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The Honorable David M. McIntosh
Chairman, Subcommittee on National
Economic Growth, Natural Resources,
and Regulatory Affairs
Committee on Government Reform
House of Representatives

Dear Mr. Chairman:

This letter is in response to your letter of September 1, 1998, requesting our views on whether "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Interim Guidance) issued by the Environmental Protection Agency (EPA) is a "rule" under the Congressional Review Act (CRA) portion of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. § 801 et seq.). For the reasons which follow, we find that the document is a "rule" and should be submitted in accordance with the requirements of SBREFA.

Rules Subject to Congressional Review

Chapter 8 of title 5, United States Code, entitled "Congressional Review of Agency Rulemaking," is designed to keep Congress informed about the rulemaking activities of federal agencies and to allow for congressional review of rules. The requirements of ch. 8 take precedence over any other provision of law.[1]

Section 801(a)(1) provides that before a rule becomes effective, the agency promulgating the rule must submit to each House of Congress and to the Comptroller General a report containing:

> "(i) a copy of the rule;
> (ii) a concise general statement relating to the rule, including whether it is a major rule; and
> (iii) the proposed effective date of the rule."

On the date the report is submitted, the agency also must submit to the Comptroller General and make available to each House of Congress certain other documents, including a cost-benefit analysis, if any, and agency actions relevant to the Regulatory Flexibility Act,

[1] 5 U.S.C. § 806(a) provides that: "This chapter shall apply notwithstanding any other provision of law."

5 U.S.C. § 601 et seq., the Unfunded Mandates Reform Act of 1995, 5 U.S.C. § 202 et seq., and any other relevant information or requirements under any other legislation or any relevant executive orders. 5 U.S.C. § 801(a)(1)(B)(i)-(iv).

Once a rule, whether determined to be a major rule or not, is submitted in accordance with § 801(a)(1), special procedures for congressional consideration of a joint resolution of disapproval are available for a period of 60 session days in the Senate or 60 legislative days in the House. 5 U.S.C. § 802. These time periods can be extended upon a congressional adjournment. 5 U.S.C. § 801(d)(1).

A major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register, whichever is later. 5 U.S.C. § 801(a)(3)(A).

Section 804(3) provides that for purposes of ch. 8, with some exclusions, the term "rule" has the same meaning given the term in 5 U.S.C. § 551(4), which defines rules subject to the Administrative Procedure Act (APA). The APA definition of a "rule" is as follows:

> "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances,services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . ."

Chapter 8 contains several exclusions for the APA definition of "rule":

> "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers or acquisitions therefor, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3).

EPA's Regulations and Interim Guidance Implementing Title VI

Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352) states, at section 601, that:

> "No person in the United States shall, on the grounds 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."[2]

[2] 42 U.S.C. § 2000d.

Under EPA's existing regulations all applicants for, and recipients of, EPA assistance are prohibited from engaging in specific activities that violate Title VI. Among other things, a recipient of EPA assistance shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin, or sex deny a person any service, aid, or other benefit of the program or provide a person any service, aid, or benefit that is different from that provided to others under the program. In addition, a recipient may not choose a site or locate a facility in such a manner as to discriminate on the basis of race, color, national origin, or sex against individuals under any program to which the regulations apply. Under EPA's regulations the Director of the Office of Civil Rights (OCR) must determine whether an applicant is in compliance with the regulations prior to award. OCR also has authority to conduct periodic compliance reviews and to investigate complaints. If OCR finds discrimination is occurring and the applicant or recipient does not come into compliance voluntarily, OCR is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding.

Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" was issued on February 11, 1994. Section 2-2 of the order is designed to ensure that federal actions substantially affecting human health or the environment do not have discriminator effects based on race, color, or national origin. The Presidential memorandum to the heads of all departments and agencies concerning the order directs federal agencies to ensure compliance with the nondiscrimination requirements of Title VI for all federally-funded programs that affect human health or the environment.

On July 14, 1994, Attorney General Janet Reno issued a memorandum to the heads of departments and agencies reminding them that regulations implementing Title VI apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect. She requested that each department and agency head ensure that disparate impact provisions of their Title VI regulations are fully utilized.

On February 5, 1998, EPA issued its "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits." According to the EPA memorandum transmitting the Interim Guidance and the Guidance's introductory paragraphs, the intent of the document is to update EPA's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discriminatory effects in the environmental permitting context.[3]

The Interim Guidance consists of two main sections entitled "Overview of Framework for Processing Complaints" and "Impacts and the Disparate Impact Analysis."

The first section explains that Title VI complaints alleging either discriminatory intent and/or discriminatory effect in the context of environmental permitting will be processed by EPA's Office of Civil Rights under EPA's Title VI regulations found in Part 7 of Title 40 of the Code

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[3]The Supreme Court has held that Title VI authorizes federal agencies to adopt implementing regulations that prohibit discriminatory effects, as well as those prohibiting intentional discrimination. Guardian Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983). Discrimination can result from policies and practices that are neutral on their face, but have the effect of discriminating, i.e., they have a "disparate impact." EPA's Title VI regulations prohibit discriminatory effects from facially-neutral policies unless it is shown that they are justified and there is no less discriminatory alternative.

of Federal Regulations (C.F.R.). The section then lists eight stages of the process.[4] The majority of these stages contain citations to and follow procedures in EPA's current regulations.

The second section sets forth the steps to be taken in conducting a Disparate Impact Analysis. The five steps are:

(1) Identifying the Affected Population;
(2) Determining the Demographics of the Affective Population;
(3) Determining the Universe(s) of the Facilities and Total Affected Population(s);
(4) Conducting the Disparate Impact Analysis; and
(5) Determining the Significance of the Disparity.

Under each step guidance is provided to OCR personnel as to how they may proceed. For example, "Step 2: Determining the Demographics of the Affected Population" states:

> 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 identified 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.

The introduction to the Disparate Impact Analysis section explains that OCR will not use any single technique for analyzing and evaluating disparate impact allegations but will use several techniques within a broad framework.

Analysis

EPA argues that the Interim Guidance does not constitute a "rule" under the CRA and need not be submitted to Congress and our Office because it is a non-binding, internal document that merely informs agency personnel how OCR intends to process Title VI complaints. Therefore, EPA argues that the Interim Guidance falls under the CRA exemption in 5 U.S.C. § 804(3)(C) as a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."

While EPA's characterization of its action is a factor to be considered, it is not dispositive. Rather it is the substance of what EPA has purported to do and has done which is decisive.

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[4]Acceptance of the Complaint, Investigation/Disparate Impact Assessment, Rebuttal/Mitigation, Justification, Preliminary Finding of Noncompliance, Formal Finding of Noncompliance, Voluntary Compliance, and Informal Resolution.

See Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983), quoting Columbia System v. U.S., 316 U.S. 407, 422 (1942). We, therefore, turn to the Interim Guidance itself to determine whether it is a rule or regulation requiring submission to us for approval.

The first part of the Interim Guidance entitled "Overview of Framework for Processing Complaints" (Overview) largely confirms requirements that already exist in EPA regulations at 40 C.F.R. pt. 7. It clarifies how those procedures will apply to complaint processing in the context of discriminatory effects allegations in environmental permitting, and for the most part does not alter the rights of interested parties that currently exist. However, in at least one significant instance, the Overview departs from the procedures set forth in 40 C.F.R. pt. 7. According to the Interim Guidance, OCR will make an initial finding of disparate impact; if a disparate impact is found, it will notify the recipient and complainant and afford the recipient an opportunity to respond. The recipient's response may rebut OCR's finding, propose a plan to mitigate the disparate impact, or seek to demonstrate that there is a legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact. The Overview further explains that "Even where a substantial, legitimate justification is proffered, OCR will need to consider whether it can be shown that there is an alternative that would satisfy the state interest while eliminating or mitigating the disparate impact."

These procedures differ significantly from those contained in the existing regulations at 40 C.F.R. pt. 7. Part 7 does not provide for OCR to make an initial assessment, nor are the recipient and complainant given an opportunity at this stage to provide input into EPA's analysis. Furthermore, the existing rules do not set forth that the recipient has the opportunity to demonstrate that it has a "substantial, legitimate interest" that justifies any disparate impact OCR may find. The introductory paragraph to the Overview states that the steps set forth therein "will" be followed. Therefore, we view these new steps in the procedure for handling disparate impact assessment as mandatory. They clearly alter the existing regulation and give to recipients significant rights that they did not previously possess for obtaining dismissal of the complaint. In this respect these new steps meet the elements of a substantive rule: they affect the rights and duties of the recipient, the complainant, and the affected populations; they will have future effect and they effect a change in the existing regulation. See Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 448-449 (9th Cir. 1993); Nat'l Family Planning and Reproductive Health Ass'n v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992).

We note that EPA's argument is stronger with respect to the second part of the Interim Guidance entitled "Impacts and Disparate Impact Analysis." Section 804(3)(C) of title 5, United States Code, excepts from congressional review any "rule of agency organization, procedures, or practice that does not substantially affect the rights or obligations of non-agency parties." A similar provision to § 804(3)(C) is found in the public notice and comment provision of the APA, 5 U.S.C. § 553, which exempts from notice and comment "rules of agency organization, procedures or practice." In applying the APA provision, courts have generally considered whether the rule at issue alters the rights and interests of parties. As the court in Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980), stated, the key distinguishing feature of a "procedural" rule is that it covers agency actions that do not themselves alter the rights or interests of the parties, although it may alter the manner in which the parties present themselves in their viewpoints to the agency." Id. The Batterton court recognized, however, that particular agency actions often cannot neatly be placed into any particular category and

that the categories have "fuzzy perimeters" and establish "no general formula." Id. At 702. See Kenneth Culp Davis & Richard J. Pierce, Jr., 1 Administrative Law Treatise 56.4 93d ed. 1994).

The Guidance prescribes five steps that OCR is to follow in conducting its analysis. In setting forth these steps--identifying the affected populations, determining the demographics of the affected populations, determining the universe of facilities and total affected populations, conducting a disparate impact analysis, and determining the significance of the disparity--the Guidance presents a course of action which to some extent will control the manner in which the investigation is conducted and, therefore, will have a bearing on the outcome of the investigation. However, it can be argued that these steps are the kinds of steps that statisticians would be expected to follow in conducting a disparate impact analysis. Also, OCR has broad discretion in deciding how to proceed in conducting each of the steps of the analysis, a factor courts often consider in determining whether a binding rule affecting substantive rights exists under the APA. See e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986); Guardian Federal Savings & Loan Assoc. v. Federal Savings & Loan Corp., 589 F.2d 658 (D.C. Cir. 1978).

In our opinion, irrespective of whether or not in isolation the second portion of the Interim Guidance is properly viewed as procedural, considered as a whole, the Interim Guidance clearly affects the rights of non-agency parties. Thus, we believe that it constitutes a rule under SBREFA subject to congressional review.

Sincerely yours,

Robert P. Murphy
General Counsel