

EPA CIVIL RIGHTS 'BEST PRACTICE' GUIDANCE PLAN FAILS TO QUELL CRITICISM

EPA's Office of Civil Rights (OCR) is eyeing a "best practice" guidance for handling discrimination complaints in order to address its much-criticized record on delayed responses to such complaints, but civil rights lawyers say guidance alone is insufficient to address what they say are rampant, decades-old problems with the office.

The office is under orders from EPA Administrator Lisa Jackson to reform and speed up its process for handling Civil Rights Act discrimination claims following an appeals court ruling that found OCR violated its own policies through a "pattern of delay" in tackling complaints. But one activist lawyer says there is a need for extra OCR staffing, tighter deadlines for responding to complaints, and an Inspector General (IG) investigation of the office.

Agency documents obtained by *Inside EPA* show some OCR investigations have been open up to 15 years, despite a regulatory 180-day deadline for issuing discrimination findings. OCR has informally resolved 10 Title VI complaints since 1993 but has never exercised its Civil Rights Act authority to strip funding due to discrimination.

An EPA spokeswoman says the agency recognizes that the agency's record on Title VI in recent years is "unacceptable" and that the agency is developing an action plan that will not only address delays in processing complaints but also "significant aspects of the program, procedural and substantive."

Top OCR officials met Oct. 1 with senior EPA management to lay out a "vision" for the office, an EPA source says. Civil rights officials at the meeting suggested that they should develop new guidance based on Department of Justice (DOJ) best practices, as described in DOJ manuals for federal agencies on implementing Civil Rights Act authority. Such guidance could provide basic criteria to use in investigating discrimination complaints.

OCR has responsibility for ensuring that recipients of EPA financial assistance such as grants and others comply with non-discrimination requirements under Title VI of the 1964 Civil Rights Act and other statutes that prohibit federal actions from discriminating based on race, color or national origin.

The office has authority under the Civil Rights Act to strip beneficiaries of federal funding if it finds the funds are being used in a discriminatory manner, but has never exercised that authority, EPA records show. The agency source familiar with the office says that staff instead seek "informal" resolutions that aim to satisfy both victims and defendants in a civil rights complaint, without formal penalties.

"We're looking for a win-win," the source says, explaining that EPA sees its statutory duty to strip funding as an unattractive solution because it does not provide remedy to victims of discrimination. But the stance is drawing heavy criticism from civil rights groups who say it is OCR's duty to uphold the law.

By developing guidance based on DOJ best practice manuals, EPA could adopt the department's detailed instructions on how federal agencies should investigate Title VI complaints — including its instructions for how to substantiate claims of disparate impacts, which could help the agency define what counts as evidence of discrimination. Currently, EPA's implementing regulations provide an administrative process for civil rights complaints — for example, deadlines for responses — but no provisions on basic issues like evidence and interviews.

EPA floated draft guidance in 1998 and in 2000 that aimed to aid states and local governments in developing programs to comply with Title VI, and a separate guide for agency investigators inquiring into complaints of disparate impact environmental racism, but the guidance never went final due to wide-ranging criticisms.

State environmental officials strongly objected to the 2000 draft agency guidance, saying that it failed to protect state programs from equity complaints, did not give adequate clarification of a model state environmental justice program nor provide adequate funding and priority policy status to the problems environmental justice poses. The agency's 1998 draft guidance similarly drew attacks from state and local governments and industry officials who said it provided little certainty for state regulatory programs (*Inside EPA*, Aug. 21, 2000).

OCR's new attempt on guidance may address past criticisms by adopting the more detailed policies on investigations of Title VI complaints as detailed in the DOJ manuals — for example by providing a definition of what qualifies as evidence of discrimination. EPA's draft guidance documents did not determine that definition or other definitions of key basic terms, while DOJ manuals provide detailed instructions on those issues, sources say.

DOJ's manual offers an extensive definition of evidence that proves discrimination and provides instructions on interview techniques, data collection, and other key parts of the investigation process.

But the civil rights lawyer says that while new OCR guidance based on DOJ's manual is a "start" and could be an important part of reforming the office, the agency still needs a large slate of reforms to even begin addressing its

deep, long-standing problems.

An EPA spokeswoman says, “The agency is developing a plan to both resolve the pending Title VI complaints and revitalize the Title VI program going forward. The plan will target more than just the delays in processing complaints; it will address the significant aspects of the program, procedural and substantive. We have made progress in this effort but are far from finished. Designing and initiating a comprehensive plan of action to accomplish these goals, like the achievement of the goals themselves, is challenging and will take some time.”

EPA’s civil rights office has a large backlog of cases that requires a major overhaul to address, critics say, which could, in addition to new guidance, include the administration providing OCR with significant new resources in staff and funding, and subject the office to an EPA IG investigation.

Enforcement of agency rules on handling civil rights complaints has been stymied in part by a 2001 Supreme Court decision that set a high bar requiring plaintiffs to show intentional discrimination before claims can proceed. But critics claim that OCR has also been slow and inattentive to complaints — a point underscored by the recent circuit court ruling that found the office had a “pattern of delay” in tackling complaints.

Jackson in a statement to *Inside EPA* said a Sept. 17 ruling by the U.S. Court of Appeals for the 9th Circuit in *Rosemere Neighborhood Association v. EPA* “found a consistent pattern of EPA delays” in responding to Title VI complaints. She said she has directed staff “in the strongest terms, to review and reform the Title VI process so that complainants receive timely responses and decisions with the goal of expeditiously resolving pending complaints.”

The agency spokeswoman cites Jackson’s statement after the *Rosemere* decision, saying, “The performance of EPA’s Title VI program in recent years is unacceptable. We are committed to identifying and overcoming all obstacles to the creation and operation of an effective Title VI program at EPA.”

The agency currently has 37 open investigations, one third of which date to before 2003. OCR has rejected the majority of complaints. The agency rejected 129 of 219 complaints since 1993, or about 59 percent. Ten complaints between September 1993 and June 2009 were informally resolved.

The civil rights lawyer says that OCR needs to speed up its 180-day time-frame for responding to complaints, but the agency source counters that the deadline is too short to complete investigations. 180 days “may not be the right time frame” because OCR is “invariably going to be behind schedule,” the EPA source says.

OCR also “needs to have adequate staff to resolve the existing backlog while at the same time effectively responding to all new complaints,” according to the civil rights lawyer.

The president proposed funding civil rights and Title VI efforts across the agency at \$12 million in fiscal year 2010, compared to \$11.48 million in FY09 and \$11.11 million in FY08. Those funding levels have remained fairly level dating back to FY04 when the office received \$12.11 million, a jump from FY03’s \$8.5 million funding.

Of the total \$12 million proposed to fund civil rights work across the agency in FY10, the president proposed to fund the headquarters OCR with \$8.26 million and a staff of 40.5 full-time employees.

The agency source says that the office does not have a “resource problem” and says that there are adequate staffing levels to process and investigate Title VI civil rights complaints.

The civil rights lawyer says the agency should also boost public input and accountability for OCR, for example by meeting with environmental justice groups to hear their recommendations on how to reform the office. There should also be strong oversight of the office, which could include an IG investigation to analyze the office’s ability to respond to complaints and possibly provide recommendations for improvements.

“OCR and the staff that lead the program need to be held accountable for the performance of the Title VI program. Time and again, OCR has made similar promises of reforming the Title VI program, and time and again those promises are broken,” the source says. — *Jonathan Strong*