effects exist.” 65 Fed. Reg. at 39,669. Similarly, EPA will limit its evaluation of the effects of particular permits to those that are within the recipients’ authority to address. 65 Fed. Reg. at 39,667.

### **Focus**

The main focus of the Draft Investigation Guidance is the process by which EPA will evaluate Title VI administrative complaints. For the most part, it simply summarizes EPA’s regulations at 40 C.F.R. Part 7, such as the basic requirements for filing a complete complaint to avoid EPA’s rejecting the complaint out of hand. These summaries are not controversial, except where EPA suggests positions on legal questions that have not been definitively resolved by the federal courts. The most prominent examples of these are EPA’s stated assumptions that (1) a private right of action exists to enforce violations of Title VI regulations that prohibit discriminatory effects, and (2) exhaustion of administrative remedies need not precede the filing of a judicial complaint. *See* 65 Fed. Reg. at 39,671 & n.77.

Although EPA has provided “jurisdictional criteria” to determine which complaints are sufficiently complete and valid to warrant investigation, these criteria are mostly procedural; the few substantive requirements are minimal. Thus, although the Draft Investigation Guidance does seek to provide for dismissing out-of-hand complaints that do not meet the jurisdictional criteria, those criteria will likely weed out few, if any, complaints.

### **Evaluative Criteria**

The evaluative criteria for finding a disparate impact are buried throughout the two guidances, and thus will require careful analysis. Most of the evaluative criteria are discussed under the heading of “Adverse Disparate Impact Analysis.” 65 Fed. Reg.

at 39,666-82. Significantly, here EPA has not identified any substantial thresholds for the adequacy of information or the sufficiency of evaluative approaches to determine whether disparate impacts exist or whether they reflect discrimination. Instead, EPA simply suggests that evaluations of whether disparate impacts exist should be made using the “best available tools” and data. 65 Fed. Reg. at 39,660. Moreover, EPA provides no useful concrete examples of how it will interpret these terms in reviewing actual complaints.

EPA recognizes that disparate impacts must be “significant” in both a statistical sense and a practical sense before a violation of Title VI will be found. However, EPA dilutes the value of this threshold by stating that the “benchmarks” for initial consideration of adverse effects include any “legal, scientific, or policy” benchmark for taking action under existing environmental statutes, regulations, or policies. 65 Fed. Reg. at 39,680. This apparently means that an adverse impact for evaluation is whatever EPA wishes to investigate.

EPA further suggests that any disparate impacts probably reflect discrimination, 65 Fed. Reg. at 39,682, because “EPA generally would expect the risk . . . for affected and comparison populations to be similar under properly implemented [state] programs . . . .” This “expectation” seems to fly in the face of experience and common sense.

### **Timing**

The Draft Investigation Guidance follows the time frames in EPA’s regulations at 40 C.F.R. Part 7 for processing Title VI administrative complaints. The Investigation Guidance indicates that EPA will “promptly investigate” complete complaints, 65 Fed. Reg. at 39,670, but provides no specific time frames for: (1) initiating investigations or for deferring to the informal resolutions that EPA’s Office of Civil Rights (“OCR”) “will first attempt,” except that OCR will notify recipient of preliminary findings “[w]ithin 180 days from the start of the complaint investigation”; (2) for making “conclu[sions] that there is no discriminatory effect” triggering dismissal of a complaint; (3) for making a preliminary finding of noncompliance if OCR finds a discriminatory effect; and (4) for providing notice

of a preliminary finding of noncompliance to the recipient. 65 Fed. Reg. at 39,670-73.

EPA has reiterated that any complaints must be filed within 180 days of “the alleged discriminatory act” or will be considered untimely and that complaints filed before permits are issued will be dismissed as premature. 65 Fed. Reg. at 39,672. EPA has also indicated that it will dismiss pending administrative complaints if judicial complaints are filed addressing similar issues, and also that it “may” dismiss complaints if judicial decisions address the issues, without attempting to apply res judicata and collateral estoppel principles. 65 Fed. Reg. at 39,673.

EPA will accept comments on the draft guidance documents until August 28, 2000. ‘

## Appeal of EPA’s NSR Compliance Order to TVA Being Considered by EAB on Expedited Basis

On May 4, 2000, the EPA Administrator granted the request of the Tennessee Valley Authority (TVA) for reconsideration of an administrative compliance order issued by EPA as part of its NSR enforcement initiative. The compliance order, which was issued on November 3, 1999, alleges that certain of TVA’s coal-fired electric utility plants violated PSD requirements on various occasions by undertaking major modifications without obtaining PSD permits. Under the expedited schedule for the EAB review proceeding, the EAB is to issue a decision by September 15, 2000, thereby likely making it the first significant judicial or administrative decision addressing claims made as part of the recent NSR enforcement initiative.

The unusual review proceeding arose after EPA issued the administrative compliance order against TVA rather than issuing a notice of violation and subsequently filing a civil enforcement action in federal district court. EPA had concluded that it should pursue the compliance order approach rather than filing a civil action against TVA – another federal agency. EPA and the Department of Justice apparently believe that EPA cannot bring a judicial action against another federal agency because that

would conflict with their interpretation of the “unitary federal executive” doctrine, i.e., the doctrine that all executive branch powers reside in the President and therefore executive branch agencies cannot bring judicial actions against one another to resolve executive branch disputes.

The Administrator’s order granting TVA’s request and a subsequent scheduling order established a unique proceeding for addressing the validity of the compliance order. Rather than the appeal being first considered by an EPA administrative law judge (ALJ) in accordance with normal procedures, the case will be heard directly by the EAB itself. Although discovery is ordinarily not available to parties in cases before the EAB (as opposed to cases before EPA ALJs), the EAB has provided for discovery in this case, albeit it under a greatly truncated schedule. Under the scheduling order, all briefing in the case is to be completed by July 31, and the EAB will issue its final decision in the case by September 15. (TVA has indicated that it disagrees with the special procedures established in the case and preferred that the matter be heard first by an ALJ in accordance with normal Agency administrative review procedures.)

A parallel review proceeding is also taking place in the U.S. Court of Appeals for the Eleventh Circuit. On May 4, TVA filed a petition for review of the same compliance order in that court of appeals pursuant to section 307(b) of the Clean Air Act. A briefing schedule in that case has not yet been established. However, it is expected that EPA will move to dismiss the case based on, among other things, its interpretation of the unitary federal executive doctrine. Moreover, if the Eleventh Circuit case is not dismissed, it is likely that EPA would attempt to rely on any decision supporting EPA’s position issued by the EAB and to make use of portions of the record created in the EAB proceeding. ‘

## EPA Prepares Draft of Title V White Paper on Permit Flexibility

EPA is expected to soon release for public comment a draft guidance document addressing Title V permitting requirements, entitled “White Paper No. 3, Operational Flexibility in Facilities

Subject to Title V Permitting.” EPA officials have indicated that a draft White Paper should be made available for public comment near the end of July and would likely be finalized in August or September.

A preliminary draft of the White Paper, dated May 12, 2000, has been obtained by persons outside the Agency. That preliminary draft, which continues to undergo internal Agency review, states that it is intended to help state and local permitting agencies design Title V permits “that provide sources operational flexibility while meeting all substantive and administrative regulatory requirements.” The White Paper stems in large part from EPA’s experience with its program concerning “pollution prevention in permitting projects” (P4).

The May 12 preliminary draft includes three principal mechanisms for increased flexibility in Title V permits:

- C the use of alternative operating scenarios to accomplish advance approval of certain changes that the source anticipates will occur during the life of the permit
- C the development of “other permit conditions” that can prevent sources from triggering certain applicable requirements (such as applicability thresholds for major NSR)
- C the use of a preauthorization system for expedited permit revisions when additional monitoring requirements for new emissions will be necessary

The preliminary draft also strongly encourages permit writers to include pollution prevention measures in Title V permits where feasible.

Although industry representatives believe that the goal of providing additional operational flexibility is extremely important and that the Agency should be commended for undertaking this effort, many industry representatives are concerned about certain aspects of the May 12 draft. In particular, the draft language is very prescriptive in many instances and as a result may make it difficult for permitting authorities and sources to arrive at permit terms that achieve the operational flexibility goal. Moreover, many industry representatives believe that the draft

guidance should be streamlined so that it can be more easily understood and used by permitting authorities, who otherwise may be less willing to develop permits based upon its principles. ‘

## D.C. Circuit Denies Petitions for Rehearing of NOx SIP Call Decision

On June 22, the D.C. Circuit denied petitions for rehearing filed by state and industry petitioners challenging EPA’s NOx SIP Call rule. The petitioners sought to overturn the March 3, 2000 decision of the three-judge panel largely upholding the validity of the rule. *Michigan v. EPA*, 22 F.3d 1125 (D.C. Cir. March 3, 2000).<sup>1/</sup> In separate orders also issued on June 22, the D.C. Circuit granted EPA’s motion to vacate the stay of the rule that had been issued by the Court in May 1999 and denied a motion for clarification of the panel’s decision filed by certain petitioners. As a result of the Court’s latest actions, the NOx SIP Call rule has now been conclusively upheld by the D.C. Circuit in all major respects and those states subject to the SIP call are obligated to make their SIP submissions to EPA by the end of October 2000.

In response to the petitions for rehearing of the panel’s decision, the Court issued an order denying the request for rehearing before the original three-judge panel and a second order denying the request for rehearing before the entire 12-judge court. No explanation of the Court’s reasoning was provided. In each instance, Judge Sentelle, who had dissented from the panel’s March 3 decision, voted to grant the petitions.

In addressing EPA’s motion to lift the stay, the Court noted that the purpose of the May 1999 stay had been to preserve the status quo and that the stay had been issued with 128 days remaining before the original SIP submission deadline – September 1, 1999. The Court concluded that it would vacate the stay in light of the denial of rehearing and that it would give the states an additional 128 days from the

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1/ The March 3, 2000 decision is discussed in greater detail in the March 2000 *Washington Report* at WR-291.

date of its order to submit new SIP provisions to EPA. As a result, the new deadline is October 30, 2000.

The State of Michigan recently indicated that it plans to seek Supreme Court review of the D.C. Circuit's decision. It is likely that at least some other state and/or industry petitioners will also seek Supreme Court review. '

## EPA Releases Guidance for Implementation of Section 112(r) "General Duty Clause"

On June 5, 2000, EPA's Chemical Emergency Preparedness and Prevention Office (CEPPO) and its Office of Enforcement and Compliance Assurance (OECA) jointly released a guidance document for the implementation of the General Duty Clause of section 112(r)(1) of the Clean Air Act.<sup>2/</sup> The guidance provides facility operators with a comprehensive statement of EPA's expectations regarding what facilities must do to comply with the General Duty Clause. The guidance also provides EPA investigators and enforcement officials with a checklist to use during accident investigations and inspections to determine whether a facility is in compliance with its "general duty."

The General Duty Clause imposes on owners or operators of facilities that produce, process, handle, or store extremely hazardous substances a "general duty" to: (1) identify hazards resulting from releases of such substances; (2) design and maintain a safe facility; and (3) minimize the consequences of accidental releases. Unlike the risk management program in section 112(r)(7), the General Duty Clause applies to any facility where extremely hazardous substances are present. Although the term "extremely hazardous substance" is not defined in the Act or the regulations implementing section 112(r), the guidance cites the Act's legislative history for the interpretation that an

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2/ The guidance document can be found on the Network's website under the category of MACT Standards/Section 112 - Policy and Guidance Documents - Section 112(r)(1).

"extremely hazardous substance" includes any agent which "may as a result of short-term exposures associated with releases to the air cause death, injury or property damage due to its toxicity, reactivity, flammability, volatility, or corrosivity."

### Scope of the General Duty Clause

Section 112(r)(1) specifies that the standard for judging what constitutes a facility's "general duty" is based on the General Duty Clause of the Occupational Safety and Health Act ("OSH Act"). Drawing from caselaw interpreting the General Duty Clause under the OSH Act, the guidance explains that a facility's "general duty" extends only to hazards that are (1) generally recognized by the facility or by the industry, (2) likely to cause harm, and (3) capable of being reduced or eliminated by the facility.

### Checklist of Specific Compliance Obligations

The guidance sets forth a comprehensive checklist for gauging whether a facility has taken adequate steps to comply with the General Duty Clause. As the following examples from the checklist show, EPA's inspectors will closely scrutinize a facility's efforts to comply with each of the three elements of the General Duty Clause:

1. Hazard Identification
  - Did the facility complete a "process hazard analysis" for each production process involving an extremely hazardous substance?
  - Did the facility use the appropriate techniques for hazard assessment?
  - Do the process hazard analyses identify the substance's intrinsic hazards, potential releases, and potential environmental and health impacts?
2. Facility Design, Maintenance and Operation
  - Are processes designed according to specifications and current industry codes?

- Do processes have redundant systems and remote monitoring or control systems?
- Do maintenance practices follow generally accepted engineering practices?
- Are maintenance personnel properly trained?
- Are standard operating procedures for each process current and comprehensive?

### 3. Consequence Minimalization

- Has the facility identified potential release scenarios and their potential impacts on the public and environment?
- Does the facility's emergency response plan identify responsibilities, provide for coordination with local emergency responders?
- Has the facility completed training of its employees and does it routinely conduct emergency response exercises?

While the Agency emphasizes that the guidance document is intended merely to provide guidance for EPA inspectors and investigators, the guidance seems to set forth a prescriptive template for what facilities must do to satisfy the obligations of the General Duty Clause.

## Administrator Denies Petition to Object to Title V Permit

The Administrator of EPA recently denied a petition filed by environmental groups under section 505(b)(2) of the Act requesting that EPA object to a Title V permit issued by the Louisiana Department of Environmental Quality (LDEQ). Petition No. 6-00-1, 65 Fed. Reg. 26,380 (May 9,

2000).<sup>3/</sup> The permit, which was issued pursuant to Louisiana's merged Title V and preconstruction permit program, authorized construction of a new polypropylene unit at Exxon Chemical Americas' facility near Baton Rouge. Section 505(b)(2) allows any person to file a petition requesting that the Administrator exercise her authority under section 505(b)(1) of the Act to object to a Title V permit issued by a state permitting authority. The petitioners contended (1) that the permit violated Title VI of the Civil Rights Act and EPA's environmental justice regulations and (2) that the permit violated the SIP requirement that "reasonable further progress" toward attaining the ozone NAAQS be made.

### Title VI Claims

The environmental groups argued, among other things, that the granting of the permit would have a disparate impact on minority populations within the vicinity of the facility. In response, the Administrator stated that, in order to justify EPA's objection to the permit, the petitioners must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of the Louisiana SIP. The Administrator concluded that "[w]hile there may be authority under the Clean Air Act to consider civil rights issues in some circumstances to justify objection to a Title V permit, Petitioners have not shown that their particular civil rights concerns are grounds under the Clean Air Act for objection to the Exxon Permit." Accordingly, the Administrator denied this portion of the petition. However, the Administrator further noted that the environmental justice claims raised in a separate complaint filed with EPA's Office of Civil Rights are still pending before that office.

### Reasonable Further Progress Claims

The petitioners also maintained that the permit violated the "reasonable further progress" requirement in the Louisiana SIP in that the facility is

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3/ The Administrator's decision can be found on the Network's website under the category of Title V Operating Permits – Policy and Guidance Documents – Decisions on Petitions for Objections.

located in a severe nonattainment area and issuance of the permit allegedly would “hinder” efforts to attain the ozone NAAQS. In response, the Administrator stated that the “reasonable further progress” provision is a planning requirement for states containing nonattainment areas and that it is not an “applicable requirement” for particular sources “within the meaning and purview of the Title V operating permit program.” The Administrator also ruled that, to the extent the petitioners were complaining that emissions offset requirements have not been satisfied, that claim is not well-founded. The Administrator determined that the company had submitted banked emissions reduction credits sufficient to offset the amount of increased emissions resulting from the project at the required 1.2 to 1.0 offset ratio. ‘

## EAB Remands PSD Permit to State of Indiana

In a 112-page opinion, EPA’s Environmental Appeals Board (EAB) remanded a PSD permit authorizing the construction of a new steel mill to the Indiana Department of Environmental Management (IDEM). *In re: Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 and 99-5 (June 22, 2000).<sup>4/</sup> The EAB ruled that the permit was deficient in three respects:

- C the choice of BACT with regard to NOx emissions from the reheat furnace
- C the form of BACT limits for NOx and CO emissions from the electric arc furnace (EAF)
- C the determination of whether lead emissions exceeded the PSD applicability threshold level

The case involved challenges by a labor union and a citizens group to IDEM’s issuance of the permit for the construction of the new steel mill in Whitley County, Indiana. The petitions raised dozens

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4/ Because IDEM does not have an approved PSD program but is instead delegated authority to administer the federal PSD program, the EAB is responsible for hearing appeals involving the issuance of PSD permits in Indiana.

of substantive and procedural objections to the permit. EPA’s Office of Air and Radiation and EPA Region V jointly participated in the case as an *amicus curiae*, supporting the petitioners on certain issues.

### **Choice of BACT for the Reheat Furnace**

The petitioners, supported by EPA, challenged IDEM’s choice of combustion controls as constituting BACT and its technical and economic analysis of the options available. They specifically contended that selective catalytic reduction (SCR) should constitute BACT for NOx emissions from the reheat furnace. The EAB agreed that IDEM’s cost-effectiveness analysis of SCR technology was inadequate. As a result, the EAB remanded the issue to IDEM so that it could conduct a new cost-effectiveness analysis and consider and respond to public comments on its determination.

### **Form of BACT Limits for the EAF**

Petitioners and EPA maintained that both hourly limits and production limits are necessary to ensure that NOx and CO emissions from EAFs are adequately controlled regardless of the production rate or operational conditions at the facility. IDEM had imposed only hourly emission limits in terms of “lb/hr” for the pollutants, rather than either (1) production limits (in “lb/ton” or “lb/MMBtu”) or (2) production rates alone. The EAB found that, of 15 steel mills whose EAF limits were considered in the record, none of the steel mills’ permits had only hourly emissions limits such as those contained in this permit. Accordingly, the EAB concluded that the EAF limits should be remanded to IDEM so that it can explain why the form of the limits it chose should be completely different from the limits of other steel mills.

### **Potential to Emit Lead**

Although IDEM determined that the facility need not install BACT to control lead emissions because the projected lead levels were below the significance level for the PSD program (0.6 ton/yr), the EAB concluded that the determination was based on data not contained in the record. Moreover, the EAB concluded that IDEM had failed to consider the union’s detailed alternative calculation of the facility’s

potential to emit lead. IDEM's determination was remanded so that it could provide a clear rationale for its determination in the record and specifically consider the union's alternative calculation.

The EAB also rejected all the numerous additional claims raised by petitioners, either because it concluded that they had no merit or because they had not been raised in the permit proceeding below. The EAB specifically rejected claims concerning IDEM's determination of BACT for PM emissions from the EAF, its BACT determination for NOx emissions from the EAF, and the BACT decision for PM emissions from the slag handling area. '