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State of Oregon
Department of Environmental Quality

Memorandum

To: Yasmin Yorker
Office of Civil Rights

Date: August 22, 2000

CC: Annabelle Jaramillo, Citizen's Representative
Governor's Office

Robert E. Roberts, Executive Director
ECOS

From: Langdon Marsh
Director

Lang Marsh

Subject: EPA's Guidance for Investigating Title VI Administrative Complaints

Thank you for the opportunity to review the draft Guidance and submit written comments. In general, the guidance provides more definitions of key concepts than the Interim Guidance and provides more clarity on the process of investigating complaints. There are several important improvements including clarity that the filing of a complaint does not stay a permit action and that a recipient will not be held responsible for impacts outside the recipient's statutory authority. The Department still finds that the Guidance does not address some concerns previously raised. Additionally the draft Guidance raises several new concerns. The following comments identify flaws in the draft Guidance published on June 27, 2000.

1. The draft Guidance provides no certainty for recipients or complainants of what the process will be for investigating complaints. The Guidance states that the Office of Civil Rights **intends** to process complaints under the Guidance. Page 6 of the Guidance clearly states that EPA may decide to act at variance with the guidance.

2. Based on federal law, a complaint need not be based on the part of the permit that is federally funded. But the Guidance does not provide assurance that the impact must be caused by factors within the recipient's statutory authority. Instead on page 31, the Guidance states that "OCR would expect to determine ... are within the recipient's authority to consider [.]" The guidance should clearly state that if the stressor or impact is beyond the scope of the recipient's authority, then the complaint must be dismissed. EPA cannot require a recipient to regulate something that the recipient does not have the authority to regulate. For example the Guidance refers to unregulated sources being included in the measure of impact and in the remedy. Most likely if the source is unregulated, the recipient does not have authority to regulate the source.

Another concern is the breadth of the definition of 'authority". The language in the Guidance appears to allow a complaint to be based on broad, open-ended statements in statutes. It is not clear that the fact that a statutory authority may require a recipient 'to protect the public

health' will mean that all stressors that may affect public health can now be the basis of a complaint.

3. Timeliness of Complaints - Page 17 of the Guidance states that "a complaint must be filed within 180 calendar days of the alleged discriminatory act." While this language appears to create a jurisdictional requirement for the filing of a complaint, there are numerous exceptions to this requirement. Due to these inconsistencies, there is effectively no time limitation on filing of a complaint. See page 17 regarding issuance of permit and hearing date and use of the word "should" instead of " must". A complaint can allege a "continuing violation" so long as the act occurs within the 180 days. It is unclear what a 'continuing violation" is but if emissions are ongoing from a permitted source, it appears that a complaint can be filed regarding this source at any time during the source's life span so long as there are emissions from the source.

Additionally, since there is no guarantee that the investigation will be limited to the subject matter involved in the permit action and its effects, the entire permit is open to investigation regardless of the permit action at issue. Page 28 clearly states that OCR will not automatically dismiss complaints based on modifications that are purely administrative, reduce adverse impacts on the population, or improve a facility's environmental performance. A complaint in any of these situations should be dismissed without further investigation. The complaint should have to allege that the disparate impact is specifically associated with the recipient's action that is being challenged. Sources should not be discouraged from improving their operations due to possible Title VI challenges."

4. Jurisdictional Requirements - The jurisdictional requirements for filing a complaint are too low. The complaint requires a bare minimum of allegations including name and address of complainant, alleged discriminatory act, and identifies the recipient that took the alleged discriminatory act. The complainant does not have to be directly impacted by the adverse impact. Additionally the 180 days to file a complaint should be a jurisdictional requirement (see Comment #3). The complainant should also be required to allege the claimed adverse impact including the alleged population that is affected and the type of disparate impact. Of particular concern is the fact that the Guidance specifically states that the complaint can merely allege that the community is 'overburdened' without any basis and OCR will still investigate the complaint. This lack of requirements will only lead to frivolous complaints and wasted resources both for OCR and the recipient.

There are several problems with this clear information in the complaint. First it is unclear how the recipient is to file a response to a complaint that fails to allege the impact. Second responding to and investigating a complaint will require considerable resources on the part of the recipient and OCR. While the Department understands that information that the complainant needs to formulate an articulate complaint may be in the hands of the recipient, there should be at least a requirement that the type of impact must be alleged.

5. Timeframe for Compliance and Hearing - Once a determination of noncompliance is issued, the recipient has 10 days to achieve voluntary compliance. A modification to a permit requires notice to the public of the proposed modification, consideration of the public concerns

and then drafting of the modified permit. A revocation of a permit would also take considerable time. The guidance should be drafted to indicate that the recipient must be taking **significant steps** towards voluntary compliance within the 10 days.

A recipient has 30 days to request a hearing before an ALJ after a determination of noncompliance yet they only have 10 days to achieve voluntary compliance. A recipient must expend considerable resources to achieve compliance within the 10 days regardless of whether they agree with OCR's determination and later request a hearing. At a minimum, the time frame for requiring compliance and requesting a hearing should be the same. Additionally the filing of a request for a hearing should stay the requirement of achieving compliance until a final decision is made. Otherwise a recipient may be forced to expend resources toward compliance that, if OCR's determination is changed, will be unnecessary.

6. Informal Resolution - The Guidance calls for the resolution of most complaints to occur through informal resolution. Unfortunately both the complainant and the recipient may expend considerable time and resources on reaching an informal resolution only to have OCR reject that resolution. The Guidance states that OCR will not necessarily dismiss a complaint if an informal resolution is reached. If there is no incentive to participating in the informal process, why should a recipient take the time and resources to do so?

7. It is our understanding that EPA considers the "white" population to also be a protected race and that Title VI applies to all citizens of all races. Based on this interpretation and Comment #3 above, it is questionable whether a recipient will ever be able to site a particularly troublesome facility anywhere within a state without the risk of a complaint being filed. For example, the siting of a radioactive materials disposal site will have adverse impact on whatever population that lives near it as compared to the rest of the state. Since a finding of noncompliance can lead to removal of federal funding, this is a grave concern to recipients.

The Department appreciates all the work that EPA has put into address both our concerns and the advisory committee's recommendations. While the Department finds that the draft Guidance is greatly improved, there are still many issues that need to be resolved prior to its use by OCR staff. The Department is particularly concerned that there are no 'real' time limitations on filing a complaint nor is there any guarantee that either the basis of the complaint or the remedy will be limited to actions that a recipient has specific authority to address. Finally many timeframes within the guidance are still unworkable. The Department asks that substantial revisions be made in the Guidance prior to final issuance. If you should have any questions on our comments, please feel free to contact me at (503) 229-5301 or Susan Greco at (503) 229-5213.