

ENVIRONMENTAL JUSTICE RECOMMENDATIONS

I. Introduction

This Report is the result of a collective effort by representatives of state agencies, local governments, industry, and community representatives to develop an approach for identifying and addressing environmental justice issues in Michigan. It grows out of the recognition that our environmental system is primarily managed at the state and local level. To the extent that there are inequities in the environmental system and in its implementation, they must be identified and addressed at that same level. There continue to be efforts at the federal level to deal with these issues, and this report is, in part, a response to those efforts. There have also been some Michigan-specific issues that have sensitized the environmental regulatory community to the problems that may arise from efforts to issue environmental permits or to locate enterprises in proximity to minority areas.

The challenge for state-specific approaches became clear when the United States Environmental Protection Agency (“US EPA”), through its Office of Civil Rights (“OCR”), issued a “Draft Interim Guidelines for Investigating Title VI Administrative Complaints” (“Interim Guidelines”) (Appendix 1), on February 5, 1998. While described as “draft”, US EPA used the Interim Guidelines to process the backlog of existing complaints alleging environmental racism. US EPA prepared the Interim Guidelines and publicly distributed them without providing an opportunity for meaningful review by the affected state agencies, or by any other interested parties. While a post publication 90-day public comment period was provided, nearly 18 months later, US EPA’s responses to the comments have yet to be published. The Interim Guidelines were heavily criticized by a wide variety of groups, including the United States General Accounting Office, which concluded that the Interim Guidelines constituted a rule, and should have been formally promulgated in accordance with the Small Business Regulator Enforcement Fairness Act. (Appendix 2).

The Interim Guidelines relate only to claims brought under Title VI of the 1964 Civil Rights Act (“Title VI”). Title VI prohibits the recipient of federal assistance (such as the Michigan Department of Environmental Quality, or “MDEQ”) from discriminating on the basis of race, color, or national origin¹ in its programs or activities. In the environmental context, the argument is that the state agency, when making environmental determinations and issuing environmental permits, would violate Title VI by discriminating on the basis of race, color, or national origin. Title VI does not address “economic” discrimination. An Executive Order issued by President Clinton in February of 1994 (Appendix 3) attempts to broaden the Environmental Justice concept beyond traditional Title VI categories, to include low income population as well.

This following Report does not address the issue of low income raised by the Executive Order. It only addresses Title VI issues.

Michigan has had two instances in which formal claims of violations of Title VI have been made. In both instances, the claims of environmental discrimination were ultimately rejected.

The first matter, involving the Genesee Power Station Limited Partnership, was subject both to a Title VI complaint filed with US EPA's OCR and by a law suit filed in Michigan State Court. The Title VI Administrative Complaint was filed over four and one-half years ago, alleging violations of the civil rights of residents in the area by the Michigan Department of Natural Resources ("MDNR", predecessor to the current MDEQ). OCR has not issued a decision.

The law suit, filed in Genesee County Circuit Court, alleged a violation of the Michigan Civil Rights Act, the Michigan Constitution, and the Michigan Environmental Protection Act by MDNR when it issued an air permit for the facility. The Michigan Court of Appeals has ruled that the trial court lacked jurisdiction to issue any injunctions in the matter. The Court of Appeals did not upset the trial court's determination that the Plaintiffs had failed to establish any violation of the Michigan Civil Rights Act.

The second, and more recent, matter involving an allegation of Title VI violations was made in the *Select Steel* matter in Genesee County. MDEQ issued a permit for a mini-mill facility, known as Select Steel, that was to be sited near the location of the Genesee Power Plant. The Administrative Complaint, filed by some of the same petitioners and plaintiffs in the *Genesee Power* matter, alleged a series of violations, including failure to: (1) provide proper notification, (2) provide an opportunity for comment, and (3) take into account existing pollution sources in the area. Two and one-half months after the complaint was filed, US EPA OCR issued its decision finding that MDEQ had not violated Title VI. Specifically, OCR found that because the emissions from the facility did not affect the area's compliance with the National Ambient Air Quality Standards, there was no adverse impact. According to the decision, if there was no adverse impact, there could be no finding of discriminatory effect in violation of Title VI and US EPA's implementing regulations (Appendix 4). Approximately three months later, the Petitioners asked OCR to reverse its decision. Despite the OCR dismissal of the environmental justice complaint, Select Steel decided not to build its facility in Genesee County because of the prospect of additional administrative, and perhaps judicial, appeals. The company elected to build at another location in Michigan.

II. Executive Summary

In July of 1998, the MDEQ invited potential stakeholders to participate in an Environmental Justice Workgroup ("Workgroup") to discuss and make

recommendations on a process to address environmental justice issues in Michigan. The Workgroup was comprised of representatives from industry, community, local governments, and state agencies (Appendix 5). Four subgroups were developed each with a specific charge to address the issue of environmental justice:

- Role of Local Governments and Local Zoning Subgroup
The charge of this subgroup was to consider and make recommendations for what role(s) local zoning and local governments should play in a proactive system to address environmental justice issues.
- Environmental Justice Area Subgroup
The charge of the Environmental Justice Area Subgroup was to identify geographical areas in which environmental justice concerns may exist. The subgroup will develop recommendations on a screening system that can be used in Michigan to identify environmental justice areas, where additional steps beyond the requirements of environmental statutes may be needed to engage the citizenry and evaluate the impacts of agency decisions.
- Community Outreach Subgroup
The Community Outreach Subgroup was charged with making recommendations on what additional outreach or public participation efforts, beyond those required by statute, should be undertaken in environmental justice areas.
- Disparate Impact Area Subgroup
The charge of this subgroup was to determine what impacts to a community should be considered in environmental decision making. In addressing this issue, the subgroup will make recommendations regarding whether the impacts considered should be limited to environmental impacts or include all impacts of a facility and address how impacts can be documented. The second issue to be addressed by this subgroup was what are plausible approaches to measuring impacts to the community and determining if a disparate impact exists. In addressing this issue, the subgroup will make recommendations on how to measure impacts on a community. The subgroup will also make recommendations on how to define similar communities for comparison purposes, and what level of impact differences constitute a disparate impact.

All four subgroups developed draft reports in response to their respective charges. A drafting committee was then created to merge the individual subgroup reports into a comprehensive recommendation to the MDEQ. The drafting committee was comprised of representatives from the individual subgroups (Appendix 6).

This document represents a compilation of the concepts developed in the subgroup reports. It is important to note that each subgroup recognized the importance of a proactive approach to identifying and addressing potential environmental justice issues. The subgroups also recognized the importance of early community outreach in all aspects of the MDEQ permitting process.

III. Program Recommendations from Each Subgroup

A. Role of Local Governments and Local Zoning Subgroup Recommendation

The local units of government, particularly the local zoning boards, are generally the first step in the journey to receive a permit (air, waste, water) from the MDEQ. It is well established that for air sources, the local units of government have given land use approvals well before the permit application is received by the MDEQ. This is an important step in the process that the Interim Guidelines fail to recognize. It is, therefore, crucial to establish cooperation between the local units of government and the MDEQ in an effort to identify interested parties and to provide effective public outreach on the permitting issues at the earliest juncture possible. While this subgroup recognizes the fact that the MDEQ legally cannot require the local governmental units to adopt the recommendations contained herein, it strongly suggests local governmental units incorporate these recommendations into the process utilized to review a proposed permit application for land use.

Five key assumptions were developed and validated by members of the Local Governments and Local Zoning Subgroup. They are:

1. A proactive approach that involves the applicant, community, and state and local officials is highly desired.
2. The identification of potential environmental issues related to community concerns (aside from Title VI criteria) must become an integral step in the process and occur at the onset of any zoning request, change, permit application, and/or significant modification.
3. The role of local officials should be clearly defined so as to enhance the permitting process and not complicate it or lengthen it.²
4. Recognition that impacts on the environment in a given community are attributable to many sources, some historical and some by perception. In either instance, a full and meaningful community dialog is needed.
5. It may be advisable to have a demographic analysis performed.

Identification and Resolution

Assuming a proposed land use requires a change in zoning for the affected property, the subgroup discussed how the local government responsible for zoning decisions and land use planning could identify a potential environmental justice issue during its process. Also, what role it should take in having that issue addressed at the local or state government level, or both, was discussed. To address these issues, the Local Governments and Local Zoning Subgroup developed the following suggestions:

- A zoning change application should contain a checklist that requires the property owner to examine possible impact(s) of the proposed site plan on the property and surrounding area. In addition to the formal site plan, there should be, at a minimum, a checklist for the following types of issues:
 1. Are there potential emissions (air, water, odor, vehicle, etc.)?
 2. What is the description of the waste streams?
 3. Is there a presence of wetlands?
 4. Has any community outreach been initiated, and to whom?

- Upon receipt of an application containing such information, the local government officials (perhaps a Planning Department or, as in Detroit, a Buildings & Safety Engineering Department {"BSE"}) should refer the application to what Detroit calls its Industrial Review Committee ("IRC") for further evaluation. In the City of Detroit, this committee is comprised of representatives from a number of city departments, in particular:
 1. Planning and Development
 2. Health
 3. Air Quality (or other environmental department)
 4. Fire Marshall
 5. City Planning Commission (if different from Planning & Development Department)
 6. Public Works
 7. Water/Sewer

- In addition to the issues identified above, this committee would routinely look at the site plan, focusing on external emissions such as noise, vibration, smoke, odor, noxious gas, dust, dirt, glare, heat, or other discharges or emissions that may be harmful or of concern to community residents in adjacent areas.³

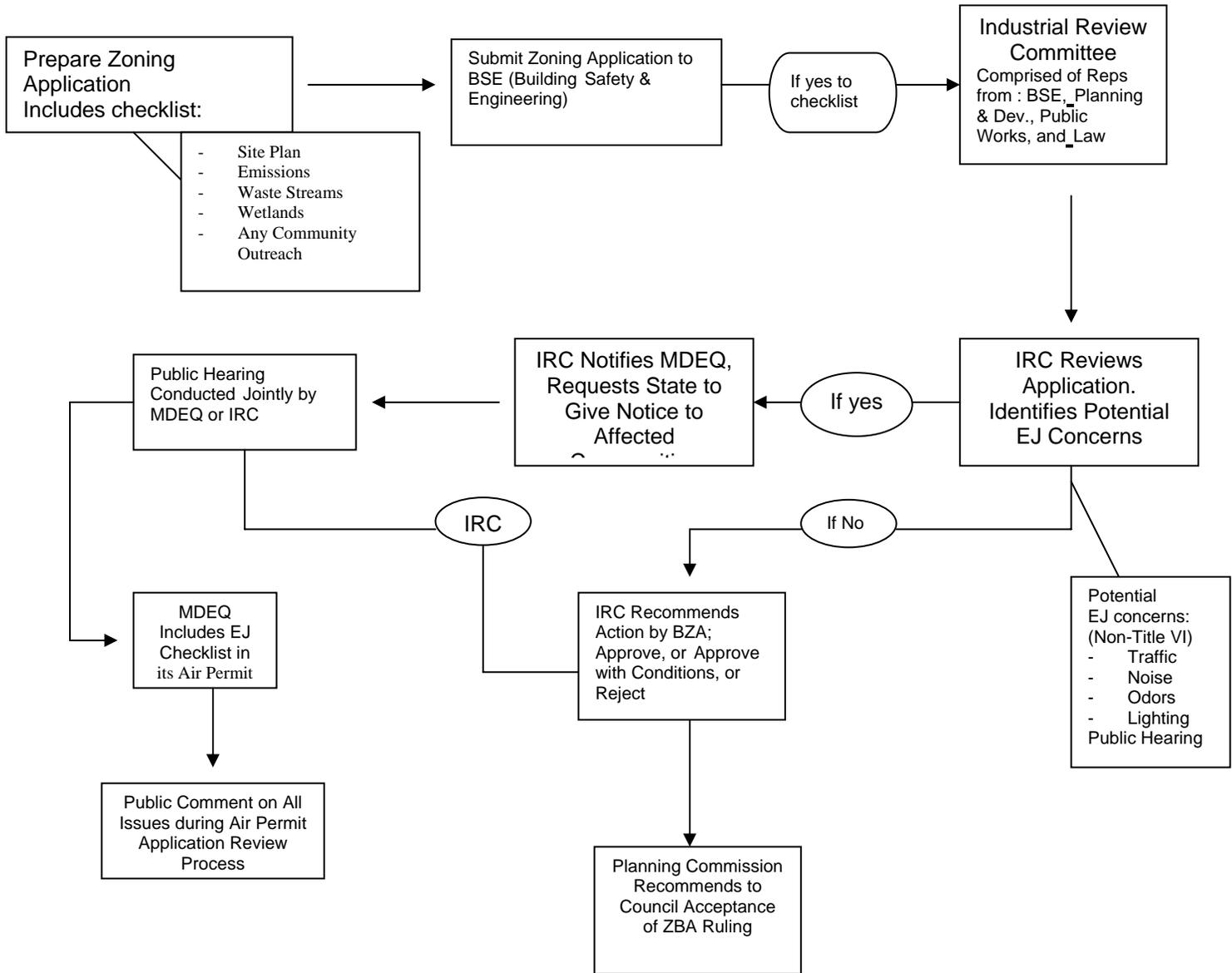
- As depicted in the attached chart, if none of these issues are a concern at the proposed site, then the IRC would recommend action by the BSE or by the Board of Zoning Appeals. It can recommend approval, approval with conditions, or rejection.

- If, however, there are concerns, then the IRC would notify the MDEQ and the two entities would conduct a public forum. (The MDEQ's role is even more important if the proposed site development is located near the local government's boundary line because of the potential impact on other jurisdictions.)

- After the hearing, the IRC is still obligated to make a recommendation to the BSE or Board of Zoning Appeals. The MDEQ will also have knowledge of any community concerns at the outset of its air permitting process. This process is outlined in the flowchart on the following page.

- It is recommended that local elected officials and/or the best suited agency be involved even in the instance that a zoning request or variance is not required. For example, a brownfield redevelopment proposal should contain a similar checklist designed to identify possible environmental justice concerns.

ROLE OF LOCAL GOVERNMENT IN ENVIRONMENTAL JUSTICE ISSUES IDENTIFICATION AND RESOLUTION



B. Environmental Justice Area Subgroup Recommendation

The initial charge of the Environmental Justice Area Subgroup (“EJ Area Subgroup”) was to identify geographical areas in which environmental justice concerns might arise and to develop recommendations on a screening system that can be used to identify those areas. It was the unanimous opinion of the subgroup not to specifically identify geographical areas in Michigan and label them “Environmental Justice Areas.” Instead, the EJ Area Subgroup concentrated its efforts on developing a screening system whereby all major permit applications submitted to the MDEQ would be evaluated to determine if there are “environmental justice issues” associated with that permit application.

The EJ Area Subgroup agreed to the following principles to fulfill its charge:

1. Groups protected by Title VI should be the focus of EJ areas.
2. Determinations of EJ areas in Michigan should be based on clear and precise definitions.
3. EJ areas should be determined through replicable methodology and in a way which avoids data manipulation.
4. A *de minimis* threshold of affected persons should be established as a factor in determining an EJ area.

Under US EPA’s Interim Guidelines, a potential EJ issue can arise when an environmental permit is issued by a state or local government that has received federal funding to administer environmental programs under federal statutes. The EJ Area Subgroup, therefore, agreed to develop a recommendation for permits issued by MDEQ under federal law. Recognizing that other environmental issues outside the scope of US EPA’s Interim Guidelines could still be of concern to community members, the EJ Area Subgroup recommended that a procedure be developed for “non-Title VI” issues (see flow diagram on page 12.)

The EJ Area Subgroup surveyed the screening methodologies used by various US EPA regions and states, and discovered a wide variety in the way other agencies determine environmental justice areas⁴. No single, scientific way to determine potential environmental justice areas is used by agencies that have environmental justice procedures. Rather, inconsistent and somewhat questionable determinations of demographic data appeared to be used. US EPA Region V acknowledged this point: “[t]here is currently no proven methodology for conducting a direct, scientific assessment of disproportionately high and adverse human health or environmental effects.”⁵

Particular attention was given to the US EPA Region V⁶ *Interim Guidelines for Identifying and Addressing a Potential EJ Case* (June 1998). Region V

decided to use demographic information employing Geographic Information Systems (GIS) for analyzing census data and census block groups within a one-mile radius of a permitted facility to ascertain environmental justice areas. Within such areas, Region V decided that “[I]f the ...minority population percentage is greater than twice the state percentages, the case should be identified and addressed as a potential EJ case.”⁷

Region V developed its screening methodology as a way to comport with guidance from the Executive Office of the President’s Council on Environmental Quality (“CEQ”), which set a minimum measure of minority population at 50% of the affected area. The CEQ believes that a minority population may be present if the minority population in an environmental justice area is “meaningfully greater” than the minority population of the general population “or other appropriate unit of geographical analysis.”⁸ Region V defined “meaningfully greater” as any value above the state minority percentage. Because this approach represents a very large universe in Region V states, Region V decided to use “2 times the state minority population percentage” as a flag for potentially viable EJ cases.⁹

According to 1990 Census Data relied upon by Region V, Michigan has a minority population of 18%. Region V would identify a potential EJ case in Michigan if a permit was issued to an applicant located in an area within a one-mile radius of the proposed permitted site if there was a minority population of 36% or greater. It also would consider an issue to be a potential EJ matter if there was a “community-identified” EJ issue and the minority population was greater than 18%. Region V did not define the “community-identified” term.

The term “minority individual” was determined by US EPA to be those groups classified by the US Census Bureau, namely: American Indian or Alaskan Native; Asian or Pacific Islander; Black; or Hispanic.¹⁰ Although Region V included low-income individuals in its EJ model, this was excluded by the EJ Area Subgroup because this is inconsistent with Title VI, which is the basis of President Clinton’s Executive Order and US EPA’s Interim Guidelines.

The EJ Area Subgroup has defined a suggested area for MDEQ and a permit applicant to consider in determining whether additional,¹¹ pro-active outreach efforts with the local community would be prudent so as to address potential environmental justice issues. The area suggested for consideration includes a composite of two components: (1) the immediate area; and (2) area of possible impact as governed by the emissions from the site.

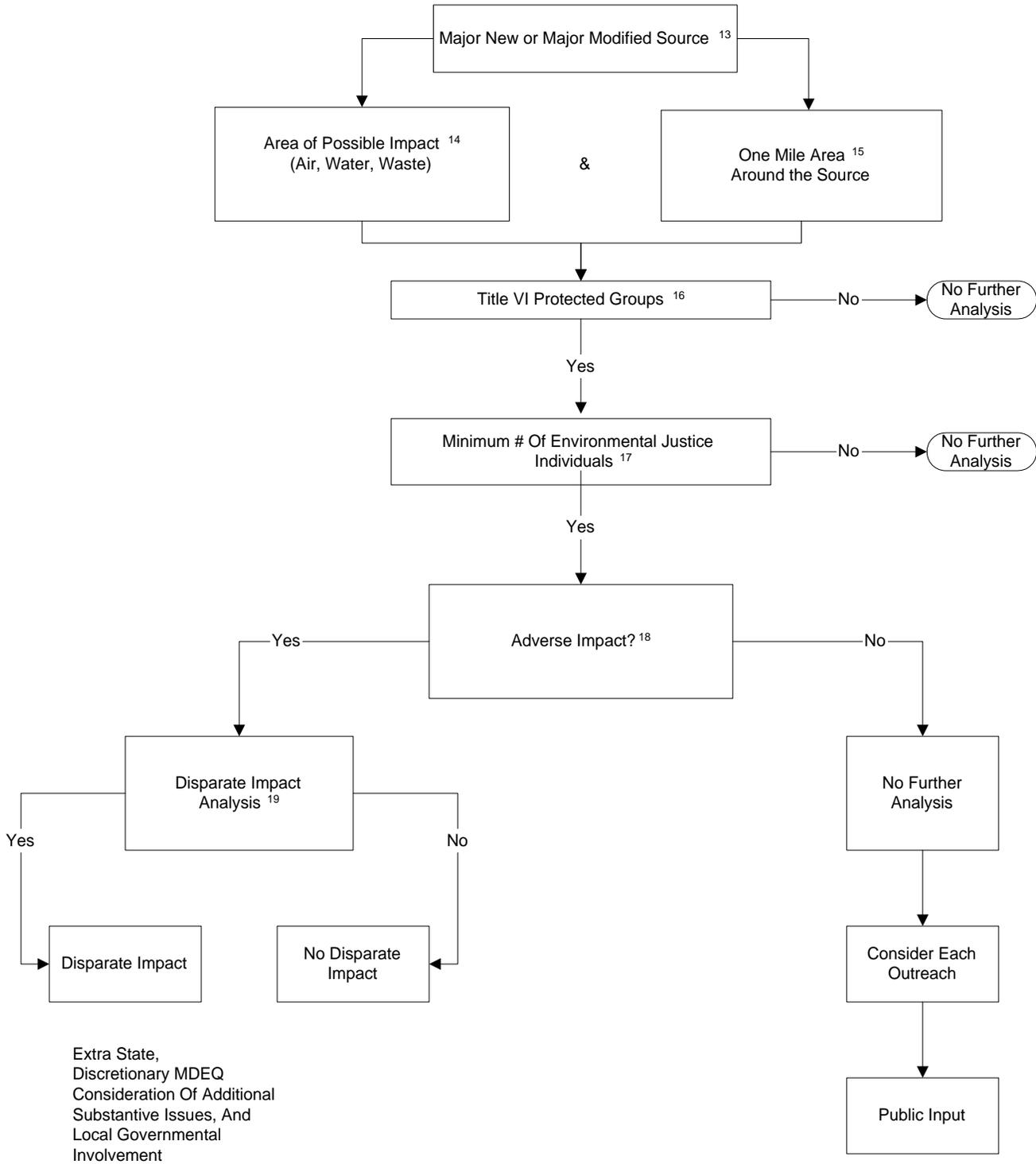
- The Immediate Area — For practical reasons, the EJ Area Subgroup suggests that a guideline of an approximate radius of one mile around the site be used as a minimum default for considering a potential environmental justice concern associated with Title VI protected groups and potential disparate analysis. It would be this minimum default which would become the

basis for outreach measures to the community, if indicated by further analysis in the decision making tree.¹² (See Page 12)

- Area of Possible Impact — The second component of the composite area would be the additional area that may extend beyond one mile from the site that is impacted due to the emissions or discharges from the new major source or major modified source, including air, water, and waste considerations. The boundaries of each emission stream would be better defined by MDEQ analysts more familiar with appropriate models and toxicology. The area boundary for each major emission stream would be based on a reasonable MDEQ test for significance based on sound science.

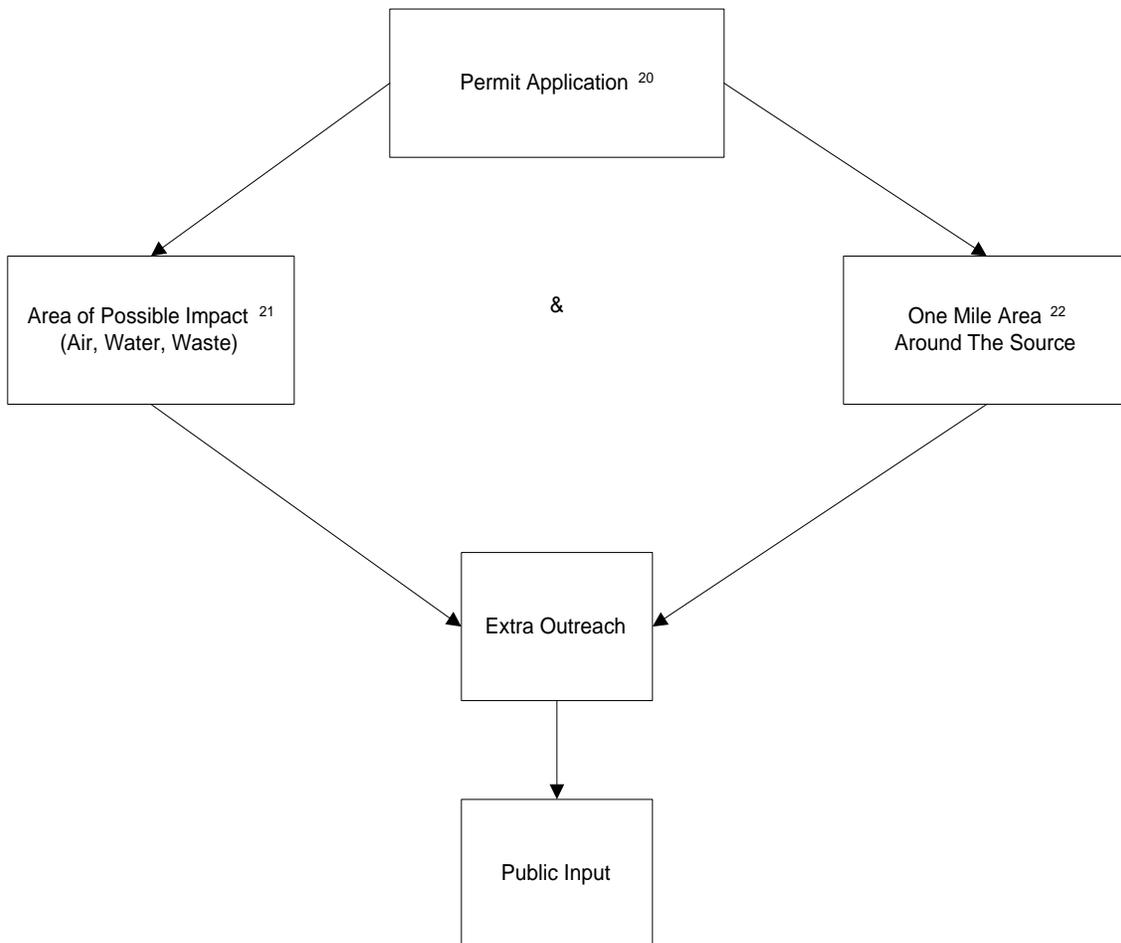
The composite area thus defined is simply mapping out the reasonable area for considering outreach efforts with the community(ies). If MDEQ determines that there is no significant adverse impact from the proposed permitted source, then no further steps need be required in the decision making tree. As a practical matter, however, the MDEQ and permit applicant may still wish to consider enhanced interaction and communication with the local community.

**PROPOSED MDEQ ENVIRONMENTAL JUSTICE
DECISION MAKING TREE**



PROPOSED MDEQ COMMUNITY OUTREACH
PROCESS FOR NON-TITLE VI ISSUES

This process should be utilized for those permit applications that are outside the scope of Title VI, do not meet the definition of a major source under applicable MDEQ programs, but may generate significant community concern. The MDEQ would have the discretion to implement this decision-making tree and to put into motion additional community outreach activities in an effort to educate the local community regarding a particular permit application.



C. Community Outreach Subgroup Recommendation

Public participation is a key aspect to addressing environmental justice concerns in a proactive manner. In communities of concern, extra efforts, beyond the normal public participation requirements of environmental statutes, may be needed to engage the citizenry in an upcoming action by the environmental regulatory agency. Outreach efforts may be necessary to ensure that the local community is informed about the issue and has meaningful opportunities to engage in the issue. This subgroup offers a number of recommendations on what additional outreach or public participation efforts, beyond those required by statute, should be undertaken in communities of concern.

- Statutory Public Participation Requirements

Statutes require that the regulatory agency provide public notice and an opportunity for a public hearing and comment on permit applications for major sources of and major modifications of sources of air pollution. The public comment period is usually 30 days with a public hearing scheduled within that time frame. The public hearing is a quasi-judicial event where written and oral comments are accepted. The agency later responds to the comments in writing, explaining why the agency did or did not agree with the comment without the chance of further interaction.

- The Problem

Often, and even with full compliance with environmental statutes and the Michigan Administrative Procedures Act, residents of communities in which new or modified facilities are proposed may be concerned about their opportunity for meaningful participation. Residents may have difficulty receiving notice of the proposal if no effort to publish the information beyond the statutory requirements is made. There may be instances where the technical language in the published public notices is difficult to understand. Residents may lack the ability to objectively understand and evaluate the impacts of a facility. Further, the format of the public hearing might discourage meaningful interaction with area residents.

Public participation is normally limited to review of technical information organized and submitted to support compliance with specific regulatory requirements and permit approval. The permit process may not provide information in a format that addresses specific community interests or is understandable.

Fulfillment of all statutory requirements and a valid permit are no guarantee the applicant's neighbors will feel comfortable that their health and the environment will be protected.

- Statement of Principles

1. Permit applicants should voluntarily engage residents in communities of concern as early as possible, and in meaningful dialog when proposing new facilities or expansion of existing facilities.
2. Permit applicants and regulatory agencies should voluntarily go beyond the public participation requirements of environmental statutes and the Michigan Administrative Procedures Act for proposed new facilities and expansions of existing facilities located in communities of concern.
3. Regulatory agencies and permit holders, who have demonstrated a competency in effective public participation, should provide assistance to potential permit applicants for proposed new facilities and expansions of existing facilities located in communities of concern.
4. Regulatory agencies and permit holders, who have demonstrated a competency in effective public participation, should provide technical assistance to communities of concern.

- Proposal

The Community Outreach Subgroup proposes that permit applicants be encouraged to begin to work with their neighboring communities as early as possible, preferably prior to submittal of an application. The applicants should be advised by those with experience in successfully working with their own neighbors. Community members should have objective technical resources available to them to assist them in understanding the impacts of the proposed facility or modification of a facility. Meetings between the applicant and the community should be held as early as possible, and preferably before a permit application is submitted.

Establish a Resource Group

The Community Outreach Subgroup proposes that a resource group be established. The group would consist of state and local agency personnel, community representatives, and holders of permits located in communities of concern. The group makeup must be flexible, based on the type and location of the facility involved. The group would be available to provide technical assistance to the community. A second charge for the group would be to provide assistance to potential applicants regarding how to engage in effective public participation.

The MDEQ would support the resource group through a web page within their home page. The web page could be used by both potential applicants and communities of concern.

Develop Additional Tools and Mechanisms for Community Notification

The subgroup proposes that the MDEQ develop additional tools and mechanisms to enhance community outreach notification. Proposed mechanisms and tools suggested include, but are not limited to: direct mailings, public service announcements on television and radio, use of Internet bulletin boards, e-mail, public notices published in newspapers, a dedicated toll-free telephone line, local community publications, informational public meetings, audience directed brochures (i.e., business, community groups, citizens), utilization of other institutional information media, newsletters, special notices, web pages.

Develop a Baseline Tool Kit for Public Participation

An inherent aspect of outreach and communication is the requirement for on-going educational efforts on the permit application process and general environmental issues. There was consensus that MDEQ should maintain a baseline level tool kit of brochures, flyers, web pages and other communication tools for both citizens and business about the permitting process and public information and outreach procedures and issues. A brochure detailing the steps necessary to fully utilize the public participation process should be developed by the MDEQ. This brochure should include a flow-map for the public participation process. It should also include a source of information for public outreach groups, recommended mechanism for disseminating public information, and description of instances when enhanced public outreach and notification should be employed. This brochure should be made available to any company who is seeking a permit in a community of concern.

Develop Triggers

In addition to a "baseline level tool kit" and general community information strategy, MDEQ should have a defined protocol that is implemented by certain triggers. Some triggers would be those associated with environmental justice (i.e., Title VI, disparate impact, zoning changes, etc.). Other triggers would be associated with non-environmental justice factors that are considered controversial to communities of concern, such as odors, noise, excessive traffic, hazardous waste or solid waste processing, incineration/combustion processes, fugitive dust, facility size, plastics manufacturing, and pre-existing or a prior compliance history of the facility or operators.

D. Disparate Impact Area Subgroup Recommendation

Introduction

The Disparate Impact Area Subgroup was asked to address two fundamental, interrelated issues. The first issue was what impacts to the community should be considered in environmental decision-making. In addressing this issue, the Disparate Impact Area Subgroup offers recommendations regarding whether the impacts considered should be limited to environmental impacts or include all impacts of a facility. The subgroup also addresses how these impacts should be documented.

The second issue addressed by the Disparate Impact Area Subgroup involved the feasible approaches to measuring impacts to the community and the determination of whether a disparate impact exists. In addressing this issue, the subgroup considered how to measure impacts on a community. They were also expected to define similar communities for comparison purposes and to determine what level of impact differences constitutes a disparate impact.

The following recommendations summarize our findings regarding these issues. The purpose of this analysis is to identify issues that might trigger a viable environmental justice complaint under federal guidance. In addition, the Disparate Impact Area Subgroup was asked to develop a proactive screening process for addressing environmental justice issues arising under Title VI. Due to the complexity of these issues and the limited time frame in which to address them, it is not surprising that on most of the issues mentioned above, the subgroup was unable to reach consensus. Many of these differing viewpoints are noted below.

Discussion of Issues

Issue 1: What impacts to a community should be considered in environmental decision making? How can impacts be documented?

In a November 19, 1998 meeting with several state environmental regulators, US EPA Administrator, Carol Browner, and OCR Director, Anne Goode, indicated that US EPA would narrow its focus in reviewing Title VI administrative complaints under its Interim Guidelines. They stated that US EPA will now, under Title VI, only review environmental issues that the permitting agency has authority over, such as air quality standards. Also, US EPA will no longer consider non-environmental issues, such as traffic and jobs, over which the permitting authority has no control.¹³

In light of these recent US EPA policy changes and the US EPA's decision in response to the environmental justice complaint challenging the environmental

permits for the Select Steel Mill in the Flint, Michigan area (see summary of the case in the Introduction), the Disparate Impact Area Subgroup agreed that the focus should be on public health and environmental impacts (i.e., air, water, soil, etc.) to the community. It was, however, agreed that in certain circumstances, non-environmental impacts such as traffic, safety, noise, and aesthetics appropriately should be considered by local government and zoning authorities.

The Disparate Impact Area Subgroup agreed that impacts should be quantified using recognized, "traditional" methods such as the Toxics Release Inventory ("TRI"), modeling, emission and discharge estimates, monitoring data, public health records, etc. In addition, the subgroup recognized that accurate and reliable scientific tools and techniques do not exist to document synergistic impacts on a community. The subgroup also recognized that, while such tools and techniques do exist to document cumulative impacts on a community, they require data that does not yet exist for all compounds and for all areas of the state.

Issue 2: What are feasible approaches to measuring impacts to the community and determining if a disparate impact exists? Recommend how to measure impacts. Recommend a definition for similar communities, for comparison purposes, and determine what level of impact differences constitutes a disparate impact.

Based on US EPA's decision in *Select Steel*, the subgroup unanimously agreed that an actionable "disparate impact" in a potentially viable environmental justice complaint must be both adverse and disparate. If an adverse impact exists, then an evaluation must be conducted for a disparate impact. If neither an adverse nor a disparate impact exists, then evaluation is not necessary because the facility will not likely result in a viable environmental justice complaint.

1) CRITICAL DEFINITIONS

An "**impact**" is defined by the Subgroup as "any introduction of a pollutant into the ambient environment."

An "**adverse impact**" is defined to mean "any activity, process, operation or release, that causes or results in an exposure of people or the environment to pollutants in violation of public health-based environmental statutes, rules or regulations."¹⁴

The Disparate Impact Area Subgroup believes that the term "**disparate impact**" generally refers to an incongruous or uneven impact on the community. This is consistent with the definition in *Webster's Ninth New Collegiate Dictionary*, which defines "disparate" as "different" and "distinct." In the context of

Title VI and environmental permitting, the subgroup believes that “disparate impact” refers to “a finding of any adverse impact on protected groups (under Title VI) as demonstrated by a comparison of the demographics in the impact area versus the statewide demographics.

Some members of the subgroup recognize that the above definition of “disparate impact” may be contrary to common perceptions of the term’s meaning. It may be fair to say that a more common understanding of “disparate” in the context of Title VI and emission permitting is that the term refers to an unusually high occurrence or predominance of pollution in an area, such that an additional increment of pollution results in a greater increment of public health risk than it would in areas with less pre-existing pollution. Under that general definition, there would arise a need to develop an appropriate methodology so that the degree of disparity can be characterized and applied in a regulatory program.

Measuring Impacts

The Disparate Impact Area Subgroup was, however, deeply divided on how to measure impacts, and devised several analytical schemes for evaluating impacts.¹⁵ Notably, in 1998, OCR developed two proposed methodologies for analytically determining disproportionate impacts from air emissions. Subsequent review by the US EPA Science Advisory Board (“SAB”) found that these initial efforts were commendable, but that both methods had serious limitations. The first one, the Relative Burden Analysis (“RBA”) was simple and easy to apply, but did not result in any measure of risk. The resulting measure, the “Relative Burden Ratio,” would not indicate if an impact was adverse and, therefore, would not support decision-making, according to the SAB. The other proposed approach, Cumulative Outdoor Air Toxics Concentration Exposure Methodology, is designed to estimate risks, which would support decision-making. The method applied by US EPA in evaluating the air toxics impacts of the Select Steel proposed facility was referred to as an enhanced version of the RBA; it had been modified to provide an estimation of risks. Based on that approach, US EPA concluded that the estimated cumulative impacts did not indicate the likelihood of adverse health impacts.

Based on the US EPA approach in the *Select Steel* decision, the subgroup suggested that the methodology for measuring adverse impacts should characterize impacts in a risk-based approach, rather than a relative burden approach.

Similar Communities

For the purpose of this analysis, the Disparate Impact Area Subgroup deviated from its charge and did not define a “similar community.” The subgroup believes that any so-called “similar community” would be chosen arbitrarily and

would be, in many cases, impossible to accurately determine; therefore, such a definition is not necessary or useful.

Proposed Screening Test for Evaluating Potential, Adverse, and Disparate Impacts

In determining the impacts to the community, the Disparate Impact Area Subgroup identified several steps that could be considered during the permit application process when assessing the potential for a viable environmental justice claim.¹⁶

PART I. Determine the Existence of Adverse Impacts to the Community

STEP 1: Identify existing or potential impacts from the source that have human health exposure pathways,¹⁷ such as:

- Air¹⁸
 - carcinogenic and non-carcinogenic air toxins¹⁹
 - criteria pollutants, including lead
- Water
 - bio-accumulative compounds
- Soil and Hazardous Wastes
- Soil
- Health
- Biota²⁰

STEP 2: In limited circumstances and where permitted under the existing environmental statutes and regulations, MDEQ should measure cumulative impacts by reviewing available environmental information about the facility, (i.e., monitoring data urban scale modeling, TRI data, total maximum daily loads, or permit requirements) or, if applicable, by comparing proposed impacts to *de minimis* level(s)²¹ that MDEQ may establish on a chemical-specific basis. The method chosen will be that one which makes sense for each chemical in light of the type of information available for that chemical.

STEP 3: Determine whether the proposed impacts meet applicable requirements under federal and state public health-based environmental statutes rules, regulations.

If proposed impacts do not satisfy the requirements under applicable public health-based environmental statutes, rules or regulations, an adverse impact may exist.

PART II. Determine Existence of Disparate Impacts

STEP 1: Determine if the impacted environmental justice area²² includes a group that is protected under Title VI.

STEP 2: Compare the demographics of the impacted environmental justice area with the statewide demographics for each protected group.

If the demographic percentages for the protected group that resides within the environmental justice area is larger than²³ the statewide demographic percentage for that group, then a disparate impact may exist and a heightened cumulative impact assessment *for* the impacted area may be necessary.

PART III. Mitigation and/or Greater Public Participation

- Depending on the outcome of the analysis under Parts I and II, greater public participation efforts may be necessary to account for viable environmental justice concerns in the affected community. Opportunities for public participation should be encouraged during the entire permitting process.
- If MDEQ and/or the permittee determine that an adverse and disparate impact may exist, MDEQ and/or the permittee may decide to conduct a more rigorous analysis. If supported by the results of the more rigorous analysis, which demonstrates that an adverse impact would exist, the MDEQ and/or the permittee shall develop a way to reduce existing or proposed impacts, or consider other mitigating factors.

Concerns and Recommendations

Most members of the Disparate Impact Area Subgroup recognize the need for some type of environmental justice program that provides greater public participation in environmental decision-making and permitting. There were, however, concerns among some members of the subgroup that the above process might lead to "reverse discrimination" -- the implementation of higher environmental standards in minority and low-income communities than in richer, non-minority communities. Other members were concerned that the approach results in redlining communities in such a way that businesses might avoid new developments in those areas.

Certain individuals in the subgroup had several suggestions that were outside the scope of its charge regarding an environmental justice program and better environmental regulation.²⁴ These suggestions included:

- Improve community outreach.

- Broaden the application of public participation provisions under existing federal, state, and local environmental statutes, rules, and regulations.
- Improve the study of air toxics in urban areas, such as additional monitors, more measured contaminants (where appropriate), and synergistic effects of different pollutants in exposure pathways.
- Improve and validate methodologies for measuring cumulative impacts.
- Create a “regulatory development” task force to: (a) examine the various studies and other sources of information; and (b) recommend areas that MDEQ needs additional authority to better protect the health of all communities in the state.

IV. Appendix

1. Interim Guidelines for Investigating Title VI Administrative Complaints
2. GAO Report
3. President's Executive Order
4. *Select Steel* Decision
5. List of Environmental Justice Workgroup Participants
6. Environmental Justice Workgroup Drafting Committee Participants
7. A Science Advisory Board Report: Review of Disproportionate Impact Methodologies – A Review by the Integrated Human Exposure Committee of the Science Advisory Board

¹ The protected groups under Title VI are identified in the text of this document, at page 10.

² I.e., local governmental officials will not be reviewing permit applications submitted to the MDEQ or adding to their expert review of permit applications, but would add to the public participation process by facilitating public concerns.

³ These are not issues that would be considered in a Title VI investigation. Only those issues that a state Agency has regulatory control over would be investigated under the Interim Guidelines.

⁴ Environmental Justice programs in US EPA Regions V, VIII and IX were reviewed, as well as programs in Louisiana and New Jersey.

⁵ US EPA Region V *Interim Guidelines for Identifying and Addressing a Potential EJ Case (June 1998)*, page 20. *Region V noted that States are not bound by regional environmental justice guidelines.*

⁶ Region V oversees federal environmental matters for Michigan and other midwestern states.

⁷ See US EPA *Interim Guidelines*, supra @ Endnote #5, at Environmental Justice Assessment – Process Flowchart, page 7.

⁸ CEQ, *Environmental Justice Guidance Under the National Environmental Policy Act [Dec. 10, 1997]*, at page 25.

⁹ See US EPA *Interim Guidelines*, supra @ Endnote #5, at Question and Answer #14, page 11.

¹⁰ See US EPA *Interim Guidelines*, supra @ Endnote #5, at Question and Answer #10, page 10. This determination is consistent with Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000d to 2000d-7).

¹¹ I.e., in addition to current state regulatory review requirements for the issuance of permits.

¹² Identification of geographical areas in which environmental justice concerns might arise need not be restricted to the one-mile area. The recommended one-mile area was not intended to exclude consideration of other relevant factors, such as natural boundaries or census tract configuration.

¹³ The Disparate Impact Area Subgroup's assumptions in this report are largely based on US EPA's position.

¹⁴ Although not verbatim, this definition seems to be consistent with the *Select Steel* decision. Several members of the Disparate Impact Area Subgroup recognize that in certain circumstances a risk assessment under existing environmental rules and regulations may appropriately rely on public health benchmarks that do not necessarily correlate to an environmental standard.

¹⁵ It was generally agreed that the specific draft proposed methodologies would not be included in this report. However, copies of these methodologies are available upon request.

¹⁶ The Disparate Impact Area Subgroup recognizes that these are very controversial.

¹⁷ The members of the Disparate Impact Area Subgroup did not reach consensus that odor-causing contaminants can lead to a viable environmental justice complaint. The supporters of this concept suggested that odor-causing contaminants could and actually would be likely to lead to a viable environmental justice complaint because odors really irritate people. Also, they argued that even if an odor complaint is not enforceable at the federal level, the odor problem could cause a major public relations issue for the company and, as a result, the community may be motivated to look hard for anything that might possibly be a basis for a valid environmental justice complaint. The opponents suggested that it could not be a viable environmental justice complaint because the federal government has no regulatory authority over odor. In fact, the only regulatory authority over odor-causing contaminants is found in Rule 901 of the rules promulgated under Michigan's environmental laws. See Mich. Admin. Code r. 336.1901. Also, note that recently there was a debate over whether this rule should be included in Michigan's State Implementation Plan ("SIP"), which resulted in US EPA's decision not to include Rule 901 in the SIP. In effect, this decision means that Rule 901 is not federally enforceable and cannot be the subject of a citizen suit under federal law.

¹⁸ The Disparate Impact Area Subgroup focused primarily on air issues because they believe that this issue is where most potential environmental justice claims will arise.

¹⁹ Some members recommended that carcinogenic effects not be considered when evaluating for adverse impacts. They argued that MDEQ Air Quality Division's air toxics rules establish acceptable incremental cancer risks for new and modified air emission sources which can be considered to be appropriate to apply to all such permit applications, regardless of the background air quality. In other words, an acceptable

incremental increase in cancer risk of 1 in 100,000 per carcinogen emitted from a facility may be considered to be a *de minimis* risk protection level whether the site specific background for air quality indicates relatively low or high background cancer risk levels.

Alternatively, other policy choices on this issue may be considered, which, for example, may include the setting of some ambient “air risk cap” (e.g., 1 in 10,000) applied to background plus the increment. This cap would preclude any additional increment if the ambient air already exceeds the cap, unless the applicant/permittee can remediate existing source impacts such that the cumulative source impact would be less than the existing contaminant level. In effect, this may allow MDEQ and the permittee an opportunity to work with the community to address the existing impact to the area

²⁰ This refers only to animal and plant life that constitutes a pathway to human exposure. Ecological risks by themselves could not likely be a part of a Title VI environmental justice claim.

²¹ The use of *de minimis* levels was suggested by certain members of the Disparate Impact Area Subgroup as a tool for measuring cumulative impacts. These certain members also suggested that if *de minimis* levels are exceeded, existing background levels plus incremental impacts from proposed source relative to the health benchmarks should be reviewed. They further suggest that in cases where the background level plus proposed source impacts exceed the health benchmarks, then there may be sufficient concerns for adverse impacts to require more rigorous analysis or pursue other means to reduce the impacts.

²² To evaluate what is an “environmental justice area” the demographics and plume of contamination should be evaluated as directed by the Environmental Justice Area Subgroup.

²³ The Disparate Impact Area Subgroup leaves the exact figure of what is “larger” to MDEQ’s discretion. Certain members of the Subgroup recognized, however, that if the demographic percentage for the protected group that resides within the environmental justice area is less than the statewide demographic percentage for that group, the permitting authority may, depending on the circumstances, still determine that a more rigorous analysis is necessary. See the discussion in Endnote #16 and corresponding text.

²⁴ It is important to note that everyone in the Disparate Impact Area Subgroup does not agree with the necessity or practicality of these suggestions.