



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 No. 02RNO-23-R3

Shawn Garvin
Secretary
Delaware Department of Natural Resources & Environmental Control
Richardson & Robins Building
89 Kings Highway SW
Dover, DE 19901
shawn.garvin@delaware.gov

RE: Acceptance of Administrative Complaint

Dear Secretary Garvin:

The U.S. Environmental Protection Agency (EPA), Office of External Civil Rights Compliance (OECRC), is accepting for investigation the referenced administrative complaint involving the Delaware Department of Natural Resources and Environmental Control (DNREC), which OECRC received on December 22, 2022. The Complaint alleges that DNREC 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 (Title VI), 43 USC § 2000d *et seq.*, and EPA's nondiscrimination regulation at 40 C.F.R. Part 7. Specifically, the Complaint alleges that DNREC failed to provide adequate information, notices and public participation opportunities to the residents living near BDC's facility, including language services for residents with limited English proficiency (LEP), during the state environmental permit application review process for BDC's facility.

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.

After careful consideration, OECRC has determined that the Complaint meets the jurisdictional requirements stated above. 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.

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;
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

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 *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

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 DEP, 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 the Complainants within 10 days of the date of this letter to provide information about OECRC's 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 the Complainant, with respect to ADR) agrees to engage in either of these potential resolution processes, OECRC will suspend the timeframe for issuing preliminary findings within 180 days of initiating the investigation. In the event that either of these potential resolution processes fails to result in an agreement, OECRC will notify DNREC, as well as Complainants, 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 is being released to you, 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

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).

⁴ 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* Case Resolution Manual, Section 3.3, p.24. 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.

EPA's regulation prohibits applicants, recipients, and other persons from intimidating, threatening, coercing, or engaging in other discriminatory conduct against anyone because they have either 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 the status of this correspondence, please contact me at (202) 809-3297, or 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

Enclosure: Via Email, Redacted Copy of Complaint

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