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March 11, 2016

Via electronic submission to www.regulations.gov

Subject: *Non Discrimination in Programs or Activities Receiving
Federal Assistance from the Environmental Protection
Agency; Proposed Rule: Docket ID No. EPA-HQ-OA-2013-
0031*

The Environmental Council of States (ECOS) is the national non-profit, non-partisan association of state and territorial environmental agency leaders. ECOS, on behalf of states, appreciates the opportunity to review and provide input regarding the U.S. Environmental Protection Agency's (EPA) proposed rule, "*Non Discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency*," Docket ID No. EPA-HQ-OA-2-13-0031.

EPA is proposing to amend its regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI), Section 504 of the Rehabilitation Act of 1973 (Section 504), Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92-500), and the Age Discrimination Act of 1975 (Age Discrimination Act) in order to enable it to create a model civil rights program which can effectively enforce civil rights statutes in the environmental context. These statutes prohibit discrimination on the basis of race, color, national origin, (including discrimination based on language ability or limited English proficiency), disability, sex, and age in programs or activities that receive federal financial assistance. Applicants for and recipients of EPA assistance such as state environmental agencies are obligated to comply with Title VI and other nondiscrimination statutes as a condition of receiving EPA assistance. The proposed rulemaking notes that the package, as a whole, will increase transparency and accountability.

This rulemaking proposes to amend subpart D (Requirements for Applicants and Recipients) and subpart E (Agency Compliance Procedures) provisions regarding compliance information, post-award compliance reviews, and complaint investigations. This rulemaking also proposes to make a technical correction to subpart D to remove citations to expired Office of Management and Budget (OMB) control numbers and to place the current OMB control number for information collection requests under 40 C.F.R. Part 7 in the consolidated list of OMB approvals under the Paperwork Reduction Act in 40 C.F.R. Part 9.

As the proposed language notes, states, as applicants for and recipients of EPA financial assistance, already are obligated to comply with Title VI and other nondiscrimination statutes as a condition of receiving EPA assistance and take seriously this obligation.

ECOS is pleased to provide these comments to EPA on the proposed rule, specifically regarding proposed changes to regulations for recipients of federal financial assurance with regard to compliance reports, post-award compliance reviews, and deadline and technical changes related to complaint investigations.

I. Compliance Reports

EPA proposes to amend § 7.85(b) by deleting the following text describing when additional information will be sought from recipients—“where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance.” In this same regulatory section, the EPA also proposes deleting “and shall be accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist.”

In the cost analysis, EPA notes that,

“The EPA proposes requiring that the affected recipients file their compliance reports on a regular basis every three years. The EPA anticipates that this will be a regular document that will be updated, rather than being created anew by each affected recipient each time.” Further, “Recipients of EPA assistance will also be responsible for collecting such reports from any sub-recipients or contractors receiving EPA funds.”

“o The proposed regulation, 40 CFR 7.85(f), does not specifically identify what should be contained in compliance reports. However, it is assumed for purposes of this cost estimate that in response to a request for such a Compliance Report, the EPA would request information on a range of information that a recipient may submit to demonstrate compliance with its nondiscrimination obligations. Such a range may include, but not be limited to:

- Data and information about its public involvement initiatives;*
- Data and information about its limited English proficiency initiatives;*
- A list of pending lawsuits;*
- EPA Form 47004 information;*
- A log of discrimination complaints;*
- Reports of compliance reviews conducted by any other agencies;*
- A list of Title VI trainings completed by relevant staff;*
- A list of all subrecipients and documentation of its processes for monitoring sub-recipients;*
- Analyses about whether there are any adverse disparate effects or impacts fom its programs or activities.”*

Removing text linking EPA’s request for information with “a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist” may make it potentially more burdensome on recipients to comply with a request for information as less direction is provided for responding to EPA’s information request. The revised language provides no limitations on how frequently additional information may be requested.

The cost analysis indicates a potential list of information that a recipient may submit to EPA. Further, the docket includes language that EPA may require affected recipients to file compliance reports on a regular basis every three years and that this will be regular document that is updated rather than being created anew each time. Having a common format and understanding what information is expected on a regular cycle will reduce state reporting burden. ECOS also recommends that EPA indicate not more than annual reporting unless performance issues indicate additional reporting should be sought. ECOS suggests that EPA add language to the proposed rule, drawing from the cost analysis report, to detail expected information that may be requested and add language indicating a three-year frequency unless a recipient has validated performance challenges in meetings its Title VI obligations.

In the cost analysis, EPA also notes,

“This proposed modification makes clear that compliance reports would be required at such times and in such form and containing such information as the EPA may determine to be necessary to enable the EPA to ascertain whether the recipient has complied or is complying with 40 CFR Part 7. Recipients of EPA assistance will also be responsible for collecting such reports from any sub-recipients or contractors receiving EPA funds. Affected recipients will not be responsible for reporting until after a guidance document has been issued by the EPA after extensive consultation with external stakeholders.”

ECOS requests that state environmental agencies be part of EPA’s consultation with external stakeholders as it develops its reporting guidance document.

II. Post-Award Compliance Reviews

The proposed rule notes that EPA solicits comments on how to schedule and conduct compliance reviews in ways that minimize unnecessary burdens to both EPA and the recipients.

Frequency

The proposed rule notes OCR may “periodically” conduct compliance reviews.

§ 7.115 Postaward compliance.

■ 5. Amend § 7.115 by revising paragraphs (a) and (c)(1) to read as follows:

(a) *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.

No limitation is provided on the frequency of such post-award compliance review, nor is a clear and objective standard set to guard against arbitrary reviews. ECOS recommends that EPA add language indicating a period of not more than annual for conducting a compliance review unless a recipient has validated performance challenges in meetings its Title VI obligations.

III. Deadline and Technical Changes

Within the proposed rule, certain internal EPA deadlines for complaint processing are slated for removal as follows:

1. The provision to notify complainant and recipient of receipt of a complaint against the recipient within 5-calendar days under 40 C.F.R. §120(c);
2. The deadline for the review of a complaint for acceptance, rejection, or referral to the appropriate Federal agency under 40 C.F.R. §7.120(d)(1) within 20-calendar days of acknowledgement of the complaint; and
3. The 180-calendar day deadline in 40 C.F.R. §7.115(c)(1) for completing compliance reviews and complaint investigations.

§ 7.120 Complaint investigations.

The OCR will make a prompt investigation whenever a complaint indicates a possible failure to comply.
* * * * *

(c) *Notification.* The OCR will notify the complainant and the recipient of the agency’s receipt of the complaint.

(d) * * *

(1) * * * (i) After the acknowledgment, the OCR will promptly review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

States appreciate that tight deadlines may increase workload burdens. However, removing timeframes in favor of “promptly” provides no expectation of when information should be provided and may add to uncertainty and less visibility about the process for both recipients and complainants. States believe that deadlines contribute to certainty and contribute to timely accountability.

Rather than removing timeframes completely, ECOS recommends replacing existing deadlines with longer, yet still concrete, deadlines. EPA may also consider adding to specific deadlines a provision that if deadlines may not be met, notification be provided and an additional, specific additional period of time be specified. As a suggestion, EPA may consider increasing deadlines to 10 calendar days for notification to complainant and recipient and 30 calendar days for review of complaint. The key suggestion is to keep some specified deadline. A specified timeframe in the rule provides confidence and transparency to the process and ensures that recipients of federal financial funding are notified of potential violation of civil rights so that appropriate action may be taken.

Thank you again for the opportunity to provide this input. If you have any questions, please contact me at 202-266-4929 or via email at adunn@ecos.org.

Sincerely,

A handwritten signature in blue ink, reading "Alexandra Dapolito Dunn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Alexandra Dapolito Dunn, Esq.
Executive Director and General Counsel
Environmental Council of the States

cc: ECOS Officers & Executive Committee
ECOS Planning Committee Chair and Vice Chair