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Robert E. Roberts
Executive Director

August 24, 2000

Ms. Ann Goode
Director, Office of Civil Rights
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Mail Code 1201
Washington, DC 20460

Dear Ms. Goode:

Attached herewith are the comments regarding the Revised Title VI Guidance from the Environmental Council of the States. These comments were adopted by the membership at the ECOS Annual Meeting, August 13-16, in Girwood, Alaska.

ECOS is the national, non-partisan, non-profit association of state environmental commissioners. Our mission is to improve the environment by providing for the exchange of ideas, views and experiences among the States, by fostering cooperation and coordination in environmental management, and by articulating state positions to Congress and EPA on environmental issues.

We appreciate your willingness to work with the states to address this important issue, and look forward to continued efforts to improve the Guidance.

Regards,

Robert E. Roberts
Executive Director

Attachments
cc: George Meyer of Wisconsin, ECOS President
Ron Hammerschmidt of Kansas, ECOS Vice-President
Dennis Hemmer of Wyoming, ECOS Secretary-Treasurer
R. Lewis Shaw of South Carolina, ECOS Past-President

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8/25/00

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ECOS Comments on Revised Title VI Guidance

(As approved by the Cross Media Committee on August 14, 2000

When U.S. EPA issued its "Draft Interim Guidance for Investigating Title VI Administrative Complaints" in February 1998, the Environmental Council of the States ("ECOS") responded quickly in March 1998 with Resolution Number 98-2 ("Resolution"), declaring the Interim Guidance was unworkable and should be withdrawn. In addition, the Resolution set out principles that should be embraced in any policy or guidance addressing Title VI complaints. The Resolution is included as Attachment #1 to this document.

U.S. EPA issued revised guidance in two documents published in the Federal Register on June 27, 2000. Those are entitled "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" ("External Guidance") and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" ("Internal Guidance").

After U.S. EPA issued the two guidance documents in June 2000, ECOS members discussed during conference calls how the External and Internal Guidances compared to the seven fundamental principles set out in its Resolution. Further, all ECOS members were invited to submit comments on the guidance. These comments were developed as a result of those efforts and finalized at the ECOS annual meeting in August 2000. They are divided into comments pertaining to both Guidances, then to the Internal Guidance, then to the External Guidance.

Comments Pertinent to Both Guidances Published June 27, 2000

- Nothing is more important to the regulatory process than clearly defined terms and requirements, so that a person subject to a particular law can take specified actions with the knowledge and certainty that if properly implemented or undertaken, compliance is achieved. This is true of a permit applicant seeking to comply with environmental laws and it is true of a federal grant recipient seeking to comply with Title VI. We cannot hit a moving target, which is what these guidances represent. The guidances fail to lay out a clear process that if followed, will satisfy Title VI concerns. There are so many judgments left to U.S. EPA to be made, that the process described therein is completely devoid of the clarity and certainty that are fundamental requirements of a sound regulatory process.

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- Notwithstanding U.S. EPA's attempt to describe a process that might be undertaken, it stresses in the External Guidance that such a process is completely voluntary and then comments in the Internal Guidance that "EPA may decide to follow the guidance provided, or to act at variance with this guidance, based on its analysis of the specific facts presented." Further, if a state voluntarily implements approaches to Title VI compliance, the External Guidance states those efforts will only be afforded "due weight" in gauging whether Title VI concerns have been satisfied, which is another judgment by U.S. EPA. Therefore, both guidances provide virtually no certainty.

- In its Resolution, ECOS stated that terms needed to be defined. Key terms are still not adequately defined in the two guidances. There is no single definition of adverse disparate impact. Similarly, terms such as "adequate justification" or "comparison populations" are not specifically defined.

- The standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, still lack specificity and assurance that sound peer-reviewed science will be used as called for in the ECOS Resolution.

- The guidances fail to define clearly how to select a comparison population, which is a key component of determining whether disparate impact exists.

- Neither guidance does much to help states avoid Title VI complaints as called for in the ECOS Resolution. Even if the state has an Environmental Justice (EJ) program, a complaint could be filed by someone whether or not he or she participated in the EJ program or public participation activities of the state.

- To fully implement the objectives of the Title VI Guidance, EPA must engage in an open debate with the Congress to clearly establish the boundaries of federal executive branch authority and provide an avenue for all levels of government to obtain adequate resources to implement agreed upon objectives.

- The choice of issuing guidance rather than regulation means that neither guidance document is binding on the states.

Comments on External Guidance

- There are aspects of the External Guidance that appear to respond to the Resolution. The variety of options provided in the External Guidance clearly address the need for states to have flexibility in designing their EJ programs. In addition, the External Guidance clearly represents an attempt to educate states on what types of factors are to be considered in evaluating whether a violation of Title VI has occurred.

- The resource intensity of operating state EJ programs is recognized in the External Guidance, but then dismissed because the guidance is voluntary. This misses the

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mark. ECOS members question whether U.S. EPA has plans to furnish federal funding to offset this resource burden, or at a minimum, to identify where those resources can be obtained. Can state EJ programs be funded for existing federal grants with a related reduction in other activities under those grants? As written, the External Guidance does not adequately address the concern expressed in ECOS' resolution to avoid unfunded mandates and unnecessary burdens.

- The External Guidance does not allow the states to develop environmental equity programs that if implemented properly, automatically satisfy Title VI requirements, as called for in the Resolution. U.S. EPA wants the states to do so, but it won't tell us how much is enough. No matter what a state does in implementing an environmental equity program, U.S. EPA reserves the right to perform a *de novo* investigation and determine whether the state effort is good enough.

- The External Guidance declares states' approaches to Title VI compliance will be given "due weight" if a complaint is filed. The refusal by U.S. EPA to define its requirements specifically enough for a recipient or a permit applicant to be able to rely on the results of those approaches contributes further to the uncertainty. U.S. EPA claims it cannot delegate its responsibility to assure compliance with Title VI. That does not preclude U.S. EPA from defining a process that either provides greater assurance that robust state approaches will be given greater weight or heightens the threshold for a Title VI complaint to be accepted. U.S. EPA prefers to leave itself complete discretion, which only further contributes to the uncertainty and potential arbitrariness of its review. In the end, such uncertainty raises doubt that the External Guidance will actually assist the states in complying with Title VI.

Comments on the Internal Guidance

- The Internal Guidance makes it clear that permit decision making is not shifted from the states to the federal government as called for in the Resolution. The revised guidance clearly states that a Title VI complaint does not nullify or even stay a permit and elaborates that the interest of the Federal Government is in ensuring nondiscrimination by its recipients.

- The guidance also addresses the concern in the Resolution that investigating and resolving Title VI complaints must not create unnecessary delays in the environmental permitting process. The guidance clearly states that acceptance of a complaint does not stay the permit at issue.

- Another change that appears positive is that the Internal Guidance states that U.S. EPA "generally expects to consider only those types of impacts affected by factors within the recipient's authority under applicable law," which is consistent with U.S. EPA's ruling in the Select Steel case, and an important acknowledgment of a recipient's limitations in achieving resolution of the issues raised. References to state constitutional authorities and other general laws that allow U. S. EPA to broadly define the recipient's authorities should be deleted.

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- The revised guidance does not specifically recognize the precedential value of the Select Steel ruling, which is the only Title VI complaint that U.S. EPA has adjudicated. The guidance seems to be stating that fundamental concepts in the Select Steel ruling may at times apply and at other times they may be overcome. This appears to be inappropriate treatment of an administrative ruling. U.S. EPA should clarify how this guidance will be implemented to ensure consistency with Select Steel, as legal principles require.

- The Internal Guidance does not provide adequate and definite timeframes as requested by the Resolution. The timeframes for various state actions in the revised guidance is unreasonably short. Fourteen (14) calendar days are allowed to submit additional information the state would like U.S. EPA to consider. Only 10 calendar days are allowed for a recipient to voluntarily comply after a formal determination of noncompliance. At the same time, in discussing the viability of Title VI complaints received, the guidance states that certain timeframes may be waived for good cause or that some steps should "generally" be done within a certain time period. Untimely complaints may be rejected, but U.S. EPA retains the right to waive the timeframe. No certainty or enforceability is provided for any of the timeframes. Experience to date suggests U.S. EPA cannot meet these timeframes. The process should contain incentives for timeframes to be met and consequences if they are not.

- The thresholds for who can file a complaint and for the acceptance of complaints are too low. The person filing the complaint does not have to be directly impacted by the issue but rather simply a member of the class of people, or a representative of a person or class of people. Further, there is no minimum level of support that must be provided with the complaint for U.S. EPA to accept it. In fact the guidance only states that complaints will be rejected if they are "so incoherent they can not be considered grounded in fact or those that fail to provide an avenue for contacting the complainant." Further, the statement in the guidance that "Complainants do not have the burden of proving their allegations are true" only invites frivolous complaints. Before accepting a complaint, U. S. EPA needs to determine the veracity of the complaint and that the complaint broadly reflects the concerns of the impacted community. Acceptance determinations should be made within 20 days of receiving the complaint. Better defined threshold requirements will avoid wasting resources of U.S. EPA and the recipient.

- U.S. EPA attempts to reduce the number of permit decisions on which a Title VI complaint will be continued through the investigation process. The guidance states that where the complaint was triggered by a permit that significantly decreases overall emission or emissions of pollutants of concern, U.S. EPA will likely close its investigation. Unfortunately, the guidance goes on to say that while a specific complaint may be dismissed on the basis of decreased emissions, U.S. EPA may choose to conduct a compliance review of the recipient's relevant permit program either at that point in time or at some future date. Once more, the guidance fails to provide certainty. Similarly, the guidance states that complaints involving permit

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modifications other than emissions will "generally" not be investigated, but provides no assurance.

- The role of local governments along with their authority is still substantially ignored in the revised guidance. The discussion of Area Specific Agreements implies their participation, yet no reference is made nor is there any effort to address limitations on legal authority. The Internal Guidance also does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, brownfield redevelopment, or greenspace preservation initiatives as called for in the Resolution.

- The emphasis placed on the informal resolution process is likely to be resource intensive and place unnecessary burdens on states without a clear picture of what will constitute success. The ability of the recipient to justify a disparate impact is a positive element of the revised guidance. However, U.S. EPA claims the right to rebut a justification if it determines that a less discriminatory alternative exists. Once again, standards for this determination are lacking, which causes uncertainty.

Conclusion

The draft guidances published on June 27, 2000 did address some of the concerns identified in the previous ECOS resolution; however, the preceding specific comments also identify fundamental flaws in these draft documents. Accordingly, ECOS calls for U.S. EPA to revise the documents substantially prior to issuing either guidance in final form. Any final guidance must provide certainty, set out explicit steps that can be taken, use the tools and science available to us today, and avoid unnecessary burdens/unfunded mandates. The current guidances fall short on each of these issues. Further revision to the current draft guidances must also focus on providing certainty - in terms of process and outcome - to the parties involved, by clarifying legal authority, by defining all terms, and by assuring U.S. EPA's commitment to be bound by it. ECOS strongly urges U.S. EPA to address the aforementioned issues in finalizing the guidance documents.

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