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Emissions Trading: Pollution Panacea or Environmental Injustice

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EMISSIONS TRADING: POLLUTION PANACEA
OR ENVIRONMENTAL INJUSTICE?

I. INTRODUCTION

At the 1992 Earth Summit in Rio de Janeiro, the United States in its opposition to global warming treaties was an environmental pariah, and has subsequently failed to reduce emissions in line with the agreed targets. Still refusing to make politically unpopular decisions mandating emission limits, the Clinton Administration now advocates emissions trading and market based incentives to reduce pollution globally. This advocacy of emissions trading and market based incentives should be evaluated in light of a recent lawsuit and an administrative complaint filed by Communities for a Better Environment (CBE) and the Center for Race, Poverty, and the Environment alleging racial discrimination in the implementation of such emissions trading programs. This is the first lawsuit to allege that a pollution trading program violates civil rights. For the Clinton Administration,

1. Sharing the Greenhouse, THE ECONOMIST, Oct. 11, 1997, at 20. America has failed abjectly to reduce its emissions in line with agreed targets. Id. See also CHRISTOPHER FLAVIN, STATE OF THE WORLD 1997 (1997). Since Rio, the United States has failed to ratify the Convention on Biodiversity or the Law of the Sea, clashed with allies over action to slow climate change, and slashed funding for many United Nations environmental programs. Id. 2. See discussion infra Part II.C. 3. See Michael Zielenziger, "Greenhouse" Compromise on the Table, SAN JOSE MERCURY NEWS, Dec. 10, 1997, at 16A. The United States proposed at the United Nations Climate Summit in Kyoto, Japan, that it be permitted to "trade" pollution "credits" with five other nations in order to allow Americans to produce more greenhouse gases. Id. 4. COMMUNITIES FOR A BETTER ENVIRONMENT, CBE ENVIRONMENTAL REVIEW 1, 2 (1995). Communities for a Better Environment is a non-profit organization promoting advocacy and citizen action to prevent pollution and reduce environmental health hazards in urban communities. Id.
this is a watershed issue because two of the highest priority environmental programs championed by the administration—environmental justice and pollution trading—appear to be on a collision course.7

On July 24, 1997, CBE filed a lawsuit8 in United States District Court9 against four major oil companies,10 seeking declaratory and injunctive relief for violating both the Clean Air Act (CAA) and state regulations to implement the CAA by their failure to install pollution abatement equipment at their marine tanker docks. In conjunction with the lawsuit, CBE also filed with the Environmental Protection Agency (EPA), an administrative complaint13 against the South Coast Air Quality Management District (SCAQMD) under Title VI of the Civil Rights Act of 1964.14 This complaint alleges that SCAQMD’s emissions trading program exempts the oil companies from compliance with the CAA and that its implementation has unjustified, disparate, adverse environmental impacts on surrounding minority communities.16

This comment focuses primarily on the administrative complaint as a means of evaluating whether Title VI is an ef-

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5. See discussion infra Part II.B.
6. See discussion infra Part II.C.
9. This was filed in Federal District Court, Central District of California.
10. The companies being sued by CBE are Unocal Corp., Western Oil Fuel, and Ultramar. Tosco purchased the Unocal facility on March 31, 1996.
13. Complaint and Memorandum of Points and Authorities for Relief from Environmental Justice Violations, Communities for a Better Env’t v. South Coast Air Quality Management Dist. (July 23, 1997) [hereinafter Administrative Complaint] (on file with author). An administrative complaint is an administrative procedure where a complainant files a complaint with a federal agency, which is charged with investigating and resolving the issue. See 40 C.F.R. § 7.120 (1997).
fective mechanism to remedy environmental discrimination and promote environmental justice. More specifically, the comment analyzes whether the SCAQMD's emissions trading program violates Title VI implementing regulations by creating an unjustified, disparate impact on minority communities, and consequently, whether the EPA should approve or deny this use of the emissions trading program. The sub-issue of whether there is, or should be, a private cause of action under the EPA's Title VI implementing regulations is also examined. These issues are evaluated in light of the environmental justice movement and the inherent tension between executive and legislative enactments to remedy such discrimination, and the competing policies of market based incentives, such as emissions trading, to address pollution.

II. BACKGROUND

A. Historical and Factual Basis for the Lawsuits and the Administrative Complaint

The EPA establishes National Ambient Air Quality Standards for pollutants which may endanger the public health or welfare. The primary goal of the CAA is to achieve and maintain these standards. NAAQS are a measurement of the acceptable level of criteria pollutants in the air and must be translated into specific limits on the amount of a pollutant that an individual source may emit.

A primary objective of the CAA is to encourage and assist states in the development and operation of air pollution prevention and control programs. States are responsible for

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17. 42 U.S.C. § 2000d-1 (1994). Implementing regulations are binding regulations promulgated by federal agencies to affect the purposes of the legislation, and in this case, the regulations are to ensure that agencies and entities receiving federal funds do not administer their programs in a discriminatory manner. Id. See also infra note 88.

18. See discussion infra Part II.E.

19. See discussion infra Part IV.B.


23. See TABB & MALONE, supra note 21.

achieving these NAAQS through a state implementation plan\(^\text{25}\) (SIP), which must be approved by the EPA.\(^\text{26}\) California is comprised of several Air Quality Management Districts, including the South County Air Quality Management District (SCAQMD), which must comply with SIP requirements.\(^\text{27}\) The South Coast air basin is classified\(^\text{28}\) as "extreme" non-attainment for ozone, and "serious" non-attainment for carbon monoxide.\(^\text{29}\)

In addition to criteria pollutants, the CAA also regulates hazardous air pollutants,\(^\text{30}\) including benzene. Facilities emitting hazardous air pollutants are categorized as either major sources or area sources, and are regulated accordingly.\(^\text{31}\) Emission standards for hazardous air pollutants require the maximum degree of reduction in emissions, including a prohibition where achievable, taking into consideration the cost of achieving such reductions.\(^\text{32}\)

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25. *Id.* § 7410. State Implementation Plans or SIPs must, among other requirements, contain emission limits and schedules to attain the NAAQS, enforcement programs, methods to obtain air quality data, and permitting provisions. *Id.*

26. *Id.* § 7407.

27. 40 C.F.R. § 51.50(c) (1997).


29. *Id.* States must classify areas as attainment, non-attainment, or unclassifiable for each criteria pollutant. Therefore, it is possible to be in attainment for some pollutants and simultaneously non-attainment for others. Clean Air Act of 1970 § 107, 42 U.S.C. § 7407(d)(1)(A) (1994).

30. Clean Air Act of 1970 § 112, 42 U.S.C. § 7412(b)(1) (1994). [These are] pollutants which . . . may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects . . . as a result of emissions to the air. *Id.* § 7412(b)(2).

31. Clean Air Act of 1970 § 112(a), 42 U.S.C. § 7412(a) (1994). The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. *Id.* § 7412(a)(1). "The term 'area source' means any stationary source of hazardous air pollutants that is not a major source." *Id.* § 7412(a)(2).

SCAQMD is home to several marine terminals in the Los Angeles basin. CBE estimates that approximately nineteen ships per month conduct fuel exchanges at each marine terminal. Each time a tanker conducts a fuel exchange, up to 6,000 pounds of volatile organic compounds (VOCs), including benzene, a known human carcinogen, are emitted into the air. The use of vapor recovery equipment, similar to that installed at other marine terminals, would eliminate between ninety-five and ninety-nine percent of these emissions. This equipment is required in the San Francisco Bay Area, Louisiana, New Jersey and Texas. In order to address the problems of toxic exposure near marine terminals, the SCAQMD and the California Air Resources Board adopted Rule 1142 in July, 1991, which required emission abatement equipment to be installed on marine vessels. Rule 1142 was approved by the EPA on January 28, 1992 for inclusion in SCAQMD's SIP.

SCAQMD's emissions trading program, The Old Vehicle Scrapping Program, or Rule 1610, was adopted on January

33. See Administrative Complaint, supra note 13, at 5 (on file with author) (citing UNOCAL, FINAL ENVIRONMENTAL IMPACT REPORT (1996)).
35. See Administrative Complaint, supra note 13, at 8 (on file with author) (citing BAY AREA AIR QUALITY MANAGEMENT DISTRICT, MARINE VESSEL LOADING TERMINALS RULE STAFF REPORT (1988)). Benzene is known to cause cancer in humans. Id. Workers exposed to 10 parts per million of benzene have shown leukemia rates of 155 times higher than the rates of the general population. Id.
36. See id. at 5, 8.
37. See id. at 8 n.21 (citing BAY AREA AIR QUALITY MANAGEMENT DISTRICT, MARINE VESSEL LOADING TERMINALS STAFF REPORT (1988)).
38. South Coast Air Quality Management District Rule 1142(a), Marine Tank Vessel Operations (1991). This rule applies to “all loading, lightering, ballasting, and housekeeping events where a marine tank vessel is filled with an organic liquid; or where a liquid is placed into a marine tank vessel's cargo which had previously held organic liquid.” Id. Effective January 1, 1992, an owner or operator of a marine tank vessel shall operate with emission control equipment. Id. at (c)(1)(A).
40. South Coast Air Quality Management District Rule 1610, Old Vehicle
8, 1993. Rule 1610 allows for the purchase and scrapping of old vehicles in exchange for Mobile Source Emission Reduction Credits (MSERCs).\textsuperscript{41} The named oil companies have purchased 612,162 pounds of MSERCs, and consequently are authorized to emit an equivalent amount of VOCs per year.\textsuperscript{42} CBE also claims that the actual emissions from the tankers are greater than the number of credits purchased.\textsuperscript{43} In addition, CBE claims the SCAQMD is using emission factors to estimate oil tanker emissions that are thirty-one percent lower than the emission factors approved by the EPA and the California Air Resources Board (CARB).\textsuperscript{44} The oil companies charged in the lawsuit are allegedly using the MSERCs to avoid compliance with Rule 1142, even though Rule 1610 has not been approved by the EPA. CBE claims that because Rule 1610 has not been approved by the EPA, a requirement of the Clean Air Act,\textsuperscript{45} it cannot be used to avoid compliance with Rule 1142, and that its use results in discrimination under Title VI.\textsuperscript{46}

The administrative complaint\textsuperscript{47} asks the EPA to deny approval of Rule 1610, alleging that its operation causes substantial and unjustifiable, disparate, adverse impacts on the predominantly minority community surrounding the marine terminals in violation of Title VI of the Civil Rights Act of 1964,\textsuperscript{48} the EPA's Title VI implementing regulations\textsuperscript{49} and

Scrapping Program (1997). The purpose of this rule is to reduce motor vehicle volatile organic compounds (VOC), nitrogen oxides (NO\textsubscript{x}), carbon monoxide (CO), and particulate matter (PM) exhaust emissions by issuing mobile source emission reduction credits in exchange for the scrapping of old, high emitting vehicles. \textit{Id.} This provides a mechanism through which stationary source emissions can be brought into compliance. \textit{Id.} The value of these credits is based on old vehicles having at least three years useful life prior to scrapping. \textit{Id.}

\textsuperscript{41} See infra text accompanying notes 70-77.
\textsuperscript{42} See Administrative Complaint, supra note 13, at 5, 9 (on file with author).
\textsuperscript{43} See supra text accompanying notes 33-35. An average of 19 ships per month, emitting 6,000 pounds of VOCs each, amounts to a total of 1.37 million pounds of VOCs which is greater than the 612,162 pounds purchased. See supra text accompanying notes 33-35.
\textsuperscript{44} See Administrative Complaint, supra note 13 (on file with author).
\textsuperscript{45} 40 C.F.R. § 52 (1997).
\textsuperscript{46} Administrative Complaint, supra note 13, at 9 (on file with author).
\textsuperscript{47} See Administrative Complaint, supra note 13, at 1 (on file with author).
\textsuperscript{49} 40 C.F.R. § 7.35(b) (1997).
Executive Order 12,898. CBE argues that allowing these facilities to scrap old vehicles in order to avoid reducing their emissions as would otherwise be required by the Clean Air Act, Rule 1610 has the effect of creating "toxic hot spots" in communities of color that would otherwise be dispersed throughout the region. Consequently, the argument holds that communities of color bear a disproportionate share of air pollution in violation of Title VI, the EPA's Title VI implementing regulations and Executive Order 12,898.

B. History of the Environmental Justice Movement

The environmental justice movement, a blend of civil rights and environmentalism, is in large part a response to the inequitable distribution of environmental burdens on minority and socio-economically disadvantaged communities. Rich neighborhoods are able to leverage their economic and political clout to fend off unwanted uses, even public housing for the poor, while residents of poor neighborhoods must put up with all kinds of unwanted neighbors, including noxious facilities.

There is a considerable body of evidence from numerous studies supporting the claims of environmental justice advocates that communities of color bear a disproportionate share of environmental ills. For example, three out of every five

51. See Administrative Complaint, supra note 13, at 8 (on file with author). A toxic hot spot is where pollution is clustered or concentrated in a limited, geographically defined area.
52. See id. at 1.
African-Americans and Latinos live in communities with uncontrolled toxic waste sites, and African-Americans are heavily over-represented in the six metropolitan areas with the greatest number of uncontrolled toxic waste sites. In the Los Angeles basin, over seventy-one percent of the African-Americans and fifty percent of the Latinos live in areas with the most polluted air, while only thirty-four percent of the white population does. Similar patterns exist nationally as well. These studies highlight the problem both nationally and, as regards this case, in the Los Angeles basin. EPA's Toxic Release Inventory (TRI) states that in the Los Angeles area, Hispanic-dominated tracts have an average of .71 such facilities, while White-dominated tracts have an average of .21 facilities.

Furthermore, a 1984 report to the California Waste Management Board stated that incinerators should not be sited near middle and upper socioeconomic strata neighborhoods because such neighborhoods possess more resources and are better able to oppose such facilities. The obvious inference is that the siting of polluting facilities is most likely to succeed in low-income, disempowered communities, and these are likely to be communities of color.

Environmental justice advocates are criticized by those who contend that the methodology is flawed, and that market forces, not discrimination, are what drive the siting of locally undesirable land uses (LULUs). A study on the siting of

56. See Colopy, supra note 53, at 130.
57. See MANASTER, supra note 54, at 166 (citing Robert D. Bullard, Anatomy of Environmental Racism and the Environmental Justice Movement, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 17-19 (1993)).
58. See id.
59. See Administrative Complaint, supra note 13, at 14-15 (on file with author) (citing LAURETTA M. BURKE, TECHNICAL REPORT 93-96 (1993)).
60. See MANASTER, supra note 54, at 167 (citing Robert D. Bullard, Anatomy of Environmental Racism and the Environmental Justice Movement, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 17-19 (1993)).
hazardous waste treatment and storage facilities (TSDF) claimed to reach conclusions contrary to the many environmental justice studies by finding that the significant correlation between the presence of TSDFs and socioeconomic factors were low employment rates, employment in industrial occupations and lower property values.62

One argument is that these facilities provide a motivation to locate nearby on the basis of a theory called "coming to the nuisance,"63 and the other is that the factors which result in the siting of LULUs are market based and race neutral.64 In fact, the findings from the two types of studies are not in conflict because these characteristics are common in minority communities. Moreover, these "market forces" are often shaped by discriminatory forces.65 Plaintiffs in environmental justice cases have sought redress under both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.66

C. Emissions Trading

Emission trading schemes were developed to allow continued economic growth in urban areas without compromising air quality goals.67 The theory is that allowing polluters flexibility in choosing how to control air pollution will reduce overall costs of pollution abatement.68 Studies and estimates indicate that emissions trading generally results in significant cost savings to industry.69

63. TABB & MALONE, supra note 21, at 77. The doctrine of coming to the nuisance effectively bars equitable relief to parties who locate within close proximity to an established business on the theory that the later arriving party either implicitly consented to the enterprise or should have reasonably foreseen that it would constitute a nuisance. Id.
64. See supra text accompanying notes 61-62.
65. See infra text accompanying notes 302-04.
66. See infra text accompanying notes 82-85, 194-200.
68. See id. at 225-26.
69. See id. at 226.
Emissions trading programs generally allow polluters to exchange "credits" or allowances to satisfy their pollution control obligations most economically, and in order to qualify an emission reduction must be surplus,\textsuperscript{70} enforceable,\textsuperscript{71} permanent,\textsuperscript{72} and quantifiable.\textsuperscript{73} Traditionally, emission reductions necessary to produce emission reduction credits (ERCs) have been obtained from stationary sources through the use of emission control technology.\textsuperscript{74} Mobile sources of air pollution are another significant source of ERCs representing one-third of all man made VOCs.\textsuperscript{75}

Rule 1610\textsuperscript{76} is a mobile emission reduction credit (MERC) program which promotes the accelerated retirement or scrapping of older vehicles which account for a disproportionate amount of motor vehicle emissions.\textsuperscript{77} MERC standards, in order to conform with EPA requirements, must meet the same standards as traditional emission trading programs.\textsuperscript{78} The requirements to be met here are set out in the EPA's requirements for economic incentive programs (EIPs).\textsuperscript{79} Unlike a stationary source, however, there is considerable uncertainty in measuring these criteria. The permanency requirement, for example, requires that "the life of the reduction be reasonably established and commensurate with the proposed use of the credit."\textsuperscript{80} Moreover, Rule 1610 is extremely complex, which makes compliance and enforcement problematic.\textsuperscript{81}

\begin{enumerate}
\item \textsuperscript{70} See \textit{id.} at 247. Surplus requires that the reductions not be currently required by law or regulation. \textit{Id.}
\item \textsuperscript{71} \textit{Id.} at 247. Actions that produce the credits must be enforceable and legally binding. \textit{Id.}
\item \textsuperscript{72} See \textit{id.} The life of the reduction must be reasonably established and commensurate with the proposed use of the credit. \textit{Id.}
\item \textsuperscript{73} See Goldschein, \textit{supra} note 67, at 247. Emissions must be real and quantified to an acceptable degree of certainty. \textit{Id.}
\item \textsuperscript{74} \textit{Id.} at 238 (citing \textit{CALIFORNIA AIR RESOURCES BOARD, MOBILE SOURCE EMISSION REDUCTION CREDITS} 1 (1994)).
\item \textsuperscript{75} See \textit{TABB & MALONE, supra} note 21, at 301.
\item \textsuperscript{76} South Coast Air Quality Management District Rule 1610, Old Vehicle Scrapping Program (1997).
\item \textsuperscript{77} See Goldschein, \textit{supra} note 67, at 241.
\item \textsuperscript{78} See \textit{id.} at 247. See \textit{supra} notes 70-73
\item \textsuperscript{79} 40 C.F.R. § 51.490-.494 (1997).
\item \textsuperscript{80} Goldschein, \textit{supra} note 67, at 247.
\item \textsuperscript{81} South Coast Air Quality Management District Rule 1610, Old Vehicle Scrapping Program (1997).
\end{enumerate}
D. Title VI of the Civil Rights Act of 1964

Title VI appears to provide environmental justice plaintiffs with a greater opportunity to attack environmental racism than equal protection doctrine under the Constitution, which requires plaintiffs to show intentional discrimination. Title VI prohibits the federal government from financially supporting any program operated in a racially discriminatory manner stating that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Federal agencies are required under Title VI to promulgate regulations to enforce the Act. These regulations must specify the agency’s administrative procedures for determining whether the recipient's activities result in racial discrimination. Section 2000d-1 is designed to regulate the “recipients” of federal financial assistance, in this case CARB and SCAQMD, that receive federal funding to enforce state environmental laws and fund environmental programs. The

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82. U.S. CONST. amend. XIV, § 1.
83. See R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (holding that a decision to permit a fourth landfill in an African-American neighborhood, where no landfills were in white neighborhoods, failed to satisfy discriminatory intent and purpose); East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (holding that statistical data as circumstantial evidence of discriminatory intent in the siting of solid waste facilities is insufficient in this particular case to prove discriminatory intent).
85. Id. The 1964 Act has been amended to extend the nondiscrimination principle to gender (Title IX of the Education Amendments of 1972), handicapped status (section 504 of the Rehabilitation Act of 1973), and age (Title III of the Age Discrimination Act of 1975). Id.
87. See id. § 2000d-1.
88. Id. This section provides that “[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of 2000d of this title . . . by issuing rules, regulations, or orders of general applicability . . . .” Id.
89. See Colopy, supra note 53, at 154.

Courts have described the nondiscrimination requirement as part of the contractual cost of accepting federal funding; thus, the obligation to enforce Title VI falls only upon those “who are in a position to ac-
EPA implementing regulations promulgated under Title VI, provide that "[a] recipient [of federal funds] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 

Plaintiffs alleging discrimination have three options under Title VI that can all be pursued concurrently:  

1. suing the discriminatory recipient of federal funding;  
2. suing the funding agency; and  
3. filing an administrative complaint through the funding agency's administrative procedure.

In addition to the lawsuits against the oil companies under the CAA, CBE has elected to proceed under option (3) by filing an administrative complaint. Where plaintiffs have sued either the recipients of federal funding or the federal agency under Title VI itself, courts have implied a private cause of action. Though Title VI itself only reaches intentional discrimination, agency regulations designed to implement the purposes of Title VI may prohibit programs that have a disparate impact on protected groups or individuals. However, it is not entirely clear whether there is a private cause of action under the implementing regulations.

A complainant may also file an administrative complaint seeking the EPA's determination that a recipient's program

\[\text{Id. (quoting United States Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 606 (1986)).}\]

\[90. \quad 40 \text{ C.F.R. § 7.35(b) (1997) (emphasis added).}\]

\[91. \quad \text{Colopy, supra note 53, at 156.}\]

\[92. \quad \text{Options (1) and (2) are private lawsuits by aggrieved individuals. Id. at 156-71.}\]

\[93. \quad \text{Option (3) is an administrative enforcement mechanism. Id. at 171-88.}\] Unlike a private lawsuit, a complainant has no role in either the investigation or adjudication of the issue. Id. Also, the only remedies available are voluntary compliance by the discriminating party or cessation of funding by the agency. Id.

\[94. \quad \text{See supra text accompanying notes 8-12.}\]

\[95. \quad \text{See Cannon v. University of Chicago, 441 U.S. 677 (1979).}\]

\[96. \quad \text{See Alexander v. Choate, 469 U.S. 287 (1985).}\]

\[97. \quad \text{See Chester Residents Concerned v. Seif, 132 F.3d 925 (3d Cir. 1997), cert. granted, 66 U.S.L.W. 3777 (U.S. June 8, 1998) (No. 97-1620). In reversing the lower court's ruling that there was no private right of action, the court stated that Supreme Court jurisprudence is not dispositive on the issue and relied largely on its own precedent to find that there is legislative intent to create a private right of action, and that a private right of action furthers the purpose of the enabling statute. Id.}\]
violates either Title VI itself or the regulations. CBE's administrative complaint seeks such a determination. As stated, the EPA prohibits recipients from discriminating on the basis of race, color, or national origin. It is not completely clear, however, what factors the EPA uses to determine if a Title VI violation on the basis of disparate impact has occurred. However, a recent interim document submitted for public comment, provides guidance for the evaluation of disparate impact when investigating Title VI administrative complaints. Furthermore, it is not entirely clear from a survey of the cases how the courts determine whether there is a disparate impact.

E. Title VI Jurisprudence

Though highly touted in academic legal scholarship as a promising alternative to equal protection doctrine in the struggle for environmental justice, Title VI does not appear as promising a means as hoped to remedy environmental discrimination and injustice. This is because Title VI has been held to reach no further than the Constitution and is conse-

98. 40 C.F.R. § 7.120 (1997).
99. See id. § 7.35(b) (1997). "A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex...." Id. (emphasis added).
100. See Colopy, supra note 53, at 178.
101. See U.S. EPA Office of Civil Rights, Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits (1998). Submitted for a period of public comment from February 5 to May 6, 1998, the document is intended to provide a framework to the Office of Civil Rights for processing complaints filed under Title VI alleging disparate/discriminatory impact. Id. Evaluation of disparate impact requires identification of the affected population. Id. Proximity to the facility is a reasonable indicator of where impacts are concentrated. Id. Disparate impact is to be based on the facts and the totality of the circumstances using several techniques within a framework of five steps. Id.
102. See infra text accompanying notes 139-58.
quently limited to intentional discrimination,\textsuperscript{104} and because of the uncertainty as to whether there is a private cause of action on the basis of disparate impact under agency implementing regulations.\textsuperscript{106}

The Supreme Court has applied Title VI in the following instances: a public school system failing to provide English instruction;\textsuperscript{106} a medical school's special admissions program;\textsuperscript{107} entrance examinations for police officers;\textsuperscript{108} and reduction of the number of inpatient hospital days covered by Medicaid.\textsuperscript{109}

The first case to find disparate impact under Title VI was \textit{Lau v. Nichols},\textsuperscript{110} where the Supreme Court found that non-English speaking Chinese students were deprived of equal education benefits on the basis of disparate impact, regardless of the absence of intentional discrimination.\textsuperscript{111} Since \textit{Lau}, the Court has retreated considerably and has narrowed the scope and reach of Title VI.\textsuperscript{112} The validity of the holding in \textit{Lau} was undermined in \textit{Regents of the University of California v. Bakke}.\textsuperscript{113}

In the next major Title VI case, \textit{Guardians Association v. Civil Service Commission},\textsuperscript{114} the Supreme Court delivered a fractured six-part opinion. However, a majority affirmed that agency implementing regulations prohibiting discriminatory effects are valid under Title VI.\textsuperscript{115} This case involved a class action suit filed by police officers who claimed that appointments made on the basis of test scores had a disparate impact on African-American and Hispanic officers who were

\textsuperscript{104} See Alexander v. Choate, 469 U.S. 287 (1985).
\textsuperscript{105} See infra text associated with notes 153-57.
\textsuperscript{109} See Alexander, 469 U.S. 287 (1985).
\textsuperscript{110} 414 U.S. 563 (1974).
\textsuperscript{111} See id. at 565-70.
\textsuperscript{112} See infra text associated with notes 113-23.
\textsuperscript{113} 438 U.S. 265, 303-06 (1978). In stating that Title VI does not reach beyond the Equal Protection Clause, the Court implied that proof of discriminatory intent is necessary to find a violation of Title VI, suggesting that the effects test of \textit{Lau} no longer applies. \textit{Id}.
\textsuperscript{114} 463 U.S. 582 (1983).
\textsuperscript{115} \textit{Id.} at 584 n.2 (White, J.); \textit{Id.} at 623 n.15 (Marshall, J., dissenting); \textit{Id.} at 642-45 (Stevens, J., dissenting).
hired later and consequently laid off first. The two prong holding explained that Title VI itself reaches only intentional discrimination, but that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. The Court stated that Title VI delegates to the agencies the complex determination of what sorts of disparate impacts upon minorities may be remedied through their regulations. Also, compensatory relief for Title VI violations was deemed recoverable only upon a showing of intentional discrimination.

The Supreme Court's unanimous holding in Alexander v. Choate re-affirmed and clarified the fragmented holding of Guardians. Alexander was a class action suit for declaratory and injunctive relief against the state of Tennessee that challenged the state's reduction of the number of inpatient hospital days available to Medicaid recipients. The plaintiffs claimed this policy had a disproportionate effect on the handicapped and was therefore in violation of section 504 of the Rehabilitation Act of 1973 and its implementing regulations.

Another Title VI case heard by the Supreme Court but not reaching the disparate impact issue was North Carolina Department of Transportation v. Crest Street Community Council. A community group filed a complaint with the U.S. Department of Transportation (DOT) alleging that the state's plan to build a highway through the community vio-

116. Id. at 582.
118. See id.
119. See Guardians, 463 U.S. 582, 607 (1983). Private plaintiffs are limited to declaratory and injunctive relief, and compensatory relief is available if a private plaintiff can prove intentional discrimination. Id.
123. Alexander v. Choate, 469 U.S. 287, 289 (1985). Section 504 of the Rehabilitation Act of 1973 provides: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." See id.
lated Title VI. Following an investigation, the DOT concurred with the plaintiffs that the planned highway constituted a prima facie case of disparate impact. The dispute was settled, and the path of the highway was shifted in order to preserve the community.

Thus, the Supreme Court has interpreted Title VI itself as a remedy for intentional discrimination, but actions which have an unjustified disparate impact may only be redressed through agency regulations. Furthermore, the Court has held that compensatory relief may be granted only for intentional discrimination.

The federal courts have largely interpreted the Supreme Court's rulings to enable a private plaintiff to sue either the funding agency or the recipient on the basis of disparate impact under the regulations. The Supreme Court has not ruled on the plaintiff's burden of proof as to disparate impact, but federal courts have largely applied to Title VI the standards of Title VII. The Civil Rights Act of 1991 changed

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125. Id. at 9.
126. Id.
127. Id. at 10. The substantive issues pertaining to Title VI were settled out of court and the case went to the Supreme Court on the issue of whether plaintiffs were entitled to collect attorney's fees. Id. The Court held that attorney's fees may not be awarded under the Civil Rights Attorney Fees Awards Act in an independent action which is not brought to enforce any of the civil rights laws listed in the act but, rather, is brought to obtain attorney's fees Id.
130. Because Title VI does not explicitly provide for a private cause of action by victims of discrimination, the Supreme Court has had to determine, in a number of cases, whether there was an implied private cause of action and what the context of that implied right might be. Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d—1-1 (1994).
Title VII (and thus implicitly Title VI) making it more difficult for a defendant to rebut a prima facie showing of disparate impact. Under this standard, a defendant must demonstrate that the challenged practice is a business necessity.

*NAACP v. Medical Center, Inc.*, a case decided in 1981 prior to *Guardians* and *Choate*, relied on *Lau v. Nichols* and congressional legislative history in holding that disparate impact under Title VI is a sufficient basis for a suit against a recipient. This holding has been superseded by *Guardians* and *Alexander*, but the case is relevant vis à vis a plaintiff's burden of proof to show disparate impact.

Most recent cases applying the holdings of *Guardians* and *Alexander* find a private right of action under Title VI implementing regulations on the basis of disparate impact. For example, in *Coalition of Concerned Citizens Against I-670 v. Damian*, a suit was filed against funding recipients under Title VI itself. Plaintiffs in a minority neighborhood alleged that government officials failed to consider the disproportionate impact of a proposed highway on minority citizens in violation of Title VI. Federal Highway Administration regulations (FHWA) are similar to EPA regulations in providing that discrimination may be found on the basis of effect. The court said that the FHWA implementing regu-

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134. *Id.* at 321.
135. 657 F.2d 1322 (3d Cir. 1981) (holding that moving the hospital from the inner city to the suburbs was necessary for financial reasons).
138. *See infra* text accompanying notes 245-54.
139. *See supra* note 130.
141. *See id.* at 126.
142. *Id.* at 113 (stating that the proposed highway would displace 60 households and 191 persons).
143. *Id.* at 126. Regulations promulgated by FHWA pursuant to Title VI provide:

In determining the site or location of facilities, a recipient [of federal funds] may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this directive applies, on the grounds of race, color, sex, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the
lations "plainly contemplate that discriminatory effect can be a violation, even where there is no discriminatory purpose." 144 The court interpreted Guardians to hold that a private party could bring suit to enforce Title VI implementing regulations embodying a disparate impact standard. 145

But Title VI only prohibits taking actions with disparate impacts without adequate justification, and here the court found that even though the plaintiffs made a prima facie showing of disparate impact, the defendants met the burden of justifying the location by articulating legitimate, non-discriminatory reasons. 146 One reason cited was that the proposed location would have less impact on minorities than the alternative locations. 147 Moreover, the defendants were able to show that the alternative proposed by the plaintiffs would not accomplish the objective sought. 148 The court further stated that if the claims were under Title VI alone, the question would arise whether the defendants were required to consider alternatives with less disparate impact. However, this did not need to be determined since the regulations promulgated by the FHWA imposed such a duty. 149

Another case involving Title VI disparate impact is Scelsa v. City University of New York. 150 The plaintiffs alleged employment discrimination against Italian-Americans, and the court found unjustified disparate impact on the basis of statistical data, which indicated a disparity in the number of Italian-Americans employed at City University. 151 Moreover, the court held that plaintiffs must invoke, but need not exhaust, administrative remedies prior to filing suit under Title VI. 152

Recently, the Third Circuit in Chester Residents Concerned v. Seif held there was a private cause of action under

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144. Id. at 126.
145. Id.
147. See id.
148. Id.
149. Id. at 128.
151. See id. at 1140.
152. Id. at 1139.
The court stated that although a close reading of the opinions in *Guardians* implies approval by five justices of the existence of a private right of action under regulations implementing section 602 of Title VI, Supreme Court jurisprudence is not dispositive on the issue. In upholding the private right of action, the court relied on its own precedent, finding that there was some indication in the legislative history of an intent to create a private cause of action that would be consistent with the legislative scheme of Title VI and that a private cause of action furthers the dual purposes of the Act by preventing discrimination and by furthering enforcement by citizen suits, given the inability of the EPA to provide adequate enforcement.

To summarize, Title VI jurisprudence has established that while Title VI itself is limited to intentional discrimination, disparate impact may be redressed through agency regulations designed to implement Title VI. The majority of federal and appellate courts have held that there is a private cause of action for disparate impact under these regulations so that plaintiffs are not limited to the administrative complaint as a means to remedy discrimination, although the Supreme Court has not affirmed this.

F. Executive Order

President Clinton, on February 11, 1994, issued an Executive Order entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” The order requires each Federal agency to make environmental justice part of its mission by identifying and addressing disproportionately high and adverse human health or environmental effects of its programs, policies, and

154. See id. at 930.
155. Id. at 932.
156. Id.
157. Id. at 936.
158. See infra note 104.
159. See infra note 130
160. See infra note 130.
161. See text accompanying notes 154-155.
activities on minority and low-income populations. In a memorandum on Environmental Justice, issued concurrently with the Executive Order, President Clinton stated that the order is designed to focus Federal attention on the environmental and human health conditions in minority and low-income communities with the goal of achieving environmental justice.

On July 14, 1994, the Attorney General of the United States, Janet Reno, sent to all agencies that provide federal financial assistance a memorandum concerning the “use of the disparate impact standard in administrative regulations under Title VI.” She reminded agencies that their Title VI regulations “apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect,” emphasizing the Clinton Administration’s intention to vigorously enforce disparate impact provisions.

However, in spite of the laudable intent, lofty language, and recognition of the goals of the environmental justice movement, the Executive Order relies on existing law and does not create any further rights or remedies.

III. IDENTIFICATION OF THE PROBLEM

The Supreme Court in Alexander v. Choate looked to Guardians v. Civil Service Commission and affirmed that because Title VI itself goes no further than Equal Protection doctrine under the Constitution, Title VI only reaches intentional discrimination, and actions having an unjustifiable

163. Id.
164. See MANASTER, supra note 54.
165. See id.
This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.
Id. at 863.
disparate impact on minorities can only be redressed through agency regulations designed to implement the purposes of Title VI.\textsuperscript{169} The Alexander Court stated that Guardians delegated to the agencies under Title VI the determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems and were sufficiently remediable to warrant altering the practices of the federal recipients that had produced those problems.\textsuperscript{170}

What is not clear, and what this comment attempts to address, is what constitutes unjustified disparate impact, and, as a sub-issue, whether there is a private right of action under the agency regulations to implement Title VI.

CBE has filed an administrative complaint\textsuperscript{171} and Title VI jurisprudence has identified some standards for disparate impact in the context of lawsuits. With respect to an administrative complaint, the standards used when an action is challenged as violating the regulations are presumably those identified in the Interim Guidance for Evaluating Title VI Administrative Complaints.\textsuperscript{172} Whether or not the EPA approves Rule 1610, the ruling will undoubtedly be subject to further legal challenges, and the Supreme Court has granted certiorari in Chester to resolve the issue of whether or not there is a private cause of action under Title VI implementing regulations.\textsuperscript{173} Most lower federal courts have found a private cause of action under Title VI implementing regulations on the basis of disparate impact.\textsuperscript{174} The recent case of Chester also finds a private cause of action, but finds it on the basis of its own precedent, claiming that Supreme Court jurisprudence is not dispositive.\textsuperscript{175} A complainant filing an

\textsuperscript{170} See id. at 294.
\textsuperscript{171} Administrative Complaint, supra note 13 (on file with author).
\textsuperscript{172} Exec. Order No. 12,898, 3 C.F.R. 859 (1995), reprinted in 42 U.S.C. § 4321 (1994). This Executive Order, in part, directs agencies to develop strategies and policies to address environmental justice concerns. See id. However, as of this writing, there is only an interim report defining how an administrative complaint alleging disparate impact is evaluated. See supra note 101.
\textsuperscript{174} See supra note 130.
administrative complaint, unlike a plaintiff in a judicial proceeding, does not have a substantive role in the process. Because the Supreme Court holds that disparate impacts can only be addressed through the agency implementing regulations, the denial of a private cause of action would severely curtail a plaintiff's ability to seek judicial redress for disparate impact discrimination.

IV. ANALYSIS

A. Disparate Impact

1. Overview

Emissions trading under Rule 1610 has enabled the oil companies to scrap 7400 old vehicles at a cost of approximately $600 each in exchange for releasing 590 tons of hydrocarbons. Rather than spending $5 million each to install the equipment, the oil companies were able to spend only $4.4 million in total.

For purposes of Rule 1610, MSERCs are generated when pre-1982 model year vehicles used within the district are purchased and destroyed and the value of the credits is based on the presumption that the vehicles will have at least three remaining years of useful operation. Rule 1610 targets the 1.9 million pre-1982 vehicles in the four-county SCAQMD. The rule requires that vehicles which are to be scrapped must be registered to an owner in the District.

Oil companies say pollution credits give them flexibility with respect to running their operations and yet still reduce

176. See supra note 93.
179. See Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997) (on file with author).
181. South Coast Air Quality Management District Rule 1610(a), Old Vehicle Scrapping Program (1997).
182. See Goldschein, supra note 67, at 254.
smog. Moreover, they claim that the program benefits all Southern Californians because most smog and benzene comes from old vehicles posing a health risk to 14 million people that eclipses the risk to the communities surrounding the terminals.\textsuperscript{184} However, cars bought and scrapped reduce smog levels in the entire Los Angeles area, whereas the release of vapors from tanker fuel exchanges directly impacts the nearby communities,\textsuperscript{185} and it is this which creates the alleged disparate impact.

CBE's administrative complaint,\textsuperscript{186} filed pursuant to Section 7.120\textsuperscript{187} of the EPA Title VI implementing regulations, seeks a determination by the EPA that Rule 1610 has an unjustified and adverse disparate impact on minority communities and is therefore a violation of these regulations and should not be approved.\textsuperscript{188} The complaint also alleges a violation of both Title VI itself and Executive Order 12,898.\textsuperscript{189} Whether or not there is a private right of action under Title VI implementing regulations is an important issue for the lawsuits filed against the oil companies, but is not an issue with respect to the administrative complaint.\textsuperscript{190} However, allegations under Title VI itself will be limited to intentional discrimination.\textsuperscript{191}

The Executive Order cannot be the basis for a cause of action.\textsuperscript{192} It should, however, add considerable weight to the arguments that there should be a private cause of action under the agency implementing regulations and that disparate impact be more readily found.\textsuperscript{193}

With respect to claims under Title VI itself, CBE can only prevail by showing intentional discrimination.\textsuperscript{194} Both the equal protection doctrine\textsuperscript{195} and Title VI reach only inten-

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{184} See Cone, \textit{supra} note\textsuperscript{7}, at A1.
  \item \textsuperscript{186} Administrative Complaint, \textit{supra} note\textsuperscript{13} (on file with author).
  \item \textsuperscript{187} 40 C.F.R. § 7.120 (1997).
  \item \textsuperscript{188} Administrative Complaint, \textit{supra} note\textsuperscript{13}, at 1-2, (on file with author).
  \item \textsuperscript{189} \textit{See id.} at 23-24.
  \item \textsuperscript{190} \textit{See supra} text accompanying notes 90-97.
  \item \textsuperscript{191} \textit{See supra} text accompanying notes 128, 168-70.
  \item \textsuperscript{192} \textit{See supra} note 166.
  \item \textsuperscript{193} \textit{See infra} text accompanying notes 202-04.
  \item \textsuperscript{194} \textit{See supra} text accompanying notes 168-70.
  \item \textsuperscript{195} \textit{See supra} text accompanying notes 168-70.
\end{enumerate}
\end{footnotesize}
tional discrimination,\(^\text{196}\) requiring a plaintiff to show the challenged action was motivated by a discriminatory purpose. However, the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development*\(^\text{197}\) has identified five factors which a plaintiff can use to infer or circumstantially show intentional discrimination.\(^\text{188}\) The Court stated that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."\(^\text{199}\) But this is a difficult test to meet when the challenged action is facially neutral and environmental justice plaintiffs have not satisfied their burden of proof.\(^\text{200}\)

Even if CBE is unable to prevail on the issue of intentional discrimination, which is likely given the seeming hostility of the federal courts to find intent,\(^\text{201}\) the fact that an argument for intentional discrimination can be plausibly made,\(^\text{202}\) lends credence to the argument that there is at least disparate impact. In fact, the court in *Scelsa* makes the point that intent will help support an action where disparate impact is the standard.\(^\text{203}\)

2. *Prima Facie Case*

To succeed, CBE must meet its burden of showing disparate impact. When an administrative complaint was filed in


\(^{198}\) *Id.* at 266-68. The factors the Court identified were: (1) existence of racially disparate impact; (2) historical background of the decision, especially if this "reveals a series of official actions taken for invidious purposes"; (3) events leading up to the decision that reveal the decision makers' purpose; (4) any departures from the normal decision making purpose; (5) legislative and administrative history of the decision. *Id.*

\(^{199}\) *Id.* at 266.

\(^{200}\) *See supra* note 83.

\(^{201}\) *See supra* note 83.

\(^{202}\) Administrative Complaint, *supra* note 13, at 23 (on file with author). The argument was made that because environmental justice studies point to a relationship between race and toxic exposure, and because there is data showing that the South Coast Air Quality Management District was knowledgeable about the environmental justice implications of Rule 1610, intentional discrimination can be inferred. *Id.*

The funding agency found disparate impact from a proposed highway through a largely minority community. This case arguably stands for the proposition that plaintiffs are more likely to succeed under Title VI administrative procedures and regulations than in the courts.

The disparate impact test requires the plaintiff to show "some definite, measurable impact." Though the holding of NAACP cannot be relied upon as to finding a cause of action on the basis of disparate impact under the Act itself, the facts are relevant in considering what constitutes a disparate impact and whether or not it is justified. The challenged action here was the planned relocation of a medical facility from the inner city to an outlying suburban location. The court was somewhat persuaded there was a disparate impact, and assumed arguendo that plaintiffs had established a case of prima facie disparate impact in order to consider the issue of justification.

The court in Coalition found disparate impact under this "definite, measurable impact" standard where the proposed route of a highway would displace sixty households and one hundred and ninety-one persons. Additionally, the court in Scelsa using the same standard, found disparate impact where statistical data indicated a disparity in the number of Italian-Americans employed, and stated that "[a]ll that is required is that the statistical disparities must be sufficiently substantial that they raise an inference of causa-

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208. See supra text accompanying notes 136-39.
210. Id. at 1332.
212. See supra text accompanying note 206.
214. See supra text accompanying notes 151-52.
Whether or not Rule 1610 creates "some definite, measurable impact" will ultimately be a question of fact that will turn on such considerations as: the actual amount of emissions emitted at the marine facilities; weather and atmospheric conditions that may serve to disperse emissions and mitigate their impact or conversely to exacerbate them; demographic studies; whether the vehicles purchased under the scrapping program are geographically proximate to the marine terminals; and whether the claimed emissions from MSERCs are real. Another relevant factor is the interim document for evaluating Title VI complaints alleging disparate impact, which states that proximity to a polluting facility is a reasonable indicator of where impacts are concentrated. According to SCAQMD data, 590 tons of hydrocarbons have been released into the air over the past three years by the oil companies, including benzene, a compound linked to leukemia. A single tanker emits up to 6,000 pounds of VOCs and approximately nineteen tankers per month conduct fuel exchanges at each terminal. Consequently, CBE estimates that 1.4 million pounds of toxic carcinogenic chemicals have been emitted since 1994. CBE also claims the emission factors used to calculate emissions are too low. A CBE memorandum, as well as the brief

216. See supra note 101.
217. See Cone, supra note 7, at A1.
218. See supra text accompanying note 33-34.
220. See supra text accompanying note 44.
221. Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997) (on file with author). Installation of vapor recovery systems reduces the risk of tanker explosions by at least 14%; 21% of oil spills at marine terminals are caused by tanker explosions or fires; in Los Angeles, oil tanker loading is one of the single largest uncontrolled sources of VOCs; the Unocal (now TOSCO) terminal hosts approximately 20 ships per month creating a cancer risk to marine terminal workers of 160 per million; the Chevron-El Segundo refinery is estimated to release over 7.8 tons of benzene each year, creating a cancer risk to workers of 22 per million; workers exposed to just 10 parts per million (ppm) of benzene have cancer rates 155 times higher than the general population; under the CAA, an airborne cancer risk is considered significant if it exceeds one per million. Id.
222. Plaintiffs Brief, Communities for a Better Env't v. Unocal Corp. (July 24, 1997) (on file with author).
and administrative complaint,\textsuperscript{223} cite a litany of hazards and risks resulting from the failure to install emission control equipment, and a study by BAAQMD concluded that vapor recovery systems have a beneficial effect on safety.\textsuperscript{224} Furthermore, the risk of lung cancer for men living close to refineries is fifty percent higher than for those who do not.\textsuperscript{225} Therefore, the fact that emission control equipment reduces emissions by between ninety-five and ninety-nine percent\textsuperscript{226} and that such equipment appears to be an industry standard,\textsuperscript{227} suggests that without the equipment there is a definite, measurable impact.

Other factors may, however, mitigate this impact. The SCAQMD as a whole exceeds federal air quality standards for ozone and carbon monoxide,\textsuperscript{228} but areas along the immediate coast do not generally exceed the ozone standard, largely because of the prevailing sea breeze that transports polluted air inland before high ozone concentrations can be reached.\textsuperscript{229} On the other hand, SCAQMD wind pattern data indicates that winds from these facilities blow toward the affected communities approximately fifty to sixty percent of the time.\textsuperscript{230} SCAQMD, in response to the administrative com-

\textsuperscript{223} Administrative Complaint, supra note 13, at 9 n.22 (on file with author). "Marine terminal workers at Unocal will be exposed to a total cancer risk of 162.0 per million if Unocal's lease is renewed to allow four additional ships per month to unload." Id. This data was based only on an increase of four ships per month at one facility and does not include the cumulative health impacts of all ships at the terminal, let alone all ships in all terminals in the area. Id. See also Los Angeles County Building and Construction Trades Council and the Steamfitters and Pipefitters Local 250, Draft Environmental Impact Report for the Renewal of Unocal's Lease for Berths 148-151, in Final Environmental Impact Report (1996).

\textsuperscript{224} Notice of CBE's Intent to Sue Unocal for Violations of the CAA from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (Apr. 25, 1997) (on file with author).

\textsuperscript{225} See David Mark, Group Alleges Oil Companies Dump in Minority Areas, San Gabriel Valley Times, July 27, 1997, at 17.

\textsuperscript{226} Administrative Complaint at 5, 8, Communities for a Better Env't v. South Coast Air Quality Management Dist. (July 23, 1997) (on file with author).

\textsuperscript{227} See infra text accompanying notes 281-82.

\textsuperscript{228} See supra text accompanying notes 27-29.

\textsuperscript{229} See SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, 1997 AIR QUALITY MANAGEMENT PLAN § 2 (1996).

\textsuperscript{230} See Declaration of Julia May in Opposition to Defendants' Motion to Dismiss at 5, Communities for a Better Env't v. Ultramar, Inc. (C.D. Cal. 1998) (No. 97-5413).
plaint, claims that MSERC applications to avoid compliance with Rule 1142 comprise 1,856,475 pounds of VOCs, 55,600 pounds of NO\textsubscript{X}, 9,154,860 pounds of CO, and 6,047 pounds of PM.\textsuperscript{231} The disputed emission factors must also be addressed and resolved.\textsuperscript{232} The "coming to the nuisance" doctrine\textsuperscript{233} should not be a factor as the issue is one of disparate impact under Title VI, rather than common law nuisance.

SCAQMD's response to the administrative complaint is that Rule 1610 is in compliance with Title VI and EPA's Title VI implementing regulations because there is no disparate impact on surrounding minority communities and that the emissions are de minimus.\textsuperscript{234} The argument that there is no disparate impact is based on the fact that sixty-eight percent of the car scrapping done under Rule 1610 is to avoid compliance with a motor vehicle mitigation program whereby employers must reduce emissions by an amount equal to that which would occur from the full implementation of an employee trip reduction plan.\textsuperscript{235} This suggests only that Rule 1610 does not always create a disparate impact, but does not address whether this particular use of Rule 1610 to avoid compliance with Rule 1142 creates such an impact. Moreover, the SCAQMD claims that the second greatest use of Rule 1610 is the Chevron bulk loading facility which accounts for over two-thirds of the MSERCs used for Rule 1142 compliance and that this facility is at least one mile off-shore and not included in the complaint, so that the remaining emis-

\textsuperscript{231} SCAQMD Response, Communities for a Better Env't v. South Coast Air Quality Management Dist. (Nov. 7, 1997) (on file with author). Excluding Chevron, the emissions are as follows: 524,313 pounds VOC, 149,400 NO\textsubscript{X}, 4,141,471 pounds CO, and 1712 pounds PM (volatile organic compounds, nitrogen oxides, carbon monoxide, particulate matter). \textit{Id.}

\textsuperscript{232} CBE claims that SCAQMD is using emission factors 31% lower than those approved by EPA and CARB. \textit{See supra} text accompanying note 44. SCAQMD claims that emission factors for marine loading operations are higher than EPA factors in most cases, but they are lower for some operations, including gasoline loading. SCAQMD Response at 3-4, Communities for a Better Env't v. South Coast Air Quality Management Dist. (Nov. 7, 1997) (on file with author).

\textsuperscript{233} \textit{See supra} note 63.

\textsuperscript{234} SCAQMD Response at 7-8, Communities for a Better Env't v. South Coast Air Quality Management Dist. (Nov. 7, 1997) (on file with author).

\textsuperscript{235} \textit{Id.} at 2. Sixty-eight percent of MSERCs purchased under Rule 1610 are to enable compliance with Rule 2202, On-Road Motor Vehicle Mitigation Options. \textit{Id.}
EMISSIONS TRADING

sions are de minimus. Additionally, Rule 1610 requires that stationary sources purchase twenty percent more MSERCs than they have emissions to offset.

For the purposes of this comment, it is impossible to determine the precise impact. However, a strong argument can be made that the use of Rule 1610 to exempt compliance with Rule 1142 creates a definite, measurable disparate impact by considering the data presented herein, the Executive Order and associated memorandum, the NEJAC Resolution, and the inference of intent.

3. Justification

Once a plaintiff presents a prima facie case of disparate impact, the burden shifts to the defendant who must justify the action. If a showing of justification is made, the plaintiff must show it is pre-textual so that the ultimate burden is always on the plaintiff to show discrimination, whether intentional or effect.

As indicated in Alexander, only unjustified disparate impacts violate Title VI implementing regulations, so that if a disparate impact is found, the burden shifts to SCAQMD to justify Rule 1610. The standard for "justified," as articulated in both NAACP and Coalition, is a fairly deferential standard, defined as a "legitimate, non-discriminatory reason." In NAACP, justification was found where the reloca-

236. Id.
237. Id. at 6.
239. See supra text accompanying notes 197-203.
240. See supra text accompanying note 146.
241. See supra text accompanying notes 132-35, 146.
243. See id. (emphasis added).
244. NAACP v. Medical Ctr., Inc., 657 F.2d 1322 (3d Cir. 1981).
tion of a hospital to the suburbs was necessary. The court stated that the necessity was due to financial problems, and an aging facility which both hindered recruitment and created a danger of losing accreditation. Loss of accreditation would have resulted in devastating financial consequences if the hospital was unable to secure Medicaid/Medicare funding as a result. The same standard applied in Coalition also resulted in a finding that the disparate impact was justified where the proposed highway route had a lesser impact on minorities than would the alternate route under consideration. Moreover, the alternative offered by the plaintiffs would not accomplish the objective sought. Since these cases were decided, however, the Civil Rights Act of 1991 established the business necessity standard.

Ostensibly, necessity, lesser impact than alternatives, and the inability of alternatives to accomplish a necessary objective are three criteria that can support a finding of justification. Rule 1610, when used to exempt compliance with Rule 1142, does not appear to meet any of these. The SCAQMD has set out various purposes for Rule 1610. The purpose of Rule 1610, as stated in the rule itself, is to reduce motor vehicle emissions. However, the stated purpose in a public hearing notice to adopt the rule is to allow stationary sources to obtain economic relief in complying with emission reduction requirements. The SCAQMD’s response to the
administrative complaint claims that the legitimate, non-discriminatory purposes are to reduce emissions from higher-emitting older vehicles, to provide a cost-effective market based alternative method of compliance for stationary sources, and to provide flexibility in lieu of ride-sharing requirements. All of these purposes are facially neutral and arguably legitimate purposes. None, however, are necessary to the extent that they justify non-compliance with Rule 1142, because there are many other ways to reduce mobile emissions, and economic relief for profitable polluting sources is not a necessity.

MERC programs, including Rule 1610, are one of many useful tools and programs in the arsenal of pollution prevention and control strategies. Though cost effective for industry, the questions that must be asked are: what is the cost to others, and is it necessary? Rule 1610, when used to avoid compliance with Rule 1142, is neither a business necessity, an alternative with lesser impact, nor a case where the proposed alternative will not achieve the desired objective. In fact, Rule 1142 is the alternative that achieves the desired objective with the least impact.

If the purpose of Rule 1610 is to reduce motor vehicle emissions, then the scrapping of old vehicles is neither necessary, nor a lesser impact alternative, nor the only alternative. The Bay Area Air Quality Management District (BAAQMD) has a program to reduce the emissions of older vehicles by purchasing and scrapping them directly. This eliminates the inefficient complexity of Rule 1610 and is, therefore, an alternative with lesser impact. If the purpose of Rule 1610 is to give stationary sources economic relief, it is clearly not the

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257. SCAQMD Response, Communities for a Better Env't v. South Coast Air Quality Management Dist. (Nov. 7, 1997) (on file with author).
258. See infra note 262.
259. See infra text accompanying notes 295, 301-03.
260. See discussion supra Part II.C.
261. See supra text accompanying note 69.
262. BAY AREA AIR QUALITY MANAGEMENT DISTRICT, AIR CURRENTS 1 (1997). BAAQMD runs a regional Vehicle Buyback Program where motorists receive $500 for pre-1979 vehicles. See id. Also, vehicles that do not pass smog inspections are not eligible for the program because the aim is to remove vehicles that would otherwise continue to be driven and vehicles that do not pass are not allowed to be driven. Id.
263. See supra text accompanying note 81. See also discussion infra Part V.
lesser impact alternative, nor is it necessary. Highly profitable corporations should not receive the benefit of a subsidy to comply with environmental and safety regulations when compliance only requires the use of industry standard technology.

The EPA will also determine the approvability of Rule 1610 in accordance with the economic incentive program (EIP) rules, which require that state programs be enforceable, non-discriminatory, and consistent with the timely attainment of NAAQS. Furthermore, areas such as the SCAQMD which are classified as extreme non-attainment for ozone or serious non-attainment for carbon monoxide, are subject to more stringent requirements. Indeed, in a letter from the EPA to CBE dated March 17, 1997, the EPA determined that Rule 1610, as submitted in October of 1996, was not approvable based on the requirements of section 110 of the CAA and associated regulations. The letter also stated the need for the EPA to revise the EIP rules to include environmental justice provisions.

The costs to polluting sources of complying with air quality regulations should not be used to justify the disproportionate and adverse impact of air pollution on communities of color, or any community for that matter. This is especially true since the installation of vapor recovery equipment has become the industry norm. Vapor control systems, as

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264. See infra note 294.
265. See infra text accompanying notes 301-03.
266. See supra text accompanying notes 37, 227. See infra text accompanying notes 271-82.
268. See supra text accompanying notes 20-27.
269. See supra text accompanying notes 28-29.
272. The rule under current consideration is an amended version. South Coast Air Quality Management District Rule 1610(a), Old Vehicle Scrapping Program (1997).
276. See infra text associated with notes 278-83.
required by Rule 1142, have been found to be a highly cost effective method of controlling emissions, and although such systems cost approximately $5,000,000, the cost per pound of pollution reduced is actually quite low compared to other control technologies. In the Los Angeles area, seven of the twelve oil facilities have installed such equipment, as have all of the facilities in the San Francisco Bay. Moreover, the oil facilities in Louisiana, New Jersey, and most in Texas have installed this equipment. As stated in the complaint, "in light of this clear industry standard, the desire of the oil companies to avoid this business expense cannot be deemed a necessity." This is particularly true where the companies are extremely profitable.

4. Summary

Because the ultimate burden of proving discrimination is on the plaintiff, where the defendant provides a legitimate, non-discriminatory justification for the challenged action, a plaintiff can only prevail by showing that the proffered justification is pre-textual. If Rule 1610 is found to be justified, CBE may argue that the proffered justification is political in the sense that its purpose is to placate corporate demands to avoid compliance with the CAA rather than to decrease emissions, because the best way to reduce emissions is compliance with Rule 1142.

Typically, an allegation of discrimination involves a balancing of benefits and burdens among the disputing parties. There is some evidence that discrimination is more likely to be found in the context of providing municipal services than in the siting of noxious facilities. This may be due in part

278. See supra note 179.
279. Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997) (on file with author).
280. Administrative Complaint, supra note 13, at 16 (on file with author).
281. Id. at 16.
282. Id.
283. See infra note 294.
284. See Colopy, supra note 53, at 162.
to the fact that a remedy is easier to justify. A finding of discrimination in the siting of a hazardous waste facility requires burdening one community to benefit another, whereas an order to equalize municipal services poses no such burdens. This situation is more analogous to the provision of municipal services because finding unjustified disparate impact would not require the redistribution of environmental hazards, but would only require the oil companies to operate their marine facilities in a manner which comports with the industry standard. 286

In making a determination as to disparate impact and whether or not to approve Rule 1610, the EPA should pay close attention to a Resolution adopted by the National Environmental Justice Advisory Council (NEJAC) on December 12, 1996, advising the EPA that approval of Rule 1610 would set a dangerous national precedent for pollution trading programs that may concentrate pollution in communities of color. 287

B. Private Right of Action under Title VI Implementing Regulations

The sub-issue of whether there is a private cause of action under agency regulations to implement Title VI has been answered affirmatively by the vast majority of district and appellate courts. 288 To hold otherwise would severely limit the remedies available to victims of discrimination and environmental injustice, and is contrary to the purpose of Title VI. 289 Because of the limitations of the administrative enforcement mechanism and the limits of administrative agencies in investigating and adjudicating, 290 it is imperative that

1274 (M.D. Fla. 1984).
286. See supra text accompanying notes 227, 281-82.
287. See supra note 238.
288. See supra note 130.
289. Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936 (3d Cir. 1997), cert. granted, 66 U.S.L.W. 3777 (U.S. June 8, 1998) (No. 97-1620). The court noted that the decisions of other courts of appeals indicate support for the reasoning of the court. Id. See also Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). Title VI, like Title IX, has two objectives. Id. One objective is to avoid the use of federal funds to support discriminatory practices and the other is to provide individual citizens effective protection against these practices. Id.
290. See supra note 93.
both Title VI and its implementing regulations be enforced in Federal courts by private parties.

V. PROPOSAL

A vast body of evidence substantiates the claims of environmental justice advocates. A ten year grass roots environmental justice movement finds official recognition in Executive Order 12,898 which signifies the President’s commitment to further the basic civil rights goals of the movement: to reduce the disproportionate burden of environmental ills shouldered by communities of color. In light of this recognition and in spite of the government’s concurrent support of emission trading programs, the use of Rule 1610 to exempt tankers from using emission abatement equipment as required by Rule 1142 under the CAA should not be approved.

The EPA should not allow highly profitable companies to use Rule 1610 to avoid the expense of CAA compliance where such compliance utilizes proven, commonplace technology that is a de facto industry standard. Moreover, Rule 1610 should not allow these companies to avoid compliance if the consequences of non-compliance create an unjustifiable disparate impact on communities of color in violation of the Civil Rights Act.

Emission trading programs, including Rule 1610, have an arguably legitimate role in the ongoing battle to combat pollution. These programs, however, are best reserved for temporary or emergency situations. For example, an appropriate use of Rule 1610 would enable polluters to buy time to install abatement equipment or to avoid penalties for non-compliance on a temporary or emergency basis. Rule 1610 is used mostly by employers to avoid compliance with a motor

291. See supra note 55.
293. See supra note 3.
294. See NEW YORK STOCK EXCHANGE, STANDARD & POOR’S STOCK REPORTS (1997). The net income (in millions) for these companies for the years 1993-1996 are as follows: Unocal 343, 124, 260, 456 (Nov. 5, 1997); Tosco 81, 84, 77.1, 146 (Nov. 2, 1997); GATX 72.7, 91.5, 101, 103 (July 28, 1997); Ultramar 86.5, 61, 47.6, -35.9 (Aug. 7, 1997). See id.
295. See supra text accompanying notes 264, 281-82.
vehicle mitigation program. Instead of implementing employee trip reduction programs, employers can scrap old cars. Arguably poor environmental policy, at least the impacts of this use of Rule 1610 are wide ranging and not concentrated in any one community.

In addition to the foregoing, there are important policy reasons to take a hard look at MSERCs in general, and Rule 1610 in particular. As environmental policy, scrapping functional, usable vehicles contradicts a core tenet of environmentalism: Reduce, Re-use, Recycle. Supporters of such programs would argue that the vehicles only have three years of life left anyway so that scrapping is not wasteful, but simply expedites the inevitable and produces cleaner air in the process. But that misses the point. The reduction or elimination of consumption, rather than environmentally friendly consumption, is always the best environmental choice. Because these programs are enormously complex, the energy and resources expended on implementation and monitoring may well exceed any environmental benefits, particularly when the only effect of the program is to expedite the inevitable. Moreover, the complexity of these programs renders them difficult, if not impossible, to enforce. This is true for regular emissions programs, and even more so for MSERCs. Finally, reliance on voluntary compliance by polluters is also problematic, for it is risky to depend on the goodwill of polluters to accurately report their pollution and trades.

Current conventional wisdom holds that market based solutions are a superior approach to many social and environmental ills. In the environmental realm, emissions trading programs are praised as a flexible and innovative market based alternative to bureaucratic command and control environmental regulations. But it is not that simple. Programs such as Rule 1610 are not really a market based solution, but just another subsidy to industry, which often burden society with heavy environmental and financial

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296. See supra text accompanying notes 235-36.
297. See supra note 81.
298. Examples of this include charitable donations to replace welfare and other forms of financial aid; corporate rather than public funding of the arts; and subsidies and tax incentives to private investors to build affordable housing rather than affordable housing being directly built by the government.
299. See Goldshein, supra note 67.
costs. Instead of having to pay the market rate for emission control equipment, the oil companies are given the ability to opt out with a less expensive alternative. As long as it is less expensive to purchase old cars, there is no incentive to innovate and develop less expensive and more effective pollution control technology. Moreover, a subsidy that perpetuates polluting industrial processes is hardly consistent with the concept of market mechanisms, the banner under which such programs parade.

Siting decisions appear to be race neutral and based on factors such as land cost, zoning and proximity to infrastructure. It is these “market forces” that determine siting and land use decisions according to the opponents of environmental justice theories. However, these factors are often shaped by the same discriminatory forces. Subsidies too are seen as race neutral, and even more than siting decisions, they reflect disparities in economic and political power. Patterns of economic development under a free enterprise system that allow or encourage the costs of pollution to be borne by the consumer, disproportionately affect the poor. Distribution of pollution under a market system of transferable pollution rights tends to replicate existing income and property distributions that, to the extent such distributions themselves are the product of racial discrimination, continue to produce and exacerbate inequitable results. Rule 1610 is a good example of this. Promulgated at the behest of multinational corporations to serve their economic interests, Rule 1610 enables these companies to release noxious chemicals and vapors near surrounding communities.

Pollution trading eliminates public participation, as trades are conducted behind closed doors and are increas-

300. See David Malin Roodman, State Of The World 1997 (1997). A subsidy is a policy that alters market risks, rewards, and costs in ways that favor certain activities or groups and exist in a variety of forms such as tax breaks, government selling services or resources below cost, and low interest loans. See id.

301. See supra text accompanying notes 61-66.


ingly traded as a Wall Street commodity. Rather than public hearings and citizen input to set and enforce emission standards, this approach arguably invites fraud and favors big business. Furthermore, such programs do not strengthen pollution standards and improve the environment because the pollution trading only works if the underlying standards are too lenient so that participation is cost effective. If the standards are sufficiently strict, there would be nothing to trade. Unlike technology forcing limits, trading does not create incentives to develop innovative technology to reduce pollution.

Assuming current emissions trading programs are the model upon which international emissions trading programs will be designed, the implications are sobering. If emissions trading can be used within the United States to justify dumping toxic and carcinogenic emissions on minority neighborhoods of American citizens, international emissions trading programs will enable large scale dumping on less developed countries consisting of poor people of color with little political clout.

VI. CONCLUSION

Without a private right of action under agency regulations implementing Title VI of the Civil Rights Act of 1964, Title VI is not an effective remedy for victims of disparate impact discrimination, who must prove intentional discrimination under the Act itself. In addition, a finding by the EPA that Rule 1610 does not create a disparate impact, would further undermine Title VI as a remedy for discrimination. Together, a finding of no disparate impact and no private right of action under the regulations, the only place where disparate impact has any meaning, suggests Title VI is indeed superfluous.

When Rule 1610 is used to avoid compliance with Rule 1142, it very likely creates an unjustified, disparate impact on minority communities in violation of regulations implementing the purposes of Title VI of the Civil Rights Act and should not be approved for this purpose. Moreover, it should not be allowed to enable a violation of the Clean Air Act.

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