Board Meeting
November 14-15, 2000

Attachment 1

California Environmental Protection Agency

Air Resources Board • Department of Pesticide Regulation • Department of Toxic Substances Control
Integrated Waste Management Board • Office of Environmental Health Hazard Assessment
State Water Resources Control Board • Regional Water Quality Control Boards

Winston H. Hickox
Agency Secretary

Gray Davis
Governor

August 28, 2000

Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

SUBJECT: *COMMENTS OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY REGARDING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S 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)*

The California Environmental Protection Agency (CalEPA) is pleased to submit the following comments regarding the United States Environmental Protection Agency's (US EPA) *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 Federal Register Number 124, page 39650, June 27, 2000). CalEPA is the cabinet-level agency responsible for the environmental protection programs for the State of California. It is comprised of the Office of the Secretary and six Boards and Departments (Air Resources Board, California Integrated Waste Management Board, Department of Pesticide Regulation, Department of Toxic Substances Control, State Water Resources Control Board and the Office of Environmental Health Hazard Assessment). In addition to the comments of CalEPA, this documents contains the individual department comments of the Air Resources Board, the California Integrated Waste Management Board, the Department of Toxic Substances Control, the Department of Pesticide Regulation and the State Water Resources Control Board.

CalEPA's Boards and Departments receive assistance from US EPA to support federal environmental protection programs, including permitting, delegated to the State of California and to support other environmental protection activities. The State of California and CalEPA are committed to complying with the Civil Rights Act of 1964. In addition, CalEPA is required under state law to:

a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of

people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.
c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.
d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
e) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency. (Public Resources Code of the State of California, Section 72000).

In implementing Section 72000 and other California statutes that mandate opportunities for public review of and input into permitting decisions, CalEPA's goal is to ensure that all Californians have access to the regulatory process and can feel confident that permitting decisions provide for protection of public health and the environment.

CalEPA would like to commend US EPA for its efforts in developing these new draft guidances. We recognize the improvements of the current draft guidance over the 1998 draft guidance in terms of offering more specific suggestions to state and local permitting agencies and clarifying aspects of the relationship between Title VI of the Civil Rights Act and permitting processes and decisions. CalEPA also appreciates the efforts by US EPA to gather input from a broad set of interested parties, including state and local regulatory agencies. CalEPA believes that the new draft guidances offer more specific suggestions for state and local permitting agencies with respect to public participation activities, disparate impact analysis and other data gathering and evaluation methodologies and opportunities for resolution of complaints.

CalEPA also commends US EPA for recognizing the role of state processes and programs by offering that it will give certain agreements "due weight." We encourage US EPA to consider expanding this concept beyond what is outlined in the draft guidance. We also strongly support US EPA's clarification that the filing or acceptance of a complaint does not suspend or stay a permit.

While CalEPA is encouraged by the direction that the draft guidances take in providing direction to state and local permitting agencies, we offer some suggestions on how they can be improved. We are concerned that US EPA is still only offering general guidance – the guidances are still too broad and vague to give a state any reasonable assurances about how complaints may be avoided, investigated and ultimately resolved, including

the need to offer more specificity about potential mitigation measures short of permit denial or loss of federal funding.

EPA should provide more detail about what kinds of program elements and public participation processes it will look for in giving state and local programs "due weight" in investigating complaints. While we appreciate US EPA's efforts to give examples, more details are necessary to allow states to develop effective processes or programs that will go a long way towards avoiding complaints or addressing complaints.

We also believe that under Title VI, US EPA has more discretion than to only give "due weight" to effective state programs. US EPA should consider reviewing state programs upfront and creating a rebuttable presumption that a permit granted under a state program US EPA believes is adequate complies with Title VI. In addition, US EPA should clarify that in reviewing state programs and investigating Title VI complaints, US EPA will look at other state statutes that further the goals of Title VI. For example, in California, certain public participation requirements are embodied in the California Environmental Quality Act, the California Administrative Procedures Act, the Bagley-Keene and Brown Acts that govern public meeting and participation requirements for state or local boards that make permitting decisions.

In addition, while we understand US EPA's criteria for accepting a complaint, US EPA should use its discretion under Title VI to require a threshold of evidence of intentional discrimination or discriminatory effects for complaints to be fully investigated.

Finally we urge US EPA to consider very carefully and clarify which kinds of permit renewals and what aspects of permit renewals are subject to de novo review under Title VI. Some aspects of permit renewals may be largely ministerial and opening all of a permit renewal to potential complaints may create an unnecessary resource drain on the permitting authority, the permitees and US EPA.

We ask US EPA to revise the guidance consistent with the comments of CalEPA and its Boards and Departments. US EPA should finalize the guidances so they can proceed to investigate and resolve complaints. Also, in light of the potentially substantial burdens on states to comply with the guidance, respond to complaints and where appropriate mitigate adverse impacts, US EPA should provide financial, technical assistance and training to the states.

CalEPA fully supports the comments of its Boards and Departments that appear below in this document. We would like to particularly highlight where the Boards and Departments have made specific suggestions on how to improve the guidance.

Comments of the Air Resources Board (ARB)

The Air Resources Board (ARB) prepared and submitted extensive comments to CalEPA in June 1998 on US EPA 's Interim Guidance for Investigating Title VI Complaints Regarding Permits. Some of these comments were incorporated into the CalEPA comments prepared by the Department of Toxic Substances Control and submitted to the US EPA by CalEPA. In the current draft documents, i.e., the Recipient Guidance and the Investigation Guidance, the US EPA has addressed many of our concerns and is to be commended for its continuing efforts to carry out the civil rights mission bestowed upon it by Title VI of the Civil Rights Act of 1964 and its implementing regulations set forth in 40 CFR Section 7.10 et seq.

Title VI of the Civil Rights Act provides, in pertinent part, that "[n]o person in the U.S. 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". (42 USC Section 2000d).

The US EPA regulations, in turn, prohibit programs having a discriminatory effect, or "disparate impact" as well as those that are intentionally discriminatory. If US EPA finds a recipient agency in violation of the nondiscrimination mandate, it will initiate actions to suspend US EPA funding, and may take other actions as well. The "Investigation Guidance" outlines how US EPA will carry out its responsibility to process complaints to its Office of Civil Rights (OCR). The "Recipient Guidance" is intended to assist US EPA grant recipients take proactive steps to avoid violations and complaints.

As the air quality agency for all purposes set forth in federal law, the ARB is responsible for coordinating and reviewing the efforts of California's air pollution control districts to attain and maintain health-based ambient and toxic air quality standards. As a regulatory agency whose mission to protect and enhance air quality must be based first and foremost upon sound science, we have been steadily improving air quality for all Californians, regardless of race, color, or national original. When it comes to environmental equity, we find that making the regulatory process more accessible to the public is considerably less difficult than addressing the existing situation in some of our urban areas. Minority populations are often located in proximity to industrial concentrations largely for economic reasons, as much as for past land use and zoning actions. Neither the ARB, which does not issue permits, nor the air districts, which are permitting agencies, are statutorily authorized to make land use decisions. Facilities that meet stringent emission standards and pre-construction requirements, as set forth in district rules and regulations (and any other applicable laws), are legally entitled to receive permits.

We believe the recipient guidance recognizes this fundamental limitation on air quality authority, and we support its emphasis on bringing together all of the stakeholders in a community cooperatively to develop solutions. The disproportionate impact on some communities that are exposed to the cumulative emissions of multiple sources of air pollution is a major challenge, however, and the US EPA guidance should be clarified to address the following concerns.

1. The guidance, (correctly, we believe) states that denial of a permit is not necessarily an appropriate solution where pre-existing conditions have resulted in disproportionate impacts on protected groups:

> "...it will be a rare situation where the permit that triggered the complaint is the sole reason a discriminatory effect exists; therefore, denial of the permit will not necessarily be an appropriate solution. Efforts that focus on all contributions to the disparate impact, not just the permit at issue, will likely yield the most effective long-term solutions."

What are air agencies expected to do to rectify past actions? Since air agencies have at least only an advisory role in the land use decision-making process, a finding by US EPA of discriminatory cumulative impact could put our federal funding in jeopardy even when the agency's action does not have a direct discriminatory impact on a protected group. A suite of mitigation actions are likely to be needed to rectify current cumulative conditions and the guidance needs to be more specific about what air agencies are required to do in such situations.

2. The guidance documents stress that US EPA will give "due weight" to a state's analysis of the impact of the permit decision and, more importantly, to a state's overall comprehensive program to eliminate or reduce adverse disparate impacts over a reasonable period of time. However, the guidance is vague as to how US EPA will gauge whether an agency's actions in this regard are sufficient. As drafted, the guidance leaves room for US EPA to find that actions ranging from a "good faith effort" to full mitigation of disparate impact would be necessary to support rejection of a complaint. States are left unsure of the recourse requirement or terms of efforts needed to forestall acceptance of a complaint.

3. The guidance appears to limit its bestowal of "due weight" to programs consisting of "area-specific agreements" between "recipients, affected residents, and stakeholders" in a specific geographic area of concern. We believe the "due weight" concept should be explicitly expanded to accord due weight to any recipient program that adequately addresses adverse impact through implementation of a set of practical, objective actions, whether or not they are the result of "area-specific agreements."

4. While the ARB appreciates US EPA's specification of a framework for conducting a disproportionate impact analysis, the specific parameters upon which a finding of disparate impact will be made/remain vague. For example, a state may conduct the analysis and find that, in its judgement, the impact is not significant or not disproportionate (or both), but US EPA may choose to use lower thresholds than the state for making these determinations. More specificity would be desirable so that we are better informed of US EPA's expectations. Further, additional guidance on the actions an agency should take or recommend in the event the impact and demographic analysis reveal a significant disparate impact is needed.

5. While the guidance provides useful information by listing suggested activities a state could consider to encourage meaningful public participation, US EPA made no commitment that satisfaction of the list would satisfy US EPA's criteria for meeting Title VI requirements. Conducting the suite of activities would require considerable resources with little assurance from US EPA that the effort would be sufficient. While we appreciate that the recipient guidance cannot be "one size fits all" and is thus general in nature, the guidance document as currently written may not suffice for permitting agencies with limited resources. A list of OCR contacts who can assist permit agencies in establishing proactive programs, along with funding and training assistance in conducting the impact and demographic analyses would be welcome.

6. The investigation guidance deems complaints filed prior to permit issuance as "premature," postponing OCR investigation until after issuance of the permit. While we appreciate US EPA's deference to the administrative permit-issuing process, we believe the optional time to apply air pollution control equipment is during the construction plan of new or modified equipment. Hence, the guidance should delineate a mechanism for bringing Title VI concerns to the attention of the applicant, the permit agency, and OCR prior to issuance of a construction permit to increase the opportunity for early, effective problem resolution. This early notice mechanism would not need to foreclose the filing of a complaint after permit issuance if the complainant supplied evidence of disparate impact.

7. The issue of "permit renewals" is especially difficult and contentious, for while the permit renewal is indeed an opportunity to ensure that the facility is current in its compliance status, and there is no vested right to pollute, the source is already in existence, and the authority of air permitting agencies is limited. The air districts possess the legal authority to determine that operating permit conditions are up-to-date and adequate to ensure compliance and enforceability with all requirements, but unless the facility is proposing a modification — subject to new source review requirements — district authority is legally as well as practically limited. The guidance should be amended to clarify that many of the listed remedial measures would need to be negotiated and implemented using voluntary agreements with affected sources rather than imposed by air permit agency authority.

8. The guidance suggests that the national ambient air quality standards (NAAQS) be used as benchmarks to evaluate the adverse impacts of criteria pollutants. While the ARB agrees that the NAAQS represent thresholds of unhealthy air, the "Investigation Guidance" should also address how the permitting agency and OCR will evaluate adverse impacts of criteria pollutants in nonattainment areas, as all of California's urban areas are nonattainment for some pollutants. Permitting agencies typically rely on modeling analyses that show whether a facility would "cause or contribute" to a violation of an ambient standard, and we suggest that such analyses be used to evaluate adverse impact with regard to a Title VI complaint.

9. The ARB would like more information regarding US EPA's intentions in cases where a permitting agency conducts a disparate impact analyses and finds cumulative violations of Title VI. We would like to know how OCR will work with all affected parties to arrive at a prompt and satisfactory resolution without the counterproductive "remedy" of fund withholding. Along the lines of resolution of existing and potential environmental inequity we would like to know how a permitting agency can identify who speaks for the "community." In a state as diverse as California, there are many racial and ethnic communities, along with potentially conflicting views and needs among their constituents. In some areas of southern California, 100 different languages may be spoken — what percentage of minority presence would require what amount of outreach? More guidance on the "area-specific" approach mentioned in the recipient guidance would be useful to assist us in identifying geographic areas where adverse, disparate impacts may exist and how comparison areas could be identified. Again, the diversity of race, color, and national origin in many regions of California complicates the problem and renders the guidance too general. Resources and assistance from OCR is desirable.

10. The guidance should specifically solicit the participation of affected facilities and land use agencies (i.e., cities and counties) in key areas where discussions are being conducted and agreements are being made, such as in the informal resolution process and in establishing area-specific agreements. The ARB and the air districts are developing and refining the tools necessary to assist land use siting agencies with neighborhood impact analyses and other types of air pollution data. We continue to believe that the land use decisionmakers are key players in any effort to ensure that environmental equity is given appropriate consideration and that legal authority to avoid and mitigate disparate impacts is available.

The ARB welcomes US EPA's efforts to devise useful guidance for agencies whose activities are subject to Title VI. The revised guidance documents go a long way toward responding to ARB's concerns with the original draft guidance documents, and we look forward the issuance of final guidance documents that address the remaining concerns set out above.

Comments of the California Integrated Waste Management Board (CIWMB)

The Integrated Waste Management Board has several active grants with the US EPA, which subject CIWMB to the non-discrimination provisions of Title VI. However, as noted in the comments below, it is not clear whether the CIWMB program for permitting solid waste facilities, because of the regulatory scheme with a state concurrence for a permit actually issued by local government, would be subject to Title VI complaints and therefore this guidance. Local Enforcement Agencies (LEAs) that have active US EPA grants would very likely be subject to the Title VI provisions and the guidance, since these entities actually issue the solid waste facility permit. Because CIWMB is the actual issuer of waste tire facility permits, it is clear that CIWMB would be subject to the Title VI provisions and guidance under the waste tire permitting program.

We have reviewed the draft guidance and submit the following comments:

1. The guidance states that once a discrimination complaint is filed, as part of a preliminary finding of noncompliance, US EPA "expects to assess whether the adverse disparate impact results from factors within the recipient's authority to consider as defined by applicable laws and regulations." In California, the issuance of a solid waste facility permit is a coordinated process between the LEA and CIWMB. The LEA obtains a permit application from the facility and develops a draft permit. CIWMB'S role is to review the draft permit and concur or object to the permit. However, the governing statutes set forth only very limited grounds under which CIWMB may object, i.e., whether the facility will operate in accordance with state minimum operating standards and financial assurance requirements, or whether the project is in compliance with the California Environmental Quality Act (CEQA) from the limited perspective of a "responsible agency." The LEA then issues the permit. Based on the aforementioned assessment process US EPA intends to follow, CIWMB'S limited authority to object to a permit, which does not include authority to either object based on disparate effects of the facility on surrounding population or object based on inadequate public participation activities, suggests its permit decision would necessarily be immune to Title VI complaints.

2. In the response to comments on the previous draft guidance (regarding claims that local zoning/siting decisions are most often the determining factor in where a facility will be located), US EPA states its view that because issuance of a permit is the necessary act that allows the operation of a source in a given location, a state permitting authority has an independent obligation to comply with Title VI, a direct result of its accepting Federal assistance. "[R]ecipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources." In light of comment #1, it is not clear whether US EPA believes this obligation to comply

would override an entity's lack of statutory authority to use Title VI grounds in a permit objection or denial.

3. Where CIWMB's permitting programs are subject to the guidance, both CIWMB and LEA staff will need to obtain extensive training in exposure, risk and demographic analysis techniques, cumulative impact assessments and disparate impact analysis, or some other source for this expertise would need to be obtained.

Comments of the Department of Toxic Substances Control (DTSC)

1. Although the siting of hazardous waste facilities is a local land use decision, the Department of Toxic Substances Control recognizes that it is responsible for ensuring that its permitting decisions not have an adverse disparate impact based on race, color or national origin. DTSC commends US EPA for clarifying that the adverse impacts for which recipients of federal funding will be held accountable are the health and environmental impacts on which DTSC has always focused, and which are cognizable under DTSC's authority. Implicit throughout both guidance documents is a recognition that these impacts are to be evaluated using the analytical tools that the states and the US EPA are constantly refining to measure health and environmental risks, and to determine their significance.

2. The suggestions in the Draft Recipient Guidance for Public Participation and Outreach are sound ideas that reflect the policies that DTSC has long put in practice.

3. The Draft Recipient Guidance has a useful list of resources for obtaining demographic and exposure data and of tools and methodologies for conducting adverse impact analysis. The most useful step that OCR can take to assist the states in ensuring non-discrimination will be to continually update these lists and to provide more specific guidance as to the methodologies for which US EPA will accord "due weight".

Comments of the Department of Pesticide Regulation (DPR)

Instead of submitting detailed substantive comments, the DPR poses the following scenario to highlight a concern regarding Title VI. For example, US EPA provides some funding to a non-permitting program of a certain state agency. A few months later, someone timely files a Title VI complaint with US EPA alleging discrimination in an environmental permitting program of that same state agency. The environmental **permitting** program, which is the subject of the Title VI complaint, did **not** receive any of the US EPA funding.

US EPA should clarify whether the challenged state environmental permitting program is subject to Title VI, and whether it has jurisdiction to investigate and decide if that state environmental permitting program violated Title VI.

Comments of the State Water Resources Control Board (SWRCB)

1. Complainants have 180 days after the subject environmental permit is issued, renewed or modified to file a Title VI complaint with US EPA's Office of Civil Rights (OCR). Complaints must include, among other things, the alleged discriminatory act that violates US EPA's Title VI regulations. In the complaint, the complainant need not show that it raised the issue of the potential Title VI violation during the permitting process conducted by the recipient agency. This is true even if the complainant was aware of or participated in the permitting action.

Even though recipients are generally responsible for anticipating and assessing potentially disparate adverse impacts, the potentially-affected community may be in a better position to alert recipients to specific potential disparate impacts. The guidance should require or encourage complainants to identify potential disparate impacts at the permitting stage. This should only apply if the complainant was aware of the permitting action at the time the permit was under consideration by the recipient. If a recipient is not aware of a specific impact until a complaint is filed - which is after the permit is issued - and the recipient later agrees that an adverse impact can be reduced or mitigated, it will be necessary to open up the permitting process again. It would be much more efficient if the alleged disparate impact was identified earlier so any warranted mitigation measures could be included in the initial permitting action.

2. A recipient's federal funding can be terminated if it is found that any of the recipient's programs or activities violate Title VI. In California, a substantial portion of federal assistance is passed through CalEPA boards, departments and offices to other political entities (e.g., districts, counties, municipalities). At the briefing held on July 24, 2000, US EPA was asked how a Title VI violation by one of the political entities receiving pass through money from the State would impact other federal funding of the state entity.

US EPA indicated that since the money passed through the state entity's program, that a Title VI violation by a recipient of pass through money would be attributed to the state entity and jeopardize all of the federal funding for that state entity. This interpretation has significant ramifications in California, where federal funds are used at various levels for environmental regulation.

SWRCB disagrees with US EPA's conclusion. Section 602 of Title VI provides that compliance with Title VI may be effected by the termination of a program or activity in which discrimination is found, but that such termination shall be limited to the particular political entity, or part thereof, or other recipient (of federal financial assistance) as to whom such a finding has been made. (42 U.S.C. s 2000d-1.) Therefore, if an entity receiving pass through money from the State violated Title VI, it seems that only the federal funding that was passed through could be terminated.

Since Regional Water Quality Control Boards issue water quality control permits, pass through implications do not arise for the State Water Resources Control Board in the context of permitting. It could impact other SWRCB programs where federal funds are passed on to other entities such as the Underground Storage Tank, Local Oversight Program, the State Revolving Fund Loan Program, and the Clean Water Act Sections 319 and 205(j) grant-funded programs. Since this may be a permitting issue for other CalEPA boards, offices and departments, it would be appropriate to seek clarification in this draft guidance.

We appreciate the opportunity to provide these comments. If you have any questions about these comments, please contact either one of us at (916) 445-3846. We look forward to continuing to work with US EPA on this important subject.

Sincerely,

Nancy H. Sutley
Deputy Secretary for Policy and
Intergovernmental Relations

Deborah L. Barnes
Deputy Secretary for Law
Enforcement and Counsel