



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

Office of Environmental Justice and External Civil Rights
Office of External Civil Rights Compliance

September 8, 2023

In Reply Refer to:

EPA Complaint Nos. 02RNO-23-R3 and 03RNO-23-R3

Elisabeth Holmes, Senior Counsel
Socially Responsible Agriculture Project
elih@sraproject.org

Maria Payan, Senior Regional Representative
Socially Responsible Agriculture Project
mariap@sraproject.org

Rachel Casteel, Regional Representative
Socially Responsible Agriculture Project
rachelc@sraproject.org

Kathryn Loden, Law Clerk
University of Oregon School of Law

Michael Payan, Sussex Health and
Environmental Network
Sussexhen2018@gmail.com

Michael Brickner, Executive Director
American Civil Liberties Union Delaware
Mbrickner@aclu-de.org

Charito Calvachi-Mateyko,
Delaware Poor People's Campaign
chartiocw@aol.com

La Vaida Owens-White, Health Committee Chair
Delaware State Conference of Branches of the
National Association for the Advancement of
Colored People
cokparish@aol.com

RE: Acceptance of Administrative Complaint (DNREC) and Rejection of Administrative Complaint (Sussex County)

Dear Msses. Holmes, Payan, Casteel, Loden, Calvachi-Mateyko, Owens-White and Messrs. Payan and Brickner:

The U.S. Environmental Protection Agency (EPA), Office of External Civil Rights Compliance (OECRC) is accepting for investigation the Administrative Complaint (Complaint) involving the Delaware Department of Natural Resources and Environmental Control (DNREC) (EPA Complaint No. 02RNO-23-R3), which was received by the EPA on December 22, 2022. The complaint alleges that DNREC and Sussex County discriminated against the Black, Haitian, and Latino residents living near Bioenergy Development Company's Bioenergy Innovation Center (BDC's facility), located in Sussex County, Delaware, on the basis of race, color, and national

origin in violation of Title VI of the Civil Rights Act of 1964, 43 USC § 2000d *et seq.* (Title VI), and EPA's nondiscrimination regulation at 40 C.F.R. Part 7. Specifically, the complaint alleges that DNREC and Sussex County failed to provide adequate public participation opportunities to the residents living near BDC's facility, including language services for residents with limited English proficiency (LEP), during the permit application review process for BDC's facility. As explained later in this letter, EPA is not accepting for investigation the Complaint against Sussex County (EPA Complaint No. 03RNO-23-R3).

Pursuant to EPA's nondiscrimination regulation, EPA's OECRC conducts a preliminary review of administrative complaints to determine acceptance, rejection, or referral to the appropriate Federal agency. *See* 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in EPA's nondiscrimination regulation. First, the complaint must be in writing. *See* 40 C.F.R. § 7.120(b)(1). Second, it must describe an alleged discriminatory act that, if true, may violate EPA's nondiscrimination regulation (i.e., an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, it must be filed within 180 days of the alleged discriminatory act. *See* 40 C.F.R. § 7.120(b)(2). Finally, the complaint must be filed against an applicant for, or recipient of, EPA financial assistance that allegedly committed the discriminatory act. *See* 40 C.F.R. § 7.15.

DNREC

After careful consideration, OECRC is accepting EPA Complaint No. 02RNO-23-R3 for investigation because the Complaint meets OECRC's four jurisdictional requirements. First, the Complaint is in writing. Second, it alleges discriminatory acts that, if true, may violate EPA's nondiscrimination regulation. Third, the Complaint was filed within 180 days of the alleged discriminatory acts. Finally, DNREC is a recipient of EPA financial assistance.

Accordingly, OECRC will investigate the following issues:

1. Whether DNREC's permit application review process for the Bioenergy Development Company's (BDC) Bioenergy Innovation Center Project,¹ including its public participation process, discriminated against the Black, Latino, and Haitian individuals living near BDC's facility on the basis of race, color, and national origin in violation of Title VI of the Civil Rights Act of 1964 and 40 C.F.R. Part 7;

¹ The five state environmental permits are found in draft form on DNREC's website. *See* Bioenergy Innovation Center Project, On file with Del. Dep't of Nat. Res. & Env't Control (Sep. 23, 2022), available at <https://dnrec.alpha.delaware.gov/public-hearings/bioenergy/>. *See* Draft Permit APC-2022/0048-CONSTRUCTION, On file with Del. Dep't of Nat. Res. & Env't Control (Aug. 21, 2022), available at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Air/Emergency-Generator-Draft-Permit.pdf>. *See* Draft Permit APC-2022/0049-CONSTRUCTION, On file with Del. Dep't of Nat. Res. & Env't Control (Sep. 23, 2022), available at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Air/Anaerobic-Digester-Draft-Permit-20220923.pdf>. *See* Draft Permit WPCC 3005/22, On file with Del. Dep't of Nat. Res. & Env't Control (Aug. 21, 2022), available at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Water/Draft-Wastewater-Pretreatment-Permit.pdf>. *See* Draft Permit WPCC 3007/22, On file with Del. Dep't of Nat. Res. & Env't Control (Aug. 21, 2022), available at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Water/Draft-Anaerobic-Digester-Permit.pdf>.

2. Whether DNREC's permit application review process for the BDC Bioenergy Innovation Center Project,² including its public participation process, discriminated against Spanish speaking and Haitian Creole speaking individuals with limited English proficiency living near BDC's facility on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964 and 40 C.F.R. Part 7; and
3. Whether DNREC has in place and is appropriately implementing procedural safeguards required under 40 C.F.R. Parts 5 and 7, that all recipients of EPA financial assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to the DNREC's services, programs, and activities for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether DNREC has a public participation policy and process that is consistent with Title VI and other federal civil rights laws, including EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.³

The initiation of an investigation of the issues above is not a decision on the merits. OECRC is a neutral fact finder and will begin its process to gather the relevant information, discuss the matter further with you and DNREC, and determine next steps utilizing OECRC's internal procedures. Generally, the investigation and resolution options and procedures identified in EPA's nondiscrimination regulation and OECRC's Case Resolution Manual (CRM) will be utilized for the complaint investigation process. We invite you to review OECRC's Case Resolution Manual for a more detailed explanation of OECRC's complaint resolution process, available at https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf

DNREC may send a written submission to OECRC responding to, rebutting, or denying the issues that have been accepted for investigation within thirty (30) calendar days of receiving a copy of this letter notifying DNREC of the acceptance of Administrative Complaint No. 02RNO-23-R3. *See* 40 C.F.R. § 7.120(d)(1)(ii-iii).

EPA's nondiscrimination regulation provides that OECRC shall attempt to resolve complaints informally whenever possible. *See* 40 C.F.R. § 7.120(d)(2). Accordingly, OECRC will contact you and DNREC within 10 days of the date of this letter to provide information about OECRC's

² *Id.*

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 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) (available at 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) (available at 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*, at https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at <https://www.epa.gov/system/files/documents/2023-04/Disability%20Nondiscrimination%20Sample%20TA%20Policy.pdf> (2022).

complaint process, and to offer and discuss the alternative dispute resolution (ADR)⁴ and informal resolution agreement (IRA)⁵ processes as potential options for resolution of the issues which OECRC has accepted for investigation. If DNREC (and you, with respect to ADR) agrees to engage in either of these potential resolution processes, OECRC will suspend the 180-day timeframe for issuing preliminary findings. In the event that either of these potential resolution processes fails to result in an agreement, OECRC will notify you, as well as DNREC, that OECRC has resumed its complaint investigation and will issue preliminary findings within 180 days of the start of the investigation – excluding any days spent in either of these potential resolution processes.⁶

Please be advised that a copy of the Complaint No. 02RNO-23-R3 is being released to DNREC, consistent with 40 C.F.R. § 7.120(e). OECRC is releasing the Complaint with appropriate redactions consistent with the Freedom of Information Act (FOIA) and the Privacy Act and will only release identifying information to the extent necessary to comply with 40 C.F.R. Parts 5 and 7.⁷

Sussex County

After careful consideration, OECRC has determined that an investigation is not appropriate based on lack of timeliness. The Complaint did not describe alleged acts of discrimination that occurred within 180 days of the filing of the Complaint.⁸ However, the Complaint does meet the other three jurisdictional requirements: (1) The Complaint was submitted in writing; (2) the Complaint alleges discriminatory acts that, if true, may violate EPA's nondiscrimination regulation; and (3) the Complaint identifies Sussex County, a recipient of EPA funding, as the entity committing the alleged discriminatory acts.

OECRC is rejecting the Complaint and closing the case as of the date of this letter. However, OECRC is considering initiating a compliance review to determine whether Sussex County 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 Sussex County services, programs, and activities, for individuals with LEP and individuals with disabilities, and whether Sussex County has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's

⁴ EPA OECRC's Alternative Dispute Resolution (ADR) process involves the formal mediation of a complaint or complaint allegations between the complainant and recipient, through the use of a professionally trained mediator. *See* EPA OECRC Case Resolution Manual, Section 3.3, p.24 (2021), available at https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf.

⁵ Informal Resolution occurs between OECRC and the recipient. *See* Case Resolution Manual, Section 3.1, p.22. https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf.

⁶ *See* 40 C.F.R. § 7.115(c).

⁷ Freedom of Information Act, 5 U.S.C. § 552(b)(6) and (7)(c) and the Privacy Act of 1974, 5 U.S.C. § 552a.

⁸ *See* 40 C.F.R. § 7.120(b)(2) and OECRC Case Resolution Manual, Section 1.5, p. 5-10.

https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf.

implementing regulation at 40 C.F.R. Parts 5 and 7.⁹ Sussex County is invited to reach out to OECRC to discuss these obligations.

EPA's nondiscrimination regulation prohibits applicants, recipients, and other persons from intimidating, threatening, coercing, or engaging in other discriminatory conduct against anyone because they either have taken action or participated in an action to secure rights protected by the civil rights requirements that we enforce. *See* 40 C.F.R. § 7.100. Any individual alleging such harassment or intimidation may file a complaint with OECRC.

If you have any questions about this letter, please contact me at (202) 809-3297, by email at hoang.anhthu@epa.gov. You may also contact Margaret Gérardin, Case Manager, at (202) 564-2491, by email at gerardin.margaret@epa.gov.

Sincerely,

Anhthu Hoang
Acting Director
Office of External Civil Rights Compliance
Office of Environmental Justice and
External Civil Rights

cc: Ariadne Goerke
Deputy Associate General Counsel
Civil Rights & Finance Law Office

Diana Esher
Deputy Regional Administrator
Deputy Civil Rights Official
U.S. EPA Region 3

Cecil Rodrigues
Regional Counsel
U.S. EPA Region 3

⁹ *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 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) (available at 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) (available at 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, at https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at <https://www.epa.gov/system/files/documents/2023-04/Disability%20Nondiscrimination%20Sample%20TA%20Policy.pdf> (2022).

