

EPA Publishes New Draft Guidance on Civil Rights in Environmental Permitting

The U.S. Environmental Protection Agency has published draft guidance explaining to federally funded state environmental agencies how to comply with Title VI of the Civil Rights Act of 1964. The draft guidance also explains EPA's process for handling civil rights complaints.

State and local agencies that receive federal funding to operate environmental permit programs are prohibited from discriminating in their permit decisions or in the public participation process on the basis of race, color, and national origin. Title VI authorizes EPA to adopt regulations prohibiting intentional discrimination. In addition, the U.S. Supreme court has stated that federal agencies may also adopt rules that prohibit discriminatory effects.

Federal agencies annually distribute an estimated \$900 billion in federal assistance. State and local aid recipients can lose federal funding if they do not comply with Title VI.

In 1980, President Jimmy Carter ordered federal agencies to issue guidance, directives, and regulations for Title VI compliance and to coordinate investigations of possible violations with the U.S. Department of Justice. EPA issued the new guidance to clarify and improve upon previous (1998) guidance to environmental agencies and to establish a blueprint for the complaint process. EPA issued the draft guidance in two parts:

- Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance); and
- Draft Guidance for EPA Assistance Recipients Administering Environmental Programs (Draft Recipient Guidance).

65 Fed. Reg. 39650 (June 27, 2000).

The Investigative Process

EPA regulations prohibit programs that receive direct or indirect EPA assistance from discriminating in permitting or the public participation process on the basis of race, color, national origin or sex. 40 C.F.R. §§ 7.30 and 7.35. In addition, any recipient that has discriminated in the past must take affirmative steps to prevent such discrimination in the future and provide remedies to those who have been injured by the discrimination.

When EPA's Office of Civil Rights (OCR) receives a complaint that a recipient of federal aid has violated Title VI, OCR institutes a seven-step process for investigating and resolving the complaint.

1. *Acknowledgment.* EPA acknowledges receipt of the complaint within 5 days of receipt. The aid recipient, once notified by EPA, then has 30 days to reply.

2. *Acceptance, Rejection, or Referral.* EPA must notify the complainant and the recipient within 20 days of acknowledging the complaint whether the complaint meets EPA's threshold "jurisdictional criteria." EPA may then accept, reject, or refer the complaint to another federal agency that has jurisdiction. EPA may also ask the complainant to clarify the complaint. If EPA requests clarification and the complainant does not respond, EPA may reject allegations that are not clearly explained.
3. *Investigation.* EPA will begin the investigative process by trying to resolve complaints informally between the complainant and the recipient. If informal resolution fails, EPA will conduct a factual investigation to find out whether the permit at issue had a disparate impact. The investigation may include an Adverse Disparate Impact Analysis to determine whether the permit action actually caused a disparate impact on an affected minority. EPA has 180 days to complete its investigation and decide whether or not there has been a discriminatory effect.
4. *Preliminary Finding of Noncompliance.* If EPA considers the information found during its investigation sufficient to indicate that the recipient violated Title VI, EPA will send the complainant and recipient a Preliminary Finding of Noncompliance. The findings will include recommendations by EPA on how to correct the problem. The aid recipient then has 50 days to give EPA information to rebut the finding or propose alternatives to EPA's recommendations.
5. *Formal Finding of Noncompliance.* After EPA receives the recipient's rebuttal or alternative recommendations, EPA has 14 days to decide whether to issue a Formal Finding of Noncompliance. EPA will forward any Formal Finding of Noncompliance to the Justice Department's Assistant Attorney General for Civil Rights.
6. *Voluntary Compliance.* If a recipient does not correct a violation cited in a Formal Finding of Noncompliance within 10 days after the notice, EPA may act to suspend or terminate federal assistance or refer the matter to the Department of Justice for litigation.
7. *Hearing/Appeal Process.* A recipient that receives a Formal Finding of Noncompliance has 30 days to request a hearing before an administrative law judge (ALJ). The EPA Administrator may elect to review a determination by the ALJ and receive written statements from the parties. If the Administrator chooses not to review the ALJ's decision, the decision becomes final. The Administrator may then elect to deny federal assistance to the recipient after submitting a report to Congress. The parties may then challenge EPA's findings in court.

Complainants have 180 days after an alleged violation occurs to file their complaints. The total process takes up to nine months from the time a complaint is filed with EPA's Office of Civil Rights to the time a Formal Finding of Noncompliance may be made.

EPA's draft guidance spells out in detail the information required in all complaints before the agency will consider complaints complete. The complaints must be coherently written and provide sufficient facts to justify an EPA investigation.

In addition, EPA will not consider complaints that are premature, such as before a final permit has been issued by the receiving agency. Moreover, EPA will dismiss complaints “without prejudice” if they are the subject of litigation or ongoing permit appeal processes. Dismissal without prejudice means that a complaint can be re-filed after the litigation or appeals have been concluded.

The draft guidance also includes detailed guidance on informal complaint resolution processes, and investigative procedures. In particular, the process used by EPA to conduct Adverse Disparate Impact Analysis is carefully laid out in the draft document. The draft guidance includes an extensive glossary of terms and a detailed flowchart describing the Title VI complaint process.

Recipient Guidance

The Draft Recipient Guidance provides a list of seven suggested activities that agencies receiving federal aid from EPA could use as part of a Title VI compliance strategy. EPA suggests that recipient agencies adopt the following activities as part of Title VI compliance programs:

1. Enhanced staff training;
2. Encouraging early and inclusive public participation in the permitting process;
3. Conducting adverse impact analyses to determine whether existing sources of pollution are contributing to cumulative adverse impacts that could be exacerbated by new permits;
4. Encouraging cooperation between various government agencies to facilitate identifying stakeholder concerns;
5. Using alternative dispute resolution techniques involving recipients and communities to resolve disparate impact concerns. Suggested approaches include facilitated dialogues to promote understanding, informal consensus-building processes, and mediation by third parties;
6. Taking steps to reduce alleged adverse disparate impacts by making procedural changes and implementing pollution reductions, cleanups, monitoring, emissions offsets, emissions caps, and emergency planning measures; and
7. Conducting self-assessments to evaluate recipient performance with respect to Title VI and identify areas for improvement.

EPA suggests that agencies adopt systematic programs to prevent discriminatory effects of permitting decisions. The EPA guidance lists three general approaches for systematic programs:

1. *A comprehensive approach to improve the entire permit process.* The comprehensive approach would integrate all of the seven suggested activities into a program to improve existing permit processes to address Title VI concerns;
2. *An area-specific approach to identify geographic locations where Title VI concerns may exist.* EPA's draft guidance encourages recipients to collaborate with communities, industry and other stakeholders in identifying geographic areas where disparate impacts can be addressed. EPA suggests that, in some cases, area-specific agreements may be developed with stakeholders to reduce or eliminate disparate impacts; and
3. *A case-by-case approach to resolve problems arising from specific permits.* Agencies could establish criteria for determining whether a particular permit action is likely to raise Title VI concerns. For each permit action, an agency would evaluate whether, based on these criteria, any or all of the listed activities should be employed. Alternatively, appropriate activities could be employed in response to comments received on specific permit applications or based upon prior experience with residents of the area affected by the permit. Where specific concerns are actually raised by residents, an alternative dispute resolution technique such as mediation could be employed to facilitate communication with residents and agreement on acceptable approaches to resolving those concerns.

The public comment period for the EPA draft guidance documents ends August 28, 2000.

Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000).

This article was prepared by Stuart J. Weiss, an associate in our Environmental Department, and previously appeared in the October, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.