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The Select Steel Analytic Shortcut: An Outcome-Predictive Analytic Model Exposes the Flaws of the Select Steel Approach to Title VI

Gina M. Van Detta

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THE *SELECT STEEL* ANALYTIC SHORTCUT: AN OUTCOME-PREDICTIVE ANALYTIC MODEL EXPOSES THE FLAWS OF THE *SELECT STEEL* APPROACH TO TITLE VI

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"Blackacre Corporation" (Blackacre) owns and operates a municipal solid waste landfill (MSWL) in the State of Despair and plans to expand capacity in the permitted section under Subtitle "D" of the Resource Conservation and Recovery Act (RCRA). The facility has an inert phase that only accepts yard debris, a methane gas collection system, and a scrap tire recycling center.

The MSWL is located in a mixed-use industrial and residential area with many other industries, including a dry cleaner with a reported release of chlorinated solvents (dense non-aqueous phase liquids), several gas stations with underground storage tanks that have reported leaks in the form of light non-aqueous phase liquids, and an abandoned copper smelting plant which is currently believed to have contaminated the nearby soils and groundwater with lead, arsenic, mercury, and cadmium.

Blackacre has operated the MSWL for over 30 years and has recently purchased nearby property to expand their existing capacity. During Appendix I groundwater monitoring, contamination was identified in the permitted phases that were closed prior to Subtitle "D." A dual-phase vapor extraction system was installed to pump and treat the contaminated groundwater and volatile compounds in the soils below.

Blackacre has a national pollutant discharge elimination system permit to discharge treated groundwater into the publicly owned wastewater treatment facility and control storm water run-off, and an air quality permit which requires monitoring and reporting of the discharge into the atmosphere of the volatiles removed during remediation. The MSWL is located in an attainment area for criteria pollutants.

A U.S. Census Bureau study identified the following ratios within a three-mile radius around the MSWL: 67% African-American, 20% Hispanic and 10% Caucasian. Ratios in the County are 10% African-American, 5% Hispanic and 70% Caucasian. Elevated blood lead levels have been identified in 46% of the children under the age of 10. Epidemiological studies show an increase cancer risk for adults living in the area for the past 20 years that is 20% higher than the national average.

The State of Despair receives federal funding through RCRA and the local government receives federal funding through the Department of Housing and Urban Development. A grassroots organization called Citizens Against Landfills, Inc. filed a complaint with the Environmental Protection Agency under Title VI of the Civil Rights Act alleging disparate treatment and adverse health effects in 1983.

A review of the merits of the Title VI complaint using an outcome-predictive analytic model called "TOM" indicated the complaint was "not likely to succeed" due to the complex physical and chemical interactions in the surrounding area from the numerous pollution sources.

After 20 years of an ongoing investigation, including consultations with leading experts in the fields of toxicology, engineering, and hydrogeology who used sophisticated analytical and numerical computer models, the EPA dismissed the complaint. The people in the community ask themselves, "Is there justice for environmental racism?"

This paper discusses the keys to leveling the playing field between industry, government, and grassroots public-interest organizations based on a direct examination of seventy-four Title VI complaints and supporting documentation filed with the United States Environmental Protection Agency (EPA) during the years 1993 to 2000 using procedures under the Freedom of Information Act (FOIA). The author concludes that the eradication of environmental racism and other forms of environmental injustice can be achieved only by rethinking, in a broader public policy context, the appropriate role of science in evaluating claims of adverse health effects.

In Section I the significance of environmental racism as a pressing public policy issue is discussed in relation to the scientific obstacles, to

establish the causal link between adverse health effects under Title VI and traditional toxic tort remedies. These obstacles are considered in relation to the history of Title VI and the author's FOIA review with a discussion on recent dismissals and withdrawals of Title VI complaints due to pending litigation.

Section II examines existing legislative and executive remedies to environmental racism with the procedural implementation of Title VI as public policy through the development of interim and revised EPA guidance, and through the only administrative decision the EPA has made interpreting the interim Title VI guidance, *Select Steel*.

Section III discusses the scientific hurdles in proving adverse health effects and evaluates the human health risk assessment processes. In particular, these circumstances are examined where it is particularly difficult for claimants to establish adverse health effects when (1) multiple exposure pathways exist; (2) historical air, soil, or groundwater contamination has been identified; or (3) sufficient technically defensible information is not available to provide a cumulative quantification of risk.

Section IV describes the development of the Title VI Outcome-predictive Model designed by the author, called "TOM," and the potential impact *Select Steel* may have on 50% of the pending ("accepted" and "under review") Title VI complaints.

Section V explores remedies for achieving environmental justice other than the current approach under Title VI. These include reforming the legislative, administrative and political processes for environmental racism. Such alternative remedies must become part of a systemic program of national enforcement to secure Title VI's motivating arsenal of environmental justice.

Section VI concludes that the time has come to place "science" in its appropriate perspective. This perspective is best achieved through a holistic approach to Title VI enforcement that uses science to achieve environmental justice, rather than thwart it.

I. IS THERE JUSTICE FOR ENVIRONMENTAL RACISM?

The significance of environmental racism as a pressing public policy issue has been documented and discussed. The problem has been succinctly described in the environmental law scholarship in terms of economical and racial disparity:

Environmental health hazards are unequally distributed in the United States. Millions of people in minority and low-income communities are subjected to greater levels of pollution than Caucasian and wealthy populations because of their race or socio-economic status. Environmental injustice occurs, in part, because of the exclusion of

these communities in the decisionmaking process[,] as well as the disproportionate location of pollution. Although data exists linking minorities and low-income populations with disproportionate exposure to environmental risks, federal and state legislation has inadequately addressed the problem, and case law interpretation has resulted in inadequate protection.¹

These legal realities perpetuate a history of inequality that has run through many elements of American society, as epitomized by the (sadly) typical scenario with which this article opens. That scenario illustrates what may have already happened, or what is likely to happen, to many of the complaints filed under Title VI of the 1964 Civil Rights Act (Title VI)² and now pending with the EPA's Office of Civil Rights (OCR). Indeed, the road to justice through the OCR is long and tortured, as demonstrated by the nine Title VI complaints pending with the OCR since 1995 or earlier.³

Just as with other forms of racism, only "by lashing out at white supremacy," and recognizing through public policy "the norms and values of racial egalitarianism," can "the [administrative and] judicial complicity of the past be rejected."⁴ This discrimination has continued one-half century later through the placement of businesses and industries in low-income and minority communities where toxic chemicals are released into the environment either directly or indirectly under the guise of environmental permits.

The EPA defines environmental justice as "the fair treatment . . . of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."⁵ Within the concept of environmental justice lies the problem of environmental racism. The theory of environmental justice incorporates the principles of basic fairness to those who are politically less powerful and influential in society and attempts to recalibrate the scales of justice by shifting the burden of environmental protection back to the more educated, wealthy, and capable components of society, regardless of their consciousness of the underlying problem.

1. Michele L. Knorr, *Environmental Injustice: Inequities Between Empirical Data And Federal, State Legislative And Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71, 71-72 (1997) (citations omitted).

2. 42 U.S.C. §§ 2000d *et seq.* (2000).

3. See OCR Files: 01R-94-R6, 02R-94-R6, 03R-94-R6, 08R-94-R4, 05R-94-R6, 01R-94-R2, 01R-94-R5, 02R-95-R6, and 01R-95-R9 (either on file with author through FOIA request, or listed on EPA <http://epa.gov/ocr>).

4. Jeffrey A. Van Detta and Dr. Dan R. Gallipeau, *Judges and Juries: Why are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev.Litig. 505, 507 (2000) (citation omitted).

5. U.S. EPA Environmental Justice Grants web site. <http://es.epa.gov/oeca/main/ej/index.html>.

The following subsections explore the weaknesses with the EPA's implementation of Title VI as identified by the author's research. These subsections include: (a) a historical perspective on Title VI, (b) a discussion on the causation prerequisites under Title VI verses traditional toxic torts, and (c) the author's direct examination of Title VI complaints.

A. *Environmental Racism: A Pervasive Problem That Perpetuates This Country's Troubled Race-Relations History Into the 21st Century.*

The 1964 Civil Rights Act is considered to be part of the Second Reconstruction in the civil rights history of America⁶ and includes Title VII (mandatory non-discrimination in employment and public accommodations) and the Voting Rights Act of 1965.⁷ Although the 1964 Civil Rights Act is considered the cornerstone of the Second Reconstruction,⁸ Title VI has just as important a role. Yet, almost four decades later, achieving environmental justice under Title VI is still an unrealized dream whose achievement necessarily depends on the technicalities of applied science. Just as "racial steering" preserved and encouraged patterns of racial segregation,⁹ science applied to support the activities of state permitting agencies that disparately impact minority and socio-economically disadvantaged groups preserve and encourage discriminatory patterns of pollution allocation. The social problem of environmental racism is well-documented and transcends the underlying science. In 1983, the General Accounting Office (GAO) looked at four hazardous waste landfills in the southeastern region of the United States.¹⁰ The study found that in three of the communities where the landfills were located, between 52% and 90% of the population were African-American and were recognized by the federal government as the first to establish the link between race and the siting of hazardous waste landfills.¹¹

6. The first Reconstruction period (1865-77) involved the federal government's attempt to secure civil rights "for four million black [emancipated] slaves in an effort to stop a great civil war, to end forty years of bitter controversy, and to appease the moral sense of civilization." W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* (Russell & Russell 1995).

7. *Id.*

8. Philip A. Klinkner & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America*, at 341 (1999).

9. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1 (1982); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). See generally Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808 (1976).

10. U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983).

11. Letter to Honorable Carol Browner, Administrator, US EPA, July 16, 1998.

One of the earliest national studies on environmental injustice was published in 1987 by the United Church of Christ Commission for Racial Justice (Commission for Racial Justice) on toxic waste sites and race. The Commission for Racial Justice concluded that communities with two or more hazardous waste facilities had three times the number of minorities as communities without such facilities, and as such established a theory of disparate treatment.¹² Significantly, the disparate treatment was not just in the siting of hazardous waste facilities, it was also in the enforcement actions taken by environmental protection agencies as well. For example, the National Law Journal conducted a study in 1992 of enforcement actions taken against Resource Conservation Recovery Act¹³ (RCRA) permitted facilities and found that the number of enforcement actions was 506% higher in white areas than in non-white areas. Moreover, when enforcement actions were taken in the form of fines, the fines imposed were 46% higher than those imposed in minority communities.¹⁴ Other studies performed in 1992 and 1997 have clearly linked environmental injustice to the relative economic and political disadvantages that continue to face people of color.¹⁵ The racial and socio-economic impact of siting, permitting, and enforcement practices is clear. In the next section, the government's response to this problem is explored and analyzed to reveal its systemic deficiencies for the victims of environmental racism.

B. *Causation More Difficult Under Title VI: No Justice for Environmental Racism*

The science of proving excess adverse health effects (as in traditional toxic tort cases) has progressed to the level of comparisons between predicted safe exposure levels to actual site-specific exposure levels. By contrast, the science behind public policy that defines the remedies for Title VI violations has yet to make the same giant leap forward. Indeed, Title VI has proven to be of little help to those victims of environmental racism who need it the most. Why? The explanation lies in the legal standards for applying science in cases of environmental racism. These standards make it virtually impossible

12. United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites* (1987).

13. 42 U.S.C. §§ 6901-6987, 9001-9010 *et. seq.* (2001).

14. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law: A Special Investigation*, NATIONAL LAW JOURNAL, September 21, 1992.

15. Bryant, Bunyan and Paul Mohai. *Race and the Incidence of Environmental Hazards: A Time for Discourse*, 1992. ENVIRONMENTAL JUSTICE 8-34; Robert D. Bullard. *Unequal Protection: Environmental Justice and Communities of Color*.

for victims to win. Therefore, in environmental racism cases, science has been misused to thwart justice. It has become adverse science, focused on one of science's most elusive applications in the law: proof of causation of adverse health effects. Proving adverse health effects has usually been where many environmental racism actions have met an untimely end.

Environmental racism actions are not merely toxic tort claims with overtones of issues of inequality. Claims of environmental racism differ from traditional toxic tort cases in at least five significant ways: (1) Under traditional toxic tort actions, the plaintiff is usually a citizen whose health has been adversely effected by the operations of a facility and the defendant is usually the owner or operator, or is/has alleged to have contributed to the harm. In environmental racism complaints, by contrast, the EPA is the finder-of-fact for a community organization and the agency that issued the permit which triggered the action is the defendant; (2) in traditional toxic tort actions, the chemicals of concern (COCs) are usually the result of discharge to the soil and subsequent leaching to the groundwater with subsurface migration to receptors. In cases of environmental racism, the COCs are commonly discharged into the air, surface water, and in similar circumstances that are more obvious to the general public in the area; (3) under traditional toxic tort actions, the facility may have been *illegally* operating or disposing of hazardous materials. In environmental racism complaints, the defendant's actions are technically *legal*, although some organizations argue the facility is operating *de facto*: the facility is in compliance with most or all of the relevant permit conditions which supposedly protect the public health and the environment; (4) Under traditional toxic tort actions, 2.8 percent of the cases may reach a jury verdict¹⁶ whereas under Title VI, only one complaint in 124 (0.8 percent) has reached adjudication on the merits, *Select Steel*; and (5) The harm alleged in traditional toxic actions is usually individualized. Environmental racism cases are focused on systemic targeting of segments of the population in which adverse health effects may be area-wide, and involve non-point and cumulative sources from one or more facilities with no specific exposure or causation links.

Arguably most significant is the fifth difference noted above, the systemic diffuse nature of causes in environmental racism claims, which is the key to establishing the causation link for adverse health effects, and can be the key to proving a Title VI claim if all other criteria are equal. Unfortunately, it can be an insurmountable financial and scientific obstacle for groups of people already living below

16. CAROL J. DEFRANCES ET. AL., U.S. Dept. of Justice, *Civil Jury Cases and Verdicts in Large Counties* (Bureau of Justice Statistics Bulletin 1995).

the poverty level, and already behind the learning curve for seeking relief under traditional toxic tort remedies. It is now time to level the playing field between industries, governments and grassroots organizations who seek justice for environmental racism. It is time to take the risk out of adverse science by developing public-policy based alternative approaches to remedying environmental racism.

In the final subsection which follows, an introduction to the author's FOIA examination of Title VI complaints is provided focusing on those complaints with pending litigation in State and/or Federal Courts, and their corresponding outcomes under the Title VI administrative process.

C. *Author's FOIA Analysis of Title VI Complaints Filed with the EPA 1993 – 2000: What is Happening in the Trenches?*

An important perspective on whether the EPA is implementing Title VI consistently with the goal of achieving environmental justice can be obtained through a direct examination of actual Title VI complaints filed with the EPA and an analysis of their disposition. This provides a more immediate and real world perspective on the treatment that a Title VI claimant can expect to receive.¹⁷ Of the 124 environmental racism complaints filed with the EPA since 1983, none have been resolved in favor of the claimant and only forty-four (35%) of the complaints are still pending ("under review" or "accepted") while the majority of the complaints eighty (65%) were rejected or dismissed.¹⁸

In preparing this paper, the author used procedures under the Freedom of Information Act (FOIA) to obtain a representative sampling of complaints filed with the EPA in 74 Title VI proceedings during the period 1993 through 2000.¹⁹ Table 1 included in Appendix A identifies the files reviewed and the author's comments. A more detail examination of these complaints is discussed in Section IV wherein specific evidentiary criteria are evaluated using an analytical Title VI

17. For a history of the administrative complaint process, see Luke W. Cole, Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964, 9 J. ENVTL. L. & LITIG. 309, 315 n. 18 (1994).

18. See generally <http://epa.gov/ocr>. Data current as of February 7, 2002.

19. The author mailed FOIA requests to all ten EPA region offices beginning on October 26, 2000. In each request, the author sought each Title VI complaint filed in or referred to that office, a case summary, decision and investigative report, and decision letter (where appropriate) based on the available listing of Title VI complaints on EPA's OCR web site as of October 4, 2000. All requests were subsequently transferred to OCR's Headquarters in Washington, D.C. for processing. The author modified the request on January 2, 2001 to obtain copies of the seventy-four complaints and supporting documentation for any complaint that was pending, accepted, rejected due to insufficient allegations or unsupported by facts, or already in court litigation (unless dismissed for other reasons). The documents were received in two deliveries, March 19, 2001, and March 27, 2001.

Outcome-predictive Model (“TOM”) to predict the likely success of the pending (“under review” and “accepted”) Title VI complaints.

Four Title VI complaints reviewed by the author had pending litigation in either State or Federal Courts. These include: 13R-99-R6 (*South Valley*), 08R-98-R3 (*Mattaponi Indian Tribe*), 02R-96-R9 (*Mercedo Apts.*), and 10R-97-R9 (*La Causa*).

*South Valley Coalition of Neighborhood Assoc. v. New Mexico Environment Department*²⁰ (*South Valley*) is listed by the EPA as “rejected – permit revoked.”²¹ At first glance, *South Valley* appears to have been resolved in favor of the complainant with the permitting agency revoking the permit. However, the EPA’s decision to reject the complaint due to the supposed revocation of the environmental permit at issue is being appealed by attorney Douglas Meiklejohn representing *South Valley*.²² In a letter to the EPA dated January 23, 2002, he writes:

“ . . . This matter has not been rendered moot by the New Mexico Court of Appeals decision. . . . As was pointed out in my January 16th letter, the Southwest Landfill, Inc. can reapply to Bernalillo County for a zoning permit, and Bernalillo County can grant that permit.

Two other complaints listed as “rejected in litigation” reflect the EPA’s policy on summarily rejecting any complaint wherein the issues before a judicial court are not determinative of environmental racism, but are based on standing²³ or procedural concerns relating to the permitting process itself.²⁴

These rejections may ultimately prove to be detrimental to the claimant in light of the many dismissals due to untimeliness by the EPA as it is not clear what relief, if any, will be granted to the complainants seeking to re-file a Title VI claim when the procedural and/or standing issues have been adjudicated.²⁵

In *Communities for a Better Environment vs. South Coast Air Quality Management District* (“*La Causa*”),²⁶ attorney Luke Cole at the Center on Race, Poverty & The Environment explained that although his organization had withdrawn their initial complaint which would

20. See OCR File: 13R-99-R6.

21. See generally <http://epa.gov/ocr>. Data current as of February 7, 2002.

22. Telephone interview with Douglas Meiklejohn, New Mexico Environmental Law Center, Santa Fe, New Mexico, February 13, 2002. See also *The Atlixco Coalition v. County of Bernalillo*, 1999-NMCA-088, 127 N.M. 549, cert. denied 127 N.M. 389 (1999).

23. Telephone interview with Mike Beach Georgetown University Law Center, February 11, 2002. See OCR File: 8R-98-R3 and *Mattaponi Indian Tribe*, 31 Va.App. at 476-77, 524 S.E.2d at 169-170 and 541 S.E.2d 920.

24. Telephone interview with Paula Forbis, Environmental Health Coalition, February 11, 2002. See also OCR File: 2R-96-R9.

25. The highest category of basis for rejection was for untimeliness — 31%.

26. See OCR File: 10R-97-R9.

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have allowed oil companies to increase toxic emissions in low income minority communities while decreasing emissions overall within a larger geographic area, it was primarily done as a tactical response to the EPA based on their interpretation of the outcome of litigation which did not in fact resolve the environmental racism allegation at the center of the complaint.²⁷

In all four of the complaints discussed above, the EPA rejected or dismissed the complaint without the corresponding State and/or Federal Courts addressing the central environmental racism issue raised. However one complainant, *ONE/CHANE*, discussed in the next paragraph, ultimately resolves the environmental racism issues raised in its complaint through an informal mediation process spearheaded by the local attorneys to the tune of eleven million dollars.

*ONE/CHANE, Inc. v. CRR/DEP*²⁸ (“ONE/CHANE”) was informally resolved resulting in a net input to the affected community of eleven million dollars over a ten year period and significant changes to the permitting process by the Connecticut Department of Environmental Protection. However, the attorney representing ONE/CHANE, Keith Ainsworth wrote:

If I had to ascribe a reason to the success of this action, it was not due to the effectiveness of Title VI as a vehicle for compensation and redress. It simply allows an aggrieved party to complain to the EPA alleging a violation of the principles of environmental justice, while leaving the enforcement of the matter to the agency. It is at this point that the system fails the aggrieved parties. Because the complainant acts merely as a witness, and does not drive the process as in litigation, political and funding considerations play too great a role in determining the outcome. . . The success of ONE/CHANE’s complaint is largely the result of the leveraging of the effects of the complaint, the media and political pressures.²⁹

The frustrations encountered by the complainants discussed above are reflected in the 69 remaining complaints and supporting documentation examined by the author. Overall, the examination of these complaints revealed a remarkable pattern of similarity. The allegations focused extensively on the issue of disparate treatment in state permitting processes that resulted in the location of polluting facilities in predominantly minority and economically disadvantaged communities. Most of the complaints alleged disparate treatment citing statistical evidence in minority populations ranging from a one-half to three

27. Telephone interview with Luke Cole, Center on Race, poverty and the Environment, February 15, 2002.

28. See OCR File: 1R-96-R1.

29. Letter from Keith Ainsworth, attorney with the firm of Evans, Feldman & Boyer, LLC, New Haven, Ct. to Gina M. VanDetta, (February 8, 2002) (on file with author).

mile radius of influence, based on census zip codes and tracts, and even county and statewide disparities. Most of the complaints reviewed failed to provide documentation on corresponding Caucasian communities affected by the same industries and characterized by the same Toxic Release Inventory (TRI) comparison data.

Unfortunately, the complaints appear much weaker in their allegations of adverse health effects, which are generally much vaguer and are obviously deficient, due to the lack of resources to satisfy the rigid elements of the causation prong. Only nine of the thirty-three (27%) accepted complaints failed to clearly allege adverse health effects.³⁰ In comparison, nine of the thirty-one complaints (29%) rejected by the EPA alleged adverse health effects and supplied minimal supporting documentation,³¹ while only three of the six complaints dismissed by the EPA alleged adverse health effects.³² Only sixteen (22%) of the total complaints under Title VI contained independent human health toxicological or risk characterization data that was not based on TRI release data, or proximity to a non-attainment zone.³³

Interestingly, three of the four remaining complaints that failed to clearly allege adverse health effects are still being reviewed.³⁴ Most of the complaints that failed to clearly allege adverse health effects involved issues of compliance to the permitting process, and general complaints of disparate treatment.

Based on the above examination, it is not surprising that as of February 7, 2002, of the 124 total complaints listed on the EPA's web site: 68 were summarily rejected for investigation; 9 were dismissed after acceptance; only 36 were accepted for investigation; 8 remain under review until the EPA decides whether to investigate them; 2 were referred to another federal agency; and 1 was informally resolved.³⁵ This may be as a result of (1) the lack of comparison data to establish disparate treatment, (2) the complainant failing to allege adverse health effects in 71% of the complaints that were rejected and/or dismissed, and/or (3) the complainant failing to provide independent toxicological and risk characterization studies. Existing legislative and

30. See generally OCR Files: 02R-94-R6, 02R-99-R9, 14R-97-R5, 23R-99-R5, 28R-99-R4, 9R-00-R9, 18R-98-R4, 20R-99-R6, and 01R-94-R6.

31. See generally OCR Files: 4R-00-R8, 26R-99-R10, 24R-99-R2, 05R-99-R6, 03R-99-R2, 02R-96-R9, 01R-95-R4, 16R-98-R6, and 07R-94-R4.

32. See generally OCR Files: 05R-98-R5, 01R-96-R1, and 10R-97-R9.

33. See generally OCR Files: 4R-00-R8, 1R-00-R6, 2R-00-R9, 25R-99-R1, 17R-99-R5, 16R-99-R9, 11R-99-R6, 05R-99-R6, 10R-98-R2, 02R-96-R9, 03R-96-R6, 02R-95-R9, 02R-95-R6, 01R-94-R2, 08R-94-R4, and 07R-94-R6.

34. See generally OCR Files: 12R-99-R4, 17R-98-R6, and 5R-00-R6.

35. These results are summarized in more detail at <http://www.epa.gov/ocr.html> "Status Summary Table of EPA Title VI Administrative Complaints (Feb. 7, 2002)".

executive responses to the staggering statistics discussed above will be explored in Section II.

II. EXISTING LEGISLATIVE AND EXECUTIVE REMEDIES FOR ENVIRONMENTAL RACISM

A. *Title VI of the 1964 Civil Rights Act*

When the United States Congress passed the Civil Rights Act of 1964, Title VI prohibited discrimination in all federally funded programs and activities by requiring that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."³⁶ The intent of Title VI is to establish a national policy to ensure that the federal government does not subsidize discrimination.³⁷ Title VI prohibits intentional discrimination.³⁸ However, citing various Supreme Court authorities, the EPA construed Title VI to authorize regulations that prohibit discriminatory *effects* embodying a disparate impact standard without having to prove discriminatory intent.³⁹ Thus, both alleged *intentional* discriminatory actions, as well as discriminatory *effects*, will be investigated.⁴⁰

Facially-neutral policies or practices, such as issuing environmental permits, which create discriminatory effects, violate Title VI, unless the issuing agency can demonstrate two crucial factors. The issuing agency must establish first that there is not a less discriminatory alternative means available to execute the permitting functions and, second, that there is a substantial justification for the greater discriminatory impact created by the current permitting practices."⁴¹ Determining what constitutes an acceptable justification is, of course, based on the facts of each case. Generally, however, an acceptable justification requires proof that the permit is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's mission.⁴² In *International Brotherhood of Teamsters v. United States*,

36. 42 U.S.C. §§ 2000d – 2000d-7 (1994).

37. Test. of Ann E. Goode, Subcomm. on Oversight and Investigations, Comm. on Commerce, U.S. House of Representatives, August 6, 1998.

38. *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983).

39. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Guardians Ass'n*, 463 U.S. at 589-93.

40. 65 Fed. Reg. 124, 39649 – 39701 (June 27, 2000); 65 Fed. Reg. 124, 46916-01.

41. 40 C.F.R. § 7.35 (b-c) (1998); See Department of Justice, Attorney General's Memorandum for Heads of Department and Agencies that Provide Federal Financial Assistance, *The Use of Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964* (July 14, 1994).

42. *Id. Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 593 (D.R.I. 1996).

the Supreme Court suggested disparate impact could only be found when it “cannot be justified by business necessity.”⁴³

Thus under extant case law, the EPA has the necessary analytical tools to police disparate impact in the permitting policies or practices of state agencies. However, as a practical proposition, these tools have resulted in little changes in state permitting practices. This is due to two significant deficiencies in the current Title VI legal scheme. First, proof of causation of adverse health effects, as discussed below, is a nearly insurmountable obstacle. Second, even if a Title VI violation is established and disparate impact cannot be justified, the principal remedy available to the EPA is to exercise the agency’s authority to retract federal funding. However, this draconian remedy has never been imposed, because the agency views that as the “nuclear option,”⁴⁴ which could potentially subject the EPA’s finding to a challenge in federal court⁴⁵ if the recipient challenged the EPA’s finding of noncompliance, or if a hearing before an EPA administrative law judge (ALJ) did not overturn the EPA’s finding. Although these additional procedures have not yet been invoked in a Title VI proceeding, the ultimate disposition of a recipient’s eligibility for continued federal funding could rest with Congress, who is empowered generally to overrule administrative action by legislation.⁴⁶ Given the lobbying efforts of industry organizations and corporate permit applicants, such legislative action is a distinct possibility.

B. *The EPA Promulgates Ineffective Regulations and Interim Guidance*

Nearly 30 years ago, the EPA promulgated regulations in coordination with the Department of Justice (DOJ) that specifically prohibited state and local governments that receive federal funds from discriminating on the basis of race. The EPA also assumed the role of policing these complaints.⁴⁷

Title VI regulations were amended in 1984 to consolidate the EPA’s non-discrimination enforcement responsibilities under Title VI and related laws, and to allow citizens to file administrative complaints with the EPA alleging discriminatory practices.⁴⁸ As of November 30, 2000, 44% of the complaints filed with the EPA under

43. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

44. E-mail from Ms. Carol Leftwich, Project Manager, Environmental Council of the States, October 17, 2000 to author (quoting Ann Goode, Director of the Office of Civil Rights, EPA).

45.

46. *See generally* 65 Fed. Reg. 124 at 39671 (June 27, 2000).

47. 38 Fed. Reg. 17968 (July 5, 1973).

48. 49 Fed. Reg. 1659 (Jan 12, 1984); 40 C.F.R. Part 7 (1998).

Title VI were rejected or dismissed.⁴⁹ Concern over a perceived lack of enforcement led the U.S. Commission on Civil Rights (Commission on Civil Rights) to recommend that the EPA issue guidance to specifically address the complaint process.⁵⁰ In response, the EPA issued *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Interim Guidance) in February 1998. The Interim Guidance provided a framework for the administrative process for filing a Title VI complaint alleging discrimination based on race, color, or national origin, and that resulted from the issuance of an environmental permit to recipients of federal funds.⁵¹ The Interim Guidance placed primary responsibility for administering the process with the OCR.⁵²

The process articulated in the Interim Guidance required that, among other things, the complaint describe the alleged discriminatory acts in writing,⁵³ the complaint be filed within 180 days of the alleged discriminatory act,⁵⁴ and that the EPA notify the complainant and recipient of federal funds of the complaint.⁵⁵ If the EPA accepts the complaint, the Interim Guidance allows the permitting agency (a federal or local government in cases that allege environmental racism) an opportunity to rebut or deny the allegations made in the complaint.⁵⁶ OCR has the responsibility to make preliminary and formal findings of noncompliance when appropriate.⁵⁷

The Interim Guidance articulated a five-step investigative process that is a prerequisite to a formal finding of noncompliance. In that investigative process, the EPA would have to determine whether the

49. See <http://www.epa.gov/ocr/docs/t6stnov2000.pdf>. Last visited March 26, 2001.

50. *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, A Report of the U.S. Commission on Civil Rights (June 1996), 428.

51. Under EPA's implementing regulations, a recipient means, "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. Recipients of federal funds can range from individuals, to states, to even foreign countries. Programs within these entities include solid waste, air and wastewater programs, as well as public education and research and development. EPA's OCR has a searchable database on the Internet to determine by name of applicant, or by applicant type, if the permitting agency has received federal funds. See also www.epa.gov/enviro/html/gics/gics_query.html last visited March 22, 2001.

52. Test. of Ann E. Goode, Subcomm. on Oversight and Investigations, Comm. on Commerce, U.S. House of Representatives, August 6, 1998 at 5. For a general overview of the EPA's role in Title VI enforcement, see Daniel Isaacs, *Environmental Justice and Title VI: The Administrative Remedy*, 18 TEMPLE ENVIRON. L. & TECH. J. 125 (2000) (1999 Symposium: Environmental Justice in Pennsylvania: Equity, Ecology, and Economics).

53. 40 C.F.R. § 7.120(b)(1) (1998).

54. 40 C.F.R. § 7.120(b)(2) (1998).

55. 40 C.F.R. § 7.120(c) (1998).

56. 40 C.F.R. § 7.120(d)(1)(ii) (1998).

57. 40 C.F.R. § 7.115(c)(1)(ii) & (d) (1998).

complainant was a member of the protected class bearing a disproportionate share of the alleged adverse effects (Steps 1 and 2 combined to form disparate treatment), and whether there were adverse health effects (Steps 4 and 5 combined to form adverse impact). Evaluations of disparate treatment and adverse impact were based upon the facts and totality of the circumstances of each case.⁵⁸ However, in actual application under *Select Steel* discussed in the subsequent sections, the EPA employed an analytical shortcut that focused entirely on Steps 4 and 5 — adverse impact, by stating that without such a finding, there could be no disparate treatment in violation of Title VI and the EPA's implementing regulations.⁵⁹ As a result of their analytical shortcut, the EPA combined a finding of disparate treatment and adverse health effect into "disparate adverse impact."⁶⁰

The Interim Guidance did not endorse this analytical shortcut. To the contrary, it called for an initial finding of disparate adverse impact by identifying the affected population that triggered the complaint utilizing a GIS database which contained known releases or impacts proximate to permitted facilities in the area. The disparate treatment analysis employed comparisons between racial or ethnic characteristics of the affected population and of the non-affected populations to determine the significance of the disparate treatment. If an initial finding of disparate adverse treatment was found under the Interim Guidance, the information obtained during the investigation was provided to the complainant and to either the state or local governments in an attempt to resolve the complaint through an informal process of rebuttal, mitigation, and/or justification. Such a shortcut, however, seriously undermined the high hopes for the Interim Guidance that the Commission on Civil Rights had when it requested it. The Interim Guidance was poorly received by the stakeholders, including community groups, environmental justice organizations, state and local governments, industry, and academia involved in local and state environmental protection. The stakeholders' adverse reaction to the Interim Guidance is explored in detail in the following subsection.

C. *Stakeholders' Adverse Reaction to the EPA's Interim Title VI Guidance*

When the EPA released its Interim Guidance, the overwhelming number of objections came from state and local government agencies

58. See *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, U.S. EPA, February 1998 at 8. (Interim Guidance).

59. Letter from Ann Goode to Father Phil Schmitter and Sister Joanne Chiaverini (Oct. 30, 1998) (the letter regards EPA File No. 5R-98-R5 at 3, concerning the complaint filed in the *Select Steel* case) (on file with author).

60. This shortcut unfortunately dehumanizes the inquiry under Title VI and transforms it into a causation question which, given the heavy legal and financial burden already placed on the complainants, is likely to prevent a Title VI violation from being established.

tasked with certifying environmental justice compliance upon receipt of federal funds. The objections were based on (1) the general lack of objective data to determine when and if a disparate adverse impact had occurred, (2) the difficulties in determining cumulative effects, and (3) what phase of a permitting process would trigger an environmental justice study (a new permit, renewals or minor/major permit modifications).

Several groups and coalitions mounted substantial efforts to criticize the Interim Guidance. For example, the Environmental Council of the States (ECOS) was established as a national, non-partisan, non-profit association of state and territorial environmental commissioners. Members include managers and directors of state agencies responsible for the majority of environmental protection contained within Title VI. In a stakeholders' hearing on the Interim Guidance before the Senate Subcommittee on Oversight and Investigations, the ECOS Executive Director testified to the Subcommittee that the EPA was not in touch with its constituents in a myriad of ways.⁶¹ Joining a similar chorus of criticism were groups representing state and local governments, including the Western Governors' Association,⁶² the National Association of Counties⁶³, the National Association of Black County Officials,⁶⁴ and the U.S. Conference of Mayors.⁶⁵ Each of these groups passed resolutions asking the EPA not to utilize the Interim Guidance until the States had an opportunity to provide input. Organizations like the Association of State and Territorial Solid Waste

61. Robert E. Roberts, Executive Director of the Environmental Council of States testifying before the Commerce Commission's Congressional Oversight Committee (Aug. 6, 1998). Mr. Roberts testified as follows: "First, it is vague. It is not clear . . . what a disparate impact is or how you calculate it . . . what geographical area is to be surveyed . . . how a disparate impact might be 'justified' or 'mitigated' . . . or what methodology is used to determine cumulative impact. Second, the Guidance creates confusion within state and local governments in land use and zoning . . . and could arguably, create a federal permitting system for the issuance of an 'environmental justice permit'. Third, time limits . . . are in some instances, inconsistent with existing state administrative procedure . . . will encourage further delays in the issuance of permits . . . [and] a State gets to make its justification argument *after* EPA has found that a disparate impact exists. Fourth, the Guidance may encourage industrialization in 'greenfields' . . . thereby contributing to urban sprawl . . . [and] may discourage development in urban 'brown fields'. Fifth, the Guidance was developed without state involvement . . . [that] spend approximately 75% of all the money spent on environmental protection and perform about 75% of all enforcement actions taken each year."

62. Western Governors' Association, Resolution 98-009 (June 30, 1998).

63. Letter from Joel McTopy, Chair of the National Association of Counties to the EPA (May 4, 1998) (the letter regards the provisions of Title VI) (on file with author).

64. Letter from Commissioner Edna Bell, President of the National Association of Black County Officials to the EPA (Apr. 28, 1998) (the letter regards the provisions of Title VI) (on file with author).

65. U.S. Conference of Mayors, Resolution No. 32, not dated.

Management Officials,⁶⁶ the America Public Works Association,⁶⁷ and the U.S. Chamber of Commerce⁶⁸ have also indicated their support of ECOS' position on withholding Title VI implementation. Similarly, on July 16, 1998, thirty-eight representatives of the Congressional Black Caucus sent a letter to the EPA Administrator Carol Browner alleging the opportunity for state permitting agencies to justify or mitigate Title VI violations was essentially a "gaping loophole" in conflict with federal statutes and Executive Order 12,898.⁶⁹

In a response to these criticisms of the Interim Guidance, the EPA assembled a Title VI Advisory Committee (Title VI Committee) in March 1998. The primary purpose of the Advisory Committee was to provide opportunities for meaningful discourse and exchange between the EPA and concerned stakeholders. These stakeholders included 26 representatives from state, tribal, and local governments, industry, academia, non-governmental organizations, and community groups.⁷⁰ This assembly of stakeholders constituted a new machine of sorts, specifically tasked with making recommendations on how state environmental agencies can address Title VI concerns early in the permitting process. Yet, before the Advisory Committee could make any real progress, the EPA locked itself into a restrictive interpretation focusing on the analytical shortcut to the causation issue — ensuring that no matter when in the permitting process environmental justice issues are raised, the complainants will now likely lose, just as they have under traditional toxic tort actions.

66. Letter from Howard A. Roitman, A.S.T.S.W.M.O. President to Office of Civil Rights, Attention: Title VI Guidance (May 4, 1998) (on file with author).

67. Letter from Robert R. Albee to Honorable Joe Barton, Chair, and Honorable Henry Waxman, Ranking Minority member, Oversight & Investigations Subcomm., Comm. on Commerce, U.S. House of Representatives (Aug. 5, 1998) (on file with author).

68. Letter from Thomas J. Donahue, President and CEO U.S. Chamber of Commerce to The President of the United States, The White House (not dated) (on file with author).

69. Letter to Honorable Carol Browner, Administrator, USEPA (July 16, 1998) at 12. Interestingly, when the Interim Guidance was released, the legal community had relatively little or no comments to provide to the Subcommittee hearings, or the EPA. However, in a letter to EPA Administrator Carol Browner, fourteen Attorneys General addressed their concerns relating to the Due Process Clause of the United States Constitution (Due Process), inconsistencies with existing state statutes of limitations, vagueness in pleading, and the apparent low bar for acceptance of a complaint. The Attorneys General also suggested that the criteria for a "disparate impact" finding be set forth in regulations, not guidance. A senior attorney for the Environmental Defense Fund suggested that the guidance should not be withdrawn, but rather refined, to require states to consider disparate treatment and cumulative effects utilizing an on-line database EDF has generated. Letter to Honorable Carol Browner, Administrator, US EPA, May 6, 1998.

70. Testimony of Ann E. Goode, Director, Office of Civil Rights, U.S. EPA, before the Subcomm. on Oversight and Investigations of the Comm. on Commerce, U.S. House of Representatives, August 6, 1998.

1. The EPA's Sole, Seminal Case: *Select Steel* Conflicts with Interim Guidance

The Title VI Advisory Committee had barely begun its work when the EPA decided its seminal and only case under the Title VI administrative process: *Select Steel*.⁷¹ Select Steel sought a permit for a recycling operation in Genesee Township, Michigan. The Michigan Department of Environmental Quality (MDEQ) issued Permit #579-97 under the Clean Air Act for the proposed steel recycling mini-mill. St. Francis Prayer Center (St. Francis) filed a complaint opposing the issuance of the permit alleging disparate treatment and adverse health effects, which was accepted by the OCR June 1998. Five months later, the EPA, relying substantially on the permitting agency's record, issued a decision dismissing the complaint finding no violation of either Title VI or the EPA's implementing regulations⁷² even though the EPA conceded that "the complainants raised serious and important issues that merited a careful review."⁷³ The hallmark of the decision was its explicit implementation of the analytical shortcut, i.e., the EPA determined that since adverse health effects were not present, a finding as to whether the effects would have been disparate was not necessary.⁷⁴

Disturbingly, the EPA did not make an independent examination of MDEQ's record of decision on adverse health effects. Instead, regardless of the process for and qualifications of the personnel determining adverse health effects, the EPA in *Select Steel* declared its intention to effectively abdicate the causation determination to the state permitting agencies, deciding that "concerns raised during the permitting process not only substantially enhance the probability that state-issued permits will withstand scrutiny under Title VI, but also enables expeditious processing by EPA."⁷⁵ *Select Steel* effectively sounded the death-knell for implementation of the Interim Guidance and the disparate treatment analysis.

71. *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, EPA File No. 5R-98-R5 (*Select Steel*), August 1998.

72. Letter from Ann E. Goode, Director, EPA, to Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center (October 30, 1998) at 6.

73. *Id.*

74. *Id.* at 2.

75. St. Francis appealed MDEQ's decision to the Environmental Appeals Board (EAB). The EAB denied review of the Title VI claim on jurisdictional grounds deferring instead to the EPA. *In re Select Steel Corporation of America*, Docket No. PSD 98-21, Sept. 10, 1998. The EAB further stated that review would not be granted unless the petition identified clear error or an important policy consideration that justified review. U.S. EPA OCR, Investigative Report for Title VI Administrative Complaint No. 5R-98-R5 (*Select Steel Complaint*) at 1. See also 40 C.F.R. § 124.19(a).

D. *Missed Opportunities: The EPA's Revised Title VI Guidance*

Select Steel realized many of the worst fears of stakeholders who opposed the Interim Guidance. Through continued political pressure, stakeholder groups finally obtained a commitment by the EPA to revise the Interim Guidance.⁷⁶ The crucial question hanging in the air was: Would the revised Interim Guidance address the substantive and procedural problems exemplified by *Select Steel*? The answer as explored below is that not only does the Revised Guidance fail to have fully resolved the existing issues, but it also creates new and substantial problems of its own. The Revised Guidance does not even purport to require any initial findings as to disparate treatment, but it does purport to delegate extraordinary control over environmental racism claims to the very state permitting authorities whose decisions are in question, the very states who indicated their reluctance for Title VI to apply to cumulative effects because of their *lack of statutory authority*, thus perpetuating the legacy of *Select Steel*.

1. Overview of the Revisions

The EPA released revisions to the Interim Guidance in the Federal Register July 2000 in two parts: an Investigation Guidance which describes how the EPA will investigate the 60 Title VI complaints currently pending for review or for investigation, and a Recipient Guidance written for the recipients of federal funds which describes how states and other agencies can establish their own environmental justice programs in environmental permitting programs (collectively called "Revised Guidance").

The Recipient Guidance was intended to "offer suggestions to assist state and local recipients in developing approaches and activities that address Title VI concerns"⁷⁷ and is an entirely new innovation keyed to the Investigation Guidance (discussed in Section III). The Investigation Guidance describes how OCR will investigate disparate treatment and adverse health effects. It includes a glossary of terms with cross references to the Interim Guidance, includes tools to use for conducting an adverse impact analysis, and clarifies what type(s) of permits may trigger the Title VI complaint process. More significant for environmental justice purposes are two momentous schemes. First, the "initial finding of disparate impact" by the OCR has been deleted entirely. Second, the Recipient Guidance incorporates a scheme by which state permitting authorities may adopt EPA pre-

76. For an overview of the Revised Guidance, see Bradford C. Mank, the Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion For EPA And A More Difficult Standard For Complainants?, 30 ENVTL. L. REP. 11144 (Dec. 2000).

77. *Id.* at 39,651.

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scribed general procedures called “activities” into state permitting programs,⁷⁸ and thereby earn increasing degrees of deference to causation findings.⁷⁹

E. *Executive Order 12,898 and the Fifth Amendment Prohibit Environmental Racism by Federal Agencies*

Title VI explicitly excludes actions against the federal government.⁸⁰ However, the equal protection guarantee in the Due Process Clause, which prohibits intentional discrimination,⁸¹ as well as Section 2-2 of Executive Order 12,898, signed by President Clinton in 1994, which prohibits discriminatory effects substantially affecting human health, prevent the same type(s) of Title VI discrimination and required that:

[E]ach [f]ederal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority population and low-income populations⁸²

For example, OCR received a complaint dated March 30, 2000, from the Equal Justice Coalition comprised of Florida municipalities of Florida City and Homestead and area coalitions of farm workers and minorities alleging that the Department of Interior violated complainants’ civil rights in the planned future use of the Homestead Air Force Base.⁸³ The EPA rejected the complaint on October 30, 2000, citing jurisdictional grounds, and referred the complaint to the EPA’s Office of Environmental Justice for “review and consideration” under the National Environmental Policy Act of 1969.

F. *The National Environmental Policy Act of 1969*

The National Environmental Policy Act (NEPA) of 1969 requires that information be obtained about the environmental effects of and alternatives to potential government actions, and that those effects be reported in an Environmental Impact Statement (EIS).⁸⁴ When the requirements of NEPA and that of another statute are “functionally

78. 65 Fed. Reg. 39649, 39658 (June 27, 2000).

79. *Id.* at 39,663 - 4.

80. *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 191 (4th Cir. 1999).

81. U.S. CONST. amend. V. *See also* *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

82. *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population*, Exec. Order No. 12, 898, 59 Fed Reg. 7629 (1994).

83. OCR File: 8R-00-R4. Incorrectly listed as “pending” on OCR web site. Copies of complaint and supporting documents on file with author through FOIA request.

84. 42 U.S.C. § 4331 (2001).

equivalent,” the agency may be excused from performing an EIS.⁸⁵ Because NEPA only provides for the consideration of adverse environmental effects, and does not mandate actions, citizens do not have standing to bring suit;⁸⁶ therefore, claims must be brought under the procedures of the Administrative Procedure Act.⁸⁷

Under NEPA, adverse effects can include both individual and cumulative effects of the action itself.⁸⁸ Although the Revised Title VI Guidance suggests that the EPA may also consider other socio-economic effects in general, adverse effects under the NEPA specifically include ecological, aesthetic, historic, cultural, economic, social, in addition to health effects, but must not be based on pure speculation.⁸⁹ The EPA issued *Final Guidance for Incorporating Environmental Justice Concerns in NEPA Compliance Analyses*, April 1998, which will likely be used to investigate any environmental justice claim made against the federal government under Executive Order 12,898.

G. *State Environmental Justice and Environmental Policy Acts*

A majority of States have enacted Environmental Justice or State Environmental Policy Acts where both private and government actions may trigger an EIS.⁹⁰ The provisions, and judicial interpretation of those provisions, demonstrate a variety of approaches. Maryland's Environmental Policy Act focuses on cooperation with “concerned public and private organizations and individuals, in a manner calculated to protect, preserve, and enhance the environment.”⁹¹ Louisiana's State Constitution requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impact has been minimized or avoided as much as possible consistent with the public welfare.⁹² A California Superior Court, applying the California Environmental Quality Act, held that the impact report inaccurately reasoned that the air quality impacts would be insignificant, and that all relevant public notice requirements had to be in Spanish.⁹³ The New York City Charter requires a “fair distribution among communities of the burdens and

85. *Western Nebraska Resources Council v. EPA*, 943 F.2d 867, 871 (8th Cir. 1991).

86. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, (4th Cir. 1999).

87. 5 U.S.C. § 551 *et seq.*

88. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

89. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

90. *Knorr supra* note 1, at 102 - 103.

91. Maryland Environmental Policy Act, Md. Code Ann., Natural Resources § 1-302(e) (2001).

92. *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152, 1157 (La. 1984).

93. *El Pueblo Para El Aire y Agua Limpio v. County of Kings*, 22 Env'tl. L. Rep. 20357 (Cal. Super. Ct.1991).

benefits associated with city facilities. . .with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites."⁹⁴ North Carolina's Environmental Justice Act requires that the permitting agency consider alternatives if a new landfill is proposed within one mile of an existing one.⁹⁵

Many of the controversies in state courts surrounding environmental justice issues are reflected in the complaints filed with the OCR, and raise additional issues such as: what constitutes a permit; when zoning laws are inequitable; and how the State defines disparate treatment.⁹⁶ For example, EPA file no. 08R-98-R3 was rejected by the OCR due to pending litigation in the Virginia Court of Appeals where the Mattaponi Indian Tribe Counsel sought to define "adverse impact" as culturally biased, an allegation which the Tribe bases on an Environmental Impact study performed under the NEPA. Although the effect of remedying environmental racism will be felt at the state as well as local levels, any guidance and precedent used in such cases should be provided by the OCR, in its capacity to equitably distribute and manage our nation's resources and provide environmental equity to all.

H. *Common Law Remedies for Environmental Racism*

Traditional tort causes of action would at first appear to be a potential alternative to the administrative process under Title VI.⁹⁷ Citizens who believe they have been discriminated against under Title VI may challenge a recipient's alleged discriminatory act in state courts without exhausting their Title VI administrative remedies.⁹⁸ The EPA has not been endowed with primary jurisdiction by Congress to determine conclusively whether a permitted activity causes tort recoverable injuries under common law theories of recovery. However, this conclusion has not been tested yet directly under Title VI (as discussed in Section IV, *infra*). In any event, the difficult causation issues involving traditional toxic remedies would appear to minimize the chances of a finding in favor of the plaintiff.

94. *Silver v. Mayor of New York*, 601 N.Y.S.2d 366, 369 (N.Y. 1983).

95. N.C.G.S. 153A-136(c) (2001). *See also*, *Franks v. NC DENR* (No. 99 HER 0344) Pre-hearing statement.

96. *See generally* OCR File No: 7R-00-R2, 6R-00-R2, 1R-00-R6, 25R-99-R1, and 12R-99-R4.

97. *See, e.g.*, OCR File No. 1R-00-R6 (Title VI complainants seeking class certification in a Texas state court filed complaint alleging claims for negligence, gross negligence, nuisance, unjust enrichment, strict liability, intentional infliction of emotional distress, and "toxic assault and battery").

98. *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), *cert. denied*, 528 U.S. 1046 (1999). This case appears to have been overruled by *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001).

I. *Using EPA Causation Findings as Evidence in Common Law Court Litigation*

While the findings of the EPA on the issue of adverse health effects might be considered probative and admissible under the principles of Federal Rules of Evidence (FRE) 401, they would, at best, be merely some evidence of causation to be considered with a myriad of other facts, expert testimony, and possible theories for alternative theories of causation.⁹⁹ In the long run, such EPA determinations would probably have relatively little impact on the outcome of traditional tort litigation initiated by individual victims of environmental injustice.¹⁰⁰

J. *Common Law Remedies in Nuisance, Negligence, and Strict Liability Face Similar Title VI Causation Obstacles*

The procedural devices applied to reach judicial resolution of complex causation issues in toxic tort cases are likely to produce questionable results. For example, there is no reason to believe that a jury verdict would provide a better resolution of the scientific issues, and frequently conflicting scientific opinions, that characterize the causation issue. The jury would appear to be a fairly poor mechanism for resolving complex causation issues. Jury decision making is characterized by its animosity and outcome orientation, which is hardly sufficient, and in fact inferior to the EPA process, where the issues involve the weighing of scientific data, evolving scientific theories, possibly competing methodologies, and often conflicting expert opinions regarding factors such as toxicity, fate-and-transport modeling, and exposure parameters. For this analysis to be meaningful it cannot simply be expressed in a jury verdict that merely finds a defendant "liable" or "not liable" for causing the alleged harm. Even special interrogatories to a jury cannot do justice to a legal analysis that does not and cannot supply the relevant scientific background and content that is crucial to attributing those factors to a specific case. The best that any jury verdict can do is to pick between two simplified, polarized views of a body of science that may in reality require a spectrum of subtle interpretation and implication. Such a condensation of complicated scientific issues cannot be expected in the long run to serve the rights of those who seek justice for environmental racism. Moreover, environmental justice is poorly served by the yes/no nature of a jury verdict,

99. See Fed. R. Evid. 401; LARRY L. TEPLY AND RALPH U. WHITTEN, CIVIL PROCEDURE 915-930 (Editor, Publisher 2000) ; Restatement Second of Judgments § 27 (1982).

100. Under Fed. Rule Evid. 702, as interpreted by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), it would appear to be questionable whether the EPA's determination on the causation issue would even be accorded a status of an expert opinion.

which does not allow for compromising between, harmonizing, or blending scientific opinions. Nor is a jury competent to do so.¹⁰¹ State common law claims have not provided a useful vehicle for remedying environmental injustice. Indeed, none of the existing federal or state-level procedures for bringing claims of environmental injustice are adequate to provide the full measure of remedy to which the victims of environmental racism are entitled. Other innovative approaches must be developed and adopted. Significant examples of these new approaches are discussed in the Section IV.

III. THE SCIENTIFIC HURDLE TO PROVING A TITLE VI CLAIM

The Investigation Guidance perpetuates the problem of causation. The EPA's Investigation Guidance contains "non-binding policy statements that do not directly affect the rights and responsibilities of state and local recipients."¹⁰² The EPA issued an internal document that describes how the OCR will investigate a Title VI complaint. The Investigation Guidance describes how the EPA will process a discriminatory effects allegation by allowing an investigation to proceed in a fashion similar "to a judicial process in which plaintiffs and defendants must each present information and arguments supporting a particular finding."¹⁰³

The defendant in a Title VI claim is the agency issuing the environmental permit. Although the EPA is charged with assuring compliance with Title VI, and cannot delegate its responsibility to its recipients, or grant a recipient's request that the EPA defer to a recipient's own assessment that it has not violated Title VI, it can grant substantial deference to the permitting agency's decision thereby relying on the evidentiary record developed by the defendant in support of issuing the permit.¹⁰⁴ This may be a direct result of the scientific complexity and resources needed to establish a Title VI claim; however, it acts as a double-edged sword to the claimant. First, the af-

101. See Jeffrey A. Van Datta, *Typhoid Mary Meets the ADA: A Case Study of the Direct Threat Standard Under the American with Disabilities Act*, 22 HARV. J. L. & PUB. POL'Y 849, 937-940 (1999); JEROME FRANK, *LAW AND THE MODERN MIND* 180-181 (Editor, Publisher 1930); G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 57 (Editor, Publisher 1978).

102. 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 Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,651 (June 27, 2000)[hereinafter Draft Recipient Guidance].

103. *Id.* at 39669, 39674. Actual sentence is "The process of investigating a Title VI complaint is NOT analogous to a judicial process in which plaintiffs and defendants must each present information and arguments supporting a particular finding." Perhaps the writers inadvertently put the "not" in, it would appear to make more sense as the author interpreted in this article.

104. *Id.* at 39675.

affected community has a substantial scientific hurdle to overcome proving adverse health effects. Second, if they are unable to obtain the needed resources to overcome the hurdle the Revised Guidance has placed before them, the EPA may substantially rely on the same permitting agency, the defendant, to determine whether adverse health effects are present.

The EPA can recognize evidence such as data and analyses to support a particular finding that adverse disparate impact does or does not exist by according the data “due weight.”¹⁰⁵ However, as stated in the Investigation Guidance, the EPA has not explained at this point what processes it will accept under “due weight”, other than outlining public participation criteria in Section II.C of the Recipient Guidance.¹⁰⁶ Five broad “elements” of discussion are covered in the EPA’s requirement for “due weight”. These elements include (1) the relevance of the evidence to the alleged impact; (2) validity of the methodologies; (3) completeness; (4) degree of consistency; and (5) uncertainties.

The five elements essentially combine to provide a quantitative estimate of actual risk.¹⁰⁷ If these very broad elements are met, it is likely that the EPA will rely on the evidence in its decision.¹⁰⁸ However, reliance on five key “elements” may not provide consistently normative risk estimations along a spectrum of cases. This effect arises in part because the permitting agency’s risk assessment methodologies and reasonable safe exposure levels may vary from state-to-state, may be program specific (RCRA or CERCLA), or approach specific (RAGS¹⁰⁹ or ASTM¹¹⁰). If the EPA accepts a higher excess carcinogenic risk (for example 1 in 10^{-5} as it did in *Select Steel*, as opposed to 1 in 10^{-6} commonly used in other states), ultimately, these same higher levels should be placed on the rest of society, effectively lowering environmental regulation across the nation.

A. *The Human Health Risk Assessment Process: Is It Risky Business?*

As with *Select Steel*, the first prong of proving a Title VI violation (Steps 1 and 2 combined) requires the analysis of adverse health effects calculated as part of a detailed human health risk assessment

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. ENVIRONMENTAL PROTECTION AGENCY, RISK ASSESSMENT GUIDANCE FOR SUPERFUND, VOLUME I: HUMAN HEALTH EVALUATION DOCUMENTS (1989).

110. AMERICAN STANDARD TESTING MATERIALS E-2081 STANDARD GUIDE FOR RISK-BASED CORRECTIVE ACTION (2000).

characterizing the nature and extent of exposure to toxic chemicals, and the resulting excess carcinogenic or non-carcinogenic risk. A human health risk assessment involves four key steps: data collection and evaluation, exposure assessment, toxicological assessment, and risk characterization.

Actual risk can be calculated in terms of each chemical of concern for each exposure pathway (ingestion, dermal contact, and/or inhalation). For indirect exposure pathways, the calculations use site-specific point-of-exposure concentrations developed through fate-and-transport models, while direct exposure pathways represent maximum exposure levels. Both indirect and direct exposure pathways require calculation of exposure concentrations for each exposure medium (soil, air, and/or groundwater). The calculation of exposure concentrations considers different exposure scenarios (residential, commercial, or industrial) that define for the risk assessor the specific exposure parameters to be used (rate, frequency, and duration). After the above exposure parameters have been identified, the quantification of risk for carcinogenic and non-carcinogenic effects, and the comparison of these values to predicted reasonable safe exposure levels developed by toxicologists and epidemiologists, must be done.

Risk characterization can be broken down into a simple equation involving two components as follows: risk equals exposure multiplied by toxicity. If either exposure or toxicity is zero, then risk is zero. Exposure can be relatively easy to characterize and may not require the consultation of experts when few environmental permits are present in a geographic area, and/or sophisticated fate-and-transport models are not required. Toxicity links the exposure to causation: without causation, there can be no adverse health effects, and under *Select Steel*, without adverse health effects, there can be no disparate treatment analysis, and there can be no environmental injustice.

B. *A Comprehensive Analysis of Risk Must Include a Cumulative Analysis of Risk*

Once individual quantification of risk estimates are developed, the EPA, along with most, if not all other states, requires as part of any standard risk assessment that these estimates be evaluated in terms of multiple exposure pathways, multiple chemicals of concern, and multiple carcinogenic and non-carcinogenic effects. However, a technically defensible cumulative analysis of risk may not be possible in areas where multiple exposure exists from multiple environmental permits, where existing toxins are already identified in the exposed population, or where increased cancer rates have been previously identified. Similarly, in areas where non-attainment zones are defined with many pol-

lution sources, including non-point sources, it may be impossible to define individual permit contributions. Additionally, if a new facility permit triggers a Title VI complaint, everyone is essentially writing on a blank slate. There would be no history of a release, no exposure, and therefore, no risk.

Although site-specific geological and hydrogeological data vary based on location, chemical properties as well as exposure parameters and toxicological information can be obtained from many government sources.¹¹¹

Toxicological and epidemiological studies performed primarily by the EPA have established reasonable safe exposure levels, under which no adverse health effects can be identified. These predicted safe exposure levels are compared to actual exposure levels in the risk characterization step of a risk assessment, with acceptable limits for excess cancer occurrences over a 70-year period set from 1.0×10^{-4} (one in 100,000) through 1.0×10^{-6} (one in 1,000,000). Non-carcinogenic health limits for acute exposure to toxic chemicals have also been established in the form of hazard quotients. A hazard quotient is a ratio of the predicted safe level to the actual exposure level. A hazard quotient less than 1.0 is generally accepted to be safe. However, these carcinogenic and non-carcinogenic "limits" vary from state to state, may be program specific, and are predominately based on current and future land use and zoning criteria, and may not be protective of sensitive populations.¹¹²

C. *Significant Digits. . . Does It All Add Up?*

A cumulative quantification of actual risk must include the following quasi-objective scientific criteria:

1. There was a *release* of toxic chemicals. If a release was not reported, then actual data would have to be collected and compared to screening levels commonly used in many states.

111. For information on toxicological properties see: Integrated Risk Information Service (IRIS), Health Effects Assessment Summary Tables (HEAST), Agency for Toxic Substances and Disease Registry, and National Institute of Environmental Health Sciences at <http://www.niehs.nih.gov>. National Toxicology Program Chemical and Safety Data provides information on chemicals and the health hazards associated with each, and can be found at http://ehis.niehs.nih.gov/ntp/docs/chem_hs.html. HazDat database contains information on hazardous waste from Superfund sites and the effects on the surrounding community at <http://www.atsdr.cdc.gov/hazdat.html>. National Center for Health Statistics contains data on various health statistics at <http://www.cdc.gov/nchs>. State and Local Health Departments can be found at <http://www.cdc.gov/other.htm>.

112. Gina M. Van Detta, P.G. and Dr. Yo Sumartojo, *Risk-Based Approaches to Closure in Georgia, Kentucky, Ohio, and West Virginia*, Atlanta Geological Society Technical Presentation, January 25, 2001.

2. The chemicals released either originated from, or can be traced to, the permit which triggered the Title VI complaint.

3. The community was *exposed* to the toxic chemicals using a site conceptual exposure model to document the route(s) of exposure.

4. The exposure was *greater* than predicted reasonable or maximum exposure levels based on state and/or program specific criteria.

5. The resulting exposure which was greater than predicted reasonable or maximum exposure levels actually *caused* increased cancer rates, or resulted in acute non-carcinogenic effects observable in a given community.

Establishing these criteria above will require, at a minimum, the collection and/or review of site-specific and community-wide chemical, meteorological, geological, hydrogeological and toxicological data using a battery of professionals in the fields of chemistry, engineering, geology, hydrogeology, toxicology, and often GIS. Finally, as discussed above, the EPA brings in the five subjective "elements" to evaluate the adverse health effects prong of the Title VI complaint:

6. *Evidence to the alleged impact.* Under this element, the EPA could consider both positive evidence (Items #1 through #5 above) as well as negative evidence (i.e., whether preexisting conditions or elevated toxins were observed in the community prior to issuance of the environmental permit).

7. *The validity of the methodology chosen* to quantify the risk assessment (i.e., whether standard procedures were used as described by the EPA in RAGS, or by the ASTM in RBCA).

8. *Completeness* (i.e., whether all the items above provided for a complete, or cumulative, analysis of risk). Under this category, other contributing sources, including non-point discharges and/or non-attainment zones, for the toxic chemicals which were reported or known to exist, could interfere with the *completeness* of a risk assessment, and therefore the EPA could find the risk assessment incomplete.

9. *Degree of consistency.* This element is vague, but could be interpreted to include consistency with other studies and/or risk assessments submitted by competing interests.

10. An *uncertainty analysis* which could include a probabilistic analysis of uncertainty which uses statistics to show ranges of probability based on varying exposure and/or intake rates. This is usually performed after an identified risk level is exceeded using either reasonable or maximum exposure parameters. When large data gaps are identified due to complex and long-standing environmental degradation (as in many Title VI claims) this element could be used to find a risk assessment insufficient to establish causation, or link the observable effects to the permit which triggered the Title VI complaint

As discussed in the preceding paragraphs, the risk assessment process can involve multiple chemicals that may target the same organ(s), or have cumulative effects increasing the excess risk of cancer for known carcinogens. Multiple pathways for each chemical must also be evaluated. Some chemicals may also degrade into chemicals of varying toxicity during transport from the original release through a medium such as soil, air, or groundwater, to the point-of-exposure. The fate-and-transport of the chemicals through these media require sophisticated analytical and sometimes numerical computer modeling to determine the fate of the chemical as it moves through the medium. All of these factors complicate determining the relative contribution by a single facility, or emission source within the facility, as some facilities have more than one environmental permit.

The substantial factor test will be explored in the next subsection in relation to these scientific obstacles that were created within communities where longstanding practices of environmental degradation have existed. The difficulty of linking any given permit action which may trigger a Title VI complaint, with specific adverse health effects, increases with (1) an increase in the number of environmental discharges in the area, (2) the complexity of the fate-and-transport of the toxic chemicals, and (3) the existence of any pre-existing conditions observed in the community prior to permit issuance.

D. *The Substantial Factor Test*

A claimant in traditional toxic tort litigation can establish the defendant's liability if s/he can show the defendant was a substantial factor in causing the alleged harm. The D.C. Court of Appeals applied the substantial factor test and granted summary judgment for defendants when the plaintiff could not prove that their products were a "substantial factor" in causing the alleged injuries. Interestingly, the Court also indicated that in some cases where the inference is so tenuous that it rests merely upon speculation and conjecture, the Court may withdraw the case from a jury.¹¹³ A claimant who files a Title VI claim faces the same scientific and legal obstacles, as in traditional toxic tort cases, however, the bar is raised when the issues involve such mere speculation and conjecture, and must be filed within 180 days of the alleged harm.

113. See generally *Claytor v. Owens-Corning Fiberglass Corporation*, 662 A. 2d 1374 (D.C. 1995).

E. *Defining Disparate Treatment: "Who's on First?"*

Under the Investigation Guidance, a disparity analysis is performed only *after* an impact analysis, and only *after* that impact analysis is shown to be adverse.¹¹⁴ Only *then* does the EPA recommend methods to look at the community as a whole. Data on sensitive populations can be obtained from the many government and private sources.¹¹⁵ A disparity analysis can be conducted using comparisons of race, color, or national origins of two populations, and the level of risk experienced by each population and/or the probability of different demographic groups in a surrounding jurisdiction.¹¹⁶

Documenting disparate treatment is the easier of the two key prongs in Title VI to prove. The U.S. Supreme Court in *Casteneda* endorsed the binomial test as a highly useful tool for measuring disparate impact based on statistical probabilities. Deviations from expected results of two standard deviations or more provide substantial evidence of disparate impact discrimination.¹¹⁷ Measures of demographic disparity between an affected population and a comparison population would need to achieve a statistical significance of at least two to three standard deviations.¹¹⁸ If disparate treatment can be shown, then the next step would be to document the degree of the disparity. This process involves considering the nature of the decision being made (e.g., allocation of resources, air/water discharge permit, municipal solid waste landfill permit) to the quality of the data used for the disparity analysis.¹¹⁹

IV. EVALUATING EVIDENTIARY STANDARDS NEEDED TO PROVE ADVERSE HEALTH EFFECTS USING A TITLE VI OUTCOME-PREDICTIVE MODEL CALLED "TOM"

Sections I, II, and III focused on the historical perspective of environmental racism, existing ineffective legislative and executive responses as shown through the author's FOIA analysis, as well as through the staggering statistics released by the EPA, and the scien-

114. Draft Recipient Guidance, 65 Fed. Reg. 39650, 39660 (June 27, 2000).

115. U.S. Census Bureau, American Fact Finder contains information on age, distribution, education, and ethnicity in geographical areas at <http://factfinder.census.gov>. U.S.EPA Sociodemographic data can be used to identify Potentially Highly Exposed Populations at <http://www.epa.gov/ncea/sociodeg.htm>.

116. In re Louisiana Department of Environmental Quality/Permit for Proposed Shintech Facility (Shintech Demographic Information, April 1998). EPA OCR File No. 04R-97-R6 (accepted August 1997). Unsure of source or cite format.

117. *Casteneda v. Partida*, 428 U.S. 1 (1978).

118. Draft Recipient Guidance, 65 Fed. Reg. at 39661.

119. *Id.* at 39662.

tific and legal hurdles to proving adverse health effects administratively and judicially by effectively looking at the past implementation of Title VI. In order to predict the future disposition of a Title VI complaint, the author developed a Title VI Outcome-predictive Model called "TOM."¹²⁰

TOM can evaluate the relative strengths and weaknesses of a Title VI complaint on both scientific and policy criteria by dissecting each complaint into the evidentiary components needed to prove a Title VI claim.¹²¹ For each of the 74 complaints and supporting documentation reviewed by the author, a numerical value was assigned to various criteria under both policy and scientific areas. Any criterion that could theoretically be proven using scientific methods was designated as a scientific criterion. A criterion that could not be established without a substantial financial hardship to the claimant, or one that required speculation and large degrees of uncertainties, was designated as a policy criterion.

Table 2 included in Appendix A describes the descriptive scores for all Title VI complaints reviewed by the author. The following table lists the descriptive elements used and the criteria for assigning points.

The process for evaluating each descriptive element is similar to the review by EPA experts according permitting agencies "due weight" in the five elements discussed previously and is described in the following table.¹²²

120. Analytical models are simply mathematical expressions used to predict some outcome. Various forms of analytical models are commonly used in the environmental regulatory field to predict safe exposure levels, screen facilities, or predict groundwater-flow and contaminant transport properties.

121. In exchange for a fee waiver for obtaining copies of the complaints and supporting materials, author agreed to provide EPA with a copy of the Access database and manuscript developed from the analysis prior to publication. This agreement was limited to providing EPA with the database in general, not specifically as to which fields to track, or how to analyze the data. Letter to author from EPA in reply to HQ-RIN-00350-01 ¶3, June 4, 2001.

122. The evaluation is primarily focused on the evidentiary components needed to establish adverse health effects using standard human health risk assessment methodologies based on the author's professional experience as a human health risk assessor, and was limited to the available documents received from the EPA — primarily the original complaint and supporting documentation.

DESCRIPTIVE ELEMENTS USED IN TOM

Select Steel Element	Element Number	Descriptive Element	Data Type	Data Category	Criteria	Points
A. Disparate Treatment: Defining the affected community						
Yes	1	Radius	Science	Disparate Treatment	The affected community can be/ was defined to show disparate populations.	10
No	2	Exposure	Policy	Disparate Treatment	The affected community defined above can/did link any exposure to toxic chemical(s) with permit.	10
B. Disparate Impact: Disparate Treatment + Impact						
No	3	Socio/Economic	Policy	Disparate Impact	Social and/or economic impact can be/was defined.	5
Yes	4	Health	Science	Disparate Adverse Impact	Release and exposure can be/ was linked to adverse health effects through a human health risk assessment and could be found to be adverse.	15
C. Nature/Degree Disparate Impact						
No	5	Any	Policy	Disparate Treatment	The affected community can/did link any disparate impact to the permit.	10
Yes	6	Substantial	Science	Adverse Impact	The affected community can/did link permit to disparate adverse impact.	10
D. Adverse Health Effects: Causation linked to a specific permit						
Yes	7	Imminent Danger	Policy	Adverse Impact	The adverse health effects can be/were established through a human health risk assessment and showed an increased risk (see <i>Select Steel</i>), OR proving actual causation would be financially or technically impossible.	10
Yes	8	Actual	Science	Adverse Impact	The adverse health effects can be/were linked to the permit to show actual causation.	10
E. Cumulative Adverse Health Effects						
Yes	9	Point Sources	Science	Disparate Treatment	Less than 3 permitted sources are in the area which release different chemicals of concern as the permit which triggered complaint.	10
No	10	Non-Point Sources	Policy	Adverse Impact	Contributing point or non-point sources are in the same geographical area, for the same COCs which triggered the complaint. No policy reasons for negating this causation prong exists. Examples: non-attainment zones, encouraging permit trading, proximity to sensitive areas, etc.	10

COMPARISON OF EPA'S FIVE "DUE WEIGHT" ELEMENTS TO DESCRIPTIVE ELEMENTS

EPA's Five Elements According State Agencies "Due Weight"	Correlative Descriptive Elements Used in TOM ¹²³
Relevance of evidence to alleged impact	This category could broadly cover all ten descriptive elements. However, under <i>Select Steel</i> , the focus would likely be those scientific criteria under descriptive elements 1, 4, 6, 8, and 9.
Validity of the methodologies	Scientific elements 1, 4, 6, 8, and 9 likely focusing on statistical evidence of disparate treatment, the human health risk assessment methodology, and/or epidemiological studies.
Completeness	Both scientific and policy criteria <i>could</i> be considered here. The scientific evaluation would focus on what evidence <i>was</i> submitted, whereas the policy evaluation would focus on what components were <i>left out</i> , and why. See specifically descriptive elements 7, 9, and 10. If a community was exposed to widespread contamination over long periods of time, EPA <i>could</i> use this category to negate causation and prevent linking adverse health effects to a given environmental permit.
Degree of consistency	If this category were based on degree of consistency with other studies and/or within the report submitted, then only those scientific criteria 1, 4, 6, 8, and 9 would be likely correlative.
Uncertainties	This analysis is required as part of any standard risk assessment. Under <i>Select Steel</i> , EPA would likely focus on what is <i>left out</i> , (non-attainment zones, non-point sources, pre-existing conditions) and why, rather than the uncertainties inherent in any risk assessment. See descriptive elements 5, 7, and 10.

A. *Disparate Treatment: Using TOM Elements 1 and 2 to Define the Affected Community*

A radius-based approach generally defines the community within certain radii around the environmental permit to show whether or not there is disparate treatment. If documents were included, or allegations were made to this effect, then TOM Element 1 was met. If this criterion was established, then a corresponding policy consideration as to whether or not *any* exposure to toxic chemicals that was included in the environmental permit followed. If the nature and extent of the toxic chemicals released could be geographically defined in an X, Y, Z coordinate system, then direct exposure defining the affected commu-

123. Correlation with the five elements EPA will use to determine whether or not to accord "due weight" to a permitting agency and those described below is somewhat difficult, as EPA has not fleshed out the meaning of EPA's five elements through application in numerous cases. To the contrary, at this point as no specific information is available to determine the relative impact on Title VI claim evaluation of each of EPA's five elements, beyond *Select Steel*.

nity was be established through an exposure assessment and TOM Element 2 was satisfied. Additional considerations for Element 2 were as follows:

- Has there been a reported release into the environment of toxic chemical(s)?
- Is there data to suggest a direct exposure pathway exists via ingestion, inhalation, or dermal contact without the use of sophisticated fate-and-transport models which incorporate indirect pathways, changes to chemical concentration, and toxic properties? If so, exposure will be easier to link to the permit.
- If there was a release to the subsurface soil and/or groundwater, direct exposure may not be as easy to document and policy considerations should take precedence.

B. *Adverse Impact: Using TOM Elements 3 and 4 to Evaluate Disparate Treatment + Impact*

Under *Select Steel*, adverse impact focused on adverse health effects using a scientific test developed from a human health risk assessment. However, TOM Element 3 awards points based on a policy criterion if sociological and/or economic impact can be identified. Other policy considerations in determining whether TOM Element 3 was met included:

- The existence of health studies not linked directly to the permit in dispute.
- Consideration of primary land use in the area: residential, commercial, industrial.
- Did the community settle in the area before or after industry?
- Is there a relative increase or decrease in toxic chemicals released into the community over the last ten years?

If there is a release of toxic chemicals that are included in the environmental permit at issue, and exposure can be/was linked to adverse health effects through a human health risk assessment, TOM Element 4 is met. This is essentially “exposure plus one”. The complainant would not only have to prove that (a) the permit holder released the toxic chemical, but also that (b) the community was exposed to that chemical. In addition, the complainant would also have to prove that that exposure was above established levels.

In *Select Steel*, the complaint failed essentially when OCR determined that the excess carcinogenic risk of 6.0×10^{-5} was “within” the established threshold of 1.0×10^{-5} . This determination is in effect a finding that no release above acceptable levels occurred. The complainants could show that exposure had occurred to toxic chemicals, but were unable to meet the next scientific hurdle of proving the exposure was in excess of acceptable levels.

C. *Disparate Impact: Using TOM Elements 5 and 6 to Show Nature and Degree*

TOM Elements 5 and 6 evaluate the nature and degree of the harm alleged. In this category, proving a statistically significant difference in degrees of impact is a relatively simple academic exercise using U.S. Census data. Therefore, if any disparity is identified that is also adverse, TOM Element 5 is met. However, if the standard of proof is construed to require proof of a substantial impact, the following criteria were evaluated:

- Likelihood of documenting excess risk greater than 1.0×10^{-5} for carcinogens or greater than a hazard quotient of 1.0 for non-carcinogens.
- Alleged pattern of past discrimination by permitting agency.
- Control group comparisons using same data.
- Number, density, and types of toxic chemicals released into the community from the Toxic Release Inventory data tracking system.¹²⁴
- Existence of local and/or state laws acknowledging the affected community or establishing it as an area of concern.

If it was apparent from the documents supplied that this burden could be met, TOM Element 6 was also satisfied.

D. *TOM Elements 7 and 8: Linking Adverse Health Effects to Permit*

As discussed previously, with 31% of the complaints filed resulting in rejection due to untimeliness, the 180-day statutory deadline is strictly enforced by the OCR, and a claimant must be able to link adverse health effects to the permit which triggered the complaint. The type of adverse health effects may also be identified as either (1) imminent (there is an increased risk associated with the risk assessment) TOM Element 7, or (2) actual (carcinogenic or non-carcinogenic effects have already been manifested or identified in the community above some acceptable level) TOM Element 8. Data on both long term and acute toxicity must be obtained for both carcinogenic and non-carcinogenic effects.

Defining whether imminent danger exists is more of a policy choice than a scientific benchmark. The policy choice is between how much death and injury can be politically tolerated before imposing limits on pollution discharges that are “bad for business”. A policy consideration that “imminent danger exists” can be based on a combination of toxic chemicals in the area (including non-point sources and the existence of non-attainment zones), or previous health studies, none of

124. *Id.*

which can be linked to a specific permit. A detailed human health risk assessment would not be required under these circumstances but rather a “50,000 feet perspective” could be employed as it would be immaterial as to the origin of the toxic chemicals, the exposure levels, or actual manifestation of harm. If any of the above considerations were identified, TOM Element 7 was met.

TOM Element 8 *requires* a human health risk assessment, and *requires* that the quantification of risk (i) exceed acceptable health based levels, (ii) actual (carcinogenic and/or non-carcinogenic) effects be manifested or identified in the community above some acceptable level, and (iii) that these effects be linked directly to the permit in question. This is essentially the same as going to trial and linking cause and effect as in traditional toxic tort litigation.

E. *Measuring Cumulative Adverse Health Effects: TOM Elements 9 and 10*

As discussed in Section III, assessment of cumulative effects is required in practically every risk assessment submitted, in every state and in every program that allows human health risk assessments to establish acceptable levels of exposure to toxic chemicals. Without the evaluation of the cumulative effects, the risk assessment would likely be simply rejected by the regulator as “incomplete.” TOM Elements 9 and 10 focus on the *origin* of the toxic chemicals as either point or non-point sources, and the complexity of the surrounding environmental discharges, which ultimately may define the policy or scientific burdens that the complainant must overcome to establish a claim under Title VI.

If there is a practical scientifically defensible methodology to evaluate cumulative effects, then TOM Element 9 is met. For example, for purposes of this element, the author proposes that a cumulative analysis of risk may only be scientifically defensible when a community has the following characteristics:

- Few industries (less than three)¹²⁵ are located in the area.
- The chemicals of concern vary for each industry in the area.
- No non-point pollution sources can be identified for the chemicals of concern.
- No pre-existing health studies identify sensitive populations.

If a community has been exposed to environmental pollution over a period of decades, it is unlikely that any scientifically defensible analysis of cumulative risk can be quantified due to the increased uncertain-

125. Three is a reasonable benchmark chosen to demonstrate that as the number of permitted sources increase, the complexity in proving cumulative adverse health effects may increase correspondingly.

ties in the risk assessment process particularly in the key exposure equations developed by the EPA. Specifically, the existence of many environmental permits will decrease the chances that the complainants will succeed in meeting their burden to link specific toxic chemical(s) to exposure and subsequent adverse health effects.

However, if the above conditions can not be satisfied TOM Element 10 may be satisfied due to the complexities of quantifying cumulative exposure from many toxic chemicals to a given community through multiple permitted discharges (air, soil, and water), and from various sources which may include non-point as well as point sources, and proximity to non-attainment zones when air quality is a primary concern.

Cumulative exposure quantification has two prerequisites. First, there must be available data from which the complainant can document all the exposures to toxic chemicals for a community. Second, the data should incorporate existing sensitive populations (without the use of an unrealistic amount of scientific expertise and use of GIS modeling). Absent both of these prerequisites, there is no practical cumulative evaluation of risk. Additionally, the renewal or modification of an existing environmental permit using data from unregulated, unknown sources should only be evaluated under policy considerations. In these cases, policy considerations should take precedence over scientific ones.

F. *Policy and Science Point Combinations Using TOM*

As discussed above, each category was subdivided into a scientific and policy element. TOM Elements 1, 4, 6, 8, and 9 were designated as scientific elements whereas TOM Elements 2, 3, 5, 7, and 10 were designated as policy criterion. This was done to rank each complaint on the relative strengths and weaknesses for both scientific and policy criterion. Using the above descriptive elements, the following table summarizes the total point combinations possible for various categories and shows that the scientific and policy criteria are 55% and 45% respectively, while the *Select Steel* criteria (primarily scientific) is 65%:

1. Total Possible Points	All Criteria 100	<i>Select Steel</i> Criteria ¹²⁶ 65
2. Points by Data Type	Policy Criteria 45	Scientific Criteria 55
3. Points by Data Category		
Disparate Treatment (Policy)	20	N/A
Disparate Treatment (Science)	20	N/A
Adverse Effects (Policy)	25	N/A
Adverse Effects (Science)	35	N/A

G. Outcome-Predictive Scores and Cohort Identification

Based on the scores of 74 Title VI complaints, additional analysis was performed based on the complaint's status (accepted, under review, dismissed, or rejected), and percentage of score which was scientific or policy. These scores were used along with the criteria established under *Select Steel* (including the Revised Guidance), and the ONE/CHANE complaints for model calibration. Based on these categories, complaints were dissected into three cohorts for all criteria, and those criteria established under *Select Steel* based on whether or not that criterion could or could not be present to meet that evidentiary demand to overcome dismissal or rejection.

Applying the TOM model results in a score for each complaint on a 0 – 100 scale. The sum of the TOM score can be related to the predictable likelihood of success for each complaint. The linkage between score and success prediction required the development of a methodology for grouping the complaints into cohorts. Clear patterns were revealed by the scores of the complaints. These patterns permitted the author to group the complaints into three major cohorts for both policy and scientific criteria, and for those primarily scientific criteria considered in *Select Steel*. The three cohorts for both categories are defined below as:

Cohort 1 “Very likely to succeed”

Cohort 2 “Potential to succeed”

Cohort 3 “Not likely to succeed”

H. Average Outcome-Predictive Scores

Average scores for rejected complaints (using non-jurisdictional criteria discussed previously), dismissed, under review, and accepted Title VI complaints are shown on the following table. A breakdown of

126. Included descriptive elements 1, 4, 6, 7, 8, and 9.

the scores received for each descriptive element for each category is included in Appendix C as Tables 2A through 2F.

AVERAGE SCORES FOR TITLE VI COMPLAINTS
REVIEWED BY AUTHOR

EPA Status	Number of Complaints Reviewed	Average Score <i>Select Steel</i> Criteria	Average Score all Criteria
Accepted (2A)	33	25.15	54.70
Under Review (2B)	4	16.25	36.25
Dismissed (2C)	2	15.00	40.00
Dismissed: Complaint Withdrawn (2D)	4	20.00	45.00
Rejected (2E)	15	9.67	24.67
Rejected: Pending Litigation (2F)	3	21.67	46.67

The highest average scores were identified in those complaints “accepted” by the EPA whereas the lowest average scores occurred in those rejected listed on Table 2E for jurisdictional reasons.

I. Average Percentage Outcome-Predictive Policy and Scientific Criteria Scores

Average scores based on percentage of policy and scientific criteria for rejected, dismissed, under review, and accepted Title VI complaints are shown on the following table.

AVERAGE POLICY AND SCIENCE SCORES FOR TITLE VI
COMPLAINTS REVIEWED BY AUTHOR

EPA Status	Average/ Percentage Policy Score <i>Select Steel</i>	Average/ Percentage Policy Score All Criteria	Average/ Percentage Science Score <i>Select Steel</i>	Average/ Percentage Science Score All Criteria
Accepted (2A)	13%	60%	87%	40%
Under Review (2B)	19%	71%	81%	29%
Dismissed (2C)	0%	63%	100%	37%
Dismissed: Complaint Withdrawn (2D)	17%	63%	83%	37%
Rejected (2E)	7%	64%	93%	36%
Rejected: Pending Litigation (2F)	15%	61%	85%	39%

Under the *Select Steel* criteria, the maximum percentage of score based on policy criteria was 19 % for the dismissed Title VI complaints while the second highest, 17 % of the total score occurred for those complaints that were dismissed when the complaint was withdrawn with corresponding percentages of scores for the scientific criteria of 81 % and 83 % respectively. Using additional policy criteria

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not designated under *Select Steel*, average percentage of total score based on policy criteria ranged from 60 % for accepted complaints, to a maximum of 71 % for those complaints under review.

J. *Model Calibration Using Select Steel, ONE/CHANE, and Quantitative Point Analysis*

TOM was “calibrated” using data from (a) those complaints reviewed by the author that were not previously dismissed by the EPA for non-jurisdictional reasons (b) the *Select Steel* decision and investigative report, (c) ONE/CHANE¹²⁷ and (d) an independent analysis by the author of various combinations of the above point ranges in TOM Elements 1 through 10 needed to support a Title VI complaint for complaints either accepted by the EPA or under its review. The following tables summarize the primary calibration criteria chosen and the corresponding scores for each Cohort:

Cohort 1: “Very Likely to Succeed”

<i>Select Steel Minimum</i>	<i>Select Steel Maximum</i>	TOM Minimum	TOM Maximum
> 35	N/A	> 55	N/A
(b), (c) and (d) above	N/A	(c) and (d) above	N/A

Cohort 2: “Potential to Succeed”

<i>Select Steel Minimum</i>	<i>Select Steel Maximum</i>	TOM Minimum	TOM Maximum
> or = 20	< or = 35	> or = 35	< or = 55
(b) and (d) above	(b) and (d) above	(a), (b), and (d) above	(c) and (d) above

Cohort 3: “Not Likely to Succeed”

<i>Select Steel Minimum</i>	<i>Select Steel Maximum</i>	TOM Minimum	TOM Maximum
N/A	< 20	< 20	< or = 30
N/A	(a), (b), and (d) above	(a), (b), and (d) above	(a), and (d) above

K. *Accepted Title VI Complaints Less Likely to Succeed Under Select Steel*

The following table identifies in bold lettering those sixteen accepted complaints out of 33 evaluated (48%) where the likelihood to succeed has been reduced by one or more cohort based on the scores observed.

127. *Select Steel* scored 20 points under *Select Steel* Criteria and 55 using all criteria; ONE/CHANE scored 35 points and 80 points respectively. Recall that *Select Steel* was dismissed when no adverse health effects were identified and that ONE/CHANE is the only complaint resolved through voluntary mediation.

COHORT IDENTIFICATION FOR ACCEPTED TITLE VI COMPLAINTS

EPA	Complainant	Select Steel	Select Steel	All Criteria	TOM
Reference		Total	Cohort	Total	Cohort
07R-98-R6	North Baton Rouge Environmental Assoc.	10	3	25	3
08R-97-R9	Chester Street Block Club Assoc. Counsel and others	10	3	25	3
18R-98-R4	Miller; Congressman B. Thompson	10	3	25	3
01R-94-R5	St. Francis Prayer Center	10	3	35	2=fn
01R-94-R6	Iberville Police Juror Jackson and others	10	3	35	2=fn
02R-94-R6	L. Anderson	10	3	35	2=fn
02R-99-R9	Waimanalo Citizens for a Healthy Future	10	3	35	2=fn
05R-94-R6	Mothers Organized to Stop Environmental Sins (MOSES)	10	3	35	2=fn
14R-99-R4	Congressman B. Thompson	10	3	35	2=fn
01R-95-R9	Parents for Better Living of Buttonwillon (Padres) and others	10	3	45	2=fn
19R-99-R9	Community United for Political and Individual Development (CUPID)	10	3	45	2=fn
28R-99-R4	African-American Environmental Justice Action Network	10	3	45	2=fn
04R-98-R5	Alum Crest Acres Assoc., Inc.	20	2	45	2
17R-99-R5	D. Romak	20	2	45	2
11R-98-R9	Untied Paperworks International Union; J. McKnight	25	2	50	2
02R-95-R9	Residents of Sanborn Court	20	2	55	2
2R-00-R9	Californians for Renewable Energy, Inc.(CARE)	20	2	55	2
20R-99-R6	Louisiana Environmental Action Network (LEAN)	20	2	55	2
23R-99-R5	Improving Kids' Environment	20	2	55	2
03R-94-R6	Garden Valley Neighborhood Assoc.	25	2	60	1=fn
01R-96-R6	People Organized in Defense of Earth and Her Resources (PODER)	35	2	70	1=fn
04R-97-R6	St. James Citizens for Jobs & the Environment and others. ("Shintech")	35	2	70	1=fn
10R-98-R2	Congressman J. Serrano et. al.	35	2	70	1=fn
1R-00-R6	People Against Contaminated Environments (PACE) Lone Star Chapter, Sierra Club	35	2	70	1=fn
25R-99-R1	Alternatives for Community & Environment (ACE)	35	2	70	1=fn
9R-00-R9	IWU Negotiating Team, Center on Race, Poverty & Environment	35	2	70	1=fn
14R-97-R5	South Cook County Environmental Action Coalition	40	1	75	1
01R-94-R2	New York Assemblyman W. Bianchi	45	1	80	1
02R-95-R6	People against Contaminated Environments (PACE)	45	1	80	1
08R-94-R4	Hyde Park/Aragon Park Improvement Committee	45	1	80	1
16R-99-R9	Angelita C. et al.	45	1	80	1
11R-99-R6	Southwest Public Worker's Union (SPWU)	55	1	80	1
03R-96-R6	Oakville Community Action Group (OCAG)	55	1	90	1

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L. *Title VI Complaints Under Review Less Likely to Succeed Under Select Steel*

The following table shows that the likelihood to succeed has been reduced by one cohort in all four complaints under review based on the scores observed.

COHORT IDENTIFICATION FOR TITLE VI COMPLAINTS
UNDER REVIEW

EPA	Complainant	Select Steel	Select Steel	All Criteria	TOM
Reference		Total	Cohort	Total	Cohort
15R-99-R6	Pine Bluff for Safe Disposal and others	10	3	35	2
17R-98-R6	Louisiana Environmental Action Network (LEAN)	10	3	35	2
5R-00-R6	LEAN, et. al.	10	3	45	2
12R-99-R4	Residents of the Easton Acres and Feltonsville Communities, Holly Springs	35	2	70	1

In summary, whether or not to accept policy based criteria when evaluating a Title VI claim, will have a significant impact on the likelihood of success for over the 50% of accepted and under review complaints. The following table summarizes the accepted and under review complaints into three predictive cohorts based on their total score:

COHORT IDENTIFICATION FOR PENDING TITLE VI COMPLAINTS

Cohort	Title VI Complaints Accepted		Title VI Complaints Under Review	
	<i>Select Steel</i>	All Criteria	<i>Select Steel</i>	All Criteria
"Very Likely to Succeed"	7	14	0	1
"Potential to Succeed"	14	14	1	3
"Not Likely to Succeed"	12	5	3	0
Total Number of Complaints	33	33	4	4

As the above tables demonstrate, *Select Steel's* approach has significant impact on (a) how many accepted and under review complaints will be categorized as "not likely to succeed" or "very likely to succeed". The following tables identify the percentage of TOM score that was based on science and policy criterion for pending complaints where likelihood of success has been reduced by one cohort.

Using the *Select Steel* analytic shortcut reduces the number of complaints that are very likely to succeed, and increases the number of

ACCEPTED TITLE VI COMPLAINTS SCIENCE AND POLICY
SCORE PERCENTAGES

TOM Elements 1-10 Average Score: 52	Percentage Average Score
Science	36%
Policy	64%
<i>Select Steel</i> Criteria Average Score: 20	
Science	91%
Policy	9%

UNDER REVIEW TITLE VI COMPLAINTS SCIENCE AND POLICY
SCORE PERCENTAGES

TOM Elements 1-10 Average Score: 49	Percentage Average Score
Science	29%
Policy	71%
<i>Select Steel</i> Criteria Average Score: 18	
Science	81%
Policy	19%

complaints that are not likely to succeed. In so doing, *Select Steel* thwarts the important policy considerations that also underlie the remedial aims of Title VI.

These policy considerations are just as important as the “science” that the EPA asserts supports *the Select Steel* approach. Clearly, in 1964 Congress probably had little or no knowledge regarding the complexities surrounding a detailed human health risk assessment and, therefore, would have never intended for the science to be adverse to environmental justice.¹²⁸ Additionally, the EPA construed Title VI in 1985 to authorize the issuance of implementing regulations that prohibited discriminatory *effects* embodying a disparate impact standard without having to prove discriminatory intent¹²⁹ when it was clear the evidentiary burden could not be met to establish intent in communities with systemic environmental degradation. Science has replaced intent with essentially the same outcome determinative factors. Thus, by following *Select Steel*, the EPA risks undermining Title VI, thereby promoting environmental *injustice* rather than environmental justice.

128. At that time, the process was in its infancy. Toxicological data was not available for many of the COCs, and environmental racism may have simply meant placing a landfill “across the tracks”. Cumulative loading of toxic COCs would have not been present, and if they were, there would have been no GIS database that could have effectively predicted adverse health effects.

129. *Id.*

V. ALTERNATIVE REMEDIES FOR ENVIRONMENTAL RACISM: SEEING THE PROMISED LAND FROM THE VISTA OF AN AGENDA FOR REFORM

The preceding sections of this article lead to an inescapable observation: Complex legislative, administrative, and political processes produce environmental racism. Those processes have created an unlevel playing field for victims of environmental racism. Why has this happened in a democracy? The discrete and insular minority groups and the economically disadvantaged segments of the community have been effectively excluded from meaningful participation in these processes.¹³⁰ Why has this been permitted to go on? Like all legal processes, the processes that supposedly promote environmental justice are, in reality, the product of policy balancing. In that balance, the interests of industry were held to trump the interests of victims. Economic activity that pollutes was accorded a heavy presumption that it was not responsible for the injuries that are precisely the kind one would reasonably expect would be caused by human exposure to toxic chemicals. Industry's economic contributions were held to outweigh the economic impact of pollution on the health, lives, and property of those communities exposed to the pollution. As a result, the process created for enforcing environmental civil rights is an unlevel playing field in which the victims can almost never catch up.

Leveling this playing field requires a coherent multi-faceted agenda. That agenda must be remedial and must enhance the opportunity for success for a variety of environmental racism victims who have been left without remedies in the past. This agenda for reform is described in the following section. Reform must start at the root of the problem. As indicated by the backlog of Title VI complaints, it is obvious that OCR does not have sufficient resources to handle the scientific and political complexities involving environmental racism. Thus, the key-stone of an agenda for reform is to develop, use and create alternative avenues for the EPA and stakeholders to prevent the further deterioration of the backyards of our nation's minority and socio-economically disadvantaged citizens.

Under Title VI, the primary remedy available to the plaintiff is the denial of recipient funding, which has never been done in the almost two decades the EPA has been investigating Title VI complaints due

130. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994). See also Jeffrey A. Van Detta, *Constitutionalizing Roe, Casey, and Carhart: A Due-Process Anti-Discrimination Principle To Give Constitutional Content To The "Undue Burden" Standard Of Review Applied To Abortion Control Legislation*, 10 SO. CAL. REV. L. & WOMEN'S STUDIES 546 (Spring 2001) (discussing exclusion of racial, gender, and socio-economic "political" minority groups from effective representation in the state legislative process).

to the difficulties establishing adverse health effects, and, it not likely to be done since the recipient (commonly a state permitting agency) may be able to justify the disparate adverse impact.

Broadly speaking, the agenda proposed here envisions reforms in the legislative, administrative, and political processes that will enlarge the opportunities for environmental racism plaintiffs to receive a greater measure of restitution more expeditiously than in the current system.

First, reform in the legislative process is described focusing on substantive amendments to Title VI and stronger application of Title VI to state permitting authorities through federal preemption principles.

Second, administrative reforms are discussed. These include a modification or abandonment of the *Select Steel* analysis, the EPA policy changes regarding permit denials and according less deference to NAAQS compliance, and state environmental protection agency commitment to innovative programs that emphasize outcome-based compliance, comprehensive permitting, and de-centralization of permitting agencies.

Third, reform in political process is discussed through the paradigm of steps to increase public participation in the permitting process itself.

A. *Legislative Reform: Amend Title VI of the 1964 Civil Rights Act-Bring Back the Intent of the Law*

In 1964 Congress probably had little or no knowledge regarding the complexities surrounding a detailed human health risk assessment and, therefore, would have never intended for the science to be adverse to environmental justice.¹³¹ In addition to a lack of comprehensive perspective at the time of Title VI's enactment, Congress has also been slow to use the legislative process to correct its omissions, oversights, and obvious shortcomings in laws with environmental implications, including Title VI. Indeed, commentators have noted that federal environmental legislation suffers from a "piecemeal character" and that "[t]he decade from 1990 to 2000 has been one of political gridlock" such that "Congress has not enacted any major new environmental regulatory statutes, nor has it made any major amendments to pre-existing statutes."¹³² In the cause of environmental justice, the time has come for Congress to amend Title VI in three significant ways: (1) expressly creating a private right of action for environmen-

131. *Id.*

132. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 24 (2001) (National Symposium on Second Generation Environmental Regulation and the Law).

tal racism claims; (2) shifting the burden of proof in environmental racism claims to the state permitting authorities and permit seekers and requiring the use of ADR to resolve those claims more efficiently and expeditiously; and (3) creating a mandate for the Department of Justice to seek out appropriate cases to bring on behalf of the victims of environmental racism. Each of these amendments to Title VI is discussed below *seriatim*.

1. Establishing a Statutorily Guaranteed Private Right of Action

The Supreme Court ruled that a private right of action under Title VI does not exist,¹³³ although a number of Circuit Courts had previously ruled in other types of Title VI cases that a private right of action may be implied.¹³⁴ The ability of an individual victim of environmental racism to bring a private right of action under Title VI is now only available through section 1983.¹³⁵ This would appear especially true in light of the administrative procedures currently in place for processing complaints, and the guidance that was issued during the Clinton administration regarding that process. Of course, with

133. See generally, *Alexander v. Sandoval*, 532 U.S. 275 (2001). It is well established that implication of a private right of action for a statute that does not expressly create one requires analysis of the four factors set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975). Those factors address whether the putative plaintiff is a member of a class for whose special benefit Congress enacted the statute; whether there is any indicia of Congressional intent to create such a remedy, or to deny one; whether implication of a private right of action is consistent with the purposes underlying the legislative scheme of which the statute is a part; and whether implying a federal cause of action would be inappropriate because such a federalized claim would embrace a cause of action in an area that traditionally had been one of state, not federal, concern.

134. *Powell v. Ridge*, 189 F.3d 387, 398-99 (1999) (private right of action under § 602 of Title VI implied in favor of parents suing state school officials on claim that state's school funding policies had discriminatory disparate impact on minority students). In one of the few reported cases involving a claim under EPA's administrative regulations promulgated pursuant to § 602 of Title VI, a U.S. District Court concluded that there was no private right of action for a citizens group to sue the state agency responsible for the issuing permits to a waste facility, a ruling subsequently reversed by the Third Circuit. *Chester Residents Concerned for Quality of Living v. Seif*, 944 F. Supp. 414 (1996), rev'd, 132 F.2d 925 (3d Cir. 1997). However, the precedential value of the Third Circuits potentially landmark decision was nullified by the U.S. Supreme Court, which granted a petition for certiorari in the case but did no more than vacate the Third Circuits decision and remand it on mootness grounds. 524 U.S. 974 (1998); see also Patricia E. Salkin, *Environmental Justice Coming of Age: EPA Moves To Adopt Guidance*, SF08 ALI-ABA 319 (August 2000) (Land Use Institute Program). The tortured history of the *Chester* case amply illustrates the need for dispositive Congressional action in this area. See, e.g., Michele L. Knorr, *supra* note 3, at 105. Industry has criticized private rights of action in Title VI environmental cases under Title VI as permitting "opponents to your facility [to] ignore the state administrative appeals process." Terry R. Bossert, *Environmental Justice: The Permit Applicant's Perspective*, 18 TEMPLE ENVTL. L. & TECH. J. 129, 135 (2000). Yet, it appears disingenuous to suggest that groups hemmed in by their own political powerlessness should be denied a day in court in deference to a state permitting process that operates to create disparate impact in violation of Title VI.

135. District Court Orlofsky, J., held that: "Section 1983 permitted action based on alleged violations of the disparate impact implementing regulations promulgated by EPA under Title VI." 145 F.Supp.2d 505 [get better cite].

a new administration, and a new EPA Administrator, the enforcement priorities of the agency may well be changed. In fact, the guidance as it exists might be amended, replaced, or even withdrawn entirely. Therefore, legislative action is necessary to secure the Title VI rights of those affected to realize environmental justice.

2. Shifting the Burden of Proof by Establishing a Prima Facie Case of Disparate Impact or Exposure and Requiring ADR if Sought by Plaintiffs

Even if a statutory right of action were created, it would be useless under the current burden of adverse science. Title VI requires at least two amendments in order to become an effective option for victims of environmental racism. First, Title VI should be amended to allow for plaintiffs to prove a prima facie case that consists solely of proving disparate impact in the permitting process and exposure to toxic chemicals, and shifts the burden of proof to the permitting authority to establish the absence of adverse health effects. Second, the statute should be amended to *require* the EPA to establish an alternative dispute resolution program (ADRP), as discussed in the next section, and provide prevailing complainants with attorneys' fee awards to recognize their efforts as "private Attorneys General" to enforce this civil rights law. Such amendments would change the entire enforcement landscape. They would, for example, reduce the number of backlogged complaints pending at the OCR (some dating back to 1984) and encourage industry to come to the bargaining table to resolve claims of environmental racism — ready to reduce a discharge permit rather than to increase one.

If exposure to toxic chemicals can be established (risk = exposure \times toxicity), then the permit applicant, who has more resources available and is more familiar with the facility, would have to raise an affirmative defense establishing the absence of actual or threatened adverse health effects. However, if OCR (rather than the permit applicant) develops the risk assessment, then an appropriate public notification of that assessment and period for public comment in response should be provided, just as such notices and public comment periods are provided when a permit applicant submits a risk assessment under other regulatory schemes such as RCRA and CERCLA.¹³⁶

136. Compare generally OCR File: 01R-95-R2 (rejecting Title VI claim despite claimants' allegation that there were allowed only 15 minutes to comment on an EIS consisting of over 600 pages and a 200-page supplemental impact statement); OCR File: 04R-97-R6 (asserting claim that public comment period should be extended due to length and complexity of permit), with OCR File No. 02R-95-R2 (public comment on risk assessment notice persuaded permitting authority to withdraw assessment).

3. The Assistant Attorney General as Plaintiff: Leveling the Playing Field

In some cases a private right of action, even if recognized, cannot be maintained by individual victims because of lack of resources or because of statute of limitations issues. The fact that a private citizen suit cannot be maintained should not defeat the public interest in eliminating discrimination that violates Title VI. To that end, Title VI should be amended to allow the Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice to bring claims on behalf of victims of environmental racism. Such an amendment should also provide that in any case brought by the Assistant Attorney General, the affected individuals would have the right under Fed. R. Civ. P. 24(a) to intervene in the action as a right.¹³⁷ The standard for the Attorney General to apply in determining whether to file suit should be whether the issues raised in any particular Title VI case are either systemic or of such public importance that the federal government should spearhead the litigation in order to ensure consistency of outcomes and widespread achievement of the policy goals underlying Title VI in the area of environmental justice.

4. Arbitration or Court Ordered Mediation: Justice Delayed Is Justice Denied

The EPA endorses ADR techniques under Title VI implementing regulations that state that it is the EPA's policy to seek informal resolution of Title VI complaints whenever possible. While no Title VI complaint has been resolved using ADR, the parties in two complaints are currently engaged in the alternative dispute resolution process.¹³⁸ However, under Section 575 of the Administrative Dispute Resolution Act,¹³⁹ the parties have to *consent* to any form of ADR, which makes the ADR provision virtually useless. With a backlog of pending Title VI complaints that date back to 1984, OCR should be directed by the amended statute to require the use of ADR in every case sought by the complainant.

As the large number of environmental justice complaints still pending, or already dismissed demonstrate, victims of environmental racism face huge hurdles on the road to winning environmental justice under current procedures. The delay under current EPA procedures – years in many cases – illustrates the old saying that “justice delayed is

137. See, e.g., OCR File: 25R-99-R1 (complainants in OCR proceeding under review filed motion to intervene in a state court appeal by the permitting agency from a lower-court order reversing agency's issuance action).

138. See generally <http://www.epa.gov/ocr/infresln.htm> for more information.

139. The Administrative Dispute Resolution Act of 1996–, 5 U.S.C. 575 (2001).

justice denied.” Nor would adding Title VI claims or related state tort law claims to the already crowded dockets of federal and state courts provide much more of a realistic solution for the victims of environmental injustice, unless no other alternatives are available. Indeed, the litigation option is flawed not only by court delays, but also by the tremendous expense required to litigate cases involving complex scientific evidence and the competing testimony of adverse camps of expert witnesses, as well as by the difficulty of retaining and paying for counsel to prosecute these cases on behalf of victims. If environmental justice is to be realized, the delay and expense in the current processes must be removed, and ADR must be required if a *prima facie* case can be established for either disparate treatment, or exposure.

One of the most important trends in removing delay and expense in the legal process is the use of alternative dispute resolution techniques: arbitration, mediation, and fact-finding followed by conciliation. These alternatives remove disputes from lengthy administrative or judicial processes and place them in a process designed to move them efficiently to resolution through a variety of less-adversarial or non-adversarial techniques.

Arbitration involves the use of a neutral decision-maker or body of decision-makers chosen by the mutual agreement of the parties. The parties reach their own agreement as to timing and procedural rules, but generally the decision rendered on the merits in arbitration is final and binding. Mediation, by contrast, involves the use of a mutually acceptable neutral party who facilitates dialogue and perspective between the parties in an effort to help the parties reach their own mutually agreeable solution. Fact-finding offers the parties the opportunity to select a mutually acceptable neutral party who investigates the evidence, prepares written factual findings, and reports those findings to the parties. The parties may then elect a meditative-style conciliation process in which they discuss the findings with the same or another mutually selected neutral in an effort to resolve their dispute in light of the newly developed information.¹⁴⁰ As applied to claims for environmental racism, each of these ADR options is discussed below.

a. Arbitration: *Res Judicata*

Arbitration of environmental racism claims promises a more informed, expeditious, efficient, and affordable process than the current

140. The general information presented here on forms of alternative dispute resolution was developed through conversations with Dr. Jeffrey A. Van Detta, Graduate Business Faculty, American InterContinental University, and a trained mediator-arbitrator. See also RAY AUGUST, *INTERNATIONAL BUSINESS LAW*, Ch. 3, 109-110, 127-129 (2000).

administrative and judicial options. Arbitration procedures can be streamlined and expedited. Arbitrators can be chosen from among leading legal and scientific experts whose expertise is relevant to resolving competing claims of disparate impact and adverse health effects. This will bring insight and neutrality into the process from individuals who will have only public service in mind rather than partisan loyalties or agendas. In addition, by careful crafting of the selection criteria for creating a pool of arbitrators and for selecting arbitrators from the pool, the body in charge of creating such a program – such as the EPA – can ensure that the highest levels of expertise and judgment are brought to the decision of each matter raising an environmental racism claim under Title VI.¹⁴¹

b. Fact-Finding and Conciliation: “Whose Data Is It Anyway?”

As an alternative to the mini-trial scenario of arbitration and the negotiation-style of mediation, fact-finding followed by conciliation presents a middle ground that should be available for victims of environmental racism. Specifically, fact-finding in Title VI cases could be undertaken by panels of experts similar to those proposed above for serving as arbitrators. These experts could employ their expertise and familiarity causation and impact issues to make specific factual determinations of facts crucial to the key issues in a Title VI claim. This fact-finding would be done in a neutral, non-adversarial manner that focuses primarily on developing the most useful record of relevant information possible. The procedures for such fact-finding would require both parties to open up their sources of information, records, witnesses, and related discovery-type documents to the fact-finders without reservation. The fact-finders would also have to have free access to the facilities of the permit applicants, as well as other facilities in the contested area, to inspect the sites and conduct tests. By opening such avenues of investigation to expert fact-finders, a great deal of the investigatory burden that would currently fall on EPA personnel or on private attorneys during litigation could be streamlined and performed in a most cost effective manner.

The ultimate product of this fact-finding alternative would be a detailed written report supported by written documentation, affidavits,

141. See generally, Jeffrey A. Van Detta, *Typhoid Mary Meets The ADA: A Case Study Of The Direct Threat Standard Under The Americans With Disabilities Act*, 22 HARV. J. L. & PUB. POL’Y 849, 936-955 (1999) (discussing a similar proposal for resolving claims of direct threats to health and safety in employment discrimination law). As Professor Van Detta noted, arbitration awards in such proceedings should be subject only to very limited judicial review in very narrowly confined circumstances, including filing an action to enforce an award should a party to the arbitration refuse to comply. *Id.* at 954-55.

summaries of scientific information, photographs, videotapes, transcripts of witness interviews, and any other relevant information. The findings themselves would be expressed in a neutral, non-adversarial manner. At the point that the fact-finding panel issues its written report, the parties to a Title VI proceeding would have two options. First, they could use the facts found by a panel of neutral experts to attempt to negotiate their own settlement. Second, in the alternative, the parties could elect to use the services of a conciliator. The conciliator could be drawn from the panel that prepared the fact-finding report (ensuring that the conciliator is familiar with factual record) or could be drawn from the larger panel of neutrals established by arbitration program. The mission of the conciliator would be to mediate the dispute of the parties in light of the written factual report submitted by the fact-finders. With such a detailed and carefully assembled factual record before him or her, a conciliator would have a much greater likelihood of brokering a just and neutral settlement than in the ADR processes typically undertaken to resolve litigation.¹⁴²

c. "Make Mediation, Not War"

If all else fails, then as the Revised Guidance suggests, mediation between the parties should be encouraged. The controversy between stakeholders is not whether the EPA should require mediation, but when in the permitting process it should begin. Industry representatives feel that mediation should only be required when and if the EPA finds substantial noncompliance and the permitting agency cannot justify the permitting decision. Environmental justice organizations want to invoke mediation early in the process.

In contrast to arbitration, where the arbitrator essentially functions as neutral judge who reaches a final decision, mediation is in fact a facilitated negotiation. Through the mediation process, a third-party neutral (typically called a mediator) assists the parties and their representatives to reach their own solutions to a dispute. Mediation is typically a voluntary process invoked by the agreements of the parties. As discussed further below, mediation may be imposed by statute, rule, or administrative policy that requires participants of disputants in mediation. The process is typically controlled by the disputants and the mediator, who jointly decide the time and place of the mediation, the participants to be invited, the sharing of costs, whether caucuses will be used, and whether the mediation will be conducted in a facilitative, directive, or transformational style (which primarily impacts the level of involvement that mediator will take in course of session). The con-

142. See RAY AUGUST, *supra*, at 109-111.

tribution of a mediator to this process consists of several discrete functions. These functions include: providing an organization and scheduled forum for negotiation between disputants; the supervision of information exchange and negotiations; searching for common ground among the parties; assisting the parties in identifying common ground; addressing unrealistic expectations on the part of any party (usually called "reality checking"); offering creative solutions or alternative resolutions that the parties may not have recognized due to their emotional involvement in the matter; and drafting of an agreement memorializing the terms of the settlement of the dispute.¹⁴³

Of the available means of ADR, binding arbitration or mandatory fact-finding followed by conciliation would appear to offer complainants the best hopes for quickly and economically achieving justice under Title VI. While mediation is useful as an additional tool, it is primarily directed at facilitating negotiations between parties who voluntarily submit to the process, and therefore is less effective in resolving claims of environmental racism where permitting authorities typically refuse to recognize that the problem even exists.

2. Federal Preemption and Amending State Statutes: "The Buck Stops Here"

State permitting authorities have taken the position that, despite Title VI and Section 602's non-discrimination mandate, they are compelled to issue permits if the applicant satisfies the technical requirements under the State permit laws and regulations. This argument, however, overlooks a fundamental element of the relationship of Title VI to State permitting schemes. As a federal statute, Title VI preempts any State law or regulation to the extent that such laws or regulations are inconsistent with the language or purpose of Title VI. Clearly, the attempt of a State to make the circular argument that its own regulatory scheme that produces biased results is a defense to a Title VI claims fails in the face of the obligations imposed by Title VI on federal fund recipients.¹⁴⁴ Accordingly, it is black-letter constitutional law that the States cannot hide behind technical compliance

143. LARRY L. TEPLY AND RALPH WHITTEN, *supra*, at 17 (and authorities cited therein); RAY AUGUST, *supra*, at 110; see, e.g., OCR File No. 1R-96-R1 (describing settlement reached at mediation between complainants and the permit applicant that was awaiting approval by the state permitting agency, whose approval will presumably result in the withdrawal of the Title VI complaint); compare with OCR File No. 21R-99-R5 (complainants specifically requested not to submit to mediation arranged for by state permitting agency).

144. See, e.g., 40 C.F.R. §§ 7.35(b), (c)

with their own permitting schemes as a defense to enforcing the non-discrimination obligations of Title VI.¹⁴⁵

In contrast to the arguments typically advanced by State permitting authorities in an effort to circumvent their Title VI responsibilities, a number of States have enacted either State constitutional or statutory provisions for environmental equality.¹⁴⁶ For example, a number of State statutes provide for “equal distribution” of locally undesirable land uses (LULUs) among low-income or minority communities and higher income or majority communities.¹⁴⁷ These laws, however, provide no private rights of action for individual citizens to secure enforcement.¹⁴⁸ As a commentator has observed, “[w]ithout citizen-suit provisions, these laws are virtually useless for communities affected by disparate environmental hazards because they do not have standing to sue.”¹⁴⁹ Thus, if such State statutes were amended to provide citizens with a right to sue to enforce the statutes, “minority and low-income communities would be able to hold government entities accountable for decisions which have a disparate impact on their communities,”¹⁵⁰ and would therefore have another avenue of attack upon State permitting authorities who would otherwise assert that their obligations are limited by permitting statutes and regulations.

In a more technical vein, one of the key arguments States have advanced against the Title VI Investigation Guidance is that they often lack the authority to regulate all environmental impacts in an area, and thus they cannot fully implement the requirements created by Title VI. For example, the States argue that a Title VI investigation should not encompass cumulative burden or discriminatory permitting pattern scenarios. However, this is in direct contradiction to most environmental agencies’ mission of regulating in a manner that is “protective of human health and the environment,” as well as the States’ general obligations to comply with the mandates of Title VI. Indeed, because Title VI “imposes independent, nondiscrimination requirements,”¹⁵¹ OCR continues to develop such guidance for the recipients of federal funds to implement these requirements. Clearly, the federal fund recipients, such as State permitting agencies, should be re-

145. U.S. Const. Art. VI; see, e.g., EPA ID No. AZD081705402 (complaint filed by Community United for Political and Individual Development discussing argument of Arizona Department of Environment Quality)

146. Michele L. Knorr, *supra* note 3, at 99-100 (noting that eight State constitutions “provide for environmental rights” and eleven States have issued “public policy statements in favor of environmental protection”).

147. *Id.* at 99-102.

148. *Id.* at 103.

149. *Id.* (footnote omitted).

150. *Id.* at 104-105.

151. *Interim Guidance*, *supra* note 58 at 8.

quired to implement measures to achieve Title VI's non-discrimination requirements. OCR should make this obligation clear by stating it as a federally required mandate. However, the Recipient Guidance only *recommends* that States develop plans in this area. To strengthen the enforcement of Title VI, therefore, OCR should, at the very least, revise the Recipient Guidance to state clearly that the States are obligated by Title VI to implement plans that achieve the non-discrimination mandates of Title VI.

B. *Administrative Reform: Was Select Steel's Decision Adverse to Science?*

Administrative reforms must be incorporated into the Title VI evaluation procedure including: a modification or abandonment of the *Select Steel* analysis, significant policy changes regarding permit denials, and according less deference to compliance standards and permitting agency determinations.

1. Re-open *Select Steel* or, in the Alternative, Set Aside the Investigative and Analytical Methods Used

Of the many concerns raised by St. Francis in its OCR complaint filed in *Select Steel*, the critical issue that had to be resolved was the impact of the proposed recycling center on the already existing elevated blood lead levels in children. St. Francis alleged that blood lead levels in children living in the vicinity of the proposed steel mill were fifty-percent above the national average.¹⁵² MDEQ determined that "even with the addition of the lead proposed to be emitted by Select Steel, the lead concentrations would be more than ten times lower than the National Ambient Air Quality Standards,"¹⁵³ citing a D.C. Circuit decision which held that "safe did not mean risk free."¹⁵⁴ However, this scientific assertion, adopted wholesale by the EPA, is flawed. The study MDEQ conducted when comparing predicted blood lead levels in children as a result of the increased exposure from the proposed Select Steel facility appeared to use a baseline comparative methodology that may not have adequately accounted for the possibility that the baselines themselves reflect cumulative exposure to lead, or the insidious effects of cumulative exposure. Furthermore, the state risk estimates adopted by the EPA were not subjected to an

152. *Id.* at 9.

153. *Id.*

154. *Id.* See also, *Natural Resources Defenses Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987).

appropriate public notice period for risk assessments. Stakeholders' comments might have highlighted such methodological flaws.¹⁵⁵

Although St. Francis had insufficient resources to retain the army of toxicologists, risk assessors, and sophisticated fate-and-transport modelers needed to perform its own characterization of the excess risk to the children in the community, had MDEQ published the results of the risk assessment and provided adequate notice, St. Francis may have been able to hire experts in a review capacity to dispute the MDEQ's findings. St. Francis was therefore forced to rely on the EPA as the finder of fact using the Interim Guidance, and the EPA effectively delegated its decision under the analytical shortcut approach to the state agency accused of environmental racism in the first place. This circular legal process created under the Interim Guidance offered no effective remedies to the victims of environmental racism that the Guidance was supposed to serve,¹⁵⁶ and represents a: "secret one-sided determination of facts decisive of rights," as described in *Joint Anti-Fascist Refugee Comm. v. McGrath*¹⁵⁷ where public officials and others excluded petitioners from critical government decision-making processes affecting their civil rights.

As a proposed remedy for the *Select Steel* decision, in cases where complainants are not able to retain or consult their own experts needed to prove adverse health effects, the information used by the EPA (whether supplied by the federal recipient or independently obtained) should be available for public review and comment for a minimum of three months. Although many federal and state statutes require public notice during the permitting process, any decision made by the EPA involving an interpretation of a complex scientific process that affects the civil rights of a discrete and insular community should merit further comment prior to any adjudication of rights. If St. Francis had been unable to show *any* exposure-related illnesses for the community (exposure = zero), then there may not have been a factual issue. However, in *Select Steel*, exposure was well documented — it was the decision-making process employed by the EPA that was not.

155. See *supra* note 9.

156. As late as July 29, 1999, the EPA issued a two page letter from stakeholders asking to re-open *Select Steel*, or, in the alternative, to set aside the investigative and analytical methods used. The EPA denied the request, stating that it "continues to support the conclusions and analyses presented in the October 30, 1998 decision letter." Re: Joint Petition to Re-Open Select Steel Investigation, or, in the Alternative, to Set Aside Investigative and Analytical Methods. (Petition to Re-Open *Select Steel*).

157. *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951).

2. Reduce the Risk of Adverse Science: "Who Needs Information?"

Many of the difficulties in establishing a Title VI claim fall within the realm of scientific improbabilities, not political impossibilities. Although not refined to an exact science, human health risk characterization can increase the chances of bringing the stakeholders to the bargaining table, if only to argue over the input parameters used in the model. However, if the discussion over different approaches to risk characterization is never resolved, the EPA should look to the policy of Title VI to resolve the complaint, rather than simply declare that the complainants have not met their burden of proof on issues of science.

To better use the science that is available, the EPA should reduce the risk of adverse science by: (1) denying permit applications for *any* permitted discharge into the environment if adverse health effects can be shown in area population for *any* COC. For example, since elevated blood lead levels were identified in an affected population around the *Select Steel* case, the EPA would have to deny the permit if disparate treatment was also shown; (2) allowing for findings of adverse health impact even if area standards are in compliance with NAAQS. In *Select Steel*, NAAQS were used in addition to the actual risk characterization, but it was not clear what the EPA would have decided had the risk characterization shown a probability of adverse health effects while the area was still in compliance with environmental standards; and (3) allowing for extended comment periods on risk assessments prepared by OCR or State EPA which disclose all input parameters and model assumptions. This is crucial for full public involvement since many grass roots organizations may not be able to hire their own experts.

Under *Whitman v. American Trucking Ass'n*,¹⁵⁸ the Court held that the EPA did not have to consider the cost of the implementing regulations when setting NAAQS based on health. The initial effect of one of the most important environmental decisions in decades will be the classification of more non-attainment zones for ozone and particulate matter.¹⁵⁹ Long term, it may result in lowering already existing pollutant levels, or establishing new levels for other criteria pollutants, especially in light of President Bush's support of permit trading initiatives.¹⁶⁰

158. *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001).

159. Interview with James L. Setser, Program Coordination Branch Chief, Ga. Environmental Protection Division, in Atlanta, Ga. (March 19, 2001).

160. Permit trading can effectively lower pollution only when the discharge capacity traded or sold is capacity not previously used (i.e., implementation of better technology, risk reduction

If a facility is in a non-attainment zone in which there is a pending environmental racism complaint, and the complainant can document disparate treatment, it should be considered as substantial evidence that a Title VI violation has occurred. However, the reverse should not be true (i.e., if an area happens to satisfy the technical requirements of the NAAQS). Compliance with NAAQS levels should never be considered conclusive evidence negating the existence of adverse health effects, because the NAAQS may have been set, for a variety of reasons, at levels higher than those that should be acceptable. In situations in which the facility at issue is in a non-attainment zone, the permit applicant could assert as an affirmative defense that, based on risk characterization, no adverse health effects are present. This approach effectively shifts to the permit applicant the burden of establishing that no adverse health effects are present. Such a shift in burden would not only directly benefit the complainants, but would also free more EPA investigative resources to commit to Title VI complaints arising out of those areas located in attainment zones.¹⁶¹

3. Recent Trends in Environmental Management: The Georgia Department of Natural Resources, Environmental Protection Division.

The Georgia Department of Natural Resources, Environmental Protection Division (Georgia EPD) has been pro-active in three policy areas that would increase environmental justice resolutions under Title VI. These areas include a change from results-based to outcome-based compliance, evaluating a comprehensive permitting scheme, and de-centralization.

a. Moving Towards Environmental Compliance Outcomes

A draft study entitled *Moving Towards Environmental Compliance Outcomes*¹⁶² presents arguments from state environmental organizations on how environmental permitting agencies need to measure success with a move away from activity-based operations (i.e., number of inspections performed each month, number of facilities fined and/or number of notice of violations issued) to results-based operations ("Blackacre" will spend \$1.8 million to develop a park and buffer zone surrounding the MSWL). The article expands on this theory by

standards, or complete zero discharge). However, if the capacity purchased on the market was simply *excess* permitted capacity, it could have a significant impact on low income or minority communities in light of the 180-day statutory deadline so stringently enforced by the EPA.

161. See generally OCR File Nos. 5R-00-R6; 1R-00-R6; 20R-99-R6; 17R-98-R6; 16R-98-R6.

162. JAMES L. SETSER AND TED V. JACKSON, *MOVING TOWARD ENVIRONMENTAL COMPLIANCE OUTCOMES* (draft – prepared for the Environmental Compliance Consortium), Georgia Environmental Protection Division (2000).

making an analogy between current environmental permitting organizations to an old Indian culture of “counting coup,” and provides a thematic model that shows a range of options environmental agencies have at their disposal to ensure compliance.¹⁶³ Pro-active prevention under a “Response Continuum” described in this study includes public outreach, education, facility technical assistance, and voluntary programs designed to facilitate dialogue among regulated facilities, the communities in which they are sited, and the Georgia EPD. Grassroots organizations would be included in this process and would have earlier and more direct access to permit applicants and regulators. Although grassroots organizations may not be particularly interested in “counting coup,” which could be analogous to the number crunching that is performed during a risk assessment, they certainly would welcome such processes that encourage the *outcome* of a better environment within which to raise their families — a backyard that is not polluted — regardless of how many fines are imposed, or how long the battle of the Title VI claim is pending.

b. Holistic Permitting Process. Case Studies on Multi-Media Permitting and Compliance: Gilman Paper Company and the City of Savannah

The Georgia EPD is leading the way for a new approach in environmental permitting that increases the body of reliable information available to regulators in fulfilling their obligations under the permitting process and, therefore, increases the likelihood that emerging scenarios of environmental injustice may be identified and remedied far earlier in the process. Looking at an environmental permit from a holistic approach (area or industry wide) as a way to determine cumulative adverse health effects for multiple exposure media and multiple COCs will reduce the data gaps for appropriate G.I.S. modeling capabilities needed for a cumulative analysis of risk. The Georgia EPD has completed two multi-media permit analyses for Gilman Paper Company (Gilman) and the City of Savannah. This multi-faceted approach to permitting and inspection represents a culmination of the activities and planning of the Georgia EPD senior management in the past four years, building on a philosophy that incorporates a new approach in “doing business.”¹⁶⁴

163. Indian culture describes counting coup as the act of a warrior who would hit his enemy with a stick. This act would change the enemy's energy, by just letting him know that the warrior was not frightened. If the warrior had really wanted to hurt his enemy he could have.

164. GEORGIA EPD, GEORGIA DEPARTMENT OF NATURAL RESOURCES, CITY OF SAVANNAH MULTI-MEDIA INSPECTION REPORT, EXECUTIVE SUMMARY (May 1999).

Two examples demonstrate how this approach can be used in a way that provides more informed permitting decisions (based on greater and more accurate data regarding potential adverse health effects) by regulators that, presumably, will lead to decisions more likely to promote environmental justice. In April 1999, Georgia EPD facilitated a company-wide inspection for the Gilman facility located in St. Mary's, Georgia. The inspection was designed to be an "all inclusive, multi-media inspection of all parts of Gilman operations that are permitted or regulated by state or federal environmental laws."¹⁶⁵ It was felt that the multi-media inspection would give both the Georgia EPD and Gilman a better environmental "picture" of Gilman's overall facility operations. Gilman processes approximately 1.5 millions tons of wood each year and has air quality, wastewater treatment, solid waste, hazardous waste, and ground use permits. Similarly, the Georgia EPD inspected the City of Savannah's permits under the same approach in May 1999.¹⁶⁶ The City of Savannah has environmental permits in water supply, wastewater treatment, solid waste, underground storage tank and lead abatement. The agency has concluded that this inspection demonstrated that the multi-media approach to facility compliance "is a viable alternative to the past inspections employed by Georgia EPD,"¹⁶⁷ and thus, may in the future be employed to the benefit of those groups who would otherwise be adversely affected by less-well informed permitting decisions.

In summary, this type of comprehensive permitting and inspection approach will help fill the data gaps when cumulative impact needs to be considered from many sources in the area, and often from many sources within one single company. This data could also facilitate internal "permit trading." Such permit trading can be used to negotiate reductions of permitted discharge in communities with substantial minority or socio-economically disadvantaged groups.

3. Re-Deployment of Centralized Environmental Programs

Another recent trend in many State environmental programs is the de-centralization of regulatory staff into regional offices bringing government closer to the people in administrative agencies. Georgia EPD is undergoing de-centralization of the Atlanta, Georgia offices and placing environmental staff back into the communities rather than in cubicles located in the downtown offices, which may make them

165. GEORGIA EPD, GEORGIA DEPARTMENT OF NATURAL RESOURCES, GILMAN PAPER COMPANY ST. MARYS, GA. MULTI-MEDIA INSPECTION (April 1999).

166. GEORGIA EPD, GEORGIA DEPARTMENT OF NATURAL RESOURCES, CITY OF SAVANNAH MULTI-MEDIA INSPECTION REPORT, EXECUTIVE SUMMARY (May 1999).

167. *Id.*

appear too detached and unapproachable to small town residents. De-centralization will help create better working relationships with the grassroots organizations and industries that rely on environmental decision-making and help establish trust during mediation or arbitration. When environmental staff live *and* work in a community, they may be more responsive to environmental justice issues as well as have input into local zoning and land use controls.

If none of the new approaches to environmental regulation by the Georgia EPD are employed in other states or fail to resolve environmental justice complaints, then additional, stricter remedies should be imposed. Such remedies may include mandatory fines for permit violations if a Title VI complaint is pending; revocation of delegated environmental permitting programs (CAA, RCRA); re-evaluation of entire industries on a regular basis (such as periodic re-evaluations every 50 years or re-evaluations triggered by defined changes in population or land use); or, in cases of a pattern and practice of serious violations by a permitting agency of its obligations under Title VI (which preempts any inconsistent state law), imposition of a moratorium on issuance of any permit to an applicant seeking to establish a facility within an area where there are pending Title VI complaints.

C. *Political Process Reform: Meaningful Participation with LULU and NIMBY*

Reforming the political process involves more than just superficial participation from community organizations through public notice requirements. It will require a paradigm shift to increase (and perhaps *require*) public participation in the process itself, the evaluation and incorporation of community evaluations into state and federal statutes.

“Locally undesirable land use” (LULU) and “not in my backyard” (NIMBY) are familiar terms to industries, community organizations, and regulators that evoke adversarial overtones in any environmental permitting process, and appear in both technical and social impact documents. These terms reflect a lack of communication concerning the fears within the scientific community and among regulators and grassroots organizations about the actual risk of adverse health effects. Notwithstanding the social and economic impact of placing a hazardous waste landfill or water treatment plant in a community, the actual risk of these types of facilities is poorly understood.¹⁶⁸ This lack of understanding (or comprehensibility) is reflected in numerous pending Title VI complaints that merely challenge the siting of a land-

168. Risk Communication and Public Involvement Workshop, US EPA, (need month and day 1995).

fill in their community without quantifying the actual risk posed to the community.

Although the EPA has taken some steps to help stakeholders understand the nature of the actual risk requirement, more clearly needs to be done. For example, in April 2000, at the request of the Waste and Facility Siting Subcommittee of the National Environmental Justice Advisory Council (NEJAC), the EPA published *Social Aspects of Siting RCRA Hazardous Waste Facilities* to address the social and economic impacts of siting a hazardous waste facility.¹⁶⁹ Although not carrying the weight or authority of either guidance or rules, the document addressed various ways to consider the social and economic aspects of siting a hazardous waste facility.¹⁷⁰ The EPA's analysis suggests that communities may chose to waive any complaints about potential adverse health effects from a permitted facility by remaining silent during the permitting process. However, the EPA should never find a "waiver" by silence or initial acquiescence. As explained in a companion document entitled *A Tale of Two Sites*,¹⁷¹ the EPA attempts to define the benefits of working with a community during early hazardous waste siting discussions. Ultimately the decision to grant or deny the permit is usually not based on public concerns, but rather on statutorily created technical scientific criteria; which, if met, requires the permitting agency to issue the permit.

The early discussions which take place by the permit applicant within the community do not result in protest by the citizens — who may or may not have been provided with sufficient information to permit an informed choice. Instead, those discussions are reported to have resulted in permit issuance, construction, and operation of the facility. This example might be interpreted as an endorsement by the EPA of a policy position that communities can *chose* whether to allow additional facilities that require environmental permits, regardless of any adverse disparate impacts, to be permitted, and can do so by uninformed silence. A serious question is raised by the ambiguity in the EPA's pronouncement of this implicit position: Has the community essentially waived any future rights under Title VI? Moreover, is the suggestion that such rights may be waived, particularly without the benefit of full and complete disclosure of the risks of the waiver and

169. *Social Aspects of Siting RCRA Hazardous Waste Facilities*, US EPA Office of Solid Waste and Emergency Response. EPA530-K-00-005, April 2000.

170. See *id.* Topics discussed include: mechanisms to address community concerns, how to determine if sensitive populations exist within an area, databases that may be helpful to assess whether a cumulative impact exists, resources for effective outreach and communication, and a checklist for siting hazardous waste facilities.

171. *Id.* at 2.

the permit itself, consistent with Congressional intent in enacting Title VI?

The EPA should clarify this disturbing policy ambiguity by expressly stating in the guidance that it will not find such waivers of Title VI rights because of their great importance to the national policy of eradicating invidious discrimination. Furthermore, the guidance should be changed to reflect compliance requirements under Title VI, with a clear mandate to remedy environmental racism — a mandate that should not be compromised merely by the opportunity for public involvement.¹⁷²

1. Metalclad Case Study: Tools of the Trade?

The power of state and local environmental authorities to thwart environmental racism if given the tools to do so was dramatically illustrated last year in an international arbitration case between Metalclad, Inc. and Mexico. Metalclad had targeted a location in a province of Mexico for building a \$16.7 million hazardous waste processing facility. The laissez-faire spirit of NAFTA¹⁷³ and the lax permitting process of Mexico's federal environmental protection agency allowed Metalclad's permit application to sail through the approval process with little fanfare. Thus, nothing seemed likely to protect the land, homes, and health of thousands of Mexican citizens targeted by Metalclad apparently for no apparent reason other than their poverty and ethnicity. However, local officials stunned Metaclad when they invoked a little-known legal remedy that empowered the local government to designate the site as part of an environmental trust area. That designation permanently brought Metalclad's project to a grinding halt. Metaclad learned that the willingness of a national government to permit environmental racism to be imposed in the name of free trade was not enough when the local government had been empowered by legislative reform to protect its constituents from environmental injustice.¹⁷⁴

172. A comprehensive directory of environmental groups including a historical perspective is available listing over 400 people of color, resource and legal groups from 40 states, the District of Columbia, Puerto Rico, Canada and Mexico.

173. NAFTA cite. . . (need help here!)

174. Anthony DePalma, *Judge Issues Split Decision in NAFTA Rules Case*, N.Y. TIMES, May 4, 2001, at W1.

Metalclad claimed that its Mexican investment had been expropriated and invoked international arbitration under the NAFTA treaty. An international arbitration panel awarded Metalclad \$16.7 million in damages, but that award was reversed by a Canadian judge in an appeals process provided by NAFTA. See also, *Arab Republic of Egypt v. Southern Pacific Properties, Ltd.*, 23 International Legal Materials 1048 (1984). (reversing ICC arbitration panel award to American developer whose attempts to commercialize the Giza Valley and pyramids into a resort was ultimately repudiated by the Egyptian government because of its devastating environmental impact and its discrimination against Egyptians in favor of Western business interests).

VI. CONCLUSION

During his last mission, the Reverend Dr. Martin Luther King came to Memphis, Tennessee in 1968 to “address an economic and environmental injustice dispute.”¹⁷⁵ He appeared before an assembly that included the victims of that injustice with the hopeful words: “And I’ve seen the promised land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the promised land.”¹⁷⁶ If Dr. King were able to visit with “the pale and downtrodden children” of the State of Despair described in the scenario that opened this paper, however, he would see a sight all too familiar to his eyes – and he would hear a question that would ring all too familiarly in his ears: “Is there justice for environmental racism?”

The legacy of environmental injustice and environmental racism has been tolerated too long. The twenty-first century must bring in a new age in which creative solutions and proactive legislation bring relief to the victims of environmental injustice in our country. The time has come to end misapplied science, administrative backlogs, inadequate remedies, and permitting processes far too friendly to the interests of industry at the expense of the lives of minority and socioeconomically disadvantaged adult citizens and children. The time has come to erase the perpetuation of a checkered political history in imposing the burden of “progress” on those within our society who have the least effective voices in directing its policies. The time has come for fundamental change to secure environmental justice and to end environmental racism by placing “science” in its appropriate perspective within a reformed set of laws and procedures specifically designed to achieve maximum effectiveness in ending this problem.

175. KNORR, *supra* note 1, at 73.

176. MARTIN LUTHER KING, JR., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 203 (1992) (quoting from the address, “I See The Promised Land,” that Dr. King delivered at Mason Temple on the eve of his assassination).