

**EPA TITLE VI INVESTIGATION:
SOUTHERN MIGRANT LEGAL SERVICES
FINDINGS OF MATERIAL FACT
EPA OCR FILE NO. 04R-08-R6**

The U.S. Environmental Protection Agency, Office of Civil Rights, makes the following findings of material fact in connection with its investigation of this complaint.

1. Southern Migrant Legal Services (SMLS) represents 14 temporary H-2A¹ agricultural workers who worked at [REDACTED] from September 2007 to February 2008.²
2. The Louisiana Department of Agriculture and Forestry (LDAF) is the state's lead agency for the regulation of pesticide use and application. LDAF's Pesticide and Environmental Programs Division is responsible for licensing and training pesticide applicators, overseeing worker protection, registering pesticides for sale in the state and working to minimize unnecessary impacts by pests to agriculture and society in general while protecting human health, the environment, and endangered and threatened species as mandated by the federal law. Through the Advisory Commission Pesticides and the Structural Pest Control Commission, the division investigates and brings actions against those charged with violations of pesticide laws, rules and regulations.³
3. In 2007, 26% (7,107 out of 27,470) of farm workers in Louisiana were H-2A workers.⁴
4. The U.S. EPA Worker Protection Standard for Agriculture Pesticides (WPS) sets forth requirements for pesticide safety training, notification of pesticide applications, use of personal protective equipment, restricted-entry intervals after pesticide application, decontamination supplies, and emergency medical assistance.⁵

¹ An H-2A visa is a temporary visa that is issued to nonimmigrant foreign workers by the U.S. Department of Labor to perform agricultural labor or services of a temporary or seasonal nature.
<http://www.dol.gov/compliance/guide/taw.htm>.

² Letter from Spring Miller, Staff Attorney, SMLS, to Lisa Gautreaux, Program Coordinator for Pesticide Enforcement, LDAF (April 21, 2008); *See also* Letter from Spring Miller, Staff Attorney, SMLS, to Karen Higginbotham, Director, Office of Civil Rights, U.S. EPA [hereinafter Miller Letter to Higginbotham] (May 20, 2008).

³ <http://www.ldaf.state.la.us/portal/Offices/AgriculturalEnvironmentalSciences/PesticideEnvironmentalPrograms/tabid/118/Default.aspx>.

⁴ *See* U.S. Department of Agriculture, The 2007 Census of Agriculture, Vol. 1, Chapter 2: Parish Level Data, Table 7. Hired Farm Labor-Workers and Payroll,
http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_2_County_Level/Louisiana/st22_2_007_007.pdf; and Foreign Labor Certification Data Center Online Wage Library, 2006-2008 H-2A Disclosure data, *available at* <http://www.flcdatcenter.com/CaseH2A.aspx>.

⁵ Worker Protection Standard, 40 C.F.R. Part 170 (2009).

5. The U.S. EPA Guidance for WPS Agricultural Inspections (WPS Guidance) clarifies procedures for conducting effective WPS inspections and ensuring thoroughness and national consistency of these inspections. The Guidance should be used as the minimal criteria of coverage for all routine and For-Cause WPS agricultural inspections by States.⁶
6. SMLS's clients allege that they were regularly exposed to pesticide spray from Fall 2007 through February 2008, while working at [REDACTED], which resulted in adverse physical reactions, including burning in their eyes and on their skin, headaches, stomach aches, coughing, and skin rashes.⁷
7. In February 2008, Daniel Chapman, a paralegal with SMLS, spoke to Lisa Gautreaux, the LDAF Program Coordinator for Pesticide Enforcement, to inquire about how to properly submit a WPS complaint.⁸
8. On March 13, 2008, Ms. Gautreaux called SMLS and spoke to Mr. Chapman to ask if SMLS wanted to file a WPS complaint.⁹
9. Two months after the alleged exposure, on April 21, 2008, SMLS submitted a WPS complaint on behalf of the 14 H-2A workers to LDAF alleging that 14 migrant farm workers had been exposed to pesticide spray.¹⁰
10. On April 28, 2008, Marvin Montgomery, General Counsel of LDAF, sent a letter to Spring Miller, SMLS staff attorney, responding to the SMLS complaint. In that letter he stated, "In order to conduct such an investigation it will be necessary for each of the fourteen individuals to sign a complaint form and to be interviewed at the Department's office in Baton Rouge, Louisiana. The Department will provide an interpreter, if one is necessary."¹¹
11. On April 29, 2008, Ms. Miller informed Mr. Montgomery via a phone conversation that an in-person interview with her clients would be impossible because most of them returned to Mexico and those still in the United States would not be able to travel to Baton Rouge.¹²

⁶ U.S. EPA Worker Protection Standard Agricultural Inspection Guidance, 3 [hereinafter WPS Guidance] (April 30, 1994), <http://www.epa.gov/compliance/resources/policies/state/grants/fifra/08-10-appendix4c.pdf>.

⁷ Letter from Spring Miller, Staff Attorney, SMLS, to Lisa Gautreaux, Program Coordinator for Pesticide Enforcement, LDAF (April 21, 2008).

⁸ Transcript of Interview with Lisa Gautreaux, Program Coordinator, LDAF, in Baton Rouge, 2 [hereinafter Gautreaux Interview] (May 13, 2009); *See also* Transcript of Interview with Stacie Jonas and Doug Stevick, Attorneys, SMLS, 3 (April 24, 2009).

⁹ Gautreaux Interview, *supra* note 8, at 2.

¹⁰ Letter from Spring Miller, Staff Attorney, SMLS, to J. Marvin Montgomery, General Counsel, LDAF (April 21, 2008).

¹¹ Letter from J. Marvin Montgomery, General Counsel, LDAF, to Spring Miller, Staff Attorney, SMLS, (April 28, 2008).

¹² Letter from Spring Miller, Staff Attorney, SMLS, to J. Marvin Montgomery, General Counsel, LDAF (May 5, 2008).

12. According to Ms. Miller, during the April 29, 2008 conversation she had with Mr. Montgomery, he explained that there was no particular statutory or regulatory authority for the in-person interview policy, but that it fell within LDAF's discretion to implement procedures for its own investigations.¹³
13. On May 5, 2008, Ms. Miller sent a follow up letter via email to Mr. Montgomery explaining her clients' inability to travel to Baton Rouge, Louisiana, for an in-person interview. The letter stated, "Based on my office's experience representing migrant agricultural workers, an in-person interview requirement for WPS investigations creates a perennial and insuperable obstacle to migrant workers' accessing WPS protections in Louisiana."¹⁴
14. On May 6, 2008, Ms. Miller and Mr. Montgomery had a phone conversation in which Mr. Montgomery reiterated LDAF's position regarding in-person interviews. Ms. Miller asked why the Department refused to reconsider its requirement of an in-person interview. In a letter memorializing the conversation later the same day, Ms. Miller wrote to Mr. Montgomery, "I reminded you that we could make one of our clients available for a phone interview. You emphatically told me that a phone interview would be insufficient to initiate an investigation. You said that it is 'difficult enough to get information necessary for an investigation from a U.S. born citizen who speaks English' but that to try to get that information from 'a citizen of Mexico who may or may not be fluent in English' over the phone would be impossible." In that letter, Ms. Miller asks that Mr. Montgomery let her know if she has incorrectly restated their conversation or LDAF's position.¹⁵
15. On May 16, 2008, Mr. Montgomery responded to Ms. Miller's May 5th and 6th letters and did not dispute her summary of his statement. In that letter, Mr. Montgomery reiterated that an investigation of the complaint would not be conducted without in-person interviews with her clients.¹⁶
16. During a recorded in-person interview with OCR staff regarding LDAF's interview policy, Mr. Montgomery explained, "In regards to complaints our concern is not whether the person speaks English or doesn't speak English or how good they do, we can accommodate that. Our concern is to make sure that we get accurate reliable information upon which we can conduct an investigation. And that is what my complaint with Spring Miller was that they would not provide us with the information. And when she said 13 of my clients are in Mexico then I presumed that they were Spanish speaking and probably did not speak very good

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Letter from Spring Miller, Staff Attorney, SMLS to J. Marvin Montgomery, General Counsel, LDAF (May 6, 2008); *See also* Miller Letter to Higginbotham, *supra* note 2.

¹⁶ Letter from J. Marvin Montgomery, General Counsel, LDAF, to Spring Miller, Staff Attorney, SMLS (May 16, 2008).

English and that's why we need to talk to them in person with an interpreter on it to get this accurate information."¹⁷

17. In an email to OCR staff, Ms. Miller explained that "LDAF never provided our clients the option of conducting an interview anywhere besides in their Baton Rouge office, and Mr. Montgomery told us that the LDAF would not open a WPS investigation until our clients conducted in-person interviews in the Baton Rouge office. We offered to make a client who was still in the U.S. available for an interview by telephone or video conferencing. The LDAF did not accept that option or offer any other option other than an in-person interview in Baton Rouge."¹⁸
18. LDAF also explained that their WPS inspections/investigations are conducted using EPA's WPS Guidance.¹⁹
19. According to the WPS Guidance, the EPA expects that all inspectors will attempt to interview workers and handlers to ensure they receive the protections required by WPS. The Guidance states that interviews are a critical part of assessing compliance during WPS agricultural inspections. Further, interviews should be conducted in private without the presence of an employer or supervisor, or they can be conducted at a time or place convenient for the worker. When no interviews are conducted as part of the inspection, the final inspection report must provide an explanation. The Guidance also provides that WPS complainants need not be interviewed if s/he is out of State.²⁰
20. The WPS Guidance does not explicitly require in-person interviews.
21. Contemporaneous with the discussions between LDAF and SMLS, LDAF consulted with EPA Region 6, which advised that because of the passage of time between the alleged pesticide exposures and the filing of the WPS complaint, LDAF should conduct an inspection to determine if [REDACTED] was currently in compliance with the WPS.
22. On May 16, 2008, Mr. Montgomery informed Ms. Miller that LDAF would conduct a WPS inspection that would determine only if [REDACTED] was currently in compliance with the WPS.²¹
23. On May 14, 2008, Dana Davis and John Walther, LDAF inspectors, conducted an inspection of [REDACTED] and found "mixed compliance" with the WPS. Although

¹⁷ Transcript of Interview with David Fields, Assistant Director, LDAF, Larry LeJeune, Director, LDAF, and J. Marvin Montgomery, General Counsel, LDAF, in Baton Rouge, La., 11 (May 13, 2009).

¹⁸ Email from Spring Miller, Staff Attorney, SMLS, to Brittany Martinez, Case Manager, Office of Civil Rights, U.S. EPA (December 3, 2009).

¹⁹ Letters from J. Marvin Montgomery, General Counsel, LDAF, to Helena Wooden-Aguilar, Team Leader, Office of Civil Rights, U.S. EPA (January 15, 2009 and May 11, 2010).

²⁰ WPS Guidance, *supra* note 6, at pp. 7-8.

²¹ Montgomery, *supra* note 16.

- the inspectors found that the owner did have safety posters and personal protective equipment (PPE), they were not able to determine whether all the workers had received training and what pesticides they handled during the growing season. The LDAF inspectors also found that the [REDACTED] owner no longer grew strawberries.²²
24. On May 14, 2008, Mr. [REDACTED], owner of [REDACTED], signed a statement in which he wrote that he did not have any of his records, and he was no longer farming and no longer had workers on his field.²³
25. On June 3, 2008, Ms. Dana Moore, an LDAF Inspector, contacted Mr. [REDACTED] to determine the location of the missing pesticide application records, but they were never recovered.²⁴
26. The goals in conducting WPS agricultural inspections include monitoring employer compliance, documenting violations, addressing noncompliance, and increasing handler/worker safety.²⁵
27. While LDAF did an inspection of the [REDACTED] farm, they did not conduct an investigation into SMLS's clients' WPS complaint.
28. LDAF did not conduct in-person or telephonic interviews with any of SMLS's 14 H-2A clients.
29. With the exception of the SMLS clients, LDAF has never received a WPS complaint from a complainant that was unavailable for an in-person interview.²⁶
30. LDAF staff does not recall ever providing a telephonic interview to a WPS complainant.²⁷
31. LDAF Inspection Reports, Final Investigation Reports, and Final Decision Letters associated with WPS complaints from 2004 to 2008 do not indicate that any telephonic interviews were performed.²⁸

²² Dana Davis, LDAF Inspector, Louisiana Department of Agriculture & Forestry Inspectors Summary of Investigation (July 2, 2008); *See also* Letter from J. Marvin Montgomery, General Counsel, LDAF, to Helena Wooden-Aguilar, Acting Assistant Director, Office of Civil Rights, U.S. EPA (January 15, 2009).

²³ Davis, *supra* note 22, LDAF Statement Form, signed by [REDACTED] Owner, [REDACTED], on May 14, 2008.

²⁴ Davis, *supra* note 22.

²⁵ WPS Guidance, *supra* note 6, at p. 4.

²⁶ Letter from J. Marvin Montgomery, General Counsel, LDAF, to Helena Wooden-Aguilar, Team Leader, Office of Civil Rights, U.S. EPA (May 11, 2010).

²⁷ *Id.*

²⁸ Montgomery, *supra* note 22.