

INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS

Introduction

This interim guidance is intended to provide a framework for the processing by EPA's Office of Civil Rights (OCR) of complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI),¹ alleging discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding.

In the past, the Title VI complaints filed with EPA typically alleged discrimination in access to public water and sewerage systems or in employment practices. This interim guidance is intended to update the Agency's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discrimination in the environmental permitting context.

As reflected in this guidance, Title VI environmental permitting cases may have implications for a diversity of interests, including those of the recipient, the affected community, and the permit applicant or permittee. EPA believes that robust stakeholder input is an invaluable tool for fully addressing Title VI issues during the permitting process and informally resolving Title VI complaints when they arise.

Background

No 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.

– Title VI

On February 11, 1994, President Clinton issued Executive Order 12,898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations." The Presidential memorandum accompanying that Order directs Federal agencies to ensure compliance with the nondiscrimination requirements of Title VI for all Federally-funded programs and activities that affect human health or the environment. While Title VI is inapplicable to EPA actions, including EPA's issuance of permits, Section 2-2 of Executive Order 12,898 is designed to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. Accordingly, EPA is committed to a policy of nondiscrimination in its own permitting programs.

¹ 42 U.S.C. §§ 2000d to 2000d-7.

Title VI itself prohibits intentional discrimination. The Supreme Court has ruled, however, that Title VI authorizes Federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory *effects*. Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating.² Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.

EPA awards grants on an annual basis to many state and local agencies that administer continuing environmental programs under EPA's statutes. As a condition of receiving funding under EPA's continuing environmental program grants, recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants. EPA's Title VI regulations define a "[r]ecipient" as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient"³ Title VI creates for recipients a nondiscrimination obligation that is contractual in nature in exchange for accepting Federal funding. Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as any EPA funding is extended.⁴

Under amendments made to Title VI by the Civil Rights Restoration Act of 1987,⁵ a "program" or "activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance.⁶ Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the

² Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, *The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964*, (July 14, 1994).

³ 40 C.F.R. § 7.25 (1996). Title VI applies to Indian Tribes as EPA recipients only when the statutory provision authorizing the Federal financial assistance is not exclusively for the benefit of Tribes. Otherwise, Tribes are exempt from Title VI.

⁴ 40 C.F.R. § 7.80(a)(2)(iii)(1996).

⁵ Pub. L. No. 100-259, 102 Stat. 28 (1988); S. Rep. No. 64 at 2, 11-16, 100th Cong., *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3-4, 13-18.

⁶ 42 U.S.C. § 2000d-4a.

actions they take under programs that do not derive their authority from EPA statutes (*e.g.*, state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA.

In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding.⁷ EPA also may use any other means authorized by law to obtain compliance, including referring the matter to the Department of Justice (DOJ) for litigation.⁸ In appropriate cases, DOJ may file suit seeking injunctive relief. Moreover, individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies.⁹

Overview of Framework for Processing Complaints

While this guidance is directed at the processing of discriminatory effects allegations, as a general proposition, Title VI complaints alleging either discriminatory intent and/or discriminatory effect in the context of environmental permitting will be processed by OCR under EPA's Title VI regulations at 40 C.F.R. Part 7. The steps that the Agency will follow in complaint processing are described below. EPA's Title VI regulations encourage the informal resolution of all complaints with the participation of all affected stakeholders (see step 8 below).

1. Acceptance of the Complaint

Upon receiving a Title VI complaint, OCR will determine whether the complaint states a valid claim. If it does, the complaint will be accepted for processing within twenty (20) calendar days of acknowledgment of its receipt, and the complainant and the EPA recipient will be so notified. If OCR does not accept the complaint, it will be rejected or, if appropriate, referred to another Federal agency. 40 C.F.R. § 7.120(d)(1).

⁷ 40 C.F.R. §§ 7.115(e), 7.130(b)(1996); *Id.* at 7.110(c).

⁸ 42 U.S.C. § 2000d-1; 40 C.F.R. § 7.130(a).

⁹ Chester Residents Concerned for Quality Living v. Seif, No. 97-1125, U.S. App. LEXIS 36797 (3d Cir. Dec. 30, 1997).

2. Investigation/Disparate Impact Assessment

Once a complaint is accepted for processing, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population. If, based on its investigation, OCR concludes that there is no disparate impact, the complaint will be dismissed. If OCR makes an initial finding of a disparate impact, it will notify the recipient and the complainant and seek a response from the recipient within a specified time period. Under appropriate circumstances, OCR may seek comment from the recipient, permittee, and/or complainant(s) on preliminary data analyses before making an initial finding concerning disparate impacts.

3. Rebuttal/Mitigation

The notice of initial finding of a disparate impact will provide the recipient the opportunity to rebut OCR's finding, propose a plan for mitigating the disparate impact, or to "justify" the disparate impact (see step 4 below regarding justification). If the recipient successfully rebuts OCR's finding, or, if the recipient elects to submit a plan for mitigating the disparate impact, and, based on its review, EPA agrees that the disparate impact will be mitigated sufficiently pursuant to the plan, the parties will be so notified. Assuming that assurances are provided regarding implementation of such a mitigation plan, no further action on the complaint will be required.

4. Justification

If the recipient can neither rebut the initial finding of disparate impact nor develop an acceptable mitigation plan, then the recipient may seek to demonstrate that it has a substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact. Even where a substantial, legitimate justification is proffered, OCR will need to consider whether it can be shown that there is an alternative that would satisfy the stated interest while eliminating or mitigating the disparate impact.

5. Preliminary Finding of Noncompliance

If the recipient fails to rebut OCR's initial finding of a disparate impact and can neither mitigate nor justify the disparate impact at issue, OCR will, within 180 calendar days from the start of the complaint investigation, send the recipient a written notice of preliminary finding of noncompliance, with a copy to the grant award official (Award Official) and the Assistant Attorney General for Civil Rights. OCR's notice may include recommendations for the recipient to achieve voluntary compliance and, where appropriate, the recipient's right to engage in voluntary compliance negotiations. 40 C.F.R. § 7.115(c).

6. Formal Determination of Noncompliance

If, within fifty (50) calendar days of receipt of the notice of preliminary finding, the recipient does not agree to OCR's recommendations or fails to submit a written response demonstrating that OCR's preliminary finding is incorrect or that voluntary compliance can be achieved through other steps, OCR will issue a formal written determination of noncompliance, with a copy to the Award Official and the Assistant Attorney General for Civil Rights. 40 C.F.R. § 7.115(d).

7. Voluntary Compliance

The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance within which to come into voluntary compliance. 40 C.F.R. § 7.115(e). If the recipient fails to meet this deadline, OCR will start procedures to deny, annul, suspend, or terminate EPA assistance in accordance with 40 C.F.R. § 7.130(b) and consider other appropriate action, including referring the matter to DOJ for litigation.

8. Informal Resolution

EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable. 40 C.F.R. § 7.120(d)(2). Therefore, OCR will discuss, at any point during the process outlined above, offers by recipients to reach informal resolution, and will, to the extent appropriate, endeavor to facilitate the informal resolution process and involvement of affected stakeholders. Ordinarily, in the interest of conserving EPA investigative resources for truly intractable matters, it will make sense to encourage dialogue at the beginning of the investigation of complaints accepted for processing. Accordingly, in notifying a recipient of acceptance of a complaint for investigation, OCR will encourage the recipient to engage the complainant(s) in informal resolution in an effort to negotiate a settlement.

Rejecting or Accepting Complaints for Investigation

It is the general policy of OCR to investigate all administrative complaints that have apparent merit and are complete or properly pleaded. Examples of complaints with no apparent merit might include those which are so insubstantial or incoherent that they cannot be considered to be grounded in fact.

A complete or properly pleaded complaint is:¹⁰

- 1) in writing, signed, and provides an avenue for contacting the signatory (*e.g.*, phone number, address);
- 2) describes the alleged discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act of intentional discrimination or one that has the effect of discriminating on the basis of race, color, or national origin);
- 3) filed within 180 calendar days of the alleged discriminatory act(s)¹¹; and
- 4) identifies the EPA recipient that took the alleged discriminatory act(s).

EPA's Title VI regulations contemplate that OCR will make a determination to accept, reject, or refer (to the appropriate Federal agency) a complaint within twenty (20) calendar days of acknowledgment of its receipt. 40 C.F.R. § 7.120(d)(1). Whenever possible, within the twenty-day period, OCR will establish whether the person or entity that took the alleged discriminatory act is in fact an EPA recipient as defined by 40 C.F.R. § 7.25. If the complaint does not specifically mention that the alleged discriminatory actor is an EPA financial assistance recipient, OCR may presume so for the purpose of deciding whether or not to accept the complaint for further processing.

Timeliness of Complaints

Under EPA's Title VI regulations a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). EPA interprets this regulation to mean that complaints alleging discriminatory effects resulting from issuance of a permit must be filed with EPA within 180 calendar days of issuance of the final permit. However, OCR may waive the 180-day time limit for good cause. 40 C.F.R. § 7.120(b)(2).

OCR will determine on a case-by-case basis whether to waive the time limit for good cause. EPA believes that, in order to encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process, thereby fostering early resolution of Title VI issues, it is appropriate to consider in making a good cause determination a complainant's pursuit

¹⁰ EPA's Title VI regulations require that the complaint be in writing, describe the alleged discriminatory acts that violate the regulations, and be filed within 180 calendar days of the alleged discriminatory act(s). 40 C.F.R. § 7.120(b)(1),(2). The criteria listed above satisfy these regulatory requirements.

¹¹ Also, see discussion below on Timeliness of Complaints.

of its Title VI concerns through the recipient's administrative appeal process. Under such circumstances and after considering other factors relevant to the particular case, OCR may waive the time limit if the complaint is filed within a reasonable time period (*e.g.*, 60 calendar days) after the conclusion of the administrative appeal process.

In addition, it is OCR's policy not to reject automatically complaints challenging permits where such complaints are filed prior to final permit issuance by the recipient. Rather, OCR should provide the recipient with the information contained in the complaint for consideration in the permit issuance process. OCR also may notify the complainant that the complaint is premature, but that OCR is keeping the complaint on file in an inactive status pending issuance of a final permit by the recipient. Should the recipient issue a final permit, OCR could initiate an investigation if OCR or the complainant believe that issuance of the final permit may be discriminatory.

Permit Modifications

EPA believes that permit modifications that reduce adverse impacts and improve the environmental operation of the facility should be encouraged. Similarly, the Agency does not want to discourage merely administrative modifications, such as a facility name change, or otherwise beneficial modifications that are neutral in terms of their impact on human health or the environment. Because such modifications do not cause or add to adverse impacts, Title VI discriminatory effects claims based on them are likely to be dismissed.

Permit modifications that result in a net increase of pollution impacts, however, may provide a basis for an adverse disparate impact finding, and, accordingly, OCR will not reject or dismiss complaints associated with permit modifications without an examination of the circumstances to determine the nature of the modification.

In the permit modification context (as opposed to permit renewals), the matter under consideration by the recipient is the modified operation. Accordingly, the complaint must allege, and, to establish a disparate impact OCR must find, adverse impacts specifically associated with the modification.

Investigations of Allegedly Discriminatory Permit Renewals

Generally, permit renewals should be treated and analyzed as if they were new facility permits, since permit renewal is, by definition, an occasion to review the overall operations of a permitted facility and make any necessary changes. Generally, permit renewals are not issued without public notice and an opportunity for the public to challenge the propriety of granting a renewal under the relevant environmental laws and regulations.

Impacts and the Disparate Impact Analysis

Evaluations of disparate impact allegations should be based upon the facts and totality of the circumstances that each case presents. Rather than use a single technique for analyzing and evaluating disparate impact allegations, OCR will use several techniques within a broad framework. Any method of evaluation chosen within that framework must be a reasonably reliable indicator of disparity.

In terms of the types of impacts that are actionable under Title VI in the permitting context, OCR will, until further notice, consider impacts cognizable under the recipient's permitting program in determining whether a disparate impact within the meaning of Title VI has occurred. Thus, OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program.¹²

The general framework for determining whether a disparate impact exists has five basic steps.

Step 1: Identifying the Affected Population

The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity. The impacts investigated must result from the permit(s) at issue.

The adverse impacts from permitted facilities are rarely distributed in a predictable and uniform manner. However, proximity to a facility will often be a reasonable indicator of where impacts are concentrated. Accordingly, where more precise information is not available, OCR will generally use proximity to a facility to identify adversely affected populations. The proximity analysis should reflect the environmental medium and impact of concern in the case.

¹² Even where a recipient's authority to regulate is unclear concerning cumulative burden or discriminatory permitting pattern scenarios (see step 3 below), OCR will nonetheless consider impacts measured in these terms because Title VI is a Federal cross-cutting statute that imposes independent, nondiscrimination requirements on recipients of Federal funds. As such, Title VI, separate from and in addition to the strictures of state and local law, both authorizes and requires recipients to manage their programs in a way that avoids discriminatory cumulative burdens and distributional patterns. Thus, while Title VI does not alter the substantive requirements of a recipient's permitting program, it obligates recipients to implement those requirements in a nondiscriminatory manner as a condition of receiving Federal funds.

Step 2: Determining the Demographics of the Affected Population

The second step is to determine the racial and/or ethnic composition of the affected population for the permitted facility at issue in the complaint. To do so, OCR uses demographic mapping technology, such as Geographic Information Systems (GIS). In conducting a typical analysis to determine the affected population, OCR generates data estimating the race and/or ethnicity and density of populations within a certain proximity from a facility or within the distribution pattern for a release/impact based on scientific models. OCR then identifies and characterizes the affected population for the facility at issue. If the affected population for the permit at issue is of the alleged racial or ethnic group(s) named in the complaint, then the demographic analysis is repeated for each facility in the chosen universe(s) of facilities discussed below.

Step 3: Determining the Universe(s) of Facilities and Total Affected Population(s)

The third step is to identify which other permitted facilities, if any, are to be included in the analysis and to determine the racial or ethnic composition of the populations affected by those permits. There may be more than one appropriate universe of facilities. OCR will determine the appropriate universe of facilities based upon the allegations and facts of a particular case. However, facilities not under the recipient's jurisdiction should not be included in the universe of facilities examined.

If in its investigation OCR finds that the universe of facilities selected by the complainant is not supported by the facts, OCR will explain what it has found and provide the complainant the opportunity to support the use of its proposed universe. If the complainant cannot adequately support the proposed universe, then OCR should investigate a universe of facilities based upon the facts available and OCR's reasonable interpretation of the theory of the case presented. Once the appropriate universe(s) of facilities is determined, the affected population for each facility in the universe should be added together to form the Total Affected Population.

Ordinarily, OCR will entertain cases only in which the permitted facility at issue is one of several facilities, which together present a cumulative burden or which reflect a pattern of disparate impact.¹³ EPA recognizes the potential for disparate outcomes in this area because most permits *control* pollution rather than prevent it altogether. Consequently, permits that satisfy the base public health and environmental protections contemplated under EPA's programs nonetheless

¹³ In some rare instances, EPA may need to determine whether the impacts of a single permit, standing alone, may be considered adequate to support a disparate impact claim. While such a case has not yet been presented to EPA, it might, for example, involve a permitted activity that is unique (*i.e.*, "one of a kind") under a recipient's program.

bear the potential for discriminatory effects where residual pollution and other cognizable impacts are distributed disproportionately to communities with particular racial or ethnic characteristics. Based on its experience to date, the Agency believes that this is most likely to be true either where an individual permit contributes to or compounds a preexisting burden being shouldered by a neighboring community, such that the community's cumulative burden is disproportionate when compared with other communities; or where an individual permit is part of a broader pattern pursuant to which it has become more likely that certain types of operations, with their accompanying burdens, will be permitted in a community with particular racial or ethnic characteristics.

Step 4: Conducting a Disparate Impact Analysis

The fourth step is to conduct a disparate impact analysis that, at a minimum, includes comparing the racial or ethnic characteristics within the affected population. It will also likely include comparing the racial characteristics of the affected population to the non-affected population. This approach can show whether persons protected under Title VI are being impacted at a disparate rate. EPA generally would expect the rates of impact for the affected population and comparison populations to be relatively comparable under properly implemented programs. Since there is no one formula or analysis to be applied, OCR may identify on a case-by-case basis other comparisons to determine disparate impact.

Step 5: Determining the Significance of the Disparity

The final phase of the analysis is to use arithmetic or statistical analyses to determine whether the disparity is significant under Title VI. OCR will use trained statisticians to evaluate disparity calculations done by investigators. After calculations are informed by expert opinion, OCR may make a *prima facie* disparate impact finding, subject to the recipient's opportunity to rebut.

Mitigation

EPA expects mitigation to be an important focus in the Title VI process, given the typical interest of recipients in avoiding more draconian outcomes and the difficulty that many recipients will encounter in justifying an "unmitigated," but nonetheless disparate, impact. In some circumstances, it may be possible for the recipient to mitigate public health and environmental considerations sufficiently to address the disparate impact. The sufficiency of such mitigation should be evaluated in consultation with experts in the EPA program at issue. OCR may also consult with complainants. Where it is not possible or practicable to mitigate sufficiently the public health or environmental impacts of a challenged permit, EPA will consider "supplemental mitigation projects" (SMPs), which, when taken together with other mitigation efforts, may be viewed by EPA as sufficient to address the disparate impact. An SMP can, for example, respond

to concerns associated with the permitting of the facility raised by the complainant that cannot otherwise be redressed under Title VI (*i.e.*, because they are outside those considerations ordinarily entertained by the permitting authority).

Justification

If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to “justify” the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient. While determining what constitutes a sufficient justification will necessarily turn on the facts of the case at hand, OCR would expect that, given the considerations described above, merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity. Because the interests of a state or local environmental agency are necessarily influenced and informed by the broader interest of the government of which it is a part, OCR will entertain justifications based on broader governmental interests (*i.e.*, interests not limited by the jurisdiction of the recipient agency). While the sufficiency of the justification will necessarily depend on the facts of the case at hand, the types of factors that may bear consideration in assessing sufficiency can include, but are not limited to, the seriousness of the disparate impact, whether the permit at issue is a renewal (with demonstrated benefits) or for a new facility (with more speculative benefits), and whether any of the articulated benefits associated with a permit can be expected to benefit the particular community that is the subject of the Title VI complaint.

Importantly, a justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations. Less discriminatory alternatives should be equally effective in meeting the needs addressed by the challenged practice. Here, again, mitigation measures should be considered as less discriminatory alternatives, including additional permit conditions that would lessen or eliminate the demonstrated adverse disparate impacts.

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