

August 28, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Comments on the Title VI
Recipient Guidance and the
Draft Revised Investigation Guidance

The Louisiana Mid-Continent Oil and Gas Association appreciates the opportunity to submit the following comments on the Title VI Draft Recipient Guidance and the Draft Revised Investigation Guidance Documents which appeared in the June 27, 2000 Federal Register (Page 39650). Louisiana Mid-Continent is an industry trade association representing individuals and companies who together produce, transport, refine and market over 90% of the crude oil and natural gas in Louisiana. These individuals and companies must obtain multiple permits from the Louisiana Department of Environmental Quality to operate and therefore could be affected by complaints investigated under this guidance. It is in this context that we offer the following comments for EPA's consideration.

Mid-Continent is affiliated with the American Petroleum Institute (API) and participated in the review of the draft guidance with API and National Petrochemical and Refining Association (NPRRA) representatives. As such, Mid-Continent endorses the comments being submitted by API and NPRRA. Mid-Continent has also reviewed the comments being submitted by the Business Network for Environmental Justice (BNEJ), and Mid-Continent endorses the BNEJ comments.

>> General Comments

Mid-Continent supports EPA's efforts to improve the clarity of the guidance documents on how EPA will investigate Title VI complaints. It is in everyone's best interest to have the recipients expectations described and the complaint process outlined. Mid-Continent believes the guidance is greatly improved over that presented in the 1998 Interim Investigation Guidance. Mid-Continent, however, believes the guidance needs to further clarify several provisions to ensure complete understanding by all affected parties.

Mid-Continent also commends EPA for its effort to hear the concerns of stakeholders after the publication of the 1998 Interim Guidance. Mid-Continent was afforded the opportunity to participate in some of these forums, and we appreciate the opportunity to express our views during this period.

>> The Affect of a Complaint on a Permit

The EPA states throughout the Federal Register notice that "the filing or acceptance for investigation of a Title VI complaint does not suspend an issued permit." While this may be true from a strict legal standpoint, Mid-Continent believes that a complaint often will have the practical effect of suspending a project covered by the permit. While the complaint is filed against the "recipient", the press often reports the filing as a complaint against the permittee. It is anticipated that very few permittees will undertake the activities authorized by the permit in question while the complaint is unresolved. This concern is evidenced by one of the resolutions EPA offers in the guidance.

On page 39683, Column 2, EPA offers that the "justification" a recipient offers for a permit can be "rebutted" by EPA if a "less discriminatory alternative exists". (Section VII.A.1.). Mid-Continent believes that a permittee is unlikely to construct a facility using one technology if there is the possibility that a different technology will be identified as the possible remedy for this complaint.

Secondly, a permittee must often receive multiple permits (air, water, etc.) before a facility can be constructed. The air construction permit is usually the first permit issued since it must be obtained prior to start of construction. If the complaint is filed on this initial permit action, a permittee is not likely to aggressively pursue the remaining permit actions until the complaint is resolved. The recipient is also more likely to slow the processing of these additional permits since a complaint has already been filed against the recipient. The EPA, which has oversight of these permitting actions, is also expected to take a long look at these permits which causes additional potential delays.

Mid-Continent believes that the filing of a complaint does have the "equivalent" effect, if not the legal effect, of suspending the activity authorized by the permit. This being the case, Mid-Continent believes the EPA should make every attempt to resolve complaints quickly. Several of Mid-Continent's comments will address issues that will facilitate the speedy resolution of a complaint.

>> Procedural Steps for Processing Complaints

In Section II.A. (Page 39670), EPA outlines the procedure for acknowledging and accepting complaints. This procedure is taken from 40 CFR 7.120. It appears that EPA misses an excellent opportunity to reject a complaint (if warranted) at this early stage due to the timing of the steps.

The steps require that EPA "notify" the complainant and the recipient within five days of the receipt of the complaint. The EPA is required to accept for investigation a complaint satisfying the jurisdictional criteria within 20 days. EPA, however, allows the recipient 30 days to respond to the complaint. EPA is therefore required to make a decision before the recipient is required to respond.

A permit complaint can be something as simple as the recipient failed to hold a public hearing on the permit. This allegation could easily be rebutted by the recipient in short order. The procedural steps, however, require EPA to accept the complaint before the 30 day deadline the

recipient is allowed to make its initial response to the complaint. Mid-Continent believes that the EPA misses an excellent opportunity to resolve a complaint early in the process by not waiting for the initial response of the recipient.

>> Role of the Complainant in the Permit Process

The EPA Recipient's Guidance does an excellent job of identifying potential activities recipients can undertake to minimize the potential for a complaint. Louisiana has undertaken many changes to its public participation procedures in the last few years. Mid-Continent has supported many of the legislative and regulatory actions that implemented these changes. Mid-Continent believes that the most appropriate place for disparate impacts to be addressed is before the permit is issued, not afterwards, as is often the case. EPA will have the opportunity to review the comments on the permit and the recipient's response before the permit is ultimately issued. Resolution of any issues at this point allows a valid permit to be issued and should lead to quick resolution of any future complaint.

EPA, however, places no burden on the complainant to participate in the permit process. The guidance as proposed appears to allow EPA to fully investigate a complaint and to apply a remedy even if the complainant fails to take advantage of the opportunity to offer their comments in the permit process. What incentive does a complainant have to participate in the permit process when they can wait to file a complaint after the permit is issued?

Mid-Continent believes the guidance should include strong language that EPA will be more likely to dismiss a complaint if the complainant fails to participate in the permit process. Mid-Continent acknowledges that this predisposition is only appropriate in those instances where the recipient has provided the complainant the opportunity to participate as outlined in the examples in the Recipient's Guidance. The EPA hopes issues can be resolved before the permit issuance. This is EPA's reason for the Recipient's Guidance. For this to occur, EPA must place some onus on the complainant to participate in this process which does not currently exist in the guidance.

>> Role of the Permittee

While Mid-Continent acknowledges that a complaint can only be filed against a recipient, Mid-Continent believes that there is a role for the permittee. Once again, Mid-Continent believes that it is in everyone's best interest to resolve a complaint quickly. The permittee can often quickly provide the information to accomplish this resolution. While Mid-Continent assumes that EPA fully expects the permittee will take part in any resolution, as proposed in the guidance this occurs only through a third party request for information. Mid-Continent believes the guidance should include a specific role for the permittee to participate.

>> Clarifying the "Affected Population" and "Who may file a complaint"

Mid-Continent believes that EPA should add more clarity to its interpretation of "affected populations". Mid-Continent members individually and through support of legislative and regulatory changes have already implemented some of the public outreach concepts presented in

the Recipient's Guidance. However, there remains much doubt about the geographic limits of the community the facilities should target for outreach.

This confusion is caused by the implementation of several federal programs in the 1990s that purport that pollutants travel hundreds of miles and cause significant impacts far from their source. These programs include the acid rain program, the regional haze program and the northeast states ozone transport (OTAG) initiative. The guidance appears to allow a community several hundreds miles away from the source to allege an adverse impact that EPA would be required to review and potentially investigate. The EPA has often used an area of 50 square miles to analyze demographic information. Mid-Continent believes this smaller concept of affected population is more appropriate for considering the validity of a complaint.

Mid-Continent is also concerned about the provisions of allowing a party "authorized to represent" a person or class to file a complaint. Mid-Continent believes EPA should outline criteria to be met to be considered "authorized to represent".

Mid-Continent members have made great strides to improve the relationship and communications with the communities immediately surrounding the facilities. A potential detriment to this improved relationship is the opportunity for groups outside of the community to use the Title VI program to pursue an agenda that is different than the community's concerns. The community should make the overture to a group to represent them and not the other way around. The guidance should include some form of "test" to ensure that an outside group is truly authorized to represent the community and is expressing the community's actual concerns.

>> Complaints Based on Issues Outside EPA or Recipient's Jurisdiction

Mid-Continent is concerned that the Title VI complaint process will be used to foster issues that are outside the scope of the environmental laws under the EPA's or recipient's jurisdiction. Many of the concerns of communities surrounding facilities have their roots in activities that are not environmental in nature. The failure for local and state governments to institute zoning requirements or to allocate tax revenues to upgrade schools or infrastructure in poor and/or minority areas around facilities is not the responsibility of the permitting agency and is not appropriate for EPA to review in complaints on environmental permit actions. Complaints seeking resolution on issues not associated with direct impacts associated with environmental programs under EPA's jurisdiction should be quickly dismissed.

>> Area Specific Agreements

While Mid-Continent understands the potential benefits of engaging in area specific agreements, Mid-Continent believes these agreements may actually have an unintended negative impact on the community. The communities of concern often need businesses of many types to move into these neighborhoods. These area specific agreements could place a stigma on these areas discouraging these new businesses. Louisiana has lost many new plants or businesses because an area was designated ozone non attainment. This in spite of the fact that the business was of a nature that it could easily be sited in the location under the environmental rules. The simple designation of non

attainment was enough to halt these opportunities.

>> Dismissal of Complaints Using "Banked" Emission Credits.

EPA states that it would not dismiss a complaint if the permit relied on "banked emission" to achieve the reductions. (Section VI.B.1a-Page 39677, Column 2). Mid-Continent requests that EPA reconsider this position.

Many states have some form of emissions banking program for use in permitting activities. The banking program for Baton Rouge has led to significant emissions reductions well in advance of any rule requiring such reductions. The communities surrounding these facilities have benefited from these early reductions. Admittedly, a permit using banked emission credits increases emissions. However, the increase is still significantly less than the amount originally reduced due to the offset ratio provisions (e.g. 1.3 to 1 offset). In fact, many credits in the bank are never used, and the early reductions become permanent.

Disallowing early reductions will actually hurt nearby communities since facilities will wait several months if not years to perform the emissions reduction project to be contemporaneous with the increase. Instead of encouraging early reductions which is in the community's best interest, the guidance discourages this activity. Once again, banking programs 1) result in significant reductions, therefore benefiting the community, 2) result in reductions sooner versus later, and 3) result in reductions that eventually become permanent if the credits are not used. EPA should encourage early reductions. The guidance, however, discourages this practice to the community's detriment.

>> Multiple Complaints on the Same Activity

Mid-Continent believes that EPA should dismiss follow-up complaints on actions that have already been resolved by the parties involved. For example: a new facility received an air construction permit and a complaint is filed. This complaint is eventually resolved (either changes made or dismissed). The facility is constructed in compliance with the permit and the facility requests a Title V operating permit, which is granted. The guidance would allow a new complaint to be filed on the same issue as previously resolved at this point in the permit process. Unless significant new issues are raised, Mid-Continent believes EPA should immediately reject this complaint. This case also can occur when a facility applies to renew a Title V permit. If no new substantive issues are raised, EPA should immediately dismiss the complaint.

>> Compliance with Existing Environmental Laws

Mid-Continent has serious concerns with EPA's blanket position that "compliance with environmental laws does not constitute per se compliance with Title V." It is one thing if "compliance" is achieved because there is no regulation addressing a specific pollutant. It is quite another when the permit action involves facilities required to be modified to meet a specific rule.

Louisiana (as is many other states) is in the process of issuing Title V permits to facilities. These permits are required by statute and were not intended to add/change requirements at a facility. Mid-Continent believes complaints against Title V permits that simply document existing requirements should be dismissed.

Mid-Continent is also concerned that the guidance can be used to require compliance with a more stringent level of control. Many permits are issued to install facilities needed to meet EPA regulatory requirements. These requirements are justified based on cost impact figures developed by EPA in the rule promulgation process. Mid-Continent is concerned that the Title VI process could be used by EPA to mandate control requirements that it could not initially justify in the rulemaking process. Mid-Continent is also concerned that the Title VI process could lead to control technologies that raise the BACT/LAER threshold in PSD or NSR permitting that could not otherwise be justified based on the permit process alone. States may also not have the legal authority to mandate "compliance" beyond that stated in the rules.

>> Acknowledgement of Agency's Need to Issue Permits for the Public Good

Mid-Continent concurs with EPA's position that agencies must at times issue permits to meet an overreaching goal to improve the environment and/or spur economic development and that EPA could dismiss complaints based on these grounds. Mid-Continent believes the upcoming permit actions to manufacture Tier 2 low-sulfur gasoline falls into this category and EPA should acknowledge this fact. Refiners have no choice but to construct new process units at existing plant sites to manufacture this fuel. State agencies must issue permits to allow this construction. The overall benefits to society will far outweigh any increased impact to communities around the plant sites. Mid-Continent requests that EPA take a strong public stance that they will dismiss claims for these permits unless there is overwhelming evidence to the contrary.

>> Improvements in the Guidance Supported by Mid-Continent

As stated in the opening General Comments, Mid-Continent believes the new guidance is significantly improved in several areas. Mid-Continent requests the following concepts be retained in the final guidance:

- 1) The use of risk-based procedures to determine adverse impact - Section VI.B.4.a.
- 2) The affirmation that compliance with a NAAQS standard is presumed protective of public health - Section VI.B.4.b.
- 3) The acknowledgement that permit actions that significantly reduce emissions and/or that reduce the pollutant(s) of concern in the complaint will likely be dismissed - Section VI.B.1.a.
- 4) The requirement that an adverse impact be "significant" to qualify as a valid complaint - Section VI.A.Step 6.
- 5) The addition of the definitions are quite helpful and should be retained and clarified where

appropriate.

6) The position that EPA will not process complaints that are also part of ongoing legal action.

Once again, the Mid-Continent Oil and Gas Association appreciates the opportunity afforded us to participate in the discussions that led up to the new guidance and we appreciate the opportunity to submit these comments.

Sincerely,

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