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Proving an Environmental Justice Case: Determining an Appropriate Comparison Population

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PROVING AN ENVIRONMENTAL JUSTICE CASE: DETERMINING AN APPROPRIATE COMPARISON POPULATION

Bradford C. Mank*

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Introduction

In proving a case of adverse disparate impact discrimination under Title VI of the 1964 Civil Rights Act, a plaintiff in its prima facie case must show a significant disparity between an affected population and an appropriate comparison population. Both government agencies and commentators have neglected to address the
crucial issue of how to select and define a comparison population. Title VI cases often look to Title VII cases for guidance. Title VII cases require that a comparison population should be similarly situated to the affected population. In 2000, the Environmental Protection Agency ("the EPA" or "the Agency") issued draft Title VI guidance addressing this issue, but the Agency failed to address how to select a similarly situated comparison population. Business commentators have proposed an overly restrictive test requiring that both the affected area and comparison population contain very similar land uses. For example, business commentators suggest it would be inappropriate in many cases to compare a poor, urban area with an affluent suburban area.

This Article proposes that a comparison population is similarly situated with an affected population if the comparison area meets the minimum relevant requirements for the proposed facility. This test is consistent with Title VII cases requiring that comparisons be made between qualified workers in the same relevant job market. The proposed test would allow comparisons between poor, heavily minority areas and affluent suburban areas as long as the facility could be sited in either area. The Article addresses how the EPA can use existing information to select comparison areas and the special problems presented by local zoning restrictions.

Title VI of the 1964 Civil Rights Act prohibits federal agencies from providing financial assistance to recipients that commit discrimination on the basis of "race, color or national origin ...." Title VI clearly prohibits recipients from engaging in intentional discrimination that results in disparate treatment of protected groups. Additionally, the Supreme Court has recognized that federal agencies may adopt Title VI implementing regulations that prohibit recipients of federal funds from using criteria or methods that cause an unjustified disparate impact on protected groups, even if the practices or actions are not intentionally discriminatory. The EPA's Title VI regulations prohibit its recipients, which include almost all state environmental agencies, from taking

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3 Alexander v. Choate, 469 U.S. at 292-94; Guardians Ass'n, 463 U.S. at 618 (Marshall, J., dissenting) (stating that recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination," according to 45 C.F.R. § 80.3(b)(2) (1964)); Guardians Ass'n, 463 U.S. at 592 n.13 (observing that "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination").
actions that cause either intentional discrimination or unintentional disparate impact discrimination to protected minority groups.\(^4\) On June 27, 2000, the EPA published the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("Revised Investigation Guidance") to clarify when a permit decision by a recipient may cause adverse, unjustified disparate impacts that violate Title VI.\(^5\)

In determining whether a decision causes adverse, unjustified disparate impacts, a decision-maker must compare the level of adverse impacts experienced by the affected population to an appropriate comparison population.\(^6\) The EPA and most commentators have focused on defining the scope of the affected population and paid far less attention to the issue of defining an appropriate comparison population.\(^7\) Yet whether a court or government agency finds a significant and unjustified disparity often depends on the size and characteristics of the comparison population.\(^8\)

The Revised Investigation Guidance's approach to defining comparison populations is inadequate in light of Title VI and VII case law because there is no requirement that a comparison population be similarly situated to the affected population. While Title VII cases initially allowed plaintiffs to compare an allegedly affected minority population to a general population, subsequent Supreme Court decisions have required a plaintiff, in establishing a prima facie case of discrimination, to compare a group that is allegedly

\(^4\) "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 . . ." 40 C.F.R. § 7.35(b) (2000); see generally 40 C.F.R. pt. 7 (2000); Bradford C. Mank, Title VI, in THE LAW OF ENVIRONMENTAL JUSTICE 25-26 (Michael Gerrard ed., 1999) [hereinafter Mank, Title VI]; Bradford C. Mank, Is There a Private Cause of Action Under EPA's Title VI Regulations?, 24 COLUM. J. ENVTL. L. 1, 17 (1999) [hereinafter Mank, Private Cause of Action].


\(^6\) See supra notes 1-5.

\(^7\) See supra notes 1-5.

\(^8\) See supra notes 1-5.
the victim of discrimination with qualified persons in the relevant job market.\textsuperscript{9} Courts in Title VI cases often look to Title VII decisions for guidance, so Title VII cases defining an appropriate comparison group are therefore helpful in addressing the same question under Title VI.\textsuperscript{10} While the EPA is not technically bound by Title VII cases, the Department of Justice in its Title VI Legal Manual recognizes that "Title VI disparate impact claims are analyzed using principles similar to those used to analyze Title VII disparate impact claims."\textsuperscript{11} Although it is unclear to what extent courts will give deference to the Agency's Title VI guidance, it is likely that courts will give more deference to the Title VI guidance if it is firmly grounded in Title VI and VII case law. Accordingly, the EPA should carefully consider Title VII precedent demanding an appropriate comparison population be similarly situated to the affected population.

A distinction must be made between the use of general population statistics to make initial identifications of possible high-risk areas and using those same statistics to make a formal comparison to determine liability under Title VI. It is appropriate for the EPA or states to use general population statistics as part of a process in which they initially identify areas that may have high amounts of pollution or potential disparate impacts and then compare the pollution levels in such areas with statewide averages.\textsuperscript{12} Accordingly, as part of a program to avoid potential disparities, it is frequently acceptable for states or the EPA to compare a potentially affected population with general population statistics. Furthermore, if a facility could be sited anywhere in a recipient's jurisdiction, it may sometimes be appropriate to use a general population as the applicable comparison group in making a final determination as to whether an affected population is disproportionately affected by disparate impacts.

Nevertheless, in light of Title VII law, the EPA should not automatically use a general population as the appropriate comparison group, or even the non-affected sub-population of the general pop-

\textsuperscript{9} See, e.g., Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 650-51 (1989); infra notes 153-82.

\textsuperscript{10} See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406-07 (11th Cir. 1993); infra note 123.


\textsuperscript{12} See infra notes 188-94.
ulation, in making legal determinations about whether a recipient has violated Title VI. Instead, the agency should first define the appropriate comparison area based not just on the recipient's jurisdictional authority, but also on whether the facility at issue in the affected area could be sited in the proposed comparison area.\textsuperscript{13} If minority job applicants must be compared to a relevant labor market rather than just the general population, then the EPA should compare an affected population with a comparison population that is located in an area that could have been a possible site for the facility. Accordingly, if a public transportation project could only be built in certain urban areas, then the affected population should be compared to the populations in those urban areas, rather than the state-wide population.\textsuperscript{14} Some might argue that the defendant or recipient has the burden of showing as a valid business necessity that certain areas are unsuitable for the facility.\textsuperscript{15} Yet in defining a relevant comparison group, the plaintiff has a duty to show that the comparison group is similarly situated enough to compare it to the affected population.\textsuperscript{16}

On the other hand, a comparison area does not have to be the same as the affected area to be similarly situated as long as the comparison area is suitable for the facility at issue, meeting all relevant objective minimum requirements. Some business trade associations have proposed an overly restrictive definition of "similarly situated" by contending that a comparison population must be in an area very similar to the affected population, having a similar range of residential, industrial and commercial uses.\textsuperscript{17} There is some confusion in Title VII law about whether a plaintiff must address relative qualifications in its prima facie case and hence consider such issues in delineating an appropriate comparison population. Most courts simply require a plaintiff's prima facie case to address objective, minimum qualifications, however, and place the burden on the defendant to show that it hired better qualified

\textsuperscript{13} See infra notes 198-200, 206-07, 213, and 225.
\textsuperscript{14} See infra notes 198-200, 206-07, 213, and 225.
\textsuperscript{15} See infra notes 213-28.
\textsuperscript{16} See infra notes 198-200, 206-07, 213, and 225.
workers than the plaintiffs. Accordingly, in Title VII cases, courts have required a basic similarity in selecting a comparison population that consists of qualified applicants in the relevant job market, but have not demanded that a comparison population be nearly the same in every relevant characteristic. For example, in Title VII cases, minority job applicants do not need to have the same educational or occupational characteristics as an appropriate comparison population, as long as they are qualified for the job at issue. In the context of environmental permits, the best test for whether a comparison population is similarly situated is usually if the proposed facility in the affected area could also be sited in the comparison area.

To determine whether a comparison area is similarly situated, the EPA should start by examining existing information from permit applications, but may need to encourage states and permit applicants to provide additional information. Some of the information that the Agency needs to define an appropriate comparison population may be available from existing state and federal permitting requirements. For example, because many state siting statutes already require a permit applicant to propose or consider a number of different locations for a proposed facility, existing siting and permitting processes already generate some of the information that would be useful in defining what is an appropriate comparison population. Additionally, several federal environmental statutes, most notably the National Environmental Policy Act, require the government to evaluate alternatives to a proposed project, and this information could prove useful in selecting an appropriate comparison population. Furthermore, the EPA, in both the Revised Investigation Guidance and the Recipient Guidance, encourages states to collect demographic information and pollution data about high risk populations, and this information could prove useful in selecting both the affected population and an appropriate comparison population.

Nevertheless, in investigating and resolving Title VI administrative complaints, the EPA has ultimate responsibility in researching and assessing any disputed factual issues. If any necessary informa-

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18 See infra notes 213-28.
19 See infra notes 203-07.
20 See supra notes 13-16 and infra notes 198-200, 206-07, 213, and 225.
21 See infra notes 270-85.
22 See infra notes 287-90.
23 See infra notes 286, 291-302.
tion about comparison populations is not available, the EPA should work with recipients and complainants to develop such information. Moreover, the EPA should develop guidelines for determining appropriate comparison populations. In selecting a comparison population, the Agency needs to evaluate whether a recipient’s siting criteria are legitimate minimum requirements or whether the recipient’s criteria are likely to be masks for discriminatory decisions. An especially sensitive problem is the role of local land use restrictions that may be beyond the authority of the recipient, but may effectively foreclose some areas from consideration. The EPA should examine whether the recipient can preempt, mitigate or avoid discriminatory local land use regulations. By carefully evaluating a recipient’s siting criteria to determine whether all stated criteria are legitimate and selecting appropriate comparison populations, the EPA can improve its process for analyzing Title VI disparate impact complaints.

I. Evidence of Environmental Inequities

Several studies have found that racial minority and low-income groups disproportionately live near polluting industries and solid and hazardous waste treatment and disposal facilities.\(^{24}\) For exam-

\(^{24}\) See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 Env't. L. Inst. (10681, nn. 34-37 (2000) (summarizing several studies finding evidence of environmental discrimination) [hereinafter Kuehn, *A Taxonomy of Environmental Justice*]; Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios: A Longitudinal Analysis of Environmental Justice Claims*, 24 Ecology L.Q. 1, 9, 19-27, 33-34 (1997) (using 1990 census data, examining 544 communities that hosted active commercial hazardous waste treatment storage and disposal facilities, and finding no substantial evidence that commercial hazardous waste facilities that began operating between 1970 and 1990 were sited in areas that were disproportionately African American or that had high concentrations of the poor, but finding evidence that Hispanics were disproportionately more likely to live near such facilities); John A. Hird & Michael Reese, *The Distribution of Environmental Quality: An Empirical Analysis*, 79 Soc. Sci. Q. 693, 707-11 (1998) (finding “[e]ven when numerous other potentially relevant variables are included in the analysis, race and ethnicity remain strongly associated with environmental quality, with both nonwhite and Hispanic populations experiencing disproportionately high pollution levels,” but not finding low income levels to be associated with higher levels of pollution); Evan J. Ringquist, *Equity and the Distribution of Environmental Risk: The Case of TRI Facilities*, 78 Soc. Sci. Q. 811 (1997) (finding Toxic Release Inventory facilities and pollutants are concentrated in residential ZIP codes with large minority populations); J. Tom Boer et al., *Is There Environmental Racism? The Demographics of Hazardous Waste in Los Angeles County*, 78 Soc. Sci. Q. 793 (1997) (finding working class communities of color in industrial areas of Los Angeles are most affected by hazardous waste treatment storage and disposal facilities); Robert D. Bullard, *Solid Waste and the Black Houston Community*, 53 Soc. Inquiry 273, 279-83 (1983) (finding that although African-Americans made up only 28% of the Houston population in 1980, six of Houston’s eight incinerators and mini-incinerators and fifteen of seventeen landfills were located in predominantly African-American neighborhoods); *United
Minority and low-income populations are more likely to live in areas with high amounts of pollution. Additionally, cities are more likely to locate industrial or commercial zoning in low-income, high-minority census tracts than in high-income, low-

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25 See generally Goldman & Fitton, supra note 24; United Church of Christ Comm'n for Racial Justice, supra note 24.

26 United Church of Christ Comm'n for Racial Justice, supra note 24, at 15.

27 See Rodger C. Field, Siting, Justice, and the Environmental Laws, 16 N. Ill. U. L. Rev. 639, 641 (1996) (stating that African Americans are 40 percent more likely to live in an area that does not attain the national ambient air quality standards, and Latinos are 90 percent more likely than Whites); Robert R. Kuehn, The Environmental Justice Implications of Quantitative Risk Assessment, 1996 U. Ill. L. Rev. 103, 118 1996 [hereinafter Kuehn, Quantitative Risk Assessment]; Faber & Krieg, supra note 24, at 13 (finding Massachusetts communities where people of color comprise more than fifteen percent of population are substantially more likely to live near high levels of pollution than communities with small minority populations); Mank, Environmental Justice, supra note 24, at 339.
minority areas.28 Furthermore, there also exists some evidence that minority groups are disproportionately exposed to multiple sources of pollution.29

Other studies, however, have found no statistically significant difference in the percentage of minority populations in areas with commercial hazardous waste facilities.30 For example, a sophisticated study sponsored by the EPA found statistically significant evidence of disparities in the location of hazardous waste facilities

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28 Craig Anthony Arnold, Planning Milagros: Environmental Justice and Land Use Regulation, 76 DENV. U. L. REV. 1, 80-89 (1998) (finding in study of 31 census tracts in seven cities nationwide that industrial and commercial zoning is more common in low-income, high-minority neighborhoods than in high-income, low-minority neighborhoods). See also Yale Rabin, Expulsive Zoning: The Inequitable Legacy of Euclid, in ZONING AND THE AMERICAN DREAM 101-20 (Charles M. Haar & Jerold S. Kayden, eds., 1990) (presenting case studies of "expulsive zoning" where cities from 1917 through at least the 1930s rezoned minority residential areas to allow intensive industrial or commercial use, often with intent to reduce minority populations); infra note 313.

29 Robert W. Collin & Robin Morris Collin, The Role of Communities in Environmental Decisions: Communities Speaking for Themselves, 13 J. ENVTL. L. & LITIG. 37, 55-57 (1998); James H. Hamilton & W. Kip Viscusi, The Benefits and Costs of Regulatory Reforms for Superfund, 16 STAN. ENVTL. L.J. 159, 180 (1997) (finding some minority groups are more likely to live near Superfund sites and to be exposed to multiple chemicals); Hird & Reese, supra note 24, at 709-10; Bradford C. Mank, Reforming State Brownfield Programs to Comply with Title VI, 24 HARV. ENVTL. L. REV. 115, 141-43 (2000) [hereinafter Mank, Reforming State Brownfield Programs]. But see Vicki Ferstel, Scholar Urges More Debate, BATON ROUGE ADVOCATE, Jan. 6, 1999, at 1B (reporting that Christopher H. Foreman, senior fellow at Brookings Institution, argues there is no proof that different pollutants interact to create multiple, cumulative and synergistic risk).

in Hispanic areas, but no statistically significant evidence of disparities with respect to African Americans or poor communities.31

Sometimes studies of environmental discrimination disagree because they use different units of comparison.32 For instance, a study examining the percentage of minorities in the census tract surrounding a facility is likely to reach a different result than a study assessing minority populations in the surrounding zip code area because the latter area is usually larger than a census tract.33

Some studies have suggested that any disparities between minorities and whites in the location of hazardous facilities may be caused by subsequent events after the initial siting process, such as minorities “moving toward a nuisance” because land becomes cheaper after an undesirable facility is sited, although the most comprehensive national study of this issue failed to find such evidence.34 If minorities in fact “moved to the nuisance,” a court

31 Been & Gupta, supra note 24, at 9, 19-27, 33-34 (using 1990 census data, examining 544 communities that hosted active commercial hazardous waste treatment storage and disposal facilities, and finding no substantial evidence that commercial hazardous waste facilities that began operating between 1970 and 1990 were sited in areas that were disproportionately African American or with high concentrations of poor, but did find evidence that Hispanics were disproportionately more likely to live near such facilities).

32 See generally Mank, Discriminatory Siting, supra note 24, at 343 n.59, 390-92 & n.373 (discussing how use of different definitions of subpopulations or geographical areas can dramatically affect research results); Paul Mohai, The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research, 14 VA. ENVTLL. L.J. 615 (1995) (discussing measures used in assessing site locations for dumping); Rae Zimmerman, Issues of Classification in Environmental Equity: How We Manage Is How We Measure, 21 FORDHAM URB. L.J. 633, 665-69 (1994); John J. Fahs lender, Comment, An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context, 5 N.Y.U. ENVTL. L. REV. 120, 157-69 (1996) (discussing a number of different environmental justice studies using different units of comparison).

33 See Vicki Been, Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?, 103 YALE L.J. 1383, 1401 n.73, 1402-03 n.84 (1994) (arguing census tracts are more reliable means to define community than zip code areas) [hereinafter Been, Market Dynamics]; Been & Gupta, supra note 24, at 10-13 (citing sources and contending census tracts are generally more reliable means to define community than zip code areas).

34 Compare Lambert & Boerner, supra note 30, at 205 (using data from 1970, 1980, and 1990 censuses, examining housing patterns around hazardous and solid waste disposal facilities and incinerators in St. Louis, and finding evidence that Whites tended to move away from such facilities at a faster rate than minorities and that “white flight” led to an increasing proportion of minorities near such facilities) with Been & Gupta, supra note 24, at 9, 27-30, 34 (using 1990 census data, examining 544 communities that hosted active commercial hazardous waste treatment storage and disposal facilities, and finding little evidence that the siting of a facility was followed by substantial changes in a neighborhood’s socioeconomic status or racial or ethnic composition).
would likely reject a disparate impact suit because a facility developer would not be responsible.35

However, some environmental justice advocates would argue that even if minorities actually moved toward an existing facility, a state permitting agency considering renewal of the facility’s permit would still have a duty under Title VI to at least minimize any adverse disparate impacts because there is no absolute right to have a permit renewed if, for whatever reason, it causes significant adverse disparate impacts. Many environmental justice advocates contend that any differences between minority and majority areas in terms of land use are often the result of historical discrimination in zoning, racial steering or other discriminatory practices.36

Existing studies of environmental inequities have generally not focused on the problem of defining appropriate comparison populations. To determine whether disparities alleged in a Title VI complaint are significant or unjustified, the EPA needs to develop more refined approaches for both defining the scope of the affected population and selecting a similarly situated comparison population.

II. THE EPA’s TITLE VI PROGRAM

A. Title VI and EPA’s Title VI Regulations

Title VI of the Civil Rights Act of 1964 forbids intentional discrimination by programs or activities receiving federal financial assistance.37 Section 602 of Title VI requires federal funding agencies to adopt and enforce regulations that prohibit recipients from engaging in discrimination and that establish a process for investigating possible violations by recipients.38 Since 1964, all federal

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36 See Arnold, supra note 28, at 80-89 (finding in study of 31 census tracts in seven cities nationwide that industrial and commercial zoning is more common in low-income, high-minority neighborhoods than in high-income, low-minority neighborhoods); Sheila Foster, Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement, 86 CAL. L. REV. 775, 833-37 (1998); Mank, Reforming State Brownfield Programs, supra note 29, at 118, 175.

37 Section 601 of the statute provides 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.” Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994); Mank, Title VI, supra note 4, at 23-25.

38 42 U.S.C. § 2000d-1; Mank, Title VI, supra note 4, at 25; Mank, Private Cause of Action, supra note 4, at 12.
agencies have adopted implementing regulations that prohibit recipients from taking actions that cause either intentional discrimination or unjustified disparate impacts against protected minority groups. In 1983, in Guardians Association v. Civil Service Commission, the Supreme Court held that section 601 of Title VI prohibits recipients of federal funding from engaging in intentional discrimination, and a majority of five members also indicated that federal agencies may issue implementing regulations pursuant to section 602 that prohibit recipients from taking actions that cause unintentional, unjustified disparate impact discrimination. While some commentators have questioned whether Guardians clearly authorized disparate impact regulations under Title VI, in 1985, in Alexander v. Choate, the Supreme Court stated in dicta: "The [Guardians] Court held that actions having an unjustifiable, disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." The Civil Rights Restoration Act of 1987 clarified that Title VI and its regulations apply to "all of the operations" of a state or local government agency that receives any federal assistance.

Because virtually all state environmental permitting agencies receive federal financial assistance, Title VI and its regulations apply to state permitting decisions. The EPA’s Revised Investi-

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39 Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination," quoting 45 C.F.R. § 80.3(b)(2) (1964)); Guardians Ass'n, 463 U.S. at 592 n.13 (observing "every Cabinet department and about forty agencies adopted Title VI regulations prohibiting disparate-impact discrimination.").

40 See id. at 584 n.2.

41 See id. at 293.

42 See Mank, Title VI, supra note 4, at 25; Paul K. Sonn, Note, Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Gratzon: A Title VI Litigation Strategy, 101 YALE L.J. 1577, 1581 n.25 (1992) (listing Title VI regulations for several federal agencies).


First promulgated in 1973 and then revised in 1984, the EPA’s Title VI regulations prohibit recipients of agency funding, which include almost all state environmental agencies, from engaging in actions that either intentionally discriminate or cause disparate impacts. Additionally, the EPA’s Title VI regulations require state recipients to create a compliance scheme to prevent discrimination by both the state and any beneficiaries of state-administered funds. Furthermore, the agency’s Title VI regulations define procedures for investigating possible violations by recipients. EPA’s section 602 regulations forbid recipients from creating disparate impacts: “A recipient [of federal funds] shall not use criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin.” In addition, the agency’s regulations proscribe recipients from choosing or approving a facility in an area where the plant will create discriminatory impacts that harm minority or ethnic groups covered by the statute. The Administrator of EPA has authority under the regulations to refuse, delay, or discontinue agency funding to any specific program or subprogram in which the agency has found unjustified discrimination, but the agency generally prefers to use settlement agreements with recipients to change practices that are arguably discriminatory. The Revised Investi-
In 2001, the Agency first issued Title VI regulations prohibiting recipients from engaging in actions that cause disparate impacts,\textsuperscript{54} and then in 1984 promulgated slightly revised regulations that took the same approach.\textsuperscript{55} The EPA, however, did not actively enforce its Title VI regulations until 1993 because the agency was reluctant to rescind funding that state and local environmental agencies could use to reduce pollution.\textsuperscript{56} In 1993, President Clinton appointed Carol Browner as Administrator of the EPA, and she directed the agency to begin actively enforcing its Title VI regulations.\textsuperscript{57}

On February 11, 1994, President Clinton issued Executive Order 12898, which requires all federal agencies to promote environmental justice "[t]o the greatest extent practicable and permitted by law."\textsuperscript{58} While the Executive Order does not directly address Title VI, President Clinton simultaneously issued a Presidential Memorandum in conjunction with the Order that requires federal agencies "providing funding to programs affecting human health or the environment [to] ensure that their grant recipients comply with


\textsuperscript{53} See Guidance, supra note 5, at 39,669, 39,683; infra notes 294-99 and accompanying text.

\textsuperscript{54} 38 Fed. Reg. 17,968, 17,969 (July 5, 1973) (providing a recipient may not "directly or indirectly, utilize criteria or methods of administration which have or may have the effect of subjecting a person to discrimination because of race, color, or national origin.").

\textsuperscript{55} See 49 Fed. Reg. 1661 (Apr. 26, 1984) (codified at 40 C.F.R. § 7.35(b)) ("A recipient [of federal funds] shall not use criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin.").


\textsuperscript{57} See Fisher, supra note 35, at 314-15; Mank, \textit{Private Cause of Action, supra} note 4, at 18; Worsham, supra note 56, at 647.

Title VI of the Civil Rights Act of 1964." Accordingly, the memorandum encourages federal agencies to enforce their Title VI regulations. It was no coincidence that in 1994, after President Clinton issued Executive Order 12,898 and the accompanying memorandum, the EPA created an Office of Civil Rights (the "OCR") to handle Title VI investigations.

Any person who is allegedly adversely affected by the actions of a funding recipient may file a Title VI complaint with the OCR, which will determine if the complaint is within the Agency's jurisdiction and begin an investigation if appropriate. Unfortunately, because of both staff shortages and substantial uncertainties about how to apply its Title VI regulations, the OCR has had serious problems resolving complaints in a timely fashion. As of November 30, 2000, the EPA had received 108 Title VI complaints. The Agency had rejected forty-seven complaints. Forty-three were rejected because the Agency lacked jurisdiction for various reasons while four were dismissed after an agency investigation had begun. Only one case was dismissed on the merits after an agency investigation found no evidence of adverse disparate impacts. By November 30, 2000, the EPA had a backlog of sixty-one pending complaints. Of these, forty were under review for possible investigation and twenty-one had been accepted for investigation. Several pending accepted cases were filed in 1993 or 1994 even

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60 See generally Mank, Executive Order 12898, supra note 58, at 107-09 (discussing efforts by President Clinton and EPA Administrator Carol Browner to expand EPA's environmental justice programs).

61 See Mank, Draft Guidance, supra note 5, at 11,147-48, 11,157-61 (discussing EPA's criteria for accepting a complaint); Mank, Private Cause of Action, supra note 4, at 20-23.


65 See Status Summary Table of EPA Administrative Complaints, supra note 63. See generally 40 C.F.R. § 7.115(c)(1) (1999) (stating EPA will issue preliminary findings within 180 days from start of complaint).

66 See Status Summary Table of EPA Administrative Complaints, supra note 63.
though the Agency's regulations normally require the Agency to issue preliminary findings within 180 days from the start of an investigation.\textsuperscript{67} Since 1998, the Agency has doubled its staff resources and contract dollars to reduce this backlog.\textsuperscript{68}

Complainants have very limited rights to either internal agency or judicial review under either Title VI or the Administrative Procedure Act if the EPA decides to dismiss an administrative complaint for lack of evidence.\textsuperscript{69} However, some courts have recognized that citizens have a private right of action under Section 602 of Title VI to enforce the EPA's regulations even if they do not exhaust their administrative remedies with the Agency.\textsuperscript{70} The Supreme Court has granted certiorari to decide whether there is a private right of action under Section 602.\textsuperscript{71} Whatever the decision of the Supreme Court as far as private rights of action, an affected individual could file a complaint with the EPA.

B. The EPA's Title VI Guidance

In February 1998, the EPA issued an “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits” to help the Agency's Office of Civil Rights evaluate Title VI complaints.\textsuperscript{72} The Interim Guidance addressed the procedural process for filing complaints and set forth a five-step process for

\textsuperscript{67} See Title VI Complaints Filed with United States Environmental Protection Agency, http://www.epa.gov/civilrights/t6complint.htm.


\textsuperscript{69} See Cannon v. University of Chicago, 441 U.S. 677, 715 (1979) (suggesting that Title VI generally does not allow private suits against the federal government); Mank, Private Cause of Action, supra note 4, at 22 (stating that complainants have very limited appeals rights under either Title VI or the Administrative Procedure Act); Mank, Title VI, supra note 4, at 29; Colopy, supra note 49, at 168-71.

\textsuperscript{70} See generally Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999) (holding private right of action under disparate impact regulations issued pursuant to Section 602 of Title VI), cert. granted, Alexander v. Sandoval, 121 S. Ct. 28 (U.S. Sept. 26, 2000); Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (same), cert. denied, No. 99-574, 1999 USLW 3252, 1999 WL 812341 (U.S. Dec. 6, 1999); Mank, Private Cause of Action, supra note 4; Guidance, supra note 5, at 39,671 n.77 (raising issue of private right of action).

\textsuperscript{71} See Sandoval, 197 F.3d 484.

assessing whether a decision causes disparate impacts.  

However, a wide range of groups criticized the Interim Guidance for using vague definitions, failing to elucidate the crucial term "adverse disparate impact," and not suggesting how recipients might avoid Title VI complaints. Additionally, the Interim Guidance provided that a recipient might be able to justify disparate impacts by either mitigating them or showing that the benefits of the project outweighed any harms to protected groups, but failed to adequately explain when mitigative measures or economic benefits would be sufficient, or when a recipient is required to consider a less discriminatory alternative proposal. Because of the hostile reaction of industry representatives, state officials, and mayors, Republicans in Congress have attached riders to the last three EPA-appropriation bills that prohibit the Agency from conducting investigations using the Interim Guidance for complaints received since the date of the initial bill, October 21, 1998, until the Agency issues a final Title VI policy. The legislation does not affect com-

73 The Agency set forth a five-step process for evaluating whether a recipient’s approval or renewal of a permit will create disparate impacts: (1) identifying the affected population, especially those in close proximity to the facility; (2) determining the demographics of the affected population through mapping technology such as geographic information systems; (3) determining the universe(s) of facilities and total affected population(s), especially the cumulative pollution burden of neighboring facilities; (4) conducting a disparate impact analysis by both examining the racial or ethnic composition within the affected population and by comparing that composition to non-affected populations in other relevant areas; and (5) determining the significance of the disparity through the use of standard statistical methods. See Interim Guidance, supra note 72, at 9-12; Mank, Title VI, supra note 4, at 40-45; Bradford C. Mank, Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions, 73 Tul. L. Rev. 787, 795-98 (1999) [hereinafter Mank, Recipient Agencies].

74 On June 27, 2000, the Agency published in the Federal Register, along with the draft guidance, a Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance that summarizes and responds to over 120 written comments the Agency received about the Interim Guidance. See generally Guidance, supra note 5, at 39,688-758.

75 See Interim Guidance, supra note 72, at 11-12 (discussing mitigation and justification of disparate impacts). See generally Mank, Recipient Agencies, supra note 73, at 814-34 (criticizing Interim Guidance’s discussion of mitigation, justification, or less discriminatory alternatives).

plaints that had already been accepted for investigation prior to that date.\textsuperscript{77} On June 27, 2000, the EPA published two draft guidances on Title VI in the Federal Register.\textsuperscript{78} The Recipient Guidance, prepared at the request of state and local officials seeking to avoid complaints and violations, discusses a range of possible approaches to minimize the likelihood that a complaint will be filed against a recipient.\textsuperscript{79} In particular, the Recipient Guidance encourages recipients to collect data about minority populations and pollution levels to identify areas where there may be significant disparate impacts and to eliminate such impacts so that there is no need for minority communities or individuals to file a Title VI complaint.

The Revised Investigation Guidance clarifies how the Agency will process complaints, conduct its investigations, determine whether a permit decision creates unacceptable adverse impacts, and weigh efforts by the recipient to reduce or eliminate adverse disparate impacts.\textsuperscript{80} By providing more detailed standards and procedures than the Interim Guidance, the Revised Investigation Guidance attempts to give recipients a better idea of both what they should not do and what they should do.\textsuperscript{81} However, while the Revised Investigation Guidance provides more clarity than the Interim Guidance, a wide range of critics argue that the EPA must provide more precise definitions and firm standards applicable in every case.\textsuperscript{82}

\textbf{C. Defining an Appropriate Comparison Population}

In Step Four of the Interim Guidance, the EPA stated that it would conduct a disparate impact analysis by both examining the racial or ethnic composition within the affected population and by comparing that composition to non-affected populations in other relevant areas.\textsuperscript{83} No further explanation was provided. By contrast, the Revised Investigation Guidance provides a more detailed explanation of how the EPA will conduct a disparity analysis and select a comparison population than the Interim Guidance, but,

\begin{itemize}
\item \textsuperscript{77} See Mank, Recipient Agencies, \textit{supra} note 73, at 810.
\item \textsuperscript{78} See Guidance, \textit{supra} note 5; Mank, \textit{Draft Guidance}, \textit{supra} note 5, at 11,147.
\item \textsuperscript{79} See Guidance, \textit{supra} note 5, at 39,651-52, 39,655; Mank, \textit{Draft Guidance}, \textit{supra} note 5.
\item \textsuperscript{80} See Guidance, \textit{supra} note 5, at 39,651-54. The Guidance addresses only permitting decisions. Later guidance will address other issues, including allegedly disproportionate enforcement. \textit{Id.} at 39,650-51.
\item \textsuperscript{81} See Guidance, \textit{supra} note 5, at 39,669; Mank, \textit{Draft Guidance}, \textit{supra} note 5, at 11,150.
\item \textsuperscript{82} See Mank, \textit{Draft Guidance}, \textit{supra} note 5, at 11,145-46, 11,173.
\item \textsuperscript{83} Interim Guidance, \textit{supra} note 72, at 9-12.
\end{itemize}
despite its greater length, does not fully address many important issues.

1. The Affected Population

While a complaint may roughly identify the population group that is allegedly adversely harmed by the recipient's actions, the Revised Investigation Guidance states that the EPA will have the final say in defining the "affected population." First, the EPA will identify the affected population by determining which population(s) are likely to be disproportionately affected by significant adverse impacts above established statutory or regulatory thresholds, particularly those nearest to facilities or exposure pathways creating such impacts. Assessing the degree of such impacts is difficult because each group may experience separate and unique harms from different pollutants or exposure pathways. Additionally, estimating the dimensions of the affected populations is often difficult because exposure pathways may be irregularly shaped in light of prevailing wind direction, stream direction, or topography. Consequently, depending upon the location of a plume or pathway of impact, the affected population does not necessarily include those people who live closest to a source.

The OCR will use mathematical models based on monitoring data, when possible, to estimate the location and size of the affected populations because an area of adverse impacts may be irregularly shaped as a result of environmental factors or other conditions such as wind direction, stream direction, or topography. Even though the Agency will use quantitative models where possible to identify the most affected population, the Revised Investigation Guidance acknowledges that limitations in available information will often force the OCR to use simpler radial models based primarily on proximity to the environmental medium and impacts of concern in that case. As discussed below in Section

84 See Guidance, supra note 5, at 39,681-82; Mank, Draft Guidance, supra note 5, at 11,168.
85 See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,168.
86 See Guidance, supra note 5, at 39,681 n.132; Mank, Draft Guidance, supra note 5, at 11,168.
87 See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,168.
88 See Mank, Draft Guidance, supra note 5, at 11,168.
89 Id.
90 Id.
VI, there is controversy about the comparative advantages and disadvantages of quantitative, radial, and proximity models.\textsuperscript{91}

In addition, after defining the physical location of the most affected geographic areas, the Agency will use standard demographic analysis methods, such as geographic information systems, to estimate the racial demographics of populations within a certain proximity from a facility.\textsuperscript{92} If it uses pre-ordained units of measurement, the EPA will use the smallest geographic area possible for the demographic data, such as census blocks, when conducting disparity assessments.\textsuperscript{93}

A number of environmental justice advocates have criticized the Revised Investigation Guidance for adopting a restrictive approach in defining the "affected community" by preferring scientific monitoring data and computer modeling to determine the "affected communities" within a facility's exposure pathway; although the EPA in some circumstances uses a less restrictive proximity analysis if more thorough statistical evidence is unavailable.\textsuperscript{94} These advocates argue that such data is often unavailable, especially in poor and minority areas. They do not want the EPA to dismiss a complaint simply because quantitative data is unavailable.\textsuperscript{95} Conversely, industry and state officials generally prefer scientifically reliable evidence and caution that the EPA should be careful about finding discrimination based on simplistic models, such as mere proximity to a proposed site, because distance does not establish whether significant harm exists.\textsuperscript{96}

2. Comparison Populations

After identifying the affected population, the OCR will analyze whether a disparity exists between the affected population and an appropriate comparison population in terms of race, color, or national origin and adverse impact.\textsuperscript{97} The Revised Investigation Guidance states that the EPA would probably find a significant

\textsuperscript{91} See Fisher, supra note 35, at 322; Worsham, supra note 56, at 690.
\textsuperscript{92} See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,168.
\textsuperscript{93} See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5 at 11, 168.
\textsuperscript{94} See Guidance, supra note 5, at 39,679-81; Mank, Draft Guidance, supra note 5, at 11,166.
\textsuperscript{95} See Guidance, supra note 5, at 39,679-81; Mank, Draft Guidance, supra note 5, at 11,166.
\textsuperscript{96} See Guidance, supra note 5, at 39,679-81; Mank, Draft Guidance, supra note 5, at 11,166.
\textsuperscript{97} See Guidance, supra note 5, at 39,654, 39,681-82; Mank, Draft Guidance, supra note 5, at 11,168-69.
adverse disparate impact under Title VI if reliable tests of both demographic disparity and disparities in the amount of impact are statistically significant to a factor of at least two to three standard deviations higher in the affected population than an appropriate comparison population.98 However, the Agency has broad discretion to weigh other factors, such as the severity of the impact or the extent of the demographic disparity.99

In determining the comparison population, the EPA will evaluate the allegations and facts in each case.100 Accordingly, the Agency has considerable discretion in each case to decide what the comparison population should be. The Revised Investigation Guidance does provide some direction by stating that the EPA will usually define a relevant comparison populations from those who live within a "reference area" defined by the recipient's jurisdiction.101 The reference area will normally fall into one of the following three categories: (1) a "reference area" such as the recipient's jurisdiction, which may range from an air district to an entire state; (2) a political jurisdiction such as a town, county, or state; or (3) an area defined by environmental criteria, such as an airshed or watershed.102 Furthermore, the OCR will usually select comparison populations that are larger than the affected population. For instance, if a complaint alleges that Asian Americans throughout a state bear adverse disparate impacts from permitted sources of water pollution, then the Agency would probably select the entire state as the appropriate reference area.103

Moreover, the EPA has broad discretion to include either the general population of the reference area or only the non-affected portion of the reference area as the comparison population, including the general population of a state.104 Hence, the EPA in its discretion could compare the affected population with either the total general population in the Agency's jurisdiction, including the

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98 See Guidance, supra note 5, at 39,661, 39,681-82; Mank, Draft Guidance, supra note 5, at 11,169-70.
99 "For instance where a large disparity (e.g., a factor of 10 times higher) exists with regard to a significant adverse impact, OCR might find disparate impact even though the demographic disparity is relatively slight (e.g., under 20%)." Guidance, supra note 5, at 39,682; Mank, Draft Guidance, supra note 5, at 11,169-70.
100 See Guidance, supra note 5, at 39,661, 39,681-82; Mank, Draft Guidance, supra note 5, at 11,168-69.
102 See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,169.
103 See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,169.
104 See Guidance, supra note 5 at 39,681; Mank, Draft Guidance, supra note 5, at 11,169.
affected group, or with only the non-affected population within the general population of the Agency's jurisdiction, excluding the affected group from the comparison population. These choices are important because the Agency is more likely to find a disparity if the comparison population has a relatively low number of minorities than if their proportion is relatively high. The EPA in the Revised Investigation Guidance recognized that there is great variability in the proportion of racial subgroups in each state, from 4% to 50% of different states' populations, and that these differences would affect the outcome of its adverse disparity analyses unless the Agency compensated for them.

Moreover, the Agency may evaluate whether there is a disparity by using comparisons both of the different prevalence of race, color, or national origin in the two populations, and of the level of risk of adverse impacts experienced by each population. The Agency will generally apply at least one and usually more of the following comparisons of demographic characteristics: (1) the demographic characteristics of an affected population in relationship to the demographic characteristics of a non-affected population or the general population; (2) the demographic characteristics of those most likely affected, for example, the highest 5% of risk, to those least likely affected, such as the lowest 5%; or (3) the probability of different demographic groups such as African Americans, Hispanics, or Whites in a surrounding juris-

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105 Mank, Draft Guidance, supra note 5, at 11,169.

106 See Michael W. Steinberg, Making Sense of Environmental Justice, 15 F. FOR APPLIED RES. & PUB. POL'y 82, 84-85 (2000).

107 For example, in a state with a minority population of four percent, using a factor of two test would result in the EPA finding a disparity if the minority population in an affected area was at least eight percent. By contrast, in a state with a minority population of fifty percent, using a factor of two test would result in the EPA finding a disparity only if the minority population in an affected area was one hundred percent—the entire population! See Guidance, supra note 5, at 39,682 n.138; Mank, Draft Guidance, supra note 5, at 11,170.

108 See Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,169.


110 These values approximate the outlying portions (sometimes called the "tails") of a distribution of risk that are beyond two standard deviations of the mean value. See Guidance, supra note 5, at 39,681-82 n.135; Mank, Draft Guidance, supra note 5, at 11,169.
diction being in an affected population or a highly affected subpopulation.¹¹¹

The OCR also expects to compare the level of risk of potential adverse impacts between the affected population and comparison population by evaluating either: (1) the average risk of adverse impacts by demographic groups within the general population or within an affected population;¹¹² or (2) the range of risk of adverse impacts by demographic groups within the general population or within an affected population.¹¹³

A wide range of critics has argued the Guidance does not adequately define such terms as “affected population” and “an appropriate comparison population.”¹¹⁴ This article will focus on the problem that the EPA’s broad discretion to include either the general population of the reference area or only the non-affected portion of the reference area as the comparison population, including the general population of a state, may in some circumstances fail to address the principle in many Title VII cases that a comparison population must be “similarly situated” to the affected population.¹¹⁵

III. PROVING DISPARATE IMPACT DISCRIMINATION UNDER TITLES VI AND VII

A. The Basics of Proving Disparate Impact Discrimination

There is a fundamental distinction between discrimination cases alleging disparate treatment in which a plaintiff must prove intentional discrimination, and those alleging that facially neutral policies cause significant and unjustified disparate impacts. An intent claim alleges that similarly situated persons are treated differently because of their race, color, or national origin, and that “a chal-


¹¹³ See Guidance, supra note 5, at 39,682; Mank, Draft Guidance, supra note 5, at 11,169.


¹¹⁵ See infra notes 197-200, 206-07.
lenged action was motivated by an intent to discriminate.\textsuperscript{116} In disparate treatment cases, plaintiffs are often unable to present direct proof of discriminatory motive. Instead, plaintiffs usually present either direct or circumstantial evidence suggesting that the defendant intended to discriminate and from such evidence a trier of fact may infer intentional discrimination.\textsuperscript{117} Statistical evidence by itself usually cannot conclusively prove whether a defendant engaged in intentional discrimination, but statistical evidence is sometimes strong enough for a trier of fact to draw an inference of intentional discrimination.\textsuperscript{118} Under the shifting burden framework established by the Supreme Court in \textit{McDonnell Douglas Corp. v. Green},\textsuperscript{119} a plaintiff alleging disparate treatment in either a Title VI or VII case may establish a prima facie case of discrimination by alleging that she was denied a job or benefit for which she was qualified, and then shift the burden to the recipient or employer to articulate a legitimate, nondiscriminatory reason for its action.\textsuperscript{120}

In a Title VI disparate impacts case, a plaintiff alleges that a neutral procedure or practice used by a recipient causes significant and unjustified disparate effects on individuals of a particular race, color, or national origin.\textsuperscript{121} If a plaintiff establishes a prima facie case of discrimination, the investigating agency must determine whether the recipient can articulate a “substantial legitimate justifi-

\textsuperscript{116} Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993); \textit{Title VI Legal Manual}, \textit{supra} note 3, at 27.


\textsuperscript{118} See Adams, \textit{supra} note 117, at 421 n.37, 426.

\textsuperscript{119} \textit{McDonnell Douglas}, 411 U.S. at 792.


\textsuperscript{121} See Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996); N.Y. Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); City of Chicago v. Lindley, 66 F.3d 819, 828-29 (7th Cir. 1995); Elston v. Talladega County Bd. of Educ., 997 F.2d at 1406-07; Larry P. v. Riles, 793 F.2d 969, 982 n.9 (9th Cir. 1984).
cation” for the practice.122 This article will focus on disparate impact discrimination.

In Title VI cases, judges have often looked to Title VII employment discrimination decisions for assistance in addressing various substantive and procedural questions, although some care must be taken in comparing these two civil rights statutes.123 Both Title VI and Title VII cases have applied a tripartite structure in which: (1) the plaintiff must prove a prima facie case of disparate impacts; (2) if the plaintiff makes out a prima facie case of adverse disparate impacts, the defendant may offer a legitimate justification for its actions such as cost, safety or the use of appropriate technical criteria; and (3) if the defendant offers an apparently legitimate justification, a plaintiff then has the ultimate burden of proof in establishing that the defendant’s justification is actually a pretext or that the defendant has refused to use an alternative practice or location with less discriminatory harm.124 This article will focus on the plaintiff’s initial burden of establishing a prima facie case of discrimination by showing that a facially neutral practice causes disproportionate effects to an affected population when compared to an appropriate comparison population.

B. A Prima Facie Case of Discrimination

To establish a prima facie case of disparate impact discrimination, a Title VI plaintiff must demonstrate by a preponderance of the evidence that a recipient agency has engaged in a specific practice that causes an unjustified disproportionate impact on persons protected by the statute.125 To establish a prima facie case, a plaintiff must first present evidence that a specific group of minorities are disproportionately included or excluded compared to a rele-

123 See N.Y. Urban League, 71 F.3d at 1036; Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d at 1417; Larry P. v. Riles, 793 F.2d at 982 n.9; Mank, Recipient Agencies, supra note 73, at 798-99; Mank, Title VI, supra note 4, at 37-38; Sidney D. Watson, Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn’t Be So Easy, 58 FORDHAM L. REV. 939, 971-73 (1990).
124 See N.Y. Urban League, 71 F.3d at 1036-39; Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406-07 (11th Cir. 1993); Young v. Montgomery County Bd. of Educ., 922 F. Supp. at 544-51; Mank, Recipient Agencies, supra note 73, at 799-809; Mank, Title VI, supra note 4, at 38-40.
125 See Mank, Recipient Agencies, supra note 73, at 799-800. See also EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995) (discussing standard for prima facie case under Title VII).
 vant comparison group and then persuade a court to infer that the recipient's practices caused those disproportionate impacts.\textsuperscript{126}

During the 1970s, courts in Title VII cases often allowed a plaintiff to establish a prima facie case of discrimination by comparing an affected population to the general population in deciding whether disproportionate impacts were present. More recently, courts have required a plaintiff seeking to establish a prima facie case to show it has chosen an appropriate comparison group that is "similarly situated" to the allegedly affected population.\textsuperscript{127} For instance, a Title VII plaintiff in an employment case normally compares the racial characteristics of successful job applicants with the pool of qualified job applicants.\textsuperscript{128} In Title VII employment discrimination cases, courts have frequently rejected a plaintiff's statistical evidence if either the "affected" minority population or the comparison groups selected are under- or over-inclusive.\textsuperscript{129} As discussed below in Section V, a Title VI plaintiff must also establish that a comparison group is similarly situated with the allegedly affected population.

\textsuperscript{126} See, e.g., New York City Envtl. Justice Alliance v. Giuliani, 214 F.3d 65, 69-72 (2d Cir. 2000) (stating "[t]he plaintiffs did not, in our view, submit adequate proof of causation to show a likelihood of success on the merits of their disparate impact claim."); Elston, 997 F.2d at 1406-07 (discussing standard under Title VI for proving causation); Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction. Fair Housing and Lending Law, and the Antidiscrimination Principle, 47 Emory L.J. 409, 423, 460-61 (1998); Mank, Recipient Agencies, supra note 73, at 799-801. In Title VII employment discrimination cases, a plaintiff proving a prima facie case must also identify a specific employment practice alleged to cause the disparity and prove that the practice actually caused the disparity. \textit{Id.} at 799-800. It is not clear to what extent the specific practice requirement applies to Title VI. \textit{Id.} at 800. Furthermore, to establish a prima facie case, a plaintiff must prove the identified practice actually caused the disparate impact. \textit{See id.} at 800-01. Both the specific practice and causation issues are beyond the scope of this article.


Initially, during the 1970s, the Supreme Court in Title VII cases frequently approved a plaintiff's use of general population statistics as the appropriate comparison group in establishing a prima facie case of disparate impact discrimination. During 1971, in *Griggs v. Duke Power Co.*, the Supreme Court unanimously held in a case of first impression that facially neutral employment practices could violate Title VII if they have a disparate impact on minority groups. In *Griggs*, African-American employees challenged a policy that required employees to have a high school degree and to pass two general intelligence tests to be eligible for certain jobs. Duke Power had imposed those requirements the same day it ended its overtly discriminatory policies against African-Americans. Because African-Americans as a group possessed fewer high school diplomas and passed the various standardized tests at a significantly lower rate than did whites, these employment policies disproportionately limited their employment opportunities at Duke Power. The lower courts held that these facially neutral requirements did not violate Title VII because "there was no showing of a racial purpose or invidious intent."

In *Griggs*, the Court first held that facially neutral policies that have disparate impacts may violate Title VII. An employer has "the burden of showing that any given requirement [having a disparate impact] must have a manifest relationship to the employment in question." Duke Power failed to show that either high school diplomas or the standardized tests utilized were relevant to job performance because white employees who were hired before these requirements had performed satisfactorily and were promoted despite the absence of these credentials. Accordingly, the "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as

133 See Adams, supra note 117, at 430-32 & n.6.
135 Adams, supra note 117, at 431-32.
136 Id.
137 Id.
'built-in headwinds' for minority groups and are unrelated to measuring job capability.  

For the purposes of this Article, it is significant that the Griggs Court relied upon general population statistics introduced by the plaintiff about the percentage of white males and African-American males who had graduated from high school in North Carolina, and also approved the use by the plaintiff of general statistics about what percentage of whites and African-Americans passed a battery of tests that included the two intelligence tests used by the defendant. Accordingly, Griggs implied that, at least in some cases, a plaintiff might be able to use general population statistics to establish a prima facie case.

For the first few years after deciding Griggs, the Supreme Court used a relaxed standard for assessing whether a plaintiff had proved a prima facie case of disparate impact discrimination and frequently approved the use of general population statistics. For example, in Dothard v. Rawlinson the Supreme Court approved the plaintiff's use of national statistics on the general population to show that the defendant's height and weight requirements for prison guards disproportionately excluded women compared to men. Citing Griggs, the Court specifically rejected the defendant's argument that a plaintiff should have to show disproportionate impact based on women who actually applied for the correctional positions, through applicant flow statistics. The Court observed that actual applications might not reflect the "actual potential applicant pool" because otherwise qualified persons might have been discouraged by the "very standards challenged as being discriminatory." Similarly, in United Steelworkers v. Weber the Supreme Court approved the use of general population statistics to justify a voluntary affirmative action plan reserving half of all job openings for African-Americans until

138 Adams, supra note 117, at 432.
139 Adams, supra note 117, at 430 n.6.
141 Dothard, 433 U.S. at 329-30 (using national general population statistics to demonstrate disparate impact on women of height and weight requirements for prison guards); Adams, supra note 117, at 428-29; Lye, supra note 128, at 326.
142 See Dothard, 433 U.S. at 330; Lye, supra note 128, at 326.
143 Dothard, 433 U.S. at 330.
their percentage at a plant was commensurate with their percentage in the local labor market.\textsuperscript{144}

In \textit{International Brotherhood of Teamsters v. United States},\textsuperscript{145} the Supreme Court approved the plaintiff’s comparison between the employer’s work force and the general population because no special qualifications were required for the line-driver job.\textsuperscript{146} The \textit{Teamsters} Court stated:

[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longstanding and gross disparity between the composition of a work force and that of the general population . . . may in a proper case constitute prima facie proof of a pattern or practice of discrimination.\textsuperscript{147}

Nevertheless, the \textit{Teamsters} Court recognized that “evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.”\textsuperscript{148}

Likewise, in \textit{Hazelwood School District v. United States},\textsuperscript{149} the Supreme Court quoted with approval the \textit{Teamsters} Court’s view that general population statistics may be probative in some cases, especially where there are gross statistical disparities.\textsuperscript{150} Yet the \textit{Hazelwood} Court also stated: “When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”\textsuperscript{151} Accordingly, \textit{Hazelwood} rejected the government’s use of a comparison between the percentage of African-American teachers with the percentage of African-American students and concluded that a “proper comparison was between the racial composition of Hazel-

\textsuperscript{144} See United Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (explaining that a voluntary affirmative action plan reserving “50% of the openings in an in-plant craft-training program until the percentage of black craft-workers in the plant is commensurate with the percentage of blacks in the local labor force” is valid under Title VII); Adams, supra note 117, at 429.
\textsuperscript{145} 431 U.S. 324 (1977).
\textsuperscript{146} Id. at 337-40 & nn.17, 20.
\textsuperscript{147} Id. at 340 n.20.
\textsuperscript{148} Id.
\textsuperscript{149} 433 U.S. 299 (1977).
\textsuperscript{150} Id. at 307-08 (citing Teamsters, 431 U.S. at 339, 340 n.20).
\textsuperscript{151} Id. at 308 & n.13.
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wood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.”

By the late 1970s, the Supreme Court began to demand that plaintiffs use more narrowly tailored statistics to prove that a minority population was disproportionately affected by a facially neutral policy in relation to a narrow pool of qualified, likely job applicants or actual applicant flow data. In New York City Transit Authority v. Beazer, the plaintiffs challenged the New York Transit Authority's prohibition against hiring narcotics users, including those using methadone as treatment for curing heroin addiction. The District Court found a prima facie case of discrimination based on its factual findings involving two statistics suggesting the rule had a disproportionate impact on minorities as compared to whites. First, about 81% of the employees referred to the Authority's medical staff for suspected violation of its narcotics ban were either Hispanic or African-American. Second, approximately 63-65% of all persons participating in publicly-administered methadone maintenance programs in New York City were either Hispanic or African-American.

Beazer was the first Title VII case in which the Supreme Court rejected the use of general population statistics to prove a prima facie case. Instead, the Court demanded that the plaintiff produce statistical evidence regarding the pool of "qualified" applicants. The Beazer Court held that the statistical evidence relied upon by the District Court was insufficient because "it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs over a year—the only class improperly excluded by [the Transit Authority's] policy under the District Court's analysis." The Court concluded that the plaintiffs' statistics were both over- and under-inclusive. The statistics were over-inclusive because they included many "unqualified" persons who used illicit drugs or alcohol, or persons who had successfully obtained other jobs. On the other hand, they were also under-inclusive because they failed to take into account the racial demographics of methadone users in private

152 Id.
153 Lye, supra note 128, at 327.
155 Id. at 571-77.
156 Id. at 584-85.
157 Id. at 585.
158 Id. at 586.
159 Id.
programs. Beazer favorably referenced the Court's 1977 decision in Teamsters for the proposition that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants." In Wards Cove Packing Co. v. Antonio, the Court established a firm rule that plaintiffs presenting a statistical case of disparate impacts must compare the racial composition of persons holding at-issue jobs with the demographics of "the qualified population in the relevant labor market." Wards Cove Packing Company and another company operated a seasonal salmon canning business. A group of minority employees filed a class action alleging that the companies' employment practices had created a racially stratified workforce in which minorities were relegated almost completely to lower-paying, unskilled "cannery" jobs, while whites held the overwhelming majority of higher-paying, skilled "non-cannery" positions. In holding that the plaintiffs had presented an acceptable prima facie case of disparate impacts, "the Court of Appeals relied solely on respondents' statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the non-cannery positions." The Supreme Court reversed and held that statistical evidence showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the non-cannery positions did not establish a prima facie case of disparate impacts in violation of Title VII. The central flaw was the plaintiffs' comparison between skilled non-cannery workers and unskilled cannery workers and the failure to address the crucial issue of whether qualified nonwhite applicants existed for the skilled, non-cannery jobs. Most cannery workers were not qualified for the majority of non-cannery jobs. Additionally, even a comparison based on those

160 Id.
161 Id. at 586 n.29 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977)).
163 Id. at 650 (citations and editorial marks omitted). See also Adams, supra note 117, at 429 n.76; Lye, supra note 128, at 334-35 (discussing Civil Rights Act of 1991). Congress subsequently amended Title VII to reverse part of the Wards Cove decision, but this legislation did not change Ward Cove's requirement that a plaintiff use data from the relevant labor market. 42 U.S.C. § 2000e-2(k)(1)(C) (1994).
165 Id. at 650.
166 Id. at 650-55.
167 Id. at 651.
168 Id.
cannery workers who were qualified for the non-cannery jobs would be under-inclusive because “there are obviously many qualified persons in the labor market for non-cannery jobs who are not cannery workers.”\(^{169}\) Thus, the Court in \textit{Wards Cove} emphasized that a plaintiff’s statistical evidence for prima facie case of disparate impacts must focus on “qualified” workers in the relevant labor market.\(^{170}\)

The \textit{Wards Cove} Court did recognize that if such labor market statistics are difficult to obtain, it may be appropriate for a court to accept other statistical evidence presented by a plaintiff that indicates the number of “otherwise-qualified applicants” for at-issue jobs.\(^{171}\) Furthermore, the \textit{Wards Cove} Court acknowledged that general population statistics in some cases could accurately reflect the pool of qualified job applicants, and even serve to establish a prima facie case.\(^{172}\)

Critics of the \textit{Ward Cove} approach to statistical comparisons argue that a focus on “qualified workers” and the “relevant labor market” places plaintiffs at a disadvantage because defendants can use their greater familiarity with labor markets to criticize any evidence proffered by plaintiffs as either over-inclusive or under-inclusive.\(^{173}\) Plaintiffs frequently lack either the expertise or the requisite data to establish what is the relevant labor market.\(^{174}\) The pool of persons who actually apply for a position may not reflect all potentially qualified applicants if a defendant engages in practices that consciously or unconsciously discourage qualified minorities from applying.\(^{175}\) Additionally, employers often fail to keep adequate records regarding the racial composition of applicants and employees and, as a result, it may be difficult for a plaintiff to prove discrimination based on applicant flow data.\(^{176}\) Moreover, it may be difficult for a plaintiff to identify either the relevant job

\(^{169}\) \textit{Id.} at 654.

\(^{170}\) \textit{Id.} at 650-55.

\(^{171}\) \textit{Id.} at 651.

\(^{172}\) \textit{Id.} at 651 n.6.

\(^{173}\) See \textit{Lye, supra} note 128, at 332 n.87, 343-44.

\(^{174}\) See \textit{generally} \textit{Lye, supra} note 128, at 344 (“The Supreme Court has so refined the demonstration of disparity as to force plaintiffs to mount virtually impossible statistical showings—impossible because, in practice, plaintiffs frequently lack access to the requisite data, expertise, or both, and because a plaintiff’s definition of the relevant labor market can almost always be criticized as under- and/or over-inclusive.”); \textit{Greenberger, supra} note 140, at 312-15 (arguing it is “not easy” for plaintiffs to delineate pool of qualified potential job applicants).

\(^{175}\) See \textit{Lye, supra} note 128, at 344. See \textit{generally} \textit{Greenberger, supra} note 140, at 312-15.

\(^{176}\) See \textit{Greenberger, supra} note 140, at 312-13 & n.252.
market as a whole or in particular otherwise qualified minorities who fail to apply. In *Wards Cove*, the seasonal nature of the work and remote location of the canneries made it very difficult to identify the relevant labor market because most workers in, for example, the Pacific Northwest would *not* wish to work at a seasonal position in the Alaska hinterlands. In light of the difficulties that plaintiffs face in identifying the relevant labor market, a number of commentators have argued that courts should apply a more relaxed standard for establishing a prima facie case if a plaintiff presents a plausible case that any pool of potential applicants is disproportionately affected by the defendant’s employment practices.

Despite the objections of many commentators, most lower court decisions read *Wards Cove* to require that plaintiffs precisely identify the relevant labor market or “appropriate pool” of qualified applicants. Courts have frequently rejected statistical evidence proffered by a plaintiff on the grounds that is either over-inclusive or under-inclusive. A plaintiff’s comparison “must show that the

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177 Id. at 312-15; Lye, supra note 128, at 343.
178 490 U.S. 642, 676 n.23 (1989) (Stevens, J., dissenting); Greenberger, supra note 140, at 288.
179 See generally Greenberger, supra note 140, at 312-15; Lye, supra note 128, at 343-44.
180 See, e.g., Alexander v. Fulton County, Ga., 207 F.3d 1303, 1327-28 (11th Cir. 2000) (observing general population statistics are useful for disparate treatment claims only for jobs with low skill levels where the applicant pool can be considered roughly coextensive with the general population, but that plaintiff must carefully identify relevant labor market for skilled positions); *In re Employment Discrimination Litig. agaisnt the State of Ala.*, 198 F.3d 1305, 1311-13 (11th Cir. 1999) (stating whether employment practice causes disparate impact must be assessed in light of qualified applicant pool); Peightal v. Metro. Dade County, 26 F.3d 1545, 1554 (11th Cir. 1994) (stating that “for positions requiring minimal training or for certain entry level positions, statistical comparison to the racial composition of the relevant population suffices, whereas positions requiring special skills necessitate a determination of the number of minorities qualified to undertake the particular task”); Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 929 F. Supp. 583, 590 (D.R.1. 1996) (“[C]ompare must be taken to be sure that the comparison is one between ‘apples and apples’ rather than one between ‘apples and oranges.’”) (citing *Wards Cove*, 490 U.S. at 650-51), aff’d, 110 F.3d 2 (1st Cir. 1997); Mahoney, supra note 126, at 461.
unfavorable consequences are borne disproportionately by the
members of the class in comparison to non-members who are simi­
larly situated."182 However, even under Wards Cove, courts may
look at additional statistical data, including general population sta­
tistics, if the actual applicant pool might not accurately reflect the
potential applicant pool because of the presence of discriminatory
barriers that may discourage "otherwise-qualified applicants" from
applying. 183 Nevertheless, the use of general population statistics is
limited by the need to identify "otherwise" qualified persons in the
relevant job market.184

In Title VII cases, there are often difficult factual questions in
determining the precise geographical size or occupational scope of
the relevant market. 185 For example, commuting distance may be a
relevant factor in determining the scope of the relevant labor
pool. 186 Thus, even if the pool is limited to qualified workers
rather than the general population, there are often difficult factual
issues about which qualified workers are reasonably likely to apply
for work at a particular company. 187 As discussed below, defining
an appropriate comparison group is often even more difficult in
environmental siting cases.

IV. THE REVISED INVESTIGATION GUIDANCE FAILS TO
REQUIRE THAT COMPARISON POPULATIONS ARE
SIMILARLY SITUATED

The Revised Investigation Guidance’s approach to comparison
populations raises serious questions under Title VI because the
EPA does not require that a comparison population must be simi­
larly situated with the affected population. The Agency cannot

182 Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 929 F. Supp. at 590
(citing EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995)); see
also Mahoney, supra note 126, at 461.
183 See EEOC v. Joint Apprenticeship Comm., 186 F.3d 110, 119 (2d. Cir. 1999)
(allowing use of general population statistics to establish prima facie case where there was
evidence that actual applicant pool did not reflect potential applicant pool of otherwise
qualified workers because of discriminatory barriers that discouraged applications by
Blacks and women).
184 See, e.g., In re Employment Discrimination Litig. against the State of Ala., 198 F.3d
at 1311-13 (stating plaintiff must identify pool of otherwise qualified candidates).
185 See EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872, 877-78 (7th
Cir. 1994).
186 See EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 295, 298, 300, 302-05
(7th Cir. 1991).
187 See EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F.3d at 877-78; EEOC
v. Chicago Miniature Lamp Works, 947 F.2d at 295, 298, 300, 302-05.
automatically assume that either the general population or non-affected population in a reference area defined by the recipient's jurisdiction is an appropriate comparison population. Conversely, while business interests correctly point out that Title VII and Title VI case law require the use of similarly situated comparison populations, these groups overstate the need for similarity between an affected population and an appropriate comparison population. Accordingly, it is appropriate, for instance, to compare an urban area with a heavy minority population with a suburban or rural area as long as these areas would meet all relevant minimum requirements for the proposed facility.

A. It is Often Appropriate to Use General Population Statistics to Identify High-Risk Populations.

One of the major goals of the Recipient Guidance is to help recipients identify areas where disparate impacts may exist and to reduce such impacts. Indeed, both draft guidance encourage recipients to identify geographic areas where disparate impacts may exist and to enter into area-specific agreements with the affected communities and polluters to reduce pollution impacts over a period of time.188 Similarly, the EPA's Title VI Advisory Committee had encouraged states to adopt preventative "Track 1" mapping programs to identify areas at high risk.189

To initially identify areas where there are high levels of pollution or potential disparate impacts, it is often useful to compare pollution levels in an area with statewide levels. For example, the State of New Jersey has adopted a program that compares the amount of pollution exposure experienced by selected subpopulations, the affected groups, with the general state population.190 The EPA is currently studying the New Jersey approach as a possible model for other states.191 Accordingly, as part of a program to avoid potential disparities, it is frequently appropriate for states or the EPA to compare a potentially affected population with general population statistics. However, comparisons between a minority subpopula-

188 See Guidance, supra note 5, at 39,651, 39,653, 39,657, 39,662, 39,674; infra notes 295-99.
191 Id. at 2574.
tion and a state’s general population may sometimes understate the risk to some minority subpopulations that are more vulnerable or sensitive to particular chemical exposures and disease because of dietary, lifestyle or even genetic differences from the average member of the general population.192

Title VII courts have recognized that it may be appropriate to use general population statistics in making an initial determination about a disparate impact claim, “especially in cases . . . in which the actual applicant pool might not reflect the potential applicant pool, due to a self-recognized inability on the part of potential applicants to meet the very standards challenged as discriminatory.”193 For example, if otherwise qualified individuals did not apply for a job because the employer required having a high school diploma, but the court later determined that the diploma requirement was unnecessary then it may be appropriate for a court to examine general population statistics just as the Court did in Griggs.194

Furthermore, if a facility could be sited anywhere in a recipient’s jurisdiction, it may sometimes be apropos to use a general population as the appropriate comparison group in making a final determination about whether an affected population is disproportionately affected by disparate impacts. Even under the logic of Wards Cove, the general population of an area could be an appropriate comparison group for some types of unskilled jobs. Similarly, for instance, if a light industrial facility could be sited virtually anywhere in a state then the state’s general population might be an appropriate comparison group.

192 See Eileen Gauna, The Environmental Justice Misfit: Public Participation and the Paradox, 17 STAN. ENVTL. L.J. 3, 33-34 (1998) (arguing water quality standards based upon amount and type of fish that average person eats do not protect minorities consuming more or different fish, especially bottom-dwelling or fatty fish); Kuehn, Quantitative Risk Assessment, supra note 27, at 117-23, 151-53; Mank, Reforming State Brownfield Programs, supra note 29, at 139-43; Catherine A. O’Neill, Variable Justice: Environmental Standards, Contaminated Fish, and “Acceptable” Risk to Native Peoples, 19 STAN. ENVTL. L.J. 5, 70-85 (2000) (arguing water pollution has more severe impact on indigenous subpopulations); Brian D. Israel, Comment, An Environmental Justice Critique of Risk Assessment, 3 N.Y.U. ENVTL. L.J. 469, 491-509 (1995) (discussing possibility that risk assessments may underestimate risk to certain groups because of multiple exposures and genetic, social, or lifestyle differences from average population).


194 See id.
B. The Revised Investigation Guidance Fails to Require “Similarly Situated” Comparison Populations

The Revised Investigation Guidance’s discussion of comparison populations raises troubling questions in light of Title VII case law that requires a comparison population consist of similarly situated persons in the same relevant labor market. The Revised Investigation Guidance states that the EPA may use a recipient’s jurisdiction as the “reference area” for defining the relevant comparison population.195 Additionally, the Revised Investigation Guidance states that the EPA may use either the general population or the non-affected population of a recipient’s jurisdiction as an appropriate comparison population.196

The Revised Investigation Guidance fails to address Title VII cases that require a plaintiff seeking to establish a prima facie case to demonstrate that a proposed comparison population is similarly situated to the affected population.197 Additionally, while there are few Title VI cases that have explicitly addressed the issue of selecting appropriate comparison population, the best analogy to the requirement in Title VII law that a comparison population consist of qualified workers in the same relevant job market is to require in Title VI cases that a comparison area be suitable for the challenged facility by meeting all relevant minimum requirements.

In light of Beazer, Hazelwood, and Wards Cove, the Revised Investigation Guidance fails to address the need to select similarly situated comparison populations rather than just using the general population of a political or agency jurisdiction. It is inappropriate to automatically find a prima facie case of discrimination whenever an affected area has a level of risk different from the general population in an area. For example, if a facility requires special geological or transportation criteria, then any comparison area must meet the minimum requirements for siting the facility.198 For example, a mass transit project may only be suitable in high density, urban locations. It would be inappropriate to compare a proposed urban site for a light rail transit system to a rural location that is unsuita-

195 Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,169.
196 Id.
197 See supra notes 145-87.
198 See Mank, Recipient Agencies, supra note 73, at 826-28 (arguing Title VI allows recipient to justify siting decision based on legitimate safety, geological, or transportation criteria).
ble for such a project. Instead, it would be appropriate to use only relatively urbanized areas that would also be suitable for the proposed project as comparison areas. However, a suburban area might be a similarly situated site if it meets the basic criteria for siting the light rail project. As discussed below, business groups that argue that the comparison area must be almost the same in terms of land use overstate the need for similarity.

The EPA should amend the Revised Investigation Guidance to require the Agency to use only similarly situated comparison populations. Furthermore, the EPA needs to develop explicit criteria for determining how it will select similarly situated comparison populations. Such criteria will provide guidance for permit applicants, recipients, and potential civil rights advocates in evaluating whether a proposed permit action could raise issues of disparate impacts.

C. A Comparison Population or Area Does Not Have to Have a Similar Range of Activities

Some business commentators contend that the principle in Title VI and VII case law that comparison populations must be "similarly situated" with an affected population mandates that there must be a close similarity in activities and land uses between those populations. For instance, they maintain that the EPA should not compare an affected population living in highly urban or industrial area with a statewide population that is largely suburban or rural. Instead, some business commentators argue that the EPA should compare the affected population to a comparison population that lives in an area with a similar range of residential, industrial and commercial uses.

However, the argument that a comparison population must have a "similar balance to the affected population of rural, urban and industrial uses" overstates the need for similarity.

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199 See Steinberg, supra note 106, at 84-85 (arguing it is inappropriate to compare a minority population affected by transportation project to general population if project could only be sited in minority area). See also Vicki Been, Environmental Justice and Equity Issues, in 4 Patrick J. Rohan, ZONING AND LAND USE CONTROLS § 25D.04[3][g][i]. 91-92 (Matthew Bender, ed. 1990) (arguing comparison area must be suitable for proposed facility at issue) [hereinafter Been, Environmental Justice and Equity Issues]; Mank, Recipient Agencies, supra note 73, at 800-01.

200 See supra note 17 and infra notes 201-03.

201 See API, supra note 17, at 11; BNEJ, supra note 17, at 19-20; Mank, Draft Guidance, supra note 5, at 11,169 (citing BNEJ, supra note 17, at 19-20); Steinberg, supra note 106, at 84-85.

202 See BNEJ, supra note 17, at 19-20; Mank, Draft Guidance, supra note 5, at 11,169 (citing BNEJ, supra note 17, at 19-20); Steinberg, supra note 106, at 84-85.
suburban areas, with a similar range of residential, commercial and industrial activities" is more restrictive than necessary under Title VI or Title VII. In employment discrimination cases, the key issue is whether a comparison population is comprised of "qualified" potential employees. For instance, it is not necessary that minority applicants have exactly the same educational or occupational skills as others in the relevant labor pool as a whole as long as all included in a comparison are qualified for the job-at-issue. For example, in *Griggs* there was no evidence that the lower educational attainment of minority applicants had any effect on their ability to perform the jobs at issue. Indeed, there was evidence that white employees who lacked high school diplomas had performed well in the past and received promotions.

In presenting a prima facie case, a plaintiff need only demonstrate that a minority population allegedly subject to discrimination is "similarly situated" to others in the relevant job market, not that all their characteristics are the same.

Similarly, in an environmental siting case, a comparison population should be located in an area that would be suitable for the facility in question, meeting all relevant minimum requirements. Because there are multiple factors or requirements for most industrial facilities, including land suitability, transportation access, or availability of potential employees, it is often more complex in a siting case than an employment case to decide whether a comparison population or area is similarly situated. Nevertheless, the mix of residential, commercial and industrial activities does not necessarily have to be the same for an area to be a qualified comparison area. It is enough that a comparison area is similarly situated in its ability to operate a facility similar to that in question in the affected area. If an industrial facility could have been sited in either a heavily minority urban area or a predominantly white suburb, the EPA ought to compare the two areas to see if there are significant disparities. While it is often more difficult in environmental siting cases to decide whether two different areas share enough of the relevant requirements for a proposed facility to com-


\[205\] Id. at 431-32.

\[206\] See *Been, Environmental Justice and Equity Issues, supra* note 199, at § 25D.04[3][g][i], 90-92; Mank, *Recipient Agencies, supra* note 73, at 800-01.

\[207\] Mank, *Recipient Agencies, supra* note 73, at 826-28 (discussing use of legitimate safety, geological, or transportation criteria to justify siting decision).
pare than it is to decide whether workers are "qualified" and in the same relevant job market, in both Title VI siting cases and Title VII employment cases the essential issue is whether a comparison group is "similarly situated" and not whether the affected area and comparison area are exactly the same.

D. Distinguishing Between a Prima Facie Case and a Defendant's Burden of Establishing Business Necessity.

1. The Defendant's Burden of Proof Under the 1991 Civil Rights Act

A distinction needs to be made between the plaintiff's burden of proof in establishing a prima facie case and a defendant's burden of showing that a challenged practice that causes disparate impacts is justified by business or educational necessity. In Wards Cove, the Supreme Court had held that, after a plaintiff establishes a prima facie case, the burden of going forward shifts to the defendant, but that the ultimate burden of persuasion always remains with the plaintiff. However, in the 1991 Civil Rights Act, Congress rejected that holding and instead placed both the burdens of production and persuasion on the defendant once a plaintiff sets forth a prima facie case. The 1991 Act explicitly amended Title VII to place the burden of persuasion on the defendant to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," unless the defendant has rebutted the plaintiff's prima case by "demonstrating that a specific employment practice does not cause the disparate impact." The 1991 Act does not explicitly apply to Title VI, but

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210 Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2(k) (2000); see also Bradley v. Pizzaco of Neb., 7 F.3d 795, 797-99 (8th Cir. 1993) (holding in Title VII case that 1991 Act places burden of persuasion regarding business necessity on defendant); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117 & n.5 (11th Cir. 1993) (same); Frazier v. Garrison Indep. Sch. Dist., 980 F.2d 1514, 1526 n.34 (5th Cir. 1993) (same); Been, Environmental Justice and Equity Issues, supra note 199, at § 25 D.04[j][g], 87-88 n.85; Mahoney, supra note 126, at 454-55; Mank, Recipient Agencies, supra note 73, at 802.

211 Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(ii); see also Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n. 14 (11th Cir. 1993); Mahoney, supra note 126, at 454-55. The 1991 Act defines "demonstrate" as requiring a defendant to "meet the burdens of production and persuasion." 42 U.S.C. § 2000e(m); see Mahoney, supra note 126, at 454-55; Mank, Recipient Agencies, supra note 73, at 802 n.76.
courts in Title VI cases have generally followed the scheme in the 1991 Civil Rights Act by placing the burden of proof on Title VI defendants to either rebut the plaintiff’s prima facie case or to justify their actions.²¹²

2. The Prima Facie Case Should Address Objective, Minimum Qualifications

There is some confusion in Title VII law about whether a plaintiff must address relative qualifications in its prima facie case and hence consider such issues in delineating an appropriate comparison population, but most Title VII cases only require a plaintiff in her prima facie case to show that she meets the objective, minimum qualifications for a job and then place the burden on the defendant to show that they hired a better qualified worker than the plaintiff.²¹³ This issue is important because it has implications for how similarly situated a comparison population must be to the affected population. If relative qualifications come in at the prima facie stage of litigation, arguably business commentators might be right that a comparison population must be very similar to the affected population.²¹⁴ However, a number of Title VII cases have emphasized that a plaintiff’s prima facie case need only establish that the plaintiff is qualified for the job-at-issue, and, by implication, then a comparison population need only meet the objective, minimum standards for a job or siting a facility.²¹⁵

In footnote 44 of the Teamsters case, the Supreme Court suggested that whether a plaintiff is “qualified” might refer not only to objective, minimum job credentials, but also to relative qualifications:

²¹² See Ass’n of Mexican-American Educators v. California, 231 F.3d 572, 584 & n.7 (9th Cir. 2000) (stating burden is on defendant once plaintiff in Title VI case establishes prima facie case); Sandoval v. Hagan, 197 F.3d 484, 507 (11th Cir. 1999) (stating if plaintiff establishes prima facie case then defendant has burden of establishing substantial legitimate justification, citing Elston), cert. granted, Alexander v. Sandoval, 121 S. Ct. 28 (U.S. Sept. 26, 2000); Elston, 997 F.2d at 1407 n.14; Mank, Recipient Agencies, supra note 73, at 802; Worsham, supra note 56, at 685-88; but see African American Legal Def. Fund, Inc. v. N.Y. State Dept. of Educ., 8 F. Supp. 2d 330, 338 n.12 (S.D.N.Y. 1998) (stating that the “analytical framework for disparate impact cases under Title VI regulations is the same as that for Title VII cases,” but ignoring 1991 Civil Rights Act and declaring that the burden of persuasion remains on the plaintiff).

²¹³ See Alisa D. Shudofsky, Note, Relative Qualifications and the Prima Facie Case in Title VII Litigation, 82 Colum. L. Rev. 553 (1982); infra notes 218, 222-23.

²¹⁴ See infra notes 216-17.

²¹⁵ See infra notes 218-23.
The *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.\textsuperscript{216}

While the Court used the phrase “absolute or relative” only to describe a “lack of qualifications,” the Seventh Circuit has interpreted the language in the footnote to refer to the necessary qualifications as being either absolute or relative and, therefore, required plaintiffs in their prima facie case to prove they are as well or more qualified than successful applicants.\textsuperscript{217}

Many federal courts of appeals decisions have concluded that the Teamsters’ footnote did not change the allocation of proof set forth in *McDonnell Douglas* and that a plaintiff need only show in establishing a prima facie case that she meets the basic, minimum requirements for a job.\textsuperscript{218} First, Teamsters concerned the prima facie case for a class action and did not involve the standard for a private, non-class action.\textsuperscript{219} Additionally, Teamsters discussed *McDonnell Douglas* as holding that a prima facie case is established by a “qualified applicant.”\textsuperscript{220} While the Supreme Court has not clearly addressed the issue of whether a prima facie case must

\textsuperscript{216} Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

\textsuperscript{217} Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980); see also David N. Rosen & Jonathan M. Freiman, *Remodeling McDonnell Douglas: Fisher v. Vassar College and the Structure of Employment Law*, 17 QUINNIPIAC L. REV. 725, 753 n.142 (1998) (stating that the Seventh Circuit is the only federal circuit to interpret Teamsters to require plaintiff to address relative qualifications in prima facie case); Shudofsky, supra note 213, at 558.

\textsuperscript{218} See EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192-93 (10th Cir. 2000) (stating that plaintiff satisfies “her prima facie burden of showing she is qualified by presenting some credible evidence that she possesses the objective qualifications necessary to perform the job at issue”); Anderson v. Zubieta, 180 F.3d 329, 342 (D.C. Cir. 1999) (holding that the plaintiff can meet his prima facie burden by establishing he possesses those “objective qualifications that can be shown to be truly required to do the job at issue”); Walker v. Mortham, 158 F.3d 1177, 1190 (11th Cir. 1998) (explaining “relative qualifications are placed in the second stage of the *McDonnell Douglas* framework, not the prima facie stage”), cert. denied, 528 U.S. 809 (1999); Gafford v. Gen. Elec. Co., 997 F.2d 150, 166 (6th Cir. 1993); Mitchell v. Baldridge, 759 F.2d 80, 84-86 (D.C. Cir. 1985); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344-45 (9th Cir. 1981); Stanojev v. Ebasco Serv., Inc., 643 F.2d 914, 919 (2d Cir. 1981) (stating Teamsters requires plaintiff to show only that he “possesses the basic skills necessary for the performance of the job” (quoting Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978)); Rosen & Freiman, supra note 217, at 753 n.142 (stating the Seventh Circuit is the only federal circuit to interpret Teamsters to require plaintiff to address relative qualifications in prima facie case).

\textsuperscript{219} See Mitchell, 759 F.2d at 85.

\textsuperscript{220} Teamsters, 431 U.S. at 357-58. See also Mitchell, 759 F.2d at 85 (discussing Teamsters).
address relative qualifications, during 1981, in the important case of *Texas Department of Community Affairs v. Burdine*, the Court reiterated the *McDonnell Douglas* standards and did not suggest that a plaintiff must now prove relative qualifications. Some courts have suggested that the issue of relative or subjective qualifications is best left to the second and third stages of the process so that the defendant can introduce relative qualifications in their rebuttal and the plaintiff in turn can address whether the defendant’s claim of superior qualifications is a pretext for discrimination. In *Mitchell v. Baldridge*, the federal appeals court for District of Columbia circuit stated: “we read the somewhat delphic *Teamsters* footnote as contemplating qualifications relative to the entire pool from which applications are welcome, rather than qualifications relative only to those eventually selected.” Accordingly, a plaintiff in their prima facie case need only establish that she is qualified based on objective, minimum standards.

In the absence of controlling Supreme Court precedent and numerous federal courts of appeals decisions emphasizing that a prima facie case should rest on objective, minimum qualifications, the EPA should simply address objective, minimum siting requirements in deciding whether there is a prima facie case of disparate impact discrimination and in selecting comparison populations. The recipient is in a better position to explain why the approved site is a superior location than comparison sites that meet objective, minimum requirements.

Accordingly, in assessing a Title VI complaint, the EPA should compare a proposed site in a minority area with comparison areas that meet the relevant minimum qualifications for the proposed facility. If the percentage of protected minority groups in appro-

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221 Tex. Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 & n.6 (1981); see also *Mitchell*, 759 F.2d at 85 (discussing *Burdine*).

222 See *EEOC*, 220 F.3d at 1194 (stating subjective qualifications “are more properly considered at second stage of *McDonnell Douglas* analysis”); *Mitchell*, 759 F.2d at 85 (stating subjective or relative qualifications should not be considered in plaintiff’s prima facie case); *Lynn*, 656 F.2d at 1344 (stating “[S]ubjective criteria. . .are best treated in the later stages of the process.”).

223 *Mitchell*, 759 F.2d at 85.

224 See generally Mank, *Recipient Agencies*, supra note 73, at 815-22 (arguing Title VI recipients should have the burden of demonstrating there are no less discriminatory alternatives to a proposed site because recipient has better access to such information than most complainants).

225 See generally *Guidance*, supra note 5, at 39,654, 39,681-82 (discussing how EPA in Title VI investigation will compare affected populations to comparison populations and assess disparity); Mank, *Draft Guidance*, supra note 5, at 11,168-69; supra notes 13-16, 198-200, 206-07, 213.
appropriate comparison populations and areas is significantly less than in the proposed area, then the EPA should continue its investigation to determine whether these disparities are unjustified. For example, a recipient could argue that lower land costs made a minority site a better choice than other less discriminatory alternatives that met minimum requirements for the proposed facility. As discussed in Part VII.D, the EPA would then examine whether this justification was legitimate.

Some concerns from business commentators are that urban areas may not be similar to suburban or rural areas. For example, if a suburban area would be suitable for a proposed urban facility, the EPA may use the suburban area for comparison because it may be similarly situated enough to serve as the basis for an initial prima facie case. Later, when presenting a non-discriminatory reason for the proposed siting, a Title VI recipient might demonstrate, for instance, that land in the heavily minority urban area that it selected or approved was relatively less costly than in the comparison suburban area and that cost difference might be a valid justification for any disparate impacts to minorities living in the vicinity of the proposed urban site.

V. EXISTING APPROACHES TO SELECTING AFFECTED POPULATIONS AND COMPARISON GROUPS FAIL TO ADDRESS THE ISSUE OF SIMILARLY SITUATED POPULATIONS

The two main existing approaches for defining appropriate comparison populations do not address whether they are similarly situated to the affected population. The selection of the comparison population is important because it often will affect the result of any disparity study. According to one commentator:

Choosing the unit of population for comparison is the first factor that will affect the results of the disparate impact analysis. To construct an accurate study, the analyst must determine the size of the affected area and compare the demographic profile of that region with the demographics of

\[226 \text{ See Guidance, supra note 5, at 39,654, 39,681-82 (discussing how EPA in Title VI investigation will compare affected populations to comparison populations and assess disparity); Mank, Draft Guidance, supra note 5, at 11,168-69.} \]

\[227 \text{ See infra notes 305-09.} \]

\[228 \text{ See Mank, Recipient Agencies, supra note 73, at 801-07.} \]
unaffected areas within the defendant's decision making jurisdiction.\textsuperscript{229}

There are two common approaches to defining both affected populations and comparison populations. The first approach is to use pre-ordained units of comparison, such as census tracts or zip codes, for which demographic information is already known.\textsuperscript{230} The second approach is to use radial or proximity studies that compare the racial demographics of the population immediately surrounding a polluting facility with the racial demographics of a larger population by drawing a concentric circle around the facility.\textsuperscript{231} A serious problem with both pre-ordained units of comparison and proximity studies is that there is no guarantee that the comparison population is "similarly situated" with the affected populations. It is possible to apply a fine-tuning approach by initially selecting a comparison population, using either of these two methods, and then adjusting the geographic area and comparison population established to ensure that the comparison population is similarly situated to the affected population. However, to fine-tune either of these two methods requires further siting analysis about whether the comparison area initially selected by using one of these two approaches is suitable for the proposed facilities at issue.

A. Pre-Ordained Units of Comparison

Most studies of environmental discrimination use pre-ordained units of comparison, such as census tracts or zip codes, for which demographic information is already known.\textsuperscript{232} One problem with these types of studies in the past has been that there was no accepted definition for which unit of analysis was best. Most commentators preferred census tracts because they are usually smaller in size than zip code areas.\textsuperscript{233} Disparity studies often reach different results depending upon which pre-ordained units of comparison are employed. For example, a study based on the percentage

\textsuperscript{229} See Fisher, supra note 35, at 322.

\textsuperscript{230} Id.; See Worsham, supra note 56, at 690.

\textsuperscript{231} See Adams, supra note 117, at 426 n.60; Been, Market Dynamics, supra note 33, at 1392-94; Fisher, supra note 35, at 323; Worsham, supra note 56, at 690.

\textsuperscript{232} See Fisher, supra note 35, at 322; Worsham, supra note 56, at 690.

\textsuperscript{233} See generally Bradford C. Mank, Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation, 56 OHIO ST. L.J. 329, 343 n.59, 390-92 & n.373 (1995) (discussing how use of different definitions of subpopulations or geographical areas can dramatically affect research results); Mohai, supra note 32 at 619; Zimmerman, supra note 32, at 665-69; infra notes 234-35.
of minorities in the census tract surrounding a facility may come to a different result than one that examines the numbers of minorities in the neighboring zip code areas, which are generally larger than census tracts. The EPA has at least largely solved the problem of which unit of comparison to use by stating that it will use the smallest geographic area possible for the demographic data, such as census blocks, when conducting disparity assessments.

Nevertheless, the Agency's decision to use the smallest pre-ordained unit of comparison possible does not solve another problem. A central criticism of using pre-ordained units of comparison such as census tracts or zip codes is that they "bear[ ] no relationship to the area impacted by the polluting facility." Such a unit of comparison may either over-include persons who are not affected by the pollution or under-include those who are. If the selected comparison group is over- or under-inclusive, a court or agency may inappropriately find disproportionate impacts or fail to find actual disparate impacts. Furthermore, even if the unit of analysis and the impacted area are roughly the same, current models often fail to address whether some persons in an area are exposed to more pollution or greater health risks because of prevailing winds or currents.

Some commentators have proposed that environmental agencies begin their analysis by examining pre-ordained units to initially identify the racial demographics of the affected population, but then investigate how that data may fail to address impacts on populations outside those boundaries, or may underestimate concentrated impacts on minority populations within those units. For example, the presence of multiple facilities within a small area within the larger unit may increase the cumulative impact of pollu-

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234 Been, Market Dynamics, supra note 33, at 1401 n.73, 1402-03 n.84 (arguing census tracts are more reliable means to define community than zip code areas); Been & Gupta, supra note 24, at 10-13 (citing sources and contending census tracts are generally more reliable means to define community than zip code areas).

235 Guidance, supra note 5, at 39,681; Mank, Draft Guidance, supra note 5, at 11,168. There is a danger with using too small of a unit of analysis because the comparison area may contain part of the affected area and may not then represent a true comparison area. See Mohai, supra note 32, at 650.

236 Fisher, supra note 35, at 323; see also Worsham, supra note 56, at 690.

237 See Fisher, supra note 35, at 323; Worsham, supra note 56, at 690.


239 See Fisher, supra note 35, at 323; Worsham, supra note 56, at 690.

240 See Fisher, supra note 35, at 323-24; Worsham, supra note 56, at 692.
tion on those living in the smaller area. Using additional data based on the use of pre-ordained units to fine-tune an agency's initial findings makes sense, but raises important questions about where the agency will obtain any supplemental information and what type of methodologies it will use to refine its initial analyses.

B. Radial or Proximity Studies

Some commentators argue that it is better to use a radial study approach that compares the racial demographics of a larger population with the racial demographics of the population immediately surrounding a polluting facility, as determined by drawing a concentric circle around a facility. However, this approach is more resource-intensive than using data from pre-measured units. Additionally, radial studies do not necessarily examine the actual environmental risk faced by different populations.

The EPA used a radial analysis in examining whether Shintech's proposed $700 million PVC plant in Convent, Louisiana would cause racially disparate impacts. In 1997, the Tulane Environmental Law Clinic filed a Title VI complaint against the Shintech proposal on behalf of African-American residents in Convent, alleging that it would create disparate impacts based on race. The complaint argued that there would be significant disparate impacts because the community was predominantly African-American, and because of the significant environmental burdens already harming the area. For example, ninety-five percent of the 300 people living within one mile of the proposed plant were black, and forty-nine percent of the households had incomes of less than $15,000. The proposed plant was to be located in Convent, a

242 Adams, supra note 117, at 426 n.60; Been, Market Dynamics, supra note 33, at 1392-94; Fisher, supra note 35, at 323; Worsham, supra note 56, at 690.
243 See Fisher, supra note 35, at 323; Worsham, supra note 56, at 691.
244 See Adams, supra note 117, at 426 n.60; Been, Market Dynamics, supra note 33, at 1392-94.
245 Shintech Demographic Information, supra note 109; see Mank, Title VI, supra note 4, at 45-48; Worsham, supra note 56, at 656-59, 691; Cary Silverman, Note, EPA’s Interim Guidance on Investigating Title VI Administrative Complaints Challenging Permits: The Bumpy Road Toward a Federal Environmental Civil Rights Policy, 6 ENVTL. L. 135, n.148 (1999).
246 Mank, Title VI, supra note 4, at 45-46; Worsham, supra note 56, at 657.
247 Mank, Title VI, supra note 4, at 46; Worsham, supra note 56, at 657-58.
248 Mank, Title VI, supra note 4, at 46; Worsham, supra note 56, at 658.
town in the industrial corridor between Baton Rouge and New Orleans already known as "cancer alley" because of the number of petrochemical industries within its boundaries.249

In the EPA's Shintech investigation, the Agency relied on census data to determine the racial makeup of communities within one-, two-, and four-mile radii of the proposed plant location, and compared these to the racial composition of the state and of the other affected geographic regions.250 The EPA examined the percentage of minority persons within the test radii for each geographic and facility universe, and then compared those percentages with the percentage of minority persons in the state as a whole.251 The EPA found that African-Americans represented over eighty percent of the population within each of the one-, two-, and four-mile radial areas around the proposed site, but less than fifty percent of the population of St. James Parish and only thirty point eight percent of Louisiana's total population.252 The EPA also sought to address to what extent African-Americans were more likely to live near Shintech by examining to what extent they were likely to live near other facilities in the state that emitted toxic air pollutants.253

While the Shintech study was the EPA's most sophisticated effort at analyzing disparate impacts and is referred to as a model in the Revised Investigation Guidance,254 many environmental justice advocates argued that the EPA's methodology seriously underestimated the extent to which African-Americans had a higher probability of living in proximity to the Shintech site than did non-African-Americans.255 Nevertheless, despite disagreement about findings in the EPA's Shintech study, the EPA's statistical evidence

249 Mank, Title VI, supra note 4, at 46; Worsham, supra note 56, at 658.
251 Cole & Shanklin, supra note 250, at 9, col. 1; Worsham, supra note 56, at 691. The Agency was not yet able to measure the comparative harmfulness of the pollutants at issue, but hopes to be able to address that issue when it conducts similar studies in the future.
252 Shintech Demographic Information, supra note 109, at 12-13 & attachment 3; Silverman, supra note 245, at 135.
253 Similarity was determined by Standard Industrial Category (SIC) code, release of similar pollutants, and varying amounts of Toxic Release Inventory (TRI) releases. Cole & Shanklin, supra note 250, at 9, col. 1; Worsham, supra note 56, at 691 n.386.
254 See Guidance, supra note 5, at 39,681-82 n.134-137 (citing Shintech Demographic Information, supra note 109).
255 See Cole & Shanklin, supra note 250, at 9, col. 1; Worsham, supra note 56, at 691 n.389.
showing that African-Americans were disproportionately likely to live near the proposed Shintech facility arguably would have met the standard of proof set forth in the Revised Investigation Guidance and, therefore, the Agency potentially could have found that the proposed permit action violated its Title VI disparate impact regulations.  

Because of strong disagreements between industry and environmental justice advocates about how to measure disparate impacts, the EPA never resolved the Title VI complaint against Shintech. Instead, the Agency concluded that Shintech's proposed air permit was flawed because it did not address all potential sources of pollution. Shintech ultimately suspended plans to build the $700 million facility in Convent and announced on September 17, 1998, that it would pursue instead a permit for a smaller $250 million plant in the up-river town of Plaquemine, Louisiana.

The Shintech study demonstrates both the advantages and disadvantages of using radial studies. The radial study used in Shintech was probably more accurate in measuring the amount of actual disparities than a study using pre-ordained units, but the radial study was more costly and time consuming. The disagreements between environmental justice advocates and industry about how to interpret the data shows that radial studies do not always provide clear, easy answers to complex issues about environmental siting.

The EPA's independent Science Advisory Board (the "SAB") has recommended improvements to the Agency's approach for conducting radial studies and measuring disproportionate impact and cumulative effects in Title VI complaints. Any improvements in measuring risk, however, would not address the more

256 See John McQuaid, Environmental Justice Revisited in New EPA Plan, NEW ORLEANS TIME-PICAYUNE, June 20, 2000, at A01 available at 2000 WL 21266333 (discussing EPA data showing proposed Shintech facility in St. James Parish, Louisiana would have "disproportionately affect[ed] black residents in St. James by a factor ranging from 2 times to 3 times, depending on the type of plant").

257 Mank, Title VI, supra note 4, at 47-48.

258 Id.

259 Mank, Title VI, supra note 4, at 48; Worsham, supra note 56, at 659.

260 For instance, the SAB studied the EPA's new Cumulative Outdoors Air Toxics Concentration Exposure Methodology (COATCEM), which evaluates the cumulative impacts of cancer and non-cancer risk separately. The SAB recommended that the Agency examine the potential risk to all populations, whether significant or de minimis, before estimating the extent of any disproportionate impact. See Science Advisory Board, An SAB Report: Review of Disproportionate Impact Methodologies, EPA-SAB-IHEC-99-007, 1-3 (Dec. 1998); see also Cheryl Hogue, SAB Recommends Steps for EPA in Analyses of Disproportionate Impacts, 29 ENV'T REP. (BNA) 1310, 1310-11 (Oct. 30, 1998).
basic question of whether a proposed comparison site would be suitable for the facility at issue.

C. Risk Assessment

To measure the actual risk posed by a facility to different populations and separate geographic areas, an agency would need to undertake complex and expensive risk analyses. Such risk analyses often have serious weaknesses because of limits in scientific knowledge. Scientists frequently cannot precisely measure the risks of many carcinogens or the synergistic interaction of different chemicals. Furthermore, there are many unanswered questions about how different chemicals may affect minority subpopulations that have different diets, occupational exposures or lifestyles than the “average” adult males often used as the model in standard risk analyses. Finally, because of the uncertainties in measuring risk, opposing parties often reach significantly different results when they use risk assessment to either justify or criticize a proposal.

The EPA probably does not need to perform an extensive or comprehensive risk assessment before selecting a comparison population in a Title VI case, but the Agency will likely consider this issue when reaching a final decision about whether there are adverse disparate impacts. Business interests have argued that


262 See generally Donald T. Hornstein, Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis, 92 COLUM. L. REV. 562 passim (1992) (criticizing quantitative risk assessment for overstating its capability to measure risk); O'Neill, supra note 192, at 24-36 (criticizing quantitative risk assessment for overstating its capability to measure risk and failing to address distributional issues and differences in individual susceptibility to chemicals).

263 Kuehn, Quantitative Risk Assessment, supra note 27, at 117-23, 151-53; Mank, Reforming State Brownfield Programs, supra note 29, at 139-43; O'Neill, supra note 192, at 24-36; Israel, supra note 192, at 491-504.

264 See Gauna, supra note 192, at 33-34 (arguing water quality standards based upon amount and type of fish that average person eats does not protect minorities consuming more or different fish, especially bottom-dwelling or fatty fish); Kuehn, Quantitative Risk Assessment, supra note 27, at 117-23, 151-52; Mank, Reforming State Brownfield Programs, supra note 29, at 139-43; O'Neill, supra note 192, at 70-85 (arguing water pollution has more severe impact on indigenous subpopulations); Israel, supra note 192, at 491-509.

265 Kuehn, Quantitative Risk Assessment, supra note 27, at 133-39 (arguing that industry can manipulate risk assessments to minimize the proposal’s possible risk to minority populations); O'Neill, supra note 192, at 27-30 (arguing that quantitative risk assessments are highly malleable).
comparison populations should have a range of activities and presumably a risk similar to the allegedly affected area.\textsuperscript{266} However, Title VII's requirement that comparisons be made between qualified workers in the same relevant job market case law suggests that the similarly situated standard as applied in the context of facility siting means simply that a comparison area is suitable for the facility at issue and satisfies all relevant minimum requirements.\textsuperscript{267} Accordingly, it is probably not necessary for the EPA to ensure that the total level of risks in any comparison area that the agency selects is roughly equivalent to those in the affected area. It is important to remember that the selection of a comparison population is part of the preliminary task of establishing a prima facie case of discrimination. In reaching its final decision about whether there is a significant adverse impact, however, the issue of disproportionate risks is important and may require some measurement of actual risks.\textsuperscript{268}

\textbf{D. Fine-Tuning the Comparison Population}

It is possible to apply a fine-tuning approach that addresses whether the geographic area and comparison population established by using either pre-ordained units or radial analysis needs to be adjusted so that the comparison population is as similarly situated as possible to the affected population. There are many possible demographic or environmental criteria that could be compared to determine to what extent a possible comparison area is similar or different from an allegedly affected population. This article has argued that the single most important question about whether two areas and populations are similarly situated for purposes of environmental siting and permitting challenges is usually whether the proposed facility that is to be located in the affected area also could be located in the potential comparison area.\textsuperscript{269} As discussed in Section VII, the recipient or the EPA should begin its task of selecting a comparison population by examining existing siting information to determine whether a proposed comparison area is suitable for the challenged facility.

\textsuperscript{266} API, \textit{supra} note 17, at 11; BNEJ, \textit{supra} note 17, at 19-20; Mank, \textit{Draft Guidance, supra} note 5, at 11,169 (citing BNEJ, \textit{supra} note 17, at 19-20); Steinberg, \textit{supra} note 106, at 84-85.

\textsuperscript{267} See \textit{supra} notes 13-16, 198-200, 206-07, 213, 225.

\textsuperscript{268} Guidance, \textit{supra} note 5, at 39,661, 39,681-82; Mank, \textit{Draft Guidance, supra} note 5, at 11,169-70.

\textsuperscript{269} See generally Been, \textit{Environmental Justice and Equity Issues, supra} note 199, at \S 25D.04[3][g][i], 90-92; Mank, \textit{Recipient Agencies, supra} note 73, at 800-01.
VI. STATE SITING STATUTES AND INFORMATION ABOUT COMPARISON SITES

The EPA should initially examine information from both state and federal environmental programs to determine whether a proposed comparison area would be suitable for the challenged facility. There are many sources of information that the Agency could use to select an appropriate comparison population, but information generated during state or federal permitting processes is a good place to start. For example, many state siting statutes require either developers or a state siting board to examine a number of potential sites before making a final selection. This inventory of possible sites could be used as a starting point for identifying comparison sites and populations.270 Similarly, federal environmental statutes often require applicants to consider alternative locations and this information may be useful in defining appropriate comparison populations. Additionally, the Recipient Guidance and Revised Investigation Guidance both encourage recipients to collect pollution and demographic data and this may prove useful in selecting comparison populations. If existing sources of information fail to provide sufficient information about suitable comparison populations, the EPA has a responsibility under its Title VI guidance to gather any necessary data and evaluate whether a recipient’s justifications are legitimate.

A. State Siting Processes Often Generate Valuable Information About Comparison Areas

Information generated by state siting statutes could often prove helpful to the EPA in determining an appropriate comparison population. However, as discussed below, there are limitations to the quality and quantity of information generated by state siting statutes. For instance, siting statutes in different states take different procedural and substantive approaches in siting facilities. As a result, the amount of information about comparison locations or alternative sites is likely to vary from state to state. Furthermore, environmental justice advocates have argued that some of the information produced by industry or even state regulatory agencies may be biased, misleading, or actually falsified.271 Accordingly, the

270 Mank, Reforming State Brownfield Programs, supra note 29, at 159-66.
EPA may need to encourage states to generate additional information if existing regulations or siting processes do not provide important information that the Agency needs for Title VI decisions.

While each state siting statute is slightly different, there are three main approaches to siting: (1) super review, (2) site designation, or (3) local control. Each approach presents different issues regarding the generation of information about possible comparison sites. Unfortunately, there is no good study about the amount of siting information produced in each state or under the three different siting approaches, but some possible inferences can be made from the limited amount of information available.

Under super review, the developer of a proposed hazardous facility selects a possible site and applies for a permit with the authorizing agency, typically a state EPA or Department of Natural Resources. If the state EPA decides to issue a permit after evaluating potential environmental impacts, the state appoints a special administrative body to conduct a super review of the permit and siting decision, and to evaluate objections by the applicant, host community or public. These special siting boards usually have some expert or technical members and some local representatives, but the composition of the boards and methods for selecting local representatives vary from state to state. There is normally some


See Mank, Discriminatory Siting, supra note 24, at 348; Mata, supra note 272, at 402-05.


See, e.g., Mich. Comp. Laws Ann. § 324.11117(2) (West 2000) (establishing site review board with nine members and one nonvoting chairperson); N.Y. ENVTL. CONSERV. LAW § 27-1105.3(d) (Gould 2000) (requiring governor to appoint facility siting board com-
opportunity for the public to present their views about the site selection process to the siting board.\textsuperscript{276} If the siting board approves the site, then all of the states using a super review process have preemption clauses that permit the siting of the facility even if the local community objects.\textsuperscript{277}

A potential problem with "super review" is that the developer initially selects the proposed site and generates the information used in the review process. However, there are usually opportunities for the public to present additional information. Furthermore, it is not unusual for the siting board to request that the developer supply additional information about certain issues.

Nevertheless, under super-review siting statutes, the developer generally provides most of the information and, as a result, there is at least some possibility of bias in favor of siting the proposed facility.\textsuperscript{278} Most communities lack the resources or expertise to challenge industry data, although the EPA or states sometimes provide relatively small technical assistance grants to community groups.\textsuperscript{279}

Under the site designation approach, the state, not a private developer, creates an inventory of possible sites.\textsuperscript{280} Techniques for developing the inventory vary from state to state.\textsuperscript{281} Because site designation decreases the cost incentive in site selection and provides a statewide data gathering mechanism that can inform future environmental decision making to make sure no area is overburdened, site designation could provide more complete and less biased information than super review.\textsuperscript{282} However, state offi-
cials may have their own biases because they often select inexpensive sites to save money.\textsuperscript{283}

Some states allow local counties or municipalities to control siting either directly or through local land use regulations. In these states, local land use regulations are not preempted by a state hazardous waste management plan and a local community may usually impose land use regulations to block any hazardous waste site.\textsuperscript{284} In states with local control, developers or state officials may have no incentive to generate information about sites in any area that is likely to oppose siting. Accordingly, states with local control may generate less information about comparison sites than states using either super review or site designation.

Additionally, several states have state environmental policy statutes or regulations based on the National Environmental Policy Act that require them to consider alternative sites when the state builds a significant project.\textsuperscript{285} Similarly, other state environmental statutes or regulations may generate information about alternatives or comparison populations.

As a result of their different siting approaches, states may not produce the same level of information about comparable sites or populations. To address this problem, the EPA could strongly encourage or even require states to develop information about alternative sites and comparable populations as part of their Title VI compliance process. There are a variety of techniques could use to gather such information, including through the identification of high-risk areas, community impact statements, or risk assessments.\textsuperscript{286} Some of these are discussed in subsection C.

\textsuperscript{283} See Mata, supra note 272, at 411-12.


\textsuperscript{286} Mank, Reforming State Brownfield Programs, supra note 29, at 159-66.
Federal Permitting Statutes: Analysis of Alternative Sites

Under the National Environmental Policy Act ("NEPA") and several other federal environmental statutes, the EPA or another federal agency has to consider alternatives to a proposed site. For example, the Army Corp of Engineers has issued regulations pursuant to section 404 of the Clean Water Act that require applicants for wetlands permits to discuss whether there is a "practicable alternative" to the wetland development proposal that would have a less adverse impact on the environment. Similarly, applicants for incidental take permits under the Endangered Species Act must discuss alternatives to any proposed action that may incidentally harm endangered species. While the discussion of alternatives under various environmental statutes does not directly address the issue of comparison populations, in many instances, information about alternative sites could provide useful information in determining comparison populations.

The Recipient Guidance: Another Source of Information About Comparison Populations

The Recipient Guidance is likely to provide additional useful information that the EPA could use to define appropriate affected and comparison populations. If recipients do not produce enough useful information about potential comparison populations, the EPA could explicitly encourage recipients to address the issue of comparison populations.

Conducting Adverse Impact and Demographic Analyses

The Recipient Guidance recommends that recipients collect demographic and pollution data about potential high risk populations. The Recipient Guidance then encourages recipients to use that information to identify and address potential problem areas where there may be disparities on the basis of race, color, or...
national origin.292 The Recipient Guidance suggests that recipients begin with existing data, but cautions that they may need to collect additional local data if existing sources are inadequate.293 Both the Recipient Guidance and the Revised Investigation Guidance discuss how recipients might conduct an adverse disparate impact analysis to identify areas of concern where there may be disparities on the basis of race, color, or national origin.294 While these programs are in theory voluntary, it is likely that the EPA will strongly encourage states to collect such data to avoid discrimination problems. The pollution and demographic information and analyses collected by recipients should be very helpful in determining the scope of affected populations. While this information may not directly address the issue of comparison populations, it is likely that some of this data would also be useful in assessing that issue as well.

2. Area-Specific Agreements

Both the Recipient Guidance and the Revised Investigation Guidance encourage recipients to adopt an area-specific approach in which they identify geographic areas where adverse disparate impacts may exist and then create an “area-specific” plan to reduce or eliminate pollutants that are causing those harms.295 In both draft guidance, the EPA stated that it would give “due weight” to recipient efforts to reduce discrimination in deciding whether a permit decision causes disparate impacts and, thus, violates Title VI.296 While recipients might submit a wide range of relevant information, the Agency expects that such evidence “should at a minimum generally conform to accepted scientific approaches.”297 Next, after recipients identify high-risk geographic areas, the EPA encourages states to cooperate with the affected communities in these areas and other appropriate stakeholders to develop the relevant criteria to identify geographic areas where adverse disparate

292 Guidance, supra note 5, at 39,659; Mank, Draft Guidance, supra note 5, at 11,153.
293 Guidance, supra note 5, at 39,659; Mank, Draft Guidance, supra note 5, at 11,153.
294 Guidance, supra note 5, at 39,660-61; Mank, Draft Guidance, supra note 5, at 11,153.
296 Guidance, supra note 5, at 39,653, 39,663; Mank, Draft Guidance, supra note 5, at 11,155-56, 11,163.
297 Guidance, supra note 5, at 39,663; Mank, Draft Guidance, supra note 5, at 11,155, 11,166.
impacts may exist.\textsuperscript{298} If the OCR finds that reliable information shows that a recipient's proposed "area-specific agreement" would reduce adverse disparate impacts "to the extent required by Title VI," then the Agency would likely close the complaint.\textsuperscript{299}

Area-specific agreements are likely to provide useful information about both affected populations and comparison populations. First, because area-specific agreements are intended to address areas with high levels of pollution, especially those with significant minority populations, state agencies are likely to identify areas with high levels of pollution and minority populations to avoid future Title VI complaints. As part of assessing those areas, the New Jersey experience suggests that states are likely to compare those areas with pollution levels for the general population.\textsuperscript{300} States need to take the further step of considering whether sites are disproportionately located in minority areas compared to other areas that are similarly situated. In other words, states need to address the fundamental empirical question of whether more polluting sites are located in high minority population areas compared to low-minority areas that would also be suitable for such sites.

To increase the amount of information regarding area-specific plans, states should encourage public comment and participation before their adoption. While it generally encourages "meaningful" public participation, the Recipient Guidance provides few specific directions or requirements regarding what recipients must do to establish effective public participation programs.\textsuperscript{301} Some civil rights proponents argue that any area-specific plan should be adopted only after public notice and an opportunity for comment.\textsuperscript{302} Requiring public notice-and-comment regarding area-specific plans would make it more likely that such agreements...

\textsuperscript{298} Guidance, supra note 5, at 39,657; Mank, Draft Guidance, supra note 5, at 11,151, 11,155-56.

\textsuperscript{299} Furthermore, "[i]f a later-filed complaint raises allegations regarding other permitting actions by the recipient that are covered by the same area-specific agreement, OCR would generally rely upon its earlier finding and dismiss the allegations." However, "[a]n exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented." Guidance, supra note 5, at 39,675-76; Mank, Draft Guidance, supra note 5, at 11,163.

\textsuperscript{300} See Cook, supra note 190, at 2574 (discussing New Jersey model).

\textsuperscript{301} See Mank, Draft Guidance, supra note 5, at 11,155-56.

would be based on a broad range of information and reflect the views of a diverse set of stakeholders. Accordingly, public notice-and-comment would make it more likely that an area-specific plan would contain information relating to pertinent comparison populations.

D. **EPA Should Establish Criteria for Determining an Appropriate Comparison Population**

1. **EPA Should Obtain Any Necessary Information**

As discussed above, both state and federal statutes, regulations, and programs may generate much of the information EPA needs to establish appropriate comparison populations. However, in evaluating Title VI complaints filed with the Agency, the EPA in its Revised Investigation Guidance acknowledged that it bears the ultimate responsibility in investigating formal Title VI complaints even if the complainants and recipients fail to provide necessary information. 303 Furthermore, the Agency in its Revised Investigation Guidance explains how it will select appropriate comparison populations. 304 Accordingly, if any necessary information about comparison populations is not available, the EPA should take additional steps to collect the relevant data.

2. **EPA Should Evaluate a Recipient's Criteria for Appropriateness and Pretext**

The EPA should evaluate whether existing state siting requirements are relevant and appropriate before applying them to select comparison populations. To find a recipient in violation of the Agency's Title VI implementing regulations, the EPA must determine whether the recipient's practices or actions have caused "unjustified" adverse disparate impacts. 305 Usually, a recipient will offer a justification for any adverse disparate impacts. The Revised Investigation Guidance lists specific factors, including public

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303 Guidance, supra note 5, at 39,674 ("The process of investigating a Title VI complaint is not analogous to a judicial process in which plaintiffs and defendants must each present information and arguments supporting a particular finding. EPA, like other Federal agencies, is responsible for investigating formal complaints concerning the administration of programs by recipients of financial assistance."); Mank, Draft Guidance, supra note 5, at 11,162.

304 See supra notes 98-115 and accompanying text.

305 See Guidance, supra note 5, at 39,682-83; Mank, Draft Guidance, supra note 5, at 11,170.
health, environmental, or economic benefits, that may in appropriate circumstances provide a sufficient compelling legitimate justification for disparate impacts.\textsuperscript{306} Citing Title VII and Title VI cases, the Revised Investigation Guidance states: "Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient’s institutional mission."\textsuperscript{307}

The Agency should carefully evaluate a recipient’s siting criteria to determine whether they serve legitimate justifications as applied to the facts in the complaint. By assessing whether a recipient’s siting criteria are legitimate, the Agency can decide whether it should use these criteria to select an appropriate comparison population. For example, in \textit{Griggs}, the Supreme Court concluded that Duke Power’s educational and testing requirements were invalid because they were not sufficiently indicative of job performance.\textsuperscript{308} Similarly, the EPA must decide whether the recipient’s existing siting criteria are valid as applied to the facts of a Title VI complaint. Occasionally, otherwise legitimate criteria may not support a siting decision if the facts are carefully analyzed. For example, a recipient might justify placing a facility in a minority neighborhood because land is cheaper per acre. However, if a site in a mostly white, affluent suburban neighborhood would require less land than the minority site, then the suburban site might be cheaper overall.\textsuperscript{309} In that example, the lower cost per acre is not a valid justification for ignoring a less discriminatory alternative that would meet the recipient’s legitimate needs.

Sometimes, the Agency may face difficult questions in evaluating siting criteria. For example, a recipient’s siting criteria may prohibit a particular type of facility from locating near a school, hospital, or nursing home.\textsuperscript{310} Professor Robert Bullard, an African-


\textsuperscript{308} See \textit{supra} notes 135-138 and accompanying text.

\textsuperscript{309} See \textit{Steinberg, supra} note 106, at 84.

\textsuperscript{310} See, e.g., 30 TEX. ADMIN. CODE § 335.204(b)(6) (West 2001) (prohibiting siting of land treatment facilities within 1,000 feet of an "established residence, church, hospital, school, licensed day care center, surface water body used for a public drinking water supply or dedicated public park . . . ."); see generally Kaswan, \textit{supra} note 285, at 287 n.323 (listing numerous state statutes containing various location standards for hazardous facilities).
American sociologist and leading environmental justice advocate, has argued that such siting criteria may be biased toward the selection of sites in minority and poor areas because these areas generally lack such institutions. On the other hand, other environmental justice advocates argue that minority areas are often selected as the sites for undesirable public institutions. Are criteria that prohibit siting near certain public institutions based on valid safety concerns, or are they pretexts for discrimination? For each complaint, the EPA should carefully examine whether such criteria truly serve important safety goals. If it is reasonable to site a facility near public institutions, then the EPA should include comparison areas that contain schools, hospitals or other similar public institutions.

A further complication occurs when a siting requirement arises out of a legal ordinance that is beyond the recipient’s jurisdiction. In many cases, a state environmental agency may not have authority over zoning or traffic issues. Yet, during the twentieth century, local zoning restrictions frequently served to concentrate minority populations in industrial and commercial areas. The Revised Investigation Guidance states that the Agency will consider only impacts that are within the recipient’s legal authority to regulate, and thus suggests that disparities resulting from purely local zoning ordinances will often be beyond the scope of a recipient’s Title VI responsibilities. However, the Revised Investigation Guidance also states that a recipient is responsible if it has the potential authority to prevent unjustified disparate impacts, but does not exercise that authority. Thus, a state agency might be responsible for discriminatory local land use regulations if it has the authority to preempt or regulate them. Furthermore, some

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311 In re Louisiana Energy Services, L.P. (Claiborne Enrichment Center), No. 70-3070-ML, 45 N.R.C. 367, 388, 1997 WL 458771 (N.R.C.), 1997 N.R.C. LEXIS 20 (Atomic Safety and Licensing Bd. May 1, 1997) (summarizing Dr. Bullard's expert testimony that siting criteria that exclude facilities near schools, hospitals, and nursing homes have the effect of increasing the likelihood that they are sited in poor and minority neighborhoods without such facilities), aff'd in part, rev'd in part, 1998 N.R.C. LEXIS 7 (Nuclear Regulatory Comm'n Apr. 3, 1998).

312 See Guidance, supra note 5, at 39,662; Mank, Draft Guidance, supra note 5, at 11,154.

313 See Arnold, supra note 28, at 80-89 (finding in a study of 31 census tracts in seven cities nationwide that industrial and commercial zoning is more common in low-income, high-minority neighborhoods than in high-income, low-minority neighborhoods); see also Rabin, supra note 28, at 101-20.

314 See Guidance, supra note 5, at 39,654, 39,678; Mank, Draft Guidance, supra note 5, at 11,165.

315 See Guidance, supra note 5, at 39,654, 39,678; Mank, Draft Guidance, supra note 5, at 11,165.
state and business officials fear the Agency could consider state constitutional authority or general state laws in determining the potential authority of a recipient agency and use that general authority in some states to make a state environmental agency responsible for local land use regulations or ordinances. The EPA needs to clarify when a recipient is responsible for practices that are potentially within its legal control, including local land use regulations.

In particular, the role of local zoning restrictions is extremely important for selecting comparison populations. If local zoning ordinances effectively prohibit certain types of facilities from an area, then the EPA probably should not use such jurisdictions for comparison populations because the recipient does not have the authority to site the facility at issue in those areas. Yet local zoning restrictions could have far greater disparate impacts than many sitting criteria used by state environmental agencies. Because most municipal zoning boards do not receive funding from the EPA and are thus outside of the Agency’s Title VI jurisdiction, the EPA’s ability to stop or even influence current or historical discriminatory zoning practices is quite limited.

On the other hand, some states have state siting boards that can preempt local land use restrictions, and if such a siting board is a recipient of agency funding, then the EPA should require the board to exercise that authority. However, even in those states that have the authority to preempt local land use restrictions, local political opposition by wealthy, usually predominantly white communities is often effective in blocking undesirable facilities and relegating

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316 See BNEJ, supra note 17, at 15-16; ECOS, supra note 114, at 4-5; Mank, Draft Guidance, supra note 5, at 11,154, 11,165.

317 See Foster, supra note 36, at 833-37 (arguing historical patterns of zoning and housing have continuing impacts in locating hazardous facilities in poor and minority areas).

318 In theory, the EPA could ignore local zoning and demand that recipients consider comparison areas that are effectively barred by local land use restrictions, but there would likely be a strong political reaction against the EPA by Congress, states, and local interests. Whenever the EPA has acted in a way that infringes on local autonomy in regulating land use, there has been a strong political reaction and the Agency has generally rescinded such efforts or been ordered by Congress to do so. For example, the EPA’s program for regulating non-point sources of water pollution has been limited because a more expansive program would restrict local land use regulations. President Reagan unsuccessfully tried to veto the relatively weak regulation of non-point pollution in Section 309 of the Clean Water Act, and there has been little progress since in controlling such pollution because of deference to local land use control. See ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 376-77 (5th ed. 1999).

319 See supra notes 273-77 and accompanying text.
them to poor and minority neighborhoods.\supra \text{note 240} Thus, even if the EPA requires state environmental agencies to use their potential authority over local land use regulation, the Agency may need to closely monitor whether these efforts are successfully implemented.

The EPA should require recipients to do everything within their authority to combat discriminatory local land use practices. The EPA should carefully examine whether the recipient can preempt, mitigate, or avoid discriminatory local land use regulations. Nevertheless, the Agency’s Title VI authority is limited to actions within the recipient’s potential authority and thus the EPA may be powerless to overcome long standing patterns of local discriminatory land use if the recipient has no practical means of addressing them.

\textbf{CONCLUSION}

In many cases, it would be easier for the EPA to simply use the general population or non-affected population as the appropriate comparison populations. However, the Supreme Court in Title VII cases has increasingly demanded that a plaintiff use only qualified job applicants in the relevant labor market as the proper comparison group rather than the general population.\supra \text{note 241} Because Title VI cases often rely on Title VII unless there is a strong reason for distinguishing the two statutes, it is likely that under Title VI any comparison population should be “similarly situated” to the affected population.\supra \text{note 242} Accordingly, the Revised Investigation Guidance is inconsistent with Title VI to the extent it suggests that the EPA can routinely use general population statistics without determining whether a comparison population is “similarly situated” to the affected population.\supra \text{note 243}

In environmental cases, the most important question regarding similarity is whether the facility at issue in the affected area could be sited in the comparison area, meeting all relevant minimum requirements. Business interests overstate the need for similarity when they contend that a comparison area must contain the same

\begin{itemize}
  \item \supra \text{note 240} See Mank, \textit{Discriminatory Siting}, supra note 24, at 349-51; Boyle, \textit{supra} note 274, at 973-74; Godsil, \textit{supra} note 274, at 405-06.
  \item \supra \text{note 241} Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 650-55 (1989).
  \item \supra \text{note 242} \textit{See} Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406-07 (11th Cir. 1993); \textit{Title VI Legal Manual}, \textit{supra} note 11, at 27.
  \item \supra \text{note 243} \textit{See} Guidance, \textit{supra} note 5, at 39,681; Mank, \textit{Draft Guidance}, \textit{supra} note 5, at 11,169.
\end{itemize}
mix of urban, suburban, and rural areas as the affected area. On the other hand, if a project could only be built in certain areas, it is improper to use a comparison area that would be unsuitable for the project.  

There are several ways to reduce the costs of selecting an appropriate comparison population. The EPA should work with recipients and complainants to develop such information. Because many state siting statutes already require a permit applicant to propose or consider a number of different locations for a proposed facility, existing siting and permitting processes already generate some of the information that would be useful in defining what is an appropriate comparison population. Additionally, several federal environmental statutes, most notably the National Environmental Policy Act, require the government and sometimes private applicants for federal permits to consider alternatives to their proposed project. This information could prove useful in selecting an appropriate comparison population. Furthermore, the EPA, in the Revised Investigation Guidance and Recipient Guidance, encourages states to collect demographic information and pollution data about high risk populations and this information could prove useful in selecting both the affected population and an appropriate comparison population.  

However, in investigating and evaluating Title VI administrative complaints, the EPA has ultimate responsibility in researching and resolving any disputed factual issues. If any necessary information about comparison populations is not available, the EPA should take additional steps to collect the relevant data. Finally, the EPA should develop guidelines for selecting appropriate comparison populations. The Agency should consider which factors are legitimate objective criteria for siting decisions and selecting appropriate comparison factors. Additionally, the Agency should carefully evaluate a recipient's criteria to determine whether they are pretexts for discriminatory decisions. Furthermore, the EPA should examine whether the recipient has the authority to control, limit or preempt local land use restrictions that have a discriminatory

324 API, supra note 17, at 11; BNEJ, supra note 17, at 19-20; Mank, Draft Guidance, supra note 5, at 11,169; Steinberg, supra note 106, at 84-85.

325 Been, Environmental Justice and Equity Issues, supra note 199, at § 25D.04 [3][g][i], at 90-92; Mank, Recipient Agencies, supra note 73, at 800-01, 826-28.

326 Mank, Reforming State Brownfield Programs, supra note 29, at 159-66.


328 Guidance, supra note 5, at 39,659-61.
effect. By carefully analyzing siting criteria and selecting appropriate comparison populations, the EPA can best fulfill its responsibility in evaluating disparate impact claims.