

# Title VI Compliance at the Alabama Department of Environmental Management



Presented to the Alabama Environmental Management Commission on August 16, 2013

# Title VI of 1964 Civil Rights Act

- 1) 42 U.S.C. § 2000d prohibits recipients of federal financial assistance from *intentionally* discriminating on the basis of race, color, or national origin in their programs or activities.
- 2) 42 U.S.C. § 2000d-1 authorizes federal agencies to proscribe, by rule, activities of recipients of federal financial assistance that have a disparate *impact* on racial or other protected groups, even though such activities are not intentionally discriminatory.

# Prohibitions - Summary

40 C.F.R. Part 7 prohibits EPA-funded agencies from taking actions, including permitting actions, that are *intentionally discriminatory* or have a *discriminatory effect* based on race, color, or national origin.

# Specific Prohibitions

"No person shall . . . be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, . . . ."

*40 C.F.R. § 7.30*

"A recipient shall not use criteria or methods of administering its program or activity which have the *effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex . . . ."

*40 C.F.R. § 7.35(b)*

# Covered Programs or Activities

“ [U]nless 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), . . . are part of a program or activity covered by EPA’s Title VI regulations if the recipient receives any funding from EPA.”

*Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) at 2-3; *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667, 39697 (2000).

# Prima Facie Elements of Violation

In order to establish a prima facie case of violation of 40 C.F.R. § 7.35(b), EPA must determine that

1. The “accused” is a recipient of EPA financial assistance;
2. a causal connection exists between the recipient’s action or practice and the alleged impact;
3. the alleged impact is “adverse;” and
4. the alleged impact disparately affects an individual or group protected under Title VI.

# Neutral Policies Not A Defense

“Facially-neutral policies or practices that result in *discriminatory effects* violate EPA’s Title VI regulations . . . .”

*Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) at 2; *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667, 39688 (2000)

# Limited Justification Defense

“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.**”

“Merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification.”

“[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.”

*Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) at 11. See *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667, 39683 (2000).



# Remedies

Actions available to EPA to obtain compliance.

*“General.* If compliance with this part cannot be assured by *informal means*, EPA may *terminate or refuse to award or to continue assistance*. EPA may also use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.”

*40 C.F.R. § 7.130(a)*

# FY 2013 Federal Grants to ADEM

(Budgeted)

Federal Grants	\$21,684,352
Federal Grants – Clean Water SRF	\$20,034,836
Federal Grants – Public Water SRF	\$12,000,000
TOTAL	\$53,719,188

# Preaward Compliance Review

*“Review of compliance information. Within EPA's application processing period, the OCR will determine whether the applicant is in compliance with this part and inform the Award Official. This determination will be based on the submissions required by § 7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested from the applicant, local government officials, or interested persons or organizations, . . . . The OCR may also conduct an on-site review only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application.”*

*40 C.F.R. § 7.110(a)*

# Postaward Compliance Review

*“Periodic review. The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.”*

*40 C.F.R. § 7.115(a)*

# Historical Financial Assistance Agreements

As the duly authorized representative of the applicant, I certify that the applicant:

\* \* \*

Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88- 352) which prohibits discrimination on the basis of race, color or national origin; . . . .

*Standard Form 424B (7-97)*

# New

## Financial Assistance Agreements

Effective Jan. 23, 2013

In accepting this assistance agreement, the recipient acknowledges it has an *affirmative obligation to implement effective Title VI compliance programs* and ensure that its actions do not involve discriminatory treatment and do not have *discriminatory effects* even when facially neutral. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.

# EPA Draft Recommendations for Recipients

As a recipient, you . . . should consider integrating the following activities into permitting programs to help identify and resolve issues that could lead to the filing of Title VI complaints:

1. Staff training—to help you meet your Title VI responsibilities;
2. Encourage effective public participation and outreach—to provide permitting and public participation processes that occur early, and are inclusive and meaningful;
3. **Conduct adverse impact and demographic analyses**—to analyze new and existing sources, stressors, and adverse impacts with relevant demographic information, especially potential cumulative adverse impacts, to provide confidence that Title VI concerns are identified and appropriately addressed;
4. Encourage intergovernmental involvement—to bring together all agencies and parties that may contribute to identifying and addressing stakeholder concerns to reach innovative and comprehensive resolutions;
5. **Participate in alternative dispute resolution**—to involve both the community and recipient in an informal process to resolve Title VI concerns;
6. **Reduce or eliminate the alleged adverse disparate impact(s)**—to reduce or eliminate identified or potential adverse human health or environmental impacts; and
7. Evaluate Title VI activities—to identify progress and areas in need of improvement.

# Public Records Request

sent via electronic mail July 24, 2013

“Please provide a copy of any written Title VI compliance program(s) that ADEM has and/or is implementing to ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral.”

Receipt acknowledged by ADEM on August 2, 2013



# Relevant AEMC Authority

1. To select a director for the Department of Environmental Management and *to advise the director on environmental matters* which are within the department's scope of authority;
2. *To establish, adopt, promulgate*, modify, repeal and suspend *any rules, regulations or environmental standards* for the department which may be applicable to the state as a whole or any of its geographical parts;
3. *To develop environmental policy for the state*

*Ala. Code § 22-22A-6(a)*

# Relevant ADEM Authority

*Report, as appropriate, to the Governor and to the Legislature on the programs and activities of the department and to recommend needed changes in legislation or administrative practice.*

*Ala. Code § 22-22A-5(6)*

# Recommendations

1. Develop and implement an effective Title VI compliance program. To avoid the crippling loss of federal funding, ADEM should proactively develop and implement an effective Title VI compliance program that ensures that its actions do not involve discriminatory effects. *This program must institutionalize disparate impact analyses of proposed agency actions.*
2. Secure necessary legislative authority. Additional Legislative authority may be required to authorize ADEM to consider disparate impact issues in making permit decisions. See e.g., *East Central Alabama Alliance for Quality Living and The Town of Loachapoka v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket Nos. 03-01 and 03-02, 2003 AL ENV LEXIS 6, \*28 (Mar. 13, 2003) ("ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the granting of a permit."); *Holmes v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, \*30-31 (Feb. 17, 1998) ("The governing statutes and regulations do not confer on the Department any power to consider [the racial makeup of the neighborhood] in deciding whether or not to issue a permit.").