

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

December 22, 2022

Via Email Title VI Complaints@epa.gov

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Via Email Daria.Neal@usdoj.gov

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**Re: Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,
Regarding Civil Rights Violations by the Delaware Department of Natural
Resources and Environmental Control in Seaford, Sussex County, Delaware:**

*Violations of the Public's Rights to Access Information
and to Public Participation Opportunities*

Dear Director Dorka and Deputy Chief Neal:

The (b)(6) Privacy, (b)(7)(C) Enf. Privacy
(b)(6) Privacy, (b)(7)(C) Enf. Privacy
(b)(6) Privacy, (b)(7)(C) Enf. Privacy
(b)(6) Privacy, (b)(7)(C) Enf. Privacy the "Complainants"), respectfully submit this Complaint
against the Delaware Department of Natural Resources and Environmental Control ("DNREC")
and Sussex County Delaware ("Sussex County") for violations of Title VI of the Civil Rights
Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the U.S. Environmental Protection Agency's

(“EPA”) implementing regulations, 40 C.F.R. Part 7. For the reasons stated in this Complaint, we request that the EPA investigate whether Sussex County and DNREC (collectively, the “Recipients”) are in compliance with Title VI based on the discriminatory effects of their actions, and that EPA take all actions necessary to ensure compliance with Title VI, including taking specific steps to provide relief.

At issue here is the Recipients’ conduct during their review of county and state environmental permit applications, and how this conduct has caused disparate, adverse impacts on communities in Seaford, Sussex County, Delaware. The Recipients have failed to provide adequate information, notices, and public participation processes related to a county land use permit application (Sussex County) and state environmental permits applications (DNREC) by Bioenergy Development Company (“BDC”).

BDC proposes to construct and operate a methane gas production plant and refinery, and significantly expand a compost operation at the “Bioenergy Innovation Center” located at [REDACTED] Seaford, Sussex County, Delaware (the “project”). BDC’s proposal for heavy industrial activity would occur in the heart of residential-agricultural neighborhoods, where a significant number of persons of color live, are of Limited English Proficiency (“LEP”), are low-income, suffer from health disparities and environmental impacts from existing pollution, and have limited technology access to access information about the project and to exercise their rights of public participation.

The neighborhoods affected by the project, and Recipients’ conduct, are predominantly made up of Latinx, Hispanic, Haitian, and Black persons, and LEP persons who speak Spanish and/or Haitian Creole. The community members live, work, go to school, and attend church within half a mile and up to approximately five miles from the project. Courts have long acknowledged the sacred relationship between procedural rights and substantive rights; and, in cases where the substantive rights protected must be strictly enforced, more stringent protection of procedural safeguards of those rights is necessary to ensure compliance with substantive provisions.¹ Simply because a member of the public faces racial, socio-economic challenges, or challenges communicating in English, does not mean they are to be left behind. Title VI’s race, color, and national origin protections, federal agency guidances, and EPA regulations are designed to ensure the public’s rights of access to information, to advance notice of projects, and to public participation in projects like the BDC proposal are safeguarded.

Title VI prohibits entities receiving Federal financial assistance from engaging in activities that subject individuals to discrimination based on race, color, national origin, including LEP individuals, or sex.² As entities receiving financial assistance from the federal

¹ See, e.g., *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) abrogated on other grounds as recognized by *Cottonwood Env’tl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1092 (9th Cir. 2015) (“the strict substantive provisions of the Endangered Species Act justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”). Courts have also enjoined agencies from issuing environmental permits until they have fully complied with [the procedural requirements] of the ESA and NEPA. See *Conner v. Burford*, 836 F.2d 1521, 1541 (9th Cir. 1988), *Northern Alaska Env. Ctr. v. Hodel* 803 F.2d 466 (9th Cir. 1986), *Thomas*, 752 F.2d at 764.

² 42 U.S.C. § 2000d.

government and from EPA, the Recipients are subject to Title VI's prohibition against discrimination. The Recipients have violated Title VI and EPA's implementing regulations, and acted contrary to Federal government guidance policies by failing to: (1) provide information to the public regarding the project's additional pollution burdens, existing pollution levels, and the public's rights under local and state permitting frameworks, (2) provide public notice of permit applications, (3) failing to reasonably provide information, public notice, public participation opportunities, and public hearings in languages other than English; (4) failing to reasonably provide adequate interpretation or translation services in languages other than English; and (5) failing to provide reasonably provide public information, public notice, and public participation opportunities for low-income LEP populations of color without technology access. The Recipients' actions have created a discriminatory effect on persons of Black and Latinx race, persons of color, and on LEP individuals who use Spanish and Haitian Creole. Due to the Recipients' failures during the permit review processes, the Black, Latinx, Hispanic, Haitian people, and Spanish and Haitian Creole speaking residents in this community - who already face disproportionate impacts not only from existing pollution and from BDC's proposal - were disproportionately impacted by the lack of information and public participation procedures.

Accordingly, Complainants request that EPA and the United States Department of Justice ("DOJ") promptly and comprehensively investigate the allegations in this Complaint, take specific actions identified at the end of this complaint, and take all other actions necessary to ensure that DNREC complies fully with the law and remedy violations of Title VI. If DNREC does not come into compliance voluntarily, Complainants request that EPA, working with DOJ, suspend or terminate financial assistance to the agency, at least regarding any discretionary funding requested by the agency that would not directly benefit public health.³

³ 40 C.F.R. § 7.130.

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I. Introduction, Story, and Maps

Sussex County, the State of Delaware, and neighboring states are part of a large industrial agriculture system, which includes concentrated animal feeding operations (CAFOs), on-farm anaerobic digesters, natural gas treatment plants, pipelines and other infrastructure. The BDC anaerobic digester and methane gas production and gas refinery project proposed in Seaford is a significant departure from on-farm manure and waste anaerobic digestion projects. The project proposes trucking in 200,000 tons per year (tpy) of poultry waste from four states, increasing the amount of waste composted at the site from 30,000 tpy to 56,000 tpy, constructing a methane gas production and gas refinery facility, trucking out gas through residential neighborhoods to natural gas pipelines, and trucking out 60,000 gallons of wastewater every day to a municipal wastewater treatment facility. BDC estimates that the project would include up to 199 vehicle

trips per year or nearly 73,000 trips per year.⁴ BDC hopes to eventually connect its methane gas production equipment to a regional gas pipeline grid.

All information available clearly indicates the communities within a half mile to 3 miles and even 5 miles away are communities entitled to protection under Title VI because of color, race, and national origin considerations. BDC selected a location in unacceptably dangerously close proximity to communities that are majority Black, Latinx, low-income, of limited English Proficiency (with Spanish and Haitian Creole as predominant languages), and already burdened by other forms of pollution and industrial pollution sources.

The residences closest to the facility, approximately a half mile away, include two mobile home parks, residents of whom are mainly non-English speakers and low-income. The towns closest to the digester facility include Seaford and Laurel, Delaware. The town of Blades, Delaware - declared an EPA Superfund site in 2020 due to PFAS in the water supply - is about 3 miles away.⁵

Every analysis of the local population confirms the majority of residents and landowners are people of color.⁶ For example, Delaware's House of Representatives ballot tracking information confirms that District 1 and District 2, which the site straddles, are 67.7% and 64% Black,⁷ respectively. EPA's EJ Screen estimates that within a half mile, 1 mile, 3 miles, and 5 miles of the project 45% and 50% and 45% and 41%, respectively, of the community are people of color, primarily Black and Hispanic.⁸

The community within the half mile, 1 mile, 3 mile, and 5 mile radius are also people of limited English Proficiency. Spanish and Haitian Creole are predominant languages in this area. Complainants note that *the margin of error* for reporting English proficiency in EJ screen is large; sometimes nearly half of the number of people reporting. Complainants' experience and work with the local communities confirm that the English language remains a significant barrier to the communities' abilities to access information and access their rights to participate in public processes regarding this project, and we encourage EPA to view its own statistics as *conservative*

⁴ BDC Resource Recovery Facility Permit Application to DNREC, Environmental Assessment ("RRFP EA") p.10 (May 2022), at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Waste/Environmental-Assessment.pdf>.

⁵ The EPA declared Blades a Superfund site in 2020 due to contamination of the water supply with PFAS (see, e.g., J. Rentsch, "Blades, Del., added to federal Superfund list to clean up groundwater pollution" (Sept. 2, 2020) at <https://www.delmarvanow.com/story/news/2020/09/02/groundwater-contamination-blades-delaware-superfund-listed/5690417002/>; see also Cox, Jeremy, "As chicken waste piles up on Delmarva, a 'solution' stirs controversy," Bay Journal, (Mar. 30, 2021) at https://www.bayjournal.com/news/pollution/as-chicken-waste-piles-up-on-delmarva-a-solution-stirs-controversy/article_ba671400-7878-11eb-94d0-7bd13344c401.html.

⁶ Complainants primarily consulted U.S. EPA's EJ Screen (2022 Version) and the Centers for Disease Control ("CDC") EJ Index. Complainants believe the numbers presented by those sources may be conservative estimates as information gathering in rural areas, including for example unincorporated areas of Seaford near this project, may not be as accurate as information gathered in municipalities.

⁷ See, e.g., Ballotpedia, *Del. House of Rep. District 1 and District 2*, https://ballotpedia.org/Delaware_House_of_Representatives_District_1#District_map and https://ballotpedia.org/Delaware_House_of_Representatives_District_2#District_map (accessed Dec. 21, 2022).

⁸ See Exhibits 1-4 (EPA EJ Screen (Version 2002) Summary Reports for 0.50, 1, 3, and 5 mile radius).

estimates of the people affected by this project. Even days before the October 26, 2022 public hearing, people living near the project reported they had not received any notice about it.

Extracting information EJ Screen’s English-speaking population estimates:⁹

- Within 1 mile, 8% of the population (86 people) speak a non-English language at home with 6% speaking English “very well” and the remaining people report speaking English “well”, “not well”, “less than well”, or “less than very well.”¹⁰
- Within 3 miles, 17% of the population (1,620 people) speak a non-English language at home but only half report speaking English “very well”; the remaining people report differing degrees of English proficiency, with many reporting “less than very well” and “less than well.” Furthermore, within the 3 mile radius, approximately 159 people are categorized by EPA as “linguistically isolated”, with Spanish and “other” Indo-European languages being spoken, including Haitian Creole.
- Within 5 miles, 15% of the population (4,221 people) speak a non-English language at home; again, the remaining people report differing degrees of English proficiency, with many reporting “less than very well” and “less than well” and “not well at all” and “not well.” Furthermore, within the 5 mile radius, approximately 411 people are categorized by EPA as “linguistically isolated”, with Spanish and “other” Indo-European languages being spoken, including Haitian Creole.

For EPA’s “linguistically isolated” characterization, this means that an identifiable percentage of the “population living in a household in which all members age 14 years and over speak a non-English language and also speak English less than ‘very well’ are considered linguistically isolated.”¹¹ This percentage is reported as a percentage of total households *in the HUC12 subwatershed*. This characterization - and the fact that the characterization is tied to watersheds - is extremely important as it relates to protections the community is entitled to under environmental and public health permits because “[i]ndividuals may be more vulnerable to health issues when they lack financial resources, language skills, or education that would help them avoid exposure to pollutants or obtain treatment.”¹²

The CDC 2022 EJ Index Explorer map shows that for the four Census tracts near the facility, encompassing approximately 4,456 people, the CDC *already* assigned the area an index factor of 0.85 for a prevalence of chronic conditions; this factor is well above the “high” prevalence characterization factor of 0.75.¹³ The CDC EJ Index also assigned an index factor of 0.77 for social vulnerability risks and 0.53 for environmental burden risks.¹⁴ The Complainants

⁹ Id.

¹⁰ Exhibit 2 (EPA EJ Screen Summary Report for 1 mile radius).

¹¹ See EPA, Demographics Indicator Reference Sheet: Population Demographics (March 6, 2022) at <https://www.epa.gov/system/files/documents/2022-03/demographics-indicator-reference-sheet-20220306.pdf>

¹² EPA, Demographics Indicator Reference Sheet: Population Demographics.

¹³ See CDC EJ Index, available at <https://www.atsdr.cdc.gov/placeandhealth/eji/index.html> (“CDC EJ Index”).

¹⁴ Id.

note that within 3 miles of the project - the area with the largest number of limited English proficiency people - *also ranks high for environmental injustices*.¹⁵ For example:

EJScreen Report (Version 2.1) 3 miles Ring Centered at 38.599809,-75.603785 DELAWARE, EPA Region 3 Approximate Population: 10,603 Input Area (sq. miles): 28.27		
Selected Variables	Percentile in State	Percentile in USA
Environmental Justice Indexes		
EJ Index for Particulate Matter 2.5	34	28
EJ Index for Ozone	38	71
EJ Index for Diesel Particulate Matter*	32	44
EJ Index for Air Toxics Cancer Risk*	0	41
EJ Index for Air Toxics Respiratory HI*	73	56
EJ Index for Traffic Proximity	55	57
EJ Index for Lead Paint	75	68
EJ Index for Superfund Proximity	73	84
EJ Index for RMP Facility Proximity	52	54
EJ Index for Hazardous Waste Proximity	12	20
EJ Index for Underground Storage Tanks	67	66
EJ Index for Wastewater Discharge	60	67

Figure 1, EPA EJ Screen Three Mile Report (created using EPA EJ Screen (Version 2022)).

As an agricultural-residential area, the area surrounding the BDC site is already riddled with concentrated animal feeding operations (CAFOs). A hotspot analysis of CAFOs in Delaware at the census tract resolution found that median household income was lower in CAFO host census tracts than all others, and also lower than the state median.¹⁶ A larger percentage of people living in poverty were found to be in CAFO hotspots (15.4%) compared to the state average (13.7%).¹⁷ The EPA EJ Screen identified, within the 3 mile radius of the project, that 40% of the population is “low income”, making this particular area the 80th percentile in the state of Delaware and 69th in the nation.¹⁸ These low-wealth communities are already facing environmental pathogens from CAFOs and the siting of the BDC facility will only magnify the economic and health and social disparities that already exist in this community.

The area is additionally burdened by a number of other pollution sources concentrated geographically. For example, within a 5 mile radius of the project, there is an identifiable concentration of EPA regulated facilities, including superfund sites, water dischargers, sources of air pollution, hazardous waste, brownfields, and toxic substances, as demonstrated in the map below. The Toxics Release Inventory also identifies two polluters within this radius, (b)(6) Privacy, (b)(7)(C) Enf. Privacy at Seaford Mill, and (b)(6) Privacy, (b)(7)(C) Enf. Privacy a chemicals corporation. Within this same radius, and within the limits of Seaford, DE, sit a cluster of warehousing facilities (b)(6) Privacy, (b)(7)(C) Enf. Privacy (b)(6) Privacy, (b)(7)(C) Enf. Privacy are located within this cluster, indicating a strong presence of

¹⁵ Exhibit 3 (EPA EJ Screen Summary Report for 3 mile radius).

¹⁶ Galarraga, J., Khanjar, N., Berman, I., Hall, J., Edwards, C., Bara-Garcia, S., and Wilson, S. “Environmental Injustice and Industrial Chicken Farming in Delaware.” *New Solutions: A Journal of Environmental and Occupational Health Policy* 31(4), 441-451 (2022).

¹⁷ See Baskin-Graves, L. Mullen, H., Aber, A., Sinisterra, J., Avub, K., Amaya-Fuentes, R., and Wilson, S. “Rapid Health Impact Assessment of a Proposed Poultry Processing Plant in Millsboro, Delaware.” *International Journal of Environmental Research and Public Health* 16(18), 3429 (2019) <https://doi.org/10.3390/ijerph16183429>.

¹⁸ Exhibit 3 (EPA EJ Screen Summary Report for 3 mile radius).

warehouse and truck-related traffic emissions, as well. In contrast, as Figure 2 demonstrates, there are at least 35 places of worship within the same 5 mile radius.

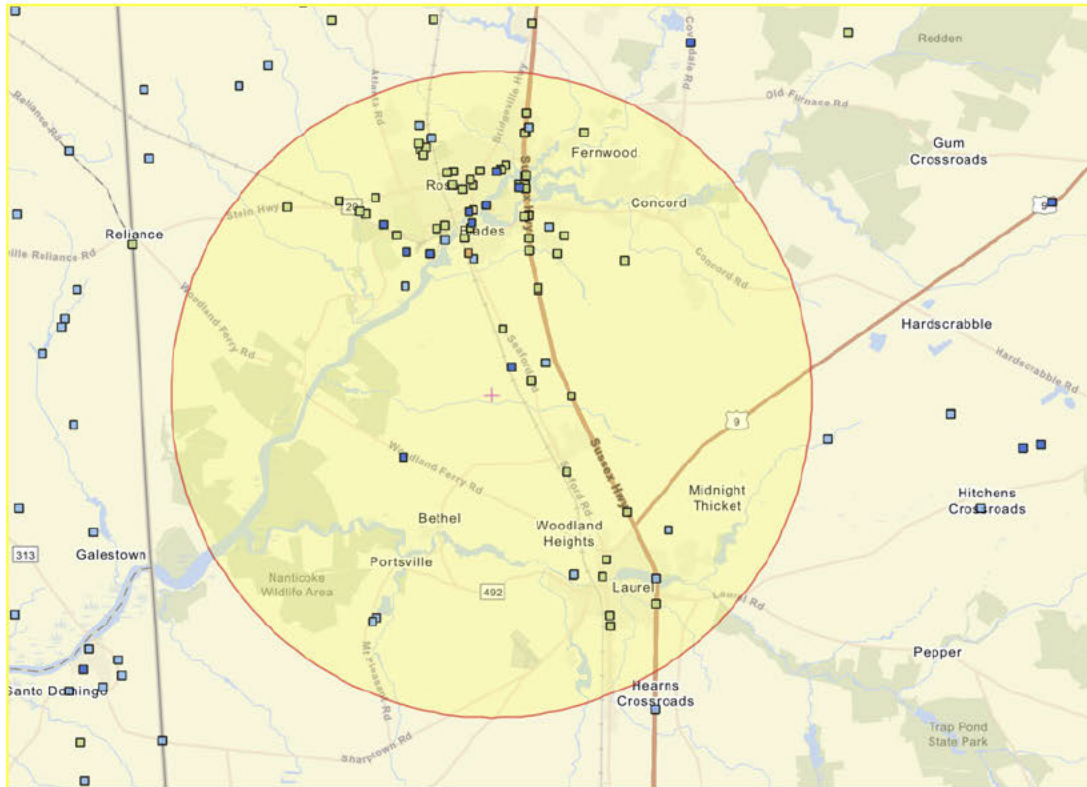


Figure 2. EPA Regulated Facilities within a 5 mile radius of BDC (created using EPA EJ Screen (Version 2022)).

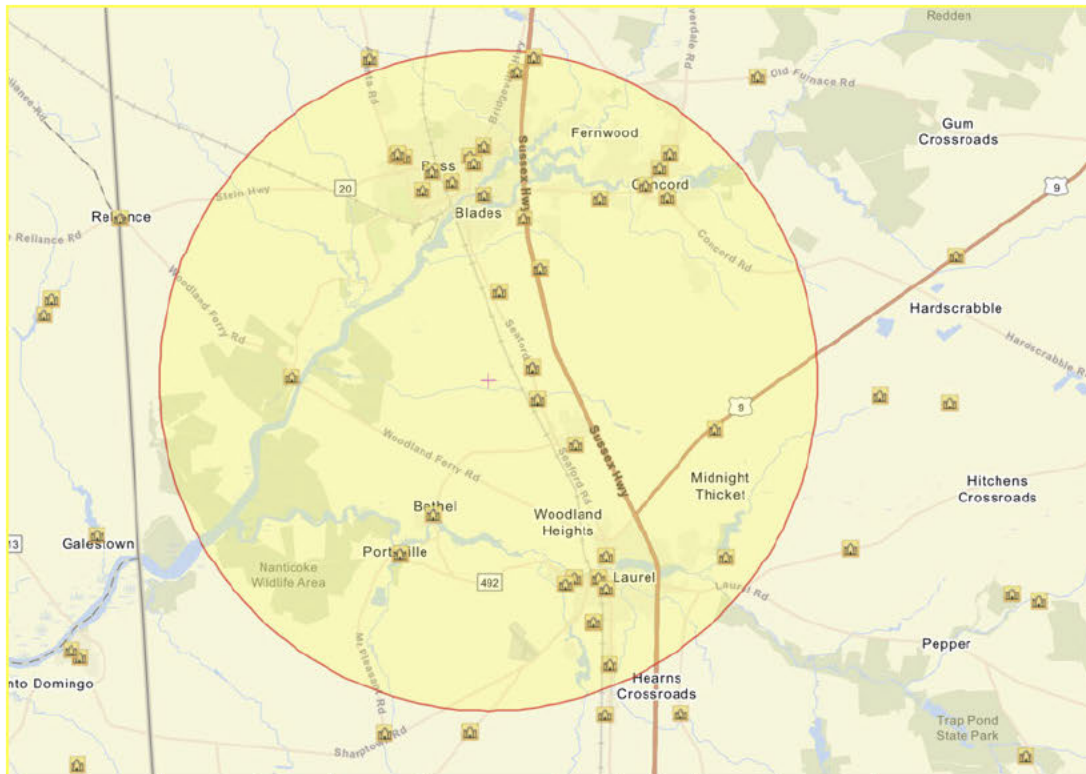


Figure 3. Places of Worship within a 5 mile radius of BDC (created using EPA EJ Screen (Version 2022)).

Within Census Tract 518.01, Sussex County, Delaware, one of four tracts immediately encompassing the project, the CDC Environmental Justice Index 2022 indicates a score of .95 for National Priority List Sites categorized under “Potentially Hazardous and Toxic Sites”. This same tract is ranked at .78 for transportation infrastructure, which covers airports, railways, and high volume roads, all of which suggest an increased concentration of air pollution burden on the community. The tract lands a .91 ranking for airports, specifically, due to the increased number of air travel sources in the area. Within Census Tract 504.08, Sussex County, Delaware, another of the four tracts immediate to the project, there is again a statistically high prevalence of potentially hazardous and toxic sites. This time, the aforementioned tract scores at .91 for coal mines, and .92 for National Priority List Sites. In contrast, there is a high prevalence of a lack in recreational parks (.83), populations without a high school diploma (.87), lack of internet access (.81), populations speaking English “less than well” (.76), and a concentration of mobile homes (.97).¹⁹

This area also suffers from lack of internet access, limiting people’s abilities to access information and to participate in public processes.²⁰

According to EPA’s 2004 Guidance Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (the “2004 EPA LEP

¹⁹ CDC EJ Index.

²⁰ Id.

Guidance”), “[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be LEP and may be entitled to language assistance with respect to a particular type of service, benefit or encounter.”²¹ EPA’s LEP Guidance provides some examples of persons who should be considered for language services; these examples “include, but are not limited to”:²²

- Persons who live in communities in close proximity to a plant or facility that is permitted or regulated by an EPA recipient.
- Persons subject to, or affected by environmental protection, clean-up, and enforcement actions of an EPA recipient.
- Persons who seek to enforce or exercise rights under Title VI or environmental statutes and regulations.

The public learned of this project only by chance. On or about June 4, 2020, [REDACTED] (b)(6) Privacy, (b)(7)(C) Est. [REDACTED] happened to be reviewing the Sussex County Planning & Zoning Commission agenda for another matter, and noticed an April 23, 2020 agenda with an item called “Other Business: Bioenergy Development Group, LLC (CU 1962) Revised Site Plan.”²³ This proposed amendment was on the agenda for approval, without public notice or public process. Since its inception, BDC’s project has failed to provide the public with information, notice, and public participation rights; as the communities affected are persons of color, and with limited English proficiency, the Recipients’ failings have a discriminatory effect on protected persons.

Responding to community pressure, on October 26, 2021, DNREC finally made a general outline via email to some community members, proposing a three-step plan to conduct outreach regarding the project.²⁴ This proposal contemplated a series of meetings with affected community members of color and LEP populations. However, none occurred and the permit review process continued. Local community members offered DNREC the opportunity to host at least one public meeting at a local mobile home park where many Haitian residents live. The goal of this meeting was to foster communication between the agency and the community and to help provide the community with a better understanding of the permit applications, the public’s health and environmental protections under the permits, and the participating in the public comment process to speak up for their concerns and their rights to protection from pollution. Holding this meeting in person would have additionally aided with the barrier that many people in this community face in accessing virtual streaming platforms. Holding this meeting also would have enabled the community to obtain information about the project that they otherwise did not readily or reasonably have the ability to obtain. DNREC refused this offer. Instead, DNREC sent out the project applicant, who met privately with a community member, just hours before the September 26, 2022 public information session.

²¹ 69 Fed. Reg. 35602 at 35606 (Jun. 25, 2004) EPA “Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.”

²² Id.

²³ Exhibit 5 (Agenda dated April 23, 2020)

²⁴ Exhibit 6 p. 13-15.

II. Parties

A. (b)(6) Privacy, (b)(7)(C) Enf. Privacy

The (b)(6) Privacy, (b)(7)(C) Enf. Privacy is a 501(c)(3) non-profit organization incorporated in Delaware. (b)(6) Privacy, (b)(7)(C) has staff based in Delaware and Maryland. For more than 20 years, (b)(6) Privacy, (b)(7)(C) has served as a mobilizing force to help communities protect themselves, using education, advocacy, and organizing, from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. (b)(6) Privacy, (b)(7)(C) provides free support, providing communities, with additional knowledge and skills to protect their rights to clean air, water, and soil and to a healthy, just, and vibrant future.

B. (b)(6) Privacy, (b)(7)(C) Enf. Privacy

(b)(6) Privacy, (b)(7)(C) is a coalition of stakeholders in Sussex County working to ensure a clean, healthy environment for current and future generations. (b)(6) Privacy, (b)(7)(C) brings attention to environmental health threats and environmental justice issues in Sussex County by partnering with local businesses, non-profit groups, community ambassadors, and residents to hold local, state, and federal governments accountable. Some members of (b)(6) Privacy, (b)(7)(C) live in proximity to the Project, an area already plagued with environmental injustices, and stand to be directly impacted by it.

C. (b)(6) Privacy, (b)(7)(C) Enf. Privacy

The (b)(6) Privacy, (b)(7)(C) Enf. Privacy established in 1961, is the state affiliate of the national (b)(6) Privacy, (b)(7)(C) and is a 501(c)(3) non-profit organization incorporated in Delaware. The mission of (b)(6) Privacy, (b)(7)(C) is to preserve and advance civil liberties and civil rights in the State of Delaware as enshrined in the United States and Delaware Constitutions through education and advocacy without consideration of political association. Our ongoing efforts today include promoting racial justice and transparency in government through open records, among other civil liberties issues. The (b)(6) Privacy, (b)(7)(C) has recently sought assistance from the EPA in holding state officials accountable to ensure that Delaware students are protected from lead contamination in their learning environment. We are committed to advancing equity in our communities and ensuring the government is responsive, accountable, and transparent to the people of Delaware.

D. (b)(6) Privacy, (b)(7)(C) Enf. Privacy

The (b)(6) Privacy, (b)(7)(C) Enf. Privacy is a chapter of the National (b)(6) Privacy, (b)(7)(C) Enf. Privacy, which was founded by Martin Luther King Jr. in 1958. The mission of the (b)(6) Privacy, (b)(7)(C) is rooted in a moral analysis based on our deepest religious and constitutional values that demand justice for all in Delaware. We are committed to lifting up and deepening the leadership of those most affected by systemic racism, poverty, the war economy, and ecological devastation and to building unity across lines of division. Because we believe that equal protection under the law is non-negotiable, we are determined to build up and support the power of people and state-based movements to serve as a vehicle for a powerful moral movement in Delaware and to transform the political, economic and moral structures of our society while embracing nonviolence.

E. (b)(6) Privacy, (b)(7)(C) Enf. Privacy

The mission of the (b)(6) Privacy, (b)(7)(C) Enf. Privacy is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons. Our vision is to ensure a society in which all individuals have equal rights without discrimination based on race. Understanding the health inequities that will be placed, once again, upon the necks and backs of our vulnerable communities, the Health Committee stands against the negative health issues, potential threats and risks that the biogas industry will impose. In this America, this State, this community, people who live, work, and worship should be able to enjoy some semblance of mental health in living free of an ever-existing threat to health and safety. (b)(6) Privacy, (b)(7)(C) Enf. Privacy stands in solidarity with the (b)(6) Privacy, (b)(7)(C) Enf. Privacy and the indigenous communities of Seaford in opposition to the issuance of permits to BDC to operate its facility in their community.

F. Delaware Department of Natural Resources and Environmental Control

The Department of Natural Resources and Environmental Control (“DNREC”) is the primary state agency responsible for environmental protection, regulation, and enforcement in Delaware.²⁵ The DNREC Secretary maintains the power to grant or deny permits governed by Delaware regulations and to apply for EPA financial assistance.²⁶ DNREC has a legal obligation to protect Delawareans by conducting a robust review of permit applications before releasing permit applications for public notice and comment, to provide information to the public regarding permit applications under review, and to provide public participation opportunities.

G. Sussex County, Delaware

Sussex County, Delaware, which includes the City Council and Planning and Zoning Commission, is a recipient of federal funds from several federal agencies.

III. Jurisdiction

Title VI prohibits discrimination by all recipients of Federal funds. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁷ Acceptance of federal funds creates an obligation of the recipient to comply with Title VI and the EPA’s implementing regulations.²⁸ Title VI applies to the entire institution that receives funds from EPA, not only the part of the institution that has received the financial assistance.²⁹

²⁵ 29 Del. C. § 8001.

²⁶ 29 Del. C. § 8003.

²⁷ 42 U.S.C. § 2000d.

²⁸ 40 C.F.R. § 7.80(c).

²⁹ 42 U.S.C. § 2000d-4a; 40 C.F.R. § 7.25 (defining “recipient” broadly).

EPA has jurisdiction over a complaint under Title VI of the Civil Rights Act of 1964 if the complaint meets four requirements: (1) the complaint is in writing; (2) the complaint alleges discriminatory acts that, if true, violate EPA's Title VI regulations; (3) the complaint identifies a recipient of EPA funding that committed the alleged discriminatory act; and (4) the complaint is filed within 180 days of the alleged discriminatory act.³⁰

EPA's External Civil Rights Compliance Office ("ECRCO") is responsible for enforcing Title VI through complaint investigations, compliance reviews, technical assistance, community engagement, and policy formulation to ensure that EPA funds are not used to support discrimination on the basis of race, color, or national origin.³¹ ECRCO has jurisdiction to respond to Title VI complaints that implicate recipients of federal funding.³²

A. Program or Activity

Under Title VI, a "program or activity" is defined as "all of the operations of...a department, agency, special purpose district, or other instrumentality of a State or of a local government...any part of which is extended Federal financial assistance."³³ EPA's 2004 LEP Guidance specifically contemplates that environmental permits are programs or activities subject to Title VI national origin LEP provisions.³⁴

A recipient of EPA funding is defined as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance."³⁵

As a Delaware state agency, any DNREC operation is considered a "program or activity" falling under Title VI compliance. This includes, for example: gathering and vetting information provided by state environmental permit applicants; providing information to the public relating to such applications; managing public notice, public participation, and public comment processes related to the agency's review of permit applications; conducting public outreach regarding the applications; responding to public requests for information and assistance in understanding the permit applications and the agency's review to protect environmental resources and public health; responding to public inquiries regarding the effects of the permitted activity on the public's health and environment; responding to public comments regarding permit applications; and how the public can enforce permit conditions to protect their health and environmental risks.

³⁰ 40 C.F.R. § 7.120; see also EPA ECRO, Case Resolution Manual (Jan. 2017), 7-11, https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

³¹ EPA, ECRO Toolkit (2017), https://www.epa.gov/sites/default/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf

³² 40 C.F.R. § 7.15.

³³ 42 U.S.C. § 2000d-4a.

³⁴ 2004 EPA LEP Guidance at 35610, 35612-35613.

³⁵ 40 C.F.R. § 7.25.

DNREC is an agency or instrumentality of the State of Delaware and must comply with Title VI whenever it receives financial assistance.

An entire local government is considered a “program or activity” that may be liable under Title VI “if it is partially responsible for the discriminatory conduct, is contractually obligated to comply with Title VI, or has a responsibility to monitor subrecipients.”³⁶ Sussex County undertook the review of BDC’s land use application, was responsible for issuing information and notices to the public relating to the application, for conducting public participation hearings related to the permit applications, and Sussex County ultimately remains responsible for allowing or denying the land use permits. Sussex County issued a Conditional Use Permit (CUP) April 20, 2021, but final approval of the CUP is conditioned upon DNREC approving BDC’s state environmental permit applications.³⁷

B. Federal Funding or Federal Assistance

The Recipients are subject to Title VI compliance because they each receive federal funding from EPA and other federal agencies. Federal financial assistance includes, for example, grants, training, use of equipment, donations of surplus property, and other assistance.³⁸ All federal agencies, including the EPA, are required to submit an assurance that projects and activities funded by the agency are in compliance with EPA regulations.³⁹ EPA’s implementing regulations state that this prohibition applies to any program or activity receiving federal funding.⁴⁰ These requirements extend to recipients but also to subrecipients.⁴¹ Once an entity receives federal financial assistance, Title VI jurisdiction attaches.⁴²

Since approximately 2011, DNREC has received over \$72 million in federal funds from EPA.⁴³ These monies include grants for programs such as the Clean Water State Revolving Fund, construction of wastewater treatment facilities, and implementation of the National Environmental Information Exchange Network. Many of these grants list Fiscal Year 2022 as a funding priority.

Since approximately 2009, Sussex County has received over \$37 million in federal funds, including funds from EPA. These monies include grant for programs such as waste disposal

³⁶ DOJ Title VI Legal Manual, Section V.E.2.

³⁷ See Exhibit 5.

³⁸ See 40 C.F.R. § 7.25 (defining “EPA assistance”); see also 67 Fed. Reg. 41459 (June 18, 2002) at Section III (DOJ Final LEP Guidance).

³⁹ 40 C.F.R. § 7.80(a).

⁴⁰ 40 C.F.R. § 7.30, § 7.35(a)(1)-(7).

⁴¹ 42 U.S.C. § 2000d; 2004 EPA LEP Guidance at 35606.

⁴² DOJ Title VI Legal Manual, Section V.

⁴³ DNREC funding from various sources is available at <https://www.usaspending.gov/search/?hash=675e9997d013aef310b9ebabf48f92df>

grants, water-related grants, and construction of wastewater collection and conveyance systems.⁴⁴

When an entity applies for EPA financial assistance, it submits an assurance with the application stating that they will comply with the requirements of Title VI and EPA's implementing regulations.⁴⁵ DNREC and Sussex County are subject to Title VI.

C. Timeliness

This Title VI complaint is timely. Title VI complaints are timely when the complaint has been filed within 180 calendar days of the date of the last alleged act of discrimination,⁴⁶ or if the complainant alleges a "continuing policy or practice" of discrimination.⁴⁷ A complainant alleging a continuing discriminatory policy or practice must "allege facts that are sufficient to indicate either a series of related acts of which one occurred within the 180-day filing period or a systematic policy or practice that operated within the 180-day period."⁴⁸

The Recipients' discriminatory conduct consists of actions within 180 calendar days, and of continuing discriminatory policies and practices. During all stages of the BDC permit application processes, the Recipients have denied individuals and communities in the Seaford, Sussex County, Delaware area access to information, to public notices, meaningful opportunities to exercise their public participation rights, and to engage in the public comment processes in direct violation of Title VI.

The Recipients' activities have had, and continue to have, the effect of subjecting individuals to discrimination because of their race, color, national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the Recipients' programs or activities with respect to individuals of a particular race, color, or national origin. The Recipients' operations have occurred within 180 days of this Complaint, and are a series of related acts of which one occurred within the filing period.

DNREC's review of the state environmental permits is ongoing; DNREC closed the public comment period on December 2, 2022 despite community requests for access to information and opportunities to participate in the process in languages other than English. Sussex County's CUP has not yet been finalized; it was issued on April 20, 2021, but is subject to conditions, including DNREC's approval of state environmental permits.

⁴⁴ Sussex County funding from various sources is available at <https://www.usaspending.gov/search/?hash=6052ae21f961a359d8982546e1d78a92>

⁴⁵ 2004 EPA LEP Guidance at 35603.

⁴⁶ 40 C.F.R. § 7.120(b)(2).

⁴⁷ EPA, Case Resolution Manual 8 (Jan. 2021).

⁴⁸ Id.

IV. Legal Background

Title VI of the Civil Rights Act of 1964 states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁴⁹ Title VI prohibits recipients’ programs or activities from evincing a discriminatory intent, and from having a disparate impact on account of a person’s race, color, or national origin thereby subjecting them to discrimination.⁵⁰ National origin discrimination includes denying, restricting, or otherwise providing different access to services, aids, and benefits of the recipient’s program or activity to individuals with LEP.⁵¹

Recipients of Federal financial assistance are forbidden from “restricting any person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or other benefit provided by the program” or from utilizing methods or criteria of administering programs which have the effect of subjecting individuals to discrimination or have the effect of impairing accomplishment of the program.⁵² In 1994, Executive Order 12898 required federal agencies to develop agency-wide environmental justice strategies to identify and address disproportionately high and adverse human health effects of its programs, policies, and activities on minority and low-income populations.⁵³ Executive Order 12898 recommended revisions to at a minimum:

1. Promote enforcement of all health and environmental statutes;
2. Ensure greater public participation;
3. Improve research and data collection relating to the health of and environment of minority and low-income populations; and
4. Identify differential patterns of consumption of natural resources among minority populations and low-income populations.⁵⁴

In 1973, EPA adopted nondiscrimination regulations implementing the purposes of Title VI. EPA regulations require state permitting agencies to minimize the “environmental impacts to local communities and ensur[e] that their practices and policies are implemented in a nondiscriminatory manner.”⁵⁵ EPA regulations clearly state:

⁴⁹ 42 U.S.C. § 2000d.

⁵⁰ *Id.*; 40 C.F.R. § 7.35(b).

⁵¹ See 71 Fed. Reg. 14207, 14210 (Mar. 21, 2006) (EPA Title VI Public Involvement Guidance, developed for recipients that implement environmental permitting programs) citing 2004 EPA LEP Guidance at 35602; EPA, Office of General Counsel Legal Tools to Advance Environmental Justice at 165 (May 2022).

⁵² See, e.g., 42 U.S.C. 2000d; 40 C.F.R. § 7.35(b); see also *Lau v. Nichols*, 414 U.S. 563 (1974) where the Supreme Court held that conduct that has a discriminatory effect on LEP persons is prohibited under Title VI as discrimination based on national origin.

⁵³ Executive Order 12898 at 1-103(a) (Feb. 11, 1994), as amd Jan. 30, 1995 by Executive Order 12948 (59 Fed. Reg. 7629 (Feb. 16, 1994)).

⁵⁴ *Id.*

⁵⁵ Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance), 71 Fed. Reg. 14207, 14214 (Mar. 21, 2006), https://www.epa.gov/sites/default/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf; see

“A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color,, national origin, or sex.”⁵⁶

EPA regulations include a prohibition against recipients choosing “a site or location of a facility that has the purpose or effect of excluding individuals from, denying them benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex.”⁵⁷

Title VI’s national origin protections, as well as federal agency guidance and EPA regulations, require federal assistance recipients, including DNREC and Sussex County, take “reasonable steps” to ensure “meaningful access” to programs and activities by LEP persons. Thus, in “certain circumstances”, failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate Title VI and Title VI regulations against national origin discrimination.⁵⁸ As further discussed below, the EPA and DOJ have identified a “flexible and fact-dependent” four-factor analysis for recipients to assess the circumstances of different situations.⁵⁹ Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient and entitled to language assistance with respect to a particular type of service, benefit, or encounter with a Federal agency or a recipient of federal assistance.⁶⁰

The four-factor analysis has been stated as:

- (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
- (2) The frequency with which LEP individuals come in contact with the program;
- (3) The nature and importance of the program, activity, or service provided by the program to people’s lives; and
- (4) The resources available to the grantee/recipient and costs.⁶¹

also S. Camden Citizens in Action v. New Jersey Dept. of Env’t Prot., 145 F.Supp. 2d 446, 476 (D.N.J. 2001) (“Title VI imposes on states an affirmative obligation to include consideration of Title VI criteria in permitting decisions.”)

⁵⁶ 40 C.F.R. § 7.35(b). The Third Circuit has confirmed that this regulatory language “clearly incorporates a discriminatory effect standard.” *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 929 (3d Cir. 1997), *vacated on other grounds*, 524 U.S. 974 (1998).

⁵⁷ 40 C.F.R. § 7.35(c); see also 28 C.F.R. § 42.104(b)(3) (DOJ implementing regulations).

⁵⁸ 2004 EPA LEP Guidance at 35606; 67 Fed. Reg. 41455 at 41457 (June 18, 2002) U.S. DOJ “Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons.” (“2002 DOJ Final Guidance”).

⁵⁹ *Id.*

⁶⁰ 2004 EPA LEP Guidance at 35606; 2002 DOJ Final Guidance at 41459.

⁶¹ 2004 EPA LEP Guidance at 35606; 2002 DOJ Final Guidance at 41459.

LEP individuals' rights, protections, and remedies under Title VI have been further identified and honed over the years. Of particular relevance are Executive Order 13166, "Improving Access to Service for Persons with Limited English Proficiency," signed by President Clinton on August 11, 2000;⁶² the U.S. Department of Justice ("DOJ")'s Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons (June 18, 2002);⁶³ EPA's LEP Guidance (2004);⁶⁴ and other tools such as EPA's "Procedural Safeguard Checklist for Recipients - Federal Non-Discrimination Obligations and Best Practices" (updated 2020)⁶⁵ and DOJ's resources such as its Self Assessment Tool (dated May 2011) and brochures on what recipients should know about providing services to LEP individuals.⁶⁶ EPA's new Interim Environmental Justice and Civil Rights Permitting FAQs document (August 2022) also addresses LEP persons in the context of environmental permitting.

Regarding Title VI and LEP individuals, recipients of Federal funding are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.⁶⁷ The first step for every federal assistance recipient is to conduct an "individualized assessment" balancing by evaluating the following four factors: (1) the number or proportion of LEP persons eligible to be served; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program to people's lives; and (4) the resources available to the recipient is the first step for every recipient.⁶⁸ After applying the four-factor analysis, a federal assistance recipient may conclude different language assistance measures are sufficient for the different types of programs or activities in which it engages.⁶⁹ The flexibility that recipients have in addressing the needs of LEP populations does not diminish, and should not be used to minimize, the obligation that those needs be addressed.⁷⁰ As discussed further below, both DNREC and Sussex County failed to conduct an "individualized assessment", failed to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.

V. Procedural History Background

In addition to facts referenced throughout this Complaint, the Complainants outline key procedural history facts below.

⁶² Executive Order 13166 (Aug. 11, 2000) (65 Fed. Reg. 50121 (Aug. 16, 2000)).

⁶³ See n. 58 supra.

⁶⁴ See n. 21 supra.

⁶⁵ EPA, "Procedural Safeguards Checklist for Recipients - Federal Non-Discrimination Obligations and Best Practices" (Rev. Jan. 2020) at https://www.epa.gov/sites/default/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf

⁶⁶ See, e.g., DOJ, Civil Rights LEP information page (created Jan. 7, 2020) at <https://www.ojp.gov/program/civil-rights/limited-english-proficient-lep>

⁶⁷ See 2002 DOJ Final Guidance at 41459.

⁶⁸ See n. 61 supra.

⁶⁹ Id.

⁷⁰ Id.

1. Sussex County's zoning rules do not allow for the siting and operation of biogas facilities in agricultural-residential zoned areas,⁷¹ like the area surrounding (b)(6) Privacy, (b)(7)(C) Enf. Privacy
2. The site operated as a pellet plant since about 1995, and as a micro nutrient processing facility since about 2006. Since 2013, the project site has operated as a composting operation under Sussex County Conditional Use Ordinance No. 2311, and under a DNREC composting permit since 2016.⁷²
3. A 2013 CUP 1962 states "The conditional use plan shall be strictly limited to the improvements shown on the site plan and attached supplements, prepared by McCrone. Any further additions, alterations or improvements shall be subject to an application and public hearings to amend this conditional use."⁷³
4. On May 29, 2019, DNREC and (b)(6) Privacy, (b)(7)(C) Enf. Privacy entered into a Settlement Agreement relating to (b)(6) Privacy, (b)(7)(C) Enf. Privacy operation and management of the composting facility at (b)(6) Privacy, (b)(7)(C) Enf. Privacy Seaford, Delaware, which resulted in compost sampling exceedences and discrepancies for Chromium VI, fecal bacteria, and *E. Coli*.⁷⁴ The Chromium VI levels identified in the Agreement were 82 times higher than the legal limit.
5. Between 2019 and 2020, (b)(6) Privacy, (b)(7)(C) Enf. Privacy sold the property to BDC for \$10.00 (ten dollars) after (b)(6) Privacy, (b)(7)(C) Enf. Privacy abandoned its financially and operationally unsuccessful poultry waste pelletizer plant.⁷⁵
6. On April 16, 2020, Sussex County Director of Planning & Zoning released a Memorandum, reporting that Staff were of the opinion that BDC's proposal does not represent an expansion of CUP 1962 area, and that a public hearing was not required for adding digester tanks "and other works" on the submitted revised Site Plan.⁷⁶
7. On April 23, 2020, Sussex County Planning and Zoning Commission held a public meeting. On the agenda for that meeting as "other business" was "Bioenergy Development Group, LLC (CU 1962) revised site plan."⁷⁷

⁷¹ See Sussex Co. Del. Zoning Code 115-22.

⁷² See BDC CUP 2258 Application Packet to Sussex Co. Del. Planning & Zoning Commission (hereafter "BDC CUP 2258 Application Packet") p. 5-6 (Sussex Co. Planner Memorandum summary (Feb. 5, 2021). The BDC CUP 2258 Application Packet is available online at <https://sussexcountyde.gov/sites/default/files/packets/CU%202258%20Bioenergy%20Development%20Group%2C%20LLC%20Paperless%20Packet.pdf>.

⁷³ Id. p. 144-148.

⁷⁴ The (b)(6) Privacy, (b)(7)(C) Enf. Privacy site is the same location as the BDC proposed site. See, e.g., RRFP EA p. 3.

⁷⁵ See Deed from (b)(6) Privacy, (b)(7)(C) Enf. Privacy to BDG DE LLC (Feb. 5, 2020) p. 73 at (b)(6) Privacy, (b)(7)(C) Enf. Privacy

⁷⁶ See BDC CUP 2258 Application Packet p. 149.

⁷⁷ Exhibit 5; the meeting was recorded and audio is available on Sussex County's website at <https://sussexcountyde.gov/sites/default/files/audio/Planning%20Commission%20Meeting%20Audio%204-23-20.mp3>

8. On or about June 4, 2020, (b)(6) Privacy, (b)(7)(C) Ent. P. happened to be reviewing Sussex County Planning and Zoning Commission's website when she noticed the April 23, 2020 agenda.
9. On December 22, 2020, BDC filed an application⁷⁸ for conditional use (No. 2258) with Sussex County. BDC sought authorization "to permit the processing and handling of poultry litter to include nutrient recovery for natural gas and electrical generation."
10. On Friday February 5, 2021, Sussex County published hundreds of pages of information that had previously been requested by the public, and for which it had demanded from groups like (b)(6) Privacy, (b)(7)(C) Ent. Privacy \$700 in fees. Sussex County had released some records to the public prior to February 5th, but the vast majority of documentation released was only days before the February 11th hearing.
11. The same day, Sussex County Planner released the Staff Analysis for CU 2258, concluding that BDC's proposal "could be considered as being consistent with the land use, area zoning and surrounding uses."⁷⁹
12. On February 11, 2021, Sussex County Planning and Zoning Commission held a public hearing on BDC's CUP Application No. 2258, seeking to amend CUP 1962 "to permit the processing and handling of poultry litter to include nutrient recovery for natural gas and electrical generation...".⁸⁰ The Planning & Zoning Commission recommended that CUP 2258 be approved with conditions.⁸¹
13. Over 275 individual comment letters were submitted to Sussex County in opposition to BDC's proposal.⁸² Comments against the proposal focused on, e.g.:
 - a. Biogas development is not a permitted use or an allowed conditional use in agricultural-residentially zoned areas;
 - b. The project would disproportionately harm communities of color nearby where people living in these communities already bear a heavy pollution burden;
 - c. Missing information regarding the project, such as BDC's violations records at other facilities, project design and explosion risks, existing groundwater pollution, wastewater pollution, existing chromium 6 and fecal bacteria contamination at the site, truck traffic, gas and safety risks for the community, wetlands determinations, land application plans for BDC's anaerobic digester waste, natural gas distribution plans and pipeline locations, was not available to the public, and to the county, at the time the CUP was being considered.

⁷⁸ See BDC CUP 2258 Application Packet p. 7-8.

⁷⁹ Id. p. 6.

⁸⁰ Id. p. 1.

⁸¹ Exhibit 5 (Ordinance No. 2769).

⁸² The comment letters are available on Sussex County's website at <https://sussexcountyde.gov/sites/default/files/packets/CU%202258%20BioEnergy%20Letters%20of%20Opposition%20as%20of%202.10.21%20FULL.pdf>

14. On March 16, 2021, despite strong community protest, Sussex County adopted Ordinance No. 2769, determining that Conditional Use 2258 was in accordance with the Comprehensive Development Plan and “promotes the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Sussex County, and that the conditional use is for the general convenience and welfare of the inhabitants of Sussex County.”⁸³ Sussex County thus approved an amendment to CUP to allow BDC’s anaerobic digester and methane gas production and refinery. On April 20, 2021, Sussex County adopted Ordinance 2769, subject to 12 conditions, and issued Findings of Fact.⁸⁴
15. On or about June 24, 2021, (b)(6) Privacy, (b)(7)(C) Enf. Privacy filed a Petition for Reconsideration and/or Rehearing on the Conditional Use Permit No. 2258 granted to BDC.⁸⁵ The Petition alleged that Sussex County’s decision did not comply with 9 Del. C. § 6904(b) general zoning requirements, with Sussex County’s Comprehensive Plan or Sussex County zoning ordinances. The Petition also alleged that failure to appropriately consider environmental justice impacts of the project, and existing environmental compliance issues at the site, constituted impermissible “spot zoning.” The Petition also alleged that the presence of Chromium VI at the project site in 2019 - at concentrations 82 times higher than allowed by law - remained an unresolved issue by the (b)(6) Privacy, (b)(7)(C) Settlement Agreement with DNREC, that poses threats to human health and the environment, and without resolution and clean up of this contamination, Sussex County could not reasonably issue the CUP to BDC.
16. In the absence of publicly available information, community members were forced to submit multiple Delaware FOIA requests. For example, in mid-2021, community members submitted and received FOIA responses from Delaware’s Small Business Division, from DNREC for other permits related to the property and pollution at the site, from EPA, the community also sent FOIAs to the County for information regarding bonds issued for BDC and had to appeal the County’s decision to the Delaware Attorney General in June 2021. These FOIA requests resulted in a wide array of information, that may or may not have been on target with the BDC proposal. But without more information about the project, 3-4 community representatives had to request and wade through hundreds of pages of material, to piece together information about the project and its health and environmental impacts on the community.
17. As of the date of this Title VI Complaint, CUP 2258 condition (b) (proposed facility shall be subject to DNREC, and other state and federal regulatory approvals), and condition (e) (CUP valid concurrent with DNREC’s permits for this use), have not yet been fulfilled because DNREC has not issued any state environmental permits.
18. Conditions represented in Ordinance No. 2769 have since, through the DNREC environmental permit application process, been changed by BDC. Primarily, BDC

⁸³ Exhibit 5 (Ordinance No. 2769).

⁸⁴ Id.

⁸⁵ A copy of the Petition and supporting materials can be provided upon request.

represented to the County that the facility would “process and handle” poultry litter to include “nutrient recovery for natural gas and electrical generation”, but BDC did not disclose that it would use complex anaerobic digesters to achieve this process, and, it appears that the size of the building areas have increased substantially since the CUP was approved - which should trigger a Preliminary Land Use process with public notice and comment. It is also alleged that the facility will “transform that waste into two new products of great value to the community” when in reality BDC has no confirmed contracts demonstrating a market for the digestate, and similar endeavors in this very region have failed. It is also claimed that “the use, as amended, will not generate a significant amount of traffic, or otherwise have an adverse effect on traffic or area roadways”, when further analysis proves that due to a lack of on-site usage for the product, an increase of around approximately 73,000 tanker truck trips per year could occur on local roads stretching approximately 12 miles from the facility.

19. On October 26, 2021, DNREC exchanged an email with community group members.⁸⁶
 - a. DNREC admitted that “in this instance, we know that many of the area residents do not speak English as a first language and may not understand the DNREC permitting process. One of the tenets of environmental justice is to ensure all communities have an opportunity to participate in the process by which environmental decisions are made.”
 - b. DNREC outlined a 3 step plan. This plan aspired to: prepare materials in Spanish in advance of or as permit applications were submitted; schedule meetings or sessions to explain the permitting process; to hold a community information sessions to help residents understand the applicants and the law in a way that is bilingual; and to conduct a formal public hearing on all the five state environmental permits at once. The formal public hearing would be the opportunity for the public to “hear details” on the applications, translation would be provided in Spanish, and DNREC stated comments would be accepted in Spanish.
 - c. DNREC stated “While DNREC has held community information sessions previously on some applications, this will be the first effort at providing targeted education on the permit and comment process within a community ahead of a public hearing. We think this is an ideal project on which to try a new approach, and hope to have the support and advice of community members as we do.”
 - d. DNREC closed the proposal with a statement that the agency looked forward “to speaking with you as we work to fine tune this process.”
20. On November 3, 2021, community groups responded to DNREC’s October 26, 2021 email,⁸⁷ strongly urging DNREC to hold at least three formal public hearings to correspond to the DNREC permitting divisions involved in the BDC permit review process (Air, Water, Solid and Hazardous waste). The groups also emphasized that meaningful public participation requires giving the public enough time to understand the permitting process and structuring hearings in a way to hear and incorporate community

⁸⁶ Exhibit 6 p. 13-15.

⁸⁷ Exhibit 6 p. 11-13.

concerns and technical evidence into DNREC's final decisions; and that the permit applications at that time already exceeded 7,500 pages of material for one permit application alone.

21. On or about November 5, 2021, BDC submitted draft applications for two air permits to DNREC and supporting materials.⁸⁸ The supporting materials included hundreds of pages of documents including, for example, back-and-forth questions and responses between DNREC and BDC, Air Permit Engineering Report, conceptual site plans, flow paths, construction and employee safety measures (very few community safety measures), air equipment and emission control factors in the natural gas combustion process, and flares/thermal oxidization processes to release unwanted gas components into the air.
22. On November 12, 2021, DNREC responded to the October 26, 2021 community group email.⁸⁹ DNREC's response stated that the applications were not yet complete, so DNREC could not "address the amount of information to be reviewed and made available as we move forward with our public notice. We are committed to providing information to the public and providing an opportunity for the public to provide comment to the Department."
23. In January - February 2022, BDC submitted applications for wastewater permits to DNREC for anaerobic digestion and wastewater pretreatment activities.⁹⁰ Some documents, like the Engineering Report and Operations Plan, overlapped with other BDC permit application materials.
24. In January 2022, [REDACTED] submitted to DNREC FOIA Request No. 22-85 for information relating to BDC permit applications and supporting documents, including communications. DNREC charged [REDACTED] \$131.91 for the records and [REDACTED] received the records in March 2022.⁹¹
25. As early as April 5, 2022, community members reached out to DNREC's air permitting division in an attempt to reprise conversations about the community concerns.⁹²
26. On or about May 12, 2022, BDC submitted a Resource Recovery Permit Application and supporting materials to DNREC relating to the project.⁹³ The supporting materials included hundreds of pages of documents including, for example, the Solid Waste Management Facility Application Form, the Environmental Assessment, Siting Criteria, Plan of Operation, Waste Permit Engineering Report, Waste Recycling Analysis, Hydrogeological Assessment, Sediment and Stormwater Plan, Delaware Department of

⁸⁸ Application materials are on DNREC's project website at dnrec.alpha.delaware.gov/public-hearings/bioenergy/.

⁸⁹ Exhibit 6 p. 10-11.

⁹⁰ See DNREC's project website at dnrec.alpha.delaware.gov/public-hearings/bioenergy/.

⁹¹ Exhibit 7 p. 1-6.

⁹² Exhibit 6 p. 17-18.

⁹³ See DNREC's project website at dnrec.alpha.delaware.gov/public-hearings/bioenergy/.

Transportation Letter of No Contention, State Fire Marshal Approval, and Conceptual Closure Plan and Financial Assurance.

27. In early June 2022, approximately three individuals from community groups began communicating with DNREC via email regarding public meetings plans.⁹⁴

- a. On June 13, 2022, community groups proposed July 23, 24, 30, 31, 2022. On June 17, 2022, DNREC responded that it “has a few concerns about logistics” as “[m]eeting outside without technology is a concern, especially with the dual language component and because this will be the first of several meetings, so a weather cancellation will have a ripple effect. We want to make sure that this meeting is helpful for people. To communicate this information, would it work best for DNREC to meet directly with your group ... and then you could disseminate the general information to the communities? The more specific Bio Dev Co pre-hearing meeting and the public hearing will need an indoor venue. DNREC is looking in Blades or Seaford for a State building/library/school or hall to hold these meetings. Let us know if you have a suggested location.”
- b. On June 17, 2022, DNREC expressed “a few concerns about logistics”, primarily that DNREC did not want to meet outside where it could not use technology, DNREC was concerned about the weather, language issues.
- c. On June 21, 2022, 3 members of community groups responded that they had already proposed dates, and asked whether a translator would be available, and whether DNREC was proposing an in-person meeting, and asked for more detail on DNREC’s proposals.
- d. On June 21, 2022, DNREC responded that “we are getting a head of ourselves.” DNREC suggested only having a meeting with a “smaller group” to discuss “Permitting 101” generally, that meeting could be online, “and then that information can be disseminated in any manner you all want.” DNREC stated it would have “a” document in Spanish. DNREC proposed a second meeting for more project-specific information where “information” will be available in Spanish and “specific questions can be asked about the permit applications.” On June 23, 2022, the community group representatives generally agreed to this format - on the understanding that the larger community would be entitled to meetings as well - and DNREC proposed July 6, 7, 12, 13, 2022.

28. In July 2022, DNREC met via Zoom with 3 community members for “Permitting 101.” On July 18, 2022, DNREC emailed the 3 community members a 2-page “Brief Guide to Delaware’s Environmental Permitting Process” document, in English and Spanish.⁹⁵ The document contains nothing specific to the BDC permit review process. DNREC did not have any plan to distribute the document themselves to the larger community, and intended that the 3 community members distribute the document.

⁹⁴ Exhibit 6 p. 1-10.

⁹⁵ Exhibit 6 p. 19-24.

29. Over the course of the rest of the summer, DNREC held 1-2 more online meetings with the same 3 community members only to discuss the logistics of DNREC meeting with the larger community. The 3 community members continued to ask for larger community meetings, including making proposals involving shade tents, chairs, and refreshments, arranging for a meeting space at a nearby mobile home community, and for translators / interpreters to be available, and on a Saturday to accommodate shift workers and child care needs.⁹⁶ The communities did not ask for BDC to attend such a meeting, specifically because they were wary of receiving misleading information coming from the project applicant, and wanted the opportunity to speak with DNREC directly.
30. DNREC never met with the larger community.
31. On August 21, 2022, DNREC published notice of BDC's permit applications, in English, on its website and in the Delaware State News, the News Journal, and the Cape Gazette.⁹⁷ The Notices announced the draft permits, a September 28, 2022 joint public workshop with BDC at 6pm EST, and a joint virtual public hearing on October 26, 2022 at 6pm EST. The DNREC website contained a statement at the bottom of the Notice that "Spanish translation will be an available option for attendees via the Zoom platform being utilized." None of these notices contained a notice for Haitian Creole, or offer assistance for Spanish speakers other than transcribing an internet-based meeting, or offer a way for LEP individuals to ask questions at either public forum. The same day, DNREC posted notice of the five permits on its website, in English only.
32. On August 21, 2022, (b)(6) Privacy, (b)(7)(C) EMP emailed DNREC "We also have a large Haitian community population that is reaching out in Seaford. Is it possible to have information in Haitian Creole and Spanish?"⁹⁸ DNREC responded that it was hoping that the community members could provide translators / interpreters. Members of the community offered to provide names of Haitian Creole translators.
33. On August 22, 2022, DNREC posted a News Release of the September 28, 2022 workshop on its website. The News Release was written in English and in Spanish; and with an audio function so people could listen to the News Release being read in English or Spanish.⁹⁹
34. On September 2, 2022, (b)(6) Privacy, (b)(7)(C) EMP spoke with Katera Moore, DNREC's Ombudsman for the Division of Waste & Hazardous Substances.
- a. During that telephone call, DNREC took the position that civil rights laws did not apply to them, only internal documents.

⁹⁶ See, e.g., Exhibit 6 p. 45-47 .

⁹⁷ See Notices on DNREC's project website at <https://dnrec.alpha.delaware.gov/public-notice/bioenergy-devco-llc-facility-permit-application/>

⁹⁸ Exhibit 6 p. 25-27.

⁹⁹ DNREC project webpage at <https://dnrec.alpha.delaware.gov/public-hearings/bioenergy/>

- b. As a result of that call, DNREC requested the applicant, BDC, conduct “targeted outreach to the community surrounding the facility.” DNREC explained that “this practice is customary and has been beneficial for all parties in other matters.”¹⁰⁰
35. On September 6, 2022, [REDACTED] introduced DNREC’s Ombudsman Katera Moore to [REDACTED], a representative of the Haitian Creole community, via email.¹⁰¹
36. In mid-September, several community groups re-confirmed their interest in participating in DNREC meetings, and for DNREC to hold a meeting with the Haitian community.¹⁰²
37. On September 23, 2022, DNREC changed the emissions addressed in the draft air permit, updated documents on its website.¹⁰³ The hyperlinks, however, were not correct and changes were not made until September 28, 2022, the day of the virtual public hearing.
38. On September 23, 2022, DNREC posted on its website “Notice of the Permit Applications - Updated to Reflect Emissions Change for Air Permit and to Note that Updated Supporting Documentation is Available for Water Permits.” DNREC posted this Notice in writing in English, Spanish, and Haitian Creole, and enabled a PDF-audio read function on its website. No other materials relating to the BDC permit application were provided in Spanish or Haitian Creole.
39. On September 28, 2022 at 1 p.m. EST, BDC’s representative, [REDACTED] met with one or two English-speaking representatives from the Haitian Creole community. [REDACTED] represented that the project was to be sited in an industrial zoned area, not an agricultural-residentially zoned area.
40. On September 28, 2022, in the three hour window before the virtual public hearing, [REDACTED] asked again why DNREC had not set up a public meeting with the Haitian community, reminded DNREC of the need for a translator, of the lack of internet access, and that no public notice had been received by many Haitian Creole community members.¹⁰⁴ [REDACTED] reiterated that the invitation for DNREC to meet with the community remains open, and referenced multiple concerns the community has regarding the project and environmental injustices. DNREC responded, two hours before the virtual public hearing, asking to meet with [REDACTED] that afternoon. [REDACTED] was preparing herself and community members for the meeting, and was unable to drop everything to meet with DNREC in that window, lest she compromise her and the community’s preparations.

¹⁰⁰ Exhibit 6 p. 44-45.

¹⁰¹ Exhibit 6 p. 32-33.

¹⁰² Exhibit 6 p. 35-40.

¹⁰³ Id.; Bioenergy Devco, LLC Facility Permit Application - Updated to Reflect Emissions Change for Air Permit and to Note that Updated Supporting Documentation is Available for Water Permits.

<https://dnrec.alpha.delaware.gov/public-notices/bioenergy-devco-llc-facility-permit-application-updated/>

¹⁰⁴ Exhibit 6 p. 28-32.

41. On September 28, 2022 at 4:24pm, DNREC “closed” FOIA Request No. 22-1131 on the grounds that the “request is not a valid FOIA request since this matter is the subject of a public hearing” and DNREC referred (b)(6) Privacy, (b)(7)(C) Etc. to DNREC’s project webpage.¹⁰⁵ (b)(6) Privacy, (b)(7)(C) Etc. had requested records since March 2022, including communications between DNREC and BDC, seeking to update her FOIA request to which DNREC had previously released records. See Para. 24 above.
42. On September 28, 2022 at 6 p.m. EST, DNREC held jointly with BDC a virtual public hearing.
- The virtual public hearing was held in English. Closed captioning was available in Spanish but not Haitian Creole. This closed caption alternative provided Spanish speaking persons the option to read interpretations/translations of what was being said during the public hearing, but it did not provide these persons or other non-English speakers with the option to speak and ask questions, like English speaking members of the public were able to do.
 - No interpretation / translation was available for people attending the meeting via telephone.
 - DNREC refused to record the hearing.¹⁰⁶
 - During the September 28, 2022 meeting, several members of the public expressed concern over the lack of DNREC engagement with Black, Latinx, Hispanic, and Haitian people, and Spanish and Haitian Creole speakers regarding this proposed facility. DNREC responded by saying that DNREC is actively involved with the community but refused to give specific examples of community outreach.
 - During the September 28, 2022 meeting, DNREC shut off microphones for members of the public who tried to raise concern with public access to the session and for members of the public who tried to ask questions about environmental justice impacts of the project and DNREC permits.
 - During the September 28, 2022 meeting, DNREC staff raced through their slide-based presentations, and gave BDC a longer amount of time to conduct a slide-based marketing presentation.¹⁰⁷
43. On October 2, 2022, (b)(6) Privacy, (b)(7)(C) Etc. emailed DNREC to memorialize recent actions and conversations. On October 3, 2022, DNREC informed (b)(6) Privacy, (b)(7)(C) Etc. that “translated information will be forthcoming on our website.”¹⁰⁸ DNREC’s communication did not identify what information would be translated, whether it would include vital documents. Nor did DNREC recognize that this offer was occurring after the September 28, 2022 meeting had already occurred, or that many community members do not have internet access.

¹⁰⁵ Exhibit 7 p. 7-9.

¹⁰⁶ Exhibit 7 p. 10-12 (SRAP submitted a public records request for any transcript of this meeting. DNREC responded that “there was no recording or transcript made.” DNREC FOIA Request No. 22-1145).

¹⁰⁷ DNREC slides are available at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/20220927-BDC-Workshop.pdf> and BDC slides are available at <https://www.bioenergyic.com/expansion/>.

¹⁰⁸ Exhibit 6 p. 44-47.

44. On October 3, 2022, DNREC informed (b)(6) Privacy, (b)(7)(C) Ent. P. that “there are only executive orders and policy guidelines; there is no federal EJ law. We are going beyond the regulatory requirements and continue to develop policies to address EJ throughout Delaware.”¹⁰⁹
45. On or about October 13, 2022, DNREC translated their September 28, 2022 Powerpoint presentations into Spanish and Haitian Creole and posted them on DNREC’s website.¹¹⁰
46. On or about October 13, 2022, BDC’s website began carrying a link to click for Spanish and Haitian Creole information; the link takes the public to BDC’s September 28, 2022 slide presentation with BDC. BDC’s website also has one page translated into Spanish and Haitian Creole, and an email form to submit questions.¹¹¹
47. On October 14, 2022, (b)(6) Privacy, (b)(7)(C) Ent. P. emailed DNREC, thanking them for providing the translated Powerpoint information but pointing out that the meeting was two and half weeks earlier. On October 18, 2022, DNREC emailed (b)(6) Privacy, (b)(7)(C) Ent. P. back, asking *her* to confirm that *she* had passed along DNREC’s information about the project to community groups she had been working with (instead of DNREC conducting its own outreach). DNREC also stated that “carbon benefits of the project are not pertinent to any applicable regulations”, and that “[t]he use of available tools including Air Tox Screen, EJ Screen, and the Climate and Economic Justice Screening Tool do not indicate a concern for proceeding with this project.”¹¹²
48. On October 26, 2022 at 6 p.m., DNREC held a virtual public hearing on the BDC Project.
- DNREC’s hearing addressed five state environmental permits, covering several thousands of pages of application materials, at one hearing.
 - DNREC gave instructions, in English only, on how to use the closed captioning for Spanish. Furthermore, DNREC gave these instructions via an *explanation*, not a *demonstration* of how to use the closed captioning.
 - DNREC did not provide closed captioning in Haitian Creole.
 - No interpretation / translation service was available for people attending the meeting via telephone.
 - DNREC did not enable a “chat” function for the public hearing.
 - DNREC gave a short presentation on the application and the permits, and again gave BDC a longer amount of time.
 - DNREC allowed public comment for persons who signed up in advance to give public comment. DNREC stated it would allow no substitutions; however, it did, for one industry representative.
 - DNREC provided each member of the public with three minutes’ time to speak.

¹⁰⁹ Exhibit 6. p. 44-45.

¹¹⁰ Spanish <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Presentacion-del-Sesion-Informativa-20220928.pdf> and Haitian Creole <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Prezantasyon-Sesyon-Enfomasyon-20220928.pdf>.

¹¹¹ See BDC project website at <https://www.bioenergyic.com/>.

¹¹² Exhibit 6 p. 48-50.

- i. The public hearing was recorded and is available in English on DNREC’s website with DNREC’s exhibits.¹¹³ BDC’s presentation is substantially similar to its September 28, 2022 presentation.¹¹⁴

49. On December 2, 2022, DNREC closed its public comment period for the state environmental five permits. Some groups, including [REDACTED] submitted comments opposing DNREC’s lack of transparency of information and public notice and process failings. Some comments on these issues were submitted on behalf of LEP persons by having the comments translated into Spanish and Haitian Creole.¹¹⁵

VI. Title VI Violations - Access to Information and Public Participation Rights

Title VI and EPA’s implementing regulations prohibit recipients of EPA financial assistance from carrying out activities that intentionally discriminate, or create a disparate impact on protected groups on the basis of race, color, or national origin or sex. To establish a prima facie case of disparate impact, EPA must “(1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity, and; (4) establish causation.”¹¹⁶ For disparate impact matters, EPA’s analysis focuses on the consequences of the policy or practice rather than the intent. If the evidence establishes a prima facie case of negative disparate impact, EPA determines “whether the recipient has articulated a ‘substantial legitimate justification’ for the challenged policy or practice.”¹¹⁷ If a recipient demonstrates a “substantial legitimate justification,” EPA must determine whether there are less discriminatory alternatives to the policy or activity.¹¹⁸ In presenting the violations below, Complainants incorporate the facts and procedural history background from Sections I. and V.

The Recipients’ practices with respect to the BDC county land use and state environmental permit applications have had, and continue to have, a disparate, negative impact on Black, Latinx, Hispanic, and Haitian people and Spanish and Haitian Creole speaking residents of Sussex County. The Recipients have failed to demonstrate a substantial legitimate justification for their actions and have failed to implement less discriminatory alternatives in a meaningful way. As a result, the Recipients’ practices violate Title VI and EPA’s implementing regulations and warrant an investigation by ECRCO.

During the Recipients’ permit application acceptance, review, releases of information to the public, public notice, public participation opportunities and public comment processes, the

¹¹³ See DNREC Public Hearing Bioenergy Innovation Center Project at <https://dnrec.alpha.delaware.gov/events/public-hearing-bioenergy-innovation-center-project/>

¹¹⁴ See BDC presentation at <https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Exhibits/bioenergy-innovation-center-presentation.pdf>

¹¹⁵ [REDACTED] et al. Comments to DNREC (Dec. 2, 2022) (available at [https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Comments/\[REDACTED\]](https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Comments/[REDACTED]) and [REDACTED] Comments to DNREC (Dec. 2, 2022) (available at [https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Comments/\[REDACTED\]](https://documents.dnrec.delaware.gov/Admin/Hearings/2022-P-MULTI-0012/Comments/[REDACTED])

¹¹⁶ EPA, *External Civil Rights Compliance Toolkit* at 8 (Jan. 2017).

¹¹⁷ Id. at 9.

¹¹⁸ Id.

Recipients failed to take reasonable steps to ensure LEP individuals have notice, meaningful access to the process or fulsome and accurate information about the Project.¹¹⁹ DNREC also failed to allow the public to participate as provided by Delaware’s Natural Resources Code and DNREC regulations.¹²⁰

A. Practices and Activities at Issue - Sussex County and DNREC Review Process of BDC’s Land Use and State Environmental Permit Applications

The Recipients have engaged in a series of conduct that has caused a disparate, adverse impact on communities in Seaford, Sussex County. As noted above and as confirmed by EPA and CDC data, the affected communities are substantially communities of color, low-income, existing health disparities, and limited internet access. The socio-economic challenges for these community members make accessing information, and meaningfully participating in public processes, incredibly difficult. Community members even informed DNREC that internet access was limited for people who would be affected by the project, but DNREC continued to rely on the internet for project information.

The Recipients released *some* information, published public notice of permit applications, comment periods, public participation opportunities, and hearings exclusively in English to the inherent detriment of LEP persons. These actions were too little too late. All these actions show is that DNREC had the *capacity and resources* to translate *some* information during the permit review process, but elected not to do so.¹²¹ Sussex County did nothing of the sort, and ignored the LEP individuals in the community entirely.

The Recipients additionally failed to provide adequate or meaningful interpretation services for the LEP communities and refused to offer meaningful accommodations for those with limited or no internet capabilities. The Recipients’ failures to provide public materials in languages other than English, and to provide information at late stages in the process, delayed and denied the public’s right to gain information about the proposed BDC facility’s operations and impacts and to participate in the permit decision-making process. Environmental permit and siting activities are clearly within the realm of Title VI protections.

B. Practices and Activities at Issue - Sussex County and DNREC Review Process and LEP Individuals

¹¹⁹ For example, between July 2021 and March 2022, community members submitted public records requests to DNREC for information and communications between DNREC and BDC. In September 2022, after DNREC changed supporting documentation for the permits on public notice, [REDACTED] submitted another FOIA request for information (No. 22-1131) seeking information and communications from April 1, 2022. DNREC denied this FOIA request on the grounds that, “Your request is not a valid FOIA request since this matter is the subject of a public hearing.” Exhibit 7 p. 7-9.

¹²⁰ See 7 Del. C. §§ 6004, 6006; 7 Del. Admin. Code §§ 1102-12 (air permitting), § 1301-4.1.2 (solid waste permitting), § 7201-4.5, -5.11, -5.12, -5.13, Part III (wastewater permitting).

¹²¹ While Complainants do not allege intentional discrimination this Complaint, *Murguia v. Childers*, 2022 U.S. Dist. Lexis 130879, at *32 (W.D. Ark. July 22, 2022), the court held that the U.S. Department of Labor’s continued transmittal of forms in English, when a translated version was available, was “perhaps the strongest evidence of intentional discrimination...”).

The DOJ's 2002 Final Guidance requires recipients to take reasonable steps to ensure meaningful access to LEP persons access to recipients' programs and activities. "While designed to be a flexible and fact-dependent standard, the starting point is an *individualized assessment* that balances the [following] four factors."¹²² The purpose for this individualized assessment is to identify and address language assistance needs of LEP persons, and for determining LEP compliance.¹²³ Here, complainants believe that an investigation by EPA will confirm that neither Recipient conducted an individualized assessment of the activities undertaken, and to the extent the recipients may have considered any of the four factors, their "consideration" did not rise to the level of an *assessment*, and that any conclusions the Recipients reached was the result of improper balancing. The result was to deny protected persons meaningful access to BDC's permit application process at the county and state levels in violation of Title VI.

1. Individualized Assessment Not Performed.

An "individualized assessment" means recipients should exercise discretion, in considering the facts of a matter, on a case-by-case basis.¹²⁴ Indeed, EPA's 2004 LEP Guidance contemplates that environmental permitting is a specific application of standards and practices to a community, raising language concerns that "may be *at least as critical*" as in regulation formation.¹²⁵ In performing an individualized assessment, DNREC and Sussex County would have consulted - at a minimum - EPA EJ Screen, the CDC EJ Index, EPA Toolkit, and numerous other sources available to them. Sussex County recognized in its own 2018 Comprehensive Plan that ethnicity and race trends in the county have increased its population of Hispanic, Black and other races.¹²⁶ Sussex County confirms its Hispanic population grew 2000-2015, and is expected to increase by 39,000 people by 2045, representing 15% of the population.¹²⁷

No such individualized assessment occurred in Seaford. Here, BDC applied to Sussex County for a land use permit, and to DNREC for five different environmental state permits, in order to implement a unique technology to convert animal waste into methane gas, essentially operating as a fuel production and refinery operation, on a site already riddled with contamination, where it also seeks to triple the amount of waste it wants to import, in the middle of an agricultural - residentially zoned area, surrounded by LEP families already suffering from social and environmental injustices.

¹²² 2004 EPA LEP Guidance at 35606 (italics added); 2002 DOJ Final Guidance at 41459.

¹²³ 2004 EPA LEP Guidance at 35606; 2002 DOJ Final Guidance at 41457.

¹²⁴ See 2004 EPA LEP Guidance at 35610; see also, *Jones v. Gusman*, 296 F.R.D. 416, 454 (E.D. La. 2013) (ordering approval of a consent decree designed to remedy specific needs of a prison with virtually no services which created problems with respect to medical treatment, no records on number of LEP patients, staff unable to locate a "catch phrase" book, number of bilingual staff unknown); *T.R. v. School Dist. of Philadelphia*, 223, F.Supp.3d 321, 331-32 (E.D. Pa. 2016) (complaint plausibly alleged school district failed to exercise any discretion and "instead adhered to a blanket policy of inaction.").

¹²⁵ 2004 EPA LEP Guidance at 35613 (italics added).

¹²⁶ See Sussex Co. Comprehensive Plan (2018) at Table 2.2-1 and Table 2.2-2, <https://sussexcountyde.gov/sites/default/files/PDFs/2018CompPlan-Final.pdf>.

¹²⁷ *Id.* at 2-4, 8-20.

2. *Vital Documents Provisions Violated.*

The 2004 EPA LEP Guidance contains “vital documents” and “safe harbor” provisions regarding written translations. EPA acknowledged that the decision as to what program related documents should be translated “is sometimes difficult”, but awareness of rights or services is an important part of “meaningful access”, and recipients “should regularly access the needs of the populations encountered or affected by the program or activity...”¹²⁸ Whether or not a document, or portions of a document, is vital “may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner.”¹²⁹ Critically, EPA states that “[a]wareness of rights or services is an important part of ‘meaningful access.’ Lack of awareness that a particular program, right, or service exists may effectively deny LEP individuals meaningful access.”¹³⁰ DOJ’s Final Guidance identified documents that create or define legally enforceable rights or responsibilities, documents that solicit important information required to maintain eligibility to participate in a Federally-assisted program or activity, documents that are the core benefit or service provided by the program or activity, or documents relating to activities specifically focused on providing benefits or services to significant LEP populations.¹³¹

Documents with vital information are “one, but not necessarily the only” point of reference for when a recipient should consider document translations or the implementation of alternatives to such documents.¹³² In fact, EPA’s LEP Guidance, “[o]ften, issuing environmental permits also requires public notice and, and when the permitting action affects LEP persons, the permit process is subject to the same kinds of language concerns that are present in the promulgation of environmental regulations. Indeed, language concerns may be at least as critical in environmental permitting because, while the development and implementation of environmental regulations, policies and programs largely concerns general programmatic standards and practices, *environmental permitting typically concerns the application of those standards and practices in a specific geographic area that directly affects an immediate population or community.*”¹³³ If the county and state permits are allowed, LEP individuals will have environmental and public health rights affected by BDC’s activities under the permits, and will have rights of enforcement of the permits’ terms and conditions. Vital documents should include materials informing the public of their rights.

Here, Sussex County did not provide any information, notice, or public participation opportunities to LEP individuals in any language other than English. DNREC did not even

¹²⁸ 2004 EPA LEP Guidance at 35610.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 41456.

¹³² See, e.g., 2002 DOJ Final Guidance at 41456; 41463 (listing examples); see also Executive Order 12898 § 5-5(b) “Federal agencies may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.”

¹³³ 2004 EPA LEP Guidance at 35613 (*italics added*); see also Executive Order 12898 at § 5-5(c) “Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.”

provide the permit public notice document in Spanish or Haitian Creole until one month *after* the English notice was published, and only 3 days before the public meeting on the project. Based on information from the Complainants, in the days before the DNREC public hearing on October 26 2022, LEP people in the community *still* did not have notice of the project, did not have information, or know how to exercise their public participation rights. The notice document is a vital document that protects important substantive rights; even if DNREC translated it, relying on the Applicant, and 3 community members, is an entirely unreasonable strategy to truly provide notice. Additionally, Powerpoint presentation information that was translated really did not identify or explain people's substantive rights, so simply translating a slideshow on what the Applicant is going to do - not what public health or environmental risks were considered, analyzed, and mitigated through the permits' operational controls and limitations - is an inadequate method to provide information and enable people to meaningfully exercise their public participation rights. DNREC did not translate or interpret any vital documents in its review of BDC's permit applications.

3. Four Factor Balancing Test Not Undertaken.

a. The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee.

The greater the number or proportion of LEP persons, the more likely language services are needed.¹³⁴ Here, the BDC proposal is only approximately half a mile from a mobile home park and places of worship.¹³⁵ Within one mile, community members are in the 80th percentile in Delaware for exposure to air toxics, meaning that the immediate area is already burdened by hazardous air pollutants with carcinogenic and other negative health impacts; also, those living within one mile of the Project are in the 68th percentile for the state with respect to proximity to Superfund sites needing long-term clean up from emergency and hazardous wastes.¹³⁶ The Superfund statistic is even more disturbing when compared nationally; this area is in the 91st percentile nationally, meaning that only 9% of the U.S. population are more exposed to Superfund sites than the community impacted by BDC's proposal.¹³⁷ BDC's proposal to Sussex County incorrectly only identified residential properties within 1.5 miles of the site.¹³⁸ Within three miles of the Project, residents of color make up 32% of the population, but only account for 17% of the population in Sussex County. Residents living in poverty make up 34% of those living within three miles of the Project, whereas only 12% of the population in Sussex County lives in poverty.¹³⁹ With this number of people of color in the area, and as explained below, the

¹³⁴ 2004 EPA LEP Guidance at 35606.

¹³⁵ See n. 115, supra (b)(6) Privacy, (b)(7)(C) Ent. Privacy et al. Comments to DNREC (Dec. 2, 2022) Exhibit B); see also RRFP EA at 9. People living in the (b)(6) Privacy, (b)(7)(C) Ent. Privacy mobile home park at (b)(6) Privacy, (b)(7)(C) Ent. Privacy Seaford, Delaware 19973, and the (b)(6) Privacy, (b)(7)(C) Ent. Privacy mobile home park at (b)(6) Privacy, (b)(7)(C) Ent. Privacy Seaford, Delaware 19973 are closest to the proposed BDC facility. The residents of these mobile home parks are comprised of individuals from Latinx, Hispanic, Black, and Haitian communities, who speak Spanish and Haitian Creole languages.

¹³⁶ See n. 115 supra (b)(6) Privacy, (b)(7)(C) Ent. Privacy et al. Comments to DNREC (Dec. 2, 2022) Exhibit A, EJ Screen Information).

¹³⁷ Id.

¹³⁸ Exhibit 5 (Ordinance No. 2769 Fact D).

¹³⁹ Food & Water Watch, Dirty Delaware Project to Turn Poultry Slaughterhouse Waste into Pipeline Grade Methane

number of LEP persons, the Recipients should have considered these factors in identifying and analyzing LEP services they needed to provide in connection with this project in order to comply with Title VI.

The population at issue is program, or activity, specific and generally includes persons “eligible to be served, or likely to be directly affected” by the activity.¹⁴⁰ This population includes persons who are in the geographic area that a Federal agency has approved as the recipient’s “service area”, and that geographic area can be smaller, e.g., a precinct and not the entire population served by a department.¹⁴¹ There is no reason with a community of this size, and EJ Screen data available for 0.5 mile, 1 mile, 3 mile, and 5 mile radius that the Recipients failed to account for the number of protected persons that would be affected by the project.

This region is also characterized by EPA as “linguistically isolated”, meaning that an identifiable percentage of the “population living in a household in which all members age 14 years and over speak a non-English language and also speak English less than ‘very well’ are considered linguistically isolated.”¹⁴² This percentage is reported as a percentage of total households in the HUC12 subwatershed. This characterization is important as it relates to protections the community is entitled to under environmental and public health permits because “[i]ndividuals may be more vulnerable to health issues when they lack financial resources, language skills, or education that would help them avoid exposure to pollutants or obtain treatment.”¹⁴³ The EPA Demographics Indicator information confirms that in both the 3 and 5 mile radius areas of the proposed site, approximately 3-4% of households are linguistically isolated.

b. The frequency with which LEP individuals come in contact with the program or activity.

Recipients should assess, through the individualized activity assessment, the frequency with which LEP individuals will come in contact with a recipient’s program or activity.¹⁴⁴ If LEP individuals come in contact with the recipient daily, once, or even on an “unpredictable or infrequent” basis,¹⁴⁵ recipients should still assess this factor. In addition to assessing the frequency, the next step recipients should take is “*to determine what to do* if an LEP individual seeks services.”¹⁴⁶

The proposed site of the project, and the 73,000 trucks a year associated with the project, will have contact with the community multiple times a day. The project is in a residential -

at 2–3 (Apr. 2021), https://www.foodandwaterwatch.org/wp-content/uploads/2022/11/FS_2104_DelawareDigesters-2210UpdWEB55.pdf.

¹⁴⁰ 2004 EPA LEP Guidance at 35606.

¹⁴¹ 2002 DOJ Final Guidance at 41459.

¹⁴² EPA, Demographics Indicator Reference Sheet: Population Demographics (March 6, 2022) see n. 11 *supra*.

¹⁴³ *Id.*

¹⁴⁴ 2004 EPA LEP Guidance at 35606.

¹⁴⁵ *Id.* at 35607.

¹⁴⁶ *Id.* (*italics added*).

agricultural area, with schools and churches. The children's school buses will use the same roads as hundreds of trucks a day hauling waste in, and explosive gas and wastewater out. Yet this information is not referenced in BDC, Sussex County, or DNREC materials (in any language). Throughout the entirety of the county and state level processes, the Recipients have provided insufficient identification and assessment of this factor, and have not taken steps to determine what to do to assist LEP individuals. Moreover, with the limited public notice and outreach performed regarding this project, the Recipients were in no position to even assess the frequency LEP individuals would come into contact with this activity.

c. The nature and importance of the program, activity, or service provided by the program to people's lives.

In assessing this factor, the recipient "needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications" for LEP individuals.¹⁴⁷ In this situation, LEP individuals rights are both procedural and substantive. LEP individuals have rights to public information, to public notice, and to public participation at the county and state levels. Additionally, LEP individuals' substantive rights, as members of the public entitled to protection under the terms and conditions of the CUP and state environmental and public health permits, are directly implicated by the recipients' review and decisions on the permits. As the Recipients already know very well, this community *already* suffers environmental injustices from years of exposure to pollution, and has EPA EJ Screen data confirming existing injustices. The BDC proposal proposes to triple the amount of waste processed at the Seaford site, and proposes to develop a methane gas production facility - essentially a fuel refinery - right next to LEP communities. Had the Recipients conducted an individualized assessment, and evaluated this third factor, they likely would have concluded that a different LEP strategy was required in order to comply with Title VI.

d. The resources available to the recipient and costs.

Resources and costs may have an impact on the nature of the steps to be taken, and the reasonability of certain steps.¹⁴⁸ DOJ's Final Guidance, DOJ's LEP website, EPA's LEP Guidance, and EPA's Procedural Safeguard Checklist all provide specific examples of how to reduce resource and cost concerns. Recipients are encouraged to "carefully explore the most cost-effective means of delivering competent and accurate language services before limiting services due to resource concerns", and large entities and those serving a significant number or proportion of LEP persons "should ensure that their resource limitations are well-substantiated before using this factor as a reason to limit language assistance."¹⁴⁹

Some project information was provided in Spanish and Haitian Creole at no cost to DNREC. The applicant, BDC, translated their marketing material Powerpoint presentation given

¹⁴⁷ Id.

¹⁴⁸ For example, recipients that are small entities, or have limited budgets, are not expected to provide the same level of language services as larger recipients with larger budgets. Additionally, "reasonable steps" to ensure compliance "may cease to be reasonable where the costs imposed substantially exceed the benefits." Id.

¹⁴⁹ Id.

on September 26, 2022 at a public meeting with DNREC, into Spanish and Haitian Creole.¹⁵⁰ Development of that resource and associated costs appear to be provided by the applicant. Obviously BDC acts in its own corporate interests, which is to advance its permit applications and to convince the public that its project will not harm the environment or human health. And BDC's translated Powerpoint presentation was not provided at the September 26th meeting, but was posted on BDC's website approximately 2 weeks later. Thus, DNREC may have saved costs by involving BDC in translation services, but in so doing, critical health and environmental information was ignored and the product was released too late for people to employ their public participation rights.

DNREC did provide Spanish written subtitled captions at the September 28, 2022 and October 26, 2022 video meetings, but none in Haitian Creole. DNREC did not activate this function for any other meeting or interaction with the LEP community or its representatives during the entire BDC permit application review process. And, no translation or interpretation services were provided for people attending via telephone.¹⁵¹ It does not appear that Sussex County made any information regarding the CUP application, the public notice, the public participation process, or review process available to LEP individuals by translation or interpretation. Neither Recipient suggested, or documented to the public, that costs were a factor in their failures to provide LEP assistance, or in undertaking any sort of reasonability assessment.

4. *Safe Harbor Provisions Do Not Apply*

The identified circumstances that can provide a "safe harbor" for recipients regarding the requirements for translations are for *written materials only*.¹⁵² Actions consistent with the safe harbor provisions will be considered "strong evidence" of compliance with written translation obligations.¹⁵³ The safe harbor circumstances are merely a floor - they are a "common starting point" for recipients to consider.¹⁵⁴ The safe harbor provisions are a "guide" for recipients who "would like greater certainty of compliance than can be provided by a fact-intensive, four-factor analysis."¹⁵⁵

- (a) Where a recipient provides translation of vital documents, for each eligible LEP language group that constitutes 5% or 1,000 (whichever is less) of the population of persons eligible to be served, or likely to be affected or encountered. Translation of other documents, if needed, can be provided orally; or
- (b) If there are fewer than 50 persons in the language group that reaches the 5% trigger in (a), the recipient does not translate vital written materials but provides

¹⁵⁰ See also Exhibit 5 (Ordinance No. 2769 Fact C).

¹⁵¹ DOJ's 2002 Final Guidance specifically contemplates interpretation services "even if" only accessible telephonically. 2002 DOJ Final Guidance at 41455.

¹⁵² 2004 EPA LEP Guidance at 35610 (italics added).

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id.

written notice in the primary language of the LEP group of the right to receive competent oral interpretation of those written materials free of cost.

The safe harbor provisions also appear to have, at least in theory, a third provision. If translation of a document would be “so burdensome as to defeat the legitimate objectives of [a] program, the translation of the written materials is not necessary.”¹⁵⁶ In such situations, effective oral interpretation of certain vital documents may be acceptable.¹⁵⁷ EPA offers guidance on translating terms of art, and technical concepts to avoid confusion by LEP individuals.¹⁵⁸ Complainants believe that neither Recipient engaged any assistance to properly navigate the kinds of documents at issue in this situation.

In running an EPA EJ Screen language analysis using a 3 mile radius from the BDC proposed project site, EPA reports a population over five years of age of approximately 8,474 persons. Of this population, EJ Screen reports that 826 are Spanish speakers and 88 are French, Haitian, or Cajun speakers (approximately 10.7% of the population).

	2016 - 2020 ACS Estimates	Percent	MOE (±)
Population by Language Spoken at Home*			
Total (persons age 5 and above)	8,474	100%	682
English	7,351	87%	650
Spanish	826	10%	432
French, Haitian, or Cajun	88	1%	128
German or other West Germanic	1	0%	12
Russian, Polish, or Other Slavic	0	0%	17
Other Indo-European	134	2%	147
Korean	20	0%	36
Chinese (including Mandarin, Cantonese)	13	0%	39
Vietnamese	29	0%	92
Tagalog (including Filipino)	12	0%	17
Other Asian and Pacific Island	0	0%	17
Arabic	0	0%	17
Other and Unspecified	0	0%	17
Total Non-English	1,124	13%	942

See Exhibit 3 (EJScreen Summary Report, 3-mile radius)

Clearly, this area exceeds the safe harbor thresholds of (a) and (b), so neither Recipient can avail themselves of these provisions.

5. Conclusion

Recipients have had access to Federal and state EOs, regulations, policy and guidance documents on LEP management for over 20 years. This is more than ample time to build a system, that works, to ensure access for LEP individuals and apply those strategies to the BDC permit application process. From the Complainants’ experience with the BDC permitting process, neither Recipient has taken reasonable steps to provide meaningful access to Federally

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id. at 35611.

assisted programs and activities. Neither Recipient has, frankly, even taken “intermediate” steps consistent with EPA’s 2004 LEP Guidance, developed a broader implementation plan or schedule. In “developing any phased implementation schedule, EPA recipients should ensure that the provision of appropriate assistance for significant LEP populations, or with respect to activities having a significant impact on the health, safety, legal rights, or livelihood of beneficiaries is addressed first.”¹⁵⁹ The Complainants did repeatedly request LEP assistance during the multi-year process, but received dismissive responses.

C. Adverse impact

The residents of Seaford, Delaware in Sussex County are already adversely impacted by pollution. The BDC proposal to expand the compost operation, and to produce and refine methane gas will only exacerbate the health and socio-economic disparities this community experiences. As discussed above, EPA data shows that between 50-80% of the residents surrounding the proposed facility site are people of color, between 50-95% of the surrounding residents are limited English proficient, between 50-100% of the surrounding residences are low-income, and between 50-95% of the surrounding residents have less than a high school education. Many people in this community lack access to reliable internet services.¹⁶⁰

The diverse community in Seaford, and Sussex County more broadly, faces numerous disadvantages that have yet to be accounted for by the Recipients. First, many residents are unaware of the proposed facility because they could not interpret or access the public notice. Second, many residents have been excluded from public participation because they again, cannot interpret or access information regarding the public comment period including the procedures, rules, or requirements. Third, many residents have been excluded from public participation as they lack reliable internet services to attend public meets online in addition to the fact that the Recipients refused to provide adequate translation or interpretation services for these meetings. Fourth, Many residents have been excluded from public participation as the Recipients have not made meaningful efforts to engage with the impacted communities to inform them of their rights in this process. Fifth, if the proposed facility is to be constructed, these residents will bear a majority of the environmental burden including increased air and water pollution and other significant health risks. The active and informed participation of these communities is critical to the public comment process in order for them to have a complete understanding of the impacts. What DNREC and Sussex County have done, through their failings, is to deny Black, Latinx, Hispanic, Haitian people and Spanish and Haitian Creole speakers their rights to protect themselves.

D. Minorities and LEP individuals suffered disproportionate adverse impacts.

The Seaford area of Sussex County is both racially and socioeconomically diverse with residents identifying as persons of color and limited English proficiency. The area is already also suffering from health impact disparities and environmental pollution. Additionally, Seaford is a technologically disadvantaged area with one in four households lacking broadband internet

¹⁵⁹ 2004 EPA LEP Guidance at 35612.

¹⁶⁰ See CDC EJ Index.

access and one in five households lacking a computer.¹⁶¹ These factors play a significant role in the community's ability to access information, resources, and engage in local and state government matters.

Issuing information, public notices, and conducting public participation processes regarding activities that will undoubtedly adversely impact the health and environment and welfare of residents of this area, exclusively in English, disproportionately impacts those individuals. The Recipients' actions regarding the BDC proposed project have objectively denied minority and LEP populations equal access to their rights.

For example, even an experienced English-speaking advocate did not even learn of the BDC proposal until 6 weeks after the County tried to push through BDC's project merely as a "site plan amendment" to the existing CUPs, issued to prior owners of the site. Once citizens learned the chain of events, and that the Planning Commission had questioned anaerobic digestion and methane gas production and whether a significant expansion of the composting operation did *not* fall under the 2013 CUP, they protested the County's approach, and BDC was required to file an application for a new CUP.¹⁶² This new CUP application triggered public notice and hearing requirements at the County level. Had the County employed proper information, notice, and public participation strategies, all members of the community would have had access to the information and notice they are entitled to under Title VI. And, as identified above regarding the DNREC permitting process, had DNREC employed different strategies, people of color and LEP persons would have had the requisite access to information, notice, and public participation opportunities. Because of the Recipients' actions the Black, Latinx, Hispanic, Haitian communities and Spanish and Haitian Creole speakers have suffered disproportionate adverse impacts.

E. Sussex County and DNREC caused adverse impacts.

The Recipients' conduct has adversely impacted the Black, Latinx, Hispanic, and Haitian and people of color, and Spanish and Haitian Creole speaking populations of Sussex county. These actions include: not providing information, issuing public notice of permit applications, comment periods, and hearings exclusively in English despite the LEP population; failing to provide reasonable or meaningful access to translation and interpretation services; and failing to provide reasonable access to public services for individuals with limited internet capabilities. Additionally, the Recipients have failed to engage with the LEP community regarding the proposed facility and their rights in the public comment process. Further actions, such as shutting off microphones during public meetings for community members trying to raise the issue of environmental justice, is wholly contrary to public participation process principles.¹⁶³

¹⁶¹ U.S. Census Bureau, "QuickFacts, Seaford, Sussex County Delaware"

<https://www.census.gov/quickfacts/fact/table/seafordcitydelaware,sussexcountydelaware/PST045221>

¹⁶² See, e.g., BDC CUP 2258 Application Packet p. 150 (Apr. 16, 2020 Memorandum); 11-15 (Apr. 10, 2020 letter).

¹⁶³ This approach is contrary to, at a minimum, the spirit of EO 12898 § 5-5(a) which states that "[t]he public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies."

F. DNREC and Sussex County cannot demonstrate a substantial legitimate justification for their actions.

Neither Recipient has put forth any justification for failing to consider disproportionate adverse impacts of the proposed BDC project to communities of color. Nor have they put forth any justification for failing to provide reasonable steps to ensure meaningful access to public information and public participation rights for LEP individuals, and evaluated the disproportionate adverse impacts of their actions.

When considering whether a disparate impact on a particular community is justified, EPA guidance instructs agencies to consider whether any purported benefits would be “delivered directly to the affected population,” keeping in mind “the views of the affected community” about whether the benefits justify the disparate impacts.¹⁶⁴ During the Recipients’ permit review processes, the community made their voices very clear - stating that they were unable to access and understand information about the project, that they were already burdened with pollution, and that the BDC proposed project would not benefit them economically, socially, or environmentally.¹⁶⁵

Seaford’s communities have already faced, for years, pollution from a concentrated number of sources as demonstrated by the heavy concentration of CAFOs, warehouses, truck traffic, EPA Superfund sites and toxic emitters, and existing, concurrent, generational health disparities. There is no justification for, at this stage of Seaford’s condition with existing environmental degradation, that the Recipients deny the public access to information and their rights to participate in public processes, especially when cumulative effects of pollution and environmental justice criteria are involved.

Even if either Recipient put forth a justification for their actions, any such explanations are merely pretextual. Sussex County did not conduct any of its information releases, notices, or public hearings in a language other than English, or provide any accommodations for LEP individuals. And, even if the Recipients claim to have a written plan to address LEP situations, such a plan cannot save them if they still failed to provide reasonable, timely, and appropriate language assistance to the LEP populations each serves.¹⁶⁶ DNREC’s only efforts can be summarized as “too little too late”, efforts that it was willing to write off due to weather and the similar technology problems that the communities themselves face, and which the Recipient shifted off to BDC (who then prepared marketing materials in lieu of explaining the project and discussing the permit terms, conditions, limitations and the public’s rights under the permits).

G. Less discriminatory alternatives were available.

The Recipients have failed to meaningfully consider less discriminatory alternatives to providing the public with information, notice, and methods to effectuate their public participation

¹⁶⁴ See, e.g., EPA ECRO Toolkit at 8, 15.

¹⁶⁵ See, e.g., Comments to Sussex County, n. 82 supra; public comments to DNREC available at <https://dnrec.alpha.delaware.gov/events/public-hearing-bioenergy-innovation-center-project/>

¹⁶⁶ Executive Order 13166.

rights in connection with the BDC permit applications.¹⁶⁷ At a minimum, the following less discriminatory alternatives were available to the Recipients:

1. Created a plan for how to undertake the information, notice, and public participation opportunities components of this project.
2. Require environmental analyses that fully identified, analyzed, and mitigated environmental injustice concerns. This review would have included existing health disparities and overburdens of pollution and the cumulative effects of these burdens in the Seaford community. This review would also have included a “no action” alternative.
3. Conduct individualized assessments of LEP communities in the Seaford, Delaware area.
4. Conduct the LEP four-factor analysis to identify, assess, and plan for ways LEP individuals could meaningfully participate in and benefit from DNREC and Sussex County programs and activities related to the project.
5. Share the results of all environmental justice and LEP analyses with the public and provide mechanisms for community input on potential mitigation measures, alternatives, and remedies.
6. Publish, translate and/or interpret all vital public materials and information in the languages spoken in the areas impacted by the proposed project.
7. Make information available in various formats (not just online as community members have limited internet access).
8. Exercise all legal and equitable remedies available to DNREC and Sussex County to engage with LEP, low-income, and environmental justice communities to ensure meaningful access to public information, to public notices, to public participation rights, and to comment opportunities from the communities impacted by proposed project.

Title VI requires recipients to “*take affirmative action to provide remedies to those who have been injured by the discrimination.*”¹⁶⁸ Instead of proactively taking action to address inequalities throughout the affected community for members to access information and exercise their public participation rights, neither Recipient did so

¹⁶⁷ See, e.g., *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

¹⁶⁸ 40 C.F.R. § 7.35(a)(7) (*italics added*).

VII. Relief Requested

Complainants request that EPA promptly and comprehensively accept this complaint; investigate the allegations in this complaint, including whether DNREC and Sussex County violated Title VI of the Civil Rights Act and its implementing regulations, and whether the Recipients failed to act consistent with Title VI prohibitions against discrimination on the basis of race, color, or national origin; LEP guidelines and policies; and take all actions necessary to ensure that both DNREC and Sussex County fully comply with the law.¹⁶⁹ Complainants also request the Civil Rights Division of the Department of Justice play an active role in coordinating this federal investigation and any enforcement actions, consistent with the mission of the Federal Coordination and Compliance Section.

Complainants request that Sussex County and DNREC be brought into full compliance and ask EPA to provide relief that includes, but is not limited to:

1. Require Sussex County and DNREC to re-commence the application process of BDC's county land use and state environmental permit applications with environmental and health assessments that fully identify and analyze environmental injustice concerns, including existing health disparities and overburdens of pollution; and conduct environmental analyses that mitigate pollution effects of the project on environmental justice communities.
2. Conduct individualized assessments of LEP communities in the Seaford, Delaware area.
3. Conduct the LEP four-factor analysis to identify, assess, and plan for ways for LEP individuals to meaningfully participate in and benefit from DNREC and Sussex County programs and activities related to the project.
4. Share the results of all analyses with the public and provide mechanisms for community input on potential mitigation or other remedies, solutions, or alternatives.
5. Assure compliance with all applicable federal, state, and county legal requirements; conduct a full and fair analysis of whether a decision to grant the state and county permit applications would disproportionately impact communities on the basis of race, color, or national origin including LEP; and to identify alternatives that would avoid, minimize, or mitigate this harm.
6. Any decision to grant these permits must be conditioned on ameliorating the negative impacts of the facility on Sussex County's predominately Black, Latinx, Hispanic and Haitian community and LEP persons and ensuring compliance with Title VI of the Civil Rights Act.

¹⁶⁹ See 40 C.F.R. § 7.130.

7. Require DNREC and Sussex County to comply with federal, state, and county public access to information laws, notices, public participation rights, and public input consideration requirements in evaluating the BDC permit applications.
8. Reopen the comment period for the county and state permit applications to allow for meaningful and informed public participation from the impacted communities, with the communities involved in the design of the outreach.
9. EPA oversight of the Sussex County land use and DNREC state environmental permitting processes for BDC to ensure Sussex County's and DNREC's full compliance with Title VI of the Civil Rights Act.
10. Require DNREC and Sussex County to publicly share records, including communications, inspection reports and the results of any inspections or investigations of BDC and the BDC site, and to maintain transparency on how, if at all, DNREC or Sussex County responded or is in the process of responding to identified violations and clean-up at the site.
11. Involve affected community members in ensuring any corrective actions and mitigation remedies related to their lack of access to information and lack of public participation opportunities actually protect and mitigate harm to the community. This could be performed by seeking input and participation of community members for any current or future violations in any enforcement actions for the next 5 years.
12. Require DNREC and Sussex County to develop written plans, including plans to address environmental justice communities and LEP situations and agency decision-making, and environmental emergency contingencies in LEP and communities of color. In preparing such plans, DNREC and Sussex County would conduct a full assessment of disparate impacts from the proposed facility (here, BDC) including a cooperative community needs assessment and in-person visits to affected neighborhoods.
13. Require DNREC and Sussex County to provide Complainants and EPA with an update on the status of the process to remove language access barriers and require them to submit the assessment to EPA and the public by a prompt deadline.
14. Perform any other action EPA deems appropriate to remedy the disparate impacts caused by the conduct of DNREC and Sussex County.
15. Request that the U.S. Department of Justice play a coordinating and oversight role to ensure "the consistent and effective implementation of Title VI across the federal government."¹⁷⁰

¹⁷⁰ DOJ, Title VI Legal Manual, Section III (Feb. 3, 2021).

16. To the extent DNREC and Sussex County have LEP approaches, written or not, complainants ask EPA to include the identification and assessment of such policies and rules within the scope of EPA's investigations to gauge the recipients' Title VI compliance and where recipients must take additional specific measures to comply with Federal civil rights laws.

If DNREC and Sussex County do not come into compliance voluntarily, Complainants request that EPA suspend or terminate financially assisting those Recipients, at least regarding any discretionary funding requested by them or used in a manner that does not directly protect the public and community members in Delaware, Sussex County.¹⁷¹

Complainants also request that they be involved in the investigation and resolution of this complaint. We look forward to working with EPA's ECRCO to prevent further harm to the Delaware, Sussex County community.

Sincerely,

(b)(6) Privacy, (b)(7)(C) Enf. Privacy



¹⁷¹ See 40 C.F.R. § 7.130(a).

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enc: Exhibits 1-7 (electronic link available upon request)

<u>EXHIBIT LIST</u>	
Exhibit Number	Description
1	U.S. EPA EJ Screen (Version 2022) Summary Report 0.50 mile radius
2	U.S. EPA EJ Screen (Version 2022) Summary Report 1 mile radius
3	U.S. EPA EJ Screen (Version 2022) Summary Report 3 mile radius
4	U.S. EPA EJ Screen (Version 2022) Summary Report 5 mile radius
5	Sussex County Planning & Zoning Commission Materials: Sussex County Agenda (Apr. 23, 2020) and Sussex County Ordinance No. 2769 (Apr. 20, 2021)
6	Emails between DNREC and community members
7	Emails relating to recent public records requests