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

SEP 26 2011

OFFICE OF
CIVIL RIGHTS

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In Reply Refer to:
EPA OCR File No. 12D-09-R8

Joel Landeen
Office of the City Attorney
City of Rapid City
300 Sixth Street
Rapid City, South Dakota 57701-2724

Re: Dismissal of Title VI Administrative Complaint

Dear [redacted]

The purpose of this letter is to notify Rapid City that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the August 26, 2009, administrative complaint filed by [redacted] (Complainant). The Complainant filed an administrative complaint with the U.S. Department of Justice (DOJ) on March 5, 2009. DOJ referred the complaint to EPA on August 26, 2009. The Complaint alleged that Rapid City, South Dakota violated Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against persons with disabilities under federally assisted programs or activities, and EPA's nondiscrimination regulations found at 40 C.F.R. Part 7. The complaint was accepted for investigation on March 26, 2010.[1] As discussed below, OCR is dismissing this complaint because the Department of Growth Management, Air Quality Division, is not a recipient of EPA assistance and because the investigation failed to uncover evidence of discrimination in violation of the Rehabilitation Act.

I. SCOPE OF INVESTIGATION

OCR investigated whether Rapid City's Growth Management Department, Air Quality Division, intentionally discriminated against the Complainant based on her disability, [redacted]), by 1) not properly enforcing its

[1] Following acceptance, OCR learned that EPA's assistance went to the Department of Public Works rather than to the Department of Growth Management, where the Air Quality Division is located. Thus, it appears that Rapid City's Growth Management Department is not a recipient of EPA assistance and not subject to EPA's jurisdiction. However, information about the division of responsibilities within Rapid City did not come to light until after OCR had conducted the bulk of its investigation. Consequently, OCR has completed its investigation and is issuing this decision.

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ordinance pertaining to the use of chimneys; and 2) Rapid City's response to air quality complaints.[2]

II. STATUTORY AND REGULATORY BACKGROUND

Section 504 of the Rehabilitation Act of 1973 (the Act) provides that "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

EPA's regulations are codified at 40 C.F.R. Part 7. Under these regulations, EPA's OCR is responsible for investigating complaints alleging discrimination based on handicap in programs or activities receiving financial assistance from EPA.[3] Subpart C of 40 C.F.R. Part 7 states:

> No qualified handicapped person shall solely on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance.[4]

In addition, EPA regulations specifically provide, in part, that recipients shall not "[d]eny a qualified handicapped person any service, aid or other benefit of a federally assisted program or activity;" "[p]rovide different or separate aids, benefits, or services to handicapped persons ..., than is provided to others..." or "[l]imit a qualified handicapped person in any other way in the enjoyment of any rights, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service from the program or activity."[5]

III. POSITION STATEMENT FROM RAPID CITY

According to Rapid City, on October 8, 2008, the Complainant left a message with Sharlene Mitchell, Administrative Assistant, for Marcia Elkins, Director of the Growth

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[2] The Complainant's original allegations were regarding the City's failure to amend its nuisance ordinance. However, the course of the investigation changed to an examination of the City's enforcement of an ordinance pertaining to chimneys, including the emission of fumes that may affect individuals or the public, as well as a complaint resolution process for alleged air quality violations.

[3] 40 C.F.R. § 7.20, 7.45. To be accepted for investigation, a complaint must be in writing, describe an alleged discriminatory act that violates EPA's Title VI regulations, be filed within 180 calendar days of the alleged discriminatory act, and must be against an applicant for, or recipient of, EPA assistance that allegedly committed the act.

[4] 40 C.F.R. §7.50

[5] 40 C.F.R. § 7.35(a)(3).

Management Department, regarding an air quality concern resulting from a neighbor's wood burning. According to Ms. Mitchell, the Complainant had previously submitted three complaints regarding smoke issues from her neighbor's residence,[6] including a November 17, 2006, complaint regarding smoke from an unspecified source.[7] The Complainant told Ms. Elkins that smoke drifts down from her neighbor's property to her residence, which is then pulled into her home via the furnace, triggering her [redacted] Ms. Elkins advised the Complainant about the Air Quality Division's scope of authority[8] and referred the Complainant to the City Attorney.

The City Attorney explained that no existing ordinances applied to Complainant's situation. Specifically, Rapid City explained that the ordinance regarding chimneys[9] was not applicable to the Complainant's situation because the ordinance pertains to the construction or physical condition of the chimney in question and that when they inspected the property identified in Complainant's air quality complaints, there was no indication that the chimney's construction or condition violated the ordinance.[10] In addition, the Rapid City inspector noted the visible smoke emissions and that there was creosote on the chimney stack.[11] The City sent two courtesy letters to the property owner on January 10, 2008, and January 31, 2008, with tips on ways to reduce emissions and how to properly clean chimneys.

IV. FINDINGS OF FACT

1) On November 17, 2006, the Complainant submitted a complaint to the City in which she identified herself as suffering from [redacted] and getting ill from smoke emitted by her neighbor's chimney. The Rapid City staff explained that there are no regulations pertaining to the type of appliance used to burn solid fuels, but there are regulations regarding the type of fuel used. Staff suggested she approach the neighbor requesting they raise the chimney height. Staff was unable to inspect because the address of the source was not provided by the Complainant.[12]

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[6] Sharlene Mitchell's hand written message stated that the Complainant was told by an engineer that the problem could be resolved by adding additional length to the existing smoke stack or a catalytic converter. *See also* Letter from Jason E. Green, City Attorney, City of Rapid City, to Ms. Helena Wooden-Aguilar, Team Leader, External Compliance and Complaints Program, Office of Civil Rights. (July 20, 2010).

[7] Letter from Jason E. Green, City Attorney, City of Rapid City, to Ms. Helena Wooden-Aguilar, Team Leader, External Compliance and Complaints Program, Office of Civil Rights. (July 20, 2010).

[8] *See* the Air Quality Division's website: www.rcgov.org/Air-Quality/complaints.html.

[9] Rapid City, SD. RCMC § 15.44.020.

[10] Letter from Jason E. Green, City Attorney, City of Rapid City, to Ms. Helena Wooden-Aguilar, Assistant Director, External Compliance and Complaints Program, Office of Civil Rights. (December 10, 2010). *See also* City of Rapid City Complaint Log. (January 10, 2008 and January 31, 2008).

[11] According to Jason E. Green, City Attorney of Rapid City, the inspectors only observe and note the visual opacity of existing emissions during inspections. The City of Rapid City does not have emission standards for private residences. *See also* City of Rapid City Complaint Log. (January 31, 2008).

[12] City of Rapid City Complaint Log. (November 17, 2006).

2) On January 9, 2008, an unknown complainant contacted the City stating that the smoke from the neighbor's chimney was causing his wife health problems.[13]

3) On January 10, 2008, the City sent a courtesy letter to the Complainant's neighbor in response to the wood burning complaint they received.[14]

4) On January 30, 2008, [redacted] filed a complaint with Rapid City on behalf of [redacted] explaining that the smoke from the neighbor's house smells noxious, gets into their home, and that the chimney stack is coated with creosote, which is a build up that may cause chimney fires and noxious emissions.[15]

5) On January 31, 2008, representatives from the Air Quality Division visited the neighbor's residence and observed the chimney from 9:40AM to 10:00AM. During that visit the inspectors noted the visible smoke emissions and that there was creosote on the chimney.[16]

6) On January 31, 2008, the City sent a courtesy letter to the Complainant's neighbor. The letter explained that the inspector noticed creosote staining on the chimney stack and that the homeowner should consider cleaning the chimney because creosote buildup in a stack is a fire hazard and can cause toxic emissions. [17]

7) On October 8, 2008, the Complainant contacted the Air Quality Division regarding the January 2008 complaint filed on her behalf. During this conversation the Complainant explained that she was still being affected by the smoke emitting from her neighbor's chimney. She alleged that the smoke sits under the eaves of her front porch and is dispersed throughout her house. Because of the smoke she is unable to go into her yard. The Complainant suspected that her neighbor was burning coal because of the fumes and the black smoke that comes from the neighbor's chimney. The Complainant expressed she suffers from [redacted].[18]

8) On October 14, 2008, the City Attorney contacted the Complainant and had a discussion about the Complainant's issue concerning the smoke emitting from the

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[13] *Id.* (January 9, 2008)
[14] Letter from Sheila Hoyer, Air Quality Specialist, Growth Management Department, City of Rapid City to Mr. [redacted]. (January 10, 2008).
[15] City of Rapid City Complaint Log. (January 30, 2008).
[16] City of Rapid City Inspection Summary. (January 31, 2008).
[17] Letter from Sheila Hoyer, Air Quality Specialist, Growth Management Department, City of Rapid City to Mr. [redacted]. (January 31, 2008).
[18] Complaint letter from [redacted] to Ms. Cee Cee Allaway, Director, Complaint Intake & Adjudication, U.S Department of Justice. Attachment 1. (October 17, 2008).

neighbor's chimney.[19] He explained to the Complainant that the City does not regulate private nuisances, so he advised the Complainant to seek private legal counsel to pursue remedies that state law provides in cases of private nuisance.[20]

9) On March 5, 2009, DOJ received a disability discrimination complaint from the Complainant filed against Rapid City, specifically Marsha Elkin of the Air Quality office and City Attorney Jason Green.[21]

10) From 2009-10, the Complainant asserts that she continued to experience [redacted] symptoms as a result of smoke coming from the neighbor's house, including light-headedness, nausea, and disorientation.[22]

11) On December 2, 2009, the Complainant acknowledged that her neighbor had been contacted by the City because they installed a new furnace the previous month.[23]

12) Rapid City has an ordinance that regulates the use of chimneys. The ordinance states:

> No person shall construct, maintain or use any chimney unless the same shall be so constructed, operated or used so that the dust, sparks, cinders, coal ashes, or fumes there from shall not become injurious or dangerous to the health, comfort, or to the property of individuals or the public, nor materially impair the comfort of persons within the city. All such stacks shall be constructed and arranged in such manner and of such material as to be safe from causing fires, and shall be of such height from the ground as not in any manner to cause a violation of this section.
>
> Whenever any such stack or chimney is causing or in danger of causing a violation of this section, the owner or person responsible therefore shall at once cause such stack or chimney to be reconstructed or repaired of proper and safe material or arresting device, or to be raised to such height, or to be arranged within a reasonable time, so that such smoke stack or chimney will be in compliance with the provisions of this section.

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[19] *Id.*

[20] Letter from Jason E. Green, City Attorney, City of Rapid City, to Ms. Helena Wooden-Aguilar, Team Leader, External Compliance and Complaints Program, Office of Civil Rights. (July 20, 2010).

[21] U.S. Department of Justice Title II of the Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973 Discrimination Complaint Form.

[22] Letter from [redacted] to Ms. Karen Higginbotham, OCR Director, EPA. (October 30, 2009); *See also* Letter from [redacted] to Ms. Karen Higginbotham, OCR Director, EPA. (December 2, 2009) and fn. 15.

[23] Letter from [redacted] to Ms. Karen Higginbotham, OCR Director, EPA. (December 2, 2009).

The city may, when any smokestack or chimney is dangerous to the health or safety of the inhabitants, or injurious to such a degree as to be a nuisance, order the same torn down or extended up or otherwise remedied so that is shall comply with this section.[24]

13) Rapid City's Air Quality Division's goals are to maintain compliance status with the EPA's National Ambient Air Quality standards (NAAQs), and to prevent adverse health and environmental effects that result from fugitive dust emissions and smoke from wood burning and open burning. The public can file complaints related to fugitive dust and smoke with the Air Quality Staff for further handling. In order to file a complaint a citizen will need to provide their name, address, and phone number. The office asks individuals to provide an accurate description of the location (address, business name, resident name, etc.) of the air quality program. The Air Quality staff will inspect the site as soon as possible. If smoke problems occur outside of business hours, the Air Quality staff can send a courtesy letter to the location of the air quality complaint.[25]

14) Rapid City forwards complaints regarding industrial emitters to the South Dakota Department of Environment and Natural Resources. [26]

15) OCR obtained Rapid City's complaint listing which included over fifty individual complaints filed from June 1, 2004, through June 22, 2010, alleging violations of burning ordinances and the City's response. The OCR investigator was able to contact twelve Rapid City residents who had previously submitted smoke/odor related complaints concerning a neighboring residence or business. The residents reported they did not have a disability. OCR found that of those complaints, six courtesy letters were sent where no air quality violation was detected. One complaint was referred to the South Dakota Department of Environment and Natural Resources (SDDENR), because it was an industrial emitter.[27] In regards to the remaining five complaints, the City provided explanations for the smoke/odor, e.g., air inversions. In four out of the twelve instances the situation improved after the resident submitted the complaint.

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[24] Rapid City, SD. RCMC § 15.44.020.
[25] http://www.rcgov.org/Air-Quality/index.html
[26] Letter from Jason E. Green, City Attorney, City of Rapid City, to Ms. Helena Wooden-Aguilar, Assistant Director, External Compliance and Complaints Program, Office of Civil Rights. (December 10, 2010).
[27] According to Rapid City's December 10, 2010 response to OCR's Requests for Information, the City refers complaints against industrial emitters to the South Dakota Department of Environment and Natural Resources (SDDENR). However, the December 5, 2008 inspection notes read as follows, "DENR will continue with complaint as emissions exceed 20% opacity at point of release." *See also* City of Rapid City Complaint Log. (December 5, 2008).

V. METHODOLOGY OF THE INVESTIGATION

OCR conducted an investigation from March 2010 to February 2011. The investigation included gathering and reviewing relevant information, including all information submitted by the Complainant and Rapid City relevant to the complaint. This included the initial complaint, responses to information requests, and discussions with the Complainant and Rapid City. In addition, the investigation included interviews with Rapid City residents who have previously submitted smoke related complaints to the City.

VI. LEGAL ANALYSIS

OCR began its analysis by determining whether Rapid City intentionally discriminated against the Complainant because of her disability by failing to enforce its chimney ordinance. In cases alleging disparate treatment, a similarly situated disabled individual is treated differently than less-disabled or non-disabled individuals.[28] Evidence of discriminatory intent may be direct or circumstantial and may be found in various sources, including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.[29]

When no direct evidence of discrimination is available, the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*[30] is applied.[31] First, a plaintiff must establish a *prima facie* case of intentional discrimination. The elements of the *prima facie* case vary depending on the facts of the complaint. The Supreme Court has explained that these elements are not rigid, but rather are intended to be "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[32] It is a "plaintiff's guide" to presenting evidence sufficient to lead to an inference of intentional discrimination.[33]

In this case, the Agency analyzed the following questions to determine whether a *prima facie* case of discrimination existed:

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[28] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).
[29] *See Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment)
[30] 411 U.S. 792 (1973).
[31] *Reeves*, 530 U.S. at 142-43; *Norcross v. Sneed*, 755 F.2d 113, 116-17 (8th Cir. 1985)(holding *McDonnell Douglas* is applicable in disparate treatment cases under the Rehabilitation Act).
[32] *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 715 (1982) (quoting *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).
[33] *Kastel v. Winnetka Bd. Of Educ.*, 946 F. Supp. 1329, 1337 (N.D. Ill. 1996).

(1) whether the complainant has a disability;
(2) whether the complainant was otherwise qualified to participate in a federally assisted program;
(3) whether a recipient of EPA assistance denied the complainant participation in a federally assisted program, despite her eligibility; and
(4) whether the recipient provided the benefit to similarly situated individuals outside the Complainant's protected class or other circumstances support an inference of discrimination.[34]

If *a prima facie* case is established, the recipient must articulate legitimate, non-discriminatory reasons for the adverse action. If this requirement is satisfied, the burden shifts to the plaintiff to show that the reasons offered are pretextual and that plaintiff was rejected solely because of her disability.[35]

As previously noted, Rapid City's Air Quality Division is not a recipient of EPA assistance. Nonetheless, OCR conducted this analysis because that information did not come to light until after the bulk of the investigation had been completed.

A. Prima Facie Case

1. The first element of establishing a *prima facie* case of disability discrimination is whether the Complainant has a disability.

The Complainant asserts that she has [redacted] Pursuant to the Rehabilitation Act and EPA's implementing regulations, the term "disability" is defined to mean any of the following: 1) a physical or mental impairment that substantially limits one or more of such person's major life activities; 2) a record of such an impairment; or (3) being regarded as having such an impairment.[36]

The Complainant provided a medical report issued by her doctor that describes her as suffering from multiple chemical sensitivities.[37] The medical report also provides that the Complainant is "intolerant to wood smoke, air pollution," and other substances.[38] In her complaint, she describes having breathing problems and becoming light headed, nauseous and disoriented when breathing the smoke coming from her neighbor's house.[39] For purposes of this analysis, therefore, OCR assumes that the Complainant has a disability.

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[34] *Norcross v. Sneed*, 755 F.2d 113, 117 n.3 (8th Cir. 1985). *McDonnell Douglas*, 411 U.S. at 802; *Cf. Bass v. Board of Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1104 (11th Cir. 2001) (describing elements of *prima facie* case under Title VII), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-254, n.6 (1981).
[35] *Norcross*, 755 F.2d at 117 n.3.
[36] 40. C.F.R. §7.25 (the term disability and handicapped are used interchangeably).
[37] [redacted] (12/17/07).
[38] *Id.*
[39] Letter from [redacted], Complainant, to Karen Higginbotham, OCR Director, EPA. (October 30, 2009).

2. The second element of establishing a *prima facie* case is whether the Complainant was otherwise qualified to participate in a federally assisted program.

The evidence shows that Complainant was otherwise qualified to participate in its programs. An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap.[40] The Air Quality Division provides the public the option to file a complaint if a Rapid City resident suspects that a neighbor is using inappropriate materials for burning or is using improper burning techniques that generate excessive smoke emission.[41] The Complainant is a City resident who alleged that her neighbor's use of their wood stove generated excessive smoke emissions. As a Rapid City resident, the Complainant is qualified to seek protections provided by the City, including enforcement of the City's chimney ordinance and the processing of air quality complaints.

3. The third element of a *prima facie* case is whether the recipient of EPA assistance denied the Complainant participation in a federally assisted program, despite her eligibility.

The evidence shows that Complainant was not denied participation in its program. The Complainant filed several complaints with the City regarding the excessive smoke coming from her neighbor's house. According to Rapid City, the chimney ordinance is not applicable to the Complainant's situation because there is no evidence that the construction, physical condition, or operation of the chimney in question violated any provision of the ordinance. [42] Moreover, both the Complainant and the recipient acknowledge that the City inspected the Complainant's neighbor's property and did not find a violation of air emissions. The City sent courtesy letters to the neighbor's house recommending ways to reduce the smoke emissions and proper chimney techniques and no further action was taken. However, according to the Complainant, the excessive smoke continued to be emitted from the neighbor's house and as a result, her [redacted] symptoms persisted. Based on OCR's investigation, the City followed its normal procedure in the instance case for responding to air quality complaints where there is no violation of air quality standards. Therefore, the City did not deny the Complainant participation in the Air Quality Division's complaint resolution process.

4. The fourth element of establishing a *prima facie* case is whether the recipient provided the benefit to other similarly situated individuals outside the Complainants' protected class or whether other circumstances support an inference of discrimination.

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[40] *Wilkerson*, 606 F.3d at 1263(citing *Southeastern Cmty.Coll.v. Davis*, 442 U.S. 397, 406 (1979).
[41] http://www.rcgov.org/Air-Quality/index.html
[42] Letter from Jason Green, City Attorney, City of Rapid City to Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights, EPA. (December 10, 2010).

The evidence shows that Rapid City did not treat the Complainant differently based on her disability. During the course of the investigation, OCR contacted individuals who had filed complaints within the past six years alleging violations of burning ordinances and OCR evaluated Rapid City's response. These individuals did not have a disability, and nothing in the record indicates that the City thought they may have disabilities. Based on the responses that OCR received, in the majority of cases Rapid City inspected the specific location, found no air emissions violations, and sent a courtesy letter to the location emitting the smoke and/or fumes. In the one instance the air complaint was referred to the South Dakota Department of Environment and Natural Resources, because the source was an industrial emitter. Contrary to the Complainant's assertion, OCR's investigation revealed that Rapid City responded to the Complainant's air quality complaints in the same manner as it has in response to other similar complaints. Therefore, the City did not treat the Complainant differently based on her disability.

Based on this information, there is no indication that Rapid City handles complaints differently based on disability status. Thus, OCR finds that a *prima facie* case of intentional discrimination has not been established.

B. Justification and Pretext

Assuming arguendo that OCR could have established a *prima facie* case of disability discrimination, OCR's investigation included an assessment of Rapid City's justification and whether there was any evidence of pretext. According to Rapid City, the chimney ordinance is not applicable to the Complainant's situation because there is no evidence that the construction, physical condition, or operation of the chimney in question violated any provision of the ordinance. [43] In addition, the City Attorney stated there are no emission limitations pertaining to chimneys at private residences and no formal policy for follow up action. The City generally sends a courtesy letter that provides steps that may be taken to reduce emissions. The City also sends out an Air Quality Specialist to visit the private residence to measure the visual opacity of emissions, if possible. In the instant case, courtesy letters were sent to the Complainant's neighbor's house and the Complainant acknowledged that the City had contacted her neighbor about the smoke emissions. In addition, the City dispatched an inspector to evaluate the opacity of the smoke emitted by the neighbor's chimney. No violation was detected, but the City sent a letter notifying the neighbor about creosote staining. Finally, the City Attorney stated that they have no legal authority to prevent a homeowner from burning wood to heat their home.[44]

As previously mentioned, OCR concluded that the City did not treat the Complainant differently based on her disability. After contacting individuals who had filed complaints with Rapid City within the past six years alleging violations of burning, OCR found that in the majority of instances, the City inspected the specific location cited in the complaint and sent a

[43] Letter from Jason Green, City Attorney, City of Rapid City to Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights. (December 10, 2010).
[44] *Id.*

courtesy letter to the smoke and/or fumes emitter. In all of these instances, the individuals asserted that they did not have a disability, nor did the City regard them as having one. OCR's investigation revealed that the City responded to the Complainant's air quality complaints in the same manner as it had to other similar complaints. While there may be some question about the City's authority to enforce the chimney ordinance more aggressively, the consistency with which the City has addressed that ordinance does not suggest a discriminatory intent.

Regarding the one complaint that the City referred to the State, according to the City Attorney, Rapid City's policy is to refer complaints involving industrial emitters to the State. Therefore, that complaint was factually distinguishable from the Complainant's and the difference in treatment appears to have been based on that factual distinction, rather than Complainant's disability. OCR notes that the City's inspection summary indicates that the reason for the referral was based on observed emissions that exceeded 20% visual opacity, while OCR's investigation revealed that no such emissions standard existed, as explained by the City Attorney. However, OCR concludes that this discrepancy was likely due to a lack of process rather than a genuine conflict with the City's stated rationale for the referral. Moreover, and more significantly, OCR ultimately found that the Complainant was not treated differently based on her disability, as the rest of the complaints handled by the City, all of whom were not disabled, were handled in the same way as the Complainant's. They all similarly received courtesy letters with no additional follow up. Therefore, OCR finds the City did not treat the Complainant differently based on her disability.

OCR has reviewed the City's justification with respect to the complainant's allegation concerning the City's non enforcement of the ordinance. OCR concludes that the City has offered, legitimate non discriminatory reasons for its action. Specifically, a review of the record and the ordinance in question confirms that it was not applicable to the Complainant's situation. The record reflects that city inspectors went to the residence in question and affirmatively determined that there was no evidence that the construction, physical condition, or operation of the chimney in question violated any provision of the ordinance.[45] Accordingly, OCR concludes that the complainant's allegations with respect to not enforcing the ordinance are not sustained.

In addition, a review of the record also fails to substantiate the complainant's allegations concerning the City's response to air quality complaints. The City Attorney credibly stated there are no formal procedures relating to emission limitations pertaining to chimneys at private residences. He also stated that there is no formal policy for follow up action to complaints. Notwithstanding the lack of formal procedures or policy, the City articulated that its practice is to generally send a courtesy letter that provides steps that may be taken to reduce emissions. The record reflects that was done in this case. In addition, the City also sends out an Air Quality Specialist to visit the private residence to measure the visual opacity of emissions, if possible. That was also done in this case.[46] In fact, although no violation was detected, the City nevertheless sent the complainant's neighbor a letter notifying the neighbor about creosote

[45] *See* fn. 9.
[46] *See* fn.16.

staining.

Further, the record corroborates that the City has responded to other complaints in a similar fashion. OCR obtained Rapid City's complaint listing which included over fifty individual complaints filed from June 1, 2004, through June 22, 2010, alleging violations of burning ordinances and the City's response. The OCR investigator was able to determine that in the vast majority of complaint filings, an Air Quality Specialist inspected the neighboring residence or business and sent a courtesy letter when no air quality violation was detected.[47]

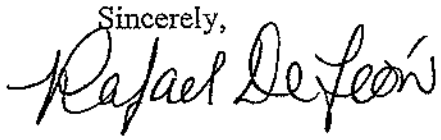
Based on the aforementioned facts, OCR concludes that Rapid City has proffered legitimate non-discriminatory reasons for conducting an inspection and sending a courtesy letter to the neighbor's house in response to the Complainant's allegations. Further, the record evidence corroborates this justification in that Rapid City has responded to other complaints in a similar fashion. The corroborative evidence strongly suggests that these justifications, rather than the Complainant's disability, motivated Rapid City's actions.

VII. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, OCR concludes that the Complainant's allegations of unlawful intentional discrimination are not supported by the record. Furthermore, OCR finds that Rapid City's Air Quality Division was not a recipient of EPA financial assistance at the time of the complaint and is not subject to OCR's jurisdiction. Thus, OCR finds no violation of Section 504 of the Rehabilitation Act of 1973 or EPA's nondiscrimination regulations found at 40 C.F.R. Part 7, and hereby dismisses the Complainant's intentional discrimination complaint against Rapid City.

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at wooden-aguilar.helena@epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,



Rafael DeLeon
Director

[47] In certain instances, Rapid City did not conduct inspections or send courtesy letters because they were not provided with the address of the smoke/fumes source.

cc: [redacted]

Sandra Fusco, EEO Officer
EPA Region 8

Peter Ornstein, Title VI Contact
EPA Region 8

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