



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

March 30, 2021

In Reply Refer to:

EPA Complaint No. 01RNO-20-R7

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Re: Partial Preliminary Findings for EPA Complaint No. 01RNO-20-R7: Non-Compliance

Dear Mr. Menees and Ms. Rubenstein:

This letter conveys partial preliminary findings of the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) in the administrative complaint (Complaint) filed with EPA on September 4, 2020, by the Great Rivers Environmental Law Center on behalf of the National Association for the Advancement of Colored People, Missouri State Conference ("Missouri NAACP"), the NAACP St. Louis City Branch ("St. Louis City NAACP"), and the Dutchtown South Community Corporation (DSCC) against the Missouri Department of Natural Resources (MoDNR). The Complaint alleges that MoDNR discriminated on the basis of race, color and/or national origin in violation of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation, 40 C.F.R. Part 7, when on March 10, 2020, MoDNR issued Part 70 Intermediate Operating Permit OP2020-008 to Kinder Morgan Transmix Company, LLC ("Kinder Morgan").

Consistent with the requirement in 40 C.F.R. § 7.115(c)(1), ECRCO herein sets forth preliminary findings.¹ As described below, ECRCO has not concluded its investigation of EPA complaint number 01RNO-20-R7 or reached final conclusions of fact or law about MoDNR's alleged

¹ See Case Resolution Manual provision Section 5.1 (Jan. 2021) (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

discrimination on the basis of race, color and/or national origin related specifically to MoDNR's issuance of the air quality permit. We continue to look into the possibility that MoDNR may have discriminated on the basis of race, color and/or national origin as the result of MoDNR's air quality permitting program.

ECRCO Authority, Complaint Background and Summary of Conclusions

ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, and age in programs or activities that receive federal financial assistance from the EPA. Pursuant to EPA's nondiscrimination regulation, ECRCO conducted a preliminary review of the Complaint to determine acceptance, rejection, or referral to the appropriate Federal agency. *See* 40 C.F.R. § 7.120(d)(1). The Complaint alleges that MoDNR issued a permit to Kinder Morgan regarding its emission of various pollutants that are harmful to human health in violation of Title VI and that results in a disproportionate impact on the basis of race, color and/or national origin. The Complaint further alleges that MoDNR has engaged in a pattern and practice of discrimination by ignoring concerns raised over the years about its failure to have in place a "nondiscrimination program," including procedural safeguards as required by the EPA's nondiscrimination regulation. In addition, the Complaint alleges MoDNR did not provide meaningful access for individuals with limited English proficiency (LEP) during its public solicitation for comments related to the pending permitting actions. On September 29, 2020, ECRCO determined that the Complaint met the jurisdictional requirements and identified the following issues for investigation:

1. Whether MoDNR discriminated against a community of color, collectively hereinafter referred to as "Dutchtown," located in St. Louis, MO, on the basis of race, color and/or national origin in violation of Title VI of the Civil Rights Act of 1964, and EPA's implementing regulation, 40 C.F.R. Part 7, by issuing Part 70 Intermediate Operating Permit Number OP2020-008 to the Kinder Morgan Transmix Company, LLC operations;² and
2. Whether MoDNR has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to MoDNR's services, programs, and activities for individuals with LEP and individuals with disabilities, and whether the MoDNR has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.³

² Title VI of the Civil Rights Act, 42 U.S.C. 2000(d) *et seq.* (prohibiting discrimination on the basis of race, color or national origin); 40 C.F.R. Parts 5 and 7. *See also* U.S. EPA, Chapter 1 of the U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit: Chapter 1, transmittal letter, and FAQs (https://www.epa.gov/sites/production/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf). (2017).

³ *See* Title VI, 42 U.S.C. 2000(d) *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services

ECRCO has concluded its investigation with respect to most of the second issue.⁴ The first issue remains under investigation.⁵ With respect to the second issue, ECRCO has determined that the preponderance of the evidence supports a conclusion that MoDNR failed to comply with its longstanding obligations under the federal nondiscrimination laws and EPA's nondiscrimination regulation to have and implement a nondiscrimination program, including: procedural safeguards required under 40 C.F.R. Parts 5 and 7; and policies and procedures for ensuring meaningful access to MoDNR's services, programs, and activities for individuals with LEP and individuals with disabilities. In addition, ECRCO has determined that MoDNR did not provide meaningful access for individuals with LEP specifically during its public solicitation for comments related to Kinder Morgan permitting actions.

ECRCO's investigation included interviews with the complainants' representative to learn more about the interactions with MoDNR and the documented allegations and to provide information on the investigation process and options for resolution such as a willingness of the complainants to pursue alternative dispute resolution (ADR).⁶ On October 19, 2020, ECRCO received confirmation that all complainants were interested in pursuing ADR to resolve the Complaint. ECRCO met with MoDNR on October 28, 2020 and again on November 2, 2020, to provide information about the investigation, the complaint resolution processes, and a copy of the

to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). *See also* U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf); U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March 21, 2006) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf); U.S. EPA, Procedural Safeguards Checklist for Recipients, (https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf); U.S. EPA, Disability Nondiscrimination Plan Sample (https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf). (2017).

⁴ At this time, ECRCO is not able to make preliminary findings related to whether MoDNR has in place a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, based on the limited information provided by MoDNR, except as to the failure to provide language access to individuals with LEP. A fuller examination of public participation is required and, thus, it remains under investigation.

⁵ The Complaint alleges that Dutchtown disproportionately suffers health risks from these and other regulated sources of pollution located within its community. The Complaint further states that the City of St. Louis' port system is the second-largest inland port system in the United States and that this industrialized riverfront corridor is located adjacent to Dutchtown and is only separated from the community's residential area by Interstate Highway 55. The Complaint further alleges that this highway system increases the exposure to lead due to the proximity to vehicle pollution and subjects Dutchtown "to frequent illegal trash and hazardous waste dumping in their neighborhoods, and the increased incidence of building demolition, leading to the further spread of harmful dust, lead and asbestos into the air."

⁶ Case Resolution Manual, Section 3.3: "Alternative Dispute Resolution." ECRCO considers the ADR process to be a viable option for recipients and complainants to address some, if not all, of the discrimination issues in a complaint. ECRCO has discretion to determine, on a case by case basis, whether to offer ADR as a possible resolution path.

Procedural Safeguards Checklist.^{7,8} During the November 2, 2020, meeting MoDNR stated it was not interested in pursuing either ADR with the complainants or informal resolution with ECRCO. MoDNR indicated it would provide a response to the Complaint and ECRCO should proceed with the investigation. Accordingly, MoDNR provided its response to the Complaint to ECRCO on November 12, 2020. On November 24, 2020, ECRCO met again with MoDNR to discuss further the investigation and MoDNR's participation in an informal resolution process. MoDNR stated that it was not interested in pursuing informal resolution at that time. Accordingly, ECRCO informed MoDNR that it would proceed with its investigation and issue Preliminary Findings.

Legal Standards

EPA's investigation was conducted under the authority of the federal civil rights laws, including Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation (40 C.F.R. Parts 5 and 7) and consistent with EPA's Case Resolution Manual.⁹

I. Background on Dutchtown Community

The Dutchtown Community is located within zip codes 63111, 63116 and 63118, and within the 9th, 11th, 13th, 20th and 25th wards of the City of St. Louis. The Dutchtown Community is an agglomerate of four (4) neighborhoods located on the southside of the City of St. Louis that include Dutchtown, Gravois Park, Mount Pleasant, and Marine Villa. The Dutchtown Community area includes a mixture of residential, retail, commercial and industrial land uses bound by "Cherokee Street or Chippewa Street to the north, Bates Street to the south, the Mississippi River to the east, and the Missouri Pacific railroad tracks to the west."¹⁰ As part of its investigation, ECRCO reviewed demographic information for the Dutchtown Community. The Dutchtown Community in zip codes 63111, 63116 and 63118 has a total population of approximately 93,865. In zip code 63111, the population is approximately: 46% Black; 9% Hispanic; and 1% Asian. In zip code 63116, the population is approximately: 20% Black; 8% Hispanic; and 7% Asian. In zip code 63118, the population is approximately: 51% Black; 7% Hispanic; and 2% Asian. With respect to persons with limited English proficiency, the Dutchtown Community in zip codes 63111, 63116 and 63118, has a total for all three zip codes of 4%, 11%, and 5%, persons 5 years or older who speak English less than very well, respectively.¹¹

⁷ ECRCO originally scheduled a meeting with the recipient on October 19, 2020. Due to conflicts, the meeting was rescheduled to November 2, 2021.

⁸ Procedural Safeguards Checklist for Recipients, Federal Non-Discrimination Obligations and Best Practices (Revised January 2020). (https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf).

⁹ Case Resolution Manual (Jan. 2021) (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

¹⁰ About Dutchtown (<https://www.dutchtownstl.org/>).

¹¹ U.S. Census Bureau, American Community Survey data (2014-2018 estimates).

Currently there are seven (7) Part 70 major source air permits, five (5) intermediate synthetic minor source air permits, and 18 permitted construction air emission sources located within the Dutchtown Community.¹²

II. Preliminary Findings for Issue Number Two

Whether MoDNR has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to the MoDNR's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether the MoDNR has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.

ECRCO assessed MoDNR's nondiscrimination program relative to the requirements of federal nondiscrimination laws and regulation. Specifically, ECRCO investigated whether MoDNR is in compliance with the requirements of EPA's nondiscrimination regulation, which sets forth the foundational elements of a recipient's nondiscrimination program.¹³ ECRCO has determined that MoDNR failed to comply with its obligations under the federal nondiscrimination laws and EPA's nondiscrimination regulation to have and implement a nondiscrimination program. Further, based on ECRCO's review of the record, it appears that MoDNR ignored concerns raised over the years about its failure to have in place a nondiscrimination program consistent with its longstanding legal obligations.¹⁴

Notice of Nondiscrimination

EPA's nondiscrimination regulation requires MoDNR have a notice of non-discrimination (Notice) stating that the recipient does not discriminate on the basis of race, color, national origin, age, or disability in a program or activity receiving EPA assistance or, in programs covered by Section 13 of the Education Amendments, on the basis of sex.¹⁵ The Notice must be posted in a prominent place including in the recipient's offices or facilities, on the recipient's website homepage, and in general publications distributed to the public. The Notice must also be accessible to individuals with limited English Proficiency (LEP) and individuals with

¹² Permit Compliance System (PCS) and Integrated Compliance Information System (ICIS) databases in Envirofacts regarding facilities registered with the federal enforcement and compliance (FE&C). *See* <https://www.epa.gov/enviro/pcs-icis-search>

¹³ 40 C.F.R. Parts 5 and 7.

¹⁴ *See*, for example, Comments submitted by Mr. Menees on various occasions and with respects to several permits, including, Mallinckrodt, LLC Part 70 Operating Permit, Installation ID: 510-0017 Project No. 1997-05-009, RPC-6; MSD - Bissell Point Wastewater Treatment Plant Installation ID: 510-0053 Part 70 Operating Permit Project No. 2007-06-088, April 16, 2018; and Kinder Morgan Transmix Company, LLC, Installation ID: 510-2939, Intermediate State Operating Permit, Project No. 2015-04-028, RPC-1. [A copy of the original comments was not provided. The comments for Mallinckrodt and Bissell WWTP address North St. Louis (communities of Hyde Park, College Hill, and Old North.)]

¹⁵ 40 C.F.R. § 7.95(a); 40 C.F.R. § 5.140.

disabilities.¹⁶ The Notice must also clearly identify the nondiscrimination coordinator, including name and contact information.

Preliminary Findings

ECRCO has determined that at the time of ECRCO's acceptance of the Complaint for investigation, MoDNR did not have a notice of nondiscrimination consistent with EPA's nondiscrimination regulation. ECRCO found that, at the time the Complaint was accepted for investigation, a search of MoDNR's website produced a notice of *employment* nondiscrimination that did not include the necessary information as required by EPA's nondiscrimination regulation, that is, to provide notice of nondiscrimination as to beneficiaries of its programs and activities. Based on ECRCO's review of MoDNR's February 5, 2021, responses to ECRCO's Request for Information #1 (RFI #1), and a search of MoDNR's website, ECRCO has determined that, at some point during the investigation, MoDNR modified its existing notice of employment discrimination and now its "Nondiscrimination Notice" also includes a reference to "the public" and the federal civil rights laws addressed in EPA's nondiscrimination regulation. However, based on ECRCO's March 2021, evaluation of MoDNR's website, ECRCO has determined the following deficiencies remain:

- MDNR's Nondiscrimination Notice does not include a statement addressing retaliation discrimination, that is, that MoDNR does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.
- MoDNR's Nondiscrimination Notice does not identify its designated Nondiscrimination Coordinator with enough specificity, including the name, to enable a member of the public to contact that Coordinator.
- MoDNR does not ensure that its Nondiscrimination Notice is accessible to individuals with limited-English proficiency.

Therefore, ECRCO has determined that MoDNR is not in compliance with EPA's nondiscrimination regulation with respect to Notice of Nondiscrimination.¹⁷

Nondiscrimination Coordinator

EPA's nondiscrimination regulation requires that EPA recipients with fifteen or more employees must designate a nondiscrimination coordinator to oversee their nondiscrimination program.¹⁸ In addition, under the "Notice of Nondiscrimination," the regulation requires that the Notice

¹⁶ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁷ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁸ 40 C.F.R. § 7.85(g) (if a recipient employs 15 or more employees, it shall designate at least one person to coordinate its efforts to comply with its obligations under this part); 40 C.F.R § 5.135(a) requiring the designation of a responsible employee with respect to Title IX of the Education Amendments of 1972, as amended.

“identify the responsible employee” designated as the recipient’s Nondiscrimination Coordinator.¹⁹

Preliminary Findings

ECRCO has determined that at the time of the Complaint’s acceptance, MoDNR had not designated or identified a nondiscrimination coordinator as required by EPA’s nondiscrimination regulation.²⁰ Based on ECRCO’s review of MoDNR’s February 5, 2021, responses to ECRCO’s RFI #1, and of MoDNR’s website, ECRCO has determined that, when MoDNR subsequently modified its existing notice of employment discrimination to include a reference to “the public” and amended its Complaint Procedures to include that “[a]ny person who believes they have been subjected to unequal treatment or discrimination . . .”²¹ as well as its External Complaint of Discrimination Form,²² it continues to direct the public to contact MoDNR’s “Office of Employee Relations.” In addition, none of MoDNR’s required statements or procedures identify its designated Nondiscrimination Coordinator with enough specificity, including the name, to enable a member of the public to contact that Coordinator. Therefore, ECRCO has determined that MoDNR is not in compliance with EPA’s nondiscrimination regulation with respect to designation of a nondiscrimination coordinator.²³

Grievance Procedures

EPA’s nondiscrimination regulation requires that each recipient with fifteen or more employees adopt and publish grievance procedures that ensure the prompt and fair resolution of complaints.²⁴ Additionally, the U.S. Department of Justice’s regulation on “Coordination of Enforcement of Non-discrimination in Federally Assisted Programs,” requires recipients to display prominently information regarding the nondiscrimination requirements of Title VI, including the procedures for filing complaints.²⁵

¹⁹ See 40 C.F.R. § 7.95; 40 C.F.R. § 5.135(a) requiring the designation of a responsible employee with respect to Title IX of the Education Amendments of 1972, as amended.

²⁰ MoDNR has over 1300 employees, and as such, this requirement applies to MoDNR (<https://dnr.mo.gov/hr/dnrjobinfo.htm>).

²¹ See MoDNR’s Complaint Procedures at <https://dnr.mo.gov/non-discrimination-notice.htm>

²² See MoDNR’s External Complaint of Discrimination Form at: <https://dnr.mo.gov/forms/780-2926-f.pdf>

²³ See 40 C.F.R. § 7.85(g), § 7.95; 40 C.F.R. § 5.135(a).

²⁴ 40 C.F.R. § 7.90 (each recipient with 15 or more employees shall adopt grievance procedures that assure the prompt and fair resolution of complaints). See also 40 C.F.R. § 5.135(b) (“Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.”).

²⁵ 28 C.F.R. § 42.405(c) (“Federal agencies shall require recipients, where feasible, to display prominently in reasonable numbers and places posters which state that the recipients operate programs subject to the nondiscrimination requirements of title VI, summarize those requirements, note the availability of title VI information form recipients and the federal agencies, and explain briefly the procedures for filing complaints. Federal agencies and recipients shall also include information on title VI requirements, complaint procedures and the rights of beneficiaries in handbooks, manuals, pamphlets and other material which are ordinarily distributed to the public to describe the federally assisted programs and the requirements for participation by recipients and beneficiaries. To the extent that recipients are required by law or regulation to publish or broadcast program information in the news media, federal agencies and recipients shall insure that such publications and broadcasts

Preliminary Findings

At the time of ECRCO's acceptance of this Complaint for investigation, MoDNR had not adopted and published grievance procedures that assure the prompt and fair resolution of complaints as required by EPA's nondiscrimination regulation.²⁶ In its February 5, 2021, response to ECRCO's RFI #1, MoDNR submitted a copy of its "External Complaint Response Policy," effective date, January 4, 2021.²⁷ ECRCO reviewed this policy and determined that it does not assure the prompt and fair resolution of complaints. Specifically:

- MoDNR's External Complaint Response Policy does not describe elements of the recipient's investigation process or provide timelines for: the submission of a discrimination complaint; the investigation's review, conclusion, or resolution process; or making an appeal of any final decision(s).
- Neither MoDNR's External Complaint Response Policy nor its External Complaint of Discrimination Form include retaliation as one of the bases for filing a complaint under these procedures.
- Neither MoDNR's External Complaint Response Policy nor its External Complaint of Discrimination Form are accessible to persons with limited English proficiency, in the appropriate languages other than English used by limited English proficient individuals in MoDNR's service area.

Therefore, ECRCO has determined that MoDNR is not in compliance with EPA's nondiscrimination regulation with respect to the adoption and publication of grievance procedures.

Meaningful Access for Persons with Limited English Proficiency (LEP)

Title VI and EPA's nondiscrimination regulation prohibit discrimination on the basis of national origin. The Supreme Court has interpreted this prohibition to include discrimination on the basis of English proficiency, that is, a person's inability to speak, read, write, or understand English.²⁸ As a recipient of EPA financial assistance MoDNR is required to provide meaningful access to its services, programs and activities for persons with limited English proficiency.²⁹ To ensure MoDNR is providing meaningful access, MoDNR should conduct appropriate analyses to determine what languages other than English are used by persons with LEP in MoDNR's service area and to determine what language services or mix of language services it needs to provide to ensure that persons with LEP can meaningfully access and participate in its programs, activities

state that the program in question is an equal opportunity program or otherwise indicate that discrimination in the program is prohibited by federal law.").

²⁶ MoDNR has over 1300 employees, and as such, this requirement applies to MoDNR, (<https://dnr.mo.gov/hr/dnrjobinfo.htm>).

²⁷ See at <https://dnr.mo.gov/policies/1.11.pdf>

²⁸ See Title VI, 42 U.S.C. 2000(d) *et seq.*; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a).

²⁹ See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf).

and services. This includes, for example, development of a language access plan; translation of vital documents into prominent languages; and provision of simultaneous interpretation of public proceedings and meetings in prominent languages for persons with LEP so they may effectively participate.³⁰

It is important to note that as part of requesting and receiving EPA financial assistance, MoDNR agreed by signing Form 4700-4 to comply with their federal non-discrimination obligations, including affirming that MoDNR had “a policy/procedure for providing access to services for persons with limited English proficiency... (40 C.F.R. Part 7, E.O. 13166).” MoDNR also agreed based on Paragraph 39 of EPA’s general terms and conditions³¹, to more specific obligations, including that: “As a recipient of EPA financial assistance, you are required by Title VI of the Civil Rights Act to provide meaningful access to LEP individuals. In implementing that requirement, the recipient agrees to use as a guide the Office of Civil Rights (OCR) document entitled "Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons." The guidance can be found at: <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi> ii.”

Preliminary Findings

Based on a review of all available information, including a review of MoDNR’s website, and of the information provided to ECRCO by MoDNR, (MoDNR’s November 12, 2020, response to ECRCO’s Complaint acceptance and MoDNR’s February 5, 2021, responses to ECRCO’s RFI #1), MoDNR does not have in place specific policies and procedures to ensure meaningful access to its services, programs, and activities, for individuals with limited English proficiency as required by Title VI.³²

In fact, this conclusion is affirmed by MoDNR in its February 5, 2021 responses to ECRCO’s RFI #1, where it states: “The Department reviews and updates its policies and practices, as needed, including those related to nondiscrimination”³³ but also that “The Department’s website is over 20 years old. Our current redesign project will make our website more compatible for individuals with limited English proficiency (LEP) and individuals with disabilities and impairments.”³⁴ MoDNR further stated, “Upon request, . . . services are provided by

³⁰ See Title VI, 42 U.S.C. 2000(d) *et seq.*; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient’s Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf).

³¹ [https://www.epa.gov/sites/production/files/2020-](https://www.epa.gov/sites/production/files/2020-11/documents/fy_2021_epa_general_terms_and_conditions_effective_november_12_2020.pdf)

[11/documents/fy_2021_epa_general_terms_and_conditions_effective_november_12_2020.pdf](https://www.epa.gov/sites/production/files/2020-11/documents/fy_2021_epa_general_terms_and_conditions_effective_november_12_2020.pdf)

³² *Id.*

³³ February 5, 2020 correspondence from the Missouri Department of Natural Resources’ (Department) in response to the U.S. Environmental Protection Agency, External Civil Rights Compliance Office’s January 6, 2021 RFI #1, Response to Question 2.g.

³⁴ February 5, 2020 correspondence from the Missouri Department of Natural Resources’ (Department) in response to the U.S. Environmental Protection Agency, External Civil Rights Compliance Office’s January 6, 2021 RFI #1, Response to Question 3.

International Language Center and Languages Translation Services.”³⁵ MoDNR finally states that “documents can be translated upon request.”³⁶ However, ECRCO found no such services offered on MoDNR’s website, either in English or in any other language. As such, members of the public are not informed that they may request language services free of charge and how they may access those services. These practices are not consistent with Title VI and MoDNR’s commitment to use EPA’s LEP Guidance as a guide to provide meaningful language access.³⁷ Further, in response to ECRCO’s January 6, 2021, Request for Information #1, and in particular, questions 9 and 10 under the Procedural Safeguards section, MoDNR failed to provide copies of any policies or procedures to ensure meaningful access to persons with LEP or even a description of any decision-making process utilized for providing such language services.³⁸ MoDNR failed to provide a single example of a translated document or instance when a language interpreter was provided for any community within its state service area including during its review of this permit. Furthermore, MoDNR did not provide any evidence that it offered or provided meaningful access to individuals with LEP during its public solicitation for comments related to the Intermediate Operating Permit OP2020-008 to Kinder Morgan Transmix Company, LLC. Accordingly, MoDNR is not in compliance with its obligation under Title VI and the general terms and conditions of EPA financial assistance to ensure meaningful access to its services, programs or activities for persons with limited English proficiency.

Individuals with Disabilities

EPA’s nondiscrimination regulation provides that no individual with a disability “shall solely on the basis of [disability] be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance.”³⁹ Recipients also must make sure that interested persons, including those with impaired vision or hearing, can find out about the existence and location of the assisted program services, activities, and facilities that are accessible to and usable by persons with disabilities and that recipients must give priority to methods of providing accessibility that offer program benefits to persons with disabilities in the most integrated setting appropriate.⁴⁰ To ensure nondiscrimination for persons with disabilities, MDNR should develop, publicize and implement written procedures to ensure meaningful access to its programs, services and activities for individuals with disabilities

³⁵ February 5, 2020 correspondence from the Missouri Department of Natural Resources’ (Department) in response to the U.S. Environmental Protection Agency, External Civil Rights Compliance Office’s January 6, 2021 RFI #1, Response to Question 8.c.

³⁶ February 5, 2020 correspondence from the Missouri Department of Natural Resources’ (Department) in response to the U.S. Environmental Protection Agency, External Civil Rights Compliance Office’s January 6, 2021 RFI #1, Response to Question 10.b.

³⁷ See Title VI, 42 U.S.C. 2000(d) *et seq.*; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient’s Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf).

³⁸ According to the U.S. Census Bureau’s American Community Survey, 2018, there are over 124,000 persons with LEP in the state of Missouri, including over 52,000 persons with LEP whose prominent language is Spanish. See at: <https://data.census.gov/cedsci/table?g=0400000US29&y=2018&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2018.DP02>.

³⁹ 40 C.F.R. § 7.45.

⁴⁰ 40 C.F.R. § 7.65 (b) and (d).

that clearly and consistently provide a recipient's "plan" for how it will provide, at no cost, appropriate auxiliary aids and services, including but not limited to, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals as necessary to ensure effective communication and an equal opportunity to participate fully in the benefits, activities, programs and services provided by the recipient, in a timely manner and in such a way as to protect the privacy and independence of the individual. To assist recipients with its nondiscrimination requirements, EPA has published a sample disability nondiscrimination plan, which provides technical assistance guidance with respect to the nondiscrimination coordinator's role, grievance procedures, facility accessibility, and accommodations.⁴¹ ECRCO has responsibility for enforcing Section 504 of the Rehabilitation Act of 1973, but does not have responsibility for enforcing compliance with the Americans with Disabilities Act (ADA). However, the Sample Plan addresses both statutes, in recognition that most recipients have obligations under both laws.

Preliminary Findings

MoDNR has a Notice and Grievance Procedures specifically addressing the Americans with Disabilities Act posted on its website. Although the documents generally address the necessary components of a "disability plan," meaningful access to individuals with disabilities to MoDNR's programs, services, and activities, the Notice and Grievance Procedures appear to be duplicative of MoDNR's other Grievance Procedures and Complaint Form for filing complaints of discrimination, including disability discrimination. Neither set of documents provides clear and consistent instructions or direction for persons with disabilities about which process to follow in order to either file a grievance for discrimination on the basis of disability or seek reasonable accommodations in order to participate in MoDNR's programs, services and activities. Further, the MoDNR's ADA grievance procedures identifies timelines for requesting accommodations to access services, programs and activities that are different from those timelines referenced in the ADA Notice.⁴² Under these circumstances, ECRCO has determined that MoDNR is not in compliance with this requirement of EPA's nondiscrimination regulation.

Public Participation

As to whether MoDNR has public participation policies and processes that are consistent with Title VI and the other federal civil rights laws, EPA's implementing regulation at 40 C.F.R. Parts 5 and 7, and EPA's guidance on this issue,⁴³ based on the limited information provided thus far

⁴¹ https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf

⁴² MoDNR's Notice Under the Americans with Disabilities Act states, "Anyone who requires an auxiliary aid or service for effective communication, or a modification of policies or procedures to participate in a program, service, or activity of the Missouri Department of Natural Resources, should contact the office of either Misty Hill or Mike Sutherland as soon as possible but no later than 48 hours before the scheduled event." See <https://dnr.mo.gov/docs/notice-under-the-americans-with-disabilities-act.pdf>. MoDNR's website states, "Individuals who require special services or accommodations to participate in the Department program, service, or activity should make arrangements by contacting the Department as soon as possible, but no later than 72 hours before the scheduled event if reasonable." See <https://dnr.mo.gov/non-discrimination-notice.htm>.

⁴³ See U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering

by MoDNR, a fuller examination of this sub-issue is required. Thus, this remains under investigation. However, the public participation process carried out by MoDNR relative to the Intermediate Operating Permit OP2020-008 to Kinder Morgan Transmix Company, LLC., was not implemented consistent with Title VI, as meaningful access to those proceedings was not provided to persons with limited-English proficiency.

III. Summary of Preliminary Findings

As discussed above, ECRCO has concluded its investigation of the second issue.⁴⁴ The first issue remains under investigation. With respect to the second issue, ECRCO has determined that the preponderance of the evidence supports a conclusion that MoDNR failed to comply with federal nondiscrimination laws and EPA's nondiscrimination regulation with respect to MoDNR not having in place nor implementing a nondiscrimination program, including: procedural safeguards required under 40 C.F.R. Parts 5 and 7; policies and procedures for ensuring meaningful access to MoDNR's services, programs, and activities for individuals with LEP and individuals with disabilities; and a public participation program that ensures meaningful access to those proceedings to persons with limited-English proficiency.⁴⁵ Further, based on ECRCO's review of available evidence, it appears that MoDNR ignored concerns raised over the years about its failure to have in place a nondiscrimination program consistent with its longstanding legal obligations.⁴⁶

IV. Steps for Resolving Preliminary Findings of Noncompliance and Achieving Compliance

After ECRCO makes a partial preliminary finding of noncompliance, the administrative process for resolving the finding is set forth in 40 C.F.R. Part 7.115(d). The regulation provides that "(a)fter receiving the notice of the preliminary finding of noncompliance in paragraph (c) of this section, the recipient may: (1) Agree to the OCR's recommendations, or (2) Submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR." If MoDNR does not take one of these actions within fifty (50) calendar days after receiving this preliminary notice, ECRCO will, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient and copies to the Award Official and Assistant Attorney General.

Environmental Permitting Programs, 71 FR 14207 (March 21, 2006)
(https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf).

⁴⁴ At this time, ECRCO is not able to make preliminary findings related to whether MoDNR has in place a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, based on the limited information provided by MoDNR, except as to the failure to provide language access to individuals with LEP. A fuller examination of this sub-issue is required and, thus, it remains under investigation.

⁴⁵ At this time, ECRCO is not able to make preliminary findings related to whether MoDNR has in place a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, based on the limited information provided by MoDNR, except as to the failure to provide language access to individuals with LEP. A fuller examination of public participation is required and, thus, it remains under investigation.

⁴⁶ See EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.

ECRCO proposes to resolve these preliminary findings through a Voluntary Compliance Agreement⁴⁷ to address the deficiencies discussed in this letter. Following this letter, ECRCO will contact MoDNR to discuss a Voluntary Compliance Agreement. In addition, ECRCO offers MoDNR the opportunity to enter into an Informal Resolution Agreement that would allow ECRCO and MoDNR to address collaboratively the remaining issue accepted for investigation, without findings of compliance or noncompliance.⁴⁸

V. Recommendations for Achieving Voluntary Compliance

Pursuant to 40 C.F.R. § 7.115(c)(1)(ii), ECRCO makes the following recommendations to address the compliance deficiencies identified in this letter:

A. Notice of Non-Discrimination under the Federal Non-Discrimination Laws

1. The MoDNR will post a notice of non-Discrimination (Notice) on the MoDNR's website homepage, in all MoDNR's offices and facilities, and in its general publications that are distributed to the public (*e.g.*, public outreach materials, such as brochures, notices, fact sheets or other information on rights and services; applications or forms to participate in or access MoDNR programs, processes or activities). The MoDNR will ensure that its Notice is accessible to individuals with limited-English proficiency (LEP) in the appropriate language(s)⁴⁹ and individuals with disabilities, including ensuring that the Notice posted on the MoDNR's Website Homepage is accessible to persons who are blind or have low vision, and for individuals with color vision impairment or color blindness.

The Notice will contain, at a minimum, the following recommended text:

- a. The MoDNR does not discriminate on the basis of race, color, national origin, disability, age, or sex in administration of its programs or activities, and the MoDNR does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.
- b. [Insert name and title of non-discrimination coordinator] is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7 (Non-Discrimination in Programs or Activities

⁴⁷ Case Resolution Manual (Jan. 2021) at Section 5.1 (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf)

⁴⁸ Case Resolution Manual (Jan. 2021) at Section 3.1 (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf)

⁴⁹ U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf) (Providing guidance in Section V(1): "the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population.")

Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title IX of the Education Amendments of 1972; and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination laws).

- c. If you have any questions about this notice or any of the MoDNR's non-discrimination programs, policies or procedures, you may contact:
(Name)
(Position)
(Organization/Department)
Missouri Department of Natural Resources
PO Box 176; 1101 Riverside Drive
Jefferson City, MO 65102-0176 (Phone Number)
(Email)

If you believe that you have been discriminated against with respect to a [Recipient Name] program or activity, you may contact the [insert title of non-discrimination coordinator] identified above or visit our website at [insert Recipient website address] to learn how and where to file a complaint of discrimination.

2. If the identity of the Non-Discrimination Coordinator changes, then the MoDNR will promptly update materials as appropriate.

B. Grievance Procedures to Process Discrimination Complaints filed under the Federal Non-Discrimination Laws

1. The MoDNR will post Grievance Procedures to promptly and fairly process and resolve discrimination complaints filed under federal non-discrimination statutes and the EPA's implementing regulations at 40 C.F.R. Parts 5 and 7 on the MoDNR's website homepage, in all MoDNR's offices and facilities, and in its general publications as appropriate that are distributed to the public. The MoDNR will ensure that its Grievance Procedures are accessible to individuals with LEP in the appropriate language(s) and individuals with disabilities, including ensuring that the Notice as posted on its Website Homepage is accessible to individuals who are blind or have low vision, and for individuals with color vision impairment or color blindness.
2. The Grievance Procedures will:
 - a. Clearly identify the Non-Discrimination Coordinator, including name and contact information;
 - b. Explain the role of the Non-Discrimination Coordinator relative to the coordination and oversight of the Grievance Procedures;
 - c. State who may file a complaint under the Grievance Procedures and

- d. describe the appropriate bases for filing a complaint;
 - e. Describe which processes are available, and the options for complainants in pursuing either;
 - f. Describe elements of the recipient's investigation process and provide timelines for: the submission of a discrimination complaint; the investigation's review, conclusion, or resolution process; or making an appeal of any final decision;
 - g. State that the preponderance of the evidence standard will be applied during the analysis of the complaint;
 - h. Contain assurances that intimidation and retaliation are prohibited and that claims of intimidation and retaliation will be handled promptly and fairly pursuant to your Grievance Procedures in the same manner as other claims of discrimination;
 - i. Assure the prompt and fair resolution of complaints which allege violation of federal non-discrimination laws;
 - j. State that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process.
 - k. Be reviewed on an annual basis (for both in-print and online materials), and revised as necessary, to ensure prompt and fair resolution of discrimination complaints.
3. The MoDNR will review and revise as necessary the Grievance Procedures on an annual basis to ensure prompt and fair resolution of discrimination complaints.

C. Designation of Non-Discrimination Coordinator

1. The MoDNR will designate at least one Non-Discrimination Coordinator to ensure compliance with the federal non-discrimination laws, who will:
- a. Provide information to individuals internally and externally that the MoDNR does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of the MoDNR's programs or activities, and that the MoDNR does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights;
 - b. Provide notice of the MoDNR's grievance processes and the ability to file a discrimination complaint;
 - c. Establish a mechanism (e.g., an investigation manual) for implementation of the MoDNR's Grievance Procedures to ensure that all discrimination complaints filed with the MoDNR under federal non-discrimination laws and the EPA implementing regulations 40 C.F.R. Parts 5 and 7 are processed promptly and fairly. One element of any policy and procedure or mechanism must include providing

- meaningful access for individuals with limited English proficiency and individuals with disabilities to the MoDNR's services, programs and activities;
- d. Track all complaints filed with the MoDNR under federal non-discrimination laws, in order to identify any patterns or systemic problems;
 - e. Conduct semiannual reviews/analysis of all complaints filed with the MoDNR under the federal non-discrimination laws identified within this Agreement, and/or any other discrimination complaints independently investigated by the MoDNR covering these laws, to identify and address any patterns, systematic problems or any trends identified;
 - f. Ensure that appropriate training is provided for MoDNR staff in the processes available to resolve complaints filed with the MoDNR under federal non-discrimination laws;
 - g. Ensure that appropriate training is provided for MoDNR staff on the MoDNR's non-discrimination policies and procedures, as well as the nature of the MoDNR's obligation to comply with federal non-discrimination laws;
 - h. Ensure that complainants are updated on the progress of their complaints filed with the MoDNR under federal non-discrimination laws and are promptly informed as to any determinations the MoDNR has made;
 - i. Undertake periodic evaluations of the efficacy of the MoDNR's efforts to provide services, aids, benefits, and participation in any of the MoDNR's programs or activities without regard to race, color, national origin, disability, age, sex or prior exercise of rights or opposition to actions protected under federal non-discrimination laws.
2. The Non-Discrimination Coordinator will not have other responsibilities that create a conflict of interest (e.g., serving as the MoDNR's Non-Discrimination Coordinator as well as its legal advisor or representative on civil rights issues).
 3. The MoDNR will identify, by name and position, at least one individual who will serve as Non-Discrimination Coordinator(s) consistent with the regulatory requirements of 40 C.F.R. §5.135, §7.85(g), and §7.95(a).

D. MoDNR Plan to Ensure Meaningful Access to Programs and Activities for Persons with Limited English Proficiency (LEP)

1. The MoDNR will conduct an appropriate analysis as described in EPA's LEP Guidance found at 69 F.R. 35602 (June 25, 2004)⁵⁰, to identify the appropriate language groups and determine what language services or mix of language services the MoDNR needs to provide (e.g., interpreters and translators), to ensure that limited-English proficient individuals can

⁵⁰ <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf>

meaningfully participate in the MoDNR's services, programs and activities.

2. The MoDNR will develop, publicize, and implement written procedures (a Language Access Plan) to ensure meaningful access to all MoDNR services, programs and activities for individuals with LEP, at no cost to those individuals.

E. MoDNR Plan to Ensure Meaningful Access to Programs and Activities for Persons with Disabilities

1. The MoDNR will develop, publicize and implement a Disability Access Plan to ensure meaningful access to all MoDNR programs, services and activities for individuals with disabilities.⁵¹
2. The MoDNR will provide, at no cost, auxiliary aids and services to individuals with disabilities, (including, but not limited to, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals, as necessary), to ensure effective communication and an equal opportunity to participate fully in benefits, activities, programs, and services provided by the MoDNR in a timely manner in such a way as to protect the privacy and independence of the individual.
3. The MoDNR will ensure that its facilities and other facilities utilized by the MoDNR (*e.g.* if the MoDNR holds a public hearing at a school or recreational center) are physically accessible to, individuals with disabilities.

F. Training

1. The MoDNR will ensure that all its employees and contractors have been appropriately trained on federal non-discrimination obligations and all plans, policies and procedures created and implemented as part of this letter. MoDNR may request assistance from EPA for any of the training required in this letter.
2. The MoDNR will forward to EPA for review a draft plan for ensuring that such training is a routine part of the on-boarding process for new employees and contractors and is given regularly as refresher training to all employees and contractors.

This letter sets forth ECRCO's partial preliminary findings in EPA Complaint No. 01RNO-20-R7. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such. This letter and any findings herein do not affect MoDNR's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulations at 40 CFR Parts 5 and 7, nor do they affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not addressed in this letter.

⁵¹ See Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf

If you have questions about this letter please feel free to contact me at (202)564-9649, by email at dorka.lilian@epa.gov, or Jeryl Covington, Case Manager, at (202)564-7713, by email at covington.jeryl@epa.gov; or Mahri Monson, Case Manager, at (202)564-2468, by email at monson.mahri@epa.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'L. S. Dorka', enclosed in a thin black rectangular border.

Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

cc: Angelia Talbert-Duarte
Associate General Counsel
Civil Rights & Finance Law Office

Edward H. Chu
Deputy Regional Administrator
Deputy Civil Rights Official
EPA Region 7

Leslie Humphrey
Regional Counsel
EPA Region 7