

May 10, 2011

Hon. Rick Scott, Governor  
Office of Governor  
State of Florida  
The Capitol  
400 S. Monroe Street  
Tallahassee, Florida 32399-0001

Hon. Herschel T. Vinyard, Jr., Secretary  
Florida Department of Environmental Protection  
3900 Commonwealth Boulevard, M.S. 49  
Tallahassee, Florida 32399

Re: **Racial Discrimination Claim**  
Northwest Florida Renewable Energy Center  
Port St. Joe, Florida  
DEP File No. 0450012-002-AC

Dear Governor Scott and Secretary Vinyard:

I represent Annie S. Fields, John B. Byrd, and Marilyn Blackwell, each of whom have interests that will be affected by the permitting of the Northwest Florida Renewable Energy Center biomass facility in Port St. Joe, Florida. If the facility is permitted by the Florida Department of Environmental Protection, my clients intend to initiate legal action against the State of Florida as described below.

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.enviro-lawyer.com/InterimGuidance.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-administered 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.enviro-lawyer.com/Interim Guidance.pdf](http://www.enviro-lawyer.com/Interim%20Guidance.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.epa.gov/ogd/forms/adobe/SF424B> Page 1.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 636 persons reside within two kilometers of the proposed biomass facility. Approximately 69.3% are African-American. This compares to 16.4% in all of Gulf County. Emissions from the facility will include 11 tons per year of hazardous air pollutants (including carcinogenic arsenic, cadmium, and chromium and toxic mercury and manganese), 72 tons per year of particulate matter (PM10), 78 tons per year of particulate matter, 25 tons per year of sulfur dioxide (SO<sub>2</sub>), 24 tons per year of volatile organic compounds (VOCs), and 96 tons per year of carbon monoxide (CO). These emissions, as well as other adverse impacts from operation of the proposed facility, will have a disparate impact on nearby African-American 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.

Sincerely,

A handwritten signature in cursive script, appearing to read "David A. Ludder".

David A. Ludder