

December 3, 2008

Michael W. Sole, Secretary
Florida Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 49
Tallahassee, Florida 32399

Re: **DEP File No. 0730109-001-AC**
Tallahassee Renewable Energy Center
Biomass Integrated Gasification and Combined Cycle Unit

Dear Secretary Sole:

I represent several associations and individuals, including the National Association for the Advancement of Colored People (NAACP), Rainey Gibson, Willie Dupree, Bob Fulford, and Irwin Jackson, who have interests that will be affected by the permitting of the above-referenced proposed biomass facility at Roberts Avenue in Tallahassee, Florida. Like many others in the area, my clients are frustrated that, despite its beginnings in 2006 or earlier, this project has proceeded to permitting with little or no community awareness of the project. If the facility is permitted by the Florida Department of Environmental Protection, my clients intend to initiate legal actions against you and the Department as described below.

Racial Discrimination Claim

Title VI of the Civil Rights Act of 1964, 42 U.S.C § 2000d, 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.

“Title VI itself prohibits intentional discrimination. The Supreme Court has ruled, however, that Title VI authorizes Federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory effects.” *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) at 2, <http://www.epa.gov/ocrpage1/docs/interim.pdf> (footnote omitted). The U.S. Environmental Protection Agency (EPA) has adopted such regulations.

A recipient [of EPA financial 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 accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b).

EPA awards grants on an annual basis to many state and local agencies that administer continuing environmental programs under EPA's statutes. The Florida Department of Environmental Protection receives millions of dollars from EPA each year. As a condition of receiving funding under EPA's continuing environmental program grants, recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants. EPA's Title VI regulations define a "[r]ecipient" as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient" Title VI creates for recipients a nondiscrimination obligation that is contractual in nature in exchange for accepting Federal funding. *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) at 2, <http://www.epa.gov/ocrpage1/docs/interim.pdf> (footnotes omitted).

As part of each application for grant assistance from EPA, the Department has made the following certification:

[The Department] [w]ill comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88- 352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 795), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101- 6107), which prohibits discrimination on the basis of age; U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

Standard Form 424B (7-97), <http://www.whitehouse.gov/omb/grants/sf424b.pdf>.

Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as any EPA funding is extended.

Under amendments made to Title VI by the Civil Rights Restoration Act of 1987, a "program" or "activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance. Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the

Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the actions they take under programs that do not derive their authority from EPA statutes (*e.g.*, state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA.

Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (EPA, Feb. 5, 1998) at 2-3, <http://www.epa.gov/ocrpage1/docs/interim.pdf> (footnotes omitted).

“Frequently, discrimination results from policies and practices that are neutral on their face, but have the *effect* of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.” *Id.* at 2 (footnote omitted). “[M]erely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification.” *Id.* at 11. And, “[i]f a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations.” *Id.* “In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding.” *Id.* at 3 (footnotes omitted) (citing 40 C.F.R. §§ 7.115(e), 7.130(b), 7.110(c)). “EPA also may use any other means authorized by law to obtain compliance, including referring the matter to the Department of Justice (DOJ) for litigation. In appropriate cases, DOJ may file suit seeking injunctive relief.” *Id.*

According to data derived from the U.S. Census (2000), approximately 11,548 persons reside within a one-mile radius of the proposed biomass facility. Forty-three percent (43%) are African-American; fifty-one percent (51%) are non-White. This compares to twenty-nine percent (29%) African-American and thirty-four percent (34%) non-White in all of Leon County. The proposed biomass facility will have a disparate impact on nearby African-American and non-White residents.

Accordingly, if a permit is issued for this facility, my clients intend to file an administrative complaint with the EPA asking it to deny, annul, suspend, or terminate all EPA funding to the Florida Department of Environmental Protection.

Due Process Claim

The Fourteenth Amendment to United States Constitution requires that a state provide persons with “due process” before a property right is deprived by the state. Persons substantially affected by the granting of a permit for the proposed biomass facility have a right to an administrative hearing on the permit upon the filing of a proper petition therefor with the Florida Department of Environmental Protection. That right is recognized by State law and is considered a constitutionally-protected property right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The right to an administrative hearing cannot be deprived by the State without due process.

Due process requires that a meaningful hearing be provided at a meaningful time before a person may be deprived of a property right. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Section 403.815, Fla. Stat., and Rule 62-110.106(3), F.A.C., provide that the right to an administrative hearing is waived if a petition containing a statement of all disputed issues of material fact, a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action, a statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes, and a statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action, is not filed with fourteen (14) days after notice of an intent to issue a permit is received or published.

In the present case, the complexity of the proposed permit, permit application and applicable rules realistically require that substantially affected persons consult with experts and lawyers prior to drafting a petition for administrative hearing. In addition, the liability for attorney fees imposed by Section 57.105, Fla. Stat., for filing a petition making claims that are not supported by material facts or not supported by the application of then-existing law to those material facts, makes the employment of a lawyer a practical necessity. Securing the assistance of such professionals and performing the analyses required to fulfill the petition requirements described above sufficiently to avoid liability for attorney fees cannot be accomplished within fourteen (14) days. This time is manifestly so insufficient that it is a denial of justice. Thus, the Florida Department of Environmental Protection has effectively deprived my clients and other substantially affected persons of their constitutionally-protected right to an administrative hearing without providing due process.

Accordingly, if a permit is issued for this facility, my clients intend to file a civil action against you under 42 U.S.C. § 1983 seeking to declare the grant of the permit void.

Sincerely,

David A. Ludder

cc: S. Glenn Farris
CEO and President
Biomass Gas & Electric, LLC
3900 Parkway Lane
Suite 440
Norcross, Georgia 30092