



ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OA-2013-0133; FRL- 9805-9]

Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964:
Adversity and Compliance with Environmental Health-Based Thresholds, and Role of
Complainants and Recipients in the Title VI Complaints and Resolution Process

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for comments on EPA's Draft Policies.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has made improving its civil rights program a priority and recognizes that its enforcement of Title VI of the Civil Rights Act of 1964 (Title VI) is an important tool to use to protect against discrimination and ensure that recipients of EPA financial assistance do not discriminate in implementing programs and activities. Today, EPA has released two draft policy papers for public comment. The first draft policy paper, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds*, proposes to change the way EPA assesses “adversity” by having the Agency refrain from applying a “rebuttable presumption” in certain Title VI investigations. The second draft policy paper, *Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, discusses EPA's proposed position on clarifying the

roles of complainants and recipients in the Title VI complaints process.

DATES: Written comments on this draft must be received on or before [Insert date 30 days after date of publication].

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-HQ-OA-2013-0133**, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- Email: ORD.Docket@epa.gov
- Fax: 202-566-1753
- Mail: Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.
- Hand Delivery: “EPA’s Draft Policies entitled *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds*, and *Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*”
Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. Such deliveries are only accepted during the Docket’s normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OA-2013-0133. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you

consider to be CBI or otherwise protected through www.regulations.gov. The www.regulations.gov website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. If you previously submitted comments to OCR via EPA’s website, those comments will automatically be placed in the Docket and do not need to be resubmitted. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. *Docket:* All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials regarding this notice are available either electronically in www.regulations.gov or in hard copy at the “EPA’s Draft Policies entitled *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds*, and *Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*” Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. This Docket Facility is open from 8:30 a.m. to

4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is 202-566-1752. The Public Reading Room is open from 8:30 am to 4:30 pm., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT:

For information on the docket, www.regulations.gov, or the public comment period, please contact the Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone: 202-566-1752; facsimile: 202-566-1753; or e-mail: ORD.Docket@epa.gov.

For information on the draft policy papers, please contact Helena Wooden-Aguilar, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone: 202-564-7272; facsimile: 202-565-0196; or email: wooden-aguilar.helena@epa.gov.

SUPPLEMENTARY INFORMATION:

1. GENERAL INFORMATION

The U.S. Environmental Protection Agency (EPA) has made improving its civil rights program a priority and recognizes that its enforcement of Title VI of the Civil Rights Act of 1964 (Title VI) is an important tool in its efforts to protect against discrimination and ensure that recipients of EPA financial assistance do not discriminate in implementing programs and activities. To that end, in 2009, EPA made a commitment to strengthen and revitalize EPA's Civil Rights and Diversity Programs. In addition to increasing staff, securing additional training and improving processes, as part of that effort, in 2010, EPA funded an independent in-depth evaluation of its civil rights program by the firm Deloitte Consulting LLP. Following receipt of the evaluation, the Administrator established a Civil Rights Executive Committee to review Deloitte's evaluation, and other sources of information, and make recommendations for building a model civil rights program for EPA. The Executive Committee posted its draft report for public review in February 2012, and the Administrator approved the final report and recommendations on April 13, 2012. Implementation of those recommendations is ongoing.

One of the recommendations was for EPA to develop policy statements and guidance that elucidates the analytical framework for reviewing Title VI complaints and for the use of ADR in resolving such complaints. To advance the dialogue on these issues, and consistent with its goal to promote transparency, EPA is seeking input and/or comment, on two policy issues that can improve the Title VI complaint process for all involved stakeholders. EPA initially posted these documents on its website and sent notification of the posting to stakeholders who previously had

expressed an interest in agency activities. EPA is now publishing in the Federal Register in an effort to further expand the potential audience who may see these documents. Also, EPA will host two outreach sessions via teleconference with interested stakeholders concerning these two draft policies. For more information about the scheduled teleconferences, please go to <http://www.epa.gov/ocr/title6policy>.

At the same time, EPA is interested in building an email distribution list of individuals, organizations, and entities that have an interest in EPA's External Civil Rights Program, including Title VI. To this end, if you are interested, please go to www.epa.gov/ocr to add your name to the list.

2. DRAFT PROPOSED POLICY ENTITLED *TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ADVERSITY AND COMPLIANCE WITH ENVIRONMENTAL HEALTH-BASED THRESHOLDS*

I. INTRODUCTION

A. PURPOSE: This paper outlines the U.S. Environmental Protection Agency's (EPA's or Agency's) current thinking about enforcement of Title VI of the Civil Rights Act of 1964 concerning how compliance with environmental health-based thresholds relates to "adversity" in the context of disparate impact claims about environmental permitting.¹

¹ Upon finalization of this paper, the policy described herein will supersede the corresponding discussions in the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39,667, 39,678, 39,680-81 (2000) (discussing relevance of recipients' authority and compliance with National Ambient Air Quality Standards) [hereinafter *2000 Draft Guidance*].

This paper does not address allegations about intentional discrimination, most non-permitting fact patterns, or technology- and cost-based standards; it is focused on discriminatory effects allegations that relate to the health protectiveness of pollution control permits issued by recipient agencies. In particular, this paper concerns the adversity prong of the *prima facie* case and does not address the other analytical steps necessary to determine whether a violation has occurred. While this paper discusses Title VI, the principles discussed here also apply to the other recipient nondiscrimination statutes,² as well as compliance with health thresholds in some non-permitting settings, such as brownfields cleanups.

B. BACKGROUND: The Agency has encountered a number of complex and unique issues of law and policy in the course of Title VI complaint investigations, especially allegations concerning the protectiveness of environmental permits issued by state and local agencies that receive EPA financial assistance. These challenges have been the consequence of the need to merge the objectives and requirements of Title VI with the objectives and requirements of the environmental laws that the Agency implements. The Agency's environmental regulatory mandates require complex technical assessments regarding pollution emissions, exposures, and cause-effect relationships. In addition, the cooperative federalism approach embodied in the federal environmental statutes requires that EPA accomplish its environmental protection objectives in close coordination with state and local environmental

² See *United States Dep't of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 600 n.4 (1986) (stating that courts have "relied on case law interpreting Title VI as generally applicable to later statutes"). Other relevant recipient nondiscrimination statutes include section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, and section 13 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251.

regulators. Such issues do not have ready analogues in the context of other federal agencies' Title VI programs.³

The Agency's historical efforts in its Title VI program have been the subject of some criticism over the years. One particular criticism arose in response to the Agency's 1998 *Select Steel* decision -- the origin of the rebuttable presumption addressed below. In *Select Steel*, EPA's Office of Civil Rights (OCR) dismissed an administrative complaint concerning a permit issued by the Michigan Department of Environmental Quality for the Select Steel facility based, in part, on the fact that the applicable National Ambient Air Quality Standards (NAAQS) were already being met, and that the facility's permitted emissions, in combination with other stressors, were not causing an adverse effect.⁴ The rebuttable presumption approach was incorporated into the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.⁵

The Agency has elected to reexamine the weight it accords compliance with

³ Nonetheless, EPA continues to review programs and best practices in place in other federal agencies to ensure consistency to the extent applicable and identify approaches that may be transferable to EPA's Title VI program.

⁴ In its evaluation of the NAAQS, OCR noted that "[t]he NAAQS for ozone [and lead] is a health-based standard which has been set at a level that is presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area." Letter from Ann E. Goode, Director, EPA/OCR, to Father Phil Schmitter and Sister Joanne Chiaverini, Co-Directors, St. Francis Prayer Center 3 (Oct. 30, 1998) [hereinafter Goode Letter]. OCR further noted that the NAAQS provides "protection for group(s) identified as being sensitive to the adverse effects of the NAAQS pollutants." Office of Civil Rights, U.S. Environmental Protection Agency, *Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint)* 14 (1998) [hereinafter *Select Steel Report*]. As applied to the complaint, OCR found that the area around the proposed Select Steel facility would attain the NAAQS for ozone and lead, and that there was no evidence suggesting other concerns. As a result, OCR concluded that no adverse impacts occurred with respect to the state's permitting emissions of those pollutants. See Goode Letter at 3-4; *Select Steel Report* at 27-33.

⁵ See 2000 *Draft Guidance* at 39,680-81.

environmental health-based thresholds because this issue, in particular, sits directly at the crossroads of environmental and civil rights law, and to respond to concerns raised by external Title VI stakeholders.

In examining this issue, EPA is mindful of the broad discretion afforded to federal agencies in the enforcement of federal statutes, including enforcement of federal financial assistance recipients' obligations under Title VI. This discretion applies to how agencies elect to enforce Title VI, including determining which Title VI issues to investigate.⁶

C. TITLE VI LEGAL FRAMEWORK⁷: Many Title VI investigations concern administrative complaints alleging adverse disparate impacts from the issuance of an environmental permit. Such complaints are filed pursuant to EPA's Title VI regulations. When assessing such complaints, EPA first determines whether it has jurisdiction over the complaint.⁸ If so, the Agency then applies the analytical framework for assessing significant adverse disparate impact claims established by the courts:⁹

⁶ See *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Webster v. Doe*, 486 U.S. 592, 599 (1988); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁷ The information in this subsection is intended as background. It does not change any of EPA's policies or practices.

⁸ The complaint must be in writing, state a claim, be timely, and concern a recipient. See 40 C.F.R. § 7.120(b). In addition, EPA evaluates whether the complaint is ripe or moot, whether the complainant has standing, whether the complaint should be referred to another federal agency, and whether clarification is required, among other things. See 40 C.F.R. § 7.120(a), (d)(1)(i); Federal Coordination and Compliance Section, U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* 12, 16-21, 37-41 (1998).

⁹ See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407, 1413 (11th Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984).

1. Is there a *prima facie* case? (The following three elements need not be established in order).

- a. Does the alleged discriminatory act have an adverse impact?
 - b. Is that adverse impact suffered disparately?
 - c. Is the adverse disparate impact caused by the recipient?
2. Can the recipient offer a substantial legitimate justification for its action?
3. Is there a less discriminatory alternative?

This paper focuses only on a particular issue that may arise in the course of conducting the inquiry described in step 1.a., above. A finding of adversity, by itself, does not amount to a finding of a Title VI violation, which requires inquiry into all three of the steps outlined above, as well as the sub-elements of step 1 (*i.e.*, step 1.b. and 1.c.).¹⁰

II. CONSIDERATION OF ENVIRONMENTAL HEALTH-BASED THRESHOLDS

In the course of investigating complaints of discrimination arising from the issuance of environmental permits, EPA may need to consider whether a permit that complies with a health- based threshold can nevertheless cause an adverse impact. Such assessments may involve analyses that are complex or, in some cases, simply infeasible with existing technical capabilities. Consequently, the Agency believes that the issue of establishing adversity

¹⁰ See *New York City Env'tl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (noting that a *prima facie* case requires “a causal connection between a facially neutral policy and a disproportionate and adverse impact,” and dismissing the case because plaintiffs failed to establish causation).

warrants further consideration as described below.

A. ISSUE: How does compliance with environmental health-based thresholds¹¹ relate to whether adversity exists in Title VI investigations?

B. CURRENT POSITION: The *2000 Draft Guidance* addresses the question of how to analyze adversity in a case where the NAAQS – which is a health-based standard – is being met. It states that attainment of health-based NAAQS creates a rebuttable presumption that no adverse impacts are caused by the permit at issue with respect to the relevant NAAQS pollutant(s) for purposes of Title VI. As applied in an investigation involving the NAAQS, EPA would first establish whether the area in question was attaining the NAAQS for the relevant pollutant. If so, EPA would presume that the adversity component of the *prima facie* case was not satisfied (*i.e.*, there is no adversity) and then dismiss the complaint. However, if the investigation produced evidence that significant adverse impacts may be occurring with respect to the NAAQS pollutant despite attainment of the NAAQS, the presumption would be rebutted and EPA would continue to investigate the remaining prongs of the *prima facie* case. While the *2000 Draft Guidance* spoke specifically to NAAQS, EPA has considered the issue of the rebuttable presumption as it might apply to any health-based threshold and the position set forth in this paper is applicable to any complaint in which a health-based threshold is present, not just NAAQS.

¹¹ The term “environmental health-based thresholds” is intended to encompass both enforceable regulatory standards (*e.g.*, NAAQS) and, in cases where such standards are not relevant, non-enforceable health-based target levels (*e.g.*, reference doses for noncarcinogenic effects in the Integrated Risk Information System).

C. PROPOSED POSITION: While EPA has had little or no opportunity to apply the rebuttable presumption (that is, this issue has been discussed in the abstract, and has not been applied to any particular case following issuance of the *2000 Draft Guidance*), EPA now intends to eliminate application of the rebuttable presumption when investigating allegations about environmental health-based thresholds. Compliance with a health-based threshold such as a NAAQS is a serious consideration in an evaluation of whether adverse disparate impact exists. As described below, the Agency will also assess other information that may be available and appropriate when investigating whether adverse health impacts exist. While no presumption is established, compliance with a health-based threshold would be considered, along with other information, to enable the Agency to focus on the most significant cases (*i.e.*, those representing the highest environmental and public health risk) and to determine whether adversity exists.

Environmental health-based thresholds are set at levels intended to be protective of public health. While compliance with such thresholds does not guarantee no risk, such compliance strongly suggests that the remaining risks are low and at an acceptable level for the specific pollutant(s) addressed by the health-based threshold. At the same time, EPA believes that presuming compliance with civil rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health.

The approach proposed here differs from the *2000 Draft Guidance*'s rebuttable presumption. Under the latter, complying with the NAAQS created a presumption of no

adversity that would stand unless affirmatively overcome. By contrast, this proposal acknowledges the relative significance of compliance with an environmental health-based threshold, while also evaluating a number of other factors, as appropriate, including the existence of hot spots, cumulative impacts,¹² the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health-based threshold. Because EPA believes that the NAAQS (and other health-based thresholds) can be valid and appropriate, and yet not assure in all cases that no adverse impact is created, EPA will no longer presume an absence of adversity if a NAAQS (or another health-based threshold) is satisfied. Instead, EPA would consider such compliance concurrently with the type of information described above.

While EPA is eliminating the applicability of the rebuttable presumption from its analyses, nevertheless, there may be other features present that may impact EPA's ability to consider other information concurrently with compliance with health-based thresholds. Examples of such features include, but are not limited to, the Agency's existing technical capabilities and the availability of credible, reliable data (given the practical constraints of complaint investigations, EPA expects to gather pre-existing technical data rather than generating new data).¹³

¹² The 2000 Draft Guidance Defined "cumulative impacts," see 65 Fed. Reg. 39,684, and discussed it further at 65 Fed. Reg. 39,678-81.

¹³ The Agency expects to evaluate relevant data from a wide variety of sources, such as Toxics Release Inventory; National Air Toxics Assessment; Comprehensive Environmental Response, Compensation, and Liability Information System; state and local databases; and monitor-specific data.

If the assessment of relevant factors fails to establish the adversity element of the *prima facie* case, EPA would ordinarily dismiss the allegation. Alternatively, if the assessment establishes adversity, EPA would then evaluate disparity and complete the other steps in the analysis set forth in Section I.C. To assist in its data collection, the Agency expects to solicit input from both complainants and recipients about these factors during the course of its investigations.

As the Title VI analytical framework described in Section I.C. illustrates, the issue addressed in this paper is not the only question that must be addressed in the investigation process. Others may require elaboration in the future as well. Moreover, there will be further work necessary to develop and implement the policy issue addressed here. Thus, the analysis here does not represent the end point, but rather an important step forward in considering and evaluating these and other policy issues raised in EPA's Title VI work.

3. DRAFT PROPOSED POLICY ENTITLED *ROLE OF COMPLAINANTS AND RECIPIENTS IN THE TITLE VI COMPLAINTS AND RESOLUTION PROCESS*

I. INTRODUCTION

EPA has made improving its civil rights program a priority and recognizes that its enforcement of Title VI of the Civil Rights Act of 1964 (Title VI), as amended, and other nondiscrimination statutes is an important tool in the Agency's efforts to address

discrimination.¹⁴

The purpose of this paper is to set forth the U.S. Environmental Protection Agency's current thinking on the roles of complainants and recipients in EPA's Title VI administrative complaint processing and resolution efforts. The proposed approaches discussed below clarify and expand upon how EPA will implement its current regulations. In discussing these proposed approaches, EPA seeks to strike a balance between providing greater involvement for complainants in the complaint process while continuing to work closely with recipients, as detailed in the regulations, to address complaints filed against them and, as appropriate, in EPA's discretion, resolve complaints where possible.

A Title VI complainant is not like a plaintiff in court. Rather, a complainant's role is more like that of a tipster, who reports what he or she believes is an act violating Title VI by an entity receiving federal financial assistance (the recipient) to the associated agency providing such assistance, in this case EPA. EPA is not in an adjudicatory role, evaluating evidence produced by opposing sides, but instead investigates allegations about its recipient, and reaches a conclusion regarding whether a violation of Title VI has occurred.

EPA's regulations do not prescribe a role for the complainant once he or she has filed

¹⁴ EPA implements Title VI, section 504 of the Rehabilitation Act of 1973 (EPA regulations at 40 C.F.R. Part 12), section 13 of the Federal Water Pollution Control Act Amendments of 1972, Title IX of the Education Amendments of 1972 (EPA regulations at 40 C.F.R. Part 5), and the Age Discrimination Act of 1975, which prohibit discrimination based on race, color, national origin, disability, sex (in limited circumstances), and age. EPA's regulation at 40 C.F.R. Part 7, entitled "Nondiscrimination in Programs or Activities Receiving Federal Assistance from EPA," includes general and specific prohibitions against intentional and disparate effects or disparate impact discrimination by EPA's assistance recipients on the basis of race, color, national origin, sex (in limited circumstances), or disability, and age. Every EPA grant recipient, including each state environmental agency receiving financial assistance from EPA, is subject to the terms of 40 C.F.R. Part 7.

a complaint. Nevertheless, one of EPA's goals is to promote appropriate¹⁵ involvement by complainants and recipients in the Title VI complaint process. This paper addresses how EPA will enhance the roles and opportunities for complainants and recipients to participate in the complaint and resolution process including efforts related to informal resolution and voluntary compliance.

This document does not change or substitute for any law, regulation, or any other legally binding requirement; is not legally enforceable; and does not impose any legally binding requirements.

II. CURRENT POSITION

A. COMPLAINANTS: EPA's *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (issued in June 2000) (Draft Investigation Guidance), states that complainants may play an important role in the administrative process; however, that role is determined by the nature and circumstances of the claims.¹⁶ Specifically, during the jurisdictional review of Title VI complaints, OCR may seek clarification regarding the issues articulated by the complainants.¹⁷ OCR may also request interviews of complainants or request additional information from the complainants during the course of an investigation.

¹⁵ All determinations about if any action described in this document is "appropriate" will be made by the EPA as part exercise of enforcement discretion, which was recognized by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 293-294 (1985).

¹⁶ See *Draft Revised Investigation Guidance*, 65 Fed. Reg. 39,650, 39,671 (proposed June 27, 2000).

¹⁷ 40 CFR 7.120(d)(1).

Finally, in appropriate cases, OCR may offer complainants and recipients an opportunity to participate in Alternative Dispute Resolution concerning the matters raised in the complaint.

B. RECIPIENTS: EPA's *Draft Investigation Guidance* states that OCR may work closely with recipients to ensure that the Agency has a complete and accurate record of all relevant information pertaining to the complaint, and a full understanding of the recipient's position relating to the allegations.¹⁸ In order for OCR to perform the appropriate analyses, one of the most important things recipients may do as early as possible is to provide OCR with all of the information relevant to the complaint, including, but not limited to, background information, the permit application(s), monitoring data, computer modeling, other aspects of the recipient's analysis of the application(s), and any information relating to steps the recipient took to address potential Title VI concerns. Moreover, under EPA's Title VI regulations, OCR has the authority to obtain information from recipients and interview recipient staff.¹⁹ Full and expeditious disclosure of such information helps to facilitate resolution of Title VI complaints.²⁰

EPA's Title VI regulations provide the recipient with several opportunities to respond to the complaint and to any OCR finding. First, the recipient may make a written submission responding to, rebutting, or denying the allegations raised in a complaint.²¹ Second, OCR

¹⁸ See *Draft Revised Investigation Guidance*, 65 *Fed. Reg.* at 39,671.

¹⁹ 40 CFR 7.85(b), (f).

²⁰ In addition to considering information supplied by recipients, OCR will also evaluate information provided by complainants.

²¹ 40 CFR 7.120(d)(1)(iii).

may attempt to resolve the complaint informally, during which time the recipient will be able to state its position. Third, if OCR makes a preliminary finding of noncompliance with the regulations, the recipient may submit a written response within 50 calendar days of receiving the preliminary finding, demonstrating that the preliminary finding is incorrect or that compliance may be achieved through steps other than those recommended by OCR.²²

Finally, if OCR begins the procedure to deny, annul, suspend, or terminate EPA assistance, recipients may request a hearing before an Administrative Law Judge (ALJ)²³ and, if the ALJ's decision upholds a finding of noncompliance, the recipient may then file exceptions with the Administrator.²⁴

III. PROPOSED POSITION

EPA has evaluated its current policy and practices on the role and opportunities of complainants and recipients in complaint processing and resolution efforts. The following is intended to clarify and expand on EPA's existing policy and practices in this regard.

EPA intends to follow these principles in the processing and resolution of Title VI complaints, as applicable and appropriate:

²² 40 CFR 7.115(d)(2).

²³ 40 CFR 7.130(b)(2).

²⁴ 40 CFR 7.130(b)(3).

A. COMPLAINT PROCESS:

1. EPA may seek clarification from the complainants during its initial review of the administrative complaint. At the time they file a complaint, complainants should provide EPA any relevant information available to them which supports their claim(s).
2. Upon acceptance of a complaint, but prior to the initiation of an investigation, EPA will offer in appropriate cases, at EPA's expense, complainants and recipients the opportunity to engage in Alternative Dispute Resolution efforts. EPA considers the ADR process to be a viable option for complainants and recipients to address some, if not all, of the issues raised in a complaint.
3. EPA will continue its present practice of requesting additional information (e.g. interviews) from the complainants and recipients during the course of an investigation.
4. EPA will make information in its case tracking system available.

B. INFORMAL RESOLUTION AND/OR VOLUNTARY COMPLIANCE

EPA may, at any point prior to a preliminary finding of compliance, seek to informally resolve complaints of discrimination.

Following issuance of a preliminary determination of noncompliance, EPA may enter into a voluntary compliance agreement with a recipient to resolve a complaint. Where

EPA issues a preliminary finding of noncompliance, in addition to notifying the recipient, per the regulations, EPA intends to notify complainant of said finding.²⁵ EPA will also, at the appropriate time, notify the public of a preliminary finding of noncompliance by posting its decision on its public access websites.

If resolution discussions are occurring between EPA and the recipient, EPA will use its discretion, when appropriate, to engage complainants who want to provide input on potential remedies, and EPA will determine based on its discretion when such engagement may occur during the process. For instance, EPA, in appropriate cases, may request and consider complainant's input on potential remedies for the complaint and may forward the suggested remedies to the recipient for further discussion with EPA. Alternatively, depending on the complaint, EPA may seek and consider complainant's input on potential terms of a settlement agreement.

C. ALTERNATIVE DISPUTE RESOLUTION

As stated above, EPA considers the ADR process to be a viable option for complainants and recipients to address some, if not all, of the issues raised in Title VI complaints. As appropriate, EPA may offer the complainant and the recipient an opportunity to engage in the ADR process at any stage in the complaint process, even if an investigation has started.

²⁵ When preliminary finding has been made and the EPA is engaging in voluntary compliance in accordance with 40 CFR §7.115(d), EPA retains the discretion to contact the Recipient first.

Dated: April 16, 2013.

Diane E. Thompson,

Chief of Staff, Office of the Administrator.

[FR Doc. 2013-09922 Filed 04/25/2013 at 8:45 am; Publication Date: 04/26/2013]