Create Control - Data Entry

Control Number: OCR-17-000-2989 Alternate Number:

Citizen Information

Citizen/Originator: 1). Cruden, John C - 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001 Search Citizen

Constituent: Search Constituent

Committee:

Sub-Committee:

Control Information

Status: Pending *

Letter Date: Dec 16, 2016 * Received Date: Dec 27, 2016

Contact Type: LTR (Letter) * Priority Code: Normal *

Addressee: (+) Addressee Org:

File Code: 401_127_a General Correspondence Files Record copy *

Signature: (+)

CC: Search CC

Signature Date: Dec 16, 2016

Primary Subject: Correspondence dated December 16, 2016, received in DOJ on July 16, 2016, from City of Grandview and received at EPA on December 27, 2016, regarding claims of violation of Title VI Civil Rights Act of 1964 (+) *

Secondary Subject: (+)

Instructions: To be reviewed (+) *

Instruction Notes:

General Notes:

*: Required field

(+): Lookup field, press space bar for complete list

Save Continue and Assign Cancel

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

DEC 16 2016

Lilian Dorka
Acting Director, Office of Civil Rights
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Title VI Referral for Ideker, Inc. Permit

Dear Ms. Dorka:

The Department of Justice's Environment and Natural Resources Division and Civil Rights Division received the attached letter from the City of Grandview, which expressed environmental justice concerns about the Missouri Department of Natural Resources (MDNR) process for issuing a Clean Air Act permit to Ideker, Inc. in 2012 and which raised claims that MDNR violated Title VI of the Civil Rights Act of 1964. Following discussions with the Environmental Protection Agency, we have responded to the City of Grandview. Based on our discussions with the Civil Rights Division, however, we are also referring this complaint to your office.

Please contact Fred Turner at (202) 305-0641 with any questions or concerns regarding this referral.

Sincerely,

John C. Cruden

Attachment

RECEIVED
DEC 27 2016
BY: SA-OCR

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

DEC 16 2016

Dennis A. Randolph, P.E.
Director of Public Works
City of Grandview
1200 Main Street
Grandview, MO 64030-2498

Dear Mr. Randolph:

Thank you for your July 7, 2016 letter to the Environment and Natural Resources Division (ENRD) and the Civil Rights Division regarding a Clean Air Act permit issued by the Missouri Department of Natural Resources (MDNR) to Ideker, Inc. in 2012. Specifically, your letter raises environmental justice concerns about MDNR's process for issuing this permit as well as claims that MDNR violated Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin in their programs or activities. This letter is a response from both ENRD and CRT.

Although we appreciate your concerns, ENRD itself is not an investigatory agency; rather we act upon referrals from client agencies, such as the Environmental Protection Agency (EPA). We have discussed your concerns with EPA Region 7, and based on those discussions, we understand that the specific permit issued by MDNR is a minor construction permit (as that term is defined in the Missouri regulations). EPA does not typically review or comment on these types of permits, and thus the Ideker permit did not undergo EPA review. However, we further understand that EPA Region 7 has been actively encouraging state regulatory agencies, including MDNR, to engage with communities on environmental justice issues. If you have questions or comments about environmental justice efforts in Region 7, I recommend that you direct them to:

Altheà M. Moses
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, KS 66219
Phone: 913-551-7649
E-mail: moses.althea@epa.gov

Further, your Title VI claims do not appear to be within the Title VI authority of CRT. However, we have referred the matter to the agency that is most likely to assist you, EPA's Office of Civil Rights:

US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave., NW
Washington, DC 20460
Phone: 202-564-7272

If you have additional questions for us, please do not hesitate to contact Cynthia Ferguson, ENRD's Senior Litigation Counsel for Environmental Justice, who can be reached at (202) 616-6560. I hope this information is helpful.

Sincerely,

John C. Cruden

cc: Daria Neal
Deputy Chief, Federal Coordination and Compliance Section
Civil Rights Division
U.S. Department of Justice

Lilian Dorka
Acting Director, Office of Civil Rights
U.S. Environmental Protection Agency

CITY OF GRANDVIEW

PUBLIC WORKS DEPARTMENT

1200 Main Street
Grandview, Missouri 64030-2498
(816) 316-4856

July 7, 2016

Vanita Gupta, Principal Deputy Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Office of the Assistant Attorney General, Main
Washington, D.C. 20530

John C. Cruden, Assistant Attorney General (AAG)
U.S. Department of Justice
Environment and Natural Resources Division
Law and Policy Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Re: Clean Air Act Administration by the Missouri Department of Natural Resources

Dear Ms Gupta and Mr. Cruden:

On October 11, 2013, Concerned Citizens for AIR, Inc. ("C.C.A.I.R."), and the City of Grandview, Missouri (Grandview) filed a lawsuit in the Circuit Court of Jackson County, Missouri ("the Lawsuit"), seeking *Judicial Review and Declaratory and Injunctive Relief and Motion for Temporary Restraining Order* in Jackson County (Missouri) Circuit Court. The Lawsuit was premised on the action in 2012 of the Missouri Department of Natural Resources ("MoDNR"), acting through their agent the City of Kansas City, Missouri Health Department ("KCMO-HD"), approving an air emissions permit (Permit No. 1343A) to Ideker, Inc.

Our contention is that MoDNR and its agent KCMO-HD failed to enforce the emission requirements laid out in the Clean Air Act at 40 C.F.R. Subchapter C, Parts 50-97 ("CAA"), for Ideker's operation of a portable hot mix asphalt plant at 5600 East 150 Highway in Kansas City, Missouri. Our action also anticipated that MoDNR intended to issue Ideker another permit to authorize a permanent stationary asphalt plant in the same location, which they did (Permit No. 1369) that also would not meet CAA requirements.

Briefly, on October 23, 2013, the Court granted Grandview's request for a temporary order, restraining MoDNR from issuing the permanent permit for at least fifteen days. Two days later, Ideker filed a motion to intervene as of right, but that motion was denied. Eventually after appeals to the Missouri Court of Appeals – Western Division and the Missouri Supreme Court,

Ideker was allowed to intervene in the underlying lawsuit. However, on January 2, 2014, MoDNR issued a permanent permit to Ideker to operate a stationary asphalt plant without ever giving Grandview an opportunity to present its comments regarding the application of the CAA, or even soliciting input from Grandview and its citizens, despite both MoDNR and their agent's knowledge that Grandview is an Environmental Justice Community (EJ).

Then, MoDNR and Ideker each filed a motion to dismiss the lawsuit, asserting that Circuit Court exceeded its statutory authority by granting judicial review, because Grandview did not exhaust its administrative remedies before filing the Lawsuit. They further asserted that MoDNR's issuance of the permanent permit to Ideker rendered Grandview's claims moot. This action by MoDNR was part of a long series of what we feel were retaliatory actions, against the City and C.C.A.I.R., for questioning MoDNR's interpretation and application of the CAA.

Eventually, after three decisions by the Missouri Court of Appeals and two by the Missouri Supreme Court, and without any discussion, fact finding, or dialog regarding Grandview's concerns that the current provisions of the CAA, and in particular those relating to particulate emission into an environmental justice community, ever being addressed, the Missouri Supreme Court dismissed Grandview's original suit.

We feel that it was the intent of MoDNR from the beginning, to deny Grandview, an environmental justice community, and its Citizens an opportunity to provide their input and comments into a permitting action that was clearly incorrectly done, when considered in the light of a simple reading of the Clean Air Act. While MoDNR will point to a Web post regarding the permit application, this is in-fact the *standard* notice that they post for every air quality permit application and certainly nothing specifically targeting the environmental justice community. As you know, environmental justice communities generally need communications approaches different from Web notices to be effective and meaningful.

A cursory review of similar air quality permits (for asphalt plants) issued by MoDNR over the past few years also indicates that most have been in relatively low population density, rural-like areas; again, situations different than Grandview. In the end, rather that consider (or even listen to) the legitimate concerns of the community before the issuance of a permit, the MoDNR and the operators of the asphalt plant chose to stonewall the City and its Citizens by claiming that our only recourse was to file an administrative appeal ***AFTER*** a permit was issued.

This last point is significant in particular since (in MoDNR's own document) Paragraph (1)(E) of 10 CSR 10-6.062 ***Construction Permits By Rule*** allows that "the Director (of MoDNR) may require an air quality analysis in addition to the general requirements listed in subsection (3)(B) of this rule if ... or *complaints filed in the vicinity* (emphasis added) of the proposed construction or modification warrant an air quality analysis." While we are aware that MoDNR air permit section managers knew of Grandview's concerns, we also believe that no such analysis was ever done or was there any effort to gain further insight from our community regarding the details of our concern. However, Paragraph (1)(E) clearly states that expressions of concern or complaints given prior to the issuance of a permit did not need to be held in abeyance until the permit was issued and then submitted to the Air Conservation Commission. So while this may not be an item relating to the CAA directly, it does show MoDNR's intent to deny Grandview's citizens any opportunity to comment on the air quality permits, except after they

had been issued.

It is clear from Executive Order 12898 (1994), that it is the obligation of entities (in this case MoDNR and its agent KCMO-HD), taking actions under federal mandate (in this case under the Clean Air Act) solicit comments and input from potentially affected environmental justice communities ***BEFORE*** taking an action. Since not only does the City of Grandview consist entirely of Environmental Justice tracts, *but* so is the Kansas City Missouri tract that the asphalt plant is located in; then the solicitation of comments and input and then an appropriate response or declaration **BEFORE** a permit is issued is required. Again, MoDNR's demand to Grandview that it wait until a permit was issued and then go to the State and MoDNR controlled administrative process is contrary to EO 12898 and EPA's stated requirements regarding the need to solicit input from affected EJ communities before an action is taken.

We have two concerns that we feel the Department of Justice (in particular the Civil Rights Division and the Environment and Natural Resources Division) should consider and ultimately take action on. First is the failure of MoDNR to fully and faithfully apply the current provisions of the CAA to the permit applications for an asphalt plant in south Kansas City Missouri. We have a specific concern in this instance related to the mis-application of the CAA and MoDNR's own rules being used to process an application as well as the specific emission limits being used for the permit review.

Common sense tells us that the time to correct a misapplication of the limits set forth in the CAA is before a permit is issued. Also, the time for assessing environmental justice is before a permit is issued. EPA is clear in their guidance documents, which apply here, that an Environmental Justice Assessment is a pre-action activity. What's more, the State's own rules make it clear that the time to do further analysis when complaints are received is before the permit is issued. In the end, by taking such proactive steps (that are in fact required) it saves the issuing entity the embarrassment of incorrectly applying the law to a case (as is the notorious case in Michigan with Flint). It would also prevent disruption to the applicant when advised (after the fact) that the incorrect limits must be changed.

However, MoDNR chose instead to insist that despite our complaints, warnings, and concerns that they issue a permit as quickly as possible, and then leave it to the City and C.C.A.I.R. to contest the permit through their Administrative Review Process', after the fact. Clearly once the cat is out of the bag it is much more difficult to get things back under control. Again, the current example of Flint Michigan is exactly on point, the only difference being that 100,000 people were harmed in Flint, and Grandview only has 25,000 people to be harmed.

In its efforts to deny the City of Grandview the protections springing from Executive Order 12898 and its own rules, MoDNR also effectively "punished" the City for having the impertinence to question the decisions of MoDNR in this entire matter. We have been advised that MoDNR staff has stated that the repeated counter actions against Grandview were a "slap on the hand" for questioning the State. In part, we believe that the failure of MoDNR to implement and carry out its duties under Title VI and EO 12898 is a complete lack of understanding of the meaning and intent of EO 12898. In reviewing MoDNR's web page, a query on "Environmental Justice" brings you only to a document referencing equal employment opportunity. There is no document (at least in the public domain) that

deals with Environmental Justice and MoDNR in terms of public input or consideration of EJ populations in their permitting process.

In this regard, Grandview submitted a Sunshine Act request to MoDNR in March 2016 related to the permits referenced above. On May 5, 2016 we received MoDNR's response which consisted of several documents. A review of these documents shows that:

- The majority are printouts from spreadsheets and other programs showing calculations. However, EO 12898 and the Environmental Protection Agency's view of inclusion related to Environmental Justice is active and robust solicitation and consideration of community input, from the environmental justice community, not simply technical calculations.
- There is no notice or solicitation of public comment that was provided to us in the Sunshine Request response that shows that MoDNR approached the environmental justice community, or even cared to approach them.

EO 12898 emphasizes the need for inclusion of the EJ community members in the processing of a major action. The documents that we received reflect the normal scientific analyses that are done by MoDNR for any permit. Most markedly, there were no analyses or consideration given that reflects the fact that the permits referenced above are for a location located in an Environmental Justice community and surrounded by environmental justice tracts.

We believe the actions of the MoDNR to deny citizens residing in identified Environmental Justice communities, in the cities of Grandview and Kansas City, Missouri directly affected by the asphalt plant operations, an opportunity to be heard during what certainly can be deemed as a significant action, contrary to EO 12898, is a violation of Title VI, 42 U.S.C. § 2000d et seq., We also believe that MoDNR's repeated actions to prevent a fair and impartial court hearing to determine if the CAA was being properly followed in the evaluation and determination of a permit, and in their apparent words "to 'slap' Grandview's hand" is a violation of Title VI, 42 U.S.C. § 2000d et seq., being a clear case of bullying and intimidation, and the use of the Court's to evade the evaluation of MoDNR's processes and procedures.

Finally, MoDNR's premise for opposing our original legal action was that the appropriate remedy for a concern regarding a permit was a hearing before an administration panel, after the permit was issued (and the emitter was in operation), this despite being contrary to their own rule (Paragraph (1)(E) of 10 CSR 10-6.062 ***Construction Permits By Rule)***. However, our concerns relating to Permit No. 1343A, processed by MoDNR's agent the City of Kansas City (Missouri) Health Department, are that KCMO-HD failed to apply then current air quality emission standards for Ideker's operation of a portable hot mix asphalt plant at 5600 East 150 Highway in Kansas City, Missouri, and as such were legitimate complaints meant to protect an already damaged environmental justice community that could only be addressed appropriately before the permit was issued.

We also have a concern that EPA Region 7 showed a lack of oversight in their administration of the entire permitting process. That there is no meaningful reference by MoDNR or direction for the consideration of EJ in the process of evaluating permits under the CAA, despite the existence of EO 12898 since February 11, 1994, supports this concern and speaks directly to that lack of oversight. It is our belief that Missouri's State Implementation Plan for its

administration of the Clean Air Act Administration is clearly lacking in direction for the Missouri Department of Natural Resources with respect to accounting for Environmental Justice in actions it takes under the Clean Air Act. As a result, the agency does not in any way take Environmental Justice into account (or seriously) when issuing permits under the CAA. Further, it appears to us, that when prompted to take action, that was to at least consider the concerns of the community, before taking regulatory action, as is the intent of Executive Order 12898, that MoDNR responded in a retaliatory manner.

Therefore, with these factors in mind, we respectfully request the Department of Justice reflect on the actions of MoDNR regarding the processes and procedures that MoDNR has failed to use in the administration of the CAA. We request specifically, that particular scrutiny be given to MoDNR's failure to consider in any way the impact or their air quality permitting actions on environmental justice communities; or in the least to seriously consider and respond directly to Citizen concerns. In our eyes, through MoDNR's incomplete and haphazard administration of the CAA, the Grandview environmental justice community has been subject to degraded air quality that will in time negatively affect the health and well-being of many of its citizens.

We appreciate the opportunity to relate our concerns to you. If you have any questions please contact me at (816)316-4855, or feel free to contact our City Attorney, Mr. Joseph S. Gall, Humphrey, Farrington & McClain, P.C., at (816)836-5050.

Sincerely,

THE CITY OF GRANDVIEW

Dennis A. Randolph, P.E.
Director of Public Works

cc: Mr. Cory Smith, City Administrator
Mr. Joseph S. Gall, City Attorney

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[1] Any person or entity who wishes to construct and operate any regulated air containment source is required to submit a permit application to MoDNR in accordance with rules established by the Air Conservation Commission ("ACC"). § 643.073.2.[4] Any person or entity aggrieved by an MoDNR *permit decision* (emphasis added) may appeal by filing a petition with the Administrative Hearing Commission ("AHC").[7] § 643.075.6; 10 CSR 10-1.030(3)(A). The AHC hearing officer's recommendation and record are reviewed by the ACC, and the ACC issues a final, written determination, which includes findings of fact and conclusions of law. 10 CSR 10-1.030(4)(B). All final orders or determinations of the ACC are subject to judicial review, pursuant to the provisions of sections 536.100 to 536.140. § 643.130.[9] "No judicial review shall be available hereunder, however, unless and until all administrative remedies are exhausted." *Id.*

U.S. Department of Justice

ENRD - LPS

Washington, D.C. 20530

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Lilian Dorka
Acting Director, Office of Civil Rights
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Ave., NW
Washington, DC 20460

DEC 27 2016