



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

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CIVIL RIGHTS

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In Reply Refer To:

EPA OCR File No. 05R-08-R8

Steven M. Pirner
Secretary
South Dakota Department of
Environment & Natural Resources
Joe Foss Building
523 East Capital Avenue
Pierre, South Dakota 57501

Re: Dismissal of Title VI Administrative Complaint

Dear Secretary Pirner:

The purpose of this letter is to notify the South Dakota Department of Environment and Natural Resources (SD DENR) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the July 21, 2008, administrative complaint filed on behalf of the Yankton Sioux Tribe. This administrative complaint was filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. §§ 2000 et seq., by the Abourezk Law Firm on behalf of the Yankton Sioux Tribe and its individual members against SD DENR. SD DENR is a recipient of EPA funds. The complaint alleged that SD DENR's approval of a General Water Pollution Control Permit for Long View Farms' concentrated animal feeding operation (CAFO) resulted in an adverse disparate impact on the members of the Yankton Sioux Tribe in violation of Title VI.

I. **SUMMARY OF FINAL DECISION**

This letter constitutes OCR's findings under Title VI and 40 C.F.R. Part 7, and its dismissal of the administrative complaint. OCR's findings, as well as the legal and factual bases for those findings, are set forth in detail in this letter. Complainants alleged generally that odors related to the operation of a CAFO had an adverse disparate impact on members of the Yankton Sioux Tribe. OCR finds that, pursuant to South Dakota law, SD DENR does not have authority

to regulate odors related to the operation of CAFOs.¹ Because the recipient lacks the authority to regulate the alleged disparate effect, OCR is dismissing the complaint.

II. DESCRIPTION OF OCR'S INVESTIGATION

OCR conducted its investigation in accordance with the U.S. Department of Justice (DOJ) Investigation Procedures Manual.² In conducting the investigation, OCR collected documents from the recipient and the complainants, and independently gathered other information. OCR received a written response from the recipient to an information request submitted to the recipient, and supplemental information from the complainant for clarification. OCR conducted telephone interviews with Yankton Sioux Tribe council members and their attorney on July 22, 2009, and with two representatives from SD DENR on July 31, 2009. OCR followed-up with a number of additional phone calls with SD DENR staff. OCR's investigation also included discussions with EPA regional and headquarters staff.

III. BACKGROUND

A. Complainant

According to the South Dakota Tribal Government website, the Yankton Sioux Tribal reservation is located in Charles Mix County, South Dakota and covers approximately 40,000 acres (without boundaries).³ There are approximately 3,500 enrolled members who live within the reservation.⁴

B. Recipient

According to the SD DENR website:

The mission of the SD DENR is to protect public health and the environment by providing environmental monitoring and natural resource assessment, technical and financial assistance for environmental projects, and environmental regulatory services; all done in a manner to protect South Dakota's environment and natural resources.⁵

The responsibility of the Surface Water Program is to regulate (permit) and monitor discharges of wastewater; establish quality water standards; and conduct routine monitoring of surface water to ensure the state's natural resources are protected.⁶

¹ Email from Jeanne Goodman, Natural Resources Administrator, SD DENR to Helena Wooden-Aguilar, Assistant Director, OCR. (December 15, 2010).

² See Coordination and Review Section, U.S. Department of Justice, Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes. (September 1998).

³ <http://www.state.sd.us/oia/yankton.asp>

⁴ *Id.*

⁵ <http://denr.sd.gov/denrorganization.aspx>

⁶ <http://denr.sd.gov/des/sw/SurfaceWaterQuality.aspx>

IV. LEGAL AUTHORITIES

A. Title VI and EPA's Regulations Implementing Title VI

Title VI prohibits discrimination based on race, color, or national origin under programs or activities receiving Federal financial assistance. Specifically, Section 601 of Title VI provides:

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.⁷

The purpose of Title VI is to ensure that public funds are not spent in a way that encourages, subsidizes, or results in discrimination on the basis of race, color, or national origin. Toward that end Title VI bars intentional discrimination.⁸

In addition, Section 602 of Title VI authorizes and directs Federal agencies to enact "rules, regulations, or orders of general applicability" to effectuate the provisions of Section 601.⁹ Like most federal agencies, in addition to prohibiting intentional discrimination, EPA's regulations prohibit recipients of Federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination based on race, color, or national origin.¹⁰ The Supreme Court has recognized that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.¹¹ When evaluating whether a recipient has violated Title VI or EPA's implementing regulations, EPA "expects to account for the adverse disparate impacts resulting from sources of stressors, stressors, and/or impacts cognizable under the recipient's authority."¹²

EPA's regulations implementing Title VI, codified at 40 C.F.R. Part 7, were promulgated under the authority of Section 602. Under these regulations, OCR is responsible for investigating complaints alleging intentional discrimination and/or disparate impact discrimination in programs or activities of recipients receiving financial assistance from EPA.¹³ Under 40 C.F.R. § 7.120(g), if OCR's investigation reveals no violation of EPA's Title VI regulations, OCR will dismiss the complaint.

⁷ 42 U.S.C.S. § 2000d.

⁸ *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607-08 (1983).

⁹ 42 U.S.C.S. § 2000d-1.

¹⁰ 40 C.F.R. § 7.35(b).

¹¹ See *Alexander v. Choats*, 469 U.S. 287, 292-94 (1985); *Guardians*, 463 U.S. at 590-92; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh'g denied*, 7 F.3d 242 (11th Cir. 1993).

¹² "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," 65 *Fed. Reg.* 39667,39678 (Jun. 27, 2000).

¹³ 40 C.F.R. § 7.20.

V. ALLEGATION

As noted earlier, the allegation accepted for investigation by OCR was: “SD DENR’s approval of Long View Farm’s CAFO to operate near Yankton Sioux Tribal land has caused a disparate impact on citizens of the Tribe.”¹⁴ The complaint added that the Tribe will “suffer disproportionately adverse health [and] environmental effects from pollution or other environmental hazards” due to the location of the CAFO.¹⁵ Specifically, Complainants alleged that the operation of the CAFO has had the following adverse impacts on the members of the Yankton Sioux Tribe: (1) the Tribal Head Start Program (which serves three and four year old Native American children) had to be moved three to four miles south to Marty, South Dakota due to the odor nuisance that emits from the CAFO;¹⁶ (2) the Tribe has discontinued its plans to build a Tribal Hall due to its proximity to the CAFO location and the related odor;¹⁷ (3) the CAFO odors have made some individuals lose their appetites at the local restaurant, made school children sick, and have caused some residents to keep their windows closed.¹⁸

VI. RECIPIENT’S RESPONSE

During the investigation, SD DENR provided OCR with general information regarding siting decisions and the permitting process. Importantly, SD DENR stated that, under South Dakota law, SD DENR does not have the authority to regulate odors resulting from the operation of CAFOs.¹⁹ Specifically, SD DENR explained:

[T]here is no statutory authority in South Dakota Codified Law for the Department of Environment and Natural Resources to promulgate rules regulating odor from concentrated animal feeding operations or otherwise. South Dakota Codified Law 34A-1-6 contains the list of items for which the state legislature has given the department authority to regulate for the purpose of air pollution control.²⁰

VII. FINDINGS

EPA generally accounts for those adverse disparate impacts cognizable under the recipient’s authority under the applicable law. This policy is consistent with EPA’s June 2000 draft revised guidance for investigating Title VI administrative complaints challenging permit.²¹

¹⁴ Complaint letter from Charles Abourezk, General Counsel to Yankton Sioux Tribe, to Art Palomares, Program Director, EPA Region 8. (July 21, 2008).

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ Transcript of interview with Yankton Sioux Tribal members. (July 22, 2009) at 3.

¹⁸ *Id.* at 4-5.

¹⁹ Interview with Jeanne Goodman, Natural Resources Administrator and Joe Nadenicek, Senior Staff Attorney, SD DENR. (July 31, 2009).

²⁰ See fn. 1.

²¹ See fn. 12.

SD DENR represents that it lacks the authority to regulate odor. The list of items found in South Dakota Codified Law 34A-1-6 for which the state legislature has given SD DENR authority to regulate for the purpose of air pollution control does not include odors. Because SD DENR does not have the authority to regulate odors, EPA will not hold it responsible for any alleged odor impact resulting from the CAFO at issue here. OCR, therefore, is dismissing the complaint and notes that because the dismissal is based on SD DENR's lack of authority, it does not address the merits of the complainant's allegations.

VIII. CONCLUSION

Based on SD DENR's lack of authority to regulate the alleged impact in this complaint, OCR hereby dismisses this complaint pursuant to 40 C.F.R. § 7.120(g). If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director of the OCR External Compliance Program, by telephone at (202) 564-0792, via email at wooden-aguilar.helena@epa.gov, or via mail at U.S. EPA, Mail Code 1201A, Washington D.C., 20460-0001.

Sincerely,

A handwritten signature in black ink that reads "Rafael DeLeon". The signature is fluid and cursive, with the first name "Rafael" and last name "DeLeon" clearly legible.

Rafael DeLeon
Director

cc: Stephen G. Pressman, Associate General Counsel
Civil Rights & Finance Law Office (MC 2399A)

Sandra Fusco, EEO Officer
EPA Region 8

Rebecca L. Kidder
Abourezk & Zephier, PC