



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

September 20, 2021

Renee McGhee-Lenart, Acting Director  
Office of Audit and Evaluation  
EPA Office of Inspector General  
1200 Pennsylvania Avenue, NW (2410T)  
Washington, D.C. 20460  
McGhee-Lenart.Renee@epa.gov

**RE: Final Report– “Improved EPA Oversight of Funding Recipients’ Title VI Programs Could Prevent Discrimination” – Project No. OA&E-FY19-0357**

Dear Ms. McGhee-Lenart:

EPA’s Office of General Counsel (OGC) is pleased to provide you with “OGC’s Revised Responses to OIG Recommendations,” which respond to the recommendations issued by EPA’s Office of Inspector General (OIG) in its Final Report – “Improved EPA Oversight of Funding Recipients’ Title VI Programs Could Prevent Discrimination” – Project No. OA&E-FY19-0357, on September 28, 2020. As you are aware, under the Biden-Harris Administration, OGC has undertaken an extensive review of its external civil rights compliance and enforcement program, and OGC’s Revised Responses are consistent with current overall program goals.

We thank OIG for working cooperatively with us throughout this process. Please feel free to reach out to us if you have any questions or need further information.

Sincerely,

Melissa Hoffer  
Acting General Counsel

A handwritten signature in black ink that reads "Marianne Engelman-Lado".

Marianne Engelman-Lado, Deputy General Counsel  
for Environmental Initiatives

Ms. Renee McGhee-Lenart

Elise B. Packard  
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Enclosure: OGC Revised Responses to OIG Recommendations

## **OGC Revised Responses to OIG Recommendations** **September 13, 2021**

### **I. BACKGROUND**

In FY20, EPA's Office of Inspector General (OIG) conducted an evaluation of EPA's External Civil Rights Compliance Office (ECRCO) to determine whether the EPA has implemented an oversight system to provide reasonable assurance that organizations receiving EPA funding comply with Title VI of the Civil Rights Act of 1964. OIG issued a Final Report with six recommendations on September 28, 2020 (OIG Report "Improved EPA Oversight of Funding Recipients' Title VI Programs Could Prevent Discrimination" (Report No. 20-E-0333), (Sept. 28, 2020) ([https://www.epa.gov/sites/production/files/2020-09/documents/epaig\\_20200928-20-e-0333.pdf](https://www.epa.gov/sites/production/files/2020-09/documents/epaig_20200928-20-e-0333.pdf))). Of those recommendations, one was directed to the Office of the Administrator (AO) and five were directed to EPA's Office of General Counsel (OGC). Overall, the OIG Report generally concluded that ECRCO has not fully implemented an oversight system to reasonably ensure that recipients of EPA funding are properly complying with and implementing Title VI.

OGC provided a formal written response to OIG on November 27, 2020, including a response to the specific recommendations. (OGC's Formal Response to OIG's Final Report (Nov. 27, 2020) ([https://www.epa.gov/sites/production/files/2021-02/documents/epaig\\_20-e-0333\\_agency\\_response.pdf](https://www.epa.gov/sites/production/files/2021-02/documents/epaig_20-e-0333_agency_response.pdf))). On February 9, 2021, EPA's Office of Inspector General (OIG) issued a Comment to EPA OGC, entitled, "Response to Planned Corrective Actions for Office of Inspector General Report No. 20-E-0333, Improved EPA Oversight of Funding Recipients' Title VI Programs Could Prevent Discrimination, issued September 28, 2020," (Feb. 9, 2021) ([https://www.epa.gov/sites/production/files/2021-02/documents/epaig\\_20-e-0333\\_ig\\_comment\\_on\\_response.pdf](https://www.epa.gov/sites/production/files/2021-02/documents/epaig_20-e-0333_ig_comment_on_response.pdf))). OIG did not accept any of OGC's responses to their recommendations as resolving the issues OIG raised.

Under the Biden Harris Administration, ECRCO has been engaged in an extensive review of its external civil rights compliance and enforcement program. OGC's Revised Responses to OIG recommendations, below, are consistent with current overall program goals. Ultimately, ECRCO is charged with ensuring that the programs or activities of recipients and subrecipients of EPA funds comply with laws prohibiting discrimination on the basis of race, color, national origin, sex, age, and disability. In order to fulfill this responsibility, EPA recognizes that ECRCO must, among other things, initiate proactive pre-award and post-award civil rights compliance activities, engage staff across the agency in civil rights compliance activities, increase transparency by affirmatively providing information to the public, including guidance documents to clarify interpretations of requirements and expectations, partner with the Office of Environmental Justice to assist with the integration of environmental justice principles in civil rights enforcement and to facilitate EPA responses to environmental justice issues, enhance communication and engagement with environmentally overburdened and disadvantaged communities, and strengthen interagency collaboration across the federal government to enforce

federal civil rights laws. Most relevant to the OIG's recommendations and consistent with the recommendations, ECRCO intends to achieve the following, all within dates certain:

- Clarify interpretations of requirements and expectations through issuance of guidance documents;
  - This includes civil rights guidance in the permitting context and, particularly, how cumulative impacts are considered when evaluating disparate impacts under civil rights law;
- Systematize review of compliance with foundational procedural requirements for applicants of federal financial assistance and recipients of federal financial assistance;
- Ensure that civil rights compliance goes beyond a checklist of procedural requirements and, toward that end, develop ECRCO capacity to evaluate whether specific actions, policies, and practices by recipients – including permitting – comply with civil rights law;
- Launch post-award compliance reviews and a process for prioritizing compliance reviews on an annual basis;
- Provide greater transparency to the public about ECRCO's work; and
- Meaningfully engage stakeholders.

Significantly, we note that resources play a role in the timeline and sequencing of our plans. Enforcing the law depends on ECRCO's ability to conduct our work professionally, in a timely and effective way, so that we can build credibility and have greater impact in enforcing the civil rights laws. However, we are limited by short staffing in headquarters and in the Regions, underfunding, and the need for additional training and certain skillsets to do the work. By contrast, some other federal agencies charged with external civil rights enforcement have significantly more staff supporting their work. Toward this end, EPA has requested and expects additional resources through the FY22 budget.

## **II. OGC Responses to OIG Recommendations**

**Recommendation 1:** *Develop and implement a plan to coordinate with relevant Agency program offices to develop guidance on permitting and cumulative impacts.*

**OGC Response:** ECRCO is committed to developing and issuing guidance to clarify the agency's interpretations of legal requirements and expectations to stakeholders. This includes guidance on the legal standards applied under Title VI of the Civil Rights Act of 1964 and EPA's implementing regulation, as well as other civil rights laws, with respect to permitting and, particularly, the consideration of cumulative impacts in the disparate impact and, where relevant, the disparate treatment analyses.

OGC accepts Recommendation 1 and commits to developing and implementing guidance on permitting and cumulative impacts related to Title VI. Although Recommendation 1 was directed to the AO, ECRCO will take the lead in developing the guidance, as it relates to civil rights enforcement and to ensure the guidance is consistent with legal standards under civil rights laws. In doing so, ECRCO will coordinate with the AO on the development and

implementation of its civil rights guidance and seek any appropriate AO approval. Notably, ECRCO's efforts to strengthen civil rights enforcement necessarily includes strengthening its relationship with EPA's program and regional offices. ECRCO envisions that prior to finalizing and implementing guidance on permitting and cumulative impacts, it will hold meetings with EPA programs and offices, Regional Counsels, and Deputy Civil Rights Officials (DCROs) and obtain and incorporate appropriate feedback from them about the guidance, its development, content, and the process for implementation. ECRCO has already briefed the AO on plans to develop guidance and convened what will be quarterly meetings with DCROs that will provide a forum for discussing programmatic developments and receiving feedback. ECRCO also plans to consult with state authorities and external stakeholders in the development of this and other guidance documents.

A necessary predicate to strong civil rights enforcement is greater clarity on EPA's interpretation of the civil rights statutes and EPA's regulation, as well as expectations for compliance with the law. ECRCO is assessing and prioritizing guidance needed to strengthen the civil rights enforcement program, including expanding upon and clarifying existing guidance. This will include the following:

### **Foundational Nondiscrimination Program Guidance for Applicants and Recipients**

- First, ECRCO is prioritizing the release of a "Dear Colleague Letter" and corresponding Guidance to recipients to emphasize the need for EPA recipients to come into compliance with foundational nondiscrimination program requirements, including clarifying recipients' obligation to collect and maintain data to evaluate and ensure compliance. **Deadline: By the end of 1st Quarter FY22.**

### **Clear and Effective Guidance for Investigating Claims of Discrimination**

- ECRCO will update, clarify, and strengthen what is currently Chapter 1 of the Toolkit, to provide clarity internally and externally about the investigative and legal standards that are applied to external civil rights claims, including those concerning permitting and how cumulative impacts will be evaluated when assessing whether an action, policy or practice, including in the permitting context, has an unjustified disparate and adverse impact. **Deadline: By the end of 4<sup>th</sup> Quarter FY22.**

***Recommendation 2:*** *Develop and implement a plan to complete systematic compliance reviews to determine full compliance with Title VI program.*

***OGC Response:*** ECRCO accepts Recommendation 2 and is committed to developing and implementing a systematic approach to ensuring compliance with Title VI, which includes clarifying expectations to recipients and other stakeholders, discussed in response to Recommendation 1, systematically reviewing applications for federal funding, discussed below in response to Recommendation 4, and conducting post-award affirmative compliance reviews. ECRCO's pre-award reviews of the 4700-4 forms submitted by applicants for EPA

funding, which are another component of a systematic approach to ensuring compliance, are addressed in response to Recommendation 4, below.

By using its affirmative authority to conduct and complete compliance reviews, ECRCO will be able to use its resources more efficiently to focus activities on high priorities. In FY22 ECRCO will conduct 1 or more compliance reviews to determine compliance with Title VI, with the number depending on complexity and resources. **Deadline: Initiate the first compliance review by the end of 1st quarter FY22.**

ECRCO will conduct and complete additional compliance reviews to determine compliance with Title VI, as well as other federal civil rights laws and EPA's nondiscrimination regulation in each FY going forward, as resources allow. **To do this, ECRCO will develop a plan, to initiate a target number of systematic (i.e., regularly planned) compliance reviews each year, which contains criteria for identifying annual priority areas of focus and selecting sites for compliance reviews, along with a process for meaningfully engaging with impacted communities and other internal and external stakeholders and partners, including EPA programs and regions. Deadline: Develop criteria and a process for annual compliance reviews by the end of 1st quarter FY22.**

Following the implementation of the revised Pre-Award Review Process described below, as part of OGC's response to Recommendation 4, including the issuance of the Dear Colleague Letter/Guidance and the Form 4700-4 review process revisions, **ECRCO will also conduct post award audits based on a sampling of submitted Form 4700-4 forms to ensure recipients have in place the required nondiscrimination program requirements. Deadline: Develop audit protocol by the end of the 2nd quarter of FY22 and initiate representative audit process by the 4th quarter FY22.**

***Recommendation 3:*** *Develop metrics to assess the effectiveness of the Cooperative Federalism pilot and other technical assistance efforts, such as the procedural safeguards checklist. Revise these tools and programs as needed based on the metrics.*

***OGC Response:*** ECRCO accepts Recommendation 3. ECRCO has undertaken a proactive initiative working with EPA Regions and states in those regions (the "Cooperative Federalism pilot") and recognizes the need for metrics to ensure that the work in support of strengthening state nondiscrimination programs is in fact yielding positive change. OGC has previously responded to OIG that OGC would develop additional tools and internal metrics to evaluate the progress and effectiveness of ECRCO's continued proactive initiatives with the states and regions, and will revise these tools and initiatives, and even the metrics, as needed. The metrics, which OGC has developed, track changes in state compliance with nondiscrimination process points (such as, indicators of whether states have notices of non-discrimination, grievance procedures, the identification of a non-discrimination coordinator, a public participation plan, a language access plan, and disability access). **Deadline: Metrics and tools will be implemented in the 4<sup>th</sup> Quarter of FY21.**

***Recommendation 4:*** *Verify that EPA funding applicants address potential noncompliance with Title VI with a written agreement before the funds are awarded.*

***OGC Response:*** ECRCO accepts Recommendation 4 and plans to use the 4700-4 pre-award process, the EPA General Terms and Conditions, which are binding on recipients and sub-recipients of funds, and the process described below to implement this Recommendation.

EPA's General Terms and Conditions applicable to recipients and sub-recipients include detailed requirements for complying with Title VI and EPA's nondiscrimination regulation, including requirements to provide meaningful access to persons with LEP, an agreement for permitting programs to use EPA's Title VI Public Involvement Guidance as a guide, and a provision requiring that recipients acknowledge their obligation to implement effective Title VI compliance programs and to ensure that their actions do not discriminate.

EPA has also developed modifications of its pre-award review process intended to achieve the goal of compliance by applicants recommended for competitive and non-competitive funding by EPA program offices, while also serving the goal of efficiency, given limitations in resources. Fundamentally, the Form 4700-4 review process needs to convey the expectation that applicants and recipients of EPA financial assistance will comply with Title VI and EPA's regulation. Our methods for ensuring compliance will be multiple.

- ECRCO is revising the process for reviewing Form 4700-4 and ensuring compliance with baseline foundational procedural requirements by applicants recommended for competitive and noncompetitive funding by EPA program offices. The goal is to ensure these applicants recommended for funding are in compliance, and if there is noncompliance, address noncompliance through voluntary means whenever possible and take appropriate action when voluntary means is not possible. The revised process will include:
  - Remove the presumption that ECRCO will not object to approval of an award absent an unresolved finding of discrimination, even if an applicant's Form 4700-4 fails to demonstrate compliance with the foundational nondiscrimination requirements. This requires modifying the Form 4700-4 review process and, particularly, removing the default response statement that "ECRCO currently does not recommend withholding approval of an award."
  - Conduct a "four-corners review" of the Form 4700-4: If the Form is completed in full, with answers indicating compliance with the requirements, and with certification of truthfulness and accuracy, ECRCO (in addition to ECRCO's regional reviewers) will respond that ECRCO does not recommend withholding approval of an award. If the Form is incomplete or contains factually incorrect information (e.g., applicant identifies EEO complaint procedures instead of external civil rights grievance procedures), ECRCO will request in writing a complete/corrected Form before considering recommending approval of financial assistance. On review of the completed form, if the applicant's response indicates that the applicant does not have

the requirements in place, ECRCO will recommend approval of the financial assistance, provided that the applicant has agreed in writing (typically by an exchange of emails) to have all requirements in place within six months. Further details of this process and follow up will be worked out with EPA's Office of Grants and Debarment. Any subsequent enforcement action would comport with regulatory requirements, 40 CFR § 7.115 (Post-award compliance). The goal is to clarify expectations and create accountability efficiently.

- **Deadline: Proposed 4700-4 Process to be launched by the end of the 1st Quarter FY22**, with the issuance of the Dear Colleague and Guidance documents clarifying expectations. These documents will provide for an initial six-month grace period before the revised process becomes effective, **by the end of the 3rd Quarter FY22**, with **training of all EPA staff involved in the Form 4700-4 form review process** during the grace period **in 2nd Quarter FY22**.
- As stated above, the revised Pre-award Review Process will also contain a review mechanism through post-award audits based on a sampling of submitted Form 4700-4 forms to ensure recipients have in place the required nondiscrimination program requirements. **Deadline: ECRCO will develop an audit protocol by the end of the 2nd quarter of FY22 and initiate representative audit process by the 4th quarter FY22.**
- In addition, ECRCO will continue to address compliance with the nondiscrimination program requirements through the investigation and resolution of complaints and will vigorously monitor informal resolution agreements until they are fully implemented.

***Recommendation 5:*** *Develop or update and implement policy, guidance, and standard operating procedure for collecting, reviewing, and using data to aid the External Civil Rights Compliance Office, EPA regions and programs, and recipients in assuring Title VI compliance.*

***OGC Response:*** ECRCO accepts Recommendation 5 and will be determining how to use data to identify and target funding recipients for proactive compliance reviews, as discussed in response to Recommendation 2, and, also, will develop or update policy, guidance, and SOPs, as appropriate, for the collection and use of data by recipients.

Currently, EPA Form 4700-4 asks recipients if they “maintain demographic data on the race, color, national origin, sex, age, or disability of the population it serves?” Over time, EPA has requested such data pursuant to investigations of complaint. Through the Foundational Nondiscrimination Program Guidance for Recipients, ECRCO will clarify expectations for applicants and recipients that recipients are obligated by EPA's nondiscrimination regulation, 40 C.F.R. § 7.85, to collect and maintain this data. This is not a new requirement but an affirmation of existing obligations. In addition, ECRCO will inform recipients of this and other nondiscrimination program obligations through materials available online, including a

technical assistance video. As stated above, **Deadline: Guidance by the end of 1st Quarter FY22 and Video by the 2<sup>nd</sup> Quarter FY22.**<sup>1</sup>

In addition, ECRCO is determining the best approach for clarifying that recipients must not only collect and maintain data about the communities they serve but must also analyze it and use it in their decision-making process to promote equity and ensure program decisions, including permitting decisions, are consistent with civil rights laws. **Deadline for recommending approach 4<sup>th</sup> Quarter FY22 and release of guidance FY23.**

***Recommendation 6:*** *Develop and deliver training for the deputy civil rights officials and EPA regional staff that focuses on their respective roles and responsibilities within EPA's Title VI compliance program.*

***OGC Response:*** ECRCO accepts Recommendation 6 and has previously provided OIG with a response that identified trainings of the type envisioned by its Recommendation 6, and OIG acknowledged our ongoing initiatives to meet the Recommendation. Specifically, ECRCO provided EPA-wide training in October and December 2020 to EPA staff involved in the pre-award form review process. Also, on March 11, 2021, ECRCO provided training on its Case Resolution Manual and Civil Rights Compliance Toolkit to DCROs, Regional Counsels, OPA, EJ and other EPA regional and program staff. ECRCO has undertaken listening sessions with DCROs and regional and media program staff, which has reinforced interest in additional training.

Additional training and internal engagement will also be required as ECRCO rolls out additional elements of a strengthened civil rights program. For example, as part of the Form 4700-4 form review process revisions, **ECRCO will provide training to all EPA staff involved in the form review process in the 2<sup>nd</sup> Quarter FY22.** Within two months of other planned deliverables (e.g., the Dear Colleague Letter and Guidance on the Foundational Procedural Requirements), ECRCO plans to provide training to EPA staff on each of those deliverables. Moving forward, ECRCO will provide additional training courses to EPA staff on civil rights topics and issues on a regular basis. For example, in addition to training in FY22 on the Form review process, ECRCO will offer training in FY23 as ECRCO issues guidance and works with national media programs and regional offices to ensure Title VI compliance is integrated into agency-wide oversight activities.

In addition, ECRCO is developing a technical assistance video on the foundational nondiscrimination program requirements. **This video will be posted on ECRCO's website in the 2<sup>nd</sup> Quarter FY22.**

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<sup>1</sup> Given resource constraints and the need to coordinate with other offices within EPA, ECRCO is considering options for how best to align recipient's data collection with revisions of the Form 4700-4 review process.