
"Disparate Impact" Communities in Michigan

A Report Prepared for the

US Conference of Mayors

Environmental Justice Roundtable

Detroit, Michigan

July 17, 1998

With Additional Information, Revised November 4, 1998

Reprinted October, 2015

Patrick L. Anderson

Managing Director, Anderson Economic Group

© 1998, 2015, Anderson Economic Group LLC

As the field of Environmental Justice is rapidly changing, some of the information in this report will become dated in the near future. Contact AEG for more recent information. The current (2015) address and website for Anderson Economic Group is: 1555 Watertower Place, East Lansing MI 48823; www.andersoneconomicgroup.com.

TABLE OF CONTENTS

Table of Contents 2

Executive Summary 4

 1. What is “Environmental Justice”? 4

 2. EJ and “Disparate Impact” 4

 3. Resolving EJ Complaints 4

 4. 5-Step EPA Investigation of EJ Complaints..... 4

 5. Analysis of Michigan Areas 5

 6. Results: High-Risk Areas 5

 7. Results: “Safe” Areas 6

 8. Results: Impact on Employers..... 6

 9. Results: Impact on Prohibited Behavior..... 6

I. Environmental Justice Impact Analysis 7

 A. Background: Environmental Justice..... 7

 1. "Environmental Justice" and the Proposed EPA Guidance Statement 7

 B. The Economic Effect of "Effects" Discrimination 8

 1. "Effects" Discrimination and Permits Under the Guidance Document..... 8

 C. Evaluating Complaints Under the Guidance Document..... 9

 D. Economic Effects on Employers 10

II. Methodology Used for "Disparate Impact" analysis 11

 A. Criteria..... 11

- B. Existing EPA Analyses..... 11
- C. Problems of Definition 13
- D. Reasonable Method 14
- III. Results of Analysis..... 16
 - 1. Income Identification..... 16
 - B. Racial Identification 16
- IV. Recent Statements By EPA Administrator..... 17
 - A. Further Comments on EJ Policy..... 18
- V. Excerpts from Key EPA and White House Documents 19
 - A. Executive Order 12898, February 11, 1994 19
 - B. Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits..... 19

EXECUTIVE SUMMARY

1. *What is “Environmental Justice”?*

- "Environmental Justice" (EJ) is a policy based on reinterpretation of Title VI of 1964 Civil Rights Act, and a 1994 Executive Order. EJ extends to all federal agency permitting activities, and state and local agencies that receive federal funds.
- EJ explicitly addresses the “effects” of actions, not “intent” of actions. Parties can violate EJ policy without intending to unlawfully discriminate against anyone. Discriminatory effect becomes "prima facie" showing of violation of Title VI, and can cause federal, state, or local agencies to deny, modify, or revoke a permit.

2. *EJ and “Disparate Impact”*

- Environmental Justice relies on statistical analyses of areas with proximity to permitted activities, with proximity assumed to indicate exposure to permitted activity. EJ investigations analyze the impact of a permitted activity on populations based on race, color, national origin, and income.
- A permit can be denied or revoked if “disparate impact” shown on protected groups. Protected populations include minorities defined by race, ethnicity, national origin, or color; and low-income populations.

3. *Resolving EJ Complaints*

- Complaints against permit holders or applicants must allege disparate impact on racial, ethnic, or income group. Complaints triggers 5-Step investigation by EPA
- If a significant disparate impact is shown, EPA concludes that it is a “prima facie” violation of law. Applicant then has opportunity to rebut

4. *5-Step EPA Investigation of EJ Complaints*

1. Identify the Affected Population
2. Determine the Demographics of the Affected Population
3. Determine the Universe(s) of Facilities and Total Affected Population(s)

4. Conduct a Disparate Impact Analysis
5. Determine, Using Arithmetic or Statistical Methods, the Significance of the Disparity

5. Analysis of Michigan Areas

- Anderson Economic Group (AEG) analyzed 2550 Michigan Census Tracts for EJ "disparate impact" on minority and low-income populations. AEG methodology is based on EPA examples, memoranda from EPA regional offices, and Executive Order 12898.
- AEG used 1997 median household income, and concentration of Black and Hispanic residents, comparing with state averages. This is a conservative methodology, as using smaller areas (such as census blocks) and drawing 50-square-mile buffers would expand the number of affected areas. The analysis highlights areas of presumed "disparate impact" on low-income and minority populations in the State of Michigan.
- A similar, though less precise, analysis using zip code household income data from 1993 was done on the entire Midwest.

6. Results: High-Risk Areas

- Facilities needing permits in "disparate impact" areas would be at high risk of a sustained EJ complaint, due to income and racial "disparate impacts" of their activities.
- Detroit, Grand Rapids, Lansing, Flint, Pontiac, and other cities become high-risk for plant locations. Most of northern Michigan also becomes high-risk, due to income "disparate impact." Some areas of western and southwestern Michigan also high-risk, due to low-income and Hispanic populations.
- Other large cities in Midwestern and adjoining states have similar patterns as large Michigan cities. These include: Madison, Milwaukee (Wisconsin); Chicago (Illinois); Indianapolis, Fort Wayne (Indiana); Louisville, Lexington (Kentucky); Cincinnati, Dayton, Toledo, Akron and Columbus (Ohio); Pittsburgh, Philadelphia (Pennsylvania); St. Louis, (Missouri); Buffalo, Rochester, Syracuse, and New York City (New York).
- Among state capitals, Springfield, Illinois; Frankfort, Kentucky; Albany, New York; Charleston, West Virginia, and Montpelier, Vermont, may be less vulnerable to EJ complaints. These cities tend to be smaller than other industrial centers in their states, and have relatively large numbers of affluent residents in and near the city itself. More detailed analysis of these areas is needed to determine the risk to facilities in these cities.

7. *Results: “Safe” Areas*

- Wealthier suburban and rural areas have a low risk of sustainable EJ complaints, as their populations are predominantly white and above-average in income. Livingston County, and much of Washtenaw, Macomb, and St. Clair, are also relatively “safe” for employers.
- Employers who are near areas of low-income or high minority populations are still at risk, as the impact of their permitted activities may extend into other areas, or the owners of the land may be members of minority or low-income populations.

8. *Results: Impact on Employers*

- Risk minimization strategies for employers would encourage movement of plants and installations out of high-risk areas, to reduce the chance of work stoppages, costly litigation and negotiated agreements with private interests and EPA.
- AEG analysis shows policy would encourage movement out of cities and into rural suburbs in Michigan. Plants in rural areas of low income would shift nearer to high-income suburbs.
- Extensive litigation is likely on the constitutionality and implementation of EJ policy.

9. *Results: Impact on Prohibited Behavior*

- “Effects” are more important than intent under EJ policy. Intentional discrimination in “safe” areas will be less likely to be discovered or sanctioned, as statistical analyses cannot uncover or prove them.
- EPA can show “prima facie” discrimination in high-risk areas, without showing victim or intent. The likelihood of EJ complaints being filed against companies who do not engage in racial or income discrimination is high.
- This is an unusual notion of “justice.”

This is the Executive Summary, with selected exhibits, of a detailed report. It was presented to the Conference of Mayors Roundtable meeting, along with full-color map, in July of 1998.

For extensive notes on the methodology used, analysis of Environmental Justice policy statements, citations and excerpts from key US Government documents, please obtain the entire report from Anderson Economic Group, 416 W. Ionia, Lansing Mi 48933; or see the AEG website, at www.aeg1.com.

I. ENVIRONMENTAL JUSTICE IMPACT ANALYSIS

A. Background: Environmental Justice

The motivation for "environmental justice" is a laudable one: that the Constitution's guarantee of equal protection under the laws extends to laws governing environmental actions as well as those governing other areas of commerce.

This protection is further implemented through Title VI of the 1964 Civil Rights Act, which states:

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 Federal financial assistance.

1. *"Environmental Justice" and the Proposed EPA Guidance Statement*

These and other provisions of the US Constitution and federal laws prohibit discrimination on the basis of race in all types of federal programs and areas of commerce. This is consistent with the notion of "justice" applying to overt actions of individuals, by prohibiting certain actions done for the purpose of excluding persons on the basis of color, race, or national origin.

In 1994, President Clinton signed Executive Order 12898, which requires federal agencies to collect data on health and environmental risks, and:

[U]se this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations; ...

This Order changes the traditional notion of "justice," which is based on overt actions to deny civil rights on the basis of race, to one that is based on "disproportionate ... effects."

This difference between *intent* and *effects* characterizes the proposed guidance statement issued by the United States Environmental Protection Agency:

This interim guidance is intended to provide a framework for the processing by EPA's Office of Civil Rights (OCR) of complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI), alleging discriminatory effects

resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding.

The guidance statement makes this point explicit:

Title VI itself prohibits intentional discrimination. The Supreme Court has ruled, however, that Title VI authorizes Federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory *effects*. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative. [Emphasis in original document.]

It is this form of "environmental justice" which is at issue.

B. The Economic Effect of "Effects" Discrimination

The shift from *intent* to *effects* has huge ramifications in constitutional law, statutes, case law, and the economic effect on employers. In this preliminary analysis of the effect of the Proposed Guidance Statement on Michigan, we deal only with the last issue: the economic effects of "effects" discrimination.

When discrimination is defined by *intent*, the opportunity to violate Title VI's protections against racial discrimination exists whenever a person participates in an activity covered by the Act, such as voting or receiving services from a federally-funded agency. This could be and is everywhere in the country, so the protection is broad. Similarly, the opportunity to act lawfully is similarly broad, since any person need only to treat people in an evenhanded manner in activities covered by the Act.

By contrast, discrimination defined by *effects* is limited to those areas and instances where such "effects" can be documented, usually by statistics. This is a double-edged sword: in those areas where the statistics indicate a large racial minority population, the "effects" of almost any action will tend necessarily to fall more heavily on racial minorities. On the other side of the sword is the opposite case: in areas with less-than-average minority population, the "effects" will almost always be smaller, so the person acting with true discriminatory intent will likely escape notice.

1. "Effects" Discrimination and Permits Under the Guidance Document

By defining discrimination in terms of "effects," the guidance document and the Executive Order will require the EPA to classify areas of the country by their racial and income characteristics. Those with higher-than-average concentrations of minorities or low-income residents will,

necessarily, be areas of greater "effect" on the health and the environment for minorities and low-income populations.

The guidance document is quite clear about this hand-in-glove connection between location and discrimination:

The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity. The impacts investigated must result from the permit(s) at issue.

The adverse impacts from permitted facilities are rarely distributed in a predictable and uniform manner. However, proximity to a facility will often be a reasonable indicator of where impacts are concentrated. Accordingly, where more precise information is not available, OCR will generally use proximity to a facility to identify adversely affected populations. . . .

Thus, under the guidance document, a complaint filed under Title VI need only allege a discriminatory *effect* on certain populations who live in the area--not any *intent* to commit an act of prohibited discrimination, or even specific individuals who were discriminated against.

C. Evaluating Complaints Under the Guidance Document

The guidance document sets up a five-step process for evaluating complaints under Title VI:

1. Identify the Affected Population
2. Determine the Demographics of the Affected Population
3. Determine the Universe(s) of Facilities and Total Affected Population(s)
[This includes a demographic analysis of other affected populations.]
4. Conduct a Disparate Impact Analysis
5. Determine, Using Arithmetic or Statistical Methods, the Significance of the Disparity

Using this process, the EPA will determine whether to issue, or even revoke, a permit on "environmental justice" grounds:

In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding. EPA also may use any other means authorized by law to obtain compliance, including referring the matter to the Department of Justice (DOJ) for litigation. In appropriate cases, DOJ may file suit seeking

injunctive relief. Moreover, individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies.¹

Note that this language also allows private parties to sue, and covers state and local permitting agencies as well.²

D. Economic Effects on Employers

The implementation of this policy will have very predictable effects on employers. These fall into two effects:

1. As the process depends entirely on *effects* and not *intent*, there is little new incentive to avoid actual discrimination. Employers therefore will not devote large amounts of new resources to avoiding *actual* discrimination.
2. Because those areas with a disproportionate amount of minorities or low-income residents can be determined in advance, employers in those areas will be vulnerable to costly permit revocation proceedings. Employers will therefore avoid expanding or continuing operations in such areas, and shift to other regions.

This analysis, below, identifies those areas in which an employer would be vulnerable to an "environmental justice" complaint, regardless of any actual acts of discrimination. Should the EPA implement a policy similar to that in the guidance document, employers would shift production and employment away from those areas.

While it is impossible to accurately predict the speed of this shift, there is no doubt that remaining in such suspect areas would create an additional cost burden that would inevitably result in migration out of suspect areas.

¹ The footnotes [excluded] and the remainder of the Guidance document describe how state and local permitting units, if any part of their agencies receive any federal funds, are also bound by the EPA's interpretation of Title VI of the Civil Rights Act, which is the "Environmental Justice" policy in the Guidance Document. The guidance document also states that EPA permitting itself is also an activity which must fall under the EJ policy--although it also claims that "Title VI is inapplicable to EPA actions." See "Background" in the guidance document.

² There is parallel language in the "Overview of Framework for Processing Complaints" section in the Guidance Document, stating "f the recipient fails to meet this deadline, OCR will start procedures to deny, annul, suspend, or terminate EPA assistance in accordance with 40 C.F.R. § 7.130(b) and consider other appropriate action, including referring the matter to DOJ for litigation." Presumably, "EPA assistance" would include any permits issued. As noted above, these permits include those issued by state and local government agencies, any part of which receives federal funds.

II. METHODOLOGY USED FOR "DISPARATE IMPACT" ANALYSIS

A. Criteria

The Executive Order and guidance document are very clear that demographic analysis and data on race and income will be the dominant factors in determining whether a complaint under Title VI will cause a permit to be revoked or not issued.

However, the exact criteria is nowhere to be found. The Executive Order speaks of "race, national origin, or income" and "minority populations and low-income populations." The guidance document speaks in one place about "persons protected under Title VI," and in others about race and ethnicity. However, the document also claims authority from the Executive Order, and disclaims the original meaning of Title VI.¹

An employer concerned about receiving a complaint would have to assume that any area with a "disproportionate" amount of low-income residents, members of racial minority groups, people of a different color or of a different national origin would be suspect under the EPA policy. As indicated above, all that is needed is a showing of adverse *effects* on any of these groups--and proximity is assumed to generate the needed "effect."

What is "disproportionate"? The guidance document states that the final phase of the investigation will use:

... arithmetic or statistical analyses to determine whether the disparity is significant under Title VI. OCR will use trained statisticians to evaluate disparity calculations done by investigators. After calculations are informed by expert opinion, OCR may make a prima facie disparate impact finding, subject to the recipient's opportunity to rebut.

Thus, a showing of "significant" arithmetic or statistical disparity will cause the EPA to make a "prima facie" finding against the employer.

B. Existing EPA Analyses

The various regional offices of the EPA have already begun their EJ initiatives. The Region 2 office of EPA has developed an "Environmental Justice Data layer," using Census data to

¹ It should be noted that Title VI of the Civil Rights Act protects all citizens against intentional discrimination. The guidance document, in a confusing series of logical turns, notes this, disclaims any obligation for EPA to follow Title VI in permitting, cites the Executive Order as authority, and then returns to Title VI again.

identify areas that have disproportionately high minority populations, or low median household income.¹ This approach is quite similar to that used by AEG in this analysis, including the use of Census data, median household income, and share of minority population.

The Region 3 office similarly has developed a data layer. It differs from Region 2 in using subsets of census tracts, down to the block group unit, and creating a score for "non-white" populations and low-income populations.

The Region 6 office also has prepared a screening on the basis of income levels and minority populations. Region 6 also uses Census block groups. The Region implements the "affected communities" provision by adding buffers around a site of 1 square mile and 50 square miles.² The Region 6 methodology relies on a scoring algorithm, in which each area is ranked according to its population density, minority population, and income levels compared with the state averages.³ The Region also included an environmental justice component in its draft Federal Facilities Risk Impact memorandum, using similar income, race, and population scoring.⁴

The Region 5 office, which covers Michigan and much of the Midwest, has issued a draft interim guidance memorandum. This memorandum is consistent with the approach taken by the other regions and the Executive Order in relying on demographic analysis of income and racial characteristics:

The Draft Interim EJ Guidelines were created to fill an immediate need to provide Region 5 staff with a methodology for identifying and addressing potential EJ cases. They direct the user to consider the low-income population and minority population of the area in which their case is located and make decisions according to specific criteria.⁵

¹ See the AEG Environmental Justice page for more extensive citations and reprints of EPA documents at www.aeg1.com; or the EPA region 2 site at www.epa.gov/r02earth/gis/atlas.old/census_equity.html.

² The Region 6 methodology is well described by publications available on their website at <http://www.epa.gov/earth1r6/6en/xp/enxp4a.htm> (requires an Adobe Acrobat viewer).

³ Areas are scored from 0 to 5, based on population, income, and minority concentration, with 5 being the most sensitive. These scores are then multiplied together, with high scores indicating a disparate impact. It is interesting to note that, in some cases, even a score of zero may be enough to trigger an EJ investigation:

"The methodology user should realize that even an index score of zero can have a significant EJ concerns. For example, an unpopulated study area will rank a zero, but the land can be owned by or be adjacent to land owned by minority and/or low income groups." [Emphasis in original.]
See "Computer Assisted Environmental Justice Methodology," Region 6 EPA, July 1994 [listed as September 1996 on Region 6 website], section E, page 9.

⁴ See the FRIA document at <http://www.epa.gov/earth1r6/6en/xp/enxp4a.htm>.

⁵ See the AEG Environmental Justice page from www.aeg1.com, for more extensive citations and reprints; or

The Region 5 "Agenda for Action" specifically targets Southeastern Michigan:

The Southeast Michigan Initiative (SEMI) area has major environmental problems, including rivers with impaired uses, contaminated sediments, combined sewer overflows, major toxic pollutant releases, a polluted airshed, and the continuing destruction of critical habitat. Many SEMI areas are subject to environmental justice concerns due to high minority-low income populations near major pollution sources and blighted urban areas.¹

C. Problems of Definition

The guidance leaves open many possible interpretations of "adverse" or "disparate" effects, based on three main areas that are not defined:

1. *The definition of the area.* The affected area could be defined by legal boundaries (township, city, village, county); by census tract; by blocks *within* census tracts; or by zip codes. The area could be defined as the area immediately surrounding the installation, the area where an emissions trail might be expected, or some buffer of indeterminate size.

This particular problem area was highlighted in the case of Select Steel, which received a Michigan DEQ permit to locate in Genesee Township, north of Flint. Anderson Economic Group provided an independent overview of the demographics of the area to *The Detroit News*, which noted that the area surrounding the plant was predominantly white. AEG used four census tracts surrounding the plant, which covered almost all of a one-mile circle around the intersection of the roads at which the plant was to be located. This result was later confirmed by the MI DEQ, which used census block groups--smaller areas--around the same area. They found the area--using two different methods--to be 93% or 94% white. Subsequently, another researcher used a number of different combinations of census blocks and tracts and circle radii, producing a whole array of numbers. While these numbers confirmed--after corrections for earlier errors--the AEG results in nearby areas, it also demonstrated the number of different ways a similar analysis can be done.²

2. *The demographic categories and definitions.* The "protected" groups under the guidance document and executive order are those defined by low income, race, color, and national origin. Income, race, and national origin are all different measures, which overlap and intersect. Furthermore, the definitions of such concepts are becoming somewhat blurred, especially as more and more Americans fall into "multi-racial" categories, or claim minority

the EPA region 5 site at www.epa.gov/reg5rcra/wptdiv/ejpages/guideln.htm.

¹ See the AEG Environmental Justice page from www.aeg1.com, for more extensive citations and reprints; or the EPA region 5 site at www.epa.gov/grtlakes/envjustice/agenda.html.

² AEG's submission to EPA describes the various data combinations and discusses the manner in which the various analyses were produced. To obtain it, check the AEG website or contact AEG.

status. Even the most well-defined measure--income--has its various measures, which fluctuate even in stable economic times. Over the life of a manufacturing plant, it is highly likely that the relative incomes of nearby residents will change, for reasons outside the control of the employer.

3. *The definitions of "disparity" and "significant"*. Statistics as a science requires a distribution of values. Therefore, between any two samples within a universe, there will almost always be a "disparity." Taking, for example, a median income figure in a county will produce a different measure each year for each township, city, and village within the county. Income figures for zip code areas and census tracts covering approximately the same area will be different from each other. These disparities may, or may not, mean anything. Even the notion of "statistical significance" is meaningless unless strictly defined, and determined by a known distribution.¹

D. Reasonable Method

In the absence of strict definition, we have used a reasonable method that is consistent with the Executive Order and guidance document, and which is relatively conservative. The methodology relies on demographic data and GIS systems, such as those contemplated in the guidance document.

The methodology used to identify suspect areas can be summarized as follows:

1. Break Michigan into census tracts, of which there are approximately 2500 across the state. These are the most reliable indicators of demographic data, as they are defined by clear boundaries and used primarily to count people.
2. Select clear data series for income and race, the two most tractable measures. We have selected median household income in 1997 for each census tract, and the percentage of residents who are black and white. The primary data source for these measures is the US Census Bureau. This is quite conservative, as the guidance document would also allow challenges based on disparate impact for other races, color, and national origin.
3. For income, break the census tracts into quintiles--five categories of roughly equal number, ranked by median income. This method of evaluating income distribution is well established. Mark the two quintiles above the median quintile as "safe." Mark the two quintiles with income below the median quintile as "suspect." Mark the middle quintiles as "caution required."

¹ No finding of "significance" can be made without relying on a distribution of a test statistic, which must be known or assumed. In such cases--which can be found in this field--the term "significant" is meaningless unless accompanied by a probability value, such as 1% or 5% or 10%.

4. For race, take the percent of residents who are black and Hispanic, and compare it with the mean percentage for census tracts in the state. Classify the census tracts into those with a concentration equal or less than the mean for the state, and those with a higher-than-average concentration.

Such a method is reproducible by other researchers, and produces a conservative result. The actual implementation of the guidance document could produce a more extensive identification of suspect areas, for the following reasons:

1. This method identifies only those census tracts that fit the demographic criteria. The guidance document allows for those areas *nearby* the immediate area to also be included. Step 4 in the EPA's process for evaluating complaints will involve identifying the "Universe(s) of Facilities and Total Affected Population(s)," which would likely be more than those residents in the immediate census tract.
2. This method uses summary statistics for the whole census tract. It is possible that the EPA, or any complainant, could use data for specific sub-areas within a tract. Using such an approach would greatly increase the number of suspect areas.

It is also the most likely method that would be used by businesses seeking to reduce regulatory and legal risk by locating plants outside of suspect areas.

The results for the State of Michigan are discussed below.

III. RESULTS OF ANALYSIS

1. *Income Identification*

Using median household income as a criterion highlights much of the landmass and population of the state. In such areas, a permitted activity would be at high risk of creating a "disparate impact" on low-income populations, under the proposed EPA policy.

The key areas of "disparate impact" are:

- ◆ Almost the entire Upper Peninsula;
- ◆ Much of Northern Lower Peninsula;
- ◆ The central cities of Detroit, Flint, and Pontiac; and
- ◆ Lower-income rural areas in Western and Southwestern Michigan.

The "safe" areas, in which an employer would have low risk of a sustained EJ complaint, are:

- ◆ A "collar" of affluent suburban communities, surrounding Detroit and other cities. This collar includes Livingston County, and most of Macomb, Oakland, St. Clair, and Washtenaw counties.

In addition to this general pattern, high-risk and low-risk areas are scattered across the state.

B. Racial Identification

Using just two racial and ethnic characteristics, those for concentrations of Black and Hispanic populations, produces the following pattern:

- ◆ High-risk areas include central cities, such as Detroit, Flint, Pontiac, and others, as well as Western Michigan communities with a large number of Hispanic workers, and other agricultural and urban communities.
- ◆ Most of the rest of the state is at relatively low risk of a sustained EJ complaint on the basis of disparate impact on Black or Hispanic populations, although they may be at high risk for such complaints on the basis of American Indian, Asian-Pacific Islands, or other populations.

IV. RECENT STATEMENTS BY EPA ADMINISTRATOR

While in Detroit for a July, 1998 meeting of a Roundtable of the US Conference of Mayors, EPA Administrator Carol Browner made a number of statements about Environmental Justice. Some of these appear to contradict written policies and past practices of the EPA.

These include:

- A claim that "Title VI" and "Environmental Justice" are "two different things."
- A claim that, since income is not a criteria under Title VI of the 1964 Civil Rights Act, income will not be used in evaluations of Title VI complaints by the EPA's Washington DC office.
- A statement that "nobody knows" how the EPA will conduct EJ investigations, because they haven't done any yet.
- An explanation that the draft guidance document was produced because the agency had received complaints, and felt that a written policy should be developed governing the handling of those complaints.

At the same meeting, other participants stated that:

- The policy would have a "chilling effect" on investment.
- While income is not listed under Title VI, it is clearly listed in the EPA region 5 guidance statement.
- Having the Washington office of the EPA investigate EJ complaints separately from the regional offices would only add further risk.

In preparing EJ analyses, AEG notes the following regarding the Administrator's statements:

- "Environmental Justice", "Title VI," and "Executive Order 12898" are all cited repeatedly in EPA documents governing EJ complaints. While all separate concepts, they are clearly tied together.
- Income is indeed not listed in the 1964 Act, but the Executive Order and Guidance Document go well beyond the 1964 Act, and indeed overturn it in some respects.

- Income is an explicit criteria in the Executive Order, the Administrator's letter, the guidance documents of several regions, and the actual practices of several EPA offices. See the excerpted documents on this site, the discussion above, and the recent news stories available on-line through links from this site.
- The fact that the EPA had not, at the time, concluded an investigation yet does not relieve communities and investors of the risks of an EJ complaint shutting down a plant. Prudent businesses and community leaders must analyze the effects of the policy before they commit to investing funds.

A. Further Comments on EJ Policy

Given these statements and the EPA dismissal of the complaint in the Flint Select Steel case, prudent business managers will view EJ policy as one with no clear definition, and subject to change.

V. EXCERPTS FROM KEY EPA AND WHITE HOUSE DOCUMENTS

A. Executive Order 12898, February 11, 1994

...

3-302. Human Health and Environmental Data Collection and Analysis. To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. section 552a): (a) each federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

...

B. Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits

a) Introduction

This interim guidance is intended to provide a framework for the processing by EPA's Office of Civil Rights (OCR) of complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI), alleging discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding.

In the past, the Title VI complaints filed with EPA typically alleged discrimination in access to public water and sewerage systems or in employment practices. This interim guidance is intended to update the Agency's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discrimination in the environmental permitting context.

As reflected in this guidance, Title VI environmental permitting cases may have implications for a diversity of interests, including those of the recipient, the affected community, and the permit applicant or permittee. EPA believes that robust stakeholder input is an invaluable tool for fully addressing Title VI issues during the permitting process and informally resolving Title VI complaints when they arise.

b) Background

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 Federal financial assistance.

- Title VI

On February 11, 1994, President Clinton issued Executive Order 12,898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations." The Presidential memorandum accompanying that Order directs Federal agencies to ensure compliance with the nondiscrimination requirements of Title VI for all Federally-funded programs and activities that affect human health or the environment. While Title VI is inapplicable to EPA actions, including EPA's issuance of permits, Section 2-2 of Executive Order 12,898 is designed to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. Accordingly, EPA is committed to a policy of nondiscrimination in its own permitting programs.

Title VI itself prohibits intentional discrimination. The Supreme Court has ruled, however, that Title VI authorizes Federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory *effects*. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating.² Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.

Note: 2. Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964, (July 14, 1994).

...

c) Impacts and the Disparate Impact Analysis

Evaluations of disparate impact allegations should be based upon the facts and totality of the circumstances that each case presents. Rather than use a single technique for analyzing and evaluating disparate impact allegations, OCR will use several techniques within a broad framework. Any method of evaluation chosen within that framework must be a reasonably reliable indicator of disparity.

In terms of the types of impacts that are actionable under Title VI in the permitting context, OCR will, until further notice, consider impacts cognizable under the recipient's permitting program in determining whether a disparate impact within the meaning of Title VI has occurred. Thus, OCR will accept for processing only those Title VI complaints that include at least an allegation of a

disparate impact concerning the types of impacts that are relevant under the recipient's permitting program.

The general framework for determining whether a disparate impact exists has five basic steps.

d) Step 1: Identifying the Affected Population

The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity. The impacts investigated must result from the permit(s) at issue.

The adverse impacts from permitted facilities are rarely distributed in a predictable and uniform manner. However, proximity to a facility will often be a reasonable indicator of where impacts are concentrated. Accordingly, where more precise information is not available, OCR will generally use proximity to a facility to identify adversely affected populations. The proximity analysis should reflect the environmental medium and impact of concern in the case.

e) Step 2: Determining the Demographics of the Affected Population

The second step is to determine the racial and/or ethnic composition of the affected population for the permitted facility at issue in the complaint. To do so, OCR uses demographic mapping technology, such as Geographic Information Systems (GIS). In conducting a typical analysis to determine the affected population, OCR generates data estimating the race and/or ethnicity and density of populations within a certain proximity from a facility or within the distribution pattern for a release/impact based on scientific models. OCR then identifies and characterizes the affected population for the facility at issue. If the affected population for the permit at issue is of the alleged racial or ethnic group(s) named in the complaint, then the demographic analysis is repeated for each facility in the chosen universe(s) of facilities discussed below.

...

f) Step 3: Determining the Universe(s) of Facilities and Total Affected Population(s)

The third step is to identify which other permitted facilities, if any, are to be included in the analysis and to determine the racial or ethnic composition of the populations affected by those permits. There may be more than one appropriate universe of facilities. OCR will determine the appropriate universe of facilities based upon the allegations and facts of a particular case. However, facilities not under the recipient's jurisdiction should not be included in the universe of facilities examined.

...

g) Step 4: Conducting a Disparate Impact Analysis

The fourth step is to conduct a disparate impact analysis that, at a minimum, includes comparing the racial or ethnic characteristics within the affected population. It will also likely include comparing the racial characteristics of the affected population to the non-affected population. This approach can show whether persons protected under Title VI are being impacted at a disparate rate. EPA generally would expect the rates of impact for the affected population and comparison populations to be relatively comparable under properly implemented programs. Since there is no one formula or analysis to be applied, OCR may identify on a case-by-case basis other comparisons to determine disparate impact.

h) Step 5: Determining the Significance of the Disparity

The final phase of the analysis is to use arithmetic or statistical analyses to determine whether the disparity is significant under Title VI. OCR will use trained statisticians to evaluate disparity calculations done by investigators. After calculations are informed by expert opinion, OCR may make a prima facie disparate impact finding, subject to the recipient's opportunity to rebut.

...

i) Justification

If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to "justify" the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient. While determining what constitutes a sufficient justification will necessarily turn on the facts of the case at hand, OCR would expect that, given the considerations described above, merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity. Because the interests of a state or local environmental agency are necessarily influenced and informed by the broader interest of the government of which it is a part, OCR will entertain justifications based on broader governmental interests (i.e., interests not limited by the jurisdiction of the recipient agency). While the sufficiency of the justification will necessarily depend on the facts of the case at hand, the types of factors that may bear consideration in assessing sufficiency can include, but are not limited to, the seriousness of the disparate impact, whether the permit at issue is a renewal (with demonstrated benefits) or for a new facility (with more speculative benefits), and whether any of the articulated benefits associated with a permit can be expected to benefit the particular community that is the subject of the Title VI complaint.

Importantly, a justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations. Less discriminatory alternatives should be equally effective in meeting the needs addressed by the challenged practice. Here, again, mitigation measures should be considered as less

discriminatory alternatives, including additional permit conditions that would lessen or eliminate the demonstrated adverse disparate impacts.

...