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SOUTHERN MIGRANT LEGAL SERVICES

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Via Certified Mail, Return Receipt Requested, No. 7005 1820 0001 5801 6608

May 20, 2008

Director of the Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Dear Director:

This letter constitutes a Title VI civil rights complaint pursuant to 40 C.F.R. § 7.120 against the Louisiana Department of Agriculture and Forestry ("the Department") for its failure to provide migrant farmworkers access to the protections to which they are entitled under the Worker Protection Standard ("WPS"), 40 C.F.R. § 170 et seq., on the basis of their race and national origin in violation of 40 C.F.R. § 7.35.

I. Factual Background

Southern Migrant Legal Services is a non-profit law firm that provides free legal services to migrant agricultural workers in six southeastern states. Our office represents fourteen H-2A workers who were employed by [redacted] in Amite, Louisiana between September 2007 and February 2008.

On April 21, 2008, I filed a WPS complaint against [redacted] and its owner/director [redacted] with the Department on behalf of my clients. See Ex. 1. In that complaint, I relayed a number of facts reported by my clients that appear to constitute serious violations of the WPS. Most significantly, my clients reported that Mr. [redacted] regularly sprayed pesticides on strawberry plants in my clients' immediate vicinity while they planted, cleaned, or picked strawberries. My clients report having experienced adverse physical reactions to the pesticide spray, including burning sensations in their eyes and skin, headaches, stomachaches, cough, and/or skin rashes. On behalf of my clients, I requested that the Department conduct an investigation of [redacted] and [redacted] pursuant to the WPS, and that the

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Department provide my clients information regarding the product name, EPA registration number, and active ingredient(s) of all pesticides applied to [redacted] strawberry fields between August 19, 2007 and February 14, 2008. Id.

Through its General Counsel, J. Marvin Montgomery, the Department responded to our WPS complaint in an April 28, 2008 letter. See Ex. 2. In his letter, Mr. Montgomery stated that the Department would not initiate a WPS investigation until each of my clients signed a "complaint form" and presented themselves at the Department's office in Baton Rouge, Louisiana, for an in-person interview.

I called Mr. Montgomery on April 29, 2008 to discuss his letter and the Department's response to our WPS complaint. I informed him that an in-person interview with my clients would be impossible, since most of them are in Mexico with no legal means of reentering the United States, and that it would be practically impossible for those still in the United States to get to Baton Rouge. However, I offered to make one of our clients available for a phone interview with the Department. Mr. Montgomery informed me that it was the Department's policy to initiate WPS investigations only after conducting in-person interviews of complainants. He told me that there was no particular statutory or regulatory authority for this policy, but that it fell within the Department's discretion to implement its own investigative procedures. Mr. Montgomery told me that some information that is important to the Department's WPS investigation, such as a complainant's demeanor or facial expressions, could only be gathered through an in-person interview.

I told Mr. Montgomery that based on my office's experience representing migrant agricultural workers, an in-person interview requirement for the investigation of WPS complaints would create an insurmountable institutional barrier to migrant farmworkers' accessing WPS protections in Louisiana.

Mr. Montgomery and I discussed additional Department requirements for the initiation of a WPS investigation, including the disclosure of the identity of a complainant and the submission of a "complaint form." Mr. Montgomery clarified that the Department does not have a pre-existing "complaint form" for WPS complaints, and that what the Department in fact requests from each of my clients is a signed letter stating the facts on which their complaint is based.

On May 5, 2008, I sent a letter to Mr. Montgomery summarizing our April 29 conversation and reiterating my office's willingness to make one of our clients available for a telephone interview. See Ex. 3. I explained to Mr. Montgomery that we would disclose one of our client's names at the point that disclosure of a complainant's identity becomes necessary to proceed with an investigation.

On May 6, 2008, I spoke to Mr. Montgomery via telephone again. He confirmed his receipt of my May 5, 2008 letter, and reiterated the Department's position that it would not respond to my clients' complaint until I provided the name of a complainant and that complainant traveled to the Department's office in Baton Rouge for an in-person interview. I asked why the Department refused to reconsider its requirement of an in-person interview in spite of the insurmountable practical barrier it created to my clients' access to WPS protections. Mr. Montgomery responded 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. Following our May 6 conversation, I sent Mr. Montgomery another letter summarizing our conversation and requesting that he contact me if I had restated it incorrectly. See Ex. 4.

On May 16, 2008, I received a letter from Mr. Montgomery stating that after consultation with the regional EPA office, the Department had decided to conduct a limited on-site investigation of my clients' former employer, [redacted]. See Ex. 5. However, Mr. Montgomery explained that in its on-site investigation, the Department would not attempt to collect any information regarding [redacted] compliance with the WPS during the period in which my clients worked at the farm, including information about the pesticides to which my clients were exposed on a regular basis between September 2007 and February 2008. Mr. Montgomery's letter appears to attribute the Department's refusal to investigate my clients' reports of regular pesticide exposure, lack of pesticide training, and lack of posted pesticide safety information at [redacted] to the fact that my clients are not available for an in-person interview in Baton Rouge. Id.

While we are gratified that the Department will be conducting an on-site investigation to determine whether [redacted] is currently in compliance with the WPS, this action will provide no redress for my clients, who report having experienced serious violations of the WPS during their employment at [redacted] and who are entitled under the Standard to information regarding the pesticides to which they were exposed by their agricultural employer. See 40 C.F.R. § 170.122. The Department's in-person interview requirement has entirely precluded my migrant farmworker clients from accessing critical WPS protections.

II. The Department's In-Person Interview Requirement to Initiate WPS Investigations Disadvantages Farmworker Complainants on Account of their Race and National Origin in Violation of Title VI of the 1964 Civil Rights Act

Mr. Montgomery's May 6 comments regarding the rationale for the Department's insistence on an in-person interview requirement for our foreign-born migrant farmworker clients suggest that our clients' national origin and limited English proficient (LEP) status are

factors in the Department's refusal to initiate a WPS investigation without an in-person interview. If the Department imposes different requirements on foreign-born, LEP individuals seeking access to pesticide protections than it does on U.S.-born, non-LEP individuals seeking the same protections, this differential treatment could constitute actionable discrimination under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution as well as a violation of Title VI of the 1964 Civil Rights Act and the Environmental Protection Agency (EPA)'s implementing regulations at 40 C.F.R. Part 7. My office is investigating the Department's policies and practices with respect to complaint-driven investigations to determine whether the in-person interview requirement is universally imposed. See Ex. 6.

Regardless of whether the Department has an intentional practice mandating differential treatment of foreign-born and U.S.-born complainants, however, its requirement of an in-person interview to initiate a WPS investigation has the unlawful effect of substantially impairing agricultural workers' access to federal pesticide protections on the basis of their migrant farmworker status,[1] race, and national origin in violation of 40 C.F.R. § 7.35.

Many foreign-born migrant farmworkers are present in the United States only on a temporary or seasonal basis.[2] For example, H-2A agricultural workers enter the United States on temporary visas that are only valid for the duration of their employment with the sponsoring employer. Except in rare circumstances in which H-2A workers qualify for exceptional immigration relief, these workers have no legal right to remain in the United States once their employment ends and no legal right to return once they depart. Compared to the opportunities for redress of pesticide violations available to native-born workers who face no legal restrictions on the duration of their presence in the United States, foreign-born workers in Louisiana have severely restricted opportunities to vindicate their pesticide-related rights as a result of the Department's in-person interview requirement. Most of our H-2A migrant worker clients who filed a WPS complaint with the Department are in Mexico with no means of legal re-entry to the United States and therefore no means of vindicating their rights under the WPS due to the Department's in-person interview requirement.

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[1] Migrant farmworkers are disproportionately foreign-born and Hispanic. See U.S. DEPARTMENT OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 2001-2002, A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS (2005) at 3-4 (78% of crop workers interviewed in the 2001-2002 survey were foreign-born, and 83% identified themselves as Hispanic). State actions that result in discrimination against migrant farmworkers as a class have been held by courts to constitute discrimination based on national origin and race. See NACCP v. Brennan, 360 F. Supp. 1006, 1011-1015 (D.D.C. 1973) (holding that in approving state Employment Services and Rural Manpower Service agency plans that discriminated against migrant farmworkers, defendant U.S. Department of Labor officials subjected minority farmworkers to race and national origin discrimination in violation of the Fifth Amendment and Title VI of the 1964 Civil Rights Act and committed other violations of federal law.)

[2] See U.S. DEPARTMENT OF LABOR, *supra* note 1 at 7-8 (31% of migrant farmworkers surveyed migrated internationally within the past 12 months).

In addition, even farmworkers who do not migrate seasonally across international borders tend to be far more mobile within the United States than their non-farmworker and native-born counterparts.[3] Individuals who suffered a violation of their pesticide safety-related rights in Louisiana and who move to work in other states are disadvantaged by the Department's in-person, in-office interview requirement for complaint investigations in a way that individuals who are settled in Louisiana are not.

Foreign-born individuals, and foreign-born farmworkers in particular, are significantly poorer than native-born or non-farmworker individuals.[4] Compared to the Louisiana population as a whole, agricultural workers by definition are especially unlikely to reside in the urbanized state capital of Baton Rouge. This means that farmworkers who want to make a complaint with the Department are disproportionately forced to summon the resources to make a special trip to Baton Rouge to access Department protections,[5] while high rates of poverty render it particularly onerous for them to do so. In the case of our several complainant clients who remain in the United States, the costs and logistical difficulties associated with a trip to Baton Rouge are prohibitively burdensome and preclude them from accessing WPS protections to which they are entitled under federal law.

I urge your office to conduct an investigation into the Louisiana Department of Agriculture and Forestry's compliance with its anti-discrimination obligations under 40 C.F.R. §§ 7.10-7.135 in regard to its enforcement of the Worker Protection Standard, and to take the steps necessary to ensure that all persons in Louisiana, regardless of their national origin, race, or migrant farmworker status, have access to the pesticide-related protections to which they are entitled under federal law.

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[3] See id. at 8 (42% of farmworkers surveyed migrated at least 75 miles to obtain a farm job within the previous year). According to the U.S. Census Bureau, only 6% of individuals in the U.S. moved out of their county of residence between 2004 and 2005. U.S. CENSUS BUREAU, GEOGRAPHICAL MOBILITY: 2004 TO 2005, DETAILED TABLES (2005), http://www.census.gov/population/www/socdemo/migrate/cps2005.html; see also U.S. CENSUS BUREAU, MIGRATION OF NATIVES AND FOREIGN BORN: 1995 TO 2000 (2003) at 1 (reporting that the foreign-born population in the U.S. was significantly more mobile than the native-born population, with 57.4% of the foreign-born population reporting living in a different residence in 2000 than in 1995, compared to 44.3% of the U.S. population).

[4] According to 2002 data from the U.S. Census Bureau, 16.6% of the foreign-born population in the United States lived in poverty, compared to 11.5% of the native-born population. U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003 (2004) at 7. The U.S. Department of Labor reported that an estimated 30% of farmworker families lived below the poverty line in 2001-2002. U.S. DEPARTMENT OF LABOR, *supra* note 1.

[5] The burden is disproportionate, of course, only if the Department does in fact require all pesticide complainants to travel to Baton Rouge for an in-person interview. If the in-person interview is a requirement imposed solely on foreign-born, LEP, or farmworker complainants, the practice does not just create a disproportionate burden but is facially discriminatory.

Pursuant to 40 C.F.R. § 7.120(c), please notify me of your agency's receipt of this complaint within five calendar days. I can be reached by telephone at (615) 750-1200 or by e-mail at smiller@trla.org.

Sincerely,

Spring A. Miller
Staff Attorney (Licensed in Tennessee)

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