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-03-R6

Chairman Dan Jones
[redacted]

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Certified Mail #7004-1160-0002-3622-8325

Jimmy D. Givens, General Counsel
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

Re: Dismissal of Title VI Administrative Complaint

Dear Mr. Jones:

This is to notify the Oklahoma Department of Environmental Quality (ODEQ) that the U.S. Environmental Protection Agency (EPA or Agency) Office of Civil Rights (OCR) is dismissing the administrative complaint dated August 21, 2003, filed with OCR on behalf of the Ponca Tribe of Oklahoma (Complainant or Ponca Tribe) against ODEQ. The complaint was filed pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 U.S.C. §§ 2000d *et seq*. The complaint concerned ODEQ's failure to provide the tribe the opportunity to comment on a permit renewal application.[1] Specifically, the Ponca Tribe asserted that this exclusion resulted in an adverse disparate impact on its members in violation of Title VI. As explained below, after conducting an investigation, the Agency finds no adverse disparate impact on the Ponca Tribe and, thus, no violation of EPA's regulations implementing Title VI. The Agency hereby dismisses this complaint pursuant to 40 C.F.R. § 7.120(g).

[1] As discussed below, the complaint concerned a lack of public participation opportunities for a permit renewal application. There is no dispute that the Ponca Tribe was afforded an opportunity to comment on the draft permit that was later issued by ODEQ and that those comments were addressed by ODEQ.

I. BACKGROUND ON INTERESTED PARTIES

The Ponca Tribe is a federally recognized tribe in Ponca City, Oklahoma. The Ponca Tribe was established in 1950 and is governed by a seven member committee.[2] Members of the Ponca Tribe live on Tribal lands downstream and adjacent to the Arkansas River.[3] Some members also live immediately to the west of the Continental Carbon Company (Continental Carbon) facility, as well as adjacent to it.[4] Members of the Ponca Tribe seek "to safeguard their health and welfare and the natural environment to which they have their unique ancestral relationship."[5]

ODEQ was created by the Oklahoma Legislature July 1, 1993, after "it was determined that the best way to protect the environment and public health was to create a stand-alone agency to address air, water, and waste issues."[6] ODEQ enforces state and federal environmental laws including the: Clean Air Act, Clean Water Act, National Pollutant Discharge Elimination System, Oklahoma Solid Waste Management Act, Resource Conservation and Recovery Act, Safe Drinking Water Act, Superfund Amendments and Title III Reauthorization Act (SARA), and Oklahoma Radiation Management Act.[7] Finally, ODEQ writes and issues permits for "air pollution control construction and operation, construction of public drinking water supply systems, hazardous waste facilities, radioactive materials license, solid waste landfills, storm water runoff, and municipal and industrial wastewater treatment plants."[8]

Continental Carbon, located in Ponca City, Oklahoma, manufactures carbon black, a component of tires and other rubber and plastic products. In November 1998, ODEQ issued a permit to Continental Carbon to operate its wastewater disposal system from December 1, 1998, through October 31, 2003.[9] The facility has a wastewater management system which collects storm water runoff and waste from various areas of the plant. The system then discharges it into surface impoundments. On April 29, 2003,

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[2] Corporate Charter of the Ponca Indian Tribe of Oklahoma. A Federal Corporation Chartered Under the Act of June 26, 1936. (1950); http://thorpe.ou.edu/IRA/okponchrtr.html.

[3] *Id.* at pg. 3.

[4] *Id.*

[5] *Id.*

[6] *See* www.deq.state.ok.us/pubs/ASD/DEQbro.pdf

[7] *Id.*

[8] *Id.*

[9] Letter from Mr. Quang Pham, P.E. Chief, PDES Permitting Section, Water Quality Division to Mr. John Luton, Plant Manager, Continental Carbon Company regarding DEQ Permit No. W-69-015 (Facility ID. No. 1-36000130). (November 30, 1998) (on file with author)

Continental Carbon sent a letter to ODEQ with an application for the renewal of wastewater Permit No. W-69-015 for facility ID No. I-36000130.[10] ODEQ received Continental Carbon's renewal application on May 1, 2003.[11]

II. ALLEGATIONS

On August 21, 2003, a complaint was filed with OCR on behalf of the Ponca Tribe alleging that ODEQ violated Title VI and EPA's regulations implementing Title VI, found at 40 C.F.R. Part 7.[12] EPA summarized the complaint to allege that ODEQ discriminated against the Ponca Tribe by: (1) denying meaningful public participation opportunities regarding the review of a wastewater permit renewal application; (2) failing to enforce a Memorandum of Understanding (MOU) entered into on March 3, 1995, with Continental Carbon, and having inadequate enforcement and permitting practices; (3) refusing to investigate possible violations related to a Title V Operating Permit issued to Continental Carbon; (4) refusing to take enforcement actions against Continental Carbon; and (5) discriminating against the Ponca Tribe by not enforcing its complaint investigation procedures.[13] On December 13, 2004, OCR accepted allegation (1), the public participation allegation, and rejected allegations (2), (3), and (4) on the basis that they were untimely. OCR also sought clarification on allegation (5) and requested additional information from the Ponca Tribe within 30 days.[14] OCR did not receive the requested information from the Ponca Tribe, and therefore rejected that allegation.[15]

On December 13, 2004, EPA accepted the following allegation for investigation after determining that it met the four jurisdictional requirements in 40 C.F.R. Part 7:[16]

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[10] Letter from Continental Carbon Company, Ponca City, Kay County, Oklahoma to Oklahoma Department of Environmental Quality (ODEQ), Water Quality Division regarding a Renewal Application for Industrial Wastewater Permit (W-69-015). (April 29, 2003)

[11] Letter from Edward Dihrberg, P.E., Manager Industrial Permits Section, Water Quality Division, ODEQ, to Todd N. Miller, Corporate Director, Safety, Health, and Environmental Affairs, Continental Carbon Facility. (May 1, 2003). (on file with author)

[12] Administrative Complaint No. 05R-03-R6. (August 21, 2003)

[13] *Id.* at pgs. 1-4.

[14] Letter from Karen D. Higginbotham, Director, Office of Civil Rights, EPA, to Michael C. Bigheart, Mitchell & DeClerck, P.L.L.C, Re: Partial Acceptance/Request for Clarification (December 2, 2004). (on file with author)

[15] Id.

[16] These four jurisdictional requirements are (1) that the complaint be in writing; (2) that it describe the alleged discriminatory act(s) which violate EPA's Title VI implementing regulations; (3) that it be filed within 180 days of the alleged discriminatory act(s); and (4) that the alleged violator was a recipient of EPA financial assistance at the time of the alleged discriminatory act(s). 40 C.F.R. §7.120(b).

"ODEQ's denial of meaningful public participation opportunities regarding review of a permit renewal application disparately impacted members of the Ponca Tribe."[17]

According to the complaint, on April 29, 2003, Continental Carbon submitted a wastewater permit renewal application that sought a variance. When members of the Ponca Tribe first attempted to review this permit application at ODEQ headquarters, they learned that it had been removed from public review because of Continental Carbon's request for confidentiality.[18] ODEQ's general counsel then informed the Ponca Tribe's environmental agency that the permit application could be approved before the application was made available for public review.[19] On April 27, 2006, during an interview conducted as part of the investigation of this complaint, the Ponca Tribe asserted that because of its tribal status as a sovereign nation, ODEQ should not have excluded them from viewing and commenting on the permit application when it was received from Continental Carbon.[20]

III. RECIPIENTS RESPONSE

In its letter dated August 25, 2006, ODEQ responded to the Ponca Tribe's allegation. ODEQ clarified the difference between the public's opportunity to comment on a *permit application* and the public's opportunity to comment on a *draft permit*. The Ponca Tribe was not provided an opportunity to comment on the permit application. ODEQ stated, however, that it would be "unusual for the ODEQ to provide a member of the public with an opportunity to review and comment on a *permit application* prior to publication of the notice of filing."[21] ODEQ noted that it was possible for an application to be provided to someone pursuant to a public records request.[22] ODEQ also provided two examples where it may notify, consult with, or release information to members of a tribe and not the general public. The examples are when ODEQ receives: (1) requests

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[17] Letter from Karen D. Higginbotham, Director, Office of Civil Rights, EPA, to Michael C. Bigheart, Mitchell & DeClerck, P.L.L.C, Re: Partial Acceptance/Request for Clarification (December 2, 2004). (on file with author)

[18] Letter from Karen D. Higginbotham, Director, Office of Civil Rights, EPA, to Michael C. Bigheart, Mitchell & DeClerck, P.L.L.C, Re: Partial Acceptance/Request for Clarification (December 2, 2004). (on file with author)

[19] See fn.13 at 26.

[20] Interview on April 27, 2006, by Karen Randolph and Helena Wooden-Aguilar of EPA, with Dan Jones of the Ponca Tribe (with Kalyn Free, counsel).

[21] Letter from Jimmy D. Givens, General Counsel, ODEQ to Karen D. Higginbotham, Director, OCR, USEPA regarding a Request for Additional Information. (August 25, 2006) (on file with author)

[22] *Id.*

for services from tribes and (2) complaints filed by tribes or tribal members against a third party."[23]

ODEQ further stated that the Ponca Tribe "was afforded a full and meaningful opportunity to participate in matters related to the wastewater permit for Continental Carbon."[24] ODEQ acknowledged that "the Ponca Tribe did in fact participate and submit comments" on the draft permit.[25] ODEQ stated that it "published notice of the *draft permit*, held a public meeting, accepted public comments, and responded to comments in an effort to address concerns of the Ponca Tribe."[26] (emphasis added). ODEQ considered and addressed all submitted comments to the draft permit in its "Response to Comments" document dated December 23, 2004.[27] Thus, the Ponca Tribe was afforded an opportunity to comment on the *draft permit*, but not on the *permit application.*

IV. DESCRIPTION OF OCR'S INVESTIGATION

This investigation was conducted in accordance with the U.S. Department of Justice (DOJ) Investigation Procedures Manual.[28] OCR determined that an on-site investigation was not necessary because the available documentation satisfactorily addressed the issues raised in the complaint. The documentation includes: correspondence between OCR and the complainant and between OCR and the recipient; a transcript of a telephone interview with the Chairman of the Ponca Tribe of Oklahoma on April 27, 2006;[29] and ODEQ's responses to two information requests sent by OCR on August 22, 2005, and July 24, 2006.[30] OCR also reviewed the extensive and complete record of both EPA and Oklahoma public involvement regulations pertaining to industrial wastewater treatment facilities.

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[23] *Id.* at pg. 4-5.

[24] Letter from Jimmy D. Givens, General Counsel, ODEQ to Karen D. Higginbotham, Director, Office of Civil Rights, EPA. (September 26, 2005) (on file with author)

[25] *Id.*

[26] *Id.*

[27] Response to Comments, Oklahoma Department of Environmental Quality, Water Quality Division, for the Continental Carbon Draft Permit. (December 23, 2004)

[28] *See Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes.* (September 1998)

[29] Administrative Index of Documents (on file with author).

[30] Letter from Karen D. Higginbotham, Director, Office of Civil Rights to Miles Tolbert, Secretary of Environment, Oklahoma Department of Environmental Quality regarding Data Request. (August 22, 2005); Letter from Karen D. Higginbotham, Director, Office of Civil Rights to Mr. Jimmy D. Givens, General Counsel, Oklahoma Department of Environmental Quality regarding a Request for additional information. (July 24, 2006) (on file with author)

V. 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.[31]

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.[32]

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.[33] 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. 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.[34]

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.[35] 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.

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[31] 42 U.S.C.S. § 2000d.

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

[33] 42 U.S.C.S. §2000d-1.

[34] *See Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh'g denied*, 7 F.3d 242 (11th Cir. 1993).

[35] 40 C.F.R. § 7.20.

B. Standard for Evaluating a Disparate Impact Claim

Pursuant to EPA's regulation at 40 C.F.R. §7.35(b):

> A recipient [of EPA assistance] shall not use criteria or methods of administering its program 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 the accomplishment of the objectives of the program with respect to individuals of a particular race, color, [or] national origin [. . .].

In assessing whether a recipient's criteria or methods of administration resulted in unlawful discriminatory effects, the Agency relies, in part, on case law developed under Title VI and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This case law sets forth the legal standard for establishing an adverse disparate impact.

1. Elements of a *Prima Facie* Disparate Impact Claim

OCR will begin its analysis of the Ponca Tribe's claim by determining whether a *prima facie* case of disparate impact exists. OCR must ascertain whether the recipient utilized a facially neutral practice or engaged in a facially neutral action that may have a disproportionate impact on a group protected by Title VI.[36] In addition, OCR will determine whether a causal connection exists between the recipient's policy, practice, or action and the allegedly adverse disparate impact.[37] If the Agency finds that a causal connection exists, it will then determine whether the alleged impact is significantly "adverse" and "disparate" on the group that allegedly suffered the impact.[38] If the evidence does not establish all of these *prima facie* elements, then the Agency will make a finding of no violation and dismiss the complaint.[39]

2. Adversity and Disparity

In order to violate EPA's Part 7 regulations in a disparate impact claim, the impact from a recipient's facially neutral practice must be "adverse." In other words, the recipient's action must cause more than a *de minimis*, insignificant, or minor effect on a protected group.[40] The action must impose some significant hardship on the protected

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[36] *New York City Envtl. Justice Alliance (NYCEJA) v. Giuliani,* 214 F.3d 65, 69 (2d Cir. 2000); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Larry P. v. Riles,* 793 F.2d 969, 982 (9th Cir. 1984).

[37] *NYCEJA*, 214 F.3d at 69.

[38] *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3d Cir. 1981); *cf. Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 656-57 (1989) (Title VII case); *see Bryan v. Koch,* 627 F.2d 612, 617 (2d Cir. 1980)

[39] 40 C.F.R. § 7.120(g).

[40] *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1332 (3rd Cir. 1981).

group, such as limitation of important opportunities and benefits.[41] Resulting unequal burdens or benefits, in and of themselves, may not be sufficient to establish adversity.[42] In addition, the impact from a recipient's facially neutral practice must have had a disproportionate impact on a group protected by Title VI.[43] This showing requires a comparison of the effects of the policy on members within the protected class relative to the effect on individuals outside of the protected class.[44] Often, statistical evidence is required to show that the practice in question has caused discrimination. Whether the disparity is sufficiently substantial is determined on a case-by-case basis.[45]

3. Justification and Less Discriminatory Alternatives

If a *prima facie* adverse disparate impact case exists, the Agency will determine if the recipient can provide a "substantial legitimate justification" for its action that caused the adverse disparate impact.[46] If the recipient cannot provide a justification, then the Agency will find that the recipient violated EPA's Part 7 regulations. If the recipient can provide a justification, then the Agency will determine if there was a "less discriminatory alternative "for the recipient's action.[47] If a less discriminatory alternative did not exist, then the Agency will find that the recipient violated EPA's Part 7 regulations. If no less discriminatory alternative existed, then the Agency will make a finding of no violation and dismiss the complaint.

4. Evidentiary Burden of Proof

The preponderance-of-the-evidence standard is the applicable burden of proof in this investigation and decision.[48] In other words, to make a finding of adverse disparate impact, the Agency must be satisfied at every step of the analysis that the record demonstrates that it was more likely than not that the recipient's actions had a disproportionately adverse effect on the complainant.

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[41] *Id.*; *Larry P. v. Riles,* 793 F.2d 969, 983 (9th Cir. 1986).

[42] *NAACP*, 657 F.2d at 1332.

[43] *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (citing *Georgia State Conference*, 775 F.2d 1403, 1417 (11th Cir. 1985)).

[44] *See Georgia State Conference*, 775 F.2d at 1417; *Larry P. By Lucille P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984).

[45] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, n.3 (1988).

[46] *See Elston*, 997 F.2d at 1413; *Georgia State Conferences of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417-18 (11th Cir.1985).

[47] *See Elston*, 997 F.2d at 1407.

[48] U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* at pg. 58 (1998) (citing Administrative Procedure Act, 5 U.S.C. § 556(d)).

VI. FINDING OF NO SIGNIFICANT ADVERSE IMPACT OR DISPARITY

As discussed above, in order to establish a violation of EPA's Title VI regulations prohibiting disparate impacts, the evidence must show that a recipient's facially neutral policy or conduct caused an adverse impact on a particular group.[49] To satisfy this requirement for purposes of this complaint, ODEQ's denial of public participation opportunities regarding the review of Continental Carbon's permit renewal application must have imposed some significant hardship on the protected group, such as limitation of important opportunities and benefits.[50] In light of the evidence gathered during the investigation of this complaint, OCR concludes that ODEQ's public participation policy regarding permit applications did not impose a significant hardship on members of the Ponca Tribe.

The evidence revealed that ODEQ's policy did not allow for public comment on permit applications. According to ODEQ, "it would be unusual for the ODEQ to provide a member of the public with an opportunity to review and comment on a permit *application* prior to the publication of the notice of filing..."[51] In the current case, ODEQ maintained its policy, and did not allow any public comment on the permit application. The issue, then, is whether members of the Ponca Tribe suffered an adverse impact as a result of ODEQ's policy. The evidence fails to reveal any adverse impact on the Ponca Tribe. In addition, the record fails to show that members of the Ponca Tribe were impacted in any significant way from ODEQ's policy. Consistent with ODEQ's policies and practices, members of the Ponca Tribe were able to subsequently comment – in person and in writing – on the draft permit. The evidence fails to show that the fact that members of the Ponca Tribe were unable to comment on the *application,* prior to issuance of the draft permit, resulted in their suffering any adversity. Therefore, there is no evidence that ODEQ's policy impacted the Ponca Tribe differently than others outside their protected group.

In conclusion, OCR has determined that ODEQ's policy did not impose a significant hardship or result in a disparate impact on the Ponca Tribe of Oklahoma. Accordingly, the Agency finds that the Complainant has not established a *prima facie* disparate impact claim. Thus, the Agency does not need to address whether ODEQ provided a substantial, legitimate justification for its conduct, or whether a less discriminatory was available.

VII. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, the Agency concludes that the Complainant's allegation that ODEQ's denial of

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[49] *See NAACP,* 657 F.2d at 1332.

[50] *See id.*; *Larry P.*, 793 F.2d at 983.

[51] *See* fn. 26.

meaningful public participation opportunities regarding the review of a permit renewal application disparately impacted members of the Ponca Tribe is unsubstantiated by the record. Thus, the Agency finds no violation of EPA's regulations implementing Title VI, and hereby dismisses this complaint against ODEQ, pursuant to 40 C.F.R. § 7.120(g).

Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against any individual or group because of action taken or participation in any action to secure rights protected under Title VI. See 40 C.F.R. § 7.100.

If you have any questions, please contact Yasmin Yorker, Assistant Director of the OCR External Compliance Program, at (202) 343-9682.

Sincerely,

Karen D. Higginbotham
Director

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