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# **EPA's *SELECT STEEL* RULING: IS A CLEARER PICTURE OF "ENVIRONMENTAL JUSTICE" EMERGING?**

by

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The recent decision by the U.S. Environmental Protection Agency's (EPA) Office of Civil Rights (OCR) on the environmental justice complaint filed against a proposed Select Steel Corporation facility near Flint, Michigan offers a glimmer of hope in an otherwise depressing area of public policy. It is a "bad news - good news" story, the ultimate consequences of which are hard to predict.

Select Steel Corporation of America, a firm based in Kansas City, Missouri, proposed the construction of a \$175 million steel recycling mini-mill in Genesee Township (Flint). The mill would generate approximately 200 jobs. Typical wages would amount to \$16 per hour. This kind of economic development would be a boom for an area like Flint, which suffered tremendously during the restructuring of the automobile industry in the 1980s.

## ***The Complaint***

A complaint was filed with OCR in June 1998 by Father Phil Schmitter and Sister Joanne Chiaverini, both affiliated with the Flint-based St. Francis Prayer Center, and a member organization of the Michigan Environmental Justice Coalition (MEJC). The complaint alleged that the Michigan Department of Environmental Quality's (MDEQ) issuance of a permit to Select Steel, under the Clean Air Act, would result in a discriminatory impact on minority residents and that the MDEQ's permitting process was conducted in a discriminatory manner, all in violation of Title VI of the Civil Rights Act of 1964 and EPA's own regulations. Title VI prohibits any entity that receives federal funds from engaging in discrimination.

The original complaint claimed that the MDEQ decision would result in an "unfair and disparate burden of pollution [which] will fall on a group of minority . . . people." However, in other supporting materials and interviews, the complaining parties cited specific concerns about the proposed steel mill's emissions of volatile organic compounds (VOCs), lead, air toxics, and dioxin.

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## *OCR's Decision*

On October 30, 1998, Ann E. Goode, Director of OCR, issued a letter of decision dismissing the complaint, stating that "EPA has not found a violation of Title VI and EPA's implementing regulations."

While the decision, in and of itself, is a welcome one, it offers both bad and good news as to EPA's view of the legal issues pertaining to environmental justice claims. It accepts bad law but finds it inapplicable to the facts in the case, facts typical of a well-managed state environmental permitting program to which the federal government has delegated program authority.

Ms. Goode's October 30, 1998 letter relies on a view of Title VI, embraced by EPA, which treats discriminatory *effects* as a violation of the law even without a finding of discriminatory *intent*. This is a hotly debated policy issue and the subject of contentious litigation in the federal courts.

The Select Steel decision confirms EPA's path in the direction of an overbroad, unfair reading of the law as evidenced by its "Interim Guidance," previously issued by OCR on February 5, 1998. Stephen B. Huebner of the Center for the Study of American Business describes the nature and scope of this guidance as follows:

This guidance document affirms the idea that a discriminatory effect standard should be applied to the evaluation of environmental permits issued by state and local agencies that receive funding from the EPA. It outlines five steps for OCR to use in determining whether the effects of a permitting decision create a disparate impact 'on persons protected under Title VI.' However, the document does little to clarify what constitutes a disparate impact, nor does it clarify how to determine whether affected populations are of a particular racial or ethnic group. This leaves OCR with considerable leeway in making a disparate impact determination.

Since the Guidance left open, *inter alia*, the question as to what factual circumstances amount to disparate impact, the Select Steel decision is a significant development in the evolution of EPA's position.

## *Now for the Good News*

Fortunately, OCR, in applying flawed legal principles to the facts at hand, came to the right decision:

In this case, EPA did not base its findings on whether the effects would be disparate since the effects did not rise to the level of 'adverse.' After reviewing all the facts in this case, OCR has found that neither the complainants' concerns regarding air quality nor those regarding the opportunity for public participation rise to the level of a discriminatory effect within the meaning of Title VI and EPA's implementing regulations.

The OCR reasoned that, in the absence of any "adverse" effects, the matter of disparate impact was beside the point. It considered the potential adverse effect from the permitted facility in the context of "the facts and totality of the circumstances" of the case.

Absolutely crucial to OCR's finding of no adverse effects was the role of the National Ambient Air Quality Standards (NAAQS), in the permitting of Select Steel's mill, at least on the issues relating to volatile organic compounds as precursors for ozone and lead.

Under the federal Clean Air Act, as amended, EPA established NAAQS which define the maximum permissible concentrations for certain "criteria" pollutants including ozone and lead. These standards were established to protect public health and are monitored on a county-by-county basis. They are the basis for permitting decisions for the criteria pollutants, made by regulatory agencies such as MDEQ. They differ from technology-based standards, which do not use an explicit health-based criteria in other areas of air and water regulation.

Regarding the matter of VOCs as precursors for ozone, OCR determined that the emissions from the proposed Select Steel facility would not effect the area's compliance with the NAAQS for ozone:

The NAAQS for ozone is a health-based standard which has been set at a level that is presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area; therefore, there is no affected population which suffers 'adverse' impacts within the meaning of Title VI resulting from the incremental VOC emissions from the proposed Select Steel facility. Therefore, EPA finds no violation of Title VI or EPA's implementing regulations associated with VOCs as ozone precursors.

The OCR also disregarded claims of discriminatory effect for failure to require immediate VOC monitoring, since MDEQ was authorized under EPA regulations to allow for a one-year delay. In other words, post-construction monitoring could be required by MDEQ as it "determines is necessary."

The OCR handled the lead issue in an identical fashion. It treated the NAAQS for lead as the health-based metric for assessing the sufficiency of MDEQ's permitting decisions. It concluded that the permitted emissions would not violate the NAAQS for lead. Moreover, it credited MDEQ for considering relevant data on children's blood levels in response to community concerns. The OCR found "no clear evidence of a prevalence of pre-existing lead levels of concern in the area most likely to be affected by emissions from the proposed facility."

Regarding the matter of airborne toxics, OCR reviewed information in the permit application, EPA's Toxic Release Inventory (TRI), and other MDEQ documents. Again, it found MDEQ's analysis to have adequately addressed the matter of adverse effects under state air toxics regulations. Because it found no adverse effects, no violation of Title VI or EPA's regulations occurred.

The OCR also upheld the MDEQ decision not to require continuous emissions monitoring systems for dioxin because EPA had not promulgated any performance specifications. Again, no violation of Title VI was found.

Finally, OCR found no basis to claims that MDEQ's public notice and participation process was discriminatory. This permit review took five months versus an average of one and a half months. There was no misconduct found on the part of a former MDEQ employee working for Select Steel's consultant. Notice was published in three local newspapers rather than just one as required by the rules. The mailing lists and location of the public hearing all were reasonable in the circumstances.

## *Future Direction?*

Basically, OCR upheld the integrity of EPA's own statutes and rules as well as those implemented by the state of Michigan and approved by EPA. The OCR explicitly relied on the health-based NAAQS, but it also gave great weight to other regulations not specifically grounded in science.

The Select Steel decision is a welcome, if puzzling, milestone in the environmental justice debate. In upholding a permitting decision made in compliance with EPA's rules and regulations, it avoided more ambitious or exotic applications of disparate impact or discriminatory effect analysis. Moreover, it affirms health-based standards, i.e., the NAAQS, and upholds the scientific basis for the regulatory system.

Yet, the reasoning of the decision could be viewed as a circular argument: environmental justice is no more than the sum of the parts of existing laws and regulations. Surely, the proponents of environmental justice will resist this benign interpretation of Title VI and EPA's interim guidance, no matter how sound it may be on public policy grounds.

Moreover, an application of flawed legal principles to a different set of facts may yield a less satisfactory outcome than occurred in the Select Steel matter. The Select Steel decision may be viewed as a significant tactical victory, but not a strategic one. Without either a legislative or judicial determination of the necessity of a finding of discriminatory intent in an environmental justice claim, there will remain a dark cloud over environmental permitting decisions in the days ahead.<sup>1</sup>

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<sup>1</sup>On the regulatory front, however, there may be new signs that this dark cloud is slowly lifting. During a November 19, 1998 meeting, EPA Administrator Browner and OCR Director Goode gave some clarification on the scope of Title VI investigations. Ms. Browner stated at the meeting that if a state's permitting program does not include a review of factors such as housing depreciation or other social issues, then OCR will not consider those issues in a Title VI complaint investigation. However, if a state opts to include such secondary impacts in their permitting program, OCR will consider those factors in a Title VI investigation.