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

AUG - 6 2010

OFFICE OF
CIVIL RIGHTS

RETURN RECEIPT REQUESTED
Certified Mail #7009-2820-0002-1759-4019

In Reply Refer to:
EPA File No. 11R-09-R9

Mr. Bradley Angel
Executive Director
Greenaction for Health and Environmental Justice
703 Market Street
Suite 501
San Francisco, California 94103

Re: Partial Acceptance and Referral of Administrative Complaint

Dear Mr. Angel:

This letter is in reference to the administrative complaint you filed with the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) on October 15, 2009, on behalf of Greenaction for Health and Environmental Justice (Greenaction). Your complaint alleges that the California Energy Commission (Energy Commission) and the San Joaquin Valley Air Pollution Control District (APCD) violated Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and EPA's nondiscrimination regulations implementing Title VI, found at 40 C.F.R. Part 7. OCR is partially accepting your complaint for investigation and partially referring your complaint to the U.S. Department of Energy (DOE). We are referring the allegations against the Energy Commission to DOE for its consideration because the Energy Commission receives financial assistance from DOE and not from EPA.

Pursuant to EPA's nondiscrimination regulations, OCR conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral. 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in EPA's nondiscrimination regulations. First, it must be in writing. Second, it must describe an alleged discriminatory act that, if true, may violate EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). Third, it must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b). Finally, the complaint must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. 40 C.F.R. § 7.15.

After careful consideration, OCR is accepting the following allegations against APCD.

1. **APCD intentionally discriminated against Avenal and Kettleman City residents of color and Spanish-speakers by failing to notify or involve residents (*e.g.*, failing to publish information in Spanish, failing to hold public hearings) during the decision-making process prior to APCD issuing the corrected Notice of Final Determination of Compliance (FDOC) for the proposed Avenal power plant on November 4, 2008.**

On January 14, 2010, OCR sent you a letter requesting additional information regarding the dates associated with each alleged discriminatory act described in your complaint. Your March 3, 2010 response states that you did not learn of the corrected notice of FDOC until June 2009.

This allegation is accepted for investigation. The complaint is in writing and states an alleged discriminatory act that would violate EPA's nondiscrimination regulations (*i.e.*, discrimination from lack of public participation during the approval process). Additionally, APCD is a recipient of EPA financial assistance. Although the complaint was filed more than 180 days after the date of the alleged discriminatory act, OCR has the authority to waive the 180-day time limit for good cause. 40 C.F.R. § 7.120(b)(2). Based on the jurisdictional review, OCR is waiving the 180-day timeliness requirement because the complainant could not reasonably be expected to have known about the alleged discriminatory act within the 180-day period in light of the circumstances.[1] Waiving the timeliness requirement is a jurisdictional decision and does not constitute a finding of fact or violation of EPA's nondiscrimination regulations. No substantive determination about this allegation will be made until the completion of a full investigation.

2. **The operation of the proposed Avenal power plant will result in additional adverse health impacts on the residents of color of Avenal and Kettleman City, who are already impacted by multiple pollution sources.**

The complaint and your March 3, 2010 response to our request for clarification letter state that the proposed Avenal power plant will have an adverse disparate impact on the Avenal and Kettleman City residents of color living near the proposed Avenal power plant.

This allegation is accepted for investigation because it meets EPA's jurisdictional requirements, but the investigation is being held in abeyance. The complaint is in writing, and states an alleged discriminatory act that would violate EPA's

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[1] Guidance from the U.S. Department of Justice provides that agencies may waive the timeliness requirement in a number of situations, including cases where "[t]he complainant could not reasonably be expected to know the act was discriminatory within the respective filing period." U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statues*, Sept. 1998 at 35.

nondiscrimination regulations (*i.e.*, adverse disparate health impacts from the upcoming operation of the Avenal power plant). Additionally, APCD is a recipient of EPA financial assistance and the complaint was timely filed. However, OCR will hold the investigation of this allegation in abeyance because the Clean Air Act Prevention of Significant Deterioration pre-construction permit application for the Avenal power plant is pending approval from EPA and, thus, the allegations are not yet ripe for review.

Remaining Allegations

1. California Energy Commission

Your complaint asserts that the Energy Commission failed to provide meaningful opportunities for public comment in the approval of the proposed power plant and failed to conduct a thorough environmental review of the health impacts on nearby residents.

A complaint must be filed against an applicant for, or a recipient of, EPA assistance to be accepted by EPA for investigation. 40 C.F.R. § 7.15. The Energy Commission does not receive EPA assistance. Therefore, OCR does not have the authority to accept the allegations against this entity for investigation. Because OCR has determined that the Energy Commission receives financial assistance from DOE, EPA is forwarding this allegation to DOE.

2. Executive Order 12898 and Environmental Law

Finally, your complaint raises allegations related to Executive Order 12898, including discrimination on the basis of income, and allegations related to violations of environmental laws. OCR does not have authority over these matters, but EPA's Office of Environmental Justice and Region 9 are currently engaged in these issues in Kettleman City and Avenal. OCR, therefore, defers to them with respect to these concerns.

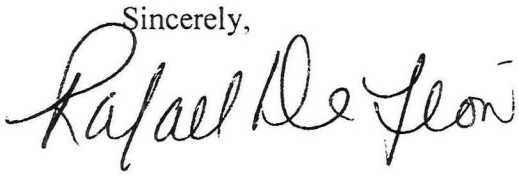
Pursuant to EPA's nondiscrimination regulations, APCD is being notified of the acceptance of this complaint. APCD may respond to the notice of acceptance of this complaint within 30 calendar days of receiving it. EPA's nondiscrimination regulations provide that OCR must attempt to resolve complaints informally, whenever possible. 40 C.F.R. § 7.120(d)(2). Accordingly, OCR may discuss, at any point during the process, offers to informally resolve the complaint, and may, to the extent appropriate, facilitate an informal resolution process with the involvement of affected stakeholders.

You should be aware that no one may intimidate, threaten, coerce, or engage in other retaliatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the nondiscrimination statutes EPA enforces. Any individual alleging such harassment or intimidation may file a complaint with EPA.

If you have any questions or need clarification regarding this letter, please contact Anthony Napoli of the OCR External Compliance and Complaints Program via Federal

Relay Service 866-377-8642, and provide the relay operator his telephone number 202-233-0651. He may also be reached via electronic mail at Napoli.Anthony@epa.gov, or by mail at: U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460-1000.

Sincerely,



Rafael DeLeon
Acting Director

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

Charles Lee, Director
Office of Environmental Justice

Jo Ann Asami, EPA Region 9

Seyed Sadredin, Air Pollution Control Officer
San Joaquin Valley Air Pollution Control District

Karen Douglas, Chair
California Energy Commission

William A. Lewis, Jr., Acting Director
Office of Economic Impact and Diversity
U.S. Department of Energy