



# Environmental Justice:

Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898

September 2016



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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
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**Environmental Justice:  
Examining the  
Environmental Protection  
Agency's  
Compliance and Enforcement  
of Title VI and  
Executive Order 12,898**

A Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, DC

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## UNITED STATES COMMISSION ON CIVIL RIGHTS

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### Letter of Transmittal

President Barack Obama  
Vice President Joe Biden  
Speaker of the House Paul Ryan  
Senator Mitch McConnell

On behalf of the United States Commission on Civil Rights (“the Commission”), and pursuant to Public Law 103-419, I am pleased to transmit our 2016 Statutory Enforcement Report: *Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898*. This report is also available in full on the Commission’s website at [www.usccr.gov](http://www.usccr.gov).

This report examines whether the Environmental Protection Agency (“EPA”) is complying with its environmental justice obligations. The Commission heard testimony from the EPA, experts and scholars in the field, and a majority of the Commission made findings and recommendations. Some of the findings are:

1. EPA’s definition of environmental justice recognizes environmental justice as a civil right, fair treatment and meaningful involvement of all people regardless of race, color, notional origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.
2. Racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities and often lack political and financial clout to properly bargain with polluters when fighting a decision or seeking redress.
3. The EPA has a history of being unable to meet its regulatory deadlines and experiences extreme delays in responding to Title VI complaints in the area of environmental justice.
4. EPA’s Office of Civil Rights has never made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA.
5. While lacking formal research on links to cancer, it is known that the heavy metals contained in coal ash are known as “hazardous substances” and can potentially damage all major organ systems. Not only do the toxic substances found in coal ash become absorbed up the food chain, but they also contaminate the environment (humans and animals) through spills, dam leaks, and sewage pipe breaks.
6. Whether coal ash facilities are disproportionately located in low-income and minority communities depends on how the comparison is done, but the EPA did find the percentage of minorities and low income individuals living within the catchment area of

coal ash disposal facilities is disproportionately high when compared to the national average. The EPA did not fully consider the civil rights impacts in approving movement and storage of coal ash.

7. The EPA's Final Coal Ash Rule negatively impacts low-income and communities of color disproportionately, and places enforcement of the Rule back on the shoulders of the community. This system requires low-income and communities of color to collect complex data, fund litigation and navigate the federal court system - the very communities that the environmental justice principles were designed to protect.

Highlights of the recommendations include:

1. The EPA should not eliminate the deadlines related to processing and investigating Title VI complaints, nor should it adopt a phased-approach to conducting post-award compliance reviews. The EPA should include affected communities in the settlement process.
2. The EPA should bring on additional staff to meet current and future needs, and to clean up its backlog of Title VI complaints. EPA should empower and support the efforts of the Office of Civil Rights (and Deputy Officers), continue sharing expertise among regions, and provide the Office with the necessary tools to hold accountable other EPA entities in minority jurisdictions.
3. Coal Ash should be classified as "special waste" and federal funding should be provided for research on health impact of coal ash exposure to humans. The EPA should provide assistance to affected communities to help enforce the Coal Ash Rule. In addition, the EPA should test drinking water wells, and assess high-risk coal-ash dams and coal ash disposal sites.
4. EPA should provide technical assistance to minority, tribal, and low-income communities to help enforce the Coal Ash Rule and should promulgate financial assurance requirements for coal ash disposal as soon as possible under RCRA or CERCLA authority.
5. EPA should prohibit its state partners, and any recipients of EPA funds, from allowing industrial facilities in their jurisdiction to operate without the appropriate permits and the EPA should enforce permitting requirements and re-evaluate remediation fund reserve guidelines.

The Commission is pleased to transmit its views in order to inform the government and ensure that all Americans' right to a clean and safe environment and that minority and low-income communities' environmental justice rights are protected.

For the Commission,



Martin R. Castro  
Chairman

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## EXECUTIVE SUMMARY

For our statutory report this year, the Commission has examined whether the Environmental Protection Agency (“EPA”) is complying with its environmental justice obligations. Specifically, the Commission has reviewed EPA’s compliance with Title VI of the 1964 Civil Rights Act, the Executive Order on Environmental Justice and EPA’s use of the Resource Conservation and Recovery Act (which governs solid waste disposal and is also known as the Solid Waste Disposal Act) as an environmental justice tool to regulate the disposal of coal ash. The Commission chose to build off its prior evaluation of EPA’s Title VI program and implementation of the Executive Order. At the same time, the Commission expanded the scope of review to include EPA’s regulation of coal ash, because it represents an attempt by EPA to implement environmental justice principles as part of exercising its traditional statutory authorities.

In the late 1980’s, advocacy by a number of community groups as well as the publication of several studies, drew attention to the issue of disproportionate exposure of minority and low-income communities to sources of pollution. Various labels were attached to this concept - “environmental equity,” “environmental racism,” and “environmental justice.” The latter term has been adopted by EPA and also used in a Presidential Executive Order in 1994. Executive Order 12,898 requires federal agencies to collect data on the health and environmental impact of their activities on communities of color and low-income populations, and develop policies incorporating the principles of environmental justice into their mission.

Following the increased focus on the distinct environmental problems and concerns faced by minority communities, EPA began to receive administrative complaints filed under Title VI of the Civil Rights Act of 1964 and EPA’s Title VI regulations. Title VI forbids recipients of federal financial assistance from discriminating on the basis of race, color or national origin. This means that any entity that receives federal assistance from EPA must comply with Title VI and EPA’s non-discrimination policies. While EPA originally enacted Title VI regulations in 1973 (amended in 1984), the first administrative Title VI complaint was not filed with the Agency until 1993. Title VI came to be viewed as a tool to advance certain categories of environmental justice issues - where discriminatory actions or impacts by a recipient of federal assistance was alleged to be premised on race, color, or national origin.

In 2003, the Commission issued its report, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*. That report examined how well four agencies, including the EPA, were implementing Executive Order 12,898 and Title VI. The Commission found that federal agencies had not yet fully incorporated environmental justice into their core missions, or established accountability outcomes for federally funded programs. The Commission found that agency leadership had not fully committed to environmental justice, that communities affected by environmental decision making were not full participants in agency decision making, and that there was inadequate scientific and technical literature on the impacts

of pollutants on human health. With regard to EPA, the Commission found there was uncertainty about EPA's use of Title VI to remedy discrimination because EPA did not have final guidance for investigations or recipients.

On January 22 and February 5, 2016, the Commission held briefings to examine environmental justice as it relates to EPA's Final Coal Ash Rule and its Office of Civil Rights' compliance and enforcement of EPA's non-discrimination regulations pursuant to Title VI. The briefings considered: 1) whether EPA's Office of Civil Rights' track-record since the Commission's 2003 report in enforcing Title VI has improved, 2) EPA's implementation of Executive Order 12,898, and, 3) whether and how EPA's Final Coal Ash Rule negatively impacts minority and low-income communities by failing to provide adequate protection measures for these communities. During the briefing, the Commission heard and received statements from EPA officials, scholars, and environmental justice advocates.

The Commission's Advisory Committees in Illinois and North Carolina also held briefings on the topic of EPA's enforcement of environmental justice in their respective states. Their memorandums with findings and recommendations are included as appendices with this report.

Merging environmental protection and civil rights obligations has been a challenge for EPA. EPA has taken many steps towards making environmental justice part of its core mission. EPA's leadership has made many environmental justice proclamations and established the Office of Environmental Justice, who has issued recent guidance for conducting environmental justice risk assessments. With regard to Title VI and the substantive incorporation of environmental justice into decision making, the Commission did not find as much improvement. The Commission's review of EPA's compliance with its environmental justice obligations revealed two major reoccurring themes.

First, EPA continues to struggle to provide procedural and substantive relief to communities of color impacted by pollution. EPA's deficiencies have resulted in a lack of substantive results that would improve the lives of people living in already overly-burdened communities. Second, EPA does not take action when faced with environmental justice concerns until forced to do so. When they do act, they make easy choices and outsource any environmental justice responsibilities onto others.

These two themes are present in the context of processing Title VI complaints. For example, since enacting its Title VI regulations in 1973, EPA has been criticized for its processes regarding implementation of environmental justice. Specifically, EPA is known for administrative delay in processing complaints, having an inadequate system for resolving complaints, referring the majority of complaints to other agencies, not engaging complainants in alternative dispute resolution, and for timid (if not entirely lacking) enforcement. This report finds that EPA continues to struggle with all of these process issues. Substantively, EPA's

inability to timely process or resolve Title VI complaints has resulted in recipients of EPA funding not being held accountable for alleged discrimination.

Moreover, EPA has been sued multiple times (sometimes in the context of processing the same Title VI complaint) for failing to meet its regulatory time frames. Once sued, EPA takes the minimal amount of action to moot the lawsuit, yet never seems to reach any substantive decisions on whether a federal recipient has violated Title VI. Since enacting its Title VI regulations, EPA has made one preliminary finding of disparate impact. EPA promptly settled the matter without involvement of the complainant and only required the federal recipient to address a pesticide it knew was being phased out.

Similarly, in the context of regulating coal ash, EPA did not take action to issue a rule regulating coal ash until forced to do so as part of settling a lawsuit. EPA did provide process to affected communities by holding public hearings and collecting written comments from affected community members in developing its final rule. When EPA did issue a final rule, it classified coal ash as a solid waste (as opposed to a hazardous substance) under the Solid Waste Disposal Act. Because of the enforcement mechanisms provided in that Act, this means that 1) states can voluntarily adopt the measures but do not have to, and 2) EPA cannot enforce the regulation and affected communities are responsible for bringing citizen suit actions. This means that the affected communities have to collect technical evidence and finance expensive litigation.

Additionally, coal ash is found throughout the United States in 47 states. At the time of enactment of the regulation, 17 of those states were anticipated to implement standards as strict (or stricter) than the federal regulation, and 30 states were anticipated to not adopt the federal regulatory standards. In looking at the 30 states not-anticipated to adopt the federal standards, the communities in which coal ash is disposed are more likely to be communities of color. EPA did not analyze the substantive result of its Final Rule in this manner despite receiving public comments making this point. Accordingly, it appears that affected communities were not provided a substantive meaningful opportunity to participate in decision-making that impacts their communities.

With the intent of furthering environmental justice for affected communities and improving EPA's compliance, the Commission developed findings and recommendations based on its social science research and briefing testimony.

Highlights of the Findings include:

- The recognition of environmental justice as a civil right means the fair treatment and meaningful involvement of all people regardless of race, color, notional origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.

## 4 Environmental Justice

- Racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities and often lack political and financial clout to properly bargain with polluters when fighting a decision or seeking redress.
- If enforced vigorously, Title VI can be a powerful tool for EPA to address environmental justice and remediate discrimination. The EPA has a history of being unable to meet regulatory deadlines, delay in response to and addressing Title VI complaints.
- The EPA's Office of Civil Rights has never made a formal finding of discrimination, has never denied or withdrawn financial assistance, and has no mandate to demand accountability within the EPA.
- While lacking formal research on links to cancer, it is known that the heavy metals contained in coal ash are known as "hazardous substances" and can potentially damage all major organ systems.
- Not only do the toxic substances found in coal ash become absorbed up the food chain, but they also contaminate the environment (humans and animals) through spills, dam leaks, and sewage pipe breaks.
- Whether coal ash facilities are disproportionately located in low-income and minority communities depends on how the comparison is done, but the EPA did find the percentage of minorities and low income individuals living within the catchment area of coal ash disposal facilities is disproportionately high when compared to the national average. The EPA did not fully consider the civil rights impacts in approving the movement and storage of coal ash.
- The EPA's Final Coal Ash Rule will negatively impact low-income and communities of color disproportionately, and places enforcement of the Rule back on the shoulders of the community. This system requires low-income and communities of color to collect complex data, fund litigation and navigate the federal court system - the communities that the environmental justice principles were designed to protect.

### Highlights of the Recommendations include:

- The EPA should bring on additional staff to meet current and future needs, and to clean up its backlog of Title VI complaints. EPA should empower and support the efforts of the Office of Civil Rights (and Deputy Officers), continue sharing expertise among regions, and provide the Office with the necessary tools to hold accountable other EPA entities in minority jurisdictions.
- The EPA should NOT eliminate deadlines related to processing Title VI complaints, nor should it adopt a phased-approach to conducting post-award compliance reviews. The EPA should include affected communities in the settlement process.
- Coal Ash should be classified as "special waste" and federal funding should be provided for research on health impact of coal ash exposure to humans. The EPA should investigate risks from coal ash disposal, take enforcement action as necessary, and ensure known cases are resolved. EPA should immediately identify coal ash lagoons and coal

plants in minority, tribal, and low income communities that rely on groundwater for drinking water. The EPA should provide assistance to these communities to help enforce the Coal Ash Rule. In addition, the EPA should test drinking water wells, and assess high risk coal ash dams and coal ash disposal sites.

Highlights of the State Advisory Committee Recommendations include:

- Illinois: The EPA should enforce permitting requirements and re-evaluate remediation fund reserve guidelines. The EPA should require that states with delegated permitting programs consider multiple sources of contamination on a single community when issuing waste disposal or operating permits.
- North Carolina: EPA should assist the North Carolina Department of Environmental Quality in proactively preventing low-income and minority communities from being disproportionately affected by coal ash disposal. Congress and relevant federal agencies should commission a study to investigate options for industry to compensate community members for health care expenses and land devaluation that results from coal ash contamination

## ENVIRONMENTAL JUSTICE AS A CIVIL RIGHT

EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>1</sup> Advocates for environmental justice argue that communities of color and poor communities have been disproportionately impacted by environmental injustices for decades. These advocates contend that it is not a coincidence that communities of color and poor communities “live, work[,] and play in America’s most polluted environments.”<sup>2</sup>

According to Raghiv Allie-Brennan, a staff member for U.S. Congresswoman Alma Adams, “[w]hat we know to be true is that many of these [citizens] are working class, minority residents who are burdened with more environmental and public health threats than rich neighborhoods, communities with limited resources, and political clout to fend off new, unwanted facility siting.”<sup>3</sup> Often times, these citizens “look to their government [to address their issues] ... only to lament the fact that large companies managing ... seem to always have the upper hand, getting their way regardless of what citizens want.”<sup>4</sup>

Statistical research also suggests that companies tend to site facilities that can negatively impact human health in these communities because they lack the political clout and resources necessary to fight siting decisions.<sup>5</sup> Therefore, there is a fundamental question as to whether communities of color and poor communities are treated fairly and have meaningful involvement with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies when it comes to land-use decisions that affect their communities.

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<sup>1</sup> EPA, *Learn about Environmental Justice*, available at <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (last updated Mar. 29, 2016).

<sup>2</sup> Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, Natural Resources Defense Council, (Mar. 17, 2016), available at <https://www.nrdc.org/stories/environmental-justice-movement>.

<sup>3</sup> Raghiv Allie-Brennan, February 5 Briefing Transcript [hereinafter “Briefing Transcript 2”], p. 17.

<sup>4</sup> Rhiannon Fionne, Briefing Transcript 2, pp. 221 – 22.

<sup>5</sup> Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting demographic Change hypotheses of Environmental Injustice*, Environmental Research Letters, (Nov. 18, 2015), available at <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/meta>. The Commission notes that this study builds on existing research of environmental justice, has been peer reviewed, and provides accurate information. The study addresses weaknesses in previous environmental justice studies since they “[t]he number of longitudinal environmental justice analyses has not only been limited, but those that exist have often led to contradictory findings.”

## Beginning of the Environmental Justice Movement

In 1982, the North Carolina government decided to place 6,000 truckloads of soil containing toxic polychlorinated biphenyls in the city of Afton.<sup>6</sup> Afton is a small community located in poor, rural Warren County, North Carolina, and at the time, had an 84 percent African-American population.<sup>7</sup> Protesters against siting the landfill in Afton argued that the siting decision was discriminatory and was made because the community was minority and poor.<sup>8</sup> According to Dr. Robert Bullard, the Afton PCB landfill site was not the most “scientifically suitable location” because of the high risk for groundwater contamination.<sup>9</sup> Throughout six weeks of protest, more than 500 people were arrested.<sup>10</sup> Many veterans of the civil rights movement from the 1950’s and 1960’s supported the protesters and classified the protest as a new fight in the civil rights movement - the fight against “environmental racism.”<sup>11</sup>

The District of Columbia’s congressional delegate and Chairman of the Congressional Black Caucus at the time of the Warren County protests, demanded that Congress study the possible connection between environmental siting decisions and race.<sup>12</sup> As demanded by Congress, the General Accounting Office conducting a study on *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*.<sup>13</sup> The report, released in 1983, revealed that three-quarters of hazardous waste landfill sites in eight southeastern states were located in communities whose residents were primarily poor and African-American or Latino.<sup>14</sup>

In 1987, the United Church of Christ Commission for Racial Justice released a comprehensive report examining environmental racism, which is the deliberate placing of hazardous waste sites near or in minority communities.<sup>15</sup> The report claimed to confirm and expanded upon the

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<sup>6</sup> Renee Skelton and Vernice Miller, *The Environmental Justice Movement*, Natural Resources Defense Council, (Oct. 12, 2006), available at <http://www.nrdc.org/ej/history/hej.asp> (visited July 27, 2015); Robert D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press, 1990), pp. 35-38.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Robert D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality*, (Westview Press, 1990), pp. 36-37 (citing Ken Guessser and Gerry Waneck, “PCB’s and Warren County,” *Science for the People*, July/Aug. 1983, p. 15).

<sup>10</sup> Renee Skelton and Vernice Miller, *The Environmental Justice Movement*, Natural Resources Defense Council, (Oct. 12, 2006), available at <http://www.nrdc.org/ej/history/hej.asp>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> U.S. General Accounting Office, *Siting Hazardous Waste Landfills and Their Correlation with Race and Economic Status of Surrounding Communities*, June 1983.

<sup>14</sup> *Id.*

<sup>15</sup> United Church Of Christ, Commission for Racial Justice, *Toxic Waste and Race: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites*, 1987.

Government Accounting Office's findings that race and ethnicity were the most significant factors in deciding where to place landfills, waste and environmentally hazardous facilities.<sup>16</sup> The report states that these siting decisions were not incidental, but the intentional result of policies at all levels of government.<sup>17</sup> In addition to its claims that minority communities "have been and continue to be beset by poverty, unemployment[,] and problems related to poor housing, education[,] and health," the report argued that minority communities "cannot afford the luxury of being primarily concerned about the quality of their environment when confronted by a plethora of pressing problems related to their day-to-day survival."<sup>18</sup>

In 1994, the United Church of Christ Commission for Racial Justice issued an update of its 1987 report.<sup>19</sup> The 1994 report found that the environmental burdens placed on minority communities from toxic waste siting decisions had actually increased. According to the 1994 report, "people of color were 47 percent more likely than whites to live near a commercial hazardous waste facility" between 1980 and 1993.<sup>20</sup> Additionally, the 1994 report also found that the concentration of minorities living in areas with commercial hazardous waste facilities had increased from 25 to 31 percent between 1980 and 1993.<sup>21</sup> More than 20 years since the United Church of Christ Commission for Racial Justice's 1994 report, its findings may still hold relevance today as environmental issues still impact minorities and low-income communities.

## Defining Environmental Justice

There remains no uniformly accepted definition of "environmental justice."<sup>22</sup> The tension between definitions centers on whether environmental justice should be measured in terms of disproportional impact or the deliberate targeting of a group of people.

Professor Robert Bullard, a sociologist who is considered the grandfather of environmental justice, defines environmental justice as:

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<sup>16</sup> *Id.* at 13-21.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at xii.

<sup>19</sup> Benjamin A. Goldman and Laura Fitton, *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites*, Center for Policy Alternatives and the United Church of Christ, Commission for Racial Justice, (1994).

<sup>20</sup> *Id.* at 2-4.

<sup>21</sup> *Id.*

<sup>22</sup> Nicholas C. Christiansen, *Environmental Justice: Deciphering The Maze Of A Private Right Of Action*, 81 *Miss. L.J.* 843, 844-45 (2012). (citing Michael B. Gerrard, *Preface to the Second Edition of THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPORPORTIONATE RISKS*, at xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008)).

[A]ny policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups or communities based on race or color; [as well as the] exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs.<sup>23</sup>

Other environmental justice advocates view environmental injustice as

occur[ing] when a particular social group is disproportionately burdened with environmental hazards. An example of environmental injustice is environmental racism ... [which] is the deliberate targeting of certain communities by rules, regulations of government or corporate decisions, resulting in the ‘disproportionate exposure of toxic and hazardous waste on communities based upon prescribed biological characteristics.’ The people affected are systematically excluded from the decisions that affect their communities.<sup>24</sup>

Powerlessness is said to be an “underlying cause of environmental injustice, manifesting itself in (1) the disproportionate siting of undesirable land uses in poor and minority communities, and (2) the inequitable enforcement of environmental laws in these communities.”<sup>25</sup>

As noted above, EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>26</sup> “Fair treatment,” according to the EPA, “means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.”<sup>27</sup> EPA further states that its goal is for all people to “[enjoy] the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”<sup>28</sup> For purposes of this report, the Commission will make no distinction between the competing definitions, but will apply the definition EPA uses to define environmental justice.

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<sup>23</sup> Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice*, 27 B.C. Env'tl. Aff. L. Rev. 631, 636 (2000).

<sup>24</sup> Yasmin Karimian, *Environmental Injustice: The Bright-Line Solution*, 5 Geo. J. L. & Mod. Critical Race Persp. 143, 144 (Fall 2013).

<sup>25</sup> R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 Am U L Rev 229, 233 (1998).

<sup>26</sup> EPA, *What is Environmental Justice*, available at <http://www.epa.gov/environmentaljustice/> (last updated May 12, 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## Environmental Justice as Federal Policy

### Title VI of the Civil Rights Act, Executive Order 12,898 and Other Environmental Statutes

#### *Title VI and Environmental Justice*

Title VI of the Civil Rights Act of 1964 provides a statutory basis for seeking relief from discriminatory activity in federally funded programs or activities.<sup>29</sup> Section 601 of Title VI provides that “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.”<sup>30</sup> Section 602 of Title VI directs agencies distributing federal funds to issue regulations implementing Section 601, and mandates that these agencies create a mechanism for processing complaints of racial discrimination.<sup>31</sup>

To establish a case of discrimination under Section 601, complainants challenging environmental permitting decisions must demonstrate that the decision was motivated by intentional discrimination. This requirement has proved to be a difficult burden for environmental justice complainants to satisfy.<sup>32</sup>

Section 602, however allows a violation to be established by proof of unintentional discrimination or disparate impact, arguably a less stringent burden of proof. If the agency makes a finding of disparate impact, Title VI allows for a federal agency to revoke, amend, or suspend a permit issued to a state or local funding recipient, or to withhold federal funds from the state or local permitting authority.<sup>33</sup>

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<sup>29</sup> 42 U.S.C. § 2000d.

<sup>30</sup> *Id.*

<sup>31</sup> 42 U.S.C. § 2000d-1.

<sup>32</sup> *See* *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 680 (S.D. Tex. 1979). This case involved an allegation of discrimination based on the siting of a solid waste facility in a minority community. The plaintiff claimed that the siting decision constituted a violation of the equal protection clause and sought a preliminary injunction stopping the siting of the solid waste facility in their community. (In a discrimination case, a plaintiff is required to show that there is a discriminatory intent behind an action). To establish that the siting decision had been driven by a discriminatory intent, the plaintiff alleged that: (1) the decision was based on a pattern or practice of discrimination, and (2) the decision amounted to discrimination because events leading up to the siting decision and the historical placement of landfills in minority communities. To show intentional discrimination, the plaintiff relied on statistical data. While the data was compelling at face value, the District Court ruled against the plaintiffs because they were unable to provide sufficiently detailed factual information showing that the decision was based on intentional discrimination.

<sup>33</sup> 42 U.S.C. § 2000d-1.

***Poverty or Prejudice: Addressing the Arguments For and Against Using Title VI for Environmental Justice***

Some critics are skeptical that disproportionate pollution in communities of color is a civil rights issue, or that the demonstration of disparate impact alone justifies a legal claim of racism.<sup>34</sup> Many argue that Title VI is ineffective at addressing environmental injustice, pointing out that:

because Title VI only addresses discrimination based on ‘race, color, or national origin,’ the statute offers no remedy to communities which cannot make a prima [facie] showing of a disproportionate demographic make-up, as compared to other communities. Second, since Section 601 only prohibits intentional discrimination, and post-Sandoval, it appears unlikely that Section 602 regulations are privately enforceable, Title VI remedies are apparently unavailable to marginal communities which cannot show that racial or ethnic discrimination drove the actions of a Title VI recipient in choosing or approving the site.<sup>35</sup>

Critics argue that the distribution of pollution is not a civil rights issue and can be explained by market forces, and that any racial disparity in environmental quality is, therefore, a function of poverty rather than prejudice.<sup>36</sup> The market forces argument has two components: (1) the distribution of environmental hazards is based on income and not race, and (2) environmental discrimination claims are not actionable under civil rights law because being poor is not a protected class.<sup>37</sup> According to economics Professor Chris Timmins, the primary question to ask when analyzing the market forces argument is whether “pollution was cited in disadvantaged neighborhoods, or was an equitable siting process followed by population resorting that led to the inequity”<sup>38</sup> - in essence, which came first, the facility or the minority population?

In the Commission’s 2003 report, four Commissioners argued that “the decision to locate a facility in a particular neighborhood often occurs long before significant numbers of racial and ethnic minorities become residents of that community.”<sup>39</sup> Citing Christopher Foreman, the four Commissioners articulated that “the current demographic pattern in a given area may be

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<sup>34</sup> Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 *Envir. L.* 285, 312 (1995).

<sup>35</sup> Scott Michael Edson, *Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act as an Environmental Justice Remedy*, 16 *Fordham Envir. L. Rev.* 141, 172-73 (2004).

<sup>36</sup> *Id.* at 291-92.

<sup>37</sup> See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *Yale L.J.* 1383, 1391 (1994).

<sup>38</sup> Professor Chris Timmins, Briefing Transcript 2, p. 283.

<sup>39</sup> Statement of Commissioners Jennifer C. Braceras, Peter N. Kirsanow, Russell G. Redenbaugh, and Abigail Thernstrom, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, U.S. Commission on Civil Rights 2003, pp. 181 – 85, available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

misleading; the local ethnic mix at the time a facility was constructed may have differed considerably, undermining the argument that racism underlay the original siting decision.”<sup>40</sup> This means that the siting process for these facilities occurred long before an increase in the minority population in the surrounding community of these facilities.

According to supporters of the market forces argument, low income individuals often move to communities near a facility that is alleged to emit pollution due to economic reasons. Roger Clegg, president and general counsel of the Center for Equal Opportunity, stated that “one would expect property to be cheaper [where these facilities are located] and that there are often economic benefits for the nearby community to businesses locating there.”<sup>41</sup> Additionally, supporters of the market forces argument suggest that “studies have revealed that poor and minority populations sometimes cluster around existing industrial facilities, possibly due to low property values.”<sup>42</sup>

Economists theorize that the population shift is explained by the Tiebout Sorting theory.<sup>43</sup> The Tiebout Sorting theory states that individuals vote with their feet to escape undesirable situations. As it relates to environmental justice, individuals trade off the higher cost of housing in richer communities free from pollution by moving to lower cost housing near polluting emitting facilities to take advantage of local amenities and goods such as jobs.<sup>44</sup> According to Professor Chris Timmins, “[t]his idea of Tiebout sorting provides an alternative explanation for the disproportionate pollution exposure that characterizes environmental justice.”<sup>45</sup>

Those who oppose this view believe that race, as opposed to poverty, is a better indicator of where environmentally suspect facilities are sited.<sup>46</sup> For example, in 2015, Professors Paul Mohai and Robin Saha conducted research using a longitudinal study examining the hazardous waste facility siting process in four decades after the passage of Title VI.<sup>47</sup> Their study found that racial composition in geographic locations “tend to be a stronger independent predictor” of

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<sup>40</sup> *Id.*

<sup>41</sup> Roger Clegg, Submitted Written Statement to the U.S. Commission on Civil Rights, p. 2.

<sup>42</sup> Statement of Commissioners Jennifer C. Braceras, Peter N. Kirsanow, Russell G. Redenbaugh, and Abigail Thernstrom, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, U.S. Commission on Civil Rights 2003, pp. 181 – 85, available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

<sup>43</sup> Professor Chris Timmins, Briefing Transcript 2, p. 286.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *In Coal Blooded: Putting Profits Before People*, National Association for the Advancement of Colored People, Nov. 2012, p. 15, available at <http://www.naacp.org/page/-/Climate/CoalBlooded.pdf>.

<sup>47</sup> Paul Mohai, Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting demographic Change hypotheses of Environmental Injustice*, Environmental Research Letters, Nov. 18, 2015, pp. 15-16, available at <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/meta>.

which areas would ultimately host a waste site.<sup>48</sup> Racial minorities have also historically represented a larger percentage of those living in poverty in the United States when compared to their white counterparts.<sup>49</sup> Actions adversely impacting the poor will almost invariably adversely impact upon minority groups. In 2012, a *Scientific American* article reported that “[t]he greater the concentration of Hispanics, Asians, African Americans or poor residents in an area, the more likely that potentially dangerous compounds such as vanadium, nitrates and zinc are in the mix of fine particles they breathe.”<sup>50</sup> Furthermore, waste disposal sites often establish near communities with the least ability to resist, “exploit[ing] communities with little economic or political power in ‘peripheral’ rural areas,” and thereby “deval[ue]” the health of low-income people.<sup>51</sup>

For example, the North Carolina State Advisory Committee to the U.S. Commission on Civil Rights found that 69 percent of all African Americans “live within 30 miles of power plants that pollute the air with toxic Chemicals.”<sup>52</sup> Marianne Engleman-Lado, senior attorney for Earthjustice, told the Commission that permitting decisions to allow companies to build or expand waste facilities in minority communities have over time “resulted in the gross maldistribution of health hazards on the basis of race and ethnicity.”<sup>53</sup> According to the Illinois State Advisory Committee to the U.S. Commission on Civil Rights, “industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations.”<sup>54</sup> Likewise, a University of

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<sup>48</sup> *Id.* It is important to note that racial and socioeconomic disparities decreased between 1970 through the 1990’s, but the disparities still remained significant.

<sup>49</sup> See Table 3, Historical Poverty Tables: People and Families – 1959 to 2014, U.S. Census Bureau, *available at* <http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html>. See also Race in America: Tracking 50 Years of Demographic Trends, Pew Research Center (Aug. 22, 2013), *available at* <http://www.pewsocialtrends.org/2013/08/22/race-demographics/>.

Hispanic poverty was 3.1 times white poverty in 1976, but the gap narrowed to 2.6 times in 2011. The Asian-white poverty gap has also narrowed: Asians are 1.2 times as likely as whites to be in poverty now, compared with 1.9 times as likely in 1987.

<sup>50</sup> Alan Barton, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility*, by Dorceta E. Taylor, 55 Nat Resources J 236 (2014), *available at* <http://heinonline.org/HOL/LandingPage?handle=hein.journals/narj55&div=15&id=&page=> (visited July 25, 2015).

<sup>51</sup> *Id.*

<sup>52</sup> Memorandum to the U.S. Commission on Civil Rights, North Carolina State Advisory Committee to the U.S. Commission on Civil Rights (Apr. 7, 2016), *infra* Appendix C at 4.

<sup>53</sup> Marianne Engleman-Lado, Briefing Transcript 2, p. 215.

<sup>54</sup> Memorandum to the U.S. Commission on Civil Rights, Illinois State Advisory Committee to the U.S. Commission on Civil Rights (May, 2016), *infra* Appendix B at 3. (citing Waterhouse Testimony. Transcript - Civil Rights and Environmental Justice in Illinois. Meeting of the IL Advisory Committee to the U.S. Commission on Civil Rights. March 09, 2016. p. 15 lines 01-04 and p. 17 line 11-p.18 line 05) *available at* [http://www.usccr.gov/pubs/SAC\\_AdvisoryMemo.pdf](http://www.usccr.gov/pubs/SAC_AdvisoryMemo.pdf).

Minnesota study revealed that race is more indicative than income in determining who is most affected by poor air quality.<sup>55</sup>

Thus, the racial, economic, and social structures that shape environmental justice issues cannot be treated as independent concerns but rather as structures that overlap and reinforce each other. Additionally, in discussing the income and race of people who live in more polluted or contaminated areas, as stated above, it is important to consider the racial and economic makeup of a community prior to an industry's establishment and the resulting impact of an established industry on the community.<sup>56</sup> In order to understand the impact of polluting facilities on surrounding neighborhoods, the socioeconomic characteristics of a neighborhood at the time it was selected to host a facility must be considered to determine "which came first - the people of color and poor or the Locally Unwanted Land Uses (LULUS)."<sup>57</sup>

### ***Executive Order 12,898***

In 1994, President Bill Clinton signed Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."<sup>58</sup> Executive Order 12,898's purpose, according to EPA, "is to focus federal attention on the environmental human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection for all communities."<sup>59</sup> The Executive Order requires federal agencies to focus on environmental justice by requiring agencies to:

make achieving environmental justice part of its mission by identifying and addressing ... disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions" to "the greatest extent practicable and permitted by law."<sup>60</sup>

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<sup>55</sup> Lara P. Clark, Dylan B. Millet and Julian P. Marshall, *National Patterns in Environmental Justice and Inequality: Outdoor NO<sub>2</sub> Air Pollution in the United States*, available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0094431>.

<sup>56</sup> Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 Yale L J 1383 (1994), available at <http://www.jstor.org/stable/797089>.

<sup>57</sup> *Id.* Barney Warf, ed., *Locally Unwanted Land Uses* (Encyclopedia of Geography 2010) (Locally Unwanted Land Uses are "facilit[ies] whose siting is resisted by local residents," including "hazardous waste repositories, landfills, power plants, highways, and other projects that pose an environmental or health risk").

<sup>58</sup> Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended* in 42 U.S.C. § 4321 (hereinafter "Exec. Order No. 12,898").

<sup>59</sup> EPA, *Summary of Executive Order 12,898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, available at <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (last updated Nov. 16, 2015).

<sup>60</sup> *Id.*

To accomplish its goal, the Executive Order mandates federal agencies to collect data on the health and environmental impact of their programs and activities on minority and low-income populations.<sup>61</sup> Executive Order 12,898 also requires consideration of environmental justice in siting and permitting decisions.<sup>62</sup> “Siting decisions” are decisions “to locate a facility in a particular place or community.”<sup>63</sup> “Permitting decisions” are under what environmental restrictions or regulations a facility may operate.<sup>64</sup> Even though Executive Order 12,898 has the “goal of achieving environmental protection for all communities,” it disclaims its enforceability by stating that it does not create any substantive or procedural rights that are enforceable at law.<sup>65</sup>

### ***Other Permitting Statutory and Regulatory Authorities***

EPA has a wide-range of statutory authority to oversee or regulate activities that impact human health. EPA initially viewed its traditional authorities as being in conflict with its environmental justice and Title VI obligations. In 2000, EPA’s Office of General Counsel issued a memorandum exploring some of these statutory authorities and their use in achieving environmental protection for all communities.<sup>66</sup> Of relevance to the Commission’s examination of coal ash, the memorandum advocated the use of the Resource Conservation and Recovery Act (“Solid Waste Disposal Act” or “RCRA”) as a tool to consider the environmental justice impacts from the disposal of solid waste.<sup>67</sup> RCRA authorizes EPA to regulate the generation, transportation, treatment, storage, and disposal of hazardous wastes, and the management and disposal of solid waste.

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<sup>61</sup> Exec. Order No. 12,898, §§ 1-101. The Council on Environmental Quality defines low-income populations based on the annual statistical poverty thresholds from the Census Bureau’s Current Population Reports. “Minority” is defined as anyone who is American Indian or Alaska Native, Asian or Pacific Islander, black (non-Hispanic origin), or Hispanic. “Minority populations” are identified where “the minority population of an affected area exceeds 50 percent or the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population.” Council on Environmental Quality, Guidance Under the National Environmental Policy Act, December 1997, Appendix A, “Guidance for Federal Agencies on Key Terms in Executive Order 12898,” p. 25. *See, e.g.*, EPA, Response to the Commission’s Interrogatory Question, 43, April 2002 [hereinafter EPA, Response to Interrogatory Question].

<sup>62</sup> *See generally* Exec. Order 12,898.

<sup>63</sup> U.S. Comm’n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, Oct. 3, 2003, at 1, available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>. (citing *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, 469-77 (Michael B. Gerrard et al. eds., 2nd ed. 2008).)

<sup>64</sup> *Id.*

<sup>65</sup> *See generally* Exec. Order 12,898.

<sup>66</sup> Memorandum from Gary Guzy, General Counsel, to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assistance, EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting (Dec. 1, 2000) (reprinted at Gail C. Ginsberg, *Environmental Justice and Title VI of the Civil Rights Act of 1964*, June 2002, SG101 ALI-ABA 1009 at \*1019-1034).

<sup>67</sup> *Id.*

The memorandum discusses the scope of EPA's authority to address environmental justice issues within the context of the Solid Waste Disposal Act.<sup>68</sup> In 1995, the Environmental Appeals Board ("the Board") held:

when [an EPA] Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.<sup>69</sup>

The Board also found that RCRA allows EPA to "tak[e] a more refined look at its health and environmental impacts assessment in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations."<sup>70</sup> The memorandum explains that "[s]uch a close evaluation, could, in turn, justify permit conditions or denials based on disproportionately high and adverse human health or environmental effects, while 'a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community.'"<sup>71</sup>

## **Implementation of Environmental Justice by EPA**

EPA's mission is to protect human health and the environment.<sup>72</sup> EPA advances its mission through various program offices dedicated to developing policies and enforcing specific federal environmental laws. For example, EPA has a specific program office dedicated to developing policies on and enforcing the Clean Air Act. Additionally, EPA has ten regional offices throughout the United States and a headquarters office in Washington, D.C. The regional offices are responsible for ensuring that states within its region are complying with federal environmental laws and policies.

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<sup>68</sup> *Id.* (citing *Chemical Waste Management, Inc.*, 6 E.A.D. 66, 1995 WL 395962 (1995)).

<sup>69</sup> *Chemical Waste Management, Inc.*, 6 E.A.D. 66, 1995 WL 395962 (1995).

<sup>70</sup> *Id.*

<sup>71</sup> *Id. supra* n. 66 at 16.

<sup>72</sup> EPA, *Learn about the Environmental Justice*, available at <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (last updated Mar. 29, 2016).

## EPA REGIONS



Available in color at <https://www.epa.gov/aboutepa/visiting-regional-office>.

As part of its mission, EPA is tasked with protecting all Americans “from significant risks to human health and the environment where they live, learn[,] and work.”<sup>73</sup> EPA has also been directed to provide all Americans with “access to accurate information sufficient to effectively” to allow them to “participate in managing human health and environmental risks.”<sup>74</sup> These protections, as mandated through EPA’s environmental justice directives, apply to all persons regardless of race, color, national origin, or income.<sup>75</sup>

Within EPA, there are multiple offices responsible for carrying out the agency’s environmental justice directives. Two offices within the EPA share primary responsibility for promoting and ensuring environmental justice: the Office of Environmental Justice and the External Compliance Division within the Office of Civil Rights. Both of these offices have overlapping jurisdiction over environmental justice issues, but each office promotes environmental justice in a different manner. Additionally, anyone who has participated in the issuance of a permit may ask the Environmental Appeals Board to review any condition of that permit, including whether that permit complies with Executive Order 12,898. EPA also maintains a federal advisory committee on environmental justice issues known as the National Environmental Justice

<sup>73</sup> Our Mission and What We Do, Environmental Protection Agency, available at <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>.

<sup>74</sup> *Id.*

<sup>75</sup> Environmental Justice, Environmental Protection Agency, available at <https://www.epa.gov/environmentaljustice>.

Advisory Council. Finally, EPA has established an environmental justice coordinator within each of the regions.

### *Office of Environmental Justice*

EPA's Office of Environmental Equity, the precursor to the Office of Environmental Justice, was established in 1992.<sup>76</sup> In 1994, as part of implementing Executive Order 12,898, EPA renamed the Office of Environmental Equity to the Office of Environmental Justice and placed it under the purview of the Office of Enforcement and Compliance Assurance. The Office of Environmental Justice, has 22 full-time employees and Fiscal Year 2016 budget of \$4.5 million, and is charged with promoting environmental justice in EPA's programs, policies, and activities.<sup>77</sup> The Office of Environmental Justice has an environmental justice coordinator and offices in each of EPA's ten regions. Additionally, the Office of Environmental Justice coordinates with EPA's program offices to distribute and provide grants, awards, and programs to increase cooperation between various EPA stakeholders to advance EPA's environmental justice directives.

The Office of Environmental Justice's Small Grants Program is one of the most prominent programs in the Office of Environmental Justice. The Small Grants Program supports and empowers collaborative partnerships and communities to work on solutions to local environmental and public health issues.<sup>78</sup> Since 1994, the Small Grants Program has awarded more than \$24 million in funding to over 1,400 community-based organizations and local and tribal organizations working with communities facing environmental justice issues.<sup>79</sup>

The Office of Environmental Justice also runs the Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program.<sup>80</sup> This program provides EPA funding for projects addressing local environmental and public health issues within an affected community.<sup>81</sup> This program aims to promote environmental justice goals by promoting collaboration between various stakeholders ranging from communities to industry.<sup>82</sup>

EPA's Office of Environmental Justice has also worked to make "substantial progress over the past eight years furthering the inclusion of environmental justice considerations throughout

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<sup>76</sup> *Basic Information*, EPA, available at <http://www.epa.gov/environmentaljustice/basics/index.html>.

<sup>77</sup> EPA Comments in Response to Commission Interrogatories [hereinafter EPA Comment Sheet], *infra* Appendix D p. 205.

<sup>78</sup> *Environmental Justice Small Grants Program*, EPA, available at <http://www.epa.gov/environmentaljustice/grants/ej-smgrants.html>.

<sup>79</sup> *Id.*

<sup>80</sup> *EJ Collaborative Problem-Solving Cooperative Agreements Program*, EPA, available at <http://www.epa.gov/environmentaljustice/grants/ej-cps-grants.html>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

EPA's business practices."<sup>83</sup> For example, in 2011, EPA released its final draft of Plan EJ 2014.<sup>84</sup> According to then-EPA Administrator Lisa Jackson, "Plan EJ 2014 offers a road map that will enable [EPA] to better integrate environmental justice and civil rights into our programs, policies[,] and daily work." Administrator Jackson stated that EJ 2014 is "critical" for advancing environmental justice in "rulemaking, permitting, compliance and enforcement, community-based programs[,] and EPA's work with other federal agencies." Administrator Jackson stated that the plan also "establishes milestones" designed to aid EPA in addressing the needs of "overburdened neighborhoods" through "decision making, scientific analysis[,] and rulemaking."<sup>85</sup> EPA states that some accomplishments of Plan EJ 2014 include the release of EJScreen - an environmental justice screening and mapping tool. The Commission notes that EJScreen is difficult to use. In order to generate an environmental justice analysis, the user has to mark a location and then run a report. EJScreen provides percentages for environmental indicators, demographic indicators and an "EJ Indexes." The website does not explain what these terms mean or what they show. EPA made a user's guide for EJScreen available on June 16, 2016. The user's guide also does not explain what the terms are or what the particular reports show.

EPA also released EJ Legal tools, which identifies key legal authorities for EPA policy makers to consider, and its Technical Guidance for Assessing Environmental Justice in Regulatory Analysis - a guideline designed to aid EPA analysts "evaluate potential environmental justice concerns associated with EPA rulemaking actions."<sup>86</sup> EPA released its most current Technical Guidance for Assessing Environmental Justice in Regulatory Analysis in June 2016.<sup>87</sup>

EPA's Office of Environmental Justice also plans to build off of EJ 2014 by releasing Plan EJ 2020. EPA states that Plan EJ 2020 "will focus on a set of priorities that [EPA] has identified for high-level attention [for the years 2016 - 2020] to strategically move EPA's environmental justice practice to the next level."<sup>88</sup> According to EPA, Plan EJ 2020's priorities are centered around three goals:

1. "Deepen environmental justice practices within EPA programs to improve the health and environment of overburdened communities;"

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<sup>83</sup> EPA Comment Sheet, *infra* Appendix D, p. 205.

<sup>84</sup> Plan EJ 2014, U.S. EPA (Sep. 2011), *available at* <http://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF>.

<sup>85</sup> *Id.*

<sup>86</sup> EPA Comment Sheet, *infra* Appendix D, p. 205.

<sup>87</sup> Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, EPA (June 2016), *available at* [https://www.epa.gov/sites/production/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf).

<sup>88</sup> Plan EJ 2020, U.S. EPA, *available at* [https://www.epa.gov/sites/production/files/2016-05/documents/052216\\_ej\\_2020\\_strategic\\_plan\\_final\\_1.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_1.pdf).

2. “Work with partners to expand our positive impact with overburdened communities;” and
3. “Demonstrate progress on significant national environmental justice challenges.”<sup>89</sup>

Furthermore, EPA has developed a program called the “Making a Visible Difference in Communities” initiative to help directly address environmental justice issues with communities.<sup>90</sup> EPA states that this effort “provides coordinated and targeted technical expertise and resources to overburdened communities and supports their efforts to improve environmental outcomes.”<sup>91</sup>

### ***Office of Civil Rights***

The Office of Civil Rights is located under the EPA’s Office of the Administrator. The Office of Civil Rights “enforces federal civil rights laws that prohibit discrimination against members of the public by recipients of EPA funds.”<sup>92</sup> It also provides guidance in executing the agency’s equal opportunity programs and provides policy and technical assistance.<sup>93</sup> Additionally, the Office of Civil Rights manages several EPA programs and projects including: the External Complaints and Compliance Program, Employment Complaints Resolution, Affirmative Employment Analysis and Accountability, and Reasonable Accommodation.<sup>94</sup> According to EPA, “[w]hile OCR retains the primary authority and responsibility for carrying out the civil rights program, the orders clearly emphasize a “One-EPA” commitment with the support of a network of Deputy Civil Rights Officials (DCROs) established under the Orders to support the civil rights mission and ensure its success throughout EPA.”<sup>95</sup>

As relevant to this report, the Office of Civil Rights External Compliance Program is responsible for ensuring that recipients of EPA financial assistance comply with EPA’s non-discrimination policies pursuant to Title VI of the Civil Rights Act of 1964.<sup>96</sup> The External Compliance Program, as detailed later in this report, operates with a small number of staff members who are aided by a “robust internship program” that helps bring in resources to aid its staff.<sup>97</sup> Title VI

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<sup>89</sup> *Id.*

<sup>90</sup> EPA Comment Sheet, *infra* Appendix D, p. 205.

<sup>91</sup> *Id.*

<sup>92</sup> EPA, *Civil Rights*, available at <https://www.epa.gov/ocr> (last updated Apr. 29, 2016).

<sup>93</sup> *About the Office of Civil Rights (OCR)*, available at <https://www.epa.gov/aboutepa/about-office-civil-rights-ocr/> (last updated May 18, 2016).

<sup>94</sup> *Id.*

<sup>95</sup> EPA Comment Sheet, *infra* Appendix D, p. 215.

<sup>96</sup> EPA, *External Compliance and Complaints Program*, available at <https://www.epa.gov/ocr/external-compliance-and-complaints-program-title-vi> (last updated Oct. 4, 2015.).

<sup>97</sup> Velveta Golightly-Howell, January 22 Briefing Transcript [hereinafter “Briefing Transcript 1”], p. 53. In a supplemental statement to the Commission, Ms. Golightly-Howell clarified the Office of Civil Rights External Compliance Program has “eight staff members who manage and investigate complaints, provide technical

prohibits recipients of federal financial assistance from discriminating against persons on the basis of race, color, or national origin in their programs or activities.<sup>98</sup> The Office of Civil Rights regulates recipients of EPA financial assistance through regulations codified at 40 C.F.R. Part 7. The Office of Civil Rights is also developing policy guidance for applicants and recipients in the form of a Civil Rights Compliance Toolkit, which it intends to roll out in phases soon.<sup>99</sup>

### ***Environmental Appeals Board***

By regulation, the Environmental Appeals Board has authority to “review any condition of [a] permit decision,” when requested by “any person who filed comments on that draft permit or participated in the public hearing.”<sup>100</sup> The Board has an extensive history of reviewing whether the EPA’s actions comply with Executive Order 12,898, yet has never found a violation.<sup>101</sup> The Board views EPA’s efforts to comply with the Executive Order as an internal agency policy issue.

### ***National Environmental Justice Advisory Council***

The National Environmental Justice Advisory Committee is a federal advisory committee established to provide EPA advice and recommendations from those involved in environmental justice issues.<sup>102</sup> The National Environmental Justice Advisory Committee is comprised of representatives of numerous interests such as academia, community groups, industry and business representatives, environmental organizations, and state, local, and tribal governments in order to ensure balance through diverse dialogue and varying perspectives.<sup>103</sup> The National Environmental Justice Advisory Committee makes recommendations to EPA as to how to ensure that there are discussions about integrating environmental justice principles into EPA policies and initiatives.<sup>104</sup>

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assistance, respond to FOIAs and[,] and assist in the development of policy documents; one management official (Assistant Director) and one administrative program assistant.” Velveta Golightly-Howell, Supplemental Statement to the U.S. Commission on Civil Rights, Feb. 18, 2016, p. 4.

<sup>98</sup> 42 U.S.C. § 2000d et seq.

<sup>99</sup> EPA Comment Sheet, *infra* Appendix D, p. 215.

<sup>100</sup> 40 C.F.R. § 124.19(a).

<sup>101</sup> Nicholas C. Christiansen, *Environmental Justice: Deciphering The Maze Of A Private Right Of Action*, 81 Miss. L. J. 843, 868 (2012).

<sup>102</sup> EPA, *National Environmental Justice Advisory Council*, available at <https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council> (last updated May 11, 2016).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

## EPA'S ENFORCEMENT OF TITLE VI

The Title VI complaint process is the primary mechanism the public uses to report discrimination by recipients of EPA financial assistance. Under this process, EPA has the authority to withdraw or threaten to withdraw financial assistance in an attempt to force a recipient to come into compliance with EPA's Title VI nondiscrimination mandates.<sup>105</sup> EPA's ability to withdraw or threaten to withdraw financial assistance has the potential to be particularly effective against state environmental agencies, which typically receive millions of dollars of financial assistance from EPA yearly and regularly coordinate with EPA.<sup>106</sup> However, as detailed within this section, EPA has not been successful in utilizing its Title VI authority to ensure that states and other entities that receive EPA financial assistance comply with EPA's Title VI nondiscrimination mandates.

The Commission, academics, environmental justice organizations, and news outlets have extensively criticized EPA's management and handling of its Title VI external compliance program. This section discusses EPA's Office of Civil Rights' historic and current difficulties in complying with its regulatory timelines for processing its Title VI Complaints, lack of pre and post financial-award compliance reviews, and the identified staffing and budgetary issues. Finally, this section examines EPA's Office of Civil Rights' actions to address the documented problems surrounding its Title VI external compliance program.

### Title VI Complaints Process

Complainants who wish to file a grievance with EPA against a recipient of EPA financial assistance must file a complaint with EPA's Office of Civil Rights.<sup>107</sup> To file a complaint, a complainant must send written notice to EPA alleging that a recipient of EPA financial assistance has acted or has a discriminatory policy against a protected class.<sup>108</sup> An authorized representative such as an attorney or a representative from an organization may file the complaint on behalf of the complainant.<sup>109</sup> Title VI complaints must be filed within 180 days of the alleged discriminatory act by the recipient of EPA financial assistance.<sup>110</sup>

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<sup>105</sup> 40 C.F.R. § 7.130.

<sup>106</sup> See, e.g., EPA, *State Water Pollution Control Revolving Fund*, available at [http://yosemite.epa.gov.oarm.igms\\_egf.nsf/52f35d81cc937e5e85256fb6006df28e/5dd781b6a6a393f185257d6f0071648b!OpenDocument](http://yosemite.epa.gov.oarm.igms_egf.nsf/52f35d81cc937e5e85256fb6006df28e/5dd781b6a6a393f185257d6f0071648b!OpenDocument).

<sup>107</sup> 40 C.F.R. § 7.120(b).

<sup>108</sup> 40 C.F.R. § 7.120(b)(1).

<sup>109</sup> 40 C.F.R. § 7.120(a).

<sup>110</sup> 40 C.F.R. § 7.120(b)(2).

After receipt of a complaint, the Office of Civil Rights must notify both the complainant and the EPA-funded entity that the Office of Civil Rights has received a complaint.<sup>111</sup> The Office of Civil Rights must send this notice within 5 business days.<sup>112</sup> Within 20 days after sending the acknowledgment of the complaint, the Office of Civil Rights must conduct a jurisdictional analysis. After completion of the jurisdictional review, the regulations required that another notice is sent to both the complainant and the recipient of EPA assistance that the Office of Civil Rights has 1) accepted the complaint for investigation, 2) rejected the complaint, or 3) referred the complaint to another federal agency.<sup>113</sup>

For the Office of Civil Rights to accept a complaint, the complainant must first, as stated above, submit a written and signed complaint to EPA.<sup>114</sup> This requirement ensures that the complaint is not frivolous and also allows the Office of Civil Rights to have a written record that a complaint was filed. EPA takes measures to ensure that private complaints remain anonymous in addition to ensuring, as mandated by EPA regulations, that complainants are free from retaliation for filing a complaint.<sup>115</sup>

Second, the complaint must allege and adequately describe a discriminatory act that, if true, would constitute a violation of EPA's Title VI non-discrimination policies.<sup>116</sup> A discriminatory act that would constitute a violation would be an act discriminating against a protected class as defined under EPA's non-discrimination regulations. For example, an allegation that a decision has been made to place a waste disposal facility in a location that disproportionately impacts a minority community would constitute a discriminatory act.

Third, the complaint must indicate that a recipient of EPA financial assistance was responsible for the alleged discriminatory act.<sup>117</sup> In the context of Title VI enforcement, the term "financial assistance" does not necessarily equate to monetary grants or similar monetary awards.<sup>118</sup> "Financial assistance" may include the granting of use of federal facilities, personnel, or land grants.<sup>119</sup> Additionally, a "recipient" of federal assistance is not restricted to only the primary recipient of EPA financial assistance.<sup>120</sup> For example, the Office of Civil Rights may hold the

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<sup>111</sup> 40 C.F.R. § 7.120(c).

<sup>112</sup> *Id.*

<sup>113</sup> 40 C.F.R. § 7.120(d)(1)(i).

<sup>114</sup> 40 C.F.R. § 7.120(b).

<sup>115</sup> 40 C.F.R. § 7.100.

<sup>116</sup> 40 C.F.R. § 7.120(b)(1).

<sup>117</sup> 40 C.F.R. § 7.15.

<sup>118</sup> *See generally* *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67 (1983).

<sup>119</sup> *Id.*

<sup>120</sup> *See Title VI Legal Manual*, U.S. Department of Justice (1989), available at <https://www.justice.gov/crt/departments-justice-manuals-concerning-title-vi-civil-rights-act-1964>.

primary recipient of EPA assistance liable for the alleged discriminatory act by a third party if the primary recipient uses EPA funding to hire the third party.<sup>121</sup> The Office of Civil Rights determines whether an entity is a recipient of EPA assistance by searching through the EPA federal grants database.

The recipient of EPA assistance must also file the complaint with the Office of Civil Rights within 180 days of the alleged discriminatory act.<sup>122</sup> The Office of Civil Rights has the discretionary ability to waive this requirement for “good cause.”<sup>123</sup> If any of these requirements are missing, the Office of Civil Rights will reject the complaint. The Office of Civil Rights may also refer a complaint to another agency, if it determines that the named recipient received federal assistance from that agency, as opposed to from EPA.

Once EPA accepts a complaint for investigation, the Office of Civil Rights has 180 days to conduct an investigation.<sup>124</sup> Additionally, the Office of Civil Rights must also notify the recipient of EPA assistance that the Office of Civil Rights has accepted a complaint against them and invite them to submit a written response to the complaint’s allegations.<sup>125</sup>

At the conclusion of the investigation, the regulations require the Office of Civil Rights to issue an “Investigative Report” detailing its preliminary findings.<sup>126</sup> If the investigation does not find a violation of EPA’s Title VI regulations, then the Office of Civil Rights will dismiss the complaint and notify both the complainant and the targeted recipient of EPA financial assistance that the complaint has been dismissed.<sup>127</sup> If the Office of Civil Rights finds that the recipient did violate EPA’s non-discrimination regulations, the Office of Civil Rights will issue a preliminary finding of non-compliance, which includes recommendations for compliance and the right to engage in voluntary compliance negotiations.<sup>128</sup>

After receiving a finding of non-compliance, the recipient may 1) agree to the Office of Civil Rights’ recommendation and attempt to return to compliance, 2) propose other means of returning to compliance, or 3) protest the Office of Civil Rights’ decision and submit a written response that sufficiently demonstrates that the findings were incorrect.<sup>129</sup> If the recipient of EPA assistance does not take any of the actions stated above within 50 calendar days and also does

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<sup>121</sup> *Id.*

<sup>122</sup> 40 C.F.R. § 7.120(b)(2).

<sup>123</sup> *Id.*

<sup>124</sup> 40 C.F.R. § 7.115(c)(1).

<sup>125</sup> 40 C.F.R. § 7.120(d)(1)(i)-(iii).

<sup>126</sup> 40 C.F.R. § 7.115(c)(1).

<sup>127</sup> 40 C.F.R. § 7.120(g).

<sup>128</sup> 40 C.F.R. § 7.115(c)(1).

<sup>129</sup> 40 C.F.R. § 7.115(d)(1)-(2).

not comply with any of the Office of Civil Rights' attempts to aid in compliance, then the regulations require the Office of Civil Rights to begin procedures to end EPA's assistance.<sup>130</sup>

## Overview of EPA's Title VI Complaints from 1993 to 2016

EPA received approximately 290 Title VI complaints between 1993 and 2014.<sup>131</sup> EPA told the Commission that it received an additional 33 new complaints in 2015 and that so far in 2016, it has received 35. These Title VI complaints are broad in scope and raise a variety of environmental issues that disproportionately impact communities of color and low-income communities. Many of these Title VI complaints often claim environmental justice issues affecting low-income and communities of color.<sup>132</sup> For example, EPA received a complaint in 2013 alleging that a local government "did not take into consideration the effect [that a slaughter house] [would] have on ... homes in the area owned or rented by low income senior citizens, Blacks, and Hispanics."<sup>133</sup> As discussed below, other complaints have questioned discriminatory practices that impact migrant farmworkers, air and water quality, and the disposal of waste in communities of color.

## Repeated Criticisms of Non-Compliance with Regulatory Timelines

Multiple organizations have criticized EPA's Office of Civil Rights for not meeting its regulatory timelines for processing and handling the Title VI complaints it receives.<sup>134</sup> The regulatory timelines are provided above. While the regulations set clear deadlines for processing and handling of Title VI complaints, EPA's Office of Civil Rights has historically been and remains unable to meet its regulatory obligations to timely process its Title VI complaints.

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<sup>130</sup> 40 C.F.R. § 7.130(b).

<sup>131</sup> Complaints Filed with EPA under Title VI of the Civil Rights Act of 1964, EPA, *available at* <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>.

<sup>132</sup> *See Id.*

<sup>133</sup> EPA Title VI Complaint (Oct. 28, 2013), EPA, *available at* [https://www.epa.gov/sites/production/files/2014-05/documents/15r-13-r2\\_complaint\\_redacted.pdf](https://www.epa.gov/sites/production/files/2014-05/documents/15r-13-r2_complaint_redacted.pdf).

<sup>134</sup> *See, e.g.*, Deloitte Consulting, LLP, Evaluation of the EPA Office of Civil Rights, (Mar. 21, 2011), *available at* <https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf> [hereinafter Deloitte Evaluation]. *See also* EPA, *Recommendations for Developing a Model Civil Rights Program at The Environmental Protection Agency*, (Jan. 18, 2012), *available at* <http://www3.epa.gov/epahome/pdf/draftreport-1-18-12-v3.pdf>; Kristen Lombardi, Talia Buford& Ronnie Greene, *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Center for Public Integrity, The Center for Public Integrity, Aug. 3, 2015, *available at* <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>. EPA also conducted a self-assessment regarding its Civil Rights Program *available at* <http://www3.epa.gov/epahome/pdf/draftreport-1-18-12-v3.pdf>.

In 2003, the Commission released a report, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, analyzing how well several federal agencies, including EPA, were enforcing their Title VI mandates as it relates to Environmental Justice.<sup>135</sup> The Commission noted that EPA had 124 Title VI complaints on its docket in January 2002.<sup>136</sup> Of those 124 Title VI complaints, EPA had only processed 13 cases “in compliance with its own regulations.”<sup>137</sup> After examining the evidence, the Commission found that although EPA began addressing its Title VI complaint backlog between 1998 and 2001, EPA still had complaints on its docket that had been pending for extended periods of time.<sup>138</sup> Moreover, David Konisky, Associate Professor of Public and Environmental Affairs at the Indiana University, stated that “[i]n the case of state permitting decisions ... the EPA Office of Civil Rights has persistently failed to expeditiously handle Title VI complaints.”<sup>139</sup>

As discussed below, EPA has also faced multiple lawsuits for not following its regulatory time frames in processing complaints. One of these lawsuits led to the Ninth Circuit concluding that the allegations in that lawsuit were “not [an] isolated incident of untimeliness,” and that “EPA [had] failed to process a single complaint from 2006 to 2007 in accordance with its regulatory deadlines.”<sup>140</sup> The second lawsuit discussed below was filed after the complainant waited 16 years for EPA to finish the investigation. It is clear from the facts of the cases that EPA has not and continues not to comply with its regulatory deadlines. While this report only highlights two cases, the Center for Public Integrity conducted a comprehensive review that provides further factual information of EPA’s noncompliance with its regulatory timelines.

EPA has recognized its own short-comings in handling Title VI complaints and has hired outside consultants to evaluate its program. EPA has also conducted its own executive council review of how to improve its program. EPA has also undertaken to revise its regulatory time frames to be more open-ended. This effort appears designed to relieve EPA of the obligation of having a time frame, which would make it more difficult for outside groups to hold EPA accountable for processing complaints in a timely manner. EPA has also set a goal of conducting a limited number of pre and post-award compliance reviews. Yet, as discussed below, a hand full of compliance reviews per year will not capture the number of awards provided by EPA.

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<sup>135</sup> U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, (Oct. 2003) available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; see also 40 C.F.R. § 7.120(b)-(d).

<sup>138</sup> *Id.* at 55, 167 (2003).

<sup>139</sup> David Konisky, Statement to the U.S. Commission on Civil Rights, p. 3.

<sup>140</sup> *Rosemere Neighborhood Association v. EPA*, 581 F.3d 1169, 1175 (9th Cir. 2009).

### *Court Challenge to Length of Time to Process Complaint*

In 2007, the Rosemere Neighborhood Association filed a lawsuit against EPA for failing to follow its regulatory timelines for processing and handling Title VI complaints.<sup>141</sup> In 2003, the Rosemere Neighborhood Association filed a Title VI complaint with EPA's Office of Civil Rights alleging that the City of Vancouver, Washington, failed to properly use EPA financial assistance "to address lingering problems in low-income and minority communities in the City."<sup>142</sup> After the Rosemere Neighborhood Association filed its initial complaint with the Office of Civil Rights, the City of Vancouver "opened an inquiry" into the Rosemere Neighborhood Association that eventually resulted in the loss of the Rosemere Neighborhood Association's status as a "formal neighborhood association."<sup>143</sup> Consequently, the Rosemere Neighborhood Association filed a second complaint with the Office of Civil Rights alleging that the City of Vancouver retaliated against it for filing its initial 2003 Title VI complaint with EPA.<sup>144</sup>

Despite the 20-day regulatory timeline for accepting, rejecting, or referring a complaint to another federal agency, the Office of Civil Rights failed to act on the Rosemere Neighborhood Association's retaliation complaint for 18 months.<sup>145</sup> In June 2005, the Rosemere Neighborhood Association filed a lawsuit in federal district court against EPA seeking to compel its Office of Civil Rights to act on its retaliation complaint.<sup>146</sup> Six weeks after the Rosemere Neighborhood Association filed its lawsuit, the Office of Civil Rights notified the Rosemere Neighborhood Association that it had accepted its retaliatory complaint for investigation.<sup>147</sup> EPA then filed a motion to dismiss the lawsuit as moot.<sup>148</sup> The court granted the motion stating that "the delay was nothing 'more than an isolated instance of untimeliness and oversight,' and there was no evidence that the EPA's failure to act was a practice that EPA might resume in the future."<sup>149</sup>

With regard to the retaliation complaint, 18 months after the Office of Civil Rights had accepted the complaint, EPA had yet to issue a preliminary finding or recommendation in accordance with its regulations.<sup>150</sup> In February 2007, the Rosemere Neighborhood Association filed another lawsuit against EPA seeking an injunction compelling its Office of Civil Rights to complete an investigation of the Rosemere Neighborhood Association's retaliation complaint and issue a

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1171.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1172.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

preliminary finding.<sup>151</sup> On April 30, 2007, the Office of Civil Rights completed its investigation and concluded that although the City of Vancouver's timing of its inquiry against the Rosemere Neighborhood Association was "suspicious," the Office of Civil Rights was closing the complaint because the City of Vancouver's alleged retaliatory action against the Rosemere Neighborhood Association did not "amount to impermissible retaliation."<sup>152</sup> EPA then filed a motion in federal district court to dismiss the Rosemere Neighborhood Association's February 2007 lawsuit for mootness.<sup>153</sup>

In response to EPA's mootness argument, the court allowed the Rosemere Neighborhood Association to conduct limited discovery into the Office of Civil Rights' history of handling Title VI complaints.<sup>154</sup> During discovery, the Rosemere Neighborhood Association found data suggesting that the Office of Civil Rights "missed its regulatory deadlines in almost every complaint filed with the agency in recent years."<sup>155</sup> The Rosemere Neighborhood Association then amended its February 2007 lawsuit adding a "claim for injunctive relief to compel the Office of Civil Rights to process all Rosemere complaints filed in the next five years within the regulatory deadlines."<sup>156</sup> The Rosemere Neighborhood Association also stated that it intended to refile its initial Title VI complaint against Vancouver to include "better documentation of the funding nexus between the City and the EPA."<sup>157</sup> Additionally, the Rosemere Neighborhood Association refuted the Office of Civil Rights' mootness argument, arguing that the amended complaint was not moot because it ensured that the Office of Civil Rights would not delay processing the Rosemere Neighborhood Association's future refiling of the Rosemere Neighborhood Association's initial Title VI complaint against Vancouver.<sup>158</sup> The district court rejected the Rosemere Neighborhood Association's argument and granted the EPA's motion to dismiss the case for mootness.<sup>159</sup>

In 2009, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's ruling.<sup>160</sup> The Court of Appeals opined that the district court's ruling was based on a faulty assumption that the Office of Civil Rights' delays in processing the Rosemere Neighborhood Association

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Rosemere Neighborhood Association v. EPA*, 581 F.3d 1169 (9th Cir. 2009).

complaints were “isolated incident[s] of untimeliness.”<sup>161</sup> The Ninth Circuit found that “EPA’s [Office of Civil Rights] failed to process a *single* complaint from 2006 to 2007 in accordance with its regulatory deadlines.”<sup>162</sup> The Court of Appeals noted that the Rosemere Neighborhood Association’s experience was “sadly and unfortunately typical of those who appeal to [the Office of Civil Rights] to remedy civil violations.”<sup>163</sup>

### ***EPA-Commissioned Report***

EPA hired Deloitte Consulting to review its Title VI program. In March 2011, Deloitte released its report examining EPA’s ability to enforce its civil rights’ mandates.<sup>164</sup> With regard to Title VI enforcement, the report found that the Office of Civil Rights had not “adequately adjudicated Title VI complaints - those addressing allegations of discrimination against communities of citizens affected by environmental rules promulgated by the EPA.”<sup>165</sup> Deloitte reported that only “6 percent of the 247 Title VI complaints [at the time of the examination] have been accepted or dismissed within the Agency’s 20-day time limit.”<sup>166</sup> Deloitte also found, at the time of the report’s release, “there were numerous cases that have been awaiting action for up to four years” and two cases have been on EPA’s docket for more than eight years.<sup>167</sup> According to Deloitte, the complexity of the Title VI complaints filed to EPA, the Office of Civil Rights’ lack of a standard complaints process, the Office of Civil Rights’ staffing skills and competencies, and overall process impediments all contributed to the EPA’s Title VI complaint backlog.<sup>168</sup>

### ***Another Court Challenge for Administrative Delay in Processing Complaints***

On June 30, 2011, Plaintiffs, whose members reside in both Buttonwillow and Kettleman City, California, filed a lawsuit in federal district court against EPA for failing to comply with its

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<sup>161</sup> *Id.* at 1175.

<sup>162</sup> *Id.* at 1175.

<sup>163</sup> *Id.* at 1175.

<sup>164</sup> Deloitte Consulting, LLP, *Evaluation of the EPA Office of Civil Rights, 2011*, available at <http://www.environmental-lawyer.com/DeloitteReport.pdf>.

<sup>165</sup> *Id.* at 1.

<sup>166</sup> *Id.* at 2; 40 C.F.R. § 7.120(d)(1)(i) (mandating OCR to review the complaint for acceptance, rejection, or referral to the appropriate Federal agency within 20 days of EPA’s acknowledgement of the complaint).

<sup>167</sup> Deloitte Consulting, LLP, *Evaluation of the EPA Office of Civil Rights, 2011*, available at <https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf>.

<sup>168</sup> *Id.* at 25-27. Deloitte’s key observations were that: 1) 50 percent of Title VI cases took over one year to be accepted, 2) 55 percent of Title VI cases involved permitting, enforcement, and public participation/involvement; 3) EPA does not have a tracking system that monitors investigations and complaints and lengthy case management timelines, 4) EPA does not provide recipients Title VI compliance guidance, and 5) the Office of Civil Rights only provides web-based training programs for its outreach and Title VI training.

regulatory timelines for processing and handling Title VI Complaints.<sup>169</sup> Prior to filing their lawsuit against EPA, Plaintiffs had filed a Title VI discrimination complaint against ten California agencies and the owners of two California toxic-waste disposal sites on December 12, 1994.<sup>170</sup> The toxic disposal sites were located in both cities. The California agencies were EPA funded recipients and were responsible for permitting decisions and overseeing the toxic waste sites. Both Buttonwillow and Kettleman City have a majority Latino population, “and a substantial portion” of the population in both cities live below the poverty line.<sup>171</sup>

In Plaintiffs’ December 12, 1994, Title VI complaint, they alleged that the ten California agencies and the two owners of the toxic waste sites discriminated against Plaintiffs when siting, permitting, expanding, and operating the toxic-waste sites.<sup>172</sup> On July 18, 1995, approximately eight months after Plaintiffs filed their Title VI complaint with EPA, EPA notified Plaintiffs that it had accepted the complaint for investigation.<sup>173</sup> Again, as stated above, EPA regulations require its Office of Civil Rights to issue acceptance letters 20 days after receiving a complaint.<sup>174</sup>

On June 30, 2011, approximately 16 years after EPA’s Office of Civil Rights accepted Plaintiff’s Title VI complaint, Plaintiffs filed a lawsuit against EPA alleging that its Office of Civil Rights had failed and continued to fail to comply with its regulatory timeline requiring the Office of Civil Rights to issue a preliminary finding and recommendations within 180 days of accepting a Title VI complaint for investigation.<sup>175</sup> In their lawsuit, Plaintiffs sought declaratory and injunctive relief “so that EPA will comply” with its regulatory timeline.<sup>176</sup> On August 30, 2012, 17 years after the Office of Civil Rights accepted Plaintiff’s Title VI complaint for investigation, EPA “completed their regulatory duties and issued a letter of dismissal.”<sup>177</sup> The court ultimately dismissed the Plaintiffs’ case as moot because EPA eventually met its regulatory obligations.

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<sup>169</sup> *Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057, 1060 (E.D. Cal. 2013) *aff’d sub nom.* *Padres Hacia Una Vida Mejor v. McCarthy*, 614 F. App’x 895 (9th Cir. 2015).

<sup>170</sup> *Id.* at 1060.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> 40 C.F.R. § 7.120(d)(i).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

### *Review by the Center for Public Integrity*

In 2015, the Center for Public Integrity published a series of articles investigating EPA’s Office of Civil Rights’ record on processing and handling its Title VI non-discrimination complaints.<sup>178</sup> As part of its review, the Center for Public Integrity filed a Freedom of Information Act request with EPA seeking “every Title VI complaint submitted to the office, and every resolution of those complaints, since the mid-1990s.” According to the Center for Public Integrity, EPA provided most of the complaints within the requested time frame. The Center for Public Integrity noted that the records that EPA provided consisted of “thousands of pages of documents” and “256 Title VI cases [stretching] from 1996 to mid-2013.”<sup>179</sup> While the Commission requested this same information (per 42 U.S.C. §§ 1975a(e)(4), 1975b(e), EPA did not provide it. EPA did eventually provide answers to questions regarding this draft report. Those responses are provided in Appendix D.

To process and study the vast amount of material EPA provided, the Center for Public Integrity “cross-referenced the data [it] received with that included in EPA’s online database.”<sup>180</sup> The Center for Public Integrity found that EPA’s online database was “missing cases, [had] inaccurate dates[,] and other discrepancies.”<sup>181</sup> The Center for Public Integrity indicated that some of the more troubling discrepancies were that some of the case numbers it received from EPA were not on the website, EPA had listed some cases as “pending” although the Center for Public Integrity had “documents indicating that they had been resolved,” and that EPA “reported receiving cases days or weeks before they were actually filed.”<sup>182</sup>

The Center for Public Integrity also sought to standardize the data it received and ensure that the records were accurate and complete:

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<sup>178</sup> Kristen Lombardi, et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>; Yue Qui, Talia Buford, *Decades of Inaction*, Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17726/decades-inaction>; *How We Acquired and Analyzed data for “Environmental Justice, Denied,”* Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17724/how-we-acquired-and-analyzed-data-environmental-justice-denied>; Talia Buford, *Thirteen Years and Counting Anatomy of an EPA Civil Rights Investigation*, Center for Public Integrity, Aug. 7, 2015, available at <http://www.publicintegrity.org/2015/08/07/17706/thirteen-years-and-counting-anatomy-epa-civil-rights-investigation>.

<sup>179</sup> *How We Acquired and Analyzed data for “Environmental Justice, Denied,”* Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17724/how-we-acquired-and-analyzed-data-environmental-justice-denied>.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

We began by entering into our own database case information gleaned from more than 500 documents. If cases were missing data or final outcomes previously published by the EPA, the Center included that information. When information in the EPA's database differed from the information we had in case files, we went with the latter. For consistency, the Center categorized the adjudication of cases as follows:

- **Denied:** Cases that did not pass a jurisdictional review because they missed the 180-day time limit; the agency targeted in the complaint didn't receive EPA financial assistance; or the complaint didn't describe an act covered by Title VI of the Civil Rights Act of 1964.
- **Dismissed:** Cases that were accepted for investigation, but in which the EPA did not find a discriminatory act; cases that were put on hold or dismissed due to concurrent pending litigation.
- **Closed:** Cases that were withdrawn by the complainant, referred to another federal agency with subject-matter expertise, or resolved through an agreement or settlement with the target of the complaint.
- **Pending:** Cases that are awaiting jurisdictional review or final outcome.<sup>183</sup>

To determine whether the Office of Civil Rights was complying with its regulatory 20-day timeline for jurisdictional review, the Center for Public Integrity used "either the date the complainant was notified of the outcome or the date EPA first reached out to the complainant for clarifying information about the case."<sup>184</sup> The Center for Public Integrity felt that this approach would be the best representation of when EPA took action on a case. Additionally, the Center for Public Integrity omitted cases that were pending when calculating how long cases took "to wind through the review process."<sup>185</sup> The Center for Public Integrity noted that "[a]llegations of environmental discrimination comprise only a sliver of the [Office of Civil Rights'] enforcement mandate."<sup>186</sup>

After the Center for Public Integrity organized and reviewed its data, its findings showed an inability to meet its regulatory timelines.<sup>187</sup> The Center for Public Integrity found that in cases

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Kristen Lombardi, et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>.

that the Office of Civil Rights dismissed as moot, “EPA took on average, 254 days - excluding weekends and holidays” to make a jurisdictional decision.<sup>188</sup> Furthermore, the Center for Public Integrity found that the Office of Civil Rights takes on average “350 days to decide whether to investigate a case.”<sup>189</sup> In nine Title VI complaints, the Office of Civil Rights took on average 367 days - “the [Office of Civil Rights] took so long ... that investigators had to dismiss the allegations as ‘moot.’”<sup>190</sup> Moreover, 17 communities have been waiting for more than half a decade for the Office of Civil Rights to review their Title VI complaints.<sup>191</sup>

The Center for Public Integrity also highlighted an instance where a Title VI complainant had to wait 13 years for the Office of Civil Rights to respond only for the Office of Civil Rights to request “additional information.”<sup>192</sup> In 2002, Deborah Reade, then research director for Citizens for Alternatives to Radioactive Dumping, filed a Title VI complaint with EPA.<sup>193</sup> Her complaint alleged that the New Mexico Environment Department engaged in a pattern of discrimination against Spanish speaking residents in New Mexico.<sup>194</sup> Deborah Reade stated that the New Mexico Environment Department made it difficult for Spanish-speaking residents to voice their concerns during a public participation process for a proposed commercial hazardous-waste disposal site.<sup>195</sup> Deborah Reade did not hear anything from EPA’s Office of Civil Rights until 2014.<sup>196</sup>

## Recent Attempts to Address Timeliness Compliance

### *Publication of Interim Case Resolution Manual*

In December 2015, the Office of Civil Rights published an Interim Case Resolution Manual detailing procedures, references, and management tools “for addressing all phases of the case resolution process for external civil rights cases.”<sup>197</sup> The Office of Civil Rights created this

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Talia Buford, *Thirteen Years and Counting Anatomy of an EPA Civil Rights Investigation*, Center for Public Integrity, Aug. 7, 2015, available at <http://www.publicintegrity.org/2015/08/07/17706/thirteen-years-and-counting-anatomy-epa-civil-rights-investigation>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> EPA, *Interim Case Resolution Manual: Executive Summary*, p. ii, (Dec. 1, 2015) available at [https://www.epa.gov/sites/production/files/2015-12/documents/ocr\\_crm\\_final.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf).

manual and the corresponding Strategic Case Management Plan to ensure that cases would be processed and investigated in a timely manner.<sup>198</sup> The Interim Case Resolution Manual covers procedures regarding collaboration with the regional Deputy Civil Rights Officials, evaluating complaints, preliminary and subsequent investigations and resolutions, voluntary compliance and compliance reviews, monitoring, and enforcement.<sup>199</sup>

According to the Interim Case Resolution Manual, the “opening” date for a complaint is the business day that the Office of Civil Rights receives the correspondence.<sup>200</sup> During the target time frame of 1-5 days following the receipt of the correspondence, the Office of Civil Rights will acknowledge the receipt of a complaint, begin evaluations, and initiate the management and tracking of said case.<sup>201</sup> The Office of Civil Rights aims to notify the Deputy Civil Rights Officials of the correspondence 1-10 days after receipt.<sup>202</sup>

Within the target time frame of 1-45 days after receiving a complaint, the Office of Civil Rights intends to complete: the jurisdictional review; acceptance, rejection, or referral of the case; drafting a desk statement; and issuing a letter of acceptance.<sup>203</sup>

During the target time frame of 45-90 days after receipt, the Office of Civil Rights plans to complete early case planning, determining if external compliance review or alternative dispute resolution is appropriate, determining the Office of Civil Rights’ need for more information or data, and considering a potential informal resolution. Furthermore, the Interim Case Resolution Manual allows the Office of Civil Rights to suspend its investigation for 30 calendar days to attempt to reach an agreement between the complainant and the targeted Title VI recipient of the complaint. The investigation will resume if an agreement is not reached.<sup>204</sup>

The Interim Case Resolution Manual emphasizes that by 90 business days after the receipt of correspondence, the Office of Civil Rights should have completed the “jurisdictional review, preliminary resolution attempts, and preliminary investigation.”<sup>205</sup> Following 90 business days after receiving the complaint, the Office of Civil Rights will continue its investigation of unresolved issues.<sup>206</sup> If informal resolution is not attainable, then the Office of Civil Rights will

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at iv-v.

<sup>200</sup> *Id.* at 5.

<sup>201</sup> *Id.* at 36.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 37-41.

<sup>204</sup> *Id.* at 19.

<sup>205</sup> *Id.* at 48.

<sup>206</sup> *Id.* at 49.

continue with post-acceptance procedures with regard to compliance and enforcement.<sup>207</sup> According to Velveta Golightly-Howell, Director of EPA’s Office of Civil Rights, “[the interim case resolution manual] includes specific goals and target dates for ensuring timely and effective processing, particularly within the first 90 calendar days after receiving a complaint, and creates accountability for OCR staff by clearly identifying expectations.”<sup>208</sup>

### ***Proposed Rulemaking and Timeliness***

Working in tandem with its Interim Case Resolution Manual, on December 14, 2015, EPA issued a notice of proposed rulemaking seeking to enhance the Office of Civil Rights’ Title VI compliance program and “ensure prompt, effective and efficient civil rights nondiscrimination compliant docket management.”<sup>209</sup> Specifically, EPA proposed to eliminate language in its regulations concerning when EPA may require recipients of EPA financial assistance to submit information and data to EPA detailing their Title VI compliance and also amend EPA’s Title VI compliance procedures.<sup>210</sup> EPA stated that the amendments will not only give EPA “discretion and flexibility” in running its Title VI compliance programs, but also “improve the EPA’s ability to ensure that recipients of federal financial assistance comply with their affirmative obligations under the Civil Rights Act of 1965 and other nondiscrimination statutes not to discriminate.”<sup>211</sup>

In its notice of proposed rulemaking, EPA seeks to eliminate its regulatory deadlines for processing and investigating its Title VI complaints. As indicated earlier in this section, the Office of Civil Rights is required, within 5 days of receiving a Title VI complaint against a recipient of EPA financial assistance, to notify the complainant and the recipient of EPA financial assistance that the Office of Civil Rights received the complaint.<sup>212</sup> After the Office of Civil Rights sends its acknowledgement notice, it has 20 days to complete a jurisdictional review to determine whether the Office of Civil Rights will accept, reject, or refer the complaint to another federal agency.<sup>213</sup> If the Office of Civil Rights accepts a complaint, it has 180 days to

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<sup>207</sup> *Id.*

<sup>208</sup> Velveta Golightly-Howell, Briefing Transcript 1, p. 16.

<sup>209</sup> Environmental Protection Agency, *FAQs for Civil Right Nondiscrimination Regulation Notice of Proposed Rule Making*, p. 3, (Dec. 1, 2015), available at [https://www.epa.gov/sites/production/files/2015-12/documents/nprm\\_faqs\\_final\\_draft.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/nprm_faqs_final_draft.pdf). [hereinafter EPA, FAQs]; EPA, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, Notice of Proposed Rule Making, 80 Fed. Reg. 77,284 (Dec. 14, 2015).

<sup>210</sup> Environmental Protection Agency, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, Notice of Proposed Rule Making, 80 Fed. Reg. 77,284, and 77,286 (Dec. 14, 2015).

<sup>211</sup> *Id.*

<sup>212</sup> 40 C.F.R. § 7.120(c).

<sup>213</sup> 40 C.F.R. § 7.120(d)(i).

conduct an investigation.<sup>214</sup> EPA's proposal would eliminate all of these deadlines related to processing and investigating Title VI complaints and replace them with nonbinding language.<sup>215</sup>

According to EPA, these deadlines are impracticable at all stages of Title VI complaint process given the complexity and volume of the complaints EPA receives.<sup>216</sup> EPA states that eliminating the deadlines would ensure that EPA has the flexibility to improve its External Compliance and Complaints programs.<sup>217</sup> EPA claims that the removal of the deadlines would allow EPA to conduct thorough and comprehensive initial complaint reviews "to identify the most appropriate path to resolve" a complaint.<sup>218</sup>

Opponents of the amendments argue that there is very little evidence that the deadlines are impractical or that the complexity of complaints would affect whether EPA can comply with current deadlines.<sup>219</sup> According to Marianne Engelman-Lado, Senior Counsel for Earthjustice, "[i]t is hard to imagine any basis, given the availability of email, for getting rid of a requirement to just notify people that you received a complaint."<sup>220</sup> The Duke Environmental Law and Policy Clinic, in its public comment opposing EPA's amendment, stated that "[d]espite the legal and scientific complexities complaints may raise, making this jurisdictional determination under § 7.120(d) does not require an in-depth analysis of the merits of the complaint."<sup>221</sup> The Duke Environmental Law and Policy Clinic raises a valid point. According to 40 C.F.R. § 7.120(b), the Office of Civil Rights has jurisdiction over a complaint if the complaint is in writing, the complaint alleges that a recipient of EPA financial assistance violated EPA's Title VI regulations, and the complaint was filed within 180 days of the alleged discriminatory act.<sup>222</sup> The current regulation also provides EPA the ability to waive the 180 days statute of limitations.<sup>223</sup> If a complaint is in writing and a complainant files the complaint to EPA within 180 days of the alleged discriminatory act, it should not be difficult to determine if the alleged violator is a

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<sup>214</sup> 40 C.F.R. § 7.115(c)(1).

<sup>215</sup> 80 Fed. Reg. 77,287.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> David Schwartz, Duke Environmental Law and Policy Clinic, Public Comment to EPA 80 Fed. Reg. 77,287, p. 5, available at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0034>; See also David Ludder, Public Comment to EPA 80 Fed. Reg. 77,287, available at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0046>.

<sup>220</sup> Marianne Engelman-Lado, Briefing Transcript 2, p. 219.

<sup>221</sup> David Schwartz, Duke Environmental Law and Policy Center, Public Comment to EPA 80 Fed. Reg. 77,287, p. 5, available at <https://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dct=PS;D=EPA-HQ-OA-2013-0031>.

<sup>222</sup> 40 C.F.R. § 7.120(b)(1)-(2). See also Environmental Protection Agency, *FAQs for Civil Right Nondiscrimination Regulation Notice of Proposed Rule Making*, p. 2, Dec. 1, 2015, available at [https://www.epa.gov/sites/production/files/2015-12/documents/nprm\\_faqs\\_final\\_draft.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/nprm_faqs_final_draft.pdf).

<sup>223</sup> *Id.*

recipient of EPA financial assistance - assuming EPA keeps records of what entities are granted EPA financial assistance. With regard to the five and 20 day deadlines, Earthjustice notes that sending a notice of receipt and notice of acceptance, rejection, or referral could be as easy as sending an email.<sup>224</sup>

Earthjustice also argues that removing timelines would not create accountability and EPA's actions are arbitrary and capricious.<sup>225</sup> Moreover, the Environmental Council of States indicated that "removing timeframes in favor of "promptly" provides no expectation of when information should be provided and may add uncertainty and less visibility about that process for both recipients and complaints."<sup>226</sup>

On the other hand, the Business Network for Environmental Justice supports the proposed change, noting in its comment that EPA rarely meets the deadlines and that "there is no basis in Title VI or its legislative history for these very short deadlines, which are not found in the Title VI rules of most other federal funding agencies."<sup>227</sup> The Business Network suggests instead that EPA provide complainants and recipients with an estimated timetable of its investigation.

With regard to EPA's 180-day complaint investigation regulatory deadline, opponents of the amendment argued that eliminating this deadline would not solve the Office of Civil Rights' complaint backlog, but further exacerbate it.<sup>228</sup> According to the Chicago Environmental Justice Network, "investigations are not only indefinitely delayed," but are also "almost never brought to complete conclusion."<sup>229</sup> David Ludder, a panelist at the Commission's briefing, stated that EPA takes an average of over 1000 days to conclude an investigation.<sup>230</sup> The Commission notes that EPA's failure to abide by regulatory timelines is easily seen when analyzing their website listing Title VI complaints.<sup>231</sup> For example, EPA received Title VI Complaint 15R-13-R3 on

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<sup>224</sup> Marianne Engleman-Lado, Earth Justice et al, Public Comment to EPA 80 Fed. Reg. 77,287, available at <https://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dct=PS;D=EPA-HQ-OA-2013-0031>.

<sup>225</sup> *Id.*

<sup>226</sup> Environmental Council of States, Public Comment to EPA 80 Fed. Reg. 77,287, p. 4, available at <https://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dct=PS;D=EPA-HQ-OA-2013-0031>.

<sup>227</sup> Gregory I. Bertelsen, Senior Director, Energy and Resources Policy, Nat'l Assoc. of Manufacturers on behalf of Business Network for Environmental Justice, Public Comment to EPA 80 Fed. Reg. 77,287, pp. 5-6, available at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0086>.

<sup>228</sup> David Schwarts, Duke Environmental Law and Policy Center, Public Comment to EPA 80 Fed. Reg. 77,287, p. 5, available at <https://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dct=PS;D=EPA-HQ-OA-2013-0031>.

<sup>229</sup> Chicago Environmental Justice Network, Public Comment to EPA 80 Fed. Reg. 77,287, 5, available at <https://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dct=PS;D=EPA-HQ-OA-2013-0031>.

<sup>230</sup> David Ludder, Public Comment to EPA 80 Fed. Reg. 77,287, p. 5, available at <https://www.regulations.gov/#!docketBrowser;rpp=25;po=25;dct=PS;D=EPA-HQ-OA-2013-0031>.

<sup>231</sup> EPA Title VI Complaints, EPA, available at <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>.

October 31, 2013. As of the publishing of this report, the case is still awaiting jurisdictional review.<sup>232</sup>

## **Enforcement and Compliance Reviews**

Current EPA regulations allow the Office of Civil Rights to withdraw or deny EPA financial assistance to recipients who, after an investigation, the Office of Civil Rights finds to be noncompliant with its Title VI nondiscrimination policies.<sup>233</sup> The following subsections provide evidence indicating that EPA’s Office of Civil Rights has “decades of inaction”<sup>234</sup> to the detriment of minority and low-income communities.

### ***Lack of Pre-Award Compliance Enforcement***

Current EPA regulations require the Office of Civil Rights to determine the eligibility of an applicant for EPA financial assistance.<sup>235</sup> In order to apply for EPA financial assistance, applicants must submit EPA Form 4700-4, which asks for the following information:

- 1) Notice of any lawsuit pending against the applicant alleging discrimination on a protected class;
- 2) A brief description of any applications pending to other Federal agencies for assistance, and the Federal assistance being provided at the time of the application; and
- 3) A statement describing any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, and information concerning the agency or organization performing the reviews.<sup>236</sup>

During the review process, Office of Civil Rights staff members “often work with grant offices and regional partners to review” any submitted EPA Form 4700-4. According to the Director of the Office of Civil Rights, while the Office of Civil Rights is involved with the review process, it does not participate in on-site reviews.<sup>237</sup>

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<sup>232</sup> *Id.*

<sup>233</sup> 40 C.F.R. § 7.130(a).

<sup>234</sup> Kristen Lombardi, et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>.

<sup>235</sup> 40 C.F.R. § 7.110.

<sup>236</sup> 40 C.F.R. § 7.80(c).

<sup>237</sup> Velveta Golightly-Howell, Supplemental Statement, p. 3.

According to David Ludder, “the information required by EPA Form 4700-4 is insufficient to allow EPA to determine whether an applicant for financial assistance is currently in compliance with 40 C.F.R. Part 7.”<sup>238</sup> Furthermore, David Ludder states that EPA’s procedures do not proactively ensure that recipients of EPA financial assistance will not violate Title VI requirements in the future.<sup>239</sup>

### ***Lack of Post-Award Enforcement***

EPA regulations authorize the Office of Civil Rights to conduct post-award compliance reviews of recipients of EPA Financial Assistance to ensure compliance with EPA’s non-discrimination policies.<sup>240</sup> Currently, the Office of Civil Rights may only request documents from recipients of EPA financial assistance or conduct a compliance review investigation of a recipient of EPA financial assistance if the Office of Civil Rights has reason to believe that discrimination exists in a recipients program or activity.<sup>241</sup> According to David Ludder, the Office of Civil Rights “does very little to ensure compliance” after EPA grants a recipient financial assistance. According to EPA, since 2010, the Office of Civil Rights has only “completed one post-award compliance review.”<sup>242</sup>

EPA has started a pilot program to supplement their post-award compliance program. The Director of the Office of Civil Rights explained that “As a pilot program, during [EPA’s Office of Grants and Debarment], OCR staff selected five recipients from which to solicit civil rights information.”<sup>243</sup> According to Ms. Golightly-Howell, “[u]pon receipt of the requested information, OCR staff and management began assessing whether the information received suggested possible non-compliance with EPA’s nondiscrimination regulations.”<sup>244</sup> Although EPA discontinued the program, the Office of Civil Rights’ Strategic Plan for 2015 to 2020 will instead take a phased approach to conducting post[-]award compliance reviews.<sup>245</sup>

The Office of Civil Rights’ “phased approach” has drawn some criticism due to the length and narrow scope of implementation. EPA’s “phased approach commits the Office of Civil Rights to conduct two compliance reviews in 2016, six compliance reviews annually by 2018, eleven

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<sup>238</sup> David Ludder, Written Statement, p. 9.

<sup>239</sup> *Id.*

<sup>240</sup> 40 C.F.R. § 7.115(a).

<sup>241</sup> *Id.*

<sup>242</sup> EPA Comment Sheet, *infra* Appendix D, p. 214. (“On December 15, 2011, EPA entered into an Agreement with the Louisiana Department of Agriculture and Forestry to resolve a civil rights complaint filed under Title VI of the Civil Rights Act of 1964 and a limited English Proficiency Compliance review conducted by EPA pursuant to its authority under Title VI.”).

<sup>243</sup> Velveta Golightly-Howell, Supplemental Statement, p. 3.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

compliance reviews annually by 2021, and 22 compliance reviews annually by 2024.<sup>246</sup> According to Mr. Ludder, this “phased approach” would require “EPA to review 800 financial assistance recipients for compliance, and that will take 40 years.”<sup>247</sup> Mr. Ludder articulated that such an approach is “totally unacceptable.”<sup>248</sup> The Commission shares this concern particularly because EPA told Commission staff that “[i]n FY 2015, EPA awarded financial assistance to 2105 grantees ... [and] [a]s of June 14, 2016” EPA [has] awarded financial assistance to 1198 grantees.”<sup>249</sup>

### ***Rejection of the Majority of Complaints***

Since being established in 1993 and having nearly 300 Title VI complaints in its docket, EPA’s Office of Civil Rights has never made a formal finding of discrimination.<sup>250</sup> EPA has never denied or withdrawn financial assistance from a recipient.<sup>251</sup> Despite its regulatory authority to withdraw financial assistance from recipients, the Office of Civil Rights has long “avoided pushing civil rights complaints alleging discrimination based on disparate impact for fear that the agency would lose such a case if challenged in court, even though almost all the Title VI complaints over the last two decades are based on the theory.”<sup>252</sup>

According to the 2015 Center for Public Integrity’s investigative study, EPA’s Office of Civil Rights has historically rejected or dismissed a majority of the Title VI complaints that it received.<sup>253</sup> The Center for Public Integrity study also indicated that when there was reason to believe that an EPA recipient has a discriminatory policy, the Office of Civil Rights still neglected to conduct an investigation.<sup>254</sup>

The Office of Civil Rights may reject a case for numerous reasons. The Center for Public integrity found that the Office of Civil Rights rejected 95 complaints because the target of the

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<sup>246</sup> EPA Comment Sheet, *infra* Appendix D, p.214.

<sup>247</sup> David Ludder, Briefing Transcript 2, pp. 271-72.

<sup>248</sup> *Id.*

<sup>249</sup> “These numbers reflect EPA prime recipients of EPA financial assistance only.” EPA Comment Sheet, *infra* Appendix D, p. 215.

<sup>250</sup> See EPA Title VI Complaints, EPA, available at <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>.

<sup>251</sup> *Id.*

<sup>252</sup> *Jackson Shuffling of Key EPA Civil Rights Office State Sparks Criticism*, InsideEPA.com, Vol. 30, No. 38 (Dec. 4, 2009).

<sup>253</sup> Kristen Lombardi, et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Center for Public Integrity, Aug. 3, 2015, available at <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>.

<sup>254</sup> *Id.*

complaint was not a recipient of EPA financial assistance.<sup>255</sup> The Office of Civil Rights is justified in denying these sorts of claims because in order for EPA to have jurisdiction over the complaint, the target of the complaint must be a recipient of EPA financial assistance. However, the Center for Public Integrity noted that of the complaints where the target of the complaint did receive EPA financial assistance, the Office of Civil Rights rejected 62 complaints because the complaints fell outside of the 180-day time limit to file a complaint with EPA. The Office of Civil Rights has the authority to waive the 180-day time limit for good cause.<sup>256</sup> Additionally, the Center for Public Integrity found that the Office of Civil Rights rejected 52 complaints for failing to properly allege a forbidden discriminatory act pursuant to Title VI.

The Commission compared the Center of Public Integrity's findings with its own research and found similar results. Using EPA's website and supplemental information provided that EPA provided the Commission, the Commission found that:

- Between 1993 and 2014 (this period reflects what is publically available on EPA's website), EPA rejected 179 complaints, dismissed 57 complaints, referred 14 complaints, resolved 13 complaints, and accepted 14 complaints.
- Since issuing the interim case resolution manual in December 2015 and June 2016, the Office of Civil Rights has received 25 Title VI complaints and resolved 15.<sup>257</sup>
- "Of the 15 resolved, 11 were rejected for lack of jurisdiction, with one of those 11 cases being referred to a state agency[,] [t]wo complaints were withdrawn by the complainants[,] [and] [t]wo cases were closed with a finding of insufficient evidence to support a conclusion of noncompliance."<sup>258</sup>
- From June 28, 2016, through July 6, 2016, the Office of Civil Rights resolved three additional cases.<sup>259</sup> In all three, EPA rejected the complaints due to a lack of jurisdiction.<sup>260</sup>
- As of June 27, 2016, the Office of Civil Rights has 32 Title VI complaints awaiting jurisdictional review, with the oldest complaint being from July 2013.<sup>261</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> 40 C.F.R. § 7.120(b)(2).

<sup>257</sup> EPA Comment Sheet, *infra* Appendix D, p. 216.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 16.

### *Failure to Include Community Stakeholders When Settling Complaints*

When the Office of Civil Rights accepts a complaint for investigation, the Office of Civil Rights will often attempt to resolve the complaint through informal methods such as Alternative Dispute Resolution or some other form of informal resolution, as encouraged by EPA's regulations.<sup>262</sup> Even when the Office of Civil Rights utilizes informal resolution, often times, as illustrated in the Title VI complaint below, the Office of Civil Rights will not include the affected communities in the settlement process nor will it withhold its financial assistance from a recipient despite finding a discriminatory practice in violation of Title VI.

The Angelita C case is an example of this practice. On June 30, 1999, residents of California filed a Title VI complaint with EPA's Office of Civil Rights alleging that the California Department of Pesticide Regulation was discriminating against Latino school children by permitting the use of methyl bromide, a highly toxic fumigant, near schools.<sup>263</sup> The complaint stated that "[s]chool children of color in California suffer a much greater risk of exposure to the deadly agricultural chemical methyl bromide than their white counterparts."<sup>264</sup> On December 11, 2001, more than two years after the complainants initially filed their complaint; the Office of Civil Rights accepted the complaint for investigation.

On April 22, 2011, more than ten years after the Office of Civil Rights accepted the complaint for investigation, the Office of Civil Rights issued its preliminary findings.<sup>265</sup> The Office of Civil Rights concluded that there was "sufficient evidence to make a preliminary finding of a prima facie violation of Title VI as a result of the adverse disparate impact upon Latino schoolchildren in California from the application of methyl bromide between 1995 and 2001."<sup>266</sup>

Despite finally issuing its findings, the Office of Civil Rights neither notified the complainants or their attorneys about its findings.<sup>267</sup> EPA entered into negotiations with the California Department of Pesticide Regulations in an effort to settle the complaint. The settlement agreement specified that the "Agreement [did] not constitute a determination of noncompliance with Title VI or 40 C.F.R. Part 7."<sup>268</sup> The settlement required additional monitoring of methyl bromide near schools and public outreach by the California Department of Pesticide

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<sup>262</sup> 40 C.F.R. § 7.120(d)(2).

<sup>263</sup> *Angelita C., et al. v. California Department of Pesticide Regulation*, EPA Case No. 16R-99-R-9 (2009).

<sup>264</sup> *Id.* at 2.

<sup>265</sup> *Angelita C.*, EPA Preliminary Finding, EPA Case No. 16R-99-R-9.

<sup>266</sup> *Id.* at 3.

<sup>267</sup> The Center on Race, Poverty and the Environment, *A Right without a Remedy: How the EPA Failed the Civil Rights of Latino Schoolchildren* at 8 ("EPA told [the complainants] only *after* the ink dried on the settlement.").

<sup>268</sup> *Angelita C., et al. v. California Department of Pesticide Regulation*, EPA Settlement Agreement, EPA Case No. No. 16R-99-R-9 (2011), at para. 5, available at <https://www.epa.gov/sites/production/files/2016-04/documents/title6-settlement-agreement-signed.pdf>.

Regulation.<sup>269</sup> Yet, unrelated to the settlement agreement, the use of methyl bromide was already going to be discontinued, which EPA knew when negotiating this settlement.<sup>270</sup> Therefore, the specific relief that the claimants were seeking had already been addressed and raises the question of how effective the remedy in the settlement agreement actually was.<sup>271</sup>

EPA has recently stated in its Interim Case Resolution Manual that one of its goals is to “promote appropriate involvement by complaints” in the complaint process.<sup>272</sup> The Commission is unaware of any settlements since the enactment of the Manual, and thus, is unable to evaluate at this time how EPA is defining “appropriate” involvement by affected complainants.

### ***Bureaucratic Terminology Inhibits Proper Investigation and Enforcement***

There appears to be an issue about the effectiveness of EPA’s tracking system and the ability of EPA to effectively communicate with communities filing complaints. During the Commission’s investigation, confusion arose as to whether the Office of Civil Rights had any Title VI complaints relating to coal ash on its docket. The Director of OCR (Ms. Golightly-Howell) told the Commission that Office of Civil Rights does not have any coal ash related matters on their docket. It is unclear whether this is a terminology issue or tracking system problem.

At the Commission’s February 5, 2016 briefing, Commissioner Narasaki questioned representatives from Earthjustice why EPA told the Commission that EPA did not have open cases involving coal ash.”<sup>273</sup> Ms. Engelman-Lado, Senior Counsel at Earthjustice, stated that “No, I think that was just a mistake on their part honestly ... [t]hey know they have a complaint ... they’re investigating.”<sup>274</sup>

After the February briefing, Ms. Golightly-Howell submitted a supplemental statement to the Commission again addressing whether there was a pending coal ash complaint and characterized the distinction as being a “terminology” issue.<sup>275</sup> Ms. Golightly-Howell stated that “[n]one of the external discrimination complaints in [the Office of Civil Rights’] current docket, at this time, contain coal ash allegations accepted for investigation.” Ms. Golightly-Howell continued stating that the Office of Civil Rights had “accepted a complaint for investigation related to a landfill in Perry County, Alabama.”<sup>276</sup> Ms. Golightly-Howell explained that “[b]ecause the allegations

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<sup>269</sup> See *Angelita C.*, EPA Case No. No. 16R-99-R-9 (2011).

<sup>270</sup> Methyl Bromide, EPA, available at <https://www.epa.gov/ods-phaseout/methyl-bromide>.

<sup>271</sup> See *Angelita C.*, et al. v. California Department of Pesticide Regulation, EPA Settlement Agreement, EPA Case No. 16R-99-R-9 (2011).

<sup>272</sup> Interim Case Resolution Manual, at Section 3.1 (Dec. 15, 2015).

<sup>273</sup> Commissioner Narasaki, Briefing Transcript 2, p. 260.

<sup>274</sup> Marianne Engelman-Lado, Briefing Transcript 2, p. 261.

<sup>275</sup> Velveta Golightly-Howell, Supplemental Statement, p. 4.

<sup>276</sup> *Id.*

accepted for investigation relate to the air, vectors, and water consequences of the reissuance of a permit and a permit modification at the landfill, [the Office of Civil Rights] does not view the complaint as a coal ash complaint.”<sup>277</sup>

On June 30, 2016, Commission staff visited EPA and asked if EPA had received any coal ash related Title VI complaints. The Acting Director for EPA’s Office of Civil Rights, and another EPA staff attorney told Commission staff that EPA did not have or was aware of any coal ash related Title VI complaints. When Commission staff continued to press EPA about coal ash related Title VI complaints by mentioning the Uniontown, Alabama Title VI complaint (Title VI complaint No. 12R-13-4), EPA reiterated that this complaint was not coal ash related.

The Uniontown Title VI complaint (Title VI complaint No. 12R-13-4) claims the Alabama Department of Environmental Management’s acted in a discriminatory manner in granting a permit to the Arrowhead Landfill to receive coal ash from the Kingston, Tennessee spill.<sup>278</sup> The Complaint also references coal ash in footnote 9 of the complaint. EPA Region 4 has also acknowledged that there is a pending Title VI civil rights complaint regarding the disposal of coal ash in Uniontown.<sup>279</sup>

EPA’s continuing insistence that it does have any coal ash complaints is baffling. The complaint allegations directly challenge whether a State’s permitting decision to accept coal ash was discriminatory. More importantly, it appears that their characterization impedes their ability to talk with those representing impacted communities who rely on the Title VI complaints’ process to be heard.

### ***Proposed Rulemaking and Enforcement***

As discussed above, EPA issued a notice of proposed rulemaking on December 2015 seeking to amend and improve its Title VI enforcement program. EPA’s notice of proposed rulemaking seeks to eliminate language regulating when recipients of EPA financial assistance must send Title VI compliance information and data to EPA. Current EPA regulations require recipients of EPA financial assistance to submit data and information to EPA to determine Title VI compliance if there is reason to believe that a particular recipient has a discriminatory program.<sup>280</sup>

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<sup>277</sup> *Id.*

<sup>278</sup> Title VI Civil Rights Complaint and Petition for Relief or Sanction - Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama, EPA OCR File No. 12R-13-R4, June 2013, *available at* <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964-case-12r-13-r4>.

<sup>279</sup> Letter to Esther Calhoun, U.S. EPA Region 4 (April 9, 2014), *available at* <http://www.arrowheadlandfill.com/wp-content/uploads/2014/08/Calhoun-Combined-R4-4250-RA-and-AX-2872-Final-4-9-14.pdf>. *See also* Letter to Esther Calhoun, U.S. EPA Region 4 (July 3, 2014), *available at* <http://www.arrowheadlandfill.com/wp-content/uploads/2014/08/Scan001.pdf>.

<sup>280</sup> 40 C.F.R. § 7.85(b).

If necessary, the OCR may require recipients to submit data and information specific to certain programs or activities to determine compliance “**where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance**” or to investigate a complaint alleging discrimination in a program or activity receiving EPA assistance.<sup>281</sup> Requests shall be limited to data and information which is relevant to determining compliance and “**shall be accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist.**”<sup>282</sup>

EPA proposes to eliminate the bolded language above<sup>283</sup> and states this would provide EPA the same “discretion and flexibility” that other agencies have when conducting Title VI compliance reviews.<sup>284</sup> EPA states that the amendments “reaffirm the agency’s existing authority to use compliance reviews to identify and resolve compliance concerns with recipients of EPA financial assistance to prevent costly investigations and litigation.”<sup>285</sup> EPA indicates that the amendment would make their regulation “consistent” with other federal agencies’ regulations regarding “routine collection of data and information” from recipients of EPA financial assistance and that the Department of Justice considers such routine collection as a “best practice” for Title VI programs.<sup>286</sup>

Additionally, EPA states that the proposed amendment would provide “EPA the discretion to require recipients to submit compliance reports” at EPA’s choosing.<sup>287</sup> This means that EPA would have the discretion to require recipients of EPA financial assistance to submit compliance reports regardless of whether there is reason to believe that a recipient of EPA financial assistance has a discriminatory program or policy. According to EPA, the amendment would be an “invaluable tool” that would help EPA prioritize compliant investigations, select recipients for compliance reviews, and conduct “target outreach” that would provide technical assistance to recipients of EPA Financial Assistance.<sup>288</sup>

Environmental advocacy groups had mixed reactions to the Office of Civil Rights’ proposed amendment. Group Against Smog and Pollution (“GASP”), an advocacy group working in communities suffering from environmental injustices, praised the Office of Civil Rights’ amendment stating that “this is a positive change to the regulation.”<sup>289</sup> Earthjustice also praised

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<sup>281</sup> *Id.* (emphasis added).

<sup>282</sup> *Id.*

<sup>283</sup> 80 Fed. Reg. 77,286.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> GASP, Public Comments on EPA’s NPRM, available upon request.

the Office of Civil Rights' proposed removal of the phrase "reason to believe" in 40 C.F.R. § 7.85(b), 7.110(a), and 7.115(a). At the same time, Earthjustice believes that removal of the phrase "where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance" from 40 C.F.R. § 7.85(b) is unnecessary.<sup>290</sup> Earthjustice argues that although they support "EPA's endeavor to strengthen its authority to collect information and ensure compliance, the agency already has the affirmative authority under existing regulations to collect data and conduct pre and post-award compliance reviews."<sup>291</sup>

Other commenters expressed concern that removing the requirement that EPA have "reason to believe that discrimination may exist in a program or activity receiving EPA assistance" would expose entities to arbitrary enforcement of Title VI. New Hampshire's Commissioner of the Department of Environmental Services stated in his written comments to EPA's Notice of Proposed Rulemaking that "[d]eleting this language would have the effect of authorizing EPA to randomly ask for additional information with no limitations on how frequently additional information can be requested. This proposed change is potentially burdensome on recipients and invites arbitrary or selective enforcement."<sup>292</sup> Similarly, the Business Network for Environmental Justice stated in its comment that entities that receive Title VI funding are already required to collect and retain certain necessary information, and that collecting additional data is by definition unnecessary and will be burdensome.<sup>293</sup>

EPA's notice of proposed rulemaking also seeks to amend regulatory language in 40 C.F.R. § 7.110(a) and 40 C.F.R. § 7.115(a).<sup>294</sup> Section 7.110(a), which regulates pre-award compliance reviews, currently states: "The OCR may also conduct an on-site review only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application."<sup>295</sup> Similarly, Section 7.115(a), which regulates post-award compliance reviews, currently states: "The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities."<sup>296</sup> EPA's proposal would eliminate the phrase "has reason to believe that discrimination may be occurring in such programs or activities" in both

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<sup>290</sup> Earthjustice, Public Comments on EPA's NPRM, available upon request.

<sup>291</sup> Earthjustice (referencing 40 C.F.R. § 7.85, 7.110, 7.115).

<sup>292</sup> Thomas S. Burrack, New Hampshire Department of Environmental Services, Public Comment to EPA 80 Fed. Reg. 77,287, p. 1, available at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0036>.

<sup>293</sup> Gregory I. Bertelsen, Senior Director, Energy and Resources Policy, Nat'l Assoc. of Manufacturers on behalf of Business Network for Environmental Justice, Public Comment to EPA 80 Fed. Reg. 77,287, pp. 3-4, available at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0086>.

<sup>294</sup> 80 Fed. Reg. 77,287.

<sup>295</sup> 40 C.F.R. § 7.110(a).

<sup>296</sup> 40 C.F.R. § 7.115(a).

section 7.110(a) and section 7.115(a).<sup>297</sup> EPA states that the amendment would allow the Office of Civil Rights to have “flexibility and discretion” to structure the way it conducts pre-award and post-award compliance reviews.<sup>298</sup> EPA insists that amendment will not induce unreasonable searches on recipients of EPA financial assistance. According to EPA:

[T]he deletion of this language will not make recipients vulnerable to unreasonable compliance reviews because the EPA must still comply with the Fourth Amendment in terms of how it selects targets for compliance reviews. The EPA will not randomly select targets for compliance reviews. Rather, compliance review sites will be carefully selected in light of a number of relevant criteria including statistical data, prior complaints, reports by other EPA offices, information shared by other federal agencies, and other specific and reliable information from communities and other sources. Moreover, the EPA will continue to tailor its requests for additional information from recipients during post-award compliance reviews to data and information that is relevant to determining compliance. With the proposed rule, the EPA will: 1) help ensure that recipients of EPA financial assistance are complying with their nondiscrimination obligations, before a complaint is filed or a lengthy investigation is conducted; and 2) bring EPA’s regulations into conformance with those of over twenty other federal agencies that have well established compliance review programs with which recipients are already familiar.<sup>299</sup>

Several environmental groups support this amendment.<sup>300</sup> According to GASP “[b]y removing the elimination that EPA must have reason to believe that discrimination is occurring before conducting a compliance review, EPA is giving itself more latitude in proactively addressing compliance with Title VI.”<sup>301</sup> Additionally, according to the Duke Environmental Law & Policy Clinic, this particular amendment to EPA’s non-discrimination regulation “is beneficial because it expands, or, more appropriately, unencumbers [*sic*] OCR’s ability to request compliance information, in that OCR no longer needs to have reason to believe discrimination is occurring in a program or activity receiving EPA assistance before requesting compliance data and information from recipients.”

Other commenters disagreed with this proposed change. One expressed concern that deleting this language will not provide the recipients of a complaint with sufficient information to respond to

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<sup>297</sup> 80 Fed. Reg. 77,287.

<sup>298</sup> *Id.*

<sup>299</sup> Environmental Protection Agency, FAQs For Civil Right Nondiscrimination Regulation Notice of Proposed Rule Making, pp. 3, Dec. 1, 2015, *available at* [https://www.epa.gov/sites/production/files/2015-12/documents/nprm\\_faqs\\_final\\_draft.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/nprm_faqs_final_draft.pdf).

<sup>300</sup> GASP, Public Comments on EPA’s NPRM, available upon request.

<sup>301</sup> *Id.*

the complaint.<sup>302</sup> Gregory Bertelsen, on Behalf of the Business Network for Environmental Justice, noted that simply because other agencies routinely collect compliance information does not answer the question of “whether that routine collection of information is ‘necessary,’ or even important, a point that EPA has yet to address.”<sup>303</sup>

### **Staffing Issues Exacerbate Title VI Enforcement Efforts**

EPA’s inability to proactively ensure that recipients of financial assistance comply with Title VI is exacerbated by their lack of resources. EPA has eight employees (not counting managers) who are responsible for managing and investigating Title VI complaints. To compensate for the lack of resources, the Director of EPA’s Office of Civil Rights, stated to the Commission that “while OCR would like to have additional resources just like any organization would ... what we really focus on is maximizing the utilization of the resources available.”<sup>304</sup>

According to the 2010 Deloitte report, the staff responsible for the Title VI complaint process “lack clarity” on the technical skills required for their position.<sup>305</sup> Deloitte indicated that the staff skill set and competencies are “misaligned with the highly technical nature of complex Title VI complaints investigation.” Additionally, according to Deloitte, a majority of the Office of Civil Rights staff at the time of the report, lacked environmental policy or legal background expected in their job roles that are particularly necessary in completing Title VI investigations. Deloitte found that only 42 percent of the Office of Civil Rights’ staff at the time of the report believed that knowledge of EPA programs is important for their roles.

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<sup>302</sup> Thomas S. Burrack, New Hampshire Department of Environmental Services, Public Comment to EPA 80 Fed. Reg. 77,287, p. 1, *available at* <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0036>, stated:

EPA proposes to amend § 7.115(a), regarding compliance reviews. Currently, § 7.115(a) allows on-site post-award compliance reviews when EPA “has reason to believe that discrimination may be occurring in such programs or activities.” The proposed language would delete the quoted language, thereby authorizing such reviews even in the absence of any suspicion of non-compliance. This would make paragraph (a) inconsistent with paragraph (b), which requires notice of the nature of the review and an opportunity to rebut or deny the allegations. Without the qualifying language in paragraph (a), which currently limits the review to cases of suspected discrimination, the review process could be used for random compliance investigations. This would nullify the opportunity to rebut or deny “the allegations raised in the review or complaint” as provided for in paragraph (b). With no information as to the nature of the review, the notice and opportunity to respond currently available to recipients under paragraph (b) would become illusory.

<sup>303</sup> Gregory I. Bertelsen, Senior Director, Energy and Resources Policy, Nat’l Assoc. of Manufacturers on behalf of Business Network for Environmental Justice, Public Comment to EPA 80 Fed. Reg. 77,287, at 4, *available at* <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OA-2013-0031-0086>.

<sup>304</sup> Velveta Golightly-Howell, Briefing Transcript 1, p. 32.

<sup>305</sup> Deloitte Consulting, LLP, Evaluation of the EPA Office of Civil Rights, 2011, *available at* <http://www.envirolawyer.com/DeloitteReport.pdf>.

Staffing levels for the Office of Civil Rights may also contribute to its inability to properly and timely process the Title VI complaints it receives. The Office of Civil Rights has a small staff, “most of whom are case managers,” to process the active investigations and complaints for jurisdictional review.<sup>306</sup> According to the Office of Civil Rights’ supplemental response sent to the Commission in January 2016, there are eight staff members who manage and investigate complaints, provide technical assistance, respond to Freedom of Information Act Requests, and assist in developing policy documents. There is also one management official and one administrative program assistant. Additionally, EPA recently told the Commission that it has also demonstrated a commitment to enforcing Title VI by supplementing the Office of Civil Rights staff with two additional “high-level career members of the Senior Executive Service.”<sup>307</sup>

### *Attempts to Address the Issue*

Since the 2010 Deloitte report, the Office of Civil Rights has taken active steps to address its staff incompetency issue and staffing levels. At the Commission’s briefing, the Office of Civil Rights discussed its “method for [Office of Civil Rights] staff to fully utilize the expertise that already exists within EPA.”<sup>308</sup> For example, the Office of Civil Rights told the Commission that “EPA Order 4700 clearly emphasize a ‘One-EPA’ commitment with the support of a network of Deputy Civil Rights Officials.”<sup>309</sup> EPA now has 23 Deputy Civil Rights Officials who, according to the Office of Civil Rights, “support the civil rights mission and ensure its success throughout EPA.”<sup>310</sup> The Office of Civil Rights explains that these officials “are a critical resource in support of EPA’s civil rights program ... and serve as civil rights champions throughout the EPA, and provide prompt, programmatic, regulatory, analytical, scientific, and technical expertise and support” along with having a “vast network of critical stakeholder contacts at a regional level and in specific program area[.]”<sup>311</sup> The Commission does not have enough information at this time to determine whether EPA’s network of Deputy Civil Rights Officials is effective.

The Office of Civil Rights also has established a “protocol for processing” Title VI complaints bringing “regions and programs throughout [EPA] into a collaborative process for coordinating and committing the analytical resources, expertise[,] and technical support” needed to process

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<sup>306</sup> Velveta Golightly-Howell, Briefing Transcript 1, pp. 72-73.

<sup>307</sup> EPA Comment Sheet, *infra* Appendix D, p. 217.

<sup>308</sup> *Id.* at 14-15.

<sup>309</sup> EPA Comment Sheet, *infra* Appendix D, p. 215.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

Title VI complaints.<sup>312</sup> Furthermore, as stated above, the Office of Civil Rights created an interim case resolution manual to help identify expectations for its staff.<sup>313</sup>

Moreover, the Office of Civil Rights released its External Compliance and Complaints Program Strategic Plan for FY 2015-2020. EPA states that the plan “promotes mission-critical program accountability through measurable goals.” According to EPA, these goals ensure that the Office of Civil Rights promptly, effectively, and efficiently manages its complaint docket management; enhances its “external compliance program through proactive compliance reviews, strategic policy development, and engagement of critical EPA, federal and external partners and stakeholders,” and strengthens its “workforce through strategic human capital planning, organizational development and technology resources and training to promote a high-performing organization.”<sup>314</sup>

## Conclusion

Based on the facts above, the Office of Civil Rights has a long history of not effectively enforcing EPA’s Title VI non-discrimination regulations. The Office of Civil Rights’ inability to meet regulatory deadlines demonstrates that the Office of Civil Rights is not fulfilling its mission to become “a model civil rights” program. Additionally, eliminating the deadlines that the Office of Civil Rights already cannot meet in order to appear more compliant with its regulations seems arbitrary. The Office of Civil Rights has made some positive changes. Yet, despite those changes, EPA still rejects the super-majority of Title VI complaints, lacks effective pre and post-award compliance reviews, does not coordinate with complainants when resolving complaints, and uses bureaucratic terminology to describe complaints.

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<sup>312</sup> *Id.* at 15.

<sup>313</sup> *Id.* at 16.

<sup>314</sup> External Compliance and Complaints Program Strategic Plan for FY 2015-2020, EPA, p. 5 (Sep. 10, 2015), available at [https://www.epa.gov/sites/production/files/2015-10/documents/strategic\\_plan.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/strategic_plan.pdf).

## EPA'S ENFORCEMENT EFFORTS AND COAL ASH

There has been a large amount of controversy and discussion regarding the federal regulation of coal ash. From the federal government's initial attempt to regulate coal ash in 1976 to the present, the topic has been the subject of much debate and discussion between Congress, industry groups, and the environmental community. As detailed within this section, in 2014, EPA issued a final rule regulating coal ash under Subtitle D of the Resource Conservation and Recovery Act, as amended. This section analyzes EPA's compliance with Executive Order 12,898 when approving the disposal of coal ash in Uniontown, Alabama, and the impact that the EPA's final rule has on minority communities. This section discusses the following in detail:

- Executive Order 12,898 on environmental justice to provide context for this section;
- What is coal ash and where it is stored;
- Federal regulation of coal ash;
- EPA's substantive incorporation of Executive Order 12,898 when approving the movement of coal ash to Uniontown, Alabama; and
- EPA's incorporation of environmental justice concerns in issuing its Final Coal Ash Rule.

### What is Coal Ash?

Coal combustion residuals, commonly known as "coal ash," is the toxic residue created when power plants burn coal to produce electricity.<sup>315</sup> Coal ash is a general term used to describe several byproducts of coal residue.<sup>316</sup> Fly ash,<sup>317</sup> bottom ash,<sup>318</sup> boiler slag,<sup>319</sup> and fuel gas desulfurization ("FGD") material are all different forms of coal ash.<sup>320</sup> Hundreds of coal-fired

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<sup>315</sup> See EPA, *Coal Ash Basics* (Mar. 25, 2016) available at <http://www2.epa.gov/coalash/coal-ash-basics>.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* (identifying fly ash as a fine, powdery "residue from the combustion of fuel or the smelting of metallurgical materials which enters the flue gas stream").

<sup>318</sup> *Id.* (describing bottom ash as a coarse, angular ash particle that remains in the bottom of the coal furnace after coal combustion).

<sup>319</sup> See also Blake Korb, *Holding Our Breath: Waiting for the Federal Government to Recognize Coal Ash as a Hazardous Waste*, 45 J. Marshall L Rev (2012).

<sup>320</sup> *Id.* (FGD is the material that remains captured from scrubber systems).

power plants collectively produce 140 million tons of toxic coal ash waste every year.<sup>321</sup> This waste is stored at 1,425 sites in 47 states.<sup>322</sup>

### ***Coal Ash Linked to Human Health Problems***

There is a debate as to the usefulness and health impacts of coal ash. Tom Adams, Executive Director of the American Coal Ash Association, states “[t]here are many good reasons to view coal combustion products as a resource rather than a waste.”<sup>323</sup> According to Mr. Adams, using coal ash “conserves natural resources and saves energy.”<sup>324</sup> For example, coal ash has been used in concrete and accounting for “over 150 million tons of reduction in greenhouse gases.”<sup>325</sup>

At least 535 coal ash ponds “operate without a simple liner to prevent dangerous chemicals and heavy metals from reaching drinking water sources.”<sup>326</sup> Because of this, hazardous contaminants leach from coal ash dumps into groundwater.<sup>327</sup> Coal ash has contaminated more than 200 bodies of water that provide drinking water for millions of Americans.<sup>328</sup> Yet despite this statistic, there have not been many efforts to study the exposure to coal ash and human health.

Despite a lack of research or collected data on the causal link between coal ash exposure and its impact on human health, Dr. Yolanda Whyte has advocated that EPA and the federal government should use the precautionary principle to regulate coal ash.<sup>329</sup> The basic premise behind the precautionary principle is to encourage “policies that protect human health and the environment in the face of uncertain risk.”<sup>330</sup> With regards to coal ash, its actual risk to human health is uncertain. According to Peter Harrison, an attorney with the Waterkeeper Alliance, one of the most troubling issues about coal ash is that “we still don’t know the risk associated with coal ash.”<sup>331</sup> Furthermore, Barbara Gottlieb, Director of Environment and Health at Physicians for

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<sup>321</sup> *Coal Ash Contaminated Sites* (Earth Justice 2015), available at <http://earthjustice.org/features/coal-ash-contaminated-sites> (visited Aug 3, 2015).

<sup>322</sup> *Id.*

<sup>323</sup> Tom Adams, Briefing Transcript 2, p. 143.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Beyond Coal* (Sierra Club), available at <http://content.sierraclub.org/coal/disposal-ash-waste> (visited Aug 3, 2015).

<sup>327</sup> *Id.*

<sup>328</sup> *High and Significant Hazard Coal Ash Dump Sites*, Earthjustice, (2015), available at <http://earthjustice.org/features/high-and-significant-hazard-coal-ash-dump-sites> (visited Aug 3, 2015).

<sup>329</sup> See Barbara Gottlieb, Briefing Transcript 2, p. 86.

<sup>330</sup> David Kriebel et al., The Precautionary Principle in Environmental Science, *Environmental Health Perspectives*, Vol. 109, Number 9 (Sept. 2001), p. 871, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1240435/pdf/ehp0109-000871.pdf>.

<sup>331</sup> Peter Harrison, Briefing Transcript 2, p. 87.

Social Responsibility, explained that the lack of research makes it difficult to draw “a direct line between the presence of coal ash” and its impact on the surrounding communities.<sup>332</sup> Yet, Dr. Whyte argued to the Commission that “a lack of full scientific knowledge about the situation[ ] should not be allowed to delay actions taken to avoid or diminish that harm.”<sup>333</sup>

Regardless of these uncertainties, the heavy metals contained in coal ash are known to cause cancer and other diseases.<sup>334</sup> Coal ash contains at least fifteen toxic pollutants, including heavy metals such as arsenic, selenium, chromium, lead, uranium, and mercury.<sup>335</sup> Alone, these metals are considered “hazardous substances” under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>336</sup> Individuals who ingest water contaminated with these pollutants can potentially develop nervous system damage, cardiovascular issues, loss of feeling in limbs, and several forms of cancer.<sup>337</sup> Additionally, prolonged exposure to the toxins found in coal ash can cause heart damage, lung disease, reproductive problems, gastrointestinal illness, eye problems, birth defects, impaired bone growth in children, and behavioral problems.<sup>338</sup> In short, the toxicity of coal ash can potentially damage all major organs systems in adults, including pregnant women, and children.<sup>339</sup> According to Dr. Whyte, this danger is enough to warrant federal regulation under the precautionary principle.<sup>340</sup>

Some have argued that merely living in the vicinity of a coal ash pond is more dangerous to an individual’s health than smoking a pack of cigarettes a day.<sup>341</sup> An EPA study cautioned that people living within one mile of a coal ash pond have a 1 in 50 chance of developing some form of cancer.<sup>342</sup> This statistic has especially proven to be true for residents of three adjacent counties—Luzerne, Carbon, and Schuylkill—in Pennsylvania.<sup>343</sup> Collectively, these counties

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<sup>332</sup> *Id.*

<sup>333</sup> Dr. Yolanda Whyte, Briefing Transcript 2, p. 86.

<sup>334</sup> *See* Barbara Gottlieb, Briefing Transcript 2, p. 70.

<sup>335</sup> *Health Impacts of Coal Ash*, Southeast Coal Ash Wastes (Southern Alliance for Clean Energy 2013), available at [http://www.southeastcoalash.org/?page\\_id=56](http://www.southeastcoalash.org/?page_id=56) (visited Aug 3, 2015).

<sup>336</sup> 42 U.S.C. § 9601(14).

<sup>337</sup> *Beyond Coal*, *supra* n. 12.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> Dr. Yolanda Whyte, Briefing Transcript 2, p. 128.

<sup>341</sup> *See EPA Coal Combustion Waste Risk Assessment*, Human and Ecological Risk Assessment of Coal Combustion Wastes \*17 (EarthJustice Apr 6, 2010), available at <http://earthjustice.org/sites/default/files/library/reports/epa-coal-combustion-waste-risk-assessment.pdf> (visited Aug 3, 2015).

<sup>342</sup> *Id.*

<sup>343</sup> *See ATSDR Investigates Disease Cluster Mystery in Pennsylvania* (Agency for Toxic Substances and Disease Registry July 15, 2011), available at [http://www.atsdr.cdc.gov/stories/disease\\_cluster.html](http://www.atsdr.cdc.gov/stories/disease_cluster.html) (visited Aug 3, 2015).

comprise the nation's largest number of individuals with a rare form of blood cancer known as polycythemia vera cancer ("PV").<sup>344</sup> In 2004, thirty-three people in these counties were diagnosed with PV.<sup>345</sup> Polycythemia Vera is a blood cancer in which a person's blood marrow produces excessive red blood cells.<sup>346</sup> PV can cause chronic fatigue and vascular pain, require amputation of limbs, and, as in the case of two residents in that tri-county area, lead to death.<sup>347</sup>

### *Environmental Effects*

In addition to affecting human health, coal ash has widespread effects on animals and the ecological health of the environment. This includes pollution of not just drinking water, but fish populations and crops as well. When the toxic substances found in coal ash seep into streams, lakes, and groundwater, they are absorbed by plants and fish that are then consumed by humans.<sup>348</sup> These toxic substances become increasingly concentrated at each stage in the food chain and thus increase the risk to the consumer of ingesting harmful substances.<sup>349</sup> This affects both human and animal consumers; it is dangerous for wildlife to consume contaminated fish, plants, and crops.<sup>350</sup> When animals ingest coal ash, the toxins can potentially accumulate in the animals' reproductive organs, which in turn can reduce species' reproductive rates.<sup>351</sup> In addition, coal ash toxins gravely affect vegetation.<sup>352</sup> In terms of the physical environment, coal ash sludge damages the earth's sediments and surface waters when it seeps into groundwater.<sup>353</sup>

These damaging effects of coal ash are found in America's largest coal ash dump, the 1700 acre Little Blue Run pond ("Little Blue").<sup>354</sup> Coal ash has destroyed the vegetation and homes surrounding the dump.<sup>355</sup> There is no vegetation or wildlife near Little Blue, although the power

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<sup>344</sup> *Id.*

<sup>345</sup> Carolyn Kaster, *Cancer Cluster Confirmed Near Pa. Superfund Sites*, (USA Today Aug 27, 2008), available at [http://usatoday30.usatoday.com/news/health/2008-08-26-toxic-cancer\\_N.htm](http://usatoday30.usatoday.com/news/health/2008-08-26-toxic-cancer_N.htm) (last visited Aug 3, 2015).

<sup>346</sup> ATSDR, *supra* n. 343.

<sup>347</sup> *Id.*

<sup>348</sup> See *Why Coal Ash is Bad*, Coal Ash Fact Sheet (Catawba Riverkeeper Foundation), available at <http://www.catawbariverkeeper.org/coal-ash-fact-sheet> (visited Aug 3, 2015).

<sup>349</sup> *Id.*

<sup>350</sup> Lisa Widawsky, *Out of Control: Mounting Damages from Coal Ash Waste Sites*, \*9 (Earthjustice 2010), available at <http://earthjustice.org/sites/default/files/library/reports/ej-eipreportout-of-control-final.pdf> (visited Aug 3, 2015).

<sup>351</sup> *Id.*

<sup>352</sup> Rachel Cernansky, *Largest U.S. Coal Ash Pond to Close, But Future Rules Still Undecided*, National Geographic News, available at <http://news.nationalgeographic.com/news/energy/2012/08/120809-little-blue-run-coal-ash-pond-to-close/> (visited Aug 3, 2015).

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

company promised the residents that Little Blue would be a beautiful oasis with fish, wildlife, and plenty of vegetation.<sup>356</sup> All that remains is mud, a putrid smell, and insects.<sup>357</sup> Residents cannot plant grass or garden their own land.<sup>358</sup> Although Little Blue is scheduled to close in 2016, the environmental damage caused by the dump may be irreversible.<sup>359</sup>

### *Spills, Breaks, and other Coal Ash Catastrophes*

Big spills and breaks in dams are the main ways that coal ash continues to contaminate the environment.<sup>360</sup> For example, a 2005 coal ash dam breakage released over one hundred million gallons of coal ash into the Delaware River; the spill was unable to be contained for four days.<sup>361</sup> Between 2007 and 2008, an Indiana power plant breached twice, with thirty million gallons of coal ash discharged into the White River each time.<sup>362</sup> A Wisconsin bluff collapse dumped coal ash directly into Lake Michigan - a source of drinking water for forty million people.<sup>363</sup> The most catastrophic coal ash spill in US history occurred in 2008, when more than a billion gallons of toxic coal ash burst through a dike in Kingston, Tennessee, and covered 300 acres of land.<sup>364</sup> The EPA sampled soil in residential neighborhoods of Kingston and found “arsenic, cobalt, iron, and thallium levels above the residential Superfund soil screening values.”<sup>365</sup> The EPA also confirmed the arsenic levels in Kingston’s residential soil as being above the EPA Region 4 Residential Removal Action Levels.<sup>366</sup> Uniontown, Alabama inherited the coal ash waste from the spill in Kingston, Tennessee.<sup>367</sup> Most recently, 82,000 tons of coal ash spewed into the Dan River in Eden, North Carolina, from a break in a 48-inch storm water pipe.<sup>368</sup>

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<sup>356</sup> *Little Blue: A Short Documentary*, available at <https://www.youtube.com/watch?v=FPpznN3Gw6U> (visited Aug 3, 2015).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> Dump sites, *supra* n. 328. See also *Map Feature: Coal Ash Contaminated Sites & Hazard Dams* (EarthJustice 2015), available at <http://earthjustice.org/features/map-coal-ash> (visited Aug 11, 2015).

<sup>361</sup> Lisa Evans et al., *State of Failure: How States Fail to Protect Our Health and Drinking Water from Toxic Coal Ash* \*7 (Aug 2011), available at <http://earthjustice.org/sites/default/files/library/reports/ej-eipreportout-of-control-final.pdf> (visited on Aug 3, 2015).

<sup>362</sup> *Id.* at 5.

<sup>363</sup> *Id.* at 7.

<sup>364</sup> Dump sites, *supra* n. 328.

<sup>365</sup> EPA’s Region 4, *EPA’s Response to the TVA Kingston Fossil Plant Fly Ash Release* available at <https://archive.epa.gov/pesticides/region4/kingston/web/html/index.html> (last updated Feb. 2, 2016).

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> Catherine E. Shoichet, *Spill Spews Tons of Coal Ash Into North Carolina River*, (CNN Feb 9, 2014), available at <http://www.cnn.com/2014/02/09/us/north-carolina-coal-ash-spill/> (visited Aug 3, 2015).

### *Economic Risks*

The repercussions of such catastrophes are not only environmental. The Kingston spill damaged or destroyed forty homes and polluted the Emory River, but it also caused an estimated \$3 billion dollars of economic damage.<sup>369</sup> Certainly, major spills are not the only way coal ash causes economic harm.<sup>370</sup> Coal ash that travels through groundwater and air affects homes.<sup>371</sup> The homes in neighborhoods with coal ash dumps often develop a film of coal ash and damaged pipes.<sup>372</sup> Coal ash-caused damage to homes and land reduces home equity.<sup>373</sup>

### **Overview of Coal Ash Locations and Affected Communities**

Coal ash, after it is created, is relocated to landfills, ponds, and surface impoundments to be disposed. These facilities are prominent in the United States, found in 47 states, and according to the EPA, “there are over 1,000 operating coal ash landfills and ponds and many hundreds of ‘retired’ coal ash disposal sites.”<sup>374</sup> For example, Rev. Leo Woodberry testified that South Carolina, “has 23 active coal ash sites and one inactive site [ ... ] [a]nd every one of those sites are located in a community that is low-income and predominantly African American.”<sup>375</sup> In Nevada, the biggest utility company in the state “will pay the Moapa Band of Paiute Indians \$4.3 million dollars and close a power plant that is making tribal members sick from coal ash.”<sup>376</sup> Coal ash ponds are also found in North Carolina.<sup>377</sup>

EPA determines the safety of these facilities based on estimated fatalities and damage during a potential facility failure - similar to that in Kingston, Tennessee. Following these criteria, EPA

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<sup>369</sup> Dump sites, *supra* n. 328.

<sup>370</sup> Little Blue, *supra* n. 356.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> “Map: Coal Ash Contaminated Sites & Hazard Dams,” Earthjustice, available at <http://earthjustice.org/features/map-coal-ash>.

<sup>375</sup> Rev. Leo Woodberry, Briefing Transcript 2, p. 30.

<sup>376</sup> Mike Heuer, *Tribe Wins 4.3 M From Polluting Utility*, Courthouse News, July 30, 2015, available at <http://www.courthousenews.com/2015/07/30/tribe-wins-4-3-m-from-polluting-utility.htm>.

<sup>377</sup> Emily Atkin, *More North Carolina Residents Warned of Contaminated Drinking Water*, Climate Progress, May 6, 2015, available at <http://thinkprogress.org/climate/2015/05/06/3655603/more-contaminated-drinking-water-in-north-carolina/>. Bruce Henderson, *NC lifts warnings against drinking well water near Duke Energy ash ponds*, Charlotte Observer, Mar. 8, 2016, available at <http://www.charlotteobserver.com/news/local/article64759982.html>. Bruce Henderson, *NC lifts warnings against drinking well water near Duke Energy ash ponds*, Charlotte Observer, (Mar. 8, 2016), available at <http://www.charlotteobserver.com/news/local/article64759982.html>.

has identified 331 High and Significant hazard coal ash ponds within the United States.<sup>378</sup>

### Coal Ash Facility Contamination, Spills, and Hazardous Dam Locations



Source: Earthjustice, available at <http://earthjustice.org/features/map-coal-ash>

The location of coal ash disposal facilities with respect to minority and low-income populations can be determined by analyzing demographic data of areas surrounding the facilities. While this data can be gathered using various statistical methods and mapping techniques, inconsistencies with the geographical radius used to determine impacted demographics can pose problems when determining the true population of the community affected by the coal ash facility. EPA, when conducting its analysis for its final coal ash rule, examined the demographics within a one-mile radius from surface impoundments and landfills because this radius “approximates the population likely to be affected by groundwater releases from both landfills and impoundments.”<sup>379</sup> Additionally, EPA used the surface impoundment catchment area, which is a measurement of the area in which runoff can travel downstream within 24 hours, to measure the affected community.<sup>380</sup> According to Abel Russ, EPA’s analysis was incomplete and that “health risks facing low-income and minority populations are much greater than EPA estimated.”<sup>381</sup>

According to Dulce Ortiz, “[t]he U.S. EPA conducted a [lackluster] analysis with the Clean Power Rule.”<sup>382</sup> Ms. Ortiz claimed that EPA “identified over 62,000 people who live in a three

<sup>378</sup> *Id.*

<sup>379</sup> 80 Fed. Reg. 21,467.

<sup>380</sup> *Id.*

<sup>381</sup> Abel Russ, Briefing Transcript 2, pp. 77-78.

<sup>382</sup> Dulce Ortiz, Briefing Transcript 2, p. 25.

mile radius of the Waukegan[, Illinois] plant.”<sup>383</sup> According to Ms. Ortiz, “72 percent are minority and 49 percent are low-income...”<sup>384</sup> Other panelists at the Commission’s briefing corroborated Ms. Ortiz’s assertions. Abel Russ, told the commission that “communities that live downstream from coal ash impoundments tend to have a higher than average” minority and low income population.<sup>385</sup> Additionally, Lisa Hallowell, an attorney with the Environmental Integrity Project, stated that when using EPA’s EJSCREEN tool, she found that within a three mile radius of a particular coal ash site had a “minority population of 36 percent, compared with 19 percent minority population statewide.”<sup>386</sup>

Other studies have also used a three mile radius to calculate the environmental effects of coal ash in minority communities. The NAACP used a three mile radius to analyze demographics impacted by coal facilities nationwide in their report titled “In Coal-Blooded.”<sup>387</sup> These measurements, however, can occasionally be unclear. For example, “the area immediately around the Belews Creek facility [is] made up of 80 to 100 percent people of color.”<sup>388</sup> However, according to the Census Bureau’s 5-year estimate, Belews Creek overall is 82.0 percent white alone.<sup>389</sup> Some studies compare local demographics to state data while others compare them to national percentages. These discrepancies are problematic because different statistical measures can produce different results regarding the impact of coal ash facilities on certain communities. These inconsistent standards of measurement make it difficult for consistent demographical analyses.

## Federal Regulation of Coal Ash

The Resource Conservation and Recovery Act of 1976<sup>390</sup> (RCRA) is the federal statute governing the disposal of solid and hazardous waste, including coal ash.<sup>391</sup> RCRA provides EPA

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> Abel Russ, Briefing Transcript 2, p. 75.

<sup>386</sup> Lisa Hallowell, Briefing Transcript 2, pp. 158-159.

<sup>387</sup> *In Coal Blooded: Putting Profits Before People*, National Association for the Advancement of Colored People, (Nov. 2012), available at <http://www.naacp.org/page/-/Climate/CoalBlooded.pdf>, p.15.

<sup>388</sup> Elmes, Nicholas, *Federal Hearing on Coal Ash Held in Walnut Cove*, The Stokes News, (April 7, 2016), available at <http://thestokesnews.com/news/4462/federal-hearing-on-coal-ash-held-in-walnut-cove>.

<sup>389</sup> “American FactFinder,” U.S. Census Bureau, available at <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>. (zip code 27009).

<sup>390</sup> Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 (1976).

<sup>391</sup> 42 U.S.C. § 6901(n); *See also* Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128 (Jun. 21, 2010).

with two options for regulating coal ash outlined under Subtitle C and Subtitle D.<sup>392</sup> Coal ash regulation under Subtitle C classifies the by-product as a hazardous waste and grants EPA and the federal government the authority to oversee coal ash waste management nationally from its initial generation to its eventual disposal.<sup>393</sup> Alternatively, coal ash regulation under Subtitle D classifies coal ash as a non-hazardous waste and allows EPA to “develop and encourag[e] methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources ...” between the federal, state, and local governments and private industry.<sup>394</sup> The following subsections briefly highlight RCRA, RCRA Subtitles C and D, and EPA’s current coal ash rule.

### ***Resource Conservation and Recovery Act (RCRA)***

RCRA the primary federal law “establish[ing] a comprehensive federal program to regulate the handling of solid” and hazardous waste.<sup>395</sup> Under RCRA, Congress authorized the EPA Administrator to “proscribe, in consultation with federal, state, and regional authorities, such regulations as are necessary to carry out his functions under [RCRA].”<sup>396</sup> Additionally, RCRA mandates EPA “to develop and publish suggested guidelines for solid waste management” within one year of Congress’ enactment of RCRA and “from time to time thereafter.”<sup>397</sup>

RCRA grouped solid waste into two main categories: Hazardous Waste (Subtitle C) and Non-Hazardous Waste (Subtitle D).<sup>398</sup> Congress did not identify which waste RCRA would classify as hazardous or non-hazardous under RCRA Subtitle C or D, instead, Congress deferred such decision making to EPA.<sup>399</sup>

### ***RCRA Subtitle C***

Subtitle C establishes “a ‘cradle-to-grave’<sup>400</sup> regulatory structure providing for the safe treatment, storage, and disposal of hazardous waste” from the initial waste generation to its

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<sup>392</sup> 42 U.S.C. § 6921 - 6939(g); § 6941 - 6949(a).

<sup>393</sup> 42 U.S.C. § 6921.

<sup>394</sup> 42 U.S.C. § 6941.

<sup>395</sup> *Envtl. Def. Fund v. EPA*, 852 F.2d 1309, 1310 (D.C. Cir. 1988).

<sup>396</sup> 42 U.S.C. § 6921(a)(1).

<sup>397</sup> 42 U.S.C. § 6907(a).

<sup>398</sup> 42 U.S.C. § 6921-6939(b) and 42 U.S.C. § 6941-6949(a).

<sup>399</sup> 42 U.S.C. § 6921(a).

<sup>400</sup> “Cradle-to-grave” is an idiom meaning to regulate waste from its generation to its ultimate point of disposal.

eventual disposal.<sup>401</sup> Subtitle C mandates EPA to “develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which would be subject to the provisions of [Subtitle C].”<sup>402</sup> Accordingly, federal regulation considers waste to be hazardous and subject to Subtitle C regulation if that waste exhibits four characteristics: ignitable, corrosive, reactive, or toxic.<sup>403</sup> Subtitle D regulates all other waste that EPA does not classify as hazardous.

In 1978, EPA submitted its first Subtitle C proposed rule for hazardous waste management by establishing a “special waste” category. EPA stated that “some portions of certain very large volume wastes ... will be hazardous” warranting regulation under Subtitle C.<sup>404</sup> EPA included in its proposal that waste “from the extraction, beneficiation, and processing of ores and minerals” – including utility waste such as coal ash - was classified as “special waste” under Subtitle C.<sup>405</sup> EPA stipulated that it had “very little information on the composition, characteristics, and degree of hazard posed by these wastes ...”<sup>406</sup> Therefore, “[t]he limited information the Agency does have indicates that such waste occurs in very large volumes that the potential hazards posed by the waste are relatively low, and that the waste generally is not amendable to the control ... in Subtitle D.”<sup>407</sup>

In 1980, EPA issued a Final Rule on hazardous waste management<sup>408</sup> after receiving extensive comments on its proposed rule. In EPA’s final rule, EPA eliminated the need for the “special waste” category by relaxing EPA’s definition of what constituted a hazardous waste.<sup>409</sup> By eliminating the “special waste” category, EPA indicated that “[t]hose portions of the six proposed special wastes which are determined by the characteristics to be hazardous will be” subject to Subtitle C regulation.<sup>410</sup> In response to EPA’s proposal, “Congress altered EPA’s course by enacting the Bevill Amendment as part of the Solid Waste Disposal Act Amendments of 1980.”<sup>411</sup>

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<sup>401</sup> *Env’tl. Def. Fund v. E.P.A.*, 210 F.3d 396, 397 (D.C. Cir. 2000) (citing *Natural Resources Defense Council v. EPA*, 25 F.3d 1063, 1065 (D.C. Cir. 1994)); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 722, 744 (D.C. Cir. 1996).

<sup>402</sup> 42 U.S.C. § 6912(b).

<sup>403</sup> 40 C.F.R. § 261.11; *See* 40 C.F.R. §§ 261.20 through 261.24.

<sup>404</sup> EPA Hazardous Waste Guidelines and Regulations, 43 Fed. Reg. 58,946, 58,991-92 (1978).

<sup>405</sup> 43 Fed. Reg. 58,946, 59,016.

<sup>406</sup> 43 Fed. Reg. 58,946, 58,991-92.

<sup>407</sup> *Id.*

<sup>408</sup> 45 Fed. Reg. 33,084 (1980).

<sup>409</sup> 45 Fed. Reg. 33,084, 33,174.

<sup>410</sup> 45 Fed. Reg. 33,084, 33,175.

<sup>411</sup> *Solite Corp. v. U.S. E.P.A.*, 952 F.2d 473, 478 (D.C. Cir. 1991).

The Bevill amendment required EPA to submit a report to Congress by October 21, 1983.<sup>412</sup> It required EPA to study any adverse health and environmental effects that “solid waste from the extraction, beneficiation, and processing of ores and minerals” might have.<sup>413</sup> Additionally, the amendment required EPA, no later than six months after the date of submission of the report to Congress, to either “promulgate regulations under [RCRA] for [fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels] or determine that such regulations are unwarranted.”<sup>414</sup> The Bevill Amendment prohibited EPA from “regulating mining and mineral processing wastes as hazardous wastes within the compass of Subtitle C,” until EPA submitted its mining waste study to Congress.<sup>415</sup> Accordingly, EPA amended its final rule<sup>416</sup> on hazardous waste management to include in its language exempting “solid waste from the extraction, beneficiation[,] and processing of ores and minerals.”<sup>417</sup>

EPA completed its first Bevill Amendment Regulatory Determinations in 1993 - ten years after EPA passed its October 21, 1983 deadline - and submitted another report in 2000.<sup>418</sup> In both the 1993 and 2000 regulatory determinations, EPA declined to regulate coal ash under Subtitle C.<sup>419</sup> However, EPA stated that it would continually assess whether Subtitle D would be the appropriate measure to regulate coal ash.<sup>420</sup>

### ***RCRA Subtitle D***

Subtitle D regulates all solid waste that the EPA does not classify as hazardous waste.<sup>421</sup> Subtitle D provides states and regional authorities with “federal technical and financial assistance ... for comprehensive planning” under federal guidelines.<sup>422</sup> These federal guidelines were “designed to

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<sup>412</sup> 42 U.S.C. § 6982(p).

<sup>413</sup> *Id.*

<sup>414</sup> 42 U.S.C. § 6921(b)(3)(C).

<sup>415</sup> *Id.*

<sup>416</sup> Hazardous Waste Management System: Mining and Cement Kiln Wastes Exemptions; Small Quantity Generator Standards; Generator Waste Accumulation Amendment; Hazardous Waste Spill Response Exemption, and Clarification of Interim Status Requirements, 45 Fed. Reg. 76,617 (Nov. 19, 1980).

<sup>417</sup> 42 U.S.C. § 6921(b)(2)(A)(ii); 45 Fed. Reg. 76,617, 76, 618.

<sup>418</sup> *See* Final Regulatory Determination on Four Large-Volume Wastes From the Combustion of Coal by Electric Utility Power Plant, 58 Fed. Reg. 42,466(Aug. 9, 1993); Regulatory Determination on Wastes from the Combustion of Fossil Fuels, 52 Fed. Reg. 32,214 (May 22, 2000).

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> 42 U.S.C. § 6941 *et. seq.*

<sup>422</sup> 42 U.S.C. § 6941.

foster cooperation among Federal, State, and local governments and private industry.”<sup>423</sup> States and local governments are primarily responsible for the actual planning and implementing of a solid waste program under Subtitle D.<sup>424</sup> While the federal government may proffer minimum standards surrounding solid waste managements for states, states are not required to adopt those standards despite federal incentives for compliance.<sup>425</sup>

## **EPA Disregarded Minority Community’s Environmental Justice Concerns**

Executive Order 12,898 mandates EPA to incorporate Environmental Justice decisions into its core mission and decisions that impact communities of color.<sup>426</sup> This section analyzes whether EPA properly included environmental justice decision making when approving the disposal of coal ash from the Harriman, Tennessee Superfund site to Uniontown, Alabama.

### ***Background - Tennessee Coal Ash Spill and Movement of Waste to Alabama***

On December 22, 2008, a Tennessee Valley Authority (TVA) containment dike (made and lined by earth) near Harriman, Tennessee, broke and spilled 5.4 million of gallons of wet coal ash into the Emory River and surrounding communities.<sup>427</sup> TVA told a news outlet that harsh weather conditions affected the dike’s structural integrity.<sup>428</sup> Environmental groups criticized that storing coal ash in dikes lined by earth was “inappropriate.”<sup>429</sup> These groups assert that disposal facilities should bury coal ash in landfills lined with composite materials or hard clay to prevent leaching.<sup>430</sup>

On the same day as the spill, “EPA Region 4 was notified of the incident” and dispatched “an EPA On-Scene Coordinator (OSC)” pursuant to Executive Order 12,580<sup>431</sup> effectively declaring the site a superfund cleanup site.<sup>432</sup> On December 24, 2008, EPA Region 4 officially announced

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<sup>423</sup> *Id.*; See also Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015).

<sup>424</sup> See 42 U.S.C. § 6944.

<sup>425</sup> *Id.*

<sup>426</sup> See generally Executive Order 12,898.

<sup>427</sup> *Dam Bursts in Tennessee, Damaging 12 Homes*, CBS News, December 22, 2008, available at <http://www.cbsnews.com/news/dam-bursts-in-tenn-damaging-12-homes/>.

<sup>428</sup> *Id.*; See also Sheila Dewan, *Tennessee Ash Flood Larger Than Initial Estimate*, New York Times, December 26, 2008, available at <http://www.nytimes.com/2008/12/27/us/27sludge.html>.

<sup>429</sup> Sheila Dewan, *Tennessee Ash Flood Larger Than Initial Estimate*, New York Times, December 26, 2008, available at <http://www.nytimes.com/2008/12/27/us/27sludge.html>.

<sup>430</sup> *Id.*

<sup>431</sup> Executive Order 12,585, Superfund Implementation, 52 FR 2913 (Jan. 29 1987), 3 C.F.R. 1987 Comp., p. 193.

<sup>432</sup> EPA Region 4’s Administrative Order and Agreement on Consent, Docket No.: CERCLA-04-2009-3766 (2009), available at <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/may8tvakingstonfinal106order.pdf>.

that it would join TVA, the Tennessee Department of Environment and Conservation, and other Tennessee state agencies as part of a “Unified Command” to coordinate efforts to clean up the spill.<sup>433</sup> On January 10, 2009, EPA “declared the emergency phase of the cleanup complete,” transferred the remainder of the federal cleanup responsibility pursuant to Executive Order 12,580 to TVA, and “demobilized from the site.”

On January 12, 2009, The Tennessee Department of Environment and Conservation issued TVA an Administrative Order, among other things, directing TVA to:

- “Submit all existing studies, reports[,] and memoranda that are potentially relevant to explaining or analyzing the cause of the catastrophic failure of the containment structures;”
- “Prepare and submit a Corrective Action Plan within 45 days after the [Tennessee Department of Environment and Conservation] [order];”
- “A plan for the assessment of soil, surface water[,] and groundwater; remediation of impacted media; and restoration of all natural resources damaged as a result of the release;”
- “A plan to address health or safety hazards posed by the ash to workers and the public.”<sup>434</sup>

On January 21, 2009, TVA reported that the 5.4 million gallons of coal ash contained “arsenic, beryllium, chromium, copper, lead, mercury, zinc, antimony, cadmium, silver, selenium, thallium, and vanadium oxide” to the Tennessee Emergency Response Commission.<sup>435</sup> Subsequently, EPA issued an additional Administrative Order indicating that EPA would oversee the cleanup of the spill.<sup>436</sup> EPA found that the materials contained in the coal ash from the spill were “hazardous substances” as defined by Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act<sup>437</sup> (CERCLA).<sup>438</sup> Furthermore, TVA

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<sup>433</sup> *Id.*; See also EPA Region 4’s Response: TVA Kingston Fossil Plant Fly Ash Release, available at <http://archive.epa.gov/pesticides/region4/kingston/web/html/index.html> (last updated Feb. 2, 2016).

<sup>434</sup> EPA Region 4’s Administrative Order and Agreement on Consent, Docket No.: CERCLA-04-2009-3766 (2009), available at <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/may8tvakingstonfinal106order.pdf>.

<sup>435</sup> *Id.*; See also Tenn. Valley Auth., Kingston Ash Recovery Project Non-Time-Critical Removal Action Embayment/Dredge Cell Action Memorandum, [hereinafter TVA Action Plan], p. 2, May 12, 2010, available at [https://www.tva.com/file\\_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/Kingston%20Recover%20Project/NTC5.pdf](https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/Kingston%20Recover%20Project/NTC5.pdf).

<sup>436</sup> EPA Region 4’s Administrative Order and Agreement on Consent, Docket No.: CERCLA-04-2009-3766 (2009), available at <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/may8tvakingstonfinal106order.pdf>.

<sup>437</sup> 42 U.S.C. § 9601(14).

<sup>438</sup> EPA Region 4’s Administrative Order and Agreement on Consent, Docket No.: CERCLA-04-2009-3766 (2009), available at <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/may8tvakingstonfinal106order.pdf>; See also

stated in a separate memorandum to EPA that lead and thallium "can cause birth defects, nervous system disorders, and affect the reproductive system."<sup>439</sup>

In EPA's Administrative Order to TVA, EPA placed restrictive conditions on where TVA could relocate and dispose the coal ash from the Harriman, Tennessee spill. Specifically, EPA's Administrative Order prohibited TVA from disposing the coal ash in any off-site or new landfill on-site facility "unless that facility or landfill is operating in compliance with RCRA Subtitle D permitting requirements for operation and disposal of industrial wastes which, at a minimum, shall include the use of a synthetic liner, leachate collection system, groundwater monitoring, financial assurance, and closure and post-closure care."<sup>440</sup> Less than one month after EPA issued its Administrative Order, TVA submitted an "Off-Site Ash Disposal Options Analysis Work Plan" ("Off-Site Disposal Plan") to EPA.<sup>441</sup>

TVA stated that the purpose of the "Off-Site Disposal Plan" was to "consider acceptable off-site disposal locations and recommend one or more for the disposal" of coal ash from the Harriman, Tennessee spill.<sup>442</sup> TVA indicated that nearly 3 million cubic tons of coal ash would be disposed off-site between 2009 and 2010.<sup>443</sup> To accomplish that proposal, TVA estimated that it would need to transfer "about 9,000 [cubic yards] or approximately 7500 tons of ash off-site" per day.<sup>444</sup> TVA determined that transferring that amount of coal ash would require "about 85 to 90 rail cars or approximately 500 truckloads" leaving the clean-up site per day.<sup>445</sup> TVA noted that it would submit a supplement to the "Off-Site Disposal Plan" should the amount of coal ash that TVA could transfer out the clean-up site increases.<sup>446</sup>

On February 23, 2009, TVA issued a request for proposals "to identify off-site disposal options" for the Harriman, Tennessee coal ash. Out of the 25 proposals TVA received, only seven met TVA's and EPA's technical requirements for storing the coal ash as indicated by EPA's

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TVA Action Plan, May 12, 2010, *available at* [https://www.tva.com/file\\_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/Kingston%20Recover%20Project/NTC5.pdf](https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/Kingston%20Recover%20Project/NTC5.pdf).

<sup>439</sup> *Id.*

<sup>440</sup> EPA Region 4, Administrative Order and Agreement on Consent, Docket No.: CERCLA-04-2009-3766 (2009), *available at* <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/may8tvakingstonfinal106order.pdf>.

<sup>441</sup> Tennessee Valley Authority, Off-Site Ash Disposal Options Analysis Work Plan [hereinafter TVA Off-Site Disposal Plan], June 30, 2009, *available at* <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/approved-offsite-ash-disposal-options-plan.pdf>.

<sup>442</sup> *Id.* at 2.

<sup>443</sup> *Id.* at 3.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

Administrative Orders and guidelines.<sup>447</sup> Of the seven sites TVA determined to be suitable for transferring and disposing the Harriman, Tennessee coal ash, three were rail accessible and four were truck accessible.<sup>448</sup> After consideration, TVA decided against using trucks to transfer the Harriman, Tennessee coal ash from the clean-up site for safety reasons.<sup>449</sup> Instead, TVA proposed to transfer the coal ash out of the clean-up site using the railways and trains.<sup>450</sup> The three options TVA had for transferring the coal ash from the clean-up site via railway were to transport the coal ash to the Arrowhead Landfill - Uniontown, Alabama; Veolia-Taylor county Landfill - Mauk, Georgia; or Hazelton Mine Reclamation Site - Hazelton, Pennsylvania.<sup>451</sup> TVA eliminated the Hazelton, Pennsylvania, site from consideration because the site was “unable to commit to installing a liner for placement” of coal ash.<sup>452</sup>

***EPA Did Not Substantively Incorporate the Civil Rights Impacts in the Movement of Coal Ash to Uniontown***

Before TVA could move the waste from Harriman, Tennessee to either of the two proposed off-site facilities (Uniontown, Alabama or Mauk, Georgia), TVA had to obtain EPA’s approval for the disposal site. Under EPA’s CERCLA regulations, EPA is required to conduct a technical review of TVA’s proposed sites for any “relevant violations or releases applicable under federal or state environmental programs” prior to approving the movement of waste.<sup>453</sup>

On June 30, 2009, TVA submitted its “Off-Site Disposal Plan” to EPA, which recommended disposal of the coal ash in Uniontown, Alabama.<sup>454</sup> According to the TVA, disposing of the coal ash in Uniontown was significantly less expensive than other options.<sup>455</sup> TVA noted that the Uniontown Landfill “is directly served by Norfolk Southern [Railway], while Mauk, GA landfill is served by CSX, which adds cost for dual service by both rail companies.”<sup>456</sup> TVA stated that since both Uniontown and Mauk facilities were allegedly able to compliantly and safely manage

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<sup>447</sup> *Id.* at 4.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 8.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* at 6.

<sup>452</sup> *Id.*

<sup>453</sup> EPA Comment Sheet, *infra* Appendix D, p. 210; 40 C.F.R. § 300.440.

<sup>454</sup> TVA Off-Site Disposal Plan, June 30, 2009, available at <http://archive.epa.gov/pesticides/region4/kingston/web/pdf/approved-offsite-ash-disposal-options-plan.pdf>.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

the coal ash in large capacities, “the [TVA’s] final decision was based primarily on cost per ton to transport and dispose of the ash material.”<sup>457</sup>

EPA approved TVA’s proposal to relocate the Harriman coal ash to Uniontown on July 2, 2009.<sup>458</sup> EPA approved TVA’s proposal for four reasons: the Arrowhead facility “was a permitted facility meeting all the technical requirements specified in the [Agreement of Consent] had the capacity to accommodate the volume of coal ash anticipated to be disposed, was served by a direct rail line from the TVA facility, and offered the lowest disposal price of the acceptable landfills.”<sup>459</sup>

Although EPA had looked into environmental justice concerns surrounding the movement of coal ash to Uniontown, EPA’s rationale for approving does not reflect how it weighed that environmental justice analysis.<sup>460</sup> Prior to approving TVA’s plan, EPA stated that “[e]nvironmental [j]ustice was taken into account during [EPA’s] decision making process and is a priority for [EPA] Region 4 and EPA as a whole.”<sup>461</sup> For example, EPA Region 4’s Environmental Justice office “participated in meetings in Perry County along with EPA decision makers, including [a] public meeting that was held on June 24, 2009, a tour of the community led by members of the Perry County Commission, and a visit to the [Arrowhead] landfill.”<sup>462</sup> EPA held a second public meeting on September 16, 2009, “to inform the community of the status of disposal operations and hear and respond to community questions and concern.”<sup>463</sup>

EPA also invited the public to submit written comments on where to move the waste to. During the comment period, EPA received at least one comment addressing environmental justice issues and questioning disposing the coal ash in a landfill near a community of color.<sup>464</sup> The commenter raised concerns regarding the vulnerability and susceptibility of communities of color in siting decisions for solid waste facilities. Relying on statistics from a report entitled “Race, Wealth, and Solid Waste Facilities in North Carolina,” the commenter noted that solid waste facilities were 2.8 times more likely to be located in communities where the population of people of color was

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<sup>457</sup> *Id.*

<sup>458</sup> EPA, *EPA Approves Plan for Disposal of Coal Ash from TVA Kingston Site at the Arrowhead Landfill in Perry County, Alabama* (July 2, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/2ac652c59703a4738525735900400c2c/02ec745d4bba7547852575e700476a8f!OpenDocument>.

<sup>459</sup> EPA, Letter to Ellis B. Long (July 3, 2014), available at <http://www.arrowheadlandfill.com/wp-content/uploads/2014/08/Scan001.pdf>.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> EPA, *Summation of Comments Received and Response to Comments: TVA Kingston Fossil Fuel Plant Release Site at 50*, (May 18 - Jul. 20, 2009), available at <https://archive.epa.gov/pesticides/region4/kingston/web/pdf/tvaoccommentga82009.pdf>.

50 percent or more compared to those communities where residents were less than 10 percent people of color.<sup>465</sup> EPA's approval of TVA's proposal to dispose coal ash in Uniontown, as seen in Chart 1 below, fits this trend.

**Chart 1. Proposed Disposal Sites**<sup>466</sup>

<b>Operator</b>	Phillips and Jordan, INC.	Veolia Environmental Services	Hazelton Creek Properties, LLC
<b>Facility</b>	Arrowhead Landfill	Veolia-Taylor County Landfill	Hazelton Mine Reclamation Project
<b>City and State Location</b>	Uniontown, Alabama	Mauk, Georgia	Hazelton, Pennsylvania
<b>Total Ash Capacity in Cubic Yards</b>	11 million	48 million	5 million
<b>Racial Demographic</b>	9.13 percent White; 90.59 percent Black or African American. <sup>467</sup>	70.8 percent White; 19.9 percent Black or African American. <sup>468</sup>	69.4 percent White; 4.0 percent Black or African American. <sup>469</sup>

According to TVA's Off-Site Disposal Plan, TVA considered three locations to dispose Harriman, Tennessee's coal ash. As indicated by Chart 1 above, each of the three locations also had varying racial demographics. For example, when comparing TVA's first and second choices of where to dispose of the coal ash from Harriman, Tennessee, the racial demographics were quite distinct. TVA's second choice, the Veolia-Taylor County Landfill, located in Mauk, Georgia, had a racial demographic population of 70.8 percent white compared to 19.9 percent Black or African American. Conversely, TVA's first choice, the Arrowhead Landfill, located in Uniontown, Alabama, had a racial demographic population of 9.13 percent white compared to 90.93 percent Black or African American. Even knowing the demographic make-up of Uniontown when compared to the other proposed locations, EPA still solely relied on the technical aspects of TVA's proposal rather than addressing the environmental justice concerns.

<sup>465</sup> Jennifer M. Norton, Steve Wing, Hester J. Lipscomb, Jay S. Kaufman, Stephen W. Marshall, and Altha J. Cravey, *Race, Wealth, and Solid Waste Facilities in North Carolina* *Environ Health Perspectives*, 2007 September; 115(9): 1344 - 1350.

<sup>466</sup> *Id.* at 5-6.

<sup>467</sup> <http://censusviewer.com/city/AL/Uniontown>.

<sup>468</sup> <http://www.census.gov/quickfacts/table/PST045215/1314920.13> (zip code 31058).

<sup>469</sup> <http://www.census.gov/quickfacts/table/PST045215/4233408>.

Some Uniontown citizens did not agree with EPA's approval to dispose coal ash in Uniontown. Ms. Calhoun views storing Herriman, Tennessee's coal ash in Uniontown, Alabama, as a form of discrimination.<sup>470</sup> In her statement to the Commission, Ms. Calhoun expressed her feelings to the Center for Public Integrity stating that "[t]hey put it here because we're a poor, black community... [t]hey know we couldn't fight back."<sup>471</sup> Ms. Calhoun felt that, "[i]f this had been a rich, white neighborhood, the landfill would never have gotten here."<sup>472</sup> She further feels that "[p]lanners and decision-makers ignored the fact that people lived directly across ... from the Landfill, within feet of the Landfill site."<sup>473</sup> Ms. Calhoun believes that EPA's decision to approve the landfill in Uniontown has a "disproportionate impact on African Americans."<sup>474</sup>

Of note, according to the most recent U.S. Census Data, Herriman, Tennessee has an 89.4 percent white population and a 7.2 percent Black or African American population.<sup>475</sup> Comparatively, according to the most recent U.S. Census Data, Uniontown, Alabama has a 9.13 percent white population and a 90.59 percent Black or African American population.<sup>476</sup> Additionally, the Uniontown Landfill is "the designated service area" for receiving waste from 33 states.<sup>477</sup> According to Ms. Marian Engleman-Lado, Senior Attorney for Earthjustice, "this small community is serving as a waste receptacle for a significant portion of the country, which is predominantly white."<sup>478</sup> Ms. Lado continued, that "the racial composition of that 33-state service area - the source of the waste - is only 15.1 percent Black."<sup>479</sup>

As a consequence of EPA's approval to store Herriman coal ash in Uniontown, the residents of Uniontown, the majority being Black or African American, have alleged adverse health impacts and a lower quality of life. During and after the coal ash relocation to Uniontown, residents complained of "upper respiratory infections, nosebleeds and nausea."<sup>480</sup> Residents who live closest to the landfill reported that "paint was stripping off their cars" a few months after placing

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<sup>470</sup> Kristen Lombardi, *Thirty Miles from Selma, a Different Kind of Civil Rights Struggle*, The Center for Public Integrity, August 5, 2015, available at <http://www.publicintegrity.org/2015/08/05/17703/thirty-miles-selma-different-kind-civil-rights-struggle>. Ms. Calhoun also stated similar sentiments in her written statement to the Commission. The Commission does not take Ms. Calhoun's statement as fact, but as personal opinion.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> Esther Calhoun, Written Statement, p. 6. The Commission does not take Ms. Calhoun's statement as fact, but as personal opinion.

<sup>474</sup> *Id.* at 5.

<sup>475</sup> <http://www.census.gov/quickfacts/table/PST045215/4732520,4700540,4233408>.

<sup>476</sup> <http://censusviewer.com/city/AL/Uniontown>.

<sup>477</sup> Marianne Engleman Lado, Written Statement, p. 10.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

<sup>480</sup> Paul Lewis, *Fifty Years After Selma, Alabama at the Heart of New Civil Rights Struggle*, The Guardian, March 6, 2015, available at <http://www.theguardian.com/us-news/2015/mar/06/alabama-selma-50-years-civil-rights-struggle>.

the coal ash in the Arrowhead Landfill.<sup>481</sup> As discussed above, in 2013, Earthjustice filed a civil rights complaint with the Environmental Protection Agency regarding the storage of coal ash in Uniontown. That complaint challenges whether the Alabama Department of Environmental Management violated Title VI in approving the permit for the landfill.<sup>482</sup> While EPA has accepted that Title VI complaint, they have not yet fully investigated the allegations.

In 2010, the EPA's Office of the Inspector General reviewed Region 4's decision to approve the movement of the coal ash to Uniontown. In that report, the Inspector General only considered whether EPA had complied with the CERCLA regulations and the technical aspects of EPA's approval of TVA's proposal. According to the report, the "selection of Arrowhead landfill for the disposal of CCR met or exceeded all of the criteria established under the Administrative Order of Consent between EPA and TVA," and that no EPA employees engaged in wrongdoing or any other sort of impropriety.<sup>483</sup> While the environmental justice concerns were brought to the Inspector General's attention, the report did not consider whether Region 4's decision violated the Executive Order because, in the Inspector General's view, "there are no enforceable provisions for environmental justice guidelines" and EPA had not yet set out how it intends to "fully implement its environmental justice plans."<sup>484</sup>

The requirements of Executive Order 12,898 are not optional for federal agencies. At the same time, how an agency incorporates environmental justice into its decision making process pursuant to Executive Order 12,898 is a matter of agency discretion. As stated above, EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."<sup>485</sup> EPA Region 4 appears to have provided the residents of Uniontown the opportunity to present their views on the movement of coal ash to their community. It's difficult to see how the process provided by EPA resulted in "the fair treatment" or substantive "meaningful involvement" in the outcome of the waste being transferred. Instead of explaining how the environmental justice concerns were overcome or mitigated, EPA only looked at whether the technical requirements for storage of the waste per the CERCLA regulations were met. In sum, EPA had the ability to substantively consider the environmental justice concerns of the community before approving which facility would accept the waste. Yet, EPA did not.

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<sup>481</sup> *Id.*

<sup>482</sup> Title VI Complaint for Relief or Sanction - Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama, *available at* [https://www.epa.gov/sites/production/files/2014-05/documents/12r-13-r4\\_complaint\\_redacted\\_0.pdf](https://www.epa.gov/sites/production/files/2014-05/documents/12r-13-r4_complaint_redacted_0.pdf).

<sup>483</sup> EPA, Investigation of Allegations Concerning Environmental Justice Issues in EPA Region 4, Office of the Inspector General, Report No. 10-N-0145 (June 14, 2010).

<sup>484</sup> *Id.* at 4.

<sup>485</sup> EPA, *What is Environmental Justice*, *available at* <http://www.epa.gov/environmentaljustice/> (last updated May 12, 2016).

## Promulgation of Coal Ash Final Rule

Examining coal ash regulation in regard to the possible health risks associated with exposure to coal ash is not a civil rights issue. Coal ash regulation and health risks associated with exposure to coal ash become a civil rights issue when those regulations and health risks have a disparate impact on minorities. This portion of the report examines EPA's compliance with Executive Order 12,898 when issuing its Final Rule and the Final Rule's impact on low-income and minority communities.

### *Coal Ash Litigation*

On June 21, 2010, two years after the coal ash spill in Harriman, Tennessee, EPA issued a notice of proposed rulemaking (NPRM) seeking to regulate coal ash.<sup>486</sup> EPA proposed two options. First, EPA considered reversing its previous stance on coal ash by classifying coal ash as "special waste" subject to Subtitle C regulation.<sup>487</sup> EPA noted that despite a Subtitle C regulation, coal ash that is beneficially used will not fall under the "hazardous waste regulations."<sup>488</sup> Alternatively, EPA proposed regulating coal ash under Subtitle D instead of reversing its "Bevill Regulatory Determinations."<sup>489</sup> EPA never acted on its notice of proposed rule-making.

In 2012, Environmental Plaintiffs<sup>490</sup> filed a lawsuit against EPA in the U.S. District Court for the District of Columbia.<sup>491</sup> The Environmental Plaintiffs alleged that EPA failed to uphold its responsibilities under the RCRA.<sup>492</sup> The Environmental Groups claimed that EPA failed their duty under § 2002(b) of the RCRA by: 1) failing to review its regulation regarding coal ash as a non-hazardous waste under 40 C.F.R. § 261.4(b)(4), 2) failing its regulations on coal ash under Subtitle D, and 3) violating its non-discretionary duty under § 2002(b) of the RCRA to review and revise its regulations as it relates to Coal Ash.<sup>493</sup>

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<sup>486</sup> Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,128 (2010).

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> The Environmental group consisted of the following entities: Appalachian Voices, Chesapeake Climate Action Network, Environmental Integrity Project, Kentuckians for the Commonwealth, Montana Environmental Information Center, Moapa Band of Paiutes, Prairie Rivers Network, Physicians for Social Responsibility, Southern Alliance for Clean Energy, Sierra Club, and Western North Carolina Alliance.

<sup>491</sup> *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30 (D.D.C. 2013).

<sup>492</sup> *Id.* at 40.

<sup>493</sup> *Id.*

On April 13, 2012 and April 20, 2012, industry groups<sup>494</sup> also filed a lawsuit against EPA.<sup>495</sup> Both the Environmental Plaintiffs and the industry groups shared allegations that EPA failed to “review and revise, as necessary, its solid waste disposal regulation at least every three years, as required by § 2002(b) of the RCRA.”<sup>496</sup> As a result, the court consolidated the both cases into a single case. Subsequently, the Utility Solid Waste Activities Group and the National Mining Association intervened on the action. The court granted summary judgment in favor of the EPA on the Environmental Plaintiffs’ first and third claims.<sup>497</sup> The court granted summary judgement in favor of the Environmental Plaintiffs and industry groups’ shared claim.<sup>498</sup> On May 2, 2014, the U.S. District Court for the District of Columbia approved a Consent Decree between the Environmental Plaintiffs, industry groups, and EPA establishing a deadline for EPA to publish its final rule on coal ash.<sup>499</sup> The consent decree mandated EPA to issue a final rule by December 19, 2014.<sup>500</sup>

### ***Final Coal Ash Rule***

On December 19, 2014, EPA Administrator Gina McCarthy signed the “Disposal of Coal Combustion Residuals from Electric Utilities Final Rule”<sup>501</sup> and published it in the Federal Register on April 17, 2015.<sup>502</sup> The Rule became effective on October 19, 2015. The Final Rule regulates coal ash as a non-hazardous waste under RCRA Subtitle D.<sup>503</sup> EPA decided to regulate coal ash under Subtitle D out of deference to their Final Beville Determination.<sup>504</sup> EPA stated that EPA needed more information “on a number of key technical and policy questions.”<sup>505</sup> Additionally, EPA indicated that it needed information quantifying the risk of coal combustion residual (CCR) disposal, potential impacts of EPA’s regulations on CCR’s chemical composition, and the adequacy of state programs dealing with coal ash.<sup>506</sup> EPA maintained its

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<sup>494</sup> The Market Plaintiffs were Headwaters Resources, Inc., and Boral Material Technologies, Inc.

<sup>495</sup> *Appalachian Voices*, 989 F. Supp. at 40 (D.D.C. 2013).

<sup>496</sup> *Id.*

<sup>497</sup> *Id.* at 56.

<sup>498</sup> *Id.*

<sup>499</sup> Consent Decree, *Appalachian Voices v. McCarthy*, Civ. No. 1:12-cv-00523-RBW, 5, (D.D.C. Jan. 29, 2014).

<sup>500</sup> *Id.*

<sup>501</sup> 80 Fed. Reg. 21,301 (2015) (Codified at 40 C.F.R. Parts 257 and 261).

<sup>502</sup> 80 Fed. Reg. 21,301 (April 17, 2015.), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-04-17/html/2015-00257.htm>.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* at 21,309; *See e.g.*, Briefing Transcript 1, pp. 55-56.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

ability to revisit coal ash regulation and exercise an option to regulate coal ash as a “special waste” under RCRA Subtitle C.<sup>507</sup>

EPA states that the Final Rule “was the culmination of extensive study on the effects of CCR on the environment and public health.”<sup>508</sup> EPA’s Final Rule establishes “nationally applicable minimum criteria for the safe disposal of coal combustion residuals [(CCR)] in landfills and surface impoundments.”<sup>509</sup> The Final Rule addresses “the risks from structural failures of CCR surface impoundments, groundwater contamination from the improper management of CCR in landfills and surface impoundments and fugitive dust emissions.”<sup>510</sup> The Final Rule has 7 main components: 1) location restrictions; 2) liner design criteria; 3) structural integrity requirements; 4) operating criteria; 5) groundwater monitoring and Corrective Action; 6) landfill and surface impoundment closure and post-closure requirements; and 7) public notification and disclosure requirements.<sup>511</sup>

### ***Location Restrictions***

The Final Rule restricts placing coal ash landfills and surface impoundments in the uppermost aquifer, wetlands, fault areas, seismic impact zones, and unstable areas.<sup>512</sup> EPA states that these “five location restrictions [ ] ensure that landfills and surface impoundments are appropriately sited in areas that are not highly sensitive, or otherwise susceptible to contamination.”<sup>513</sup> These restrictions apply to all new landfills and surface impoundments.<sup>514</sup> Additionally, EPA states that “[o]wners and operators must demonstrate that all of their existing CCR surface impoundments meet these restrictions currently through engineering enhancements, or established alternatives ....” EPA states that all existing landfills and surface impoundments must close if they cannot meet the location restrictions.<sup>515</sup>

### ***Liner Design Criteria***

The Final Rule requires all new landfills, new surface impoundments, and lateral expansion units to be lined by a composite liner. The Final Rule mandates that composite liners consist of a

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<sup>507</sup> *Id.* at 20,301; *See also*, Briefing Transcript, pp. 31-33.

<sup>508</sup> Betsy Devlin, Written Statement 1, p. 3.

<sup>509</sup> 80 Fed. Reg. 21,303.

<sup>510</sup> *Id.* at 21,304; *See also* Betsy Devlin, Written Statement, p. 4.

<sup>511</sup> 80 Fed. Reg. 21,304-21,305.

<sup>512</sup> *Id.* at 21,359-21,368.

<sup>513</sup> Betsy Devlin, Written Statement, p. 4.

<sup>514</sup> *Id.* at 21,359-21,368; Betsy Devlin, Written Statement, p. 4.

<sup>515</sup> *Id.*

“geomembrane and a two-foot layer of compacted soil - installed in direct and uniform contact with one another.”<sup>516</sup> The Final Rule also allows landfill and surface impoundment owners to install alternative liners as long as such liners are at least as effective as the composite liner.<sup>517</sup> The Final Rule does not mandate that existing landfills and surface impoundments operate as originally designed without installing a composite or alternative liner.<sup>518</sup> However, the Final Rule requires existing landfill and surface impoundments to “meet all applicable groundwater monitoring and corrective action criteria to address any groundwater releases promptly.”

### *Structural Integrity*

The Final Rule requires all coal ash surface impoundments to meet specific engineering design criteria and requires that surface impoundment owners and operators conduct periodic structural integrity assessments to ensure compliance with the Final Rule’s specific engineering design requirements. According to the Final Rule structural integrity assessments include:

- (1) conducting periodic hazard potential classification assessments to assess the potential adverse incremental consequences that would occur if there was a failure of the CCR surface impoundment;
- (2) conducting periodic structural stability assessments by a qualified professional engineer to document whether the design, construction, operation and maintenance is consistent with recognized and generally accepted good engineering practices; and
- (3) conducting periodic safety factor assessments to document whether the CCR unit achieves minimum factors of safety for slope stability.<sup>519</sup>

### *Operating Criteria*

The Final Rule establishes day-to-day operating criteria for all CCR units in order to prevent health and environmental impacts caused by CCR Units.<sup>520</sup> The Final Rule’s operating criteria require CCR units to establish controls preventing the CCR stored at that unit from becoming airborne.<sup>521</sup> Additionally, the Final Rule establishes regulations on how to manage the flow of water into the CCR unit by requiring water run-on and run-off controls for CCR landfills.<sup>522</sup> The

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<sup>516</sup> 80 Fed. Reg. 21,304.

<sup>517</sup> *Id.*; *See also*, Briefing Transcript 1, pp. 19-22.

<sup>518</sup> *Id.*

<sup>519</sup> 80 Fed. Reg. 21,304.

<sup>520</sup> *Id.*; *See also*, Briefing Transcript 1, p. 71.

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

Final Rule also creates capacity caps on CCR surface impoundments in order to manage water flow in and out of the surface impoundment.<sup>523</sup>

### ***Groundwater Monitoring and Corrective Action***

The Final Rule requires coal ash landfill, surface impoundments, and other coal ash disposal unit owners or operators “to install a system of monitoring wells and specify procedures for sampling these wells, in addition to methods for analyzing the groundwater data collected to detect the presence of hazardous constituents and other monitoring parameters released from units.”<sup>524</sup> The Final Rule establishes programs to monitor groundwater using “detection monitoring, assessment monitoring[,] and corrective action.”<sup>525</sup> The Final Rule requires owners and operators to initiate corrective action once a groundwater monitoring system is in place and such monitoring indicates that standards for any of the identified constituents in coal ash have exceeded groundwater protection levels.<sup>526</sup>

### ***Landfill and Surface Impoundment Closure and Post-Closure Requirements***

The Final Rule requires all CCR units “to close in accordance with specified standards and to monitor and maintain the units for a period of time after closure, including groundwater monitoring and corrective action programs.”<sup>527</sup> The Final Rule requires CCR units that are closing to “leave the CCR in place and install a final cover system” or remove the CCR and decontaminate the closing unit.<sup>528</sup> The Final Rule also establishes timeframes to begin and complete closure activities, and grants owners and operators time extensions if there are issues that arise during the closure beyond the owner or operator’s control.<sup>529</sup> The Final Rule requires owners and operators “to prepare closure and post closure care plans describing [closure] activities.”<sup>530</sup>

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<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 80 Fed. Reg. 21,304-21,305.

<sup>525</sup> *Id.*; *See also*, Briefing Transcript 1, pp. 19-22.

<sup>526</sup> *Id.*

<sup>527</sup> *Id.* at 21,305.

<sup>528</sup> *Id.*; *See also*, Briefing Transcript 1, pp. 77-78.

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

### ***Regulating Inactive Landfill and Surface Impoundments***

The Final Rule also applies to inactive landfill and surface impoundments located at active electric utilities or power producers.<sup>531</sup> The Final Rule applies to these sites “regardless of the fuel currently being used to produce electricity; i.e., surface impoundments at any active electric utility or independent power producer that have ceased receiving CCR or otherwise actively managing CCR.”<sup>532</sup> These requirements do not apply to facilities that are no longer active.

### ***Public Notification and Disclosure Requirements***

Pursuant to the Final Rule, CCR unit operators and owners are required “to record certain information in the facility’s operating record.”<sup>533</sup> The Final Rule also requires these owners and operators “to provide notification to States and/or appropriate Tribal authorities when the owner or operator places information in the operating record, as well as to maintain a publicly accessible internet site for this information.”<sup>534</sup> According to EPA, these requirements ensure transparency about CCR unit operations.<sup>535</sup>

### ***Enforcement of the Final Coal Ash Rule***

The primary mechanism for enforcing EPA’s Final Rule is through the RCRA citizen suit authority.<sup>536</sup> The Final Rule does not require states to adopt or implement the Final Rule, nor does it allow EPA to enforce the final rule.<sup>537</sup> Moreover, according to James Roewer, Executive Director of the Utility Solid Waste Activities Group, the Final Rule is one that cannot be “enforced by EPA.”<sup>538</sup> The Final Rule allows states to regulate coal ash under their own state authorities.<sup>539</sup>

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<sup>531</sup> *Id.* at 21,342.

<sup>532</sup> *Id.*

<sup>533</sup> *Id.* at 21305; *See also*, Briefing Transcript 1, pp. 30-33.

<sup>534</sup> *Id.*

<sup>535</sup> Betsy Devlin, Written Statement, p. 6; *See also*, Briefing Transcript, pp. 30-33.

<sup>536</sup> 80 Fed. Reg. 21,309; *See also* 42 U.S.C. § 6972; *See also*, Briefing Transcript, p. 30.

<sup>537</sup> The Final Rule was promulgated under RCRA sections 1008(a), 4004(a), and 4005(a). For a detailed discussion on the EPA’s authority, *see* Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; 75 Fed. Reg. 35,127 (June 21, 2010).

<sup>538</sup> James Roewer, Briefing Transcript 2, p. 161.

<sup>539</sup> 80 Fed. Reg. 21,309.

### ***Congressional Response to Final Coal Ash Rule***

On July 22, 2015, Congress responded to EPA's Final Coal Ash Rule by passing H.R. 1734 - Improving Coal Combustion Residuals Regulations Act of 2015 (HR 1734).<sup>540</sup> The House of Representatives Committee on Energy and Commerce indicated a need for congressional action "because there is no mechanism to legally incorporate [EPA's Final Rule] into State solid waste management programs, even if a State adopts the Final Rule and incorporates the criteria into the Solid Waste Management Plan, the Final Rule remains in place as an independent set of requirements that must be met."<sup>541</sup> The Committee on Energy and Commerce stated that H.R. 1734 "would provide a legislative solution to the implementation issues associated with the Final Rule by authorizing State permit programs that incorporate the provisions of the Final Rule."<sup>542</sup>

The purpose of the act was to amend RCRA Subtitle D "to encourage recovery and beneficial use of coal combustion residuals and establish requirements for the proper management and disposal of coal combustion residuals that are protective to human health and the environment."<sup>543</sup> According to the Committee on Energy and Commerce:

H.R. 1734 would effectively codify a final rule published in the Federal Register on April 17, 2014, that establishes national management and disposal standards for coal combustion residuals (CCR) under subtitle D of the Solid Waste Disposal Act, also known as the Resource Conservation and Recovery Act (RCRA). (CCR consists of inorganic residues that remain after pulverized coal is burned.) Consistent with subtitle D of RCRA, the rule and this legislation would allow states to create and enforce their own CCR permit programs. However, H.R. 1734 would enable the Environmental Protection Agency (EPA) to directly regulate CCR in any state that fails to set up its own CCR program or in states where EPA determines that the CCR permit program is deficient.<sup>544</sup>

Despite congressional intentions, Earthjustice criticized H.R. 1734 stating that the bill:

- eliminates the EPA's ban on dumping toxic coal ash directly into drinking water aquifers;
- eliminates the requirement for utilities to immediately clean up toxic releases and notify the public;
- eliminates the guarantee of public access to information about water contamination and assessments of dangerous coal ash dams;

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<sup>540</sup> H.R. 1735, 114<sup>th</sup> Cong. (1st Sess. 2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/1734/text>.

<sup>541</sup> H. Rept. 114-143 (2015).

<sup>542</sup> *Id.*

<sup>543</sup> H.R. 1735 § 1.

<sup>544</sup> U.S. Cong., Cong. Budget Office, Cost Estimate for H.R. 1735. (Apr. 28, 2015).

- delays new health and safety protections—potentially for 10 years;
- weakens the EPA mandate to close inactive ponds like the Dan River impoundment that burst last year by extending the closure deadline and allowing legacy ponds to operate without safeguards for at least six years;
- delays the closure of leaking, unlined ponds that contaminate water above health standards, allowing polluters to continue to dump into leaking ponds for an additional 8.5 years;
- eliminates the national standard for drinking water protection and cleanup of contaminated sites; and
- prevents the EPA from ever regulating coal ash again, even in the face of new threats to health and the environment.<sup>545</sup>

The Obama Administration voiced opposition to H.R. 1734.<sup>546</sup> The administration defended EPA’s Final Rule by indicating that the Final Rule “articulates clear and consistent national standards to protect public health and the environment, prevent contamination of drinking water, and minimize the risk of catastrophic failure at coal ash surface impoundments.”<sup>547</sup> The administration stated that H.R. 1734 would weaken the Final Rule by: 1) eliminating the Final Rule’s distance restrictions of CCR units to drinking water sources; 2) “undermine EPA’s requirement that unlined impoundments” be closed or “be retrofitted with protective liners if they are leaking or contaminating drinking water;” 3) delay structural integrity and closure requirements.<sup>548</sup> The White House further indicated that White House senior advisors would recommend that the President veto the bill should it pass Congress and presented to the President.<sup>549</sup>

On July 22, 2015, the U.S. House of Representatives passed HR 1734 by a vote of 258 to 166.<sup>550</sup> The bill was then sent to the U.S. Senate for consideration on July 23, 2015.<sup>551</sup> There has not been any action on HR 1734 since the U.S. House of Representatives sent the bill to the U.S. Senate.

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<sup>545</sup> Earthjustice, *Politics as Dirty as Coal Ash: House Bill Lets Polluters Off the Hook*, July 21, 2015, available at <http://earthjustice.org/blog/2015-july/politics-as-dirty-as-coal-ash-house-bill-lets-polluters-off-the-hook>.

<sup>546</sup> Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy: H.R. 1734 - Improving Coal Combustion Residuals Regulation Act of 2015 (July 21, 2015), available at [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1734r\\_20150721.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1734r_20150721.pdf).

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> See <https://www.congress.gov/bill/114th-congress/house-bill/1734/actions>.

<sup>551</sup> *Id.*

## Consideration of Environmental Justice in Enactment of Final Rule

### *Proximity of Coal Ash Disposal Sites to Minority Communities*

As noted above, coal ash landfills and ponds are found in 47 states. Prior to passing the Final Rule, EPA conducted a Regulatory Impact Analysis and an environmental justice analysis under Executive Order 12,898 that considered the locations of coal ash disposal facilities in light of the surrounding communities racial and income make-up.

In 2010, the Regulatory Impact Analysis<sup>552</sup> compared “the same minority and low-income population data [on an]: (a) itemized plant-by-plant basis,<sup>553</sup> (b) nationwide aggregation basis, and (c) state-by-state- aggregation data.” EPA found that of 495 disposal locations in all 47 states (nationwide) that “[t]hese nationwide aggregate ratios indicate a slightly lower disproportionate minority population ...”<sup>554</sup> With regard to the state-level analysis, EPA found that “state ratios revealed that 24 of the 47 states (51 percent) have higher minority percentages ...”<sup>555</sup> In considering the state-by-state analysis, EPA also looked at the difference in implementation by states and impacts to minorities in enacting a regulation under RCRA Subtitle C and D. Regulation by EPA under RCRA Subtitle C, which would make the Final Rule “Federally-enforceable,” would require all states to adopt the Final Rule or pass state regulations that are at least as stringent if not more stringent than the Final Rule.<sup>556</sup> Under RCRA Subtitle D, the Final Rule would serve only as guidelines for state and local governments to follow.<sup>557</sup> To determine the level of state compliance under RCRA Subtitle D, the Regulatory Impact Analysis assumes that states with existing coal ash and groundwater regulations “would upgrade their existing programs” to become compliant with the Final Rule while “other states would not.”<sup>558</sup>

The Commission conducted independent data analysis to determine whether minority populations are disparately impacted by the location of coal ash landfills and ponds. To conduct its analysis, the Commission used the locations of known coal ash landfills and ponds and compared them with U.S. Census demographic data based on the zip codes of where coal ash

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<sup>552</sup> U.S. Env'tl. Prot. Agency, Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry (Apr. 30, 2010), p. 216, *available at* <http://www.lexis securitiesmosaic.com/uploaded/resourcecenter/EPA-HQ-RCRA-2009-0640-0003.pdf> [hereinafter RIA].

<sup>553</sup> EPA considered 495 plants in its analysis. *Id.* at 224. Using the plant-by-plant basis, EPA found that “138 plants (28 percent) have surrounding minority populations which exceed their statewide minority benchmark percentages, whereas 357 (72 percent) have minority populations below their statewide benchmarks.” *Id.* at 225.

<sup>554</sup> *Id.* at 226.

<sup>555</sup> *Id.* at 225.

<sup>556</sup> *Id.* at 198 - 203.

<sup>557</sup> 75 Fed. Reg. at 35, 136.

<sup>558</sup> RIA, p. 124.

landfills and ponds were located. The Commission data revealed that approximately 30 percent of all coal ash landfills and ponds were located in a zip code where the minority population exceeded the national average.<sup>559</sup> At the national level, the location of coal ash landfills and ponds are not necessarily disproportionately located in areas with minority populations greater than the national average.

This is not to say that minority populations are not impacted by coal ash landfills and ponds overall. The Commission finds the opposite to be true. When analyzing state adoption of the Final Rule, research shows that a greater percentage of minorities live in states that the EPA predicts will not adopt the Final Rule. Therefore, a disproportionate number of minority communities will not enjoy the minimum federal protections that the Final Rule provides, unless all states implement the Final Rule.

The Commission's analysis is reinforced by the public comments submitted by the Center for Public Progressive Reform to EPA during the rulemaking process. The Center for Public Progressive Reform analyzed the Regulatory Impact Analysis' data finding that EPA predicted that 30 states would not adopt the Final Rule (See Chart 2 Below). According to the Center for Public Progressive Reform, this would "signify the disproportionate impacts that the [Final Rule] [would] have on [minorities]" (See Chart 2 Below).<sup>560</sup>

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<sup>559</sup> See Appendix A, Commission excel data. The Commission looked at 504 locations. The percentage was calculated using 149 for the numerator – the number coal ash waste disposal locations with minority populations above the state average – and 498 for the denominator – the number of coal ash disposal locations where the demographic data is available.

<sup>560</sup> Public Comments the Center for Progressive Reform Hazardous and Solid Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, p. 58. This source is a public comment to EPA's Notice of Proposed Rule Making discussed earlier in this section. A copy of these comments are on file with the Commission.

Chart 1: Regulatory Impact Analysis' Distribution of State Implementation

<b>Subset A</b> States Expected to Implement Subtitle-D Requirements (17 states) (48 percent of disposed tonnage)	<b>Subset B</b> States <i>Not</i> Expected to Implement Subtitle-D Requirements (30 states) (52 percent of disposed tonnage)
Colorado Florida Kentucky Louisiana Michigan Minnesota Missouri North Carolina North Dakota Nevada New York Oklahoma Pennsylvania South Carolina Utah West Virginia Wisconsin	Alabama Alaska Arizona Arkansas California Connecticut Delaware Georgia Hawaii Illinois Indiana Iowa Kansas Maine Maryland Massachusetts Mississippi Montana Nebraska New Hampshire New Jersey New Mexico Ohio Oregon South Dakota Tennessee Texas Virginia Washington Wyoming
<p><i>Note:</i> Because there are no coal-fired electric utility plants in Idaho, Rhode Island, Vermont, and Washington, D.C., these areas are not listed in either subset above.</p>	

Source: Public Comments the Center for Progressive Reform Hazardous and Solid Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities<sup>561</sup>

<sup>561</sup> *Id.* at 57.

Demographic Group	Demographic Statistics Comparison Method		Subset A	Subset B
			States Expected to Implement Subtitle-D Requirements (17 states)	States <i>Not</i> Expected to Implement Subtitle-D Requirements (30 states)
Low-Income	Subset-wide	Plant-by-plant ratio	1.01	1.13
		Population percentage	12.1%	13.5%
		To national average	1.02	1.14
		To expected state avg.	+8.5%	+28.0%
Minority	Subset-wide	Plant-by-plant ratio	0.30	0.49
		Population percentage	16.2%	26.2%
		To national average	0.65	1.05
		To expected state avg.	-16.4%	+23.0%
Child	Subset-wide	Plant-by-plant ratio	1.57	1.81
		Population percentage	24.3%	27.0%
		To national average	0.98	1.09
		To expected state avg.	+1.2%	+9.2%

*Notes* (using “low-income” and “Subset A” for purposes of illustration):

- Plant-by-plant ratio: An indication of how many *plants* within Subset A have disproportionate surrounding low-income populations. Specifically, the ratio is X/Y, where:
  - X = The number of plants in Subset A with surrounding low-income populations that *exceed* the statewide low-income benchmark percentage
  - Y = The number of plants in Subset A with surrounding low-income populations that *are below* the statewide low-income benchmark percentage
- Subset-wide:
  - Population percentage: The percentage of the plant-surrounding *population* within Subset A that is low-income.
  - To national average: The ratio of the above “population percentage” to the national low-income benchmark average across all states.
  - To expected state avg.: The ratio of the low-income population that surrounds plants within Subset A to the *expected* low-income population based on statewide averages. For example, there are +8.5 percent more low-income residents near the plants in Subset A than would be expected according to statewide low-income population averages.

Source: Source: Public Comments The Center for Progressive Reform Hazardous and Solid Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities<sup>562</sup>

According to the EPA, the Final Rule is “currently in effect and facilities must take concrete steps to bring their units into compliance without waiting for action by a state or federal regulatory authority.”<sup>563</sup> Additionally, EPA states that the agency is working with “all of [its] state partners to encourage them to adopt the federal rules or to bring their regulations in line to either be consistent with the [Federal Rule]” or pass rules that are more stringent than the Federal

<sup>562</sup> *Id.* at 59.

<sup>563</sup> Betsy Devlin, Briefing Transcript 1, p. 18.

Rule.<sup>564</sup> Betsy Devlin, director of the Materials Recovery and Waste Management Division at EPA, stated to the Commission that a “number of states have already” begun implementing the Final Rule.<sup>565</sup> The Commission is encouraged to learn that Virginia, a state projected not to adopt the Final Rule, “is the only state that has completed the process” of adopting the Final Rule.<sup>566</sup> Furthermore, according to EPA, “Kansas’s [solid waste management plan] has been conditionally approved” and is “pending the adoption of legislation.”<sup>567</sup> EPA also reports that it is working with “a number of other states including” Delaware and Indiana to adopt the Final Rule.<sup>568</sup> Yet despite this progress, the number of states still projected not to adopt the Final Rule will have a disparate impact on low-income and communities of color.

### ***Minority and Low-Income Communities Are Impacted by Coal Ash Disposal Facilities***

As required by Executive Order 12,898, in 2014, EPA also conducted an environmental justice impact analysis for its Final Rule. When determining the affected communities of the Final Rule, EPA used the demographics within a one-mile radius from surface impoundments and landfills.<sup>569</sup> EPA argues that this measurement is appropriate because it “approximates the population likely to be affected by groundwater releases from both landfills and impoundments.” EPA also used the surface impoundment catchment area, which is a measurement of the area in which runoff can travel downstream within 24 hours.<sup>570</sup> According to EPA, for the “population as a whole” 24.8 percent of people belong to a minority group and 11.3 percent of people live below the federal poverty level.<sup>571</sup> Of the population living within one mile of coal ash disposal facilities, EPA found that 16.1 percent of the people belong to a minority group and 13.2 percent live below the Federal Poverty Level.<sup>572</sup> EPA noted that these statistics indicate that the “minority and low-income population are not disproportionately high compared to the general population.”<sup>573</sup>

EPA also measured the percentage of minority and low-income people living within the catchment area of coal ash disposal facilities.<sup>574</sup> EPA found that the 28.7 percent of minorities

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<sup>564</sup> *Id.* at 31.

<sup>565</sup> *Id.* at 57.

<sup>566</sup> EPA Comment Sheet, *infra* Appendix D, p. 208.

<sup>567</sup> *Id.*

<sup>568</sup> *Id.*

<sup>569</sup> 80 Fed. Reg. 21,467.

<sup>570</sup> *Id.*; See also *Regulatory Impact Analysis For EPA’s 2015 RCRA Final Rule For Coal Combustion Residual (CCR) Landfills & Surface Impoundments at Electric Utility Plants*, EPA, Oct. 2014.

<sup>571</sup> *Id.*

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

<sup>574</sup> *Id.*

live within the catchment area compared to 24.8 percent for the national population.<sup>575</sup> EPA also found that 18.6 percent of low-income individuals live within the catchment area compared to 11.3 percent nationally.<sup>576</sup> EPA stated that percentage of minorities and low-income individuals living within the catchment area is “disproportionately high” when compared to the general population.<sup>577</sup> For example, the North Carolina State Advisory Committee to the U.S. Commission on Civil Rights found that 69 percent of all African Americans “live within 30 miles of power plants that pollute the air with toxic Chemicals.”<sup>578</sup> Additionally, the Illinois State Advisory Committee to the U.S. Commission on Civil Rights found that “industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations.”<sup>579</sup>

EPA concluded that despite the fact that minority and low-income populations living within the catchment areas of coal ash disposal facilities are disproportionately high when compared to the national average, “populations surrounding plants within landfills do not.”<sup>580</sup> EPA stated that because coal ash landfills were “less likely” than surface impoundments to experience “surface water run-off and releases, catchment areas were not considered for landfills.” Additionally, EPA argued that because the Final Rule is “risk reducing” the rule will not result in new disproportionate risks to minority or low-income populations.

Although EPA concluded that minorities and low-income populations would not be disproportionately at risk by the Final Rule, provisions in the Final Rule may inadvertently disproportionately adversely impact minority and low-income populations through its Citizen Suit provisions.

## **Enforcement of Final Coal Ash Rule May Disproportionately Impact Minorities and Low-Income Communities**

EPA’s Final Coal Ash Rule regulates coal ash under Subtitle D of RCRA.<sup>581</sup> Under Subtitle D, EPA does not have the authority to enforce the Final Rule.<sup>582</sup> According to Andrea Delgado,

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<sup>575</sup> *Id.*

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

<sup>578</sup> Memorandum to the U.S. Commission on Civil Rights, North Carolina State Advisory Committee to the U.S. Commission on Civil Rights (Apr. 7, 2016), p. 4.

<sup>579</sup> Memorandum to the U.S. Commission on Civil Rights, Illinois State Advisory Committee to the U.S. Commission on Civil Rights (May, 2016), p. 3. (citing Waterhouse Testimony. Transcript, Civil Rights and Environmental Justice in Illinois. Meeting of the IL Advisory Committee to the U.S. Commission on Civil Rights. March 09, 2016. p. 15 lines 01-04 & p. 17 line 11-p.18 line 05).

<sup>580</sup> *Id.*

<sup>581</sup> 80 Fed. Reg. 21,309; *See also*, Briefing Transcript 1, p. 30.

Senior Legislative Representative for Earth Justice, “[t]here is no regulatory oversight by either the state or federal government. EPA calls the rule “self-implementing,” meaning that federal standards are in place, but there are no mechanisms for oversight or enforcement.”<sup>583</sup> Additionally, states are not required to adopt or enforce the Final Rule’s requirements.<sup>584</sup> The primary mechanism for enforcing EPA’s Final Rule is through the RCRA Citizen Suit provisions.<sup>585</sup> This section discusses the RCRA Citizen Suit provisions and analyzes a minority and low-income individual’s ability to utilize this provision.

The RCRA, as amended, contains three types of citizen suit provisions. First, the RCRA authorizes citizens to bring a lawsuit against the EPA Administrator for failing to perform any duties required by the RCRA and is not under the discretion of the Administrator.<sup>586</sup> Second, the RCRA authorizes citizens to bring lawsuits against any person, including the Federal government and its agencies, who may be violating the RCRA.<sup>587</sup> And third, as amended in 1984, the RCRA authorizes citizens to bring lawsuits against another person, and against any past or present generator, operator, or owner of a solid waste facility who has contributed or is contributing to any action under the RCRA that presents “imminent and substantial endangerment to health or the environment. ...”<sup>588</sup> Although the RCRA provides citizens with the ability to protect their interests if there is a violation under the RCRA, minority and low-income communities may often not have the resources to take advantage of the RCRA’s citizen suit provision. According to Lisa Evans, Senior Counsel for Earth Justice, minority and low-income communities “have far less access to the legal and technical resources necessary to provide oversight of coal plants in their neighborhoods.”<sup>589</sup>

### ***Minority Communities Lack the Resources to Enforce the Final Rule***

During the Commission’s briefing on January 22, 2016, EPA stated that the Final Rule “protects everyone[;] it provides additional protections for all communities.”<sup>590</sup> EPA believes that the rule also protects minority and low-income communities because “even with the new policies ... we think our environmental justice analysis was sound and we[‘]re imposing or providing additional protections for all communities.” While the EPA’s statements may be true, the Commission has

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<sup>582</sup> 42 U.S. Code § 6972.

<sup>583</sup> Andrea Delgado, Written Statement, p. 2.

<sup>584</sup> 80 Fed. Reg. 21,309; *See also*, Briefing Transcript 1, p. 30; *See also* Andrea Delgado, Written Statement, p. 2.

<sup>585</sup> *Id.*

<sup>586</sup> 42 U.S.C. § 6972(a)(2).

<sup>587</sup> 42 U.S.C. § 6972(a)(1)(A).

<sup>588</sup> 42 U.S.C. § 6972(a)(1)(B).

<sup>589</sup> Lisa Evans, Written Statement, p. 8.

<sup>590</sup> Betsy Devlin, Briefing Transcript 1, p. 29.

received information during its fact finding indicating that the protections that the Final Rule provides are not equal for all people.

In response to EPA's statements above, Commissioner Yaki stated that, "one of the principle[s] of environmental justice is understanding the resource disparity of minority and low-income communities to deal with issues of enforcement and compliance."<sup>591</sup> Referencing the Final Rule's Citizen Enforcement Provision, Commissioner Yaki questioned the true protection of the Final Rule given "the fact that historically minority and low-income communities have less of an access to the legal system in order to bring forth their or redress wrong[.]"<sup>592</sup> Commissioner Yaki continued by inquiring how "... poor communities surrounding some of these coal ash ponds or deposits[,] ... supposed to find the resources to do even minimal investigation and understanding of their legal rights, much less find the resources to get an attorney to file a complaint or lawsuit to enforce it?"<sup>593</sup> Based on statements that the Commission received during its briefing on February 5, 2016, there is reason to believe that the Final Rule's Citizen Suit provision does not protect minorities and low-income communities because of the lack of resources these communities have.

Demonstrating how minority and low-income communities lack the resources to utilize the Final Rule's Citizen Suit provision, the Commission looks to the common struggle for these communities to afford basic necessities such as health care and groceries - let alone the cost of a lawsuit. According to Dulce Ortiz, "[f]amilies in our community are low to moderate income who don't always have access to quality healthcare nor preventative care."<sup>594</sup> Ms. Ortiz stated that some members of her community do not have health insurance or any state or federal assistance for prescription medication. Often times, they are "left with the decision of 'am I going to buy groceries for the next week or am I going to buy a \$300 inhaler for my child.'"<sup>595</sup> Financial problems faced by these communities are, according to Ms. Ortiz, compounded by the reality that "when a child is sick they miss school[;] [t]hen the parent has to stay home. The school misses on funds because the child is not there. The parent misses work, so they are not paid."<sup>596</sup>

Moreover, it is difficult to see how minority and low-income communities can afford or have the time and resources to utilize the Final Rule's Citizen Suit provisions. According to the

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<sup>591</sup> Commissioner Michael Yaki, Briefing Transcript 1, p. 29.

<sup>592</sup> *Id.*

<sup>593</sup> *Id.*

<sup>594</sup> Dulce Ortiz, Briefing Transcript 2, p. 24.

<sup>595</sup> *Id.* at 41.

<sup>596</sup> *Id.* at 41-42.

Department of Health and Human Services' Poverty Guidelines for 2016, the federal poverty level ranges from \$11,880 to \$40,890.<sup>597</sup>

2016 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA	
PERSONS IN FAMILY/HOUSEHOLD	POVERTY GUIDELINE
For families/households with more than 8 persons, add \$4,160 for each additional person.	
1	\$11,880
2	16,020
3	20,160
4	24,300
5	28,440
6	32,580
7	36,730
8	40,890

Source: Department of Health and Human Services *available at* <https://aspe.hhs.gov/poverty-guidelines>.

When comparing the poverty levels for the contiguous United States<sup>598</sup> with the costs of civil litigation, it becomes clear that minority and low-income communities cannot afford to pursue civil litigation under the Final Rule's Citizen Suit provision and still provide shelter and food for their family. According to one study in the 2010 Duke Law Journal, the median cost to bring a federal civil lawsuit was \$15,000 for plaintiffs and \$20,000 for defendants.<sup>599</sup> For a family of 6 living at the federal poverty level, the median cost to bring a lawsuit is nearly half of the family's yearly income. While some advocacy and interest groups take on cases representing affected communities, such representation is not ordinarily a part of their primary mission. For example, Earthjustice has and is currently litigating environmental justice cases on behalf of minority and low-income communities, however, their primary mission is not litigate, but to broadly use the "law to fight for the earth and its inhabitants."<sup>600</sup>

<sup>597</sup> U.S. Dep't of Health and Human Services, U.S. Federal Poverty Guidelines Used To Determine Financial Eligibility For Certain Federal Programs, (Jan. 25, 2016), *available at* <https://aspe.hhs.gov/poverty-guidelines>.

<sup>598</sup> The Commission only examines the national poverty level for the contiguous United States because all of the coal ash disposal facilities are located within the contiguous United States.

<sup>599</sup> Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 770 (2010).

<sup>600</sup> *See Our History*, Earthjustice, *available at* [http://earthjustice.org/about/our\\_history](http://earthjustice.org/about/our_history).

The true cost of litigation is further exacerbated when factoring monthly rent, groceries, and other necessities required for that family to maintain the same standard of living before bringing a lawsuit. For example, for Ms. Ortiz's community, Waukegan, Illinois, the estimated per capita income for 2013 was \$21,027.<sup>601</sup> Median rent for Waukegan for 2013 was estimated at \$586 per month.<sup>602</sup> After deducting rent payments for the year - not including cost of food and other necessities - for a household living at the estimated 2013 per capita income for 2013 in Waukegan would be left with \$13,995. A family living under these conditions would not be able to afford the cost of utilizing the Final Rule's Citizen Suit provision unless they were able to obtain pro bono representation.

EPA was aware of the struggles many communities like Ms. Ortiz's community face. EPA stated that "we acknowledge the fact that the lack of federal enforcement and reliance on citizen groups to enforce the requirements of this rule presents a challenge."<sup>603</sup> EPA argued that the Final Rule provided more protections than there would have been if EPA had never issued the rule. According to EPA, "[w]e've improved protection for all communities."<sup>604</sup> Furthermore, EPA asserted that the rule provides for greater transparency.<sup>605</sup> "The facilities are required to maintain a publicly-accessible website to put all of the information related to compliance with the rule on that web site in order to assist communities in [understanding their rights and legal issues]."

In her statement to the Commission, Ms. Ortiz stated that many of the residents in her community are "immigrants, work multiple low-paying jobs[,] and often lack a college education."<sup>606</sup> From her personal experience, Ms. Ortiz stated that when "[l]ooking through technical documents on NRG's coal ash website, which is difficult to find, it's not something that most of the people in my community have the time, expertise, or even awareness to do."<sup>607</sup> In addition to Ms. Ortiz's concerns, the Commission notes that EPA also assumes that these citizens have the ability to understand and use EPA's EJScreen. As noted in earlier in this report, this tool is not user friendly and difficult to navigate. Moreover, the Executive Order 12,898 requires EPA to post available environmental justice data for the public. During the Commission's investigation, Commission staff had a difficult time finding such information. According to Ms. Ortiz, "this is environmental injustice."<sup>608</sup>

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<sup>601</sup> Waukegan, Illinois, Data, City-Data.com, available at <http://www.city-data.com/city/Waukegan-Illinois.html>.

<sup>602</sup> Waukegan, Illinois Houses and Residents, City-Data.com, available at <http://www.city-data.com/housing/houses-Waukegan-Illinois.html>.

<sup>603</sup> Betsy Devlin, Briefing Transcript 2, p. 30.

<sup>604</sup> *Id.*

<sup>605</sup> *Id.*

<sup>606</sup> Dulce Ortiz, Briefing Transcript 2, p. 28.

<sup>607</sup> *Id.*

<sup>608</sup> *Id.*

## Conclusion

After analyzing data and EPA documents, it appears that the EPA's approval to dispose Harriman, Tennessee's coal ash in Uniontown, Alabama, was made for economic reasons. While EPA did conduct an environmental justice analysis of some kind, it did not require TVA to conduct an environmental justice analysis per federal policy pursuant to Executive Order 12,898, before approving the waste transfer. It further appears that EPA determined that the environmental justice concerns were met because they had determined the CERCLA regulations setting out the technical requirements were met. EPA should have separately analyzed the environmental justice concerns and not conflated the two inquiries.

Furthermore, based on the statements and analysis above, minority and low-income communities are unlikely to have the resources to utilize the Final Rule's Citizen Suit provision. The cost of litigation compared to the income, time, and resources needed to utilize the provision puts these communities at a disadvantage when trying to seek enforcement of a federal regulation meant to protect them. While EPA's environmental justice analysis looked at the health and safety impact that the Final Rule would have on minority and low-income communities, EPA neglected to look at the financial burden the Final Rule would have on these communities. Therefore, EPA's Final Rule does not protect minority and low-income communities because these communities would not realistically be able to afford and utilize the Final Rule's Citizen Suit provision.

## FINDINGS AND RECOMMENDATIONS

### Findings

#### *Environmental Justice*

1. EPA's definition of environmental justice recognizes environmental justice as a civil right.
2. EPA defines environmental justice as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA defines fair treatment to mean no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.
3. Racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities.
4. The intersection between race and poverty compounds the health impact of environmental pollution in communities of color. When chronic disease does occur, low-income communities demonstrate worse health outcomes than affluent communities.
5. Both historical and current housing segregation amplifies the burden of toxic industrial waste on communities of color. Insufficient public education often leaves residents unaware of the presence of dangerous toxins that are not immediately observable, while cultural, familial, and economic ties keep residents in the community despite these hazards.
6. Declining home values due to environmental contamination disproportionately impacts communities of color.
7. Minority and low-income communities often lack the political and financial clout to properly bargain with polluters when fighting a siting decision or seeking redress from pollution already in their community.
8. Civil rights enforcement is necessary because despite existing laws, environmental standards are not being upheld for everyone. Cooperation between federal, state, city, and local officials is necessary to address current environmental justice challenges.
9. If enforced vigorously, Title VI can be a powerful tool for EPA to address environmental justice and remediate discrimination.

***Environmental Protection Agency***

10. EPA has a history of being unable to meet its regulatory deadlines and extreme delays in responding to Title VI complaints in the area of environmental justice.
11. EPA's terminology in how it characterizes the subject-matter of its Title VI complaints negatively impacts its ability to address questions regarding its Title VI complaints or resolve Title VI complaints.
12. EPA's Office of Civil Rights has never made a formal finding of discrimination.
13. Despite its regulatory authority, EPA's Office of Civil Rights has never denied or withdrawn financial assistance from a recipient in its entire history.
14. EPA's Office of Civil Rights lacks clarity in its mission and has no mandate to demand accountability from other entities within EPA.
15. Pursuant to Executive Order 12,898, EPA has recently taken steps to incorporate procedural environmental justice obligations into its core missions.
16. At the same time, EPA has not incorporated environmental justice as a substantive right into its decision-making.
17. EPA's inability to proactively ensure that recipients of financial assistance comply with Title VI is exacerbated by its lack of resources and small staff levels.

***Coal Ash Effects***

18. There is a lack of research on the causal link between coal ash and its impact on health and its actual risk to human health is uncertain, however, heavy metals contained in coal ash are known to cause cancer.
19. Coal ash contains at least fifteen toxic pollutants, including heavy metals such as arsenic, selenium, chromium, lead, uranium, and mercury, which alone are considered "hazardous substances" under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and can potentially damage all major organs systems in adults, pregnant women, and children.
20. An EPA study found living in the vicinity of a coal ash pond is more dangerous to a person's health than smoking a pack of cigarettes daily and people living within one mile of a coal ash pond have a 1 in 50 chance of developing some form of cancer.
21. Coal ash can have potentially a widespread negative effect on animals and the environment.

22. When the toxic substances found in coal ash seep into streams, lakes, and ground water, they are absorbed by plants and fish and become more concentrated at each stage up in the food chain, which in turn harms humans and animals.
23. Coal ash also contaminates the environment through spills and dam breaks, including the largest coal ash spill in US history in 2008, where more than a billion gallons of toxic coal ash burst through a dike in Kingston, Tennessee, and most recently in the Dan River in Eden, North Carolina due to a break in a sewer pipe.
24. Whether coal ash facilities are disproportionately located in low-income and minority communities depends on whether the comparison is done on (1) plant-by-plant, (2) nationwide aggregation, or (3) state-by-state aggregation basis, as well as the radius used around a coal ash site. A nationwide basis shows a slightly lower disproportionate minority and slightly higher low income population surrounding coal ash plants. A state-by-state basis shows a slightly disproportionate higher minority population and relatively large, higher disproportionate low income population surrounding coal ash plants.
25. EPA also found the percentage of minorities and low income individuals living within the catchment area of coal ash disposal facilities is disproportionately high when compared to the national population. Studies using a three mile radius around coal ash sites have shown a disproportionate impact on minority communities.
26. EPA did not fully consider the civil rights impacts in approving movement of coal ash from Harriman, Tennessee to Perry County/Arrowhead Landfill.
27. Uniontown, Alabama has been adversely affected by the storage of coal ash in its community at the Arrowhead Landfill.

### ***EPA's Final Coal Ash Rule***

28. Although EPA's Final Rule is "risk reducing," the rule negatively impacts low-income and communities of color disproportionately because the states that are projected not to implement the Rule have a higher percentage of communities of color located near coal ash facilities.
29. EPA's Final Rule places enforcement of the Rule squarely on the shoulders of community members. This system requires low-income and communities of color to collect complex data, fund litigation and navigate the federal court system.
30. EPA'S Final Rule places the mandate of environmental justice on the very communities that environmental justice principles were designed to protect.

## **Recommendations**

### ***Environmental Protection Agency Staffing, Resources, and Leadership***

1. Congress should increase EPA's Office of Civil Rights budget specifically to increase staffing to meet current and future needs.
2. EPA should bring on additional staff temporarily to clean up the significant backlog – in some cases decades old.
3. EPA should continue to build up its recent efforts to share expertise among the regions and headquarters, and support the Deputy Civil Rights Officers.
4. EPA leadership must empower and support the efforts of the Office of Civil Rights and provide it with the necessary tools and administrative responsibilities to support and hold accountable other EPA entities whose jurisdiction intersects communities of color.

### ***Processing Title VI Complaints***

5. Eliminating the deadlines that the EPA Office of Civil Rights already fails to meet in order to seem more compliant with its regulations seems arbitrary and potentially harmful given the Office of Civil Rights' historic record for enforcement. Therefore, EPA should not eliminate the deadlines related to processing and investigating Title VI complaints.
6. EPA should not adopt a phased-approach to conducting post-award compliance review.
7. EPA should include affected communities in the settlement process.

### ***Final Coal Ash Rule***

8. EPA should classify coal ash as "special waste" under subtitle C of RCRA.
9. The federal government should fund research to better understand the health impact on humans due to exposure to coal ash.
10. EPA should provide technical assistance to minority, tribal, and low income communities to help enforce the Coal Ash Rule.
11. EPA should immediately identify coal ash lagoons in minority, tribal and low-income communities that rely primarily on groundwater for drinking water and test all private wells within one mile of the dumpsite.
12. EPA should independently investigate risks from coal ash disposal and take enforcement action, as necessary (using RCRA 7003 or CERCLA 104 authority).

13. EPA should investigate known coal ash damage cases to ensure cases are resolved, and, if cases are not resolved, EPA should take enforcement action.
14. EPA should investigate all poor-rated coal ash dams (from its 2009-2013 Assessment Program) to ensure structures are structurally sound.
15. EPA should test drinking water wells near unlined coal ash disposal sites.
16. EPA should independently access high-risk coal ash dams via agency inspections.
17. EPA should promulgate financial assurance requirements for coal ash disposal as soon as possible under RCRA or CERCLA authority.
18. EPA must perform a complete review of the effectiveness of the Final Coal Ash Rule by 2018, including the environmental justice implications of the beneficial use of coal ash and coal ash reuse sites.
19. EPA should identify coal plants in minority, tribal, and low income communities burdened by multiple sources of pollution and determine whether the cumulative impact of pollution from coal ash dumps presents unacceptable health and environmental hazards.

#### ***State Advisory Committee Recommendations***

Pursuant to our Illinois State Advisory Committee's Advisory Memorandum, we also make the following recommendations:

20. EPA should prohibit direct industry contributions to their Community Advisory Groups, established to make local recommendations on the cleanup of contaminated "superfund" sites. In lieu of direct financial contributions to community development and cleanup efforts, the EPA should establish a general fund to be distributed equitably to all superfund communities in the region.
21. EPA should limit the number of industry representatives and their affiliates permitted to participate in Community Advisory Groups, such that industry participation does not exceed that of the community. Community Advisory Group members designated as "community" representatives should be prohibited from employment or other financial conflicts of interests with the relevant industry (self or spouse).
22. EPA should prohibit its state partners, and any recipients of EPA funds, from allowing industrial facilities in their jurisdiction to operate without the appropriate permits. As a condition of permitting, industrial facilities should be required to set aside funding reserved for environmental remediation upon retirement, regardless of the reason for closure. Such requirements should be made uniform at the national level, to prevent

disparate economic incentives in interstate commerce. The agency should conduct a study to determine appropriate remediation fund reserve guidelines.

23. EPA should increase coordination between its bureaus of land, air, and water, and require all regulators under its environmental justice purview to consider the cumulative impact of multiple sources of contamination on a single community when issuing operating permits.
24. EPA's Office of Civil Rights should conduct a study of the placement of air quality monitoring equipment by its Air Data division. The office should ensure that available air quality monitors capture readings near areas with higher than average emissions, and that communities with high environmental justice demographic indicators are adequately represented. Furthermore, air quality data should be disaggregated at the neighborhood level, so that concerns of disparate impact may be appropriately assessed.
25. The U.S. Congress should conduct a study of environmental justice enforcement requirements under Title VI of the Civil Rights Act. Based on this study, the Congress should allocate the financial resources necessary for the EPA, Office of Civil Rights to conduct routine, proactive reviews of their funds recipients in addition to responding to Title VI complaints.

Pursuant to our North Carolina Advisory Committee's Advisory Memorandum, we also make the following recommendations:

26. EPA should assist North Carolina Department of Environmental Quality in taking action that proactively prevents low income communities and communities of color from being disproportionately affected by coal ash disposal.
27. Congress and relevant federal agencies should commission a study to investigate options for industry to compensate community members for health care expenses and land devaluation that resulted from coal ash contamination.

## COMMISSIONERS' STATEMENTS AND REBUTTALS

### Chairman Martin R. Castro

**“When the Last Tree Is Cut Down, the Last Fish Eaten, and the Last Stream Poisoned,  
You Will Realize That You Cannot Eat Money.”**

*--Cree proverb*

I'm not certain if the Environmental Protection Agency (“EPA”) is incompetent or indifferent when it comes to requiring environmental justice from polluters of minority communities, but whatever the case, the result is the same. The EPA has failed miserably in its mandate to protect communities of color from environmental hazards.

In my estimation, the EPA loses the forest for the trees. By that I mean that the EPA is more focused on process, than on outcomes; more focused on rhetoric than results. By any measure, its outcomes are pathetic when it comes to environmental justice.

Environmental “justice” should be the end result of a complaint of environmental “discrimination” or environmental “racism.” I know the last two terms make some people feel uncomfortable, however, we must call it what it is and treat this kind of discrimination and racism in the same manner we treat traditional discrimination and racism in other settings—whether it is in the form of disparate treatment of communities of color or disparate *impact* on communities of color.

The Commission has made a number of important findings in this matter. Especially the following findings:

- **EPA’s Office of Civil Rights has never made a formal finding of discrimination.**
- **Despite its regulatory authority, EPA’s Office of Civil Rights has never denied or withdrawn financial assistance from a recipient in its entire history.**

It is unconscionable that communities must wait years to hear from the EPA about an environmental justice complaint, and if they do hear back, it is often a response that fails to address the underlying injustice.

How is it possible that with all of the evidence that we have seen during the course of our briefing and research that the EPA’s Office of Civil Rights has NEVER made a formal finding of discrimination? Or NEVER denied or withdrawn a permit program or financial assistance? Incompetence, indifference? I don’t know, but I do know it is imperative that the EPA begins to do its job of enforcing environmental justice.

- **Racial minorities and low-income communities are disproportionately affected by the**

**siting of waste disposal facilities.**

- **The intersection between race and poverty compounds the health impact of environmental pollution in communities of color. When chronic disease does occur, low-income communities demonstrate worse health outcomes than affluent communities.**

To me, the issue of environmental justice is not merely one of passing interest, or intellectual curiosity, rather, it is about real, life and death scenarios affecting real people—real lives—real communities. Communities just like the neighborhood in which I was born and raised, South Chicago, on Chicago's far Southeast Side. South Chicago, a working-class community, was the first Latino settlement in the City of Chicago and was made up of Latinos and African Americans, as well as Eastern European whites. Steel mills, chemical plants, garbage dumps and recyclers surrounded us. These were the economic lifeblood of our families, but as it turns out, they were also slowly killing us. Cancer clusters, breathing disorders, so many other ailments, exist in these communities, in my community, and it can be no coincidence. We must address these issues throughout the nation.

I attended our State Advisory Committees' briefings on environmental justice in Illinois and North Carolina and heard first hand the anguish of communities of color and low-income communities about the destruction wrought by pollution and toxic (or should be classified as toxic) substances in their air, water and soil. There can be no doubt that in an overwhelming number of these communities, there are unaddressed environmental justice issues. The EPA has failed.

It is my sincere hope that by shining our agency's light on this failure by the EPA and its Office of Civil Rights, that they will finally meet their mandate through their actions, rather than through their rhetoric. Minority lives depend on it.

## Commissioner Karen K. Narasaki

It has been well over a decade since the U.S. Commission on Civil Rights last reviewed the implementation of Title VI and Executive Order 12,898 by the Environmental Protection Agency (EPA).<sup>1</sup> Sadly it appears major issues identified in our last report regarding the failure to provide adequate staffing and funding to meet, or even come close to meeting, the statutory deadlines for addressing environmental justice complaints have not been addressed. I strongly agree with the Commission's recommendation that Congress and EPA leadership should significantly increase the funding and resources to enable and empower the Office of Civil Rights (OCR) to fully address the current backlog of complaints and actively prescreen and monitor grantees to ensure compliance with environmental justice laws.

### Staffing and Delays in Processing Title VI Complaints

According to the Commission's 2003 report, EPA officials stated that OCR had sufficient funding and staffing levels to enforce Title VI and to eliminate the already existing backlog by early 2004.<sup>2</sup> The situation has not improved as the EPA promised. In fact, it has significantly worsened.<sup>3</sup>

Far from complying with its 20-day regulatory timeline, EPA took over a year to accept or dismiss complaints in 50 percent of its cases.<sup>4</sup> Some complainants have waited for over a half decade or more to have a preliminary finding and recommendation as opposed to the EPA's 180-day timeframe.<sup>5</sup> These delays are unacceptable when the health, safety, and lives of millions of people are hanging in the balance.

Under President Obama's administration, the EPA commissioned consultants to conduct an independent investigation into its Title VI program. The investigation found OCR lacks sufficient staff, and the current staff does not have the skills required to resolve Title VI complaints.<sup>6</sup> Yet despite that finding, OCR staffing and budget has not been sufficiently

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<sup>1</sup> U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools to Achieve Environmental Justice* (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf> [hereinafter *Not in My Backyard*].

<sup>2</sup> *Id.* at 56, 62.

<sup>3</sup> For example, according to the 2003 report, 10.5 percent (13 out of 124) of the cases were processed in compliance with the 20-day timeline to accept, reject or refer the case. *Id.* at 57. That number dropped to 6 percent (15 out of 247) through 2010. Deloitte Consulting LLP, *Evaluation of the EPA Office of Civil Rights 2* (2011), available at <https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf> [hereinafter *Deloitte Report*].

<sup>4</sup> *Id.* at 19.

<sup>5</sup> *See, e.g.*, U.S. Comm'n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and E.O. 12,898* 33-34 (2016) [hereinafter *Report*].

<sup>6</sup> *Deloitte Report, supra* n. 3, at 25-27.

increased. Currently, OCR has eleven total staff members and eight staff members directly responsible for Title VI compliance.<sup>7</sup> Under any measure, this is woefully inadequate to conduct environmental justice investigations and actively enforce environmental justice regulations across the country in a timely fashion. The workload is daunting. For example, David Ludder commented that EPA's proposal to incrementally increase annual post award compliance reviews from 6 by 2018 to 22 by 2024, would take nearly 40 years to review the 800 financial assistance recipients for compliance.<sup>8</sup> Moreover, according to EPA over 1,000 operating coal ash landfills and ponds and hundreds of retired coal ash disposal sites exist.<sup>9</sup>

When I asked OCR Director Golightly-Howell about whether her office had sufficient staffing and resources, she indicated that "while OCR would like to have additional resources" her office is focusing on the utilization of available resources in other parts of EPA.<sup>10</sup> Of course, appointees are constrained in their ability to be candid about budget shortfalls. Much of the testimony seemed to focus on EPA's strategic planning efforts, increasing community engagement, and the development of tools such as EJSCREEN so that outside groups and communities can access information to defend themselves. But it does not appear that adequate attention and resources are being invested in that effort and there is a question as to how helpful that can be in the end given the level of technical, scientific and legal knowledge, as well as resources it takes to challenge wealthy and politically powerful corporations who have not been unwilling to voluntarily clean up and adequately safeguard surrounding communities from hazardous byproducts of their businesses.

These measures are clearly not sufficient to address the backlog and delays that have plagued EPA. Yet instead of committing the resources required to enforce their mandate, the EPA is attempting to relax and even eliminate the regulatory deadlines.<sup>11</sup> Our report determines that the understaffing issue has not been addressed properly in the past thirteen years. Until Congress and EPA make it a priority to devote reasonable resources to OCR, it is difficult to determine whether it is necessary to adjust deadlines and clearly without them, there is no ability to hold the EPA accountable to this part of its mission.

I recognize that EPA is in a difficult position. The agency has been under attack since its beginning by powerful corporate interests and elected officials who are ideologically opposed to any government constraints on the free market. Historically, the agency itself has not sufficiently prioritized the issue of discriminatory racial impact. But lives are truly at stake here and

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<sup>7</sup> Report, *supra* n. 5, at 49.

<sup>8</sup> Briefing Transcript 2 at 271, 307-09.

<sup>9</sup> Report, *supra* n. 5, at 57.

<sup>10</sup> The efforts including cooperating with Deputy Civil Rights Officials, building a protocol for collaborations, and publishing an Interim Case Resolution Manual. *Id.* at 34-36, 49-51.

<sup>11</sup> *Id.* at 36-39.

minorities and poor communities are the “canaries in the mine.” In addition to individual suffering, the American public ends up with higher health costs, higher need for income supports, and children who cannot achieve their full potential because of the pollution in their air, water and soil. In a market economy, corporations need to bear the true cost of their operations and the federal government is the only institution with sufficient scope and resources to work with communities to hold corporations accountable.

### **Market Forces and Environmental Justice**

I have been working in civil rights for over a quarter of a century and thought nothing could shock me at this stage of my career. Yet I was stunned to hear the extremely painful stories of loss and abandonment from witnesses at our Washington, D.C. hearing and the briefing in Walnut Cove, NC by our North Carolina State Advisory Committee. We heard from people in Alabama and North Carolina, whose families had lived in their communities for sometimes for generations, who are afraid to drink or even wash in the local water, grow vegetables in their gardens, eat fish caught in local rivers and ponds or sit on their porches because of the toxins in the air and water. They have lost spouses and neighbors at a much higher than normal rate to illnesses like cancer, which is consistent with EPA studies.<sup>12</sup> They have lost most if not all of their net worth which is tied up in their homes which are now extremely difficult if not impossible to sell.<sup>13</sup>

Opponents to rigorous enforcement of environmental justice laws appear to be arguing: 1) there is no disproportionate impact on minority communities or if there is, it is the result of market forces and not discrimination and is not actionable; and 2) hazardous waste sites are a net benefit to poor minority communities because the companies generate jobs and more affordable real estate.<sup>14</sup>

As to the first argument, our report includes the disproportionate siting of undesirable land uses in poor and minority communities. The report documents that there are data showing a disproportionate impact of coal ash facilities on communities of color if you focus on a state-by-state analysis, which is appropriate because the siting decisions are generally not made nationally, but locally.<sup>15</sup> Numerous studies have also demonstrated other hazardous waste facilities are disproportionately located in poor and minority communities.<sup>16</sup>

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<sup>12</sup> *Id.* at 54-55.

<sup>13</sup> *See infra* n. 29.

<sup>14</sup> Report, *supra* n. 5, at 12-13.

<sup>15</sup> *Id.* at 79-86. This is also the case for other hazardous waste facilities.

<sup>16</sup> *See id.* at 13-14 (discussing recent studies correlating minority concentration and the siting of hazardous waste facilities, including a first-of-its-kind longitudinal study spanning four decades); Not in My Backyard, *supra* n. 1, at 14-17 (additional review of studies connecting race and siting decisions).

Secondly, race and poverty in America have become inextricably linked. The correlation between race and poverty has been well documented by other studies and is supported by findings in this report. The Commission's State Advisory Committees in North Carolina and Illinois both identified that racial minorities and low-income individuals are more likely to live within the polluted area.<sup>17</sup> The same pattern appears in South Carolina as well.<sup>18</sup> In short, "racial, economic, and social structures . . . overlap and reinforce each other."<sup>19</sup> Moreover, the question I am more interested in is whether companies are being held less accountable for safe storage and clean up in minority communities who continue to have less resources and political power. Minority and low-income communities often lack the political and financial clout to properly bargain with polluters when fighting a siting decision or seeking redress from pollution already in their community.<sup>20</sup>

Conservatives miss the real issue by focusing instead on whether the hazardous waste site came to the community or the community came to the hazardous waste site.<sup>21</sup> Based on current research and the testimony I heard in Washington, D.C. and in North Carolina, I am satisfied that in many cases the waste site came to the community.<sup>22</sup> I also believe the residents who say that they were never given full disclosure as to the risks inherent in those sites. It may well be that those risks were not well understood by even the companies in the early days, but the risks are more than clear now to the corporations who are generating or making money storing the waste. With the well-being of children and their families at stake, the focus should be on the responsibility of the entity making the profit to take action.

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<sup>17</sup> Report, *supra* n. 5, at 84.

<sup>18</sup> *Id.* at 57.

<sup>19</sup> *Id.* at 15. See also Not in My Backyard, *supra* n. 1, at 15 (discussing how "[h]ousing segregation, the influence of race in local zoning practices, and infrastructure development all contribute to this disparity").

<sup>20</sup> See Briefing Transcript 2 at 285-86 (Professor Timmons describing why Coasian bargaining theory is not perfect in real world situations).

Professor Timmons also discussed the concept of diminishing marginal utility of income, wherein low-income individuals will value an extra dollar of income more than a rich person. When put in the context of environmental justice, polluters will theoretically prefer to site their facilities in low-income communities because these communities will be willing to accept additional exposure to pollution in exchange for compensation. *Id.* at 284. "This makes the poor neighborhood an attractive destination for siting nuisances and yields and outcome that is environmentally unjust, albeit efficient, from a Coasian perspective." *Id.* at 285.

<sup>21</sup> Report, *supra* n. 5, at 12.

<sup>22</sup> See Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting demographic Change hypotheses of Environmental Injustice*, ENVIRONMENTAL RESEARCH LETTERS (Nov. 18, 2015), available at <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/meta> (longitudinal study finding strong evidence of disparate siting for facilities sited in all time periods). The study found some evidence of demographic changes after siting, but found changes were mostly a continuation of change that began prior to siting. This suggests the siting of facilities is drawn to neighborhoods in transition rather than facilities attracting minority and low income communities.

Supporters of the market force theory contend there are economic benefits for communities near polluted areas because of businesses moving to the area.<sup>23</sup> Inherent in their argument is that the promise of jobs outweighs the risks of residents becoming ill, disabled or dying. This tradeoff is unacceptable and also unnecessary. One can generate jobs without endangering the health and welfare of surrounding communities. Moreover, we learned from testimony received from our Illinois State Advisory Committee meeting that most residents do not work in the plants in the affected neighborhood, and even if they do, they rarely occupy career-oriented, high wage positions.<sup>24</sup> Whatever benefits that may exist are easily outweighed by medical expenses for health problems associated from pollution, including quality healthcare, emergency room visits, and missing work and school for asthma and other respiratory problems.<sup>25</sup> As a resident remarked at our Illinois State Advisory Committee meeting, “[D]on’t sell me on jobs. Let’s talk about the real cost of health and the environment when we are talking about these companies coming in and the types of jobs they are going to offer.”<sup>26</sup>

Market force theory supporters also cite to more affordable housing as a result of living near pollution.<sup>27</sup> This argument would be laughable, if it were not so tragic. Housing is only more affordable because of the severe health risks and environmental degradation<sup>28</sup> associated with living in a polluted area. As we heard during the Commission’s North Carolina State Advisory Committee meeting and from Esther Calhoun at our Washington, D.C. hearing, the houses in surrounding polluted areas become unsaleable and poor people particularly—if they even have houses—have all if not most of their wealth tied up with their houses and are unable to move away.<sup>29</sup> Research also indicates that African American families are more likely than white families to build their wealth based on property ownership.<sup>30</sup> Opponents to enforcement of our environmental laws are not pro-market, they are against corporate accountability.

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<sup>23</sup> Report, *supra* n. 5, at 13 (“one would expect ... that there are often economic benefits for the nearby community to businesses locating there.”).

<sup>24</sup> Ill. State Advisory Comm. to U.S. Comm’n on Civil Rights, Civil Rights and Environmental Justice in Illinois, 9 (2016), available at [http://www.usccr.gov/pubs/SAC\\_AdvisoryMemo.pdf](http://www.usccr.gov/pubs/SAC_AdvisoryMemo.pdf) [hereinafter Environmental Justice in Illinois]. See also Not in My Backyard, *supra* n. 1, at 22-25 (also discussing lack of jobs).

<sup>25</sup> Environmental Justice in Illinois, *supra* n. 24, at 9, 79.

<sup>26</sup> *Id.* at App. A 117.

<sup>27</sup> Report, *supra* n. 5, at 13 (“one would expect property to be cheaper”).

<sup>28</sup> Property damage and lower home values from air pollution alone have been documented, see, e.g., David Slawson, *The Right to Protection from Air Pollution*, 59 S. CAL. L. REV. 667, 698-702 (1986).

<sup>29</sup> See Memorandum from the N.C. State Advisory Comm. to the U.S. Comm’n on Civil Rights Finding 1.c (2016) (See Appendix. I understand this finding is tentative.); Briefing Transcript 2 at 61 (Ms. Calhoun testified, “There’s quite a few people [who] want to sell their property right now. But they can’t sell. Who is going to buy it? Do you want to live next to this thing?”).

<sup>30</sup> Environmental Justice in Illinois, *supra* n. 24, at 10.

Finally, the market force argument is based on a flawed foundation. It is based on the idea that it is jobs and affordable housing versus a clean and safe environment. Actually, investing in clean up and better pollution controls will also create jobs and there are better programs for developing jobs and affordable housing than allowing insufficiently regulated landfills and hazardous waste sites to be maintained, expanded or built next door.<sup>31</sup>

It is interesting that opponents to Title VI regulation seek to argue market efficiencies to explain siting issues, while ignoring the fact that the disproportionate impact of pollution on minorities and low income communities is the textbook example of a free market externality that is inefficiently allocated.<sup>32</sup> In many situations, including coal ash, the best practices are well established around storage and siting concerns. The issue is not that companies do not know there is an issue, or do not know how to solve the problem, it is that they are motivated to minimize costs and are not willing to cut into their profits.<sup>33</sup> And so long as they are not being required to pay for the loss of value in homes and the loss of enjoyment of these homes, or to cover the nutrition needs of poor communities who would otherwise be able to grow food and catch fish to help feed their families, or to cover the health insurance and treatment costs and lost days of school and work caused by the pollution they are making money on, then the market will not provide incentives to invest in proper storage and handling.<sup>34</sup>

Our environmental laws recognize this market flaw. Only a federal government agency not beholden to the political power of local corporate interests can adequately protect communities from pollution and enforce environmental laws. And with minorities and poor communities still lacking sufficient political power in too many states to ensure their concerns are met, Title VI is an important mechanism.<sup>35</sup> Federal taxpayers should not be subsidizing or contracting with companies or state agencies who are not complying with federal law.

I support the Commission's recommendation for Congress and relevant federal agencies to investigate options for industry to compensate community members for health care expenses and

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<sup>31</sup> For example, waste collection and landfill disposal create less than one job per 1,000 tons of waste managed versus 6 to 13 jobs per 1,000 tons for collection, processing, and manufacturing of recycled products. Natural Res. Def. Council, *From Waste to Jobs: What Achieving 75 Percent Recycling Means to California 2* (2014), available at <https://www.nrdc.org/sites/default/files/green-jobs-ca-recycling-report.pdf>.

<sup>32</sup> As Professor Timmons stated, “[A]n allocated inefficiency would be the term. There's too much pollution in that neighborhood from a pure point of view of maximizing social welfare, net social welfare. That alone would justify doing something.” Briefing Transcript 2 at 305.

<sup>33</sup> “[W]e don't think of firms as having motivations to dump pollution on particular groups. We think that they go out and they try to minimize costs and maybe even maximize profits. The problem though arises that when siting happens through a Coasian bargaining mechanism, those sorts of market failures can lead a cost minimization motivation to disproportionate exposure[.]” *Id.*

<sup>34</sup> *See id.* at 306-07 (“If you had to compensate people everywhere, a natural response to that would be to try to make less pollution, to try to find something that was going to have fewer externalities and reduce your costs of compensation,” including incentivizing innovation.).

<sup>35</sup> *See id.* at 305-06 (“Title VI ... is just trying to level the playing field in the Coasian bargaining world”).

land devaluation that result from coal ash contamination or other pollutants. During breaks in the hearings I attended, I spoke with some industry representatives who noted a willingness to entertain the idea of potentially buying out impacted community members.

The industry making profits by externalizing costs disproportionately on low income and minority communities should at least buy out the impacted homes at the value they were worth before the environmental issue became apparent.<sup>36</sup> Researchers have proposed several solutions similar to workers' compensation as well as environmental damages compensation systems in other countries.<sup>37</sup> Unfortunately, mediation between private parties is often difficult due to uneven bargaining power. This is exemplified in the case of Uniontown, Alabama, where the company owning the Arrowhead landfill has filed a \$30 million defamation lawsuit against primarily low income black residents who are publicly challenging the storage of coal ash in the landfill next to a residential neighborhood.<sup>38</sup>

Unfortunately, too many states have shown themselves unwilling or unable to hold companies accountable to environmental standards sufficient to protect the health and well-being of their most vulnerable citizens.<sup>39</sup> Consequently, the federal government has an important role to play in protecting minority communities yet the EPA has consistently failed to use Title VI as the tool it was meant to be because of its failure to provide it with the required resources.

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<sup>36</sup> Some polluters have decided to buy out homes or even a town to avoid potential litigation but the prices are usually negotiated. Given the unequal bargaining power the parties have, it is questionable whether the prices are fair. See Richard Martin, *For \$20 Million, a Coal Utility Bought an Ohio Town and a Clear Conscience*, THE ATLANTIC (Oct. 16, 2014), available at <http://www.theatlantic.com/business/archive/2014/10/for-20-million-a-coal-utility-bought-an-ohio-town-and-a-clear-conscience/381499>; Sarah Cox, *The Neighborhood Marathon Is Killing with Its Buyout*, CURBED DETROIT (Jan. 27, 2012), available at <http://detroit.curbed.com/2012/1/27/10402630/the-neighborhood-marathon-oil-is-killing-with-its-buy-out-1>.

<sup>37</sup> See Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439 (2005).

<sup>38</sup> See Press Release, American Civil Liberties Union, ACLU Makes Free Speech Case Defending Residents of Low-Income, Majority Black Alabama Town (Jun. 2, 2016), available at <https://www.aclu.org/news/environmental-protesters-fight-defamation-lawsuit-filed-coal-ash-landfill>.

<sup>39</sup> See Editorial, *Hey Gov. McCrory: Stop Meddling with Scientists' Coal Ash Warnings*, CHARLOTTE OBSERVER (Aug. 11, 2016), available at <http://www.charlotteobserver.com/opinion/editorials/article95168737.html>.

## Commissioners Michael Yaki, Roberta Achtenberg, and David Kladney

### The Problem

This report, in the wake of the mass lead poisoning of residents of Flint, Michigan, is especially timely. Environmental justice, in practice, has brought little in the way of environmental benefits or legal justice to communities that continue to suffer from the toxic and other health impacts of deliberate policies that have created a swath of destruction through poor and minority populations.

Its roots, however, go back much further than that. In San Francisco in the late 20<sup>th</sup> century, complaints were lodged that the City's power plants were located in primarily African American communities. Freeways were built over and through poorer, mainly minority, parts of town. It was there that, as elected officials, Commissioners Achtenberg and Yaki were first confronted by health studies showing disproportionate rates of asthma in young minority children in these neighborhoods. And now, twenty years later, we are still being presented with the same dismal data and the same questions that require us to ask whether we have done anything a generation later.

The Center for Public Integrity summed it up best:

The Civil Rights Act of 1964 was described by President Lyndon B. Johnson, who signed it into law, as an “effort to bring justice and hope to all our people.”

It has brought neither to Americans who complain of environmental discrimination.<sup>1</sup>

Title VI of the Civil Rights Act forbids entities that receive federal funds from discriminating on the basis of race – intentionally or through decision-making that results in an unjustified, unequal impact on a protected class. This report was meant to analyze the application and enforcement of Title VI by the Environmental Protection Agency in situations where protected classes – in the main, minority populations usually situated in economically distressed areas – were disproportionately affected by actions that had adverse impacts to their health. One such action – which seems to flow from a lack of federal action – has been the disproportionate placement of facilities working with toxic chemicals in low-income and minority communities.

The Center for Public Integrity noted that “[a] massive Alabama dump a stone’s throw away from home is expanding while the predominantly African-American residents wait for the EPA to respond to their complaint. California parents are challenging an EPA settlement with the

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<sup>1</sup> Talia Buford and Kristen Lombardi, The Center for Public Integrity, *How to fix the EPA’s broken civil-rights office*, (August 20, 2015), available at <https://www.publicintegrity.org/2015/08/20/17834/how-fix-epas-broken-civil-rights-office>.

state over pesticide use near schools with mostly Latino students, a deal the EPA touted as a success. Other stories brimming with citizen rage and frustration can be heard in New Mexico, New York and Ohio.”<sup>2</sup>

An article in *The Nation* issued a scathing critique of EPA, noting that “[l]ong before people in Flint, Michigan, had to worry about brownish, putrid-smelling, lead-laced water, they worried about poisoned air.”<sup>3</sup> The same article observed that a report issued early this year by the Center for Effective Government “found that people of color are nearly twice as likely as whites to live near facilities that process dangerous chemicals.”<sup>4</sup> Sociologist Mary Collins of the State University of New York College of Environmental Science and Forestry was part of a study of EPA data that led her to say, “It’s certainly not news that minority and low income communities face more than what some would say is their fair share of pollution from industrial sources ... We found that actually, the burden they face from these super polluters was even more extreme than you would think.”<sup>5</sup>

As we note below, EPA’s inability to substantively and procedurally afford due process to the victims of toxic discrimination is an issue that cannot wait another generation to address.

### **EPA’s weaknesses in addressing environmental justice**

EPA’s Office of Civil Rights has historically acted as a black box for complaints about discriminatory effects of toxic source locations. Even though there is plenty of evidence to suggest that “[t]he single greatest determination of where certain kinds of toxic sources are located ... is race”<sup>6</sup> in its many years of existence, EPA has “never once made a finding of discrimination and ... rarely uses any other of the tools at their disposal to push states or localities or private actors to change their behavior.”<sup>7</sup>

The criticism of EPA has been consistent. An investigation by the Center for Public Integrity and NBC News show that “[t]ime and again ... communities of color living in the shadows of sewage plants, incinerators, steel mills, landfills and other industrial facilities across the country

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<sup>2</sup> *Id.*

<sup>3</sup> Zoe Carpenter, *How the EPA has Failed to Challenge Environmental Racism in Flint – and Beyond*, *THE NATION* (January 28, 2016), available at <https://www.thenation.com/article/how-the-epa-has-failed-to-challenge-environmental-racism-in-flint-and-beyond/>.

<sup>4</sup> Center for Effective Government, *Living in the Shadow of Danger – Poverty, Race, and Unequal Chemical Facility Hazards* (January 2016), available at <http://www.foreffectivegov.org/shadow-of-danger>.

<sup>5</sup> Chris Mooney, *It’s Not Just Flint: Poor communities across the country live with “extreme” polluters*, *The Washington Post* (January 27, 2016), available at [https://www.washingtonpost.com/news/energy-environment/wp/2016/01/27/its-not-just-flint-poor-communities-across-the-country-live-with-extreme-polluters/?utm\\_term=.30e4e2feda90](https://www.washingtonpost.com/news/energy-environment/wp/2016/01/27/its-not-just-flint-poor-communities-across-the-country-live-with-extreme-polluters/?utm_term=.30e4e2feda90).

<sup>6</sup> Carpenter, *supra* n. 3.

<sup>7</sup> *Id.*

– from Baton Rouge to Syracuse, Phoenix to Chapel Hill – have found their claims denied by the EPA’s civil rights office.”<sup>8</sup>

The implementation of the 2011 “EJ 2014,” EPA’s across the board plan for environmental justice, did not seem to reach its lofty and stated goals. The treatment of coal ash is a stark, but by no means singular, example.

### **EPA and coal ash**

Multiple doctors and other experts agree on the toxic impact exposure to coal ash can have on one’s health. After one of the most infamous coal ash spills in our nation’s history, Duke University researchers tested the waters near the plant and “found high levels of arsenic and radium in the ash itself and warned that airborne dust could pose ‘a severe health impact on local communities and workers.’”<sup>9</sup> Another expert, Barbara Gottlieb of the Physicians for Social Responsibility, explained of the dust at a spill site,

[t]here are several ways airborne dust can make people sick ... Fine ash particles can adhere to lungs and penetrate deep into the body. Many of these particles contain silica, scourge of the respiratory system, as well as metals such as arsenic, chromium and cadmium, which can cause pulmonary and neurological problems and cancer. The metals mix together in the dust and can attack the same organ at once – the kidneys, for example – amplifying the damage.<sup>10</sup>

Gottlieb’s 2010 report summarizes health hazards posed by nine of the ash’s most common metals and concludes that these “coal ash toxics have the potential to injure all of the major organ systems, damage physical health and development, and even contribute to mortality.”<sup>11</sup>

Clearly there are many strong health-related reasons to take the danger of coal ash very seriously.<sup>12</sup>

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<sup>8</sup> Kristen Lombardi, Talia Buford and Ronnie Greene, Center for Public Integrity, *Environmental racism persists, and the EPA is one reason why* (Sept. 2015), available at <https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>.

<sup>9</sup> Kristen Lombardi, The Center for Public Integrity, *Former cleanup workers blame illnesses on toxic coal ash exposures* (July 20, 2016), available at <https://www.publicintegrity.org/2016/07/20/19962/former-cleanup-workers-blame-illnesses-toxic-coal-ash-exposures>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See also the views of biologist and environmental toxicologist Shea Tuberty, who found 17 metals in the coal ash from the TVA spill, including arsenic in concentrations up to 300 times safety standards. What alarmed him most, he says, were cenospheres, components of coal ash produced by the combustion process.

### Disparate placement of coal ash in low income and minority communities

Although some good information was included, we wish the main report included far more on the disproportionate exposure communities of color face to air pollution and other toxic activity.<sup>13</sup> There are many, many studies showing more extreme exposure faced by minority and low income communities, and although the numbers sometimes differ, the impact and evidence of discrimination and environmental *injustice* are the same.<sup>14</sup> This issue is critical in assessing EPA's enforcement of Title VI. A panelist from one of our briefings, Angela Delgado, from EarthJustice said,

[T]oday the real question is whether EPA has fulfilled its mandate under Executive Order 12898 to consider the proximity of minority and low-income communities to toxic coal ash lagoons and whether the agency has affirmatively addressed that disparity in order to prevent unnecessary and irreversible harm.

Unfortunately, EPA did not.<sup>15</sup>

As we noted in the concept paper that inspired the briefings the Commission held on environmental justice as well as the main report, issues involving coal ash are replete in the history of failure by the EPA. In 2008, a dam breach at a plant in Tennessee sent over a billion

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Tuberty likens cenospheres to Christmas tree ornaments: They are round, hollow particles that break into tiny, sharp fragments. They consist mostly of silica and aluminum. His analysis of the TVA ash showed that some cenospheres contained what he calls really interesting gel bubbles." The gel turned out to be iron oxide coated with arsenic at levels exceeding by the thousands the thresholds for aquatic and human life.

*Id.*

<sup>13</sup> As one of our briefing panelists, journalist Ms. Rhiannon Fionn Bowman said, "Please keep in mind that these people did not seek this fight. Coal ash came to them, and they believe it is severely harming their health, their communities, and even their properties through lowered property values and even tangible damage." USCCR Briefing Transcript, February 5, 2016, p. 223.

<sup>14</sup> For example, the Center for American Progress, addressing communities of color and environmental justice, referenced some representative studies in expressing their belief that "Communities of Color have higher rates to air pollution than their white, non-Hispanic counterparts". They wrote:

A Yale University study found that non-Hispanic whites had the lowest exposure rates for 11 of the 14 pollutants monitored in the study. Meanwhile, Hispanics had the highest exposure rates for 10 out of the 14 pollutants, and African Americans had higher exposure rates than whites for 13 out of the 14 pollutants. Some of the pollutants studied have been connected to asthma, cardiovascular issues, lung disease, and cancer. For example, a case study of The Bronx, New York, found that individuals who lived close to noxious industrial facilities were 66 percent more likely to be hospitalized for asthma. Significantly, these same individuals were 13 percent more likely to be people of color.

Jasmine Bell, Center for American progress, *5 Things to Know About Communities of Color and Environmental Justice* (April 25, 2016), available at <https://www.americanprogress.org/issues/race/news/2016/04/25/136361/5-things-to-know-about-communities-of-color-and-environmental-justice/>.

<sup>15</sup> Andrea Delgado, USCCR Briefing Transcript, February 5, 2016, p. 208.

gallons of coal ash – the largest coal ash spill in U.S. history – into that state’s Emory River. Approximately 4 million tons of that coal ash was hauled to Perry County’s Arrowhead landfill in Uniontown, Alabama. Several residents of Perry County later filed a civil rights complaint with the EPA, “saying that the landfill is lowering property values, causing illness and letting toxic chemicals flow into nearby creeks.”<sup>16</sup> A most troubling concern in this dangerous situation is that “[t]he source of the ash, the Harriman community, is almost entirely white (91 percent) and middle class (medium income \$36,031). Uniontown is almost the exact opposite – nearly 90 percent African American and 45.2 percent living below the poverty line (median income \$17,473).”<sup>17</sup> When Esther Calhoun – a resident of Uniontown who testified at our briefing – marched across the Edmund Pettus bridge to commemorate the March from Selma to Montgomery, she said it was “for a right ... more fundamental than the right to vote. ‘I want to breathe clean air,’ she says.”<sup>18</sup>

Specifically,

Calhoun’s home is right next to the train line that ferried the coal ash from a power plant spill 300 miles away in Harriman, Tennessee.

By 2011, when the last of the ash had been shifted from Harriman, a town which is 90 percent white, to a landfill on the outskirts of Uniontown, which is 90 percent black, it had formed the highest peak in Perry County.

When the coal ash first arrived, residents complained of upper respiratory infections, nosebleeds and nausea. Scientists said they found evidence of arsenic leaking into local streams and residents closest to the landfill said paint was stripping off their cars.<sup>19</sup>

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<sup>16</sup> Gigi Douban, *Mixed feelings for landfill run deep in Alabama*, *Marketplace*, (May 27, 2015), available at <http://www.marketplace.org/topics/business/mixed-feelings-landfill-run-deep-alabama>. The article notes that “[c]oal ash contains arsenic, mercury, lead and boron, and environmentalists fear these chemicals can cause health problems.”

<sup>17</sup> Earthjustice *Ashes: A Community’s Toxic Inheritance*, (September 1, 2014), available at <http://earthjustice.org/features/campaigns/photos-a-toxic-inheritance>.

<sup>18</sup> Paul Lewis, *Fifty years after Selma, Alabama at the heart of a new civil rights struggle*, *THE GUARDIAN*, (March 6, 2015), available at <http://www.theguardian.com/us-news/2015/mar/06/alabama-selma-50-years-civil-rights-struggle>.

<sup>19</sup> *Id.*

There are many more stories of specific communities or groups being uniquely hit by exposure to toxic chemicals. The publication *Who’s in Danger?: Race, Poverty, and Chemical Disasters*, looking at many locations and many types of chemical disasters, in one section highlights the environmental injustice faced by Alaska Native peoples. They observe that Alaska Natives “experience fence-line impacts from hundreds of contaminated former military and industrial sites in their own backyards, and are also connected to communities in states in the ‘lower 48’ working for chemical security.” They further observe that

Indigenous Arctic peoples are among the most highly exposed people on earth to toxic chemicals, because these chemicals – DDT, PCBs, brominated flame retardants, and perfluorinated compounds, to name a few – are persistent, and drift hundreds and thousands of miles north on

After numerous spills and related pollution incidents, a coal ash rule was absolutely needed. Unfortunately, the rule that came out was weak. Under the EPA's Disposal of Coal Combustion Residuals from Electric Utilities ("the coal ash rule"), EPA categorized coal ash under Schedule D of the Resource Conservation and Recovery Act (RCRA), a section that covers only non-hazardous waste, including household garbage. Under Schedule D, coal ash management is left under state and local governments – EPA or other federal agencies cannot enforce the rule, leaving enforcement to utilities, states, and citizen suits.

The criticism was immediate and swift:

[T]he EPA failed to fix major pollution problems in communities ... because the rule puts the burden of enforcement on citizens, rather than requiring government regulators to take action. To make matters worse, the EPA rule allows the continued operation of dangerous coal ash lagoons—the majority of which are located in low-income and minority neighborhoods. Toxic waste can leak slowly from these unlined lagoons, poisoning underlying drinking water aquifers, and catastrophic failures can occur, endangering lives and property. Consequently, the EPA's coal ash rule results in an unequal and unjustified threat of harm to poor and minority Americans.<sup>20</sup>

The Center for Public Integrity detailed the history of the development of and lobbying regarding the coal ash rule.<sup>21</sup> It documented that in October 2009, EPA's draft rule "essentially would have classified coal ash as 'hazardous, a distinction triggering a series of strict controls for its dumping.'"<sup>22</sup> The article goes on to detail how "[t]he proposal set off a frenzy of lobbying by the utility industry, which has long opposed a 'hazardous label for coal ash.'"<sup>23</sup> In the end, the industry lobbyists won.

"By the time the EPA issued its final rule in 2014 – five years after its initial regulatory proposal – the agency had backed down. Instead of a rule treating coal ash as hazardous, the EPA issued minimum national standards that amounted to

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wind and ocean currents from more southern latitudes where they are manufactured, stored, and used." (quoting Vi Waghiy, of the Native Village of Savoonga, St. Lawrence Island, Alaska).

Environmental Justice and Health Alliance for Chemical Policy Reform, *Who's in Danger?: Race, Poverty, and Chemical Disasters* (May 2014), available at <http://comingcleaninc.org/assets/media/images/Reports/Who's%20in%20Danger%20Report%20FINAL.pdf>.

<sup>20</sup> Lisa Evans, *Coal Ash: A Civil Rights Issue* (February 3, 2016), available at <http://earthjustice.org/blog/2016-february/coal-ash-a-civil-rights-issue>.

<sup>21</sup> Kristen Lombardi, Center for Public Integrity, *Coal ash bedevils Oklahoma town, revealing weakness of EPA rule* (July 13, 2016), available at <https://www.publicintegrity.org/2016/06/30/19829/coal-ash-bedevils-oklahoma-town-revealing-weakness-epa-rule>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

guidelines for states – guidelines that call for treating the disposal of coal ash as if it were household trash.”<sup>24</sup>

EPA, in essence, had abandoned the very communities it was charged to protect by refusing to treat coal ash as a hazardous substance. To add insult to injury, the rule meant that these communities, many of them low-income, did not have the means to afford representation in order to file a complaint – if they even know of their rights at all. The deliberate refusal to categorize coal ash as a Schedule C hazardous substance under RCRA is a tragedy not just for these communities, but for the nation.

**Failure to meet deadlines/address problems (taking, in some cases, decades to address complaints)**

EPA is supposed to accept, reject, or refer a complaint within 20 days under its regulations. In the Commission’s 2003 report, *Not in My Backyard*, we noted that “EPA had 124 Title VI complaints in its docket by January 2002. Of those 124 Title VI complaints, EPA had only processed 13 cases.”<sup>25</sup>

As this report notes, Deloitte found in 2011 that 50 percent of Title VI cases took EPA over one year to be accepted.<sup>26</sup> Further, EPA has acknowledged this problem. In an internal report, it says:

Keeping Title VI cases on track – and reducing the backlog of cases – is a challenge for the Agency. Currently, the Office of Civil Rights has the sole responsibility within EPA to process and review Title VI administrative complaints. Under this approach, OCR has struggled to process complaints and obtain the technical and analytical support necessary to issue final decisions, resulting in a backlog of 25 cases stretching over 15 years.<sup>27</sup>

One of the panelists at our briefing, Ms. Engelman-Lado, told us that her organization represents five community-based organizations who filed civil rights complaints between 1992 and 2005, and that “EPA accepted each complaint for investigation more than a decade ago but has failed

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<sup>24</sup> *Id.*

<sup>25</sup> This report, p. 27, citing *Not in My Backyard*.

<sup>26</sup> Deloitte, *Evaluation of the EPA Office of Civil Rights* (March 2011), available at [https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr\\_20110321\\_finalreport.pdf](https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr_20110321_finalreport.pdf).

<sup>27</sup> Civil Rights Executive Committee, *Developing a Model Civil Rights Program for the Environmental Protection Agency* (April 2012), available at [https://archive.epa.gov/epahome/ocr-statement/web/pdf/executive\\_committee\\_final\\_report.pdf](https://archive.epa.gov/epahome/ocr-statement/web/pdf/executive_committee_final_report.pdf). See also EPA’s table of cases (which says it will be updated on a continuous basis but only shows complaints up to January 2014) at <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>.

to make preliminary findings ... Each complaint remains open to this day with no resolution or relief for community residents.”<sup>28</sup> This is unacceptable.

“If we hope to address racial and ethnic disparities and health status and life expectancy, our vision for change must include a radical shift in the spatial distribution of health hazards, access to parks and other infrastructure, and civil rights compliance and enforcement in the environmental context.”<sup>29</sup>

Finally, as the Center for Public Integrity says, “the EPA has dismissed 95 percent of all community claims alleging environmental discrimination since the mid-1990s without providing any remedies to complainants ... EPA’s lax enforcement of Title VI has impacted communities across the country, some of which have waited years for the agency to act.”<sup>30</sup>

### **Concern re: EPA’s plan to eliminate deadlines from their regulations**

As noted in the main report (at p. 32), in December 2015, EPA put out a proposed rulemaking seeking to do away with its regulatory deadlines for processing and investigating Title VI complaints. This is counter-intuitive. To address the failure to meet deadlines and to ameliorate critical environmental justice problems in a timely manner, the solution is to fix EPA’s internal complaint processing approach, not to eliminate the very deadlines they should be meeting.

There is concern that, with no deadlines, extended time frames for complaint processing would grow. “[T]he EPA recently proposed changes to its rules for complying with Title VI, a move that justice advocates see as an attempt to evade legal responsibility when it fails to respond to allegations of discrimination. The proposed changes would eliminate the deadline for addressing complaints, and would give the agency more discretion to ignore them.”<sup>31</sup>

### **Possible Solutions**

There are some very good possible solutions offered by the “Recommendations” section of our main report. Our view is that the most important possible solutions include:

- Classify coal ash as a Schedule C (rather than Schedule D) form of waste under RCRA
- Do not allow EPA to eliminate its deadlines; adhere to existing regulatory deadlines
- Increase EPA’s Office of Civil Rights budget, allocating the increase specifically to increasing staffing of Title VI environmental justice work.

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<sup>28</sup> USCCR Briefing Transcript 2, February 5, 2016, p. 214.

<sup>29</sup> *Id.* at 215.

<sup>30</sup> Talia Buford, Center for Public Integrity, *EPA begins ‘wholesale attempt to fix much-criticized Office of Civil Rights* (December 2015), available at <https://www.publicintegrity.org/2015/12/01/18902/epa-begins-wholesale-attempt-fix-much-criticized-office-civil-rights>.

<sup>31</sup> Zoe Carpenter, *supra* n. 3.



## Commissioner Gail Heriot – Dissenting Statement and Rebuttal to Other Commissioners' Statements

### A. *The Commission's Independent Research, Which Shows A Lack of Disparate Impact on Racial Minorities, Is Downplayed in this Report.*

The biggest take away from this report should be this: *Coal ash landfills and ponds aren't actually disproportionately located in the vicinity of racial minorities—at least not insofar as the Commission's independent empirical research shows. Our research indicates that, if anything, coal ash landfills and ponds may be disproportionately located near whites.*<sup>1</sup> This research is broadly consistent with the findings of the EPA when it conducted similar research into coal-fired electric utility plants in 2010<sup>2</sup> and into surface impoundments and

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<sup>1</sup> This does not appear to be what our Commission or at least some members of the Commission were hoping and expecting to find. In its July 20, 2015 press release announcing that it had adopted this topic for this year's statutory enforcement report, Chairman Castro was quoted as saying, "Having been born and raised in a community that was, and continues to be, the victim of environmental racism, I know well the adverse impact this has on low-income and minority communities. It is my hope that the Commission's focus on this issue will ensure that this form of discrimination is met with justice." Using a tendentious term like "environmental racism" is not the best way to begin a study into whether coal ash disposal sites are indeed located disproportionately near minority communities and, if they are, whether this is leading to health or quality of life problems. This tendency toward tendentiousness was also in evidence last year in our statutory enforcement report on immigration detention facilities. The proposal to undertake that topic for the report concluded ahead of time that "egregious human rights and constitutional violations continue to occur in detention facilities." In fact, when we actually investigated, conditions were much better than expected. See Statement of Gail Heriot, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* 172, 174-217 (September 2015).

<sup>2</sup> See Environmental Protection Agency, *Regulatory Impact Analysis for EPA's Proposed Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry* (April 30, 2010). As the Staff-generated portion of this report indicates, *supra* at 79 & nn. 558-560, the EPA examined the data for disparate impact on racial minorities (as well as for disparate impact on low-income individuals, a category not within the Commission's jurisdiction) from three different angles: (1) plant-by-plant (by determining the proportion of the population that is minority for each zip code (or more formally Zip Code Tabulation Area or "ZCTA") containing a coal-fired electric plant and comparing that figure to a state-wide benchmark); (2) state-by-state (by aggregating the data on coal-fired electric plants in each state, determining the proportion of the population that is minority in the zip codes containing a coal-fired electric plant and comparing that figure to a state-wide benchmark) and (3) nationwide (by aggregating the data on all coal-fired electric plants, determining the proportion of the population that is minority in the zip codes containing a coal-fired electric plant and comparing that to the nationwide benchmark).

The results of the EPA's 2010 efforts were as follows:

- (1) The plant-by-plant analysis showed that only 28% of plants were surrounded by populations whose minority representations exceeded that of the state population, while 72% of plants were surrounded by populations whose minority representation fell below that of the state population. To put it a bit more plainly, contrary to the expectations of those who voice concerns over environmental justice, more coal-fired utilities are located in zip codes where the population is disproportionately white than where it is disproportionately minority.
- (2) The state-by-state analysis yielded no significant evidence of overall racial disproportionality. Of the 47 states with coal-fired electric plants, 24 (51%) had minority population levels inside zip codes with coal-fired plants above its statewide average. The remaining 23 (49%) had minority population levels inside zip

landfills in 2014.<sup>3</sup> Insofar as the Commission staff or I have been able to find additional non-EPA evidence, it is either broadly consistent with the Commission's work,<sup>4</sup> anecdotal<sup>5</sup> or questionable.<sup>6</sup>

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codes with coal-fired plants that were below its statewide average. Especially given that the EPA was working with an odd number of states, this is as close to "par" as it could get.

- (3) The nationwide analysis yielded results similar to the results for the plant-by-plant analysis. Contrary to expectations, the residents of zip codes containing a coal-fired plant were less likely than the national population at large to be members of racial minorities (i.e. they were more likely to be white). The difference, however, was small. Of the 6.08 million people living in zip codes with coal-fired plants, 1.32 million (21.7%) were members of racial minorities as opposed to 24.9% of the population at large.

<sup>3</sup> In 2014, the EPA compared the populations living with a one-mile radius of coal ash surface impoundments and landfills to the population at large. It found that 16.1% of those living within one-mile of such a coal ash disposal site are members of racial minorities. By contrast, 24.8% of the population at large consisted of members of racial minorities. Report at 83. See also Environmental Protection Agency, Regulatory Impact Analysis For EPA's 2015 RCRA Final Rule For Coal Combustion Residual (CCR) Landfills & Surface Impoundments at Electric Utility Plants, at 9-61 (Oct. 2014), *available at* <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-12034>. This is a rather substantial disproportionality, and, again, it runs in the opposite directions from the conventional wisdom among environmental justice activists.

The EPA also looked at so-called "surface impoundment catchment areas," which it defines to be the area in which run-off can travel downstream within 24 hours. Here it found that members of racial minorities are over-represented, but only very slightly. It found that 28.7% of those living in these run-off areas are members of racial minorities (as opposed to 24.8% of the population at large). The 24.8% figure is more than 85% of the 28.7% figure. Disproportionalities of that magnitude are generally disregarded in employment discrimination law, where the issue of disparate impact liability comes up far more often than it does in environmental law. See Environmental Protection Agency, Regulatory Impact Analysis For EPA's 2015 RCRA Final Rule For Coal Combustion Residual (CCR) Landfills & Surface Impoundments at Electric Utility Plants, at 9-61 (Oct. 2014), *available at* <https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-12034>.

<sup>4</sup> I include in this category the results of research reported in the NAACP's *Coal Blooded: Putting Profits Before People* (Nov. 2012). The report references *Coal Blooded*, but does not describe the research results. In it, the NAACP purports to find that "coal power plants tend to be disproportionately located in ... communities of color." *Id.* at 15. But the actual figures produced by the study are barely disproportionate:

"Among those living within three miles of a coal power plant, 39 percent are people of color—a figure that is higher than the 36 percent proportion of people of color in the total U.S. population."

*Id.* The level of disproportionality is no more than one would expect from ordinary differences in circumstances (and would be insufficient to invoke disparate impact liability in an employment law case under EEOC guidelines). Some of the difference may be caused by geographic/demographic differences. For example, states that are able to make greater use of hydroelectric power—like Idaho, Oregon and Washington—are also disproportionately white. They have less need for coal-fired power plants. But the reason has nothing to do with race or ethnicity. Note that in contrast to the Commission's independent research, which dealt with coal ash landfills and ponds, the NAACP dealt with the actual coal-fired power plants; differences in results can therefore be expected.

<sup>5</sup> The report cites anecdotal evidence that a public utility in Nevada settled a lawsuit brought by the Moapa Band of Paiute Indians concerning coal ash (see Report at 57) and that Waukegan, Illinois, the location of another plant is majority minority (see Report at 58-59). In addition, the report notes that Lisa Hollowell, an attorney with the Environmental Integrity Project, testified that she found that the residents within a three-mile radius of "a particular coal ash site" were disproportionately members of racial minorities. See Report at 59. But the "particular coal ash site" was the one in Waukegan, Illinois, which had already been discussed. *Tr.* at 15.

It is worth noting here that the Waukegan coal-fired electricity plant was built in the 1920s—long before that city's residents became disproportionately minority. See, e.g., *Activists Call for Closure of Waukegan Coal-Fired Plant*,

*All this tends to undermine the very point of this report. To the Commission's discredit, this has not been expressed clearly in either the Executive Summary or the official Findings and Recommendations.*<sup>7</sup>

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PBS (March 23, 2016) (“Activists want a date when the 88-year-old Waukegan coal-fired power plant will begin a transition to cleaner power”), available at <http://www.pbs.org/video/2365699814/>. As recently as 1970, only 5% of Waukegan residents were Hispanic. By 2014, 53% were Hispanic. White, whether Hispanic or Non-Hispanic, went from 86% of the population to 59%. No one can argue that the decision to locate a coal-fired power plant in Waukegan was made because its population was disproportionately minority. It wasn't true then. See Waukegan History, available at <http://places.mooseroots.com/1/320425/Waukegan-IL>.

For a discussion of the evidence of another single location—Belews Creek in North Carolina—see infra text & notes at nn. 12-15.

<sup>6</sup> For example, the report cites the oral testimony of the Rev. Leo Woodberry, pastor of the Kingdom Living Temple and Executive Director of Woodberry and Associates, at our February 5, 2016 briefing:

“For example, Rev. Leo Woodberry testified that South Carolina ‘has 23 active coal ash sites and one inactive site [...] [a]nd every one of those sites are located in a community that is low-income and predominantly African American.’”

Report at 57.

Weirdly, the actual transcript in my possession reads slightly differently. Since the above quotation introduces a grammatical error not in the Rev. Woodberry's original testimony, I will quote the original:

REV. WOODBERRY: In South Carolina, we have 24 sites, 23 active, one inactive. And every single one of them is located in a primarily African American and low-income community.

If so, this is interesting evidence. But where did the Rev. Woodberry get those figures? Did he do the investigation himself? Given the advocacy work he does in the area of climate justice and energy equity, this is a possibility. See, e.g., Chris Carnevale, *Black History Month Energy Champions: Rev. Leo Woodberry Fights for Climate Justice and Energy Equity*, Southern Alliance for Clean Energy (February 19, 2015), available at <http://blog.cleanenergy.org/2015/02/19/champion-leo-woodberry/>. But if he did the investigation himself, what method did he use? Alternatively, did he hear this from someone else? From whom? Who performed the actual investigation? Apparently, nobody thought to ask him either at the briefing or after. I hope that if I had been present I would have thought to ask. Alas, a blizzard caused the Commission to postpone his testimony from its originally scheduled date. The re-scheduled date coincided with long-planned surgery for one of my loved ones, and the Commission decided that it could not wait. See also infra at nn. 24, 56.

I note that the EPA looked into a slightly different question. It found that South Carolina has 12 coal-fired electric utility plants. Of them, only six are in zip codes where the population has higher minority representation than South Carolina's average. See Environmental Protection Agency, Regulatory Impact Analysis for EPA's Proposed Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry at 220, 223 (April 30, 2010).

<sup>7</sup> In addition to its page 91 Finding that “Racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities,” the Commission finds the following on page 93 of its Findings and Recommendations: “Whether coal ash facilities are disproportionately located in low-income and minority communities depends on whether the comparison is done on (1) plant-by-plant, (2) nationwide aggregation, or (3) state-by-state aggregation basis, as well as the radius used around a coal ash site. A nationwide basis shows a slightly lower disproportionate minority and a slightly higher disproportionate low income population surrounding coal ash plants. A state-by-state basis shows a slightly disproportionate higher minority population and relatively large, higher disproportionate low income population surrounding coal ash plants.” The significance of these findings, however, is not noted. See supra at n. 2 for my discussion of them and their significance in the race context.

Instead of highlighting its independent research, the Findings and Recommendations muddy the waters. In them, the Commission makes a more generalized claim of racial disparate impact, stating, “Racial minorities and low income communities are disproportionately *affected* by the siting of *waste disposal facilities*.” (Italics added.) The beauty of this claim from the Commission’s standpoint is that it is more difficult to prove or disprove than more specific research findings that focus on whether minority members live in closer proximity to coal ash landfills and ponds than whites do.<sup>8</sup>

Fortunately, the Commission didn’t delete from the body of the report the paragraph devoted to its independent research. That paragraph reads:

“The Commission conducted independent data analysis to determine whether minority populations are disparately impacted by the location of coal ash landfills and ponds. To conduct its analysis, the Commission used the locations of known coal ash landfills and ponds and compared them with U.S. Census demographic data based on the zip codes of where coal ash landfills and ponds were located. The Commission data revealed that approximately 30 percent of all coal ash landfills and ponds were located in a zip code where the minority population exceeded the national average. At the national level, the location of coal ash landfills and ponds are not necessarily disproportionately located in areas with minority populations greater than the national average.”

Report at 79-80.<sup>9</sup>

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<sup>8</sup> Around the same time it began to come clear that coal ash disposal sites are not located in such a way as to disadvantage racial minorities, the Commission moved to re-direct the report away from coal ash specifically and more toward environmental justice in the abstract. At some point in the editing process, the Commission discreetly deleted the words “Coal Ash” from the title of the report. At its March meeting, the planned Commission trip to Arrowhead Landfill in Uniontown, Alabama was cancelled.

In some way this was a return to the original sprawling concept paper that the Commission had adopted for its statutory enforcement report at its July 2015 meeting. At that meeting, the Commission had hoped that it could also focus on oil fracking and other possible sources of pollution. But at its meeting on October 14, 2015, the Commission gave the go ahead to the plan of the then-Director of the Office of Civil Rights Evaluation, and other staff members to make coal ash (and particularly the Arrowhead Landfill controversy in Uniontown, Alabama) the centerpiece to this report. It is unclear whether Commission members agreed to abandon the oil fracking topic because they learned that oil fracking activity in the United States is centered in North Dakota (the state with the fifth fewest racial minority members) or because they had decided to follow my advice to try to keep one of the Commission’s reports simple enough to do a good job. In any event, the OCRE Director’s plan to focus specifically on coal ash was a step to the right direction and thus commendable.

The problem was that it didn’t go far enough and the overall plan was that it was still too broad. We could hope to study whether coal ash landfills and ponds were being sited in locations that are disproportionately minority. But second guessing the EPA on questions like whether coal ash’s toxic properties are serious enough to classify it under Subtitle C rather than Subtitle D and whether coal ash caused the health problems cited by Uniontown residents was well beyond our capabilities.

<sup>9</sup> The last sentence in the block quote above is ... well ... misleading. It states that coal ash landfills and ponds are not “*necessarily*” located disproportionately in areas where minority populations are greater than the national

The report fails to make the point clear, so I will attempt to state it a bit more plainly: Approximately 70% of all coal ash landfills and ponds are located in zip codes that are disproportionately white, while only 30% are located in zip codes that are disproportionately minority.<sup>10</sup> In the absence of racial disparate impact, one would expect about half the zip codes that contain a coal ash landfill or pond to have a greater than average proportion of minority members and half to have a less than average proportion. This did not turn out to be the case. But the disproportionality runs in the opposite direction from what the Commission was expecting: Whites disproportionately live in zip codes containing coal ash landfills and ponds.<sup>11</sup>

A number of caveats are necessary here:

First Caveat: This doesn't mean there aren't alternative measures of racial disproportionality that go at least slightly in the other direction. It would be surprising if there were not. In the absence of actual disparate impact, one might expect some measures of disproportionality to show that whites disproportionately live near coal ash landfills and ponds and some measures to show the opposite. In general, however, these alternative measures have shown only an insignificant level of disproportionality to the detriment of racial minorities and they have been defective in other ways (and in many cases they apply only to a single location and hence are not alternative measures at all).

For example, on April 7, 2016, the Commission's North Carolina State Advisory Committee held a briefing entitled "Examining Health and Environmental Issues Related to Coal Ash Disposal in North Carolina" to provide additional evidence for inclusion in this report. The decision to do so was based on the assumption that the coal ash in Belews Creek disproportionately harmed African Americans. But the evidence turned out to be at best mixed even at this single location. This report first quotes a newspaper article claiming that "the area

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average. This is understatement. Insofar as the data show anything, they show that these landfills and ponds are located disproportionately in white areas.

<sup>10</sup> See Appendix A. Note that "disproportionately white" doesn't mean simply majority white. It means the subset has more whites than one would expect given the number of whites in the general population (in this case the national population).

<sup>11</sup> One more item of evidence that appears to be an attempt to bolster the case for disparate impact is discussed in the Commission's Findings and Recommendations: "For example, the North Carolina State Advisory Committee to the U.S. Commission on Civil Rights found that 69 percent of all African Americans live within 30 miles of coal-fired power plants that pollute the air with toxic chemicals." This, of course, is not evidence of disproportionality at all, since it does not tell us what proportion of whites lives within the same radius.

I did a quick back-of-the-envelope calculation to approximate what the answer might be. To do so, I first needed to know how many coal-fired power plants are located in North Carolina. SourceWatch.org reports there are 67 units at 25 locations. The EPA's 2010 RIA reports a similar, but not identical, figure—26 zip codes in North Carolina contain a coal-fired electric utility plant. As a matter of simple geometry, each 30-mile-radius circle around such a plant contains approximately 2,827 square miles. Twenty-five such circles would contain 70,675 square miles. But North Carolina is only 53,819 square miles, so there must be considerable overlap. Still, the 25 circles likely cover a lot of North Carolina's territory. Under the circumstances, the 69% figure may be small. The proportion of whites living within a 30-mile radius may well be higher. I don't have the data to calculate precisely.

immediately around the Belews Creek facility [is] made up of 80 to 100 percent people of color.”<sup>12</sup> The newspaper article was in turn quoting a witness at the briefing who was basing his testimony on the census unit nearest to the facility. On the other hand, as the report points out, according to the Census Bureau’s 5-year estimate for the 27009 zip code, “Belews Creek overall is 82% white alone.” (This is the figure for non-Hispanic whites. Overall, the category “white alone” makes up 90% of the population in the 27009 Belews Creek zip code.)<sup>13</sup>

Why the difference? The “80 to 100 percent” figure is for a census *block*.<sup>14</sup> Census blocks are tiny. There are over 11 million census blocks in the nation; almost 5 million of them are completely uninhabited. I cannot tell how many people reside in the block cited in the report, but in a sparsely populated area like Belews Creek it could easily be a single household or two. By using census blocks, if it happens to be that the closest one or two households to the facility were occupied by African Americans, it will have a profound effect on the numbers.<sup>15</sup>

What I can say about the Commission’s contribution to the research on disproportionality is (A) that the measure chosen by the Commission’s staff was a plausible one; (B) the measures chosen by the EPA (and discussed in Footnotes 2 and 3) were also plausible and they broadly

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<sup>12</sup> Report at 59 quoting Nicholas Elmes, *Federal Hearing on Coal Ash Held in Walnut Cove*, *The Stokes News* (April 7, 2016).

<sup>13</sup> Two more facts about the Belews Creek ZCTA are worth mentioning. Its population average (2010-2014) was 2,680. Its median household income was well above average, *available at* <http://data.sagepub.com/sagestats/document.php?id=place-84179>.

<sup>14</sup> NC SAC Tr. at 65 (testimony of Chandra Taylor).

<sup>15</sup> This is not to say that the people of North Carolina don’t have any legitimate grievances. The North Carolina Department of Health and Human Services issued a warning (later rescinded) to a few hundred residents of Rowan and Gaston Counties (and perhaps other counties as well) that their well water may be too dangerous to drink. This sort of thing hardly inspires trust in the water. The *Charlotte Observer* reported the reason for the change:

“The state health agency said the change was driven in part because similar levels of vanadium and hexavalent chromium occur in public water supplies, including Charlotte’s, at levels considered safe. Recent tests have also found the elements in groundwater far from ash ponds.

The agency also said safety standards for those elements are likely to change.

‘Using an abundance of caution, we issued low (screening) levels that we knew were low levels,’ said Dr. Randall Williams, the state health director, who joined the department in July after the screening levels had been set. ‘But we’re also humble enough to revisit them and decided that, based on new information, we felt it was appropriate to change them.’”

Bruce Henderson, *NC Lifts Warnings Against Drinking Well Water Near Duke Energy Ash Ponds*, *Charlotte Observer* (March 8, 2016).

But it is impossible to un-ring a bell of this kind. What I don’t know is whether the initial warning or the rescission of that warning was the culpable error. Were these well owners the victims of overzealous, under-informed environmentalism? Or was the rescission of that warning the (perhaps politically motivated) error? If it was the former, does this report compound the error by needlessly raising their fears again? I wish I knew the answers to these questions, because they are important. I note only that I have heard no evidence that the victims of this ghastly incident were targeted or even disproportionately affected on account of their race, color, religion, national origin, age or disability and hence the matter is beyond our jurisdiction.

support the Commission's result; and (C) insofar as there is non-EPA evidence brought to my attention, it is either broadly supportive of the Commission's result, anecdotal or questionable (as discussed in Footnotes 3, 4, 5 and 11).

Second caveat: This doesn't mean that there can't be individual public utilities that have (1) intentionally chosen a site for a coal ash landfill or pond because of its proximity to members of a particular race or races; or (2) chosen sites for multiple coal ash landfills or ponds in a manner that has disparate impact on a particular race or races. But no individualized evidence of intentional wrongdoing has been brought to my attention or (to my knowledge) to the attention of anyone on the Commission or its staff. If it had been and if minority races had been disadvantaged by these siting decisions, the Commission would have been inclined to pounce on it.<sup>16</sup>

Third caveat: It is important to keep in mind that the Commission's independent research was on coal ash landfills and ponds, not on "waste disposal facilities" or "industrial sites" generally. The Commission's finding that "Racial minorities ... are disproportionately affected by the siting of waste disposal facilities" could be true insofar as it is intended to suggest that such waste disposal facilities are located disproportionately in the vicinity of racial minority members.<sup>17</sup> But the Commission has conducted no research of its own on that question and has not sufficiently delved into the empirical literature on it to have an opinion.<sup>18</sup>

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<sup>16</sup> I noticed from Appendix A that the Commonwealth of Virginia has more than the usual number of zip codes with coal ash ponds or landfills in which racial minority members are over-represented relative to its statewide benchmark. And the level of over-representation tends to be large, including in the zip codes with large populations. Could there be legitimate explanations for this? Of course. But there could also be unsavory explanations. A closer look at who made these decisions, when they were made and why would have been in order. To my knowledge, it was not undertaken.

<sup>17</sup> I don't believe this was the intent. The Commission appears to have intended the term "affected" in a more vague sense. See *infra* at Part C.

<sup>18</sup> The three non-coal-ash-specific studies cited by the Commission in the report are not discussed in any depth. For example, the report cites a study by the General Accounting Office (as the GAO was then called) entitled "Siting Hazardous Waste Landfills and Their Correlation with Race and Economic Status of Surrounding Communities" (June 1983) and stated that it "revealed that three-quarters of hazardous waste landfill sites in eight southeastern states were located in communities whose residents were primarily poor and African-American or Latino." Report at 8. This is true (or nearly true, since the study says nothing about Latinos). But it fails to point out that there were only four such landfills, and it is very difficult to conclude anything from such small numbers.

On the issue of why three of the hazardous landfills were located in primarily African-American areas, I can only add, for what they are worth, the following facts to the analysis: The Alabama hazardous landfill in the GAO study was in Sumter County, which is part of the so-called "Black Belt" in that state. Three things are worthy of note in connection with the Black Belt. First, the name derives from the dark color of its soil, which was excellent for cultivating cotton, not from its racial composition. Second, it is nevertheless true that, since cotton cultivation was primarily undertaken by African-American slaves, the Black Belt was and remains to this day heavily African-American. Third and most important for the purpose of discussing hazardous waste landfills, a thick geological formation known as the "Selma Chalk" lies beneath the soil, but above the aquifer in the Black Belt. This is excellent for locating landfills, because the chalk is all but completely impervious. Leachates from the landfill cannot get through to the aquifer. On the other hand, it also makes drilling for water extremely difficult.

All this suggests that at least one of the GAO study's three hazardous waste landfills located in an African-American community was sited there because of the Selma Chalk and not because of the racial composition of the area. Note that the landfill in Uniontown, Alabama is also located on the Selma Chalk formation.

The second of the non-coal-ash-specific studies cited by the report was undertaken by the United Church of Christ in the 1980s. See United Church of Christ, Commission for Racial Justice, *Toxic Waste and Race: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (1987). I have not had the opportunity to examine this study with care. I note, however, that its methodology has been criticized—even by advocates of the environmental justice movement. See, e.g., Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 69 Tul. L. Rev. 1047, 1130 (1994)(criticizing the UCC for failing to examine the issue of timing); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U.L. Rev. 787, 802 n.56 (1993)(criticizing the UCC for failing to distinguish between facility siting decisions and actual exposure to toxic releases). See also Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 Villanova Environ. L.J. 121 (1997).

The third and last non-coal-ash-specific study cited in the report is by Robert D. Bullard. See Robert D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (1994); Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 Soc. Inquiry 273 (1983). Bullard found that a disproportionate number of landfills and incinerators in Houston were located in predominantly African-American neighborhoods. The Bullard study, too, has been seriously critiqued. Vicki Been, *Locally Undesirable Siting or Market Dynamics?*, 103 Yale L.J. 1383, 1400-06 & app. (1994). Daniel Kevin summarized some of those criticisms this way:

"Robert Bullard's study of incinerators and landfills in Houston also contains methodological problems. Bullard did not explain the methodology used to arrive at his findings. For example, rather than census tracts, Bullard used "neighborhoods" as his unit of analysis, but did not specify how he defined this term; thus, it is difficult to evaluate the accuracy of his analysis. Bullard classified some neighborhoods as predominantly minority based on his own observations, despite census data showing that the census tract concerned was predominantly white. Additionally, Bullard may have left some solid waste sites out of his analysis. Therefore depending upon the demographics of the location of the sites, Bullard's conclusions about disproportionate impacts may be inaccurate."

Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 Villanova Environ. L.J. 136 (1997).

Note that the report fails to cite the study by Douglas A. Anderton, et al. of hazardous waste treatment, storage and disposal facilities. This is the most well known of the studies finding the lack of a racial disparate impact. It found no statistically significant difference in the proportion of racial minority members between census tracts with those facilities and those without. See Douglas A. Anderton, Andy B. Anderson, Peter H. Rossi, John Michael Oakes, Michael R. Fraser, Eleanor W. Weber & Edward J. Calabrese, *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, 18 Evaluation Rev. 123 (1994). See also Robert Bullard, *Letter*, 36 Environment 3-4 (October 1994)(criticizing Anderton).

I am not in a position to evaluate any of these studies. My only point is that the Commission is not either.

The report also quotes from a Memorandum from the Illinois State Advisory Committee to the effect that "'industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations.'" Report at 84. In turn, the Memorandum (which I have not seen) is said to cite the testimony of Prof. Carlton Waterhouse, Director of the Environmental, Energy and Natural Resources Program at Indiana University (Indianapolis) Law School at the Committee's briefing in Chicago on March 9, 2016. Waterhouse testified, "Now, in talking about the question of environmental justice, there's been a great deal of study that has examined this question in terms of the veracity of the claims that have been made that there really are disproportionate burdens that are racially identifiable. But the bulk and the weight of research has shown that race is the greatest predictor of exposure, and that goes particularly for African-Americans as well as Latinos." Ill. SAC Tr. at 14-15. Prof. Waterhouse may well be right. Or he may not be. But his testimony does not cite the research he is referring to. It may or may not include studies other than those I have mentioned above. In any event, the statement is not itself research into the issue. Somehow the Illinois

Where does that leave us? As a result of the Commission's research and the research of others, especially the EPA, the evidence is now strong that coal ash facilities are not disproportionately located in the vicinity of members of racial minorities. And if coal ash facilities aren't located in that manner, one can't help but wonder whether the allegations about other kinds of waste disposal are true either. That's what makes the Commission's criticism of the EPA's Office of Civil Rights unfair. If the Commission hasn't established that waste disposal sites are being disproportionately located in disproportionately minority areas, why does it repeatedly complain that the EPA has (1) never made a formal finding of discrimination and (2) never denied a permit, or withdrawn a permit or federal funding on account of a violation of Title VI of the Civil Rights Act of 1964? Maybe, it is because the EPA has not uncovered any violations of Title VI.<sup>19</sup>

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State Advisory Commission's conclusion drawn from Prof. Waterhouse's testimony made it into the Commission's Findings and Recommendations: "The Illinois State Advisory Committee to the U.S. Commission on Civil Rights also found industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino and American Indian populations." This is not the kind of fact finding that we should be engaging in.

<sup>19</sup> EPA officials expressed concerns to the Commission staff that the draft of this report they saw was unfair in the sense that it simply rehashes old data from previous reports (e.g. the Deloitte Report, the Center for Public Integrity and the Commission's own NIMBY report from 2003). They felt it neglected the progress they have made in the areas of criticism. I am inclined to agree that the Commission's report relies too much on old data from previous reports. If the Commission were to be more modest in its choice of topics, it might find it easier to bring new information to the attention of Congress, the President and the American people. The complaint that EPA has never made a formal finding of discrimination or denied or withdrawn a permit or federal funding strikes me as especially wrongheaded. I suspect few offices charged with the enforcement of Title VI have done so. There aren't many blatant violations of Title VI anymore. There haven't been since 1964. When violations or arguable violations occur, it tends to be in the grey areas. The usual manner of dealing with the recipient of federal funds is for the government office involved to work with that recipient until it is satisfied that Title VI's requirements are being properly observed.

In her Statement, Commissioner Narasaki makes a plea for more funding for the EPA's OCR. Narasaki at 99. I would feel better about her recommendation if there were a showing of violations of Title VI or of Executive Order 12,898. But there is not. Rather, her Statement makes conspiratorial charges that the EPA is under attack by "powerful corporate interests" and "elected officials who are ideologically opposed to any government constraints on the free market." As to the latter charge, I can say that I have never met a single elected official who opposed all government constraints on the free market. The nation would be better off if we refrained from hyperbole.

Commissioner Narasaki goes on to attack what she calls the "market force theory." But, contrary to her assertions, no one has ever argued that landfills should be free of legal constraints or that decisions on where to locate them should be made in a state of nature, based on Coasian bargaining. Insofar as she truly contends otherwise, that contention is just silly. The real argument—which the Commission has neither jurisdiction over nor the expertise to deal with—is about whether coal ash landfills and ponds should be regulated at the federal level (pursuant to Subtitle C of the Resource Conservation and Recovery Act) or at the state level (and hence classified by the EPA under Subtitle D).

Might "market forces" or "quasi-market forces" have some role to play operating under the legal and regulatory framework? Well, of course. Should a township be able to recruit a landfill that operates within the regulatory framework imposed upon it by the law? Only an authoritarian would suggest that if one township wants a well-functioning, well-regulated landfill in its midst and another does not that these preferences should have no bearing on where the landfill is finally located. If Commissioner Narasaki is hoping the EPA's OCR will be staffed by individuals who view the world in those terms, then expanding its budget may not be such a good idea.

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At a later point in her Statement, Commissioner Narasaki appears to acknowledge that the real dispute is between whether states or the federal government should be primarily responsible for the legal and regulatory framework that applies to the disposal of coal ash. She argues: “Only a federal government agency not beholden to the political power of local corporate interests can adequately protect communities from pollution and enforce environmental laws.” Narasaki at 104. But the whole tenor of this report is that the EPA has been (in her words) “under attack since its beginning by powerful corporate interests” and that it *has already* caved to those interests in deciding that coal ash should be regulated under Subtitle D rather than Subtitle C. On the other hand, the Commission has already been informed by the EPA that some states—North Carolina and New York—already have more stringent coal ash disposal regulations than the EPA has recommended. See *infra* at 130. The world is more complicated than cartoonish notion that federal power is an effective force for good, while state power is ineffective and beholden to special interest.

As for any notion that “local corporate interests” strong-armed Alabama into authorizing the Herriman coal ash spill to be located in Uniontown, it can be safely dismissed. Green Group Holdings, LLC, which owns the Arrowhead facility, is located in Georgia. It is not local to Alabama. With the exception of the period when the Herriman spill was being disposed of, it has never employed more than a handful of persons in Alabama.

If any entity strong-armed Alabama into accepting the Herriman coal ash spill (and we produced no evidence that any entity did), it would have been the Tennessee Valley Authority, a *federally-owned corporation*. The TVA was the darling of an earlier generation of Progressives; folk songs were written about it. These days it is more like the Progressive Movement’s embarrassing but filthy rich uncle. According to Wikipedia, it owns and operates several dozen dams and hydroelectric facilities, 10 coal-fired power plants, three nuclear power plants and about a dozen other non-coal fossil fuel power plants. Its revenue for Fiscal Year 2013 was \$11.65 billion. Green Group Holdings LLC is to the TVA as a cottontail rabbit is to a bull elephant. The TVA supplies Alabama with lots of power and has considerably more leverage over Alabama’s state government than any of the puny players who operate landfills.

Never lose sight of the fact that if the spill in this case was the fault of some entity, it was the TVA; and if there is an entity big enough to strong arm Alabama into accepting coal ash that it didn’t want, it was the TVA.

One other point made by Commissioner Narasaki is also worth mentioning. In attempting to deny that there are any benefits for a town to be located near a landfill, she states that “investing in clean up and better pollution controls will also create jobs.” What is odd about this statement is that the Arrowhead Landfill appears to be exactly that—a state-of-the-art landfill for dealing with coal ash and household garbage. Promotional materials from the Green Group Holdings, LLC describe the facility this way:

Green Group Holdings, LLC (“Green Group”) is the owner of Arrowhead Landfill (“Arrowhead”), a state-of-the-art, Subtitle D Class I MSW disposal facility. The facility has a composite liner system, a leachate collection system, and an extensive groundwater monitoring system. The site is located in Perry, County, Alabama on one of the most impermeable naturally occurring clay formations in North America.

The composite liner system consists of 2 feet of  $1 \times 10^{-7}$  cm/sec compacted clay, a 60 mil high density polyethylene geomembrane liner, and a two-foot thick drainage layer with a leachate collection system and protective cover. The site geology consists of the Selma Group chalks which ranges from 500 to 570 feet thick across the site, with a permeability less than  $1 \times 10^{-8}$  cm/sec. The uppermost groundwater aquifer is located beneath this layer and is well over 400’ below the base of the landfill disposal cells. Arrowhead also has a leachate collection system that meets all requirements of the new CCR rule. Leachate is collected and removed by sumps to a tank where it is stored until it is either trucked to the Demopolis POTW for disposal and treatment in compliance with an ADEM issued permit or recirculated with the waste disposal as allowed by its landfill permit. To meet standards in the new CCR rule, storm water at Arrowhead is managed to prevent it from entering the disposal cells. Arrowhead is currently fully permitted to accept CCRs, which means your project schedule can be expedited.

When an attorney for Green Group Holdings, LLC, gave me a tour of the Arrowhead Landfill, what I saw was consistent with this description. The Arrowhead Storm Water Sampling Summary he provided me with showed no trace of arsenic, chromium, or vanadium at the site in any of the nine tests conducted between 2010 and now. One

Fourth Caveat: In this Statement, I am not addressing the issue of whether the siting of coal ash landfills and ponds has a disparate impact on the poor. There is greater evidence for this from the EPA than there is for a disparate impact on members of racial minorities. But it is not a topic within the Commission's jurisdiction. My only comment is this: Those charged with finding an appropriate location for waste disposal of any kind will have a number of things they must take into consideration. For the sake of taxpayers and ratepayers (i.e. everyone), the cost of real estate will be one of them. We should not expect to find a coal-fired electric utility plant or a coal ash pond or landfill in Midtown Manhattan, Beverly Hills, or Miami Beach.<sup>20</sup> Driving up the cost of power has its own disparate impact on those with low incomes; alas, policymaking is complicated that way.

Fifth Caveat: None of this is to suggest that the EPA's decision to treat coal ash under Subtitle D rather than Subtitle C was a wise or an unwise one. Nor is it to suggest that coal ash has or has not caused health problems to the residents of Uniontown, Alabama, Belevs Creek, North Carolina or Waukegan, Illinois. *Neither I nor anyone else on the Commission is qualified to make those calls. We are lawyers, not waste disposal experts, toxicologists, epidemiologists or physicians.* We look into issues of discrimination on the basis of race, color, sex, religion, national origin, age and disability here. Sometimes we can add a few useful facts. But mostly we aren't the ones that anybody should be looking to in order to make those sorts of judgments. See *infra* at Part E.

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out of nine showed trace selenium, but it was less than a quarter of the EPA drinking water standard. Of the sixteen substances that are tested for (none of which were found to be anything close to a problem compared to EPA drinking water standards), only arsenic, chromium, selenium and vanadium are, to my knowledge, associated with coal ash. While I arranged to have an engineer accompany me on the tour, I am of course not sufficiently expert in the area to have the final word. My point is simply that my colleagues on the Commission are in an even worse position to judge.

Note that the TVA, the corporation wholly owned by the federal government that Commissioner Narasaki purports to trust, did not dispose of its coal ash with even a fraction of that care demonstrated by the Arrowhead landfill. If it had, there wouldn't have been a spill.

<sup>20</sup> For some time there has been an academic conversation going on over whether any racial disparate impact in the location of hazardous waste facilities is due to the facilities coming to minority members or minority members going to the facilities. See Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, Environmental Research Lett. 10 (Nov. 18, 2015), available at <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/meta>; Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios: A Longitudinal Analysis of Environmental Justice Claims*, 24 Ecol. Law Q. 24 (1997); Vicki Been, *Locally Undesirable Siting or Market Dynamics?*, 103 Yale L.J. 1383 (1994); U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12, 898 and Title VI as Tools for Achieving Environmental Justice*, Statement of Commissioners Jennifer C. Braceras, Peter N. Kirsanow, Russell G. Redenbaugh, and Abigail Thernstrom 183 (Oct. 2003) (citing Professor Christopher Foreman's testimony that the racial demographics of a particular site may have shifted over the years), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

### ***B. Incendiary Allegations of “Environmental Racism” Are Inappropriate***

Some have alleged that those who decide where to locate coal ash landfills and ponds actually “target” minority communities.<sup>21</sup> Deliberately provocative terms like “environmental racism” and “toxic racism” make the same point without actually having to name the alleged racists. These are the kinds of incendiary allegations that should not be made without credible evidence.<sup>22</sup>

This is especially so in the current climate. There are those who say that race relations in this country have taken a turn for the worse in the last couple of years.<sup>23</sup> They cite the events in Ferguson and Baltimore, the rise of the Black Lives Matter movement, the shootings of police officers in Dallas, and the candidacy of David Duke, former Grand Wizard of the Ku Klux Klan, for U.S. Senate. It is therefore particularly important for those of us involved in civil rights to speak with great care: We must acknowledge and try to do something about legitimate grievances. But we must also be careful never to fan the flames of racial resentment by telling people they have been targeted on account of their race when it isn’t true.

Alas, we have not been as careful as we should be. Consider, for example, the Commission’s North Carolina State Advisory Committee, which was attended by Commission Chairman Martin Castro, Vice Chair Patricia Timmons-Goodson, and member Karen Narasaki.<sup>24</sup> At the briefing, some witnesses simply assumed that the decision to store coal ash at Belews Creek was part of a general pattern of putting coal ash disposal sites near minority communities rather than near white-majority communities (even though Belews Creek is over 90% white and has a higher than average median household income). But at least one invited witness went further. Marie Garlock, a graduate student in the University of North Carolina’s

<sup>21</sup> See, e.g., Michael Satchell, *A Whiff of Discrimination?*, U.S. News & World Rep. 3435 (May 4, 1992) (“[these are] not random siting[s]. Minority communities are deliberately targeted as sacrifice zones”) (citing Robert D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* 32 (1994)).

<sup>22</sup> There are those who say that when they use the term “racism” that they don’t really mean ... well ... *racism* (i.e. the belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race or an act inspired by that belief). See, e.g., Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism*, Land Use F. 6 (Winter 1993). I believe this is disingenuous. Decent people react with abhorrence when they hear the word “racism.” Those who use the word do so precisely because they know it will produce that reaction. One wonders what would happen if someone were to call those who use the word “racism” lightly “jack-booted Nazi storm troopers” and then deny that the epithet was meant “that way.”

<sup>23</sup> Krissah Thompson and Scott Clement, *Poll: Majority of Americans think race relations are getting worse*, Wash. Post (July 16, 2016), available at [https://www.washingtonpost.com/national/more-than-6-in-10-adults-say-us-race-relations-are-generally-bad-poll-indicates/2016/07/16/66548936-4aa8-11e6-90a8-fb84201e0645\\_story.html](https://www.washingtonpost.com/national/more-than-6-in-10-adults-say-us-race-relations-are-generally-bad-poll-indicates/2016/07/16/66548936-4aa8-11e6-90a8-fb84201e0645_story.html); Margaret Myers, *Race relations in U.S. at a low point in recent history*, PBS NewsHour (Sept. 21, 2015), available at <http://www.pbs.org/newshour/rundown/race-relations-low-point-recent-history-new-poll-suggests/>.

<sup>24</sup> Why wasn’t I there? I was discouraged from attending and told that (for reasons that were not disclosed to me) members of the Commission would not be permitted to speak. I was not told that other members of the Commission would be attending. Had I known I would almost certainly have gone. The transcript reveals that all three Commission members present were in fact given the opportunity to speak at length.

Communications Department, describes herself as a “dancer, storyteller and facilitator” with a “focus on performance and also health and social change communication.”<sup>25</sup> Her testimony included the following accusation against a specific individual and two specific entities, one governmental and the other non-governmental:<sup>26</sup>

**“... [Y]our group recreates government in the image of corruption, as you sell not just your but all our souls with your greedy deception. The people are facing brain, blood, breast, bladder, stomach, lung cancers and dying way too early. Young people with strokes, heart attacks, who can’t breathe and who faint. The people with partial paralysis from coal ash toxins leached without constraint. The people to the north and south of here. The people affected all over the state targeted for pollution because they are black, brown, or rural, low-income, or lack town voting rights.”**

N.C. SAC Tr. at 173 (emphasis added).<sup>27</sup>

Under the Commission’s rules, if “the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall receive such evidence or testimony or summary evidence of such evidence or testimony in executive session.” 45 C.F.R. § 702.6. Perhaps whether this applies to State Advisory Committees is open to debate. And perhaps one could argue for an exception for testimony intended more as attention-grabbing theater than as truth (though that raises the question of why the Commission or its advisory committees should invite testimony offered for attention-grabbing theater rather than truth).

Still, Ms. Garlock’s testimony isn’t what bothers me. What is more troubling is that at the end of the briefing, Chairman Castro himself joined in by blaming health problems and deaths on “environmental racism.” He stated:

**“... I come from a community in Chicago on the far Southeast side that shares many of the same traits of the communities that are being victimized by environmental racism here in North Carolina. I live, and I come from a community of cancer clusters. My grandfather. My uncle. My father. My aunts.**

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<sup>25</sup> Ms. Garlock, who lost her own mother to cancer, was there representing Breast Cancer Action, a group that describes breast cancer as “a widespread women’s health crisis in a male-dominated and profit-driven society” and argues that “ending the breast cancer epidemic requires profound changes at every level of our society.” See <http://www.bcaction.org/about/mission-vision-values/>.

<sup>26</sup> Ordinarily, I would simply quote the accusation in full. But an arguable case can be made that I would be violating our rules if I did. See 45 C.F.R. § 702.

<sup>27</sup> Mark McIntire, who is Duke Energy’s Environmental Affairs Director for North Carolina, testified that when Duke built the plants that are at issue, some of which date back to the 1920s, the company was “looking for large parcels of land that had access to water.” “In order to find large parcels of land with access to water, we were generally led to rural areas of the state. And we watched the communities around these facilities grow up.” NC SAC Tr. at 194-95.

Have all died of lung cancer, colon cancer, brain cancer. And it's not just my family. ... Every friend of mine from my old neighborhood whose parents or cousins or aunts have died, 90 percent of them are some kind of cancer.

And we had steel mills. We had coal burning. We had pet coke. We had lead. We had everything. **And so don't tell me that there's not a correlation. And it just so happened that the community that I lived in was black and brown."**

N.C. SAC Tr. at 283 (emphasis added).<sup>28</sup>

The world has enough problems without provoking further racial bitterness based on an insufficient factual foundation. At the time of Chairman Castro's statement, the EPA had already looked at whether coal ash disposal sites were disproportionately located in places disproportionately resided in by racial minorities. The evidence indicated they were not. Chairman Castro may not have known that, but before one throws around incendiary terms like "environmental racism," one ought to find out what the empirical data show. Moreover, the Commission staff itself had either completed or were working on independent research on whether racial minority members are over-represented in the populations in close proximity to coal ash landfills or ponds. I believe Chairman Castro is a decent man who, like everyone else, is trying to sort his way through a complicated topic as best he can. But his statement should not have been made.<sup>29</sup>

***C. So How Did the Commission Manage to Conclude that Racial Minorities are Disproportionately "Affected" by Environmental Injustices?***

After the report concedes that the Commission's independent research shows that whites, not minority members, are more likely to live in zip codes with coal ash landfills and ponds, it tries in different ways to argue that members of racial minorities are nevertheless worse off relative to whites. For example, the report states:

"This is not to say that minority populations are not impacted by coal ash landfills and ponds overall. The Commission finds the opposite to be true. When analyzing state adoption of the Final Rule, research shows that a greater percentage of minorities live in states that the EPA predicts will not adopt the Final Rule. Therefore a disproportionate number of minority communities will not enjoy the minimum federal protections that the Final Rule provides, unless all

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<sup>28</sup> See also *supra* n. 1.

<sup>29</sup> I can certainly understand how Chairman Castro might react with emotion to the illness and death of his loved ones. I can also understand how one's belief about what caused their illnesses can color one's feelings about the subject matter of this report. But maybe this is a reason to recuse oneself. I note that our colleague Commissioner Peter Kirsanow recused himself from working on this report for far less: He has public utility clients in his legal practice in Cleveland.

states implement the Final Rule.”

Report at 80.

This is a bit convoluted. The Commission is arguing that EPA’s decision to classify coal ash under Subtitle D is harmful, because not all states will be required to adopt the national standards the EPA has promulgated. States that the EPA “predicts” will not adopt the standards (Subset B) are disproportionately minority relative to states the EPA “predicts” will adopt them (Subset A).<sup>30</sup> Minority members will therefore disproportionately suffer from lax regulation.

The first thing that jumps out about the argument is that the Commission doesn’t tell the readers just how different the two subsets are in their minority population. I had to do the calculations myself.<sup>31</sup> The answer is: Not very. The 2010 census found that 63.7% of the population nationwide is non-Hispanic white. In the states that the EPA has supposedly predicted will not adopt the national standards, the figure is 59.7%. In employment discrimination law, where disparate impact arguments are far more common than they are in environmental law, that level of disproportionality would be insufficient to trigger scrutiny. Moreover, 20 of the 30 states are disproportionately non-Hispanic white rather than the other way around and one state is not disproportionate in either direction. It turns out that the only reason that this group of 30 states is disproportionately minority at all is that California is in the group. If California were taken out, the group’s population would be 64.7% (and hence disproportionately) non-Hispanic white. There is a bit of irony here: If the Commission is worried that California will be less protective of the environment than other states, I’d be happy to wager that it is mistaken.<sup>32</sup>

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<sup>30</sup> There are 17 states in Subset A and 30 states in Subset B. Three states (Idaho, Vermont and Rhode Island are in neither subset, since they have no coal fired electric utility plants. Both subsets contain states with both high-minority and low-minority populations. See Report at 81.

<sup>31</sup> There are many ways to calculate who counts as a racial minority members and who does not. For example, how should individuals who check more than one race be treated? How should Hispanic status be treated, given that the census treats Hispanic status not as a racial category, but as a special issue unto itself? For the sake of easy calculation, I calculated the proportion of the population of each state that is non-Hispanic white. This had the virtue of requiring me to have to perform the fewest operations on the data.

<sup>32</sup> For good or ill (and I suspect it is both), my home state of California tends to be out front on matters of air and water pollution, global warming, etc. See, e.g., Tony Barboza, *California Is Ahead of the Game as Obama Releases Clean Power Plan*, L.A. Times (August 4, 2015); Mark Hertsgaard, *California Takes the Lead With New Green Initiatives*, Environment 360 (March 8, 2012)(calling California “America’s environmental trendsetter”), *available at* [http://e360.yale.edu/feature/california\\_takes\\_the\\_lead\\_with\\_new\\_green\\_initiatives/2504/](http://e360.yale.edu/feature/california_takes_the_lead_with_new_green_initiatives/2504/). As I was writing this dissent, my plumber handed me a bid for the replacement and installation of my aging hot water heater. The bid was for \$2432 (or roughly three times what I’ve paid in the past). Why so high? A significant part of the reason in California’s regulations on hot water heaters and nitrogen oxide, which have the effect of requiring manufacturers to make them specifically for the California market. See *Water Heaters for Select California Markets*, available at <http://www.sears.com/appliances-water-heaters-water-heaters-for-select-california-markets/b-5000127>. If the Commission is looking for examples of environmental disparate impact, it should recognize that its argument cuts in both directions. More stringent environmental laws have a disparate negative effect on racial minorities that on average have fewer resources. Put differently, I will pay the \$2432 and forget about it soon; those with fewer

This is just the beginning of the problems with the Commission’s argument. It is a real stretch to claim that the EPA “predicted” that certain states would not adopt the rule. Rather, it devised a model for estimating the regulatory impact of its Final Rule. Its model makes the convenient assumption that states that already have “groundwater monitoring requirements at new units, or with some coverage of the units in question” will adopt the rule and that other states won’t. This was a rough cut based on a single parameter and never meant to be a serious state-by-state prediction.<sup>33</sup> Any effort to estimate a disparate racial impact based on this model is doomed to failure.<sup>34</sup>

More important, *it has already failed*. EPA has informed the Commission that Virginia—which was supposedly “predicted” not to adopt the national standards—was the first and as of this spring only state to adopt them.<sup>35</sup> Also, as of this spring, Kansas—another state supposedly “predicted” not to adopt the rule—has had its Solid Waste Management Plan provisionally approved pending the adoption of legislation.<sup>36</sup> At the time it was (and may still be) the only state to have this status. In addition, at least two more states, Delaware and Indiana, both of which were predicted not to adopt the Final Rule, are currently working with the EPA and will likely do so.<sup>37</sup> By contrast, EPA has also informed us that two states that were “predicted” to adopt the national standards—North Carolina and New York—will not do so, because they regard their already-existing standards as more stringent.

But there is a more fundamental response to the Commission’s argument: Its point is not that anything that the EPA or any state or public utility is doing is in arguable violation of Title VI or its regulations (or of any other law or the Constitution). Nor is the argument that any state or public utility is acting in ways that might have a disparate impact on racial minority members. *The argument is that federalism has a disparate impact on minorities*. This is seriously misguided.

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resources (a group that is disproportionately, but by no means exclusively African American and Hispanic) won’t be able to forget about it quite so quickly.

<sup>33</sup> U.S. Environmental Protection Agency, Regulatory Impact analysis for EPA’s Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry at 124 (April 30, 2010).

<sup>34</sup> Note that part of the reason a state might not have a regulatory framework already in place is that it does not have many coal ash disposal sites (or its sites may be particularly remote from any population). If so, this cuts against the notion that racial minorities are disproportionately affected. Rather it may mean they are disproportionately unaffected.

<sup>35</sup> Virginia Department of Environmental Quality, Coal Ash Management in Virginia (“The Waste Management Board adopted the regulations for Virginia in December 2015”), available at <http://www.deq.virginia.gov/ConnectWithDEQ/EnvironmentalInformation/CoalAshPermits.aspx>.

<sup>36</sup> See also Shalina Chatlani, *Two Years After EPA’s Coal Ash Rule, Progress Depends on States*, Utility Dive (May 24, 2016).

<sup>37</sup> See Rick Callahan, *Concerns Raised Over Indiana Plan to Adopt Coal Ash Rules*, Washington Times (June 19, 2016) (“The Indiana Department of Environmental Management is taking public comments through June 30 on its draft plan for adopting the new rules, including requirements for preventing the impoundments for contaminating groundwater”).

The whole point of Subtitle D of the Resource Conservation and Recovery Act (“RCRA”) is that different states should be able to adopt different enforcement standards for waste that is classified as non-hazardous. The EPA has determined that coal ash is non-hazardous as that term is used in RCRA. Unless the Commission can demonstrate that this determination was erroneous, something it lacks the expertise to do, its argument leads nowhere.

RCRA’s Subtitle D is an acknowledgement by Congress that there may be legitimate reasons for states to employ different enforcement standards for waste that is considered by the EPA to be non-hazardous. Similarly, the Constitution is an acknowledgement by the nation’s founders that there are legitimate reasons to reserve certain powers for the states. State-by-state variation in law is not just expected. It is very much desired.

My first instinct when I read the draft was to think, “That’s like attacking democracy on the ground it has a disparate impact on minorities.” But it is more seriously misguided than that. Democracy really does disappoint minorities sometimes—not necessarily racial minorities, but whatever groups the losing voting coalition turns out to be composed of. Federalism, on the other hand, decreases the number of disappointed minority groups, because it avoids the one-size-fits-all solutions that prevail in unitary government. A larger proportion of the population can be satisfied with the outcome when decisions are made at the state or local level.

Note that four of the states that the Commission is worried about are the nation’s so-called “majority-minority states”—California, Hawaii, New Mexico and Texas. These are not states in which minority members lack political clout. If these states ultimately decide not to follow EPA’s Final Rule, it will have to be at least with the acquiescence of a number of minority voters.

Indeed, there is a lively debate about whether African Americans tend as a group to give the same priority to environmental issues as other racial groups do. There is substantial polling evidence that they do not, although not everyone is convinced by it.<sup>38</sup> The polling evidence tends to show that African Americans are more sensitive to the need for jobs and a well-functioning economy—an unsurprising result given that African Americans tend to have higher rates of unemployment than whites. To my knowledge, no one claims to have evidence that African Americans tend as a group to give a higher priority to environmental issues than other racial groups do.

There is thus a curious irony here. The Commission is concerned that the states “predicted” not to adopt the EPA’s national standard are disproportionately minority and that they may end up with less stringent protections against coal ash than other states. But it is entirely possible—at least in some areas—that the reason they may choose not to adopt more

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<sup>38</sup> See, e.g., Judi Anne Caron Sheppard, *The Black-White Environmental Concern Gap: An Examination of Environmental Paradigms*, 26 J. Environ. Educ. 24 (Dec. 1994).

stringent standards is that minority voters have greater voting strength in those states and as a group they may tend to have somewhat different priorities.

Note that there are many reasons states may differ in their priorities. Take, for example, South Carolina (a state “predicted” to adopt the national standards) and Maine (a state not so “predicted”). According to SourceWatch.org, South Carolina has 36 coal-fired generating units at 12 different locations. Maine on the other hand has just one.<sup>39</sup> The issues that animate Maine voters right now include its high rate of opiate addiction, the need for election reform, and the proper use of the Governor’s veto power (as well as the legislature’s power to override a veto). Since not everything can be a priority, one should not expect Maine to give the issue the same priority South Carolina does. Meanwhile, in North Dakota (a state “predicted” to adopt the national standards), the unemployment rate is low at 3.2%. Environmental concerns may well make their way to the top of the agenda. By contrast, in Alaska (a state not so “predicted”), the rate is more than twice that at 6.7%. Voters there may be unhappy if their state government gives priority over anything that doesn’t bear directly on increasing the number of jobs.<sup>40</sup>

***D. Somehow the Notion that Title VI Directly Prohibits Actions that Have a Disparate Impact on Racial Minorities Has Crept into this Report; That Notion is False.***

There seems to be a general misunderstanding of the law throughout the report, especially the Commissioner Statements. In particular, the Statement of Commissioners Michael Yaki, Roberta Achtenberg and David Kladney (“Yaki Statement”) states,

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<sup>39</sup> See [http://www.sourcewatch.org/index.php/Category:Existing\\_coal\\_plants\\_in\\_South\\_Carolina](http://www.sourcewatch.org/index.php/Category:Existing_coal_plants_in_South_Carolina); [http://www.sourcewatch.org/index.php/Category:Existing\\_coal\\_plants\\_in\\_Maine](http://www.sourcewatch.org/index.php/Category:Existing_coal_plants_in_Maine) (using figures from 2005).

<sup>40</sup> An earlier version of this report gave greater emphasis to the argument that racial minorities and low-income individuals are more “affected” by coal ash than others because they have fewer resources with which to fight back legally or politically. This argument remains in the report:

“Commissioner Yaki stated that, “one of the principle[s] of environmental justice is understanding the resource disparity of minority and low-income communities to deal with issues of enforcement and compliance.” ... Commissioner Yaki continued by inquiring how “. . . poor communities surrounding some of these coal ash ponds or deposits[,] . . . supposed to find the resources to do even minimal investigation and understanding of their legal rights, much less find the resources to get an attorney to file a complaint or lawsuit to enforce it? Based on statements that the Commission received during its briefing on February 5, 2016, there is reason to believe that the [EPA’s efforts in the area of coal ash do] not protect minorities and low-income communities because of the lack of resources these communities have.”

Report at 86.

Two points are worth noting with regard to the notion that members of racial minorities have fewer resources than others. First, our finding was that coal ash landfills and ponds are *not* disproportionately located in zip codes where minority members live, not that they are. If minority members lack legal or political clout, it does not appear to have affected them in this particular area. Second, as for legal clout, members of racial minorities have tools that whites probably do not have: They can make arguments based on duly enacted rules promulgated pursuant to Title VI. Indeed, this may account for my first point.

“Title VI of the Civil Rights Act forbids entities that receive federal funds from discriminating on the basis of race—intentionally or through decision-making that results in an unjustified unequal impact on a protected class.”

Yaki Statement at 107.

Contrary to that claim, Title VI is *not* itself a disparate impact statute. To bring an action directly pursuant to the statute, a plaintiff must prove intent to discriminate on the basis of race, color or national origin. See *Alexander v. Sandoval*, 532 U.S. 275 (2001). This is a necessary result of *UC Regents v. Bakke* 438 U.S. 265 (1978). In *Bakke*, the Court decided that despite Title VI’s text, which appears simply to ban race discrimination, the law was only intended to (and therefore it should be interpreted only to) prohibit race discrimination that would have violated the Equal Protection Clause of the Fourteenth Amendment if engaged in by a state. It is well-established in the law that the Equal Protection Clause of the Fourteenth Amendment does not prohibit laws or policies because they have a disparate impact on racial minorities. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (holding that the Fourteenth Amendment of the Constitution does not prohibit actions that have a disparate impact on racial minorities). See also *Washington v. Davis*, 426 U.S. 229 (1976) (holding that the Fifth Amendment of the Constitution, which applies equal protection considerations to the federal government, does not prohibit governmental actions that have a disparate impact on racial minorities).

On the other hand, *Alexander v. Sandoval* left open the possibility that an administrative agency, like the EPA, charged with the responsibility of promulgating rules to implement Title VI could act prophylactically—just as Congress can act prophylactically in the exercise of its authority under Section 5 of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). Put differently, at least in theory, agencies may have the power to enact rules that do not require proof of discriminatory intent and instead require only disparate impact. This power is not, however, *carte blanche* to transform a statute that prohibits only intentional discrimination into a disparate impact statute.<sup>41</sup> Rules promulgated pursuant to Title VI *must* have as their aim the prevention of intentional discrimination. While it is permissible for such rules to sweep more broadly than that, preventing disparate impact must be a byproduct of the goal of preventing *intentional* discrimination. Just as legislation enacted pursuant to Section 5 of the Fourteenth

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<sup>41</sup> Such a transformation would be of epic proportions, since everything has a disparate impact on some protected group and hence presumptively illegal. For example, it would affect a federally-funded hospital in Chicago that decides to hire 15 more lower-paid orderlies rather than 10 more higher-paid registered nurses, because registered nurses are disproportionately female relative to orderlies. If such a hospital decides to terminate its emergency room 24 hour service, it would have a disproportionate impact on Hispanics, who are more likely to be uninsured and hence to use the services of an emergency room (and who, under EMTALA, it is required to take regardless of ability to pay). If the hospital declines to hire job applicants who have attempted suicide in the recent past, its action will have a disproportionate impact on Native American applicants. If it decides to build a covered parking structure rather than a covered bus stop, it may have a disparate impact on African Americans who may be more likely to arrive on a bus in a particular community.

Amendment must be “congruent and proportional” to an actual Equal Protection issue, rules promulgated pursuant to Title VI must be “congruent and proportional” to some actual violation of Title VI. Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (establishing the “congruent and proportional” test for Section 5 of the Fourteenth Amendment).

The EPA has indeed promulgated some rules pursuant to Title VI that it might argue were designed to be “prophylactic.” But even assuming arguendo that they were intended that way (rather than intended simply to extend Title VI beyond what Congress had in mind), it does not appear that they would pass the “congruent and proportional” test set out under *City of Boerne*.

The first of these—quoted below—is unclear. Does it mean to adopt a disparate impact standard? If so, is it doing so for the purpose of allowing the agency to get actual (i.e. intentional) discrimination under control or is it doing so for its own sake?

#### §7.35 Specific Prohibitions.

...

(b) A recipient shall not use criteria or methods of administering its program or activity 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 or activity with respect to individuals of a particular race, color, national origin, or sex.

#### 40 C.F.R. §7.35

Even if it could be shown that it was being done for the purpose of getting actual discrimination under control, its broad sweep would fail the congruence and proportionality test. No effort was made to determine whether any kind of intentional race discrimination was escaping the EPA’s detection, and, if so, what kind. The rule, if it is interpreted to cover disparate impact simply re-writes Title VI to expand its coverage many times over.

Subsection (c) of the same section is not much better. It states:

“(c), A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals, from denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the ground of race, color or national origin or sex, or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.”

#### 40 C.F.R. §7.35.

While this subsection limits itself to siting decisions, I suspect a court would find that neither section is “congruent and proportional” to the problem of the actual discrimination in the area of environmental protection. Among other things, it is essentially cribbed from a Civil Rights Era rule promulgated by the Department of Justice that had been designed to apply to very different kinds of structures, like schools and public swimming pools, which had been explicitly race-segregated in the not-too-distant past.<sup>42</sup> EPA’s purpose was not to ensure difficult-to-prove cases of intentional discrimination are caught in its net even at the unfortunate cost of catching a few unintentional cases along with it. Catching the cases of unintentional disparate impact was not seen by the EPA as an unfortunate byproduct of a rule designed to catch intentional discrimination. Rather it is seen as a positive benefit.

This is not to say that the EPA could not, after a thorough investigation of very particularized activities, like the siting of Subtitle C hazardous waste landfills, find that many such sitings are intentionally made in minority neighborhoods and that the only way to stop these intentional acts is to prohibit disparate impact generally. But it would have to do so after carefully weighing the pros and cons of limiting the potential locations to places that demographically “look like America.” (See, e.g., supra at n.18 for reasons the area around the Arrowhead Landfill in Uniontown, Alabama is particularly suited to landfills despite its disproportionately African American population.)

***E. What Possessed the Commission to Try to Weigh In on Topics Requiring Expertise in Waste Disposal, Toxicology, Epidemiology, and Medicine?***

My only answer to that question is that I have no idea. All I can say is that the Commission got itself in over its head. It chose a topic for this year’s enforcement report that requires several kinds of expertise that no one here has. It could have limited itself to the issue of disproportionality of residence, but it spent a lot of time spinning its wheels by trying to go beyond that and demonstrate the toxicity of coal ash. The result was bound to be unfortunate.

The staff member in our Office of Civil Rights Evaluation who was given the task of creating a research outline for this report had high hopes of getting to the bottom of the EPA’s decision to classify coal ash as a non-hazardous substance under Subtitle D. (This staff member has since left the Commission.) The then-Director of the Office of Civil Rights Evaluation supported his proposal. In outlining his plan for the report to the Commission, he stated:

“... I would really like to dive into the EPA and their involvement in coal ash. I’d really like to highlight their EPA rule and how it relates to the issue. I really want

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<sup>42</sup> 28 C.F.R. § 42.104(3). In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objective of the Act or this subpart.

to look at why they considered it as a non-hazardous substance under Subsection D, ... we would hopefully be working with some sort of university who would be willing to help us do this type of research ....”

Tr. at 35, Oct. 14, 2015.

We took that dive. And the waters turned out to be very deep indeed. At the time, the Commission shared the staff’s high hopes of “working with some sort of university who would be willing to help us do this type of research.” But it was naïve for the Commission to believe that with or without help from “some sort of university,” it would have the time and ability to shed light on whether coal ash should have been classified as a non-hazardous substance under Subtitle D. Just navigating the federal government’s complicated rules for cooperating with outside entities like a university would have required a lot of time. On top of that, first-class research would have required an extraordinary amount of time—far more than we had for our report. Moreover, university researchers are usually not sitting around waiting for an assignment from the Commission. They generally have full research agendas that would have taken them time to work through before they could consider working with the Commission.

We didn’t have that much time. Our tiny staff had less than six months from the time of the October meeting to produce the first draft of the report. Given the staff’s other responsibilities, we had the equivalent of less than one full-time staff member carrying nearly all the weight of learning about waste disposal, toxicology, epidemiology and medicine and then producing a draft of the report.<sup>43</sup> Commission members themselves, working part time, had only about two months to work to improve the report before it had to be approved. Given the statutory requirement that we produce at least one report per year on an enforcement issue, rejecting the report or holding onto it for further revisions was not an option. Once the report was approved, individual Commissioners had 30 days to draft Statements like this one (as well as an additional 30 days for rebuttal).

It was inevitable under the circumstances that the report would turn into something like a college sophomore’s term paper.<sup>44</sup> Early research ambitions would have to be scaled back. Rather than presenting original research, most of the report would have to be a re-hash of already-existing research, often poorly understood by the Commission’s members and staff working on the draft. Most troublingly, heavy reliance would be placed on untrustworthy sources.

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<sup>43</sup> During that same period, the Commission staff completed two other reports of comparable length. Work on several other reports progressed or was initiated. The Commission’s staff was also charged with putting together three briefing events on a range of topics from financial challenges in Indian Country to municipal policing practices to the funding of K-12 schools.

<sup>44</sup> Likewise, I fear that my Statement reads like comments from a professor assigned to grade the term papers only because the faculty member who actually taught the class and knows the subject matter has run off to join the circus.

As an example of that last problem, an earlier draft of the report contained the following statement:

“As a consequence of EPA’s approval to store Herriman coal ash in Uniontown, the residents of Uniontown, the majority being Black or African American, have suffered adverse health impacts and a lower quality of life.”

How did we know that the adverse health impacts complained of by Uniontown residents were “a consequence” of the decision to store coal ash nearby? Judging from the citations, one of our staff members read it in the newspaper.<sup>45</sup> How did the newspaper get its information? The reporter probably heard it from an advocacy group.<sup>46</sup>

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<sup>45</sup> Similarly, the Statement of Commissioners Michael Yaki, Roberta Achtenberg, and David Kladney repeatedly cites to newspaper articles and advocacy organizations rather than to actual data for its conclusions. For example, it quotes an article on the web site of Earth Justice for the proposition that coal ash lagoons are dangerous. Yaki et al at 112. This is embarrassing.

One semi-bright spot is this: On the issue of racial disparate impact, one of the advocacy articles cited by Yaki et al. cites to a “Yale study” that finds that non-Hispanic whites are subject to the lowest levels of certain kinds of airborne particulate matter for 11 of 14 kinds of particulate matter studied. This is at least data. See Michelle L. Bell & Keita Ebisu, *Environmental Inequality in Exposure to Airborne Particulate Matter Components in the United States*, National Institute of Environmental Health Sciences, National Institutes of Health (August 10, 2012).

But when one reads Bell & Ebisu, one finds a mixed bag. The study actually finds that overall Non-Hispanic Asians are exposed to the lowest levels of particulate matter with an aerodynamic diameter of 2.5 micrometers or less, followed by Non-Hispanic whites, Hispanics and African Americans (although for certain subcategories of particulate matter Asians are exposed to much higher quantities). The differences in overall exposure are small. When the data is broken down into subcategories of particulate matter, African Americans had a higher rate of exposure than whites for 13 of the 14 subcategories. Hispanics have higher rates of exposure than whites for 12 of the 14 subcategories, but for several of these subcategories the differences are much greater than the differences between African Americans and Non-Hispanic whites.

Different subcategories of particulate matter have their origins in different activities. Bell & Ebisu point out that silicon is associated with road dust, nickel and vanadium with oil combustion, and sulfates with coal combustion. *Id.* at 15. One might expect, therefore, that silicon would be more common in drier climates. The study found that silicon levels were nearly the same for all groups with the exception of Hispanics, who had markedly higher levels of silicon. One might expect nickel and vanadium levels to be high in urban areas, since they have higher concentrations of automobiles and trucks. Sure enough, Non-Hispanic African Americans, Non-Hispanic Asians, and Hispanics are all disproportionately urban and all subjected to elevated levels of nickel and vanadium relative to whites. Whites and Native Americans are the only groups that disproportionately reside in small towns and rural areas. See Housing Assistance Council, *Rural Research Brief, Minorities in Rural & Small Town Areas* (April 2012) (using data from the American Community Survey dividing population into urban, suburban/exurban and rural/small town). For sulfates, both Non-Hispanic Asians and Hispanics had lower levels of exposure than Non-Hispanic whites.

It is surely not clear that any of this has to do with locating environmental hazards nearer to racial minorities. People have been going to the country to breathe in the fresh air at least since the days of the Roman Empire.

<sup>46</sup> I note that the Federal Rules of Evidence provides a list of exceptions to the rule against hearsay that includes “Public Records.” Fed. R. Evid. 803(8). The exception does not apply when, as here, “the source of information or other circumstances indicate a lack of trustworthiness.” *Id.* Indeed, it cannot be applied to this report in any respect. It is riddled with unsupported and insupportable statements and conclusions and hidden leaps of logic.

Congress does not fund the Commission in order for it to re-issue unsupported statements found in newspapers. We are supposed to immerse ourselves into the facts of a particular area of civil rights policy and come up with some information or insight that nobody else has come up with. It need not be earthshaking. It need not be the last word on the issue. The facts we uncover just need to be accurate and useful for policymakers to know. When we pick a complex topic for which we have no expertise and no hope of developing meaningful expertise (as we have done here), it is impossible to write a report that is accurate and useful.

At our briefing on February 5, 2016, we failed to produce a single witness who had conducted research on health effects of coal ash. We did have a physician who was happy to testify on its evils. But this witness had done no epidemiological studies (or studies of any kind). Nor did she cite any. She had not examined the residents of Uniontown; nor to my knowledge had she examined anyone who had been exposed to coal ash. Among her other activist projects is her crusade against fluoridated water—a cause that many associate with quackery.<sup>47</sup>

In addition, we had a representative from Physicians for Social Responsibility—an organization whose primary interest is in the prevention of global warming, nuclear war and the proliferation of nuclear weapons. The witness, Barbara Gottlieb, is not a physician or scientist, but rather the executive director of the organization with a background in political activism rather than an area of expertise relevant to the subject matter at hand.<sup>48</sup> This should be embarrassing for the Commission.

The draft report was thus in obvious need of editing. The sentence was thus modified to read:

“As a consequence of EPA’s approval to store Herriman coal ash in Uniontown, the residents of Uniontown, the majority being Black or African American, *have alleged* adverse health impacts and a lower quality of life.”

Report at 69. (emphasis added).

This is true but trivial. Congress doesn’t need a Commission to tell it that there is controversy over whether coal ash has resulted in “adverse health impacts” for the people of Uniontown.

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<sup>47</sup> Michael Vagg, Anti-Fluoride Activists Should Put Their Tinfoil Hat Theories to Rest, *The Guardian* (Sept. 18, 2013), available at <https://www.theguardian.com/commentisfree/2013/sep/19/anti-fluoride-science-australia>. See also Ad Hoc Subcommittee on Fluoride of the Committee to Coordinate Environmental Health and Related Programs, Public Health Service, Review of Fluoride: Benefits and Risks (Department of Health & Human Services, February 1991).

<sup>48</sup> In a YouTube video, Ms. Gottlieb describes Physicians for Social Responsibility this way: “We rally U.S. health professionals to prevent nuclear war, other nuclear disasters and global warming.” See Barbara Gottlieb on Building PSR, available at <https://www.youtube.com/watch?v=ZYRcjqCJAVU>.

But the original statement has re-appeared in the form of a Finding worded as vaguely as possible:

“Uniontown, Alabama has been adversely affected by the storage of coal ash in its community in the Arrowhead Landfill.”

What does this mean? Who knows? But the findings appear to be intended to convey the notion that coal ash is causing health problems. Another Finding states:

“Coal ash contains at least fifteen toxic pollutants, including heavy-metals such as arsenic, selenium, chromium, lead, uranium, and mercury, which alone are considered “hazardous substances” under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and can potentially damage all major organs [sic] systems in adults, pregnant women, and children.”<sup>49</sup>

This latter finding is again literally true.<sup>50</sup> But no one has ever denied that coal ash can contain these substances or that if ingested *in sufficient quantities*, each one of them can be deadly. (Note that at least two of them—selenium and chromium—are also necessary nutrients. There is even evidence that arsenic is a necessary nutrient.<sup>51</sup>) But similarly, no one has ever denied that these substances are commonly found in soil.<sup>52</sup> ***Moreover, the EPA knew all this when it made the judgment to treat coal ash as a non-hazardous substance. And, judging from this report, EPA officials understand all this far better than the Commissioners and the Commission staff do.***

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<sup>49</sup> And the Commission forgot to mention boron.

<sup>50</sup> I have less confidence in the truth of some of the Commission's other findings. For example, the Commission finds the following: “When toxic substances found in coal ash seep into streams, lakes, and ground water, they are absorbed by plants and fish and become more concentrated at each stage up in the food chain, which in turn harms humans, animals, and physical environment. This is likely too general a statement to be true. Some toxins break down more rapidly than others; some can be effectively expelled from the body so long as they do not reach deadly levels. Note that many substances can be found in coal ash, that bodies are capable of expelling some toxins and that food chains can be complicated things. See, e.g., Hao Wang, Heng Ban, Dean Golden & Ken Ladwig, Ammonia Release Characteristics from Coal Combustion Fly Ash, 47(2) ACS Fuel Chemistry Div. Preprints 836 (2002)(discussing ammonia, a serious toxin, which bacteria produce in digesting proteins in the human body and then the liver transforms to urea, which is expelled as urine; ammonia is currently being used by coal-fired electricity plants to help control nitrogen oxide emissions).

<sup>51</sup> F.H. Nielsen, *Nutritional Requirements for Boron, Silicon, Vanadium, Nickel, and Arsenic: Current Knowledge and Speculation*, 5(12) Fed. Am. Soc. Experi. Bio. J. 2661 (1995).

<sup>52</sup> See Erik R. Venteris, Nicholas T. Basta, Jerry M. Bigham & Ron Rea, *Modeling Spatial Patterns in Soil Arsenic to Estimate Natural Baseline Concentrations*, 43 J. Environ. Qual. 936 (2014). See also Significant Baseline Levels of Arsenic Found in Soil Throughout Ohio Are Due to Natural Processes *available at* <http://www.pnnl.gov/news/release.aspx?id=1049> (summarizing the Venteris article). Christopher Oze, Dennis K. Bird, & Scott Fendorf, *Genesis of Hexavalent Chromium from Natural Sources in Soil and Groundwater*, 104 Proceedings Nat'l Acad. Sci. 6544 (2007); Crops and Soils: Lead in Residential Soils: Sources, Testing, and Reducing Exposure, Pennsylvania State University Extension, *available at* <http://extension.psu.edu/plants/crops/esi/lead-in-soil>.

In essence, the basic issue is whether these substances are any more likely to make their way into the human body in sufficient quantities to cause harm from coal ash disposal sites than they are from soil. The Commission fails to note that, thus making its finding misleading.

At one point the findings admit that there is a lot that we don't know. But the Commission doesn't linger long in contemplation of its lack of good information. Instead, skating over its lack of expertise, the Commission boldly recommends the following (among other things):

“EPA should classify coal ash as “hazardous waste” under subtitle C of RCRA.”

But this is a leap in logic from the Commission's findings. The EPA has studied this issue for years. It came to the opposite conclusion. Why are their experts wrong and our non-experts, who have invested far less time on the issue, right?

Here's what Betsy Devlin, Director of the Materials Recovery and Waste Management Division of the EPA's Office of Land and Emergency Management had to say on the matter at our briefing:

“[O]ur risk assessment, our risk analysis would not have supported a regulation under Subtitle C, which is the part of the law which would have provided us federal enforcement authority. The data wasn't there. And as we said in the preamble to our rule, EPA has not made a final determination. We've put these regulation[s] in place right now, but we continue to look at the data. So we could basically go back at some point and say we do need regulations under Subsection C.”

Tr. at 31 (January 22, 2016).

Our report does not in any way show that Ms. Devlin is wrong about either the known characteristics of coal ash or the EPA's authority under RCRA.

It is not the only overreach in the report. Scattered throughout it there are other embarrassing passages that read more like the work of an advocacy organization than of a government commission that is supposed to verify the truth of claims. For example:

“[The] damaging effects are found in America's largest coal ash dump, the 1700 acre Little Blue Run pond (“Little Blue”). Coal ash has destroyed the vegetation and homes surrounding the dump. There is no vegetation or wildlife near Little Blue although the power company promised the residents that Little Blue would be a beautiful oasis with fish, wildlife, and plenty of vegetation. All that remains is mud, a putrid smell, and insects. Residents cannot even plant grass or garden their own land. Although Little Blue is scheduled to close in 2016, the environmental damage caused by the dump is irreversible.”

Report at 55-56. (footnotes omitted).

I can't fix everything that is wrong with this paragraph. To begin, how does the Commission know that "[c]oal ash has destroyed the vegetation and homes surrounding the dump"? The report cites an article in National Geographic. But the National Geographic article does not say that. Nor does it say anything like that. Is the statement nevertheless true? I don't know. But there is at least reason to doubt both it and the following sentence, which begins, "There is no vegetation or wildlife near Little Blue ...."

The footnote for the latter sentence cites a 2012 video entitled "Little Blue: A Short Documentary" posted on YouTube by its producer and director, Angela Wiley, who was at the time a student at Chatham University in Pittsburgh. Chatham's web site lists her as a member of its climate committee and a student delegate to the United Nations Climate 17 conference. The video doesn't specifically make the claim for which the Commission cites it. Instead, a woman identified only as "Roni Kampmeyer" of Georgetown, Pennsylvania states, without any context given, "You don't hear anything, you don't see anything moving. It's just this strange eerie quiet."<sup>53</sup> The Commission seems to have taken this to mean that "[t]here is no vegetation or wildlife near Little Blue."

While the plant life being shown at the time looks brown, it is obvious that the video was being shot in the dead of winter when the plant life is always brown in that part of the country. Ms. Kampmeyer is wearing a heavy jacket and snow appears in the next portion of the video. By contrast, when I googled images for "Little Blue Run," I found a number of photos that showed the lake to have considerable nearby green vegetation.<sup>54</sup> Which of these pictures are accurate and up-to-date? I don't know. What I do know that this video by a student activist is an insufficient basis upon which to conclude that "[t]here is no vegetation or wildlife near Little Blue." It's not just that the video doesn't say that. Even if it did say that, the Commission's job is to nail down the facts, not rely on the word of activists and interested parties for those facts.

The video was in the style of many modern documentaries in that it was disjointed and depended on what sometimes seems like random statements from a number of interviewees. From later portions of the video, it appears that the core problem with Little Blue, a man-made lake created for the purpose of giving FirstEnergy Generation Corporation a place to store its coal ash, is water seepage, not coal ash toxicity. One homeowner demonstrates how soggy his (green) lawn has become; one homeowner complains that her basement is moldy. Seepage of this kind can be a problem with any man-made lake (or with any lake); it is not specifically

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<sup>53</sup> Ms. Kampmeyer is listed on LinkedIn as "Chair, Little Blue Regional Action Group," a "Community Organizer/ExComm Member" of the Sierra Club, "Lead Organizer/Chair" of Citizens Against Coal Ash and "Organizer/Fundraiser" of Clean Water Action.

<sup>54</sup> Some of the photos show dead trees actually in the lake. This is normal for a man-made lake. As the water fills up what was previously dry land, the water kills any trees that were growing there.

related to what is in the lake water, although the problem can be more serious depending on what substances are found in the lake water.

Similar claims have been made about the Arrowhead landfill in Uniontown, Alabama. I can speak with somewhat more authority on that landfill than I can on Little Blue, because I have actually visited the Arrowhead facility. Not only did I see vegetation and wildlife, I actually saw a bald eagle swoop down over the landfill area. It was rather exciting—my first bald eagle. Commercial catfish ponds are located nearby (which may account for the bald eagle’s presence).

At our briefing on February 5, 2016 in Washington, D.C., Uniontown resident, Esther Calhoun, a frequent speaker about coal ash, testified that “[y]ou can’t have gardens anymore.” Tr. at 26. In fact, however, the homeowners whose property is immediately contiguous to the landfill property do indeed have gardens. I have personally seen what appeared to be corn growing there. Indeed, there is vegetation on the landfill property, including vegetation growing on the portion of the landfill that now contains the coal ash.<sup>55</sup>

Others have commented on the smell of the coal ash. I was given a sample of coal ash to smell and could not smell anything (in contrast to household garbage, which I could smell quite clearly when I stood near the cell currently being filled). To her credit, Ms. Calhoun did not complain about the smell of the coal ash. Her complaints were about the smell of the cheese factory that is only yards away from her home, rather than the landfill, which lies about four miles from her home:

“Somebody needs to do an investigation. Come with me. Come stay with me a week. I invite you to come and see the environmental injustice. The cheese plant. It stinks. It has flies. I stay up there by the cheese plant. But the smell, it keeps you in the house.”

Tr. at 13 (Meeting of February 5, 2016).<sup>56</sup>

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<sup>55</sup> Commissioner Narasaki also complains about the impact of that landfill on real estate prices in Uniontown, citing testimony to that effect from our February briefing. Narasaki at 103. Uniontown is a tiny community with a population slightly over 2000. For decades its population had been shrinking, but in the last decade or so, this has turned around and the population is now expanding. While there, I noted that some of Uniontown’s residents must have been prosperous at some point in the distant past. There are a number of impressive old homes there in various states of decrepitude (along with more modern, but much more modest homes, some of which are also in serious states of disrepair). Whatever caused the economic decline it was not the coal ash brought to the Arrowhead Landfill in 2009. That decline has obviously been underway for a long time. Whether the recent expansion of its population is an indication that Uniontown’s economy is turning around I am not in a position to say. While there I noted that Harvest Select, a company founded in 1991, operates a large catfish farm and processing plant a little way outside of town (but before one reaches the Arrowhead Landfill, which appears to be next to the Harvest Select property). Perhaps Harvest Select has something to do with the increase in population of Uniontown.

<sup>56</sup> One issue has come up in connection with Ms. Calhoun’s statement that the coal ash brought in from Tennessee came on tracks that pass very close to her home (which is about four miles from the Arrowhead Landfill). Tr. at 19. On my trip to Uniontown, I noted that the tracks do indeed come very close to her home. But an attorney for the Arrowhead Landfill insisted to me that the route of the trains coming south from Tennessee to the landfill did not

## F. Conclusion

At the beginning of his Statement, Chairman Castro quotes what he identifies as a Cree proverb, “When the last tree is cut down, the last fish eaten, and the last stream poisoned, you will realize that you cannot eat money.” He then goes on to criticize the EPA for being more focused on “rhetoric than results.” Castro at 97.

I agree that a focus on rhetoric has been a problem. But a good example is the Chairman’s so-called Cree proverb. It turns out that it may not be such an old proverb at all. Rather, it seems to have made its earliest appearance in the 1970s in essay that quotes Alanis Obomsawin, a woman of Abenaki descent who went onto a career as a documentary filmmaker.<sup>57</sup> There is no suggestion there that it is an old proverb. In 1981, two Greenpeace members climbed a smelter smokestack and unfurled a banner containing a form of the statement without attribution.<sup>58</sup> Since then Greenpeace has made considerable use of it. Only since the 1980s has it been identified as a proverb—sometimes of the Osage tribe, sometimes the Cree.<sup>59</sup>

Rather than quoting faux proverbs in this project, the Commission should have closely examined the literature on disproportionality; we should have developed more independent

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pass along those tracks. Rather, they would arrive at the Arrowhead Landfill spur from the east, while Uniontown lies to the west. I subsequently examined a map of railroads in Alabama and it does indeed seem that trains full of coal ash would not have passed by Ms. Calhoun’s home. She may therefore be mistaken on that.

This illustrates why Commissioners should attempt to visit the locations it writes about. We did it last year in producing our last year’s statutory enforcement report—*With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* (although I was the only one to write extensively about what we saw).

This time the Commission canceled its planned visit to Uniontown, Alabama (over my objections), perhaps in part because they were starting to realize the coal ash story was not quite so one-sided as they had been led to believe. U.S. Commission on Civil Rights, March 18, 2016 Business Meeting, Tr. at 22-25. I was particularly disappointed when at least one member of the Commission sought an opinion from our General Counsel that I could not go to see the Uniontown by myself. The General Counsel’s opinion, however, was that I could go on my own time and my own dime and that, if I did, I could make use of what I learned if it turned out to be relevant. Yes, I was that curious. I am surprised my colleagues were not. I only wish the whole Commission had gone earlier in the process—in time to influence the report.

<sup>57</sup> Ted Poole, *Conversation with North American Indians* (quoting Alanis Obosawim) in *Who Is the Chairman of This Meeting?: A Collection of Essays* 39, 43 (Ralph Osborne ed. 1972)(“Your people are driven by a terrible sense of deficiency. When the last tree is cut, the last fish is caught, and the last river is polluted; when to breathe the air is sickening, you will realize, too late, that wealth is not in bank accounts and that you can’t eat money. Those who are rich and those who are poor, by bank balance standards, will achieve a final equality of poverty. The millionaire with his burden of bucks and nothing to buy will feel more impoverished than any. He will certainly feel cheated. But he will not realize, even then, that he has cheated himself.”). There is nothing in the essay to suggest that these words are a Cree or Abenaki proverb. They appear to be Ms. Obosawin’s alone. She is described in the essay as “a lady of irresistible charm” who “was named in Maclean’s magazine as one of the outstanding Canadians of 1965” and as “[a] beautician, model and folksinger” and a “popular performer in Montreal night spots.”

<sup>58</sup> Associated Press, *Smoke Protesters Quit Smelter Stack*, *Tri City Herald* (Kennewick, Wash.) 16 (October 16, 1981).

<sup>59</sup> See Quote Investigator at <http://quoteinvestigator.com/2011/10/20/last-tree-cut/>.

evidence of disproportionality or lack thereof. Most important, we should have highlighted the results of the independent evidence we did in fact produce.

One of the Commission's core duties is to gather evidence on issues relating to discrimination on the basis of race, color, and national origin (among other things), which it can then present to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Baines Johnson said when the Commission was being created in 1957, its task is to "gather facts instead of charges"; "it can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men."<sup>60</sup>

That is harder than it sounds, and we have not always done as well as I would have liked. Too often we gather charges instead of facts. Instead of sifting out the truth from the fancies, we view our jobs simply as giving activists an opportunity to sound off. We assume we know the truth and focus only on repeating it as if it were the Nicene Creed.

Our reports should expand the pool of reliable information available for policymakers. This one does not.

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<sup>60</sup> 103 Cong. Record 13,897 (1957)(statement of Sen. Johnson).

## LIST OF PANELISTS AND WRITTEN STATEMENTS

### *January 22, 2016, Briefing Panelists:*

- I. Representatives from the Environmental Protection Agency
  - Velveta Golightly-Howell, Director of the Office of Civil Rights
  - Matthew Tejada, Director of the Office of Environmental Justice
  - Betsy Devlin, Director of Materials Recovery and Waste Management Division

### *February 5, 2016, Briefing Panelists:*

- I. Presentations: Community Leaders/Advocates Who Have Experienced the Impacts of Environmental Injustices: 9:20 a.m. – 10:05 a.m.
  - Esther Calhoun, Alabama Resident
  - Dulce Ortiz, Illinois Resident
  - Rev. Leo Woodberry, South Carolina Resident
  - Raghib Allie-Brennan, Office of U.S. Rep. Alma Adams
- II. Panel 1: Health Issues: 10:10 a.m. – 11:30 a.m.
  - Barbara Gottlieb, Physicians for Social Responsibility
  - Abel Russ, Environmental Integrity Project
  - Dr. Yolanda Whyte, Physician
  - Peter Harrison, Waterkeepers Alliance
- III. Panel 2: Coal Industry Executives and Advocacy Groups: 11:40 a.m. – 12:55 p.m.
  - Thomas Adams, American Coal Ash Association
  - Amelia Shenstone, Southern Alliance for Clean Energy
  - Lisa Hallowell, Environmental Integrity Project
  - James Roewer, Utilities Solid Waste Group
  - Michael Smith, Arrowhead Landfill Facility
- IV. Panel 3: Coal Ash Activists/Advocates: 1:55p.m. – 3:10 p.m.
  - Andrea Delgado, Earth Justice
  - Marianne Engelman-Lado, Earth Justice
  - Rhiannon Fionn, Coal Ash Chronicles
  - Prof. David Konisky, Indiana University
  - Anthony L. Francois, Pacific Legal Foundation

V. Panel 4: Environmental Justice Panel: 3:15 p.m. – 4:30 p.m.

- David Ludder, Environmental Justice Attorney
- Roger Clegg, Center for Equal Opportunity
- Lois Gibbs, Center for Health, Environment and Justice
- Prof. Chris Timmins, Duke University

*Panelists' Written Statements*

The panelists' written statements for the Commission's briefing held on January 22, 2016, and February 5, 2016, are available at:

[https://securisync.intermedia.net/Web/#/s?public\\_share=kYWfwhhUK2KP\\_ip3l6zAab&id=LzIwMTYgUGFzdCBCcmllZmluZ3MvMi01LTE2IEVudmlyb21lbnRhbCBKdXN0aWNlIEJyaWVmaW5nIDIwMTYvRW52aXJvbm1lbnRhbCBKdXN0aWNlIEJyaWVmaW5nIFBhbmVsIFN0YXRlbWVudHMvUGFuZWxpc3RzJyBTdGF0ZW1lbnRz](https://securisync.intermedia.net/Web/#/s?public_share=kYWfwhhUK2KP_ip3l6zAab&id=LzIwMTYgUGFzdCBCcmllZmluZ3MvMi01LTE2IEVudmlyb21lbnRhbCBKdXN0aWNlIEJyaWVmaW5nIDIwMTYvRW52aXJvbm1lbnRhbCBKdXN0aWNlIEJyaWVmaW5nIFBhbmVsIFN0YXRlbWVudHMvUGFuZWxpc3RzJyBTdGF0ZW1lbnRz).

## Appendix A: Population Data Analyzed with Landfills and Surface Impoundments

Coal Combustion Residual (CCR) Landfill and Surface Impoundment Minority & Low-income Population Data (American Community Survey (ACS) 2014)								
Note: The calculation for State % Minority was calculated by 1) Subtracting the total of White (non-Hispanic or Latino) from the overall population, by zip code, to find Minority Population. 2) Taking the total Minority Population of the zip code calculated above and dividing by the overall population, by zip code. Additionally, some populations were not calculated because that zip code could not be located by ACS Data.								
*Indicates data was unavailable and thus, not used in calculating State % minority.								
Plant Name	State	Zip code	Census zip code % below poverty level	State % below poverty level	If zip > state poverty level	Census zip code % minority	State % minority	If zip > % state minority level % assign 1
Aurora Energy LLC Chena	AK	99701	12.09	11.2%	1	39.72	38.1%	1
Healy	AK	99743	9.74	11.2%	0	13.54	38.1%	0
Barry	AL	35073	20.40	19.30%	1	21.84	33.8%	0
Charles R Lowman	AL	35186	14.00	19.30%	0	6.90	33.8%	0
Colbert	AL	35580	20.60	19.30%	1	10.88	33.8%	0
E C Gaston	AL	35674	16.80	19.30%	0	15.95	33.8%	0
Gadsden	AL	35772	22.00	19.30%	1	14.35	33.8%	0
Gorgas	AL	35903	21.60	19.30%	1	38.77	33.8%	1
Greene County	AL	36512	100	19.30%	1	0.00	33.8%	0
James H Miller Jr	AL	36548	10.30	19.30%	1	26.33	33.8%	0
Mobile Energy Services LLC	AL	36610	46.10	19.30%	1	98.12	33.8%	1
Widows Creek	AL	36732	28.50	19.30%	1	54.04	33.8%	1
White Bluff	AR	72132	11.80	18.9%	0	7.42	26.6%	0
Independence	AR	72562	30.90	18.9%	1	7.30	26.6%	0
Flint Creek	AR	72734	19.90	18.9%	1	16.31	26.6%	0
Apache Station	AZ	85606	17.60	18.2%	0	15.36	44.2%	0
H Wilson Sundt Generating Station	AZ	85714	33.60	18.2%	1	92.42	44.2%	1
Coronado	AZ	85936	12.90	18.2%	0	43.75	44.2%	0
Springerville	AZ	85938	24.20	18.2%	1	27.02	44.2%	0
Cholla	AZ	86032	22.90	18.2%	1	41.17	44.2%	0
Navajo	AZ	86040	20.10	18.2%	1	57.10	44.2%	1
Mt Poso Cogeneration	CA	93308	25.50	16.40%	1	29.39	62%	0
Rio Bravo Jasmin	CA	93308	25.50	16.40%	1	29.39	61.5%	0
Rio Bravo Poso	CA	93308	25.5	16.40%	1	29.39	61.5%	0
ACE Cogeneration Facility	CA	93562	30.30	16.40%	1	22.57	61.5%	0
Port of Stockton District Energy Fac	CA	95203	33.90	16.40%	1	72.14	61.5%	1
Stockton Cogen	CA	95206	28.50	16.40%	1	91.07	61.1%	1
Cherokee	CO	80216	35.90	12.0%	1	77.01	31.0%	1
Arapahoe	CO	80223	23.20	12.0%	1	68.66	31.0%	1
Valmont	CO	80302	35.20	12.0%	1	14.81	31.0%	0
Colorado Energy Nations Company	CO	80401	11.10	12.0%	0	15.01	31.0%	0
Rawhide	CO	80549	9.40	12.0%	0	20.87	31.0%	0
Pawnee	CO	80723	10.40	12.0%	0	36.11	31.0%	1

Ray D Nixon	CO	80817	9.60	12.0%	0	37.08	31.0%	1
Martin Drake	CO	80903	23.50	12.0%	1	28.42	31.0%	0
Comanche	CO	81006	12.10	12.0%	1	34.99	31.0%	1
Lamar Plant	CO	81052	22.50	12.0%	1	37.21	31.0%	1
Trinidad	CO	81082	17.10	12.0%	1	49.88	31.0%	1
W N Clark	CO	81212	19.50	12.0%	1	22.71	31.0%	0
Nucla	CO	81424	23.50	12.0%	1	12.77	31.0%	0
Cameo	CO	81526	8.80	12.0%	1	14.17	31.0%	0
Craig	CO	81625	13.6	12.0%	0	11.20	31.0%	0
Hayden	CO	81639	11.30	12.0%	0	12.01	31.0%	0
AES Thames	CT	06382	6.30	10.8%	0	30.44	31.2%	0
Bridgeport Station	CT	06604	30.90	10.8%	1	74.57	31.2%	1
Edge Moor	DE	19809	7.30	12.5%	0	23.05	36.3%	0
NRG Energy Center Dover	DE	19904	14.40	12.5%	1	44.81	36.3%	1
Indian River Generating Station	DE	19939	11.10	12.5%	0	10.02	36.3%	0
Cedar Bay Generating Company LP	FL	32218	15.90	16.5%	0	57.28	44.2%	1
Northside Generating Station	FL	32226	7.90	16.5%	0	26.75	44.2%	1
Lansing Smith	FL	32409	12.40	16.5%	1	7.53	44.2%	0
Scholz	FL	32460	18.20	16.5%	1	35.11	44.2%	0
Crist	FL	32514	16.80	16.5%	1	30.09	44.2%	0
Deerhaven Generating Station	FL	32606	11.30	16.5%	0	34.30	44.2%	0
Seminole	FL	32708	10.50	16.5%	0	31.39	44.2%	0
Stanton Energy Center	FL	32831	9.90	16.5%	0	56.42	44.2%	1
Big Bend	FL	33572	8.50	16.5%	0	19.88	44.2%	0
C D McIntosh Jr	FL	33801	26.20	16.5%	1	34.26	44.2%	0
Polk	FL	33860	15.70	16.5%	0	36.84	44.2%	0
Crystal River	FL	34428	24.40	16.5%	1	13.11	44.2%	0
Central Power & Lime	FL	34605	22	16.5%	1	37.10	44.2%	0
Indiantown Cogeneration LP	FL	34956	31.20	16.5%	1	78.15	44.2%	1
Jack McDonough	GA	30080	16.70	18.3%	1	47.08	45.7%	1
Bowen	GA	30120	19.10	18.3%	1	25.61	45.7%	0
Hammond	GA	30165	29.1	18.3%	1	42.60	45.7%	0
Wansley	GA	30170	15.20	18.3%	0	13.74	45.7%	0
Yates	GA	30263	22	18.3%	1	41.10	45.7%	0
Scherer	GA	31046	11.00	18.3%	0	27.17	45.7%	0
Harlee Branch	GA	31061	32.10	18.3%	1	46.99	45.7%	1
McIntosh	GA	31326	9.20	18.3%	0	22.36	45.7%	0
Kraft	GA	31405	20.50	18.3%	1	54.72	45.7%	1
Mitchell	GA	31705	38.10	18.3%	1	74.22	45.7%	1
Crisp Plant	GA	31796	14.60	18.3%	0	33.27	45.7%	0
AES Hawaii	HI	96707	5.50	11.4%	0	81.58	77.0%	1
Hawaiian Comm & Sugar Puunene Mill	HI	96784	12.4	11%	1	91.40	77.0%	1
Ames Electric Services Power Plant	IA	50010	22.30	12.2%	1	21.51	12.90%	1
Sutherland	IA	50158	13.00	12.2%	1	30.36	12.90%	1
Pella	IA	50219	6.50	12.2%	0	6.23	12.90%	0
Streeter Station	IA	50613	18.60	12.2%	1	7.81	12.90%	0
George Neal North	IA	51052	4.80	12.2%	0	7.81	12.90%	0

George Neal South	IA	51052	4.80	12.2%	1	7.81	12.90%	0
Earl F Wisdom	IA	51301	10.70	12.2%	0	5.32	12.90%	0
Walter Scott Jr Energy Center	IA	51501	18.50	12.2%	1	16.09	12.90%	1
Dubuque	IA	52099	14.8	12.2%	1	9.80	12.90%	0
Lansing	IA	52151	8.00	12.2%	0	3.69	12.90%	0
Sixth Street	IA	52402	9.90	12.2%	0	14.94	12.90%	1
Prairie Creek	IA	52404	16.70	12.2%	1	15.44	12.90%	1
Ottumwa	IA	52548	20.40	12.2%	1	2.94	12.90%	0
Burlington	IA	52601	17.80	12.2%	1	13.01	12.90%	1
Riverside	IA	52722	5.90	12.2%	0	11.87	12.90%	0
Milton L Kapp	IA	52732	17.3	12.2%	1	10.70	12.90%	0
Fair Station	IA	52761	14.40	12.2%	1	19.63	12.90%	1
Louisa	IA	52761	14.40	12.2%	1	19.63	12.90%	1
Muscatine Plant #1	IA	52761	14.40	7.90%	1	19.63	12.90%	1
Waukegan	IL	60087	13.60	14.4%	0	63.00	37.7%	1
Joliet 29	IL	60436	20.50	14.4%	1	60.28	37.7%	1
Joliet 9	IL	60436	20.50	14.4%	1	60.28	37.7%	1
Will County	IL	60446	9.10	14.4%	0	50.66	37.7%	1
Fisk Street	IL	60608	29.10	14.4%	1	84.48	37.7%	1
Crawford	IL	60623	39.30	14.4%	1	98.09	37.7%	1
Hennepin Power Station	IL	61327	7.10	14.4%	0	9.11	37.7%	0
Duck Creek	IL	61520	17.70	14.4%	1	9.75	37.7%	0
Powerton	IL	61554	12.60	14.4%	0	5.50	37.7%	0
E D Edwards	IL	61607	10.30	14.4%	0	3.83	37.7%	0
Vermilion	IL	61858	10.00	14.4%	0	6.70	37.7%	0
Tuscola Station	IL	61953	9.90	14.4%	0	8.13	37.7%	0
Wood River	IL	62002	20.90	14.4%	1	26.82	37.7%	1
Coffeen	IL	62017	15.00	14.4%	1	5.47	37.7%	0
Baldwin Energy Complex	IL	62217	11.20	14.4%	0	4.33	37.7%	0
Pearl Station	IL	62361	24.60	14.4%	1	4.98	37.7%	0
Hutsonville	IL	62433	8.40	14.4%	1	5.24	37.7%	0
Newton	IL	62448	7.20	14.4%	0	2.92	37.7%	0
Kincaid Generation LLC	IL	62540	15.80	14.4%	1	9.06	37.7%	0
Havana	IL	62644	20.60	14.4%	1	2.88	37.7%	0
Meredosia	IL	62665	12.90	14.4%	0	1.60	37.7%	0
Dallman	IL	62703	30.10	14.4%	1	44.46	37.7%	1
Lakeside	IL	62703	30.10	14.4%	1	44.46	37.7%	1
Joppa Steam	IL	62953	45.80	14.4%	1	20.37	37.7%	0
Marion	IL	62959	14.70	14.4%	1	12.13	37.7%	0
Eagle Valley	IN	46151	15.30	15.2%	1	3.28	19.7%	0
Harding Street	IN	46217	9.60	15.2%	0	12.51	19.7%	0
CC Perry K	IN	46225	33.40	15.2%	1	30.19	19.7%	1
Bailly	IN	46304	9.90	15.2%	0	10.85	19.7%	0
State Line Energy	IN	46320	23.8	15.2%	1	58.50	19.7%	1
Michigan City	IN	46360	23.50	15.2%	1	29.83	19.7%	1
R M Schahfer	IN	46392	10.00	15.2%	0	4.85	19.7%	0
Dean H Mitchell	IN	46401	38.7	15.2%	1	91.10	19.7%	1
Logansport	IN	46947	19.10	15.2%	1	22.34	19.7%	1
Peru	IN	46970	18.00	15.2%	1	11.48	19.7%	0
Tanners Creek	IN	47025	8.80	15.2%	0	5.00	19.7%	0
R Gallagher	IN	47105	20.7	15.2%	1	15.80	19.7%	0
Clifty Creek	IN	47250	15.30	15.2%	1	7.93	19.7%	0

Whitewater Valley	IN	47375	27.9	15.2%	1	17.70	19.7%	0
Edwardsport	IN	47500	*	15.2%	0	*	19.7%	0
Jasper 2	IN	47547	7.8	15.2%	0	9.70	19.7%	0
AES Petersburg	IN	47567	12.40	15.2%	0	0.82	19.7%	0
Frank E Ratts	IN	47567	12.40	15.2%	0	0.82	19.7%	0
A B Brown	IN	47620	12.80	15.2%	0	4.28	19.7%	0
F B Culley	IN	47630	7.90	15.2%	0	8.60	19.7%	0
Warrick	IN	47630	7.90	15.2%	0	8.60	19.7%	0
Rockport	IN	47635	15.80	15.2%	1	2.01	19.7%	0
Gibson	IN	47665	9.10	15.2%	0	4.68	19.7%	0
Merom	IN	47882	22.10	15.2%	1	2.27	19.7%	0
Cayuga	IN	47928	*	15.2%	0	2.30	19.7%	0
Wabash River	IN	47900	20.2	15.2%	1	13.30	19.7%	0
Crawfordsville	IN	47933	16.30	15.2%	1	8.71	19.7%	0
La Cygne	KS	66040	17.20	13.6%	1	3.89	23.2%	0
Lawrence Energy Center	KS	66049	11.70	13.6%	0	17.75	23.2%	0
Nearman Creek	KS	66104	27.10	13.6%	1	75.41	23.2%	1
Quindaro	KS	66104	27.10	13.6%	1	75.41	23.2%	1
Jeffrey Energy Center	KS	66536	10.60	13.6%	0	15.56	23.2%	0
Tecumseh Energy Center	KS	66542	1.90	13.6%	0	6.21	23.2%	0
Riverton	KS	66770	*	13.6%	0	*	23.2%	0
Holcomb	KS	67851	12.20	13.6%	0	27.59	23.2%	1
Trimble County	KY	40006	23.40	19.1%	1	3.31	14.6%	0
Cane Run	KY	40216	17.00	19.1%	0	40.66	14.6%	1
Mill Creek	KY	40272	12.10	19.1%	0	11.09	14.6%	0
E W Brown	KY	40330	17.90	19.1%	1	8.29	14.6%	0
Tyrone	KY	40383	12.60	19.1%	0	14.64	14.6%	1
Dale	KY	40391	15.50	19.1%	0	9.47	14.6%	0
Ghent	KY	41045	20.70	19.1%	1	5.81	14.6%	0
H L Spurlock	KY	41056	18.70	19.1%	0	12.32	14.6%	0
East Bend	KY	41091	5.9	19.1%	0	10.30	14.6%	0
Big Sandy	KY	41230	24.90	19.1%	1	2.20	14.6%	0
Shawnee	KY	42086	15.60	19.1%	0	10.53	14.6%	0
Elmer Smith	KY	42303	16.30	19.1%	0	10.11	14.6%	0
D B Wilson	KY	42328	12.30	19.1%	0	3.87	14.6%	0
Green River	KY	42330	27.90	19.1%	1	11.48	14.6%	0
Paradise	KY	42337	20.30	19.1%	1	4.44	15%	0
Kenneth C Coleman	KY	42348	12.60	19.1%	0	2.74	14.6%	0
Henderson I	KY	42419	18.1	19.1%	0	11.80	14.6%	0
HMP&L Station Two Henderson	KY	42452	9.10	19.1%	0	9.52	14.6%	0
R D Green	KY	42452	9.10	19.1%	0	9.52	14.6%	0
Robert A Reid	KY	42452	9.10	19.1%	0	9.52	14.6%	0
Cooper	KY	42501	20.40	19.1%	1	6.67	14.6%	0
R S Nelson	LA	70669	14.50	19.80%	0	14.97	40.7%	0
Big Cajun 2	LA	70760	22.30	19.80%	1	70.64	40.7%	1
Dolet Hills	LA	71052	35.10	19.80%	1	67.17	40.7%	1
Rodemacher	LA	71447	9.10	19.80%	0	13.68	40.7%	0
Mount Tom	MA	01040	30.10	11.60%	1	53.90	25.7%	1
Salem Harbor	MA	01970	14.50	11.60%	1	25.61	25.7%	1
Brayton Point	MA	02726	7.80	11.60%	0	4.75	25.7%	0
Somerset Station	MA	02726	7.80	11.60%	0	4.75	25.7%	0
Chalk Point LLC	MD	20608	3.20	10.10%	0	50.94	47.4%	1

Morgantown Generating Plant	MD	20664	13.50	10.10%	1	25.52	47.4%	0
Dickerson	MD	20842	5.50	10.10%	0	23.09	47.4%	0
C P Crane	MD	21220	11.80	10.10%	1	28.51	47.4%	0
Brandon Shores	MD	21226	17.80	10.10%	1	23.93	47.4%	0
Herbert A Wagner	MD	21226	17.80	10.10%	1	23.93	47.4%	0
AES Warrior Run Cogeneration Facility	MD	21502	18.50	10.10%	1	15.64	47.4%	0
R Paul Smith Power Station	MD	21795	6.80	10.10%	0	6.23	47.4%	0
Rumford Cogeneration	ME	04276	24.2	14.10%	1	5.06	6.2%	0
Marysville	MI	48040	9.20	16.20%	0	3.21	24.2%	0
Belle River	MI	48054	8.10	16.20%	0	4.24	24.2%	0
St Clair	MI	48054	8.10	16.20%	0	4.24	24.2%	0
J R Whiting	MI	48133	8.60	16.20%	0	9.98	24.2%	0
Monroe	MI	48161	18.20	16.20%	1	12.90	24.2%	0
Trenton Channel	MI	48183	9.80	16.20%	0	14.60	24.2%	0
Wyandotte	MI	48192	11.40	16.20%	0	7.82	24.2%	0
River Rouge	MI	48218	39.40	16.20%	1	69.52	24.2%	1
Harbor Beach	MI	48441	19.90	16.20%	1	4.96	24.2%	0
Dan E Karn	MI	48732	16.30	16.20%	1	9.04	24.2%	0
J C Weadock	MI	48732	16.30	16.20%	0	9.04	24.2%	0
Eckert Station	MI	48910	26.80	16.20%	1	37.81	24.2%	1
Erickson Station	MI	48917	10.40	16.20%	0	30.47	24.2%	1
Endicott Station	MI	49252	17.40	16.20%	1	3.91	24.2%	0
J B Sims	MI	49417	10.00	16.20%	0	6.35	24.2%	0
James De Young	MI	49423	16.30	16.20%	1	29.32	24.2%	1
B C Cobb	MI	49445	13.20	16.20%	0	9.07	24.2%	0
J H Campbell	MI	49460	5.00	16.20%	0	16.51	24.2%	0
TES Filer City Station	MI	49634	34.40	16.20%	1	7.03	24.2%	0
Escanaba	MI	49829	24.90	16.20%	1	6.65	24.2%	0
Presque Isle	MI	49855	18.50	16.20%	1	9.76	24.2%	0
Shiras	MI	49855	18.50	16.20%	1	9.76	24.2%	0
White Pine Electric Power	MI	49971	12.40	16.20%	0	3.98	24.2%	0
Allen S King	MN	55003	5.50	11.50%	0	22.45	18.6%	1
Black Dog	MN	55101	18.80	11.50%	1	24.52	18.6%	1
Sherburne County	MN	55308	4.00	11.50%	0	2.67	18.6%	0
Riverside	MN	55401	13.10	11.50%	1	21.49	18.6%	1
Taconite Harbor Energy Center	MN	55613	9.60	11.50%	0	12.08	18.6%	0
Syl Laskin	MN	55705	14.30	11.50%	1	1.47	18.6%	0
Clay Boswell	MN	55721	5.20	11.50%	0	4.91	18.6%	0
Rapids Energy Center	MN	55744	14.10	11.50%	1	5.17	18.6%	0
Hibbing	MN	55746	19.90	11.50%	1	5.96	18.6%	0
Virginia	MN	55792	23.80	11.50%	1	10.41	18.6%	0
M L Hibbard	MN	55807	21.30	11.50%	1	8.15	18.6%	0
Silver Lake	MN	55903	9.7	11.50%	0	20.80	18.6%	1
Austin Northeast	MN	55912	16.90	11.50%	1	21.93	18.6%	1
New Ulm	MN	56073	7.80	11.50%	0	2.87	18.6%	0
Willmar	MN	56201	18.90	11.50%	1	25.65	18.6%	1
Hoot Lake	MN	56537	11.60	11.50%	1	5.04	18.6%	0
Rush Island	MO	63028	12.20	15.50%	0	5.19	19.9%	0
Labadie	MO	63055	3.80	15.50%	0	1.67	19.9%	0

Meramec	MO	63129	5.40	15.50%	0	7.56	19.9%	0
Sioux	MO	63386	16.10	15.50%	1	3.16	19.9%	0
Sikeston Power Station	MO	63801	19.00	15.50%	1	23.64	19.9%	1
New Madrid	MO	63869	24.00	15.50%	1	23.63	19.9%	1
Blue Valley	MO	64056	20.90	15.50%	1	27.05	19.9%	1
Missouri City	MO	64072	26.40	15.50%	1	24.05	19.9%	1
Sibley	MO	64088	6.50	15.50%	0	5.07	19.9%	0
Iatan	MO	64098	6.60	15.50%	0	3.80	19.9%	0
Hawthorn	MO	64120	8.80	15.50%	0	23.20	19.9%	1
Lake Road	MO	64504	18.50	15.50%	1	17.03	19.9%	0
Montrose	MO	64735	18.20	15.50%	1	5.33	19.9%	0
Asbury	MO	64832	7.70	15.50%	0	9.81	19.9%	0
Chamois	MO	65024	8.50	15.50%	1	0.57	19.9%	0
Columbia	MO	65205	24.9	15.50%	1	23.00	19.9%	1
Thomas Hill	MO	65244	23.30	15.50%	1	6.09	19.9%	0
Marshall	MO	65340	20.10	15.50%	1	22.35	19.9%	1
James River Power Station	MO	65804	15.70	15.50%	1	10.13	19.9%	0
Southwest Power Station	MO	65807	22.70	15.50%	1	15.48	19.9%	0
Henderson	MS	38930	39.30	16.80%	1	70.62	42.7%	1
R D Morrow	MS	39402	37.20	16.80%	1	59.50	42.7%	1
Jack Watson	MS	39501	37.30	16.80%	1	63.34	42.7%	1
Victor J Daniel Jr	MS	39562	20.6	16.80%	1	76.90	42.7%	1
Red Hills Generating Facility	MS	39735	22.40	16.80%	1	38.87	42.7%	0
Hardin Generator Project	MT	59034	18.50	15.40%	1	47.99	13.3%	1
J E Corette Plant	MT	59101	17.50	15.40%	1	19.07	13.3%	1
Lewis & Clark	MT	59270	11.30	15.40%	0	5.81	13.3%	0
Colstrip	MT	59323	8.20	15.40%	0	22.41	13.3%	1
Colstrip Energy LP	MT	59323	8.20	15.40%	0	22.41	13.3%	1
Thompson River Power LLC	MT	59873	27.70	15.40%	1	2.20	13.3%	0
Belews Creek	NC	27052	20.80	17.20%	1	15.68	35.90%	0
Dan River	NC	27288	23.20	17.20%	1	30.26	35.90%	0
Lee	NC	27530	26.20	17.20%	1	47.95	35.90%	1
Cape Fear	NC	27559	9.30	17.20%	0	17.56	35.90%	0
Mayo	NC	27573	37.90	17.20%	1	54.66	35.90%	1
Primary Energy Roxboro	NC	27573	37.90	17.20%	1	54.66	35.90%	1
Roxboro	NC	27573	37.90	17.20%	1	54.66	35.90%	1
Edgecombe Genco LLC	NC	27809	16.20	17.20%	0	50.88	35.90%	1
Roanoke Valley Energy Fac. I	NC	27890	42.90	17.20%	1	77.44	35.90%	1
Roanoke Valley Energy Fac. II	NC	27890	42.90	17.20%	1	77.44	35.90%	1
G G Allen	NC	28012	12.04	17.20%	0	15.73	35.90%	0
Cliffside	NC	28114	*	17.20%	0	*	35.90%	0
Riverbend	NC	28120	13.10	17.20%	0	21.86	35.90%	0
Buck	NC	28145	18	17.20%	1	26.30	35.90%	0
Elizabethtown Power LLC	NC	28337	35.10	17.20%	1	54.28	35.90%	1
Coastal Carolina Clean Power	NC	28349	15.50	17.20%	0	56.57	35.90%	1
W H Weatherspoon	NC	28358	30.50	17.20%	1	59.35	35.90%	1
Lumberton	NC	28359	32	17.20%	1	61.00	35.90%	1

L V Sutton	NC	28401	34.00	17.20%	1	55.58	35.90%	1
Primary Energy Southport	NC	28461	9.30	17.20%	0	8.75	35.90%	0
Marshall	NC	28673	3.50	17.20%	0	6.30	35.90%	0
Asheville	NC	28704	12.70	17.20%	0	19.66	35.90%	0
Antelope Valley	ND	58523	10.00	15.40%	0	1.90	13.3%	0
Coyote	ND	58523	10.00	15.40%	0	1.90	13.3%	0
Milton R Young	ND	58530	7.80	15.40%	0	9.62	13.3%	0
R M Heskett	ND	58554	8.70	15.40%	0	8.42	13.3%	0
Leland Olds	ND	58571	4.20	15.40%	0	4.07	13.3%	0
Stanton	ND	58571	4.20	15.40%	0	4.07	13.3%	0
Coal Creek	ND	58576	15.30	15.40%	0	5.51	13.3%	0
Lon Wright	NE	68025	12.50	12.40%	1	15.11	19.5%	0
North Omaha	NE	68112	17.10	12.40%	1	40.67	19.5%	1
Sheldon	NE	68368	5.70	12.40%	0	2.97	19.5%	0
Nebraska City	NE	68410	13.00	12.40%	1	14.23	19.5%	0
Platte	NE	68801	21.60	12.40%	1	42.33	19.5%	1
Whelan Energy Center	NE	68902	13.3	12.40%	1	13.70	19.5%	0
Gerald Gentleman	NE	69165	7.30	12.40%	0	11.43	19.5%	0
Merrimack	NH	03301	12.20	9.20%	1	10.00	8.7%	1
Schiller	NH	03801	7.50	9.20%	0	11.67	8.7%	1
PSEG Hudson Generating Station	NJ	07306	22.10	11.10%	1	76.54	43.2%	1
Logan Generating Company LP	NJ	08085	4.50	11.10%	0	24.34	43.2%	0
Howard Down	NJ	08360	16.6	11.10%	0	53.70	43.2%	1
PSEG Mercer Generating Station	NJ	08611	26.40	11.10%	1	82.45	43.2%	1
Chambers Cogeneration LP	NJ	08069	18.80	11.10%	1	48.73	43.2%	1
Deepwater	NJ	08070	10.90	11.10%	0	7.87	43.2%	0
B L England	NJ	08223	1.90	11.10%	0	7.67	43.2%	0
Escalante	NM	87045	51.90	21.30%	1	89.17	61.1%	1
Four Corners	NM	87416	29.20	21.30%	1	86.86	61.1%	1
San Juan	NM	87421	25.30	21.30%	1	70.01	61.1%	1
Raton	NM	87740	17.50	21.30%	0	58.28	61.1%	0
Reid Gardner	NV	89025	12.90	15.20%	0	38.06	48.5%	0
Mohave	NV	89029	24.00	15.20%	1	21.67	48.5%	0
North Valmy	NV	89438	*	15.20%	0	*	48.5%	0
Lovett	NY	10986	1.70	15.90%	0	9.16	43.50%	0
Danskammer Generating Station	NY	12550	21.30	15.90%	1	59.26	43.50%	1
Trigen Syracuse Energy	NY	13204	38.20	15.90%	1	48.88	43.50%	1
Black River Generation	NY	13602	16.20	15.90%	1	35.90	43.50%	0
AES Jennison LLC	NY	13733	12.00	15.90%	0	3.41	43.50%	0
AES Westover	NY	13790	18.90	15.90%	1	18.24	43.50%	0
AES Somerset LLC	NY	14012	11.40	15.90%	0	10.13	43.50%	0
Dunkirk Generating Plant	NY	14048	23.50	15.90%	1	31.22	43.50%	0
C R Huntley Generating Station	NY	14150	10.10	15.90%	0	8.68	43.50%	0
WPS Power Niagara	NY	14304	25.3	15.90%	1	30.90	43.50%	0
AES Greenidge LLC	NY	14441	37.40	15.90%	1	25.67	43.50%	0
Rochester 7	NY	14612	6.40	15.90%	0	13.01	43.50%	0
S A Carlson	NY	14702	28.9	15.90%	1	16.50	43.50%	0

AES Hickling LLC	NY	14830	13.80	15.90%	0	7.44	43.50%	0
AES Cayuga	NY	14882	3.30	15.90%	0	9.64	43.50%	0
Picway	OH	43137	6.70	15.80%	0	4.14	19.9%	0
Bay Shore	OH	43616	11.60	15.80%	0	12.31	19.9%	0
Conesville	OH	43811	20.20	15.80%	1	0.00	19.9%	0
Cardinal	OH	43913	16.00	15.80%	1	0.49	19.9%	0
R E Burger	OH	43947	13.00	15.80%	0	1.64	19.9%	0
W H Sammis	OH	43961	20.90	15.80%	1	0.00	19.9%	0
Ashtabula	OH	44004	25.30	15.80%	1	15.77	19.9%	0
Avon Lake	OH	44012	4.60	15.80%	0	6.55	19.9%	0
Painesville	OH	44077	13.40	15.80%	0	19.08	19.9%	0
Eastlake	OH	44095	8.40	15.80%	0	5.85	19.9%	0
Lake Shore	OH	44103	45.10	15.80%	1	88.86	19.9%	1
Lake Road	OH	44114	42.50	15.80%	1	59.92	19.9%	1
Niles	OH	44446	20.20	15.80%	1	7.96	19.9%	0
Dover	OH	44622	13.50	15.80%	0	6.44	19.9%	0
Orrville	OH	44667	17.50	15.80%	1	8.33	19.9%	0
Shelby Municipal Light Plant	OH	44875	11.70	15.80%	0	1.86	19.9%	0
Hamilton	OH	45011	16.10	15.80%	1	21.36	19.9%	1
Miami Fort	OH	45052	3.9	15.80%	0	2.20	19.9%	0
J M Stuart	OH	45101	36.20	15.80%	1	4.03	19.9%	0
Killen Station	OH	45144	25.30	15.80%	1	5.88	19.9%	0
W H Zimmer	OH	45153	11.2	15.80%	0	5.10	19.9%	0
Walter C Beckjord	OH	45157	*	15.80%	0	*	19.9%	0
O H Hutchings	OH	45342	13.60	15.80%	0	11.98	19.9%	0
General James M Gavin	OH	45620	27.40	15.80%	1	1.55	19.9%	0
Kyger Creek	OH	45620	27.40	15.80%	1	1.55	19.9%	0
Muskingum River	OH	45715	11.60	15.80%	0	1.33	19.9%	0
Richard Gorsuch	OH	45750	19.10	15.80%	1	5.63	19.9%	0
Sooner	OK	73061	8.10	16.60%	0	12.93	33.0%	0
Northeastern	OK	74053	5.70	16.60%	0	24.58	33.0%	0
GRDA	OK	74337	24.60	16.60%	1	25.84	33.0%	0
Muskogee	OK	74401	30.30	16.60%	1	53.25	33.0%	1
Hugo	OK	74735	25.60	16.60%	1	25.73	33.0%	0
AES Shady Point LLC	OK	74951	29.40	16.60%	1	24.05	33.0%	0
Boardman	OR	97818	22.20	16.60%	1	64.26	23.0%	1
Elrama Power Plant	PA	15038	60.30	13.60%	1	6.08	22%	0
AES Beaver Valley Partners Beaver Valley	PA	15061	9.50	13.60%	0	7.31	22.1%	0
Mitchell Power Station	PA	15067	15.10	13.60%	1	7.89	22.1%	0
Bruce Mansfield	PA	15077	23.1	13.60%	1	0.00	22.1%	0
Cheswick Power Plant	PA	15204	19.20	13.60%	1	47.07	22.1%	1
Hatfields Ferry Power Station	PA	15461	30.70	13.60%	1	14.04	22.1%	0
Homer City Station	PA	15748	11.60	13.60%	0	1.00	22.1%	0
Keystone	PA	15774	5.80	13.60%	0	8.76	22.1%	0
Colver Power Project	PA	15927	11.50	13.60%	1	0.00	22.1%	0
Cambria Cogen	PA	15931	8.30	13.60%	0	3.93	22.1%	0
Ebensburg Power	PA	15931	8.30	13.60%	0	3.93	22.1%	0
Conemaugh	PA	15944	15.40	13.60%	1	3.33	22.1%	0
Seward	PA	15944	15.40	13.60%	1	3.33	22.1%	0

New Castle Plant	PA	16160	19.80	13.60%	1	1.33	22.1%	0
Armstrong Power Station	PA	16210	5.70	13.60%	1	1.67	22.1%	0
Piney Creek Project	PA	16214	37.80	13.60%	1	6.88	22.1%	0
Scrubgrass Generating Company LP	PA	16374	9.20	13.60%	1	2.85	22.1%	0
Shawville	PA	16873	16.6	13.60%	1	19.80	22.1%	0
PPL Brunner Island	PA	17370	6.60	13.60%	0	4.40	22.1%	0
Foster Wheeler Mt Carmel Cogen	PA	17832	13.7	13.60%	1	0.61	22.1%	0
Sunbury Generation LP	PA	17876	24.8	13.60%	1	11.40	22.1%	0
PPL Montour	PA	17884	21.50	13.60%	1	3.18	22.1%	0
John B Rich Memorial Power Station	PA	17931	12.10	13.60%	0	27.38	22.1%	1
Wheelabrator Frackville Energy	PA	17931	12.10	13.60%	0	27.38	22.1%	1
St Nicholas Cogen Project	PA	28	15.60	13.60%	1	17.42	22.1%	0
WPS Westwood Generation LLC	PA	17981	19.50	13.60%	1	1.77	22.1%	0
Northampton Generating Company LP	PA	18067	5.60	13.60%	0	8.08	22.1%	0
Kline Township Cogen Facility	PA	18237	11.80	13.60%	0	8.18	22.1%	0
Panther Creek Energy Facility	PA	18240	19.40	13.60%	1	8.66	22.1%	0
Portland	PA	18351	21.00	13.60%	1	20.45	22.1%	0
Hunlock Power Station	PA	18621	9.50	13.60%	0	19.13	22.1%	0
Eddystone Generating Station	PA	19022	18.60	13.60%	1	31.05	22.1%	1
Cromby Generating Station	PA	19460	6.30	13.60%	0	17.32	22.1%	0
Titus	PA	19506	8.40	13.60%	0	5.88	22.1%	0
Cope	SC	29038	19.10	18.00%	1	31.47	36%	0
Wateree	SC	29044	14.10	18.00%	1	59.52	36.1%	1
McMeekin	SC	29212	10.10	18.00%	0	28.90	36.1%	0
Cogen South	SC	29423	19	18.00%	1	31.40	36.1%	0
Canadys Steam	SC	29488	30.7	18.00%	1	55.90	36.1%	1
Cross	SC	29436	21.50	18.00%	1	55.35	36.1%	1
Winyah	SC	29440	25.60	18.00%	1	51.65	36.1%	1
Williams	SC	29445	13.40	18.00%	0	37.69	36.1%	1
Jefferies	SC	29461	15.20	18.00%	1	36.68	36.1%	1
Dolphus M Grainger	SC	29526	23.10	18.00%	1	24.37	36.1%	0
H B Robinson	SC	29550	22.10	18.00%	1	33.07	36.1%	0
W S Lee	SC	29697	11.40	18.00%	0	11.90	36.1%	0
US DOE Savannah River Site (D Area)	SC	29808	17	18.00%	0	34.50	36.1%	0
Urquhart	SC	29842	31.60	18.00%	1	38.63	36.1%	1
Big Stone	SD	57216	13.90	14.20%	0	1.32	17.0%	0
Ben French	SD	57702	7.60	14.20%	0	14.00	17.0%	0
Cumberland	TN	37050	25.50	18.30%	1	14.82	25.4%	0
Gallatin	TN	37066	13.10	18.30%	0	20.18	25.4%	0
Johnsonville	TN	37134	8.00	18.30%	0	2.67	25.4%	0
Watts Bar Fossil	TN	37381	17.80	18.30%	0	4.83	25.4%	0
Bull Run	TN	37716	14.40	18.30%	0	4.04	25.4%	0
Kingston	TN	37763	11.20	18.30%	0	7.20	25.4%	0

John Sevier	TN	37857	22.30	18.30%	1	4.40	25.4%	0
Allen Steam Plant	TN	38109	31.50	18.30%	1	98.86	25.4%	1
Monticello	TX	75455	21.90	17.20%	1	54.17	56.5%	0
Pirkey	TX	75650	4.40	17.20%	0	8.35	56.5%	0
Welsh	TX	75686	21.30	17.20%	1	43.86	56.5%	0
Martin Lake	TX	75691	6.80	17.20%	0	41.44	56.5%	0
Big Brown	TX	75840	14.50	17.20%	0	35.36	56.5%	0
Limestone	TX	75846	24.20	17.20%	1	29.93	56.5%	0
Oklaunion	TX	76373	21.90	17.20%	1	40.60	56.5%	0
Sandow No 4	TX	76567	23.70	17.20%	1	36.54	56.5%	0
Twin Oaks Power One	TX	76629	15.10	17.20%	0	17.81	56.5%	0
W A Parish	TX	77469	20.40	17.20%	1	74.70	56.5%	1
Gibbons Creek	TX	77830	14.80	17.20%	0	29.77	56.5%	0
Coleto Creek	TX	77960	17.10	17.20%	0	19.10	56.5%	0
San Miguel	TX	78012	16.80	17.20%	0	80.00	56.5%	1
J K Spruce	TX	78263	1.20	17.20%	0	39.85	56.5%	0
J T Deely	TX	78263	1.20	17.20%	0	39.85	56.5%	0
Fayette Power Project	TX	78945	14.60	17.20%	0	30.17	56.5%	0
Harrington	TX	79108	13.80	17.20%	0	33.31	56.5%	0
Tolk	TX	79371	25.70	17.20%	1	48.24	56.5%	0
Norit Americas Marshall Plant	TX	75670	23	17.20%	1	57.40	56.5%	1
Bonanza	UT	84078	10.50	11.70%	0	11.82	20.7%	0
Hunter	UT	84513	12.10	11.70%	1	9.31	20.7%	0
Carbon	UT	84526	13.10	11.70%	1	8.44	20.7%	0
Huntington	UT	84528	7.90	11.70%	0	5.36	20.7%	0
Sunnyside Cogen Associates	UT	84539	16.90	11.70%	1	24.83	20.7%	1
Intermountain Power Project	UT	84624	14.80	11.70%	1	15.03	20.7%	0
Potomac River	VA	22314	7.70	11.80%	0	27.52	36.9%	0
Birchwood Power	VA	22485	5.80	11.80%	0	25.32	36.9%	0
Bremo Bluff	VA	23022	18.60	11.80%	1	49.64	36.9%	1
Spruance Genco LLC	VA	23234	17.10	11.80%	1	74.83	36.9%	1
Chesapeake	VA	23323	9.80	11.80%	0	45.66	36.9%	1
Yorktown	VA	23690	17.10	11.80%	1	62.62	36.9%	1
Cogentrix Virginia Leasing Corporation	VA	23703	9.70	11.80%	0	56.40	36.9%	1
Chesterfield	VA	23831	7.00	11.80%	0	34.63	36.9%	0
Southampton Power Station	VA	23851	20.60	11.80%	1	52.50	36.9%	1
Hopewell Power Station	VA	23860	15.00	11.80%	1	49.78	36.9%	1
James River Cogeneration	VA	23860	15.00	11.80%	1	49.78	36.9%	1
Mecklenburg Power Station	VA	23927	12.90	11.80%	0	30.33	36.9%	1
Glen Lyn	VA	24093	17.10	11.80%	1	0.00	36.9%	0
Clinch River	VA	24225	14.00	11.80%	1	0.00	36.9%	0
Altavista Power Station	VA	24517	22.80	11.80%	1	26.20	36.9%	0
Clover	VA	24534	26.90	11.80%	1	54.02	36.9%	1
Transalta Centralia Generation	WA	98531	22.70	13.20%	1	24.35	29.6%	0
South Oak Creek	WI	53154	7.40	13.20%	0	17.11	17.8%	0
Pleasant Prairie	WI	53158	5.40	13.20%	0	14.52	17.8%	0
Milwaukee County	WI	53226	6.50	13.20%	0	12.24	17.8%	0



## **Appendix B: Illinois Advisory Committee**

The Illinois Advisory Committee Memorandum to the U.S. Commission on Civil Rights on May 6, 2016, regarding Civil Rights and Environmental Justice in Illinois is reproduced herein as Appendix B.

*This advisory memorandum is the work of the Illinois Advisory Committee to the U.S. Commission on Civil Rights. The memorandum, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this memorandum and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government.*

## **B1. Illinois Advisory Committee May, 2016 Memorandum**

On March 09, 2016, the Illinois Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) convened a public meeting to hear testimony regarding concerns of environmental justice in the State. Key to the Committee's inquiry was an examination of factors contributing to disproportionately poor air quality and other environmental hazards on the basis of race, color, or national origin; particularly in the Chicago neighborhoods of Little Village, South Lawndale, Pilsen, and the City's Southeast side, as well as the City of Waukegan, Illinois.

The following advisory memorandum results from the testimony provided during the March 09, 2016 meeting of the Illinois Advisory Committee, as well as related testimony submitted to the Committee in writing during the relevant period of public comment. It begins with a brief background of the issue to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing related civil rights concerns. This memo is intended to focus specifically on concerns of disparate impact regarding hazardous environmental contamination on the basis of race, color, or other federally protected category. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion. This memo and the recommendations included within it were adopted by a majority of the Committee on May 06, 2016.

### **Background**

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.<sup>1</sup> U.S. Environment Protection Agency (EPA) regulations implementing Title VI further bar disproportionate impact, not only intentional discrimination, in the administration of environmental programs, including siting and enforcement for recipients of federal financial assistance.<sup>2</sup> Additionally, on February 11, 1994, President Clinton's Executive Order (E.O.) 12,898, required each federal agency, "to the greatest extent practicable and permitted by law ... make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations ..."<sup>3</sup>

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<sup>1</sup> 42 U.S.C. § 2000(d).

<sup>2</sup> 40 C.F.R. §§ 7.30 and 7.35, *available at*: <https://www.law.cornell.edu/cfr/text/40/7.30> and <https://www.law.cornell.edu/cfr/text/40/7.35> (last accessed May 23, 2016).

<sup>3</sup> Despite this direct mandate to address concerns of environmental justice, the Order explicitly denies private enforcement or judicial review of the Order. Therefore, it is not binding on any executive department or independent

The Committee notes that the U.S. Commission on Civil Rights (Commission) is presently conducting a study on the EPA's compliance with Title VI and E.O. 12,898 as part of its 2016 statutory enforcement report to be submitted to Congress and the President. Specifically, the Commission's topic is "Environmental Justice: Toxic Materials, Poor Economies, and the Impact on the Environment of Low-Income, Minority Communities." To fulfill this study, the Commission has requested its advisory committees consider undertaking studies on environmental justice generally, and coal ash disposal facilities where applicable. As such, and in keeping with their duty to inform the Commission of: (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress,<sup>4</sup> the Illinois Advisory Committee submits the following findings and recommendations to the Commission regarding environmental justice in Illinois. These findings and recommendations are intended to highlight the most salient civil rights themes as they emerged from the Committee's inquiry. In recognition of the Commission's continued study on this topic, in lieu of providing a detailed discussion of each finding presented, the Committee offers a general outline of themes, along with appropriate additional resources, as topics of reference for the Commission's 2016 statutory enforcement report. The complete meeting transcript is included in Appendix A for further reference.

### **Overview of Testimony**

The Committee approached this project from a neutral posture, and at the direction of a designated subcommittee, sought input from involved stakeholders representing all relevant perspectives. During the March 09, 2016 Committee meeting in Chicago, the Committee heard from academic experts and legal professionals in the fields of environmental law and health; community advocates; local, state, and federal government officials; and individual community members impacted by environmental contamination near their homes.<sup>5</sup> The Committee also heard testimony from experts in renewable energy alternatives which may provide some solutions to the environmental contamination concerns presented. In addition, the Committee received a number of written statements offering supplemental information on the topic.<sup>6</sup>

The Committee notes that where appropriate, all invited parties who were unable to attend personally were offered the opportunity to send a delegate; or, at a minimum, to submit a written statement offering their perspective on the civil rights concerns in question. KCBX Terminal, a subsidiary of Koch Minerals, submitted a series of letters sent to the community surrounding

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regulatory agency. Exec. Order No. 12, 898, 59 Fed. Reg. 7629 (Feb. 16, 1994), *available at* <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf> (last accessed April 25, 2016), *See also*: 32 C.F.R. § 651.17.

<sup>4</sup> 45 C.F.R. § 703.2.

<sup>5</sup> The complete agenda and minutes from this meeting can be found in Appendix B.

<sup>6</sup> Written testimony submitted can be found in Appendix C.

their 10730 Burley site in Chicago between 2013 and 2015, describing the company’s efforts to control contamination.<sup>7</sup> The final letter dated May 06, 2016 describes the company’s eventual decision to cease operations and remove existing coal and petroleum coke storage at the location—citing new city environmental regulations as the cause of the closure. Notably, despite several outreach attempts, no other officials or representatives from the industries involved with the contamination in question choose to participate in any of the aforementioned formats.<sup>8</sup> Regrettably, such limited participation prevented the Committee from obtaining the intended range of perspectives. It is within this context that the Committee presents the findings and recommendations that follow.

### **Findings**

The following findings result directly from the testimony received, and reflect the views of the cited panelists. While each assertion has not been independently verified by the Committee, panelists were chosen to testify due to their professional experience, academic credentials, subject expertise, and firsthand experience with the topics at hand. A brief biography of each panelist and his or her credentials can be found in Appendix D.

1. Industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations.<sup>9</sup>
  - a. Improperly controlled toxins from industrial activity contribute to a number of chronic health issues including asthma, cancer, lung disease, and heart disease.<sup>10</sup>

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<sup>7</sup> Estadt written testimony. Appendix C. pages 38-43.

<sup>8</sup> The Committee also reached out to the IL Environmental Regulatory Group, an industry member organization; NRG, the owner of Waukegan’s currently operating coal-fired power plant, as well as the former power plant sites in Chicago; Midwest Generation, the former owner of the Chicago coal fired power sites; Agri-Fine Corporation; and British Petroleum. The Committee also solicited the support the office of IL Senator Dick Durbin’s office in reaching out to a number of facilities he had previously contacted about their policies regarding the handling of petroleum coke. (See: <http://www.durbin.senate.gov/imo/media/doc/Letters%20to%20Companies.pdf>, last accessed April 25, 2016). The Senator’s office reported that they were “not able to engage in meaningful dialogue with most of the companies.”

<sup>9</sup> Waterhouse Testimony. Transcript, Civil Rights and Environmental Justice in Illinois. Meeting of the IL Advisory Committee to the U.S. Commission on Civil Rights. March 09, 2016. p. 15 lines 01-04 & p. 17 line 11-p.18 line 05 (See Appendix A, hereinafter *Transcript*).

Hood-Washington Testimony, *Transcript*, p. 38 lines 18-22 & p. 77 lines 10 -23; Urbaszewski Testimony, *Transcript*, p. 47 lines 19-23 & p. 48 lines 01-10; Ortiz Testimony. *Transcript*, p. 154 lines 02 – 13 & p. 156 line 11 through p. 157 line 06; Figueroa Testimony. *Transcript*, p. 199 lines 07-17; Davis Testimony. *Transcript*, p. 126 line 03 through p. 127 line 18.

<sup>10</sup> Hood-Washington Testimony. *Transcript*, p. 36 lines 16-21 & p. 37 lines 14 -24; Urbaszewski Testimony. *Transcript*, p. 46 lines 15-19 & p. 73 line 15 through p. 75 line 16; Wasserman Testimony, p. 119 lines 14-20; Nannicelli Testimony. *Transcript*, p. 189 lines 16-22; Figueroa Testimony. *Transcript*, p. 198 line 12 through p. 200 line 11.

- These increased risks can extend to a radius of several (possibly hundreds of) miles surrounding a polluting site.<sup>11</sup>
- b. Certain ancestral traits among African Americans and Latinos, which could be affected by environmental exposures, may contribute to an even greater risk of chronic asthma and other health conditions.<sup>12</sup>
  - c. The intersection between race and poverty compounds the health impact of environmental pollution in communities of color. When chronic disease does occur, low-income communities demonstrate worse health outcomes than affluent communities.<sup>13</sup>
  - d. Both historical and current housing segregation amplifies the burden of toxic industrial waste on communities of color.<sup>14</sup> Insufficient public education often leaves residents unaware of the presence of dangerous toxins that are not immediately observable,<sup>15</sup> while cultural, familial, and economic ties keep residents in the community despite these hazards.<sup>16</sup>
  - e. Contamination from industrial waste disrupts cultural, recreational, economic, and subsistence activity such as farming, hunting, and fishing.<sup>17</sup>
2. Environmental protection laws already exist requiring that clean air, water, and land be available to everyone regardless of wealth or social group.<sup>18</sup> However, without proper enforcement, these laws fail the communities who depend on them.<sup>19</sup> Civil rights

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<sup>11</sup> Hood-Washington Testimony. *Transcript*, p. 36 line 22 through p. 37 line 04; Urbaszewski Testimony. *Transcript*, p. 53 line 18-p. 55 line 02; Klipp Testimony. *Transcript* p. 170 lines 10-20.

<sup>12</sup> Urbaszewski Testimony. *Transcript*, p. 48 line 11 through p. 53 line 03.

<sup>13</sup> Urbaszewski Testimony. *Transcript*, p. 55 lines 03 – 18 & p.69 line 21 through p.71 line 22; Davis Testimony. *Transcript*, p. 103 lines 08-10.

<sup>14</sup> Hood-Washington Testimony. *Transcript*, p. 34 line 14 through p. 35 line 03 & p. 78 line 01 through p. 79 line 13; Waterhouse Testimony. *Transcript*, p. 15 line 05 through p. 16 line 09; Davis Testimony. *Transcript* p. 109 line 16 through p. 110 line 13 & p. 128 line 04 through p. 132 line 02; Davis Testimony. *Transcript*, p. 118 line 04 through p. 119 line 02.

<sup>15</sup> Hood-Washington Testimony. *Transcript*, p. 38 lines 01-08; Wasserman Testimony. *Transcript*, p.86 line 16 through p. 87 line 13; Nannicelli Testimony. *Transcript*, p. 191 lines 10-12; Villalobos Testimony. *Transcript*, p. 272 line 08 through p. 273 line 20.

<sup>16</sup> Wasserman Testimony, *Transcript*, p. 93 line 15 through p. 94 line 14; Nannicelli Testimony. *Transcript*, p. 186 lines 07 -24.

<sup>17</sup> Waterhouse Testimony. *Transcript*, p. 17 line 11-p.18 line 05; Ortiz Testimony. *Transcript*, p. 154 lines 14 – 23 & p. 157 lines 07-12; Nannicelli Testimony. *Transcript*, p. 181 lines 16-20 & p. 190 line 16 through p. 191 line 09.

<sup>18</sup> Harley Testimony. *Transcript*, p. 63 line 20 through p. 64 line 03.

<sup>19</sup> Harley Testimony. *Transcript*, p. 65 lines 18-23; Ortiz Testimony. *Transcript* p. 159 lines 07-16 & p. 161 lines 10-22 & p. 209 line 02 through p. 212 line 13; Nannicelli Testimony. *Transcript*, p. 182 lines 10-22.

enforcement is necessary because despite existing laws, environmental standards are not being upheld for everyone.<sup>20</sup> Cooperation between federal, state, city, and local officials is necessary to address current environmental justice challenges.<sup>21</sup>

- a. While community involvement is critical,<sup>22</sup> individual and community-based advocacy is likely insufficient to adequately address the health impact of industrial contamination, particularly in low-income communities of color. Citizen groups and individual citizens often lack the time, awareness, and technical expertise necessary to effectively advocate for environmental reforms.<sup>23</sup> Chicago residents organized for more than a decade before the closure of the local coal-fired power facilities in their neighborhood.<sup>24</sup>
- b. Community Advisory Groups (CAGs) established by the EPA to make local recommendations regarding the cleanup of contaminated “superfund” industrial sites often include industry representatives and may be disproportionately influenced by industry funding.<sup>25</sup>
- c. The Illinois Environmental Protection Agency (IEPA) has allowed some industrial facilities in the state to operate without permits for years. Without a permit, community members and advocates have limited legal recourse to oppose operations.<sup>26</sup> Operating without a permit may also circumvent protections within the IEPA, which require additional review of permits issued in “environmental justice” communities.<sup>27</sup>
- d. The EPA’s environmental justice goals specifically state that the agency is striving to ensure “equal access to the decision making process” and “meaningful involvement of all people ... with respect to the development, implementation, and enforcement of

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<sup>20</sup> Harley Testimony, *Transcript*, p. 64 line 24 through p. 65 line 05 & p. 66 lines 03-16.

<sup>21</sup> Sylvester Testimony. *Transcript*, p. 244 line 21 through p. 245 line 03.

<sup>22</sup> Wheat Testimony. *Transcript*, p. 263 line 21 through p. 264 line 06 & p. 341 line 08 through p. 342 line 07.

<sup>23</sup> Ortiz Testimony. *Transcript*, p. 162 line 05 through p. 163 line 17 & p. 217 line 23 through p. 218 line 03; Nannicelli Testimony. *Transcript*, p. 188 lines 02-07 & p. 194 lines 04 through 12; Villalobos Testimony. *Transcript* p. 274 lines 11-23.

<sup>24</sup> Wheat Testimony. *Transcript*, p. 268 lines 12-16.

<sup>25</sup> Klipp Testimony. *Transcript* p. 167 line 14 through p. 170 line 01 & p. 213 line 02 through p. 214 line 01 & p. 170 line 21 through p. 171 line 11; Villalobos Testimony. *Transcript* p.275 lines 02-17.

<sup>26</sup> Klipp Testimony, *Transcript*, p. 173 line 11 though p. 174 line 03 & p. 176 lines 02-17; *See also* Ortiz Testimony. *Transcript*, p. 159 lines 07-16; Nannicelli Testimony. *Transcript* p. 195 line 12 through p. 196 line 21; Villalobos Testimony. *Transcript*, p.280 line 24 through p. 281 line 07.

<sup>27</sup> Page Testimony. *Transcript*, p. 301 line 16 though p. 302 line 10.

- environmental laws, regulations and policies.”<sup>28</sup> However, financial contributions from industry such as power companies to public officials may impede enforcement efforts. This is particularly true for low income communities of color who may not have the economic resources to compete for sufficient influence over their elected officials.<sup>29</sup>
- e. A lack of coordination between regulators charged with ensuring land, air, and water purity may impede enforcement efforts, and may create a failure of regulators to consider the cumulative impact of multiple sources of contamination on a single community.<sup>30</sup>
  - f. Some environmental enforcement cases filed by the State of Illinois Attorney General’s office that affect communities with environmental justice challenges have remained pending without complete resolution for years, based on vigorous defense and appellate court review process.<sup>31</sup> Environmental litigation can be complex, especially in the area of land pollution if the contamination occurred prior to the passage of the Illinois “Environmental Protection Act”<sup>32</sup> While some facilities have closed or switched to cleaner energy forms during the time litigation is pending,<sup>33</sup> any settlement negotiations should include court enforceable requirements.<sup>34</sup>
3. Under Title VI, the EPA, Office of Civil Rights, has the authority to withdraw funding from any programs or contracting agencies that have the *effect* of discrimination, regardless of discriminatory intent.<sup>35</sup> The highly discretionary nature of environmental protection makes it critical that the EPA enforce environmental civil rights protections.<sup>36</sup>

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<sup>28</sup> U.S. EPA, Environmental Justice, *available at* <https://www.epa.gov/environmentaljustice> (last accessed April 25, 2016).

<sup>29</sup> Wasserman Testimony, *Transcript*, p. 91 line 23 through p. 92 line 22 & p. 93 lines 03-05 & p. 94 line 15 through p. 95 line 24; Klipp Testimony, *Transcript* p. 174 line 15 through p. 175 line 05 & p. 214 lines 11-24; Figueroa Testimony, *Transcript*, p. 200 line 22 through p. 202 line 01; Villalobos Testimony, *Transcript*, p. 278 lines 02 -23.

<sup>30</sup> Nannicelli Testimony, *Transcript* p. 191 line 16 through p. 192 line 14; Klipp Testimony, *Transcript*, p. 174 lines 04-14.

<sup>31</sup> Sylvester Testimony, *Transcript*, p. 238 line 07 through p. 239 line 03 & p. 243 line 11 through p. 244 line 20.

<sup>32</sup> Sylvester Testimony, *Transcript*, p. 251 lines 02-08; 415 Ill. Comp. Stat. 5.

<sup>33</sup> Sylvester Testimony, *Transcript*, p. p. 239 lines 04-17.

<sup>34</sup> Sylvester Testimony, *Transcript*, p. 252 line 05 through p. 253 line 01; Davis Testimony, *Transcript*, p. 149 lines 04 through 16.

<sup>35</sup> Waterhouse Testimony, *Transcript*, p.22 line 16 through p. 23 line 20; *see also* p.18 line 06-p.19 line 03; Nannicelli Testimony, *Transcript*, p. 187 lines 01-01; Walts Testimony, *Transcript*, p. 312 line 02 through p. 313 line 12.

<sup>36</sup> Harley Testimony, *Transcript*, p. 66 lines 06-16.

- a. Despite this authority, the agency does not have sufficient resources to effectively investigate all Title VI complaints, or to conduct routine reviews of funds recipients.<sup>37</sup> A number of challenges, such as a lack of political support, and a lack of sufficient alternatives for program implementation, have prevented the EPA from utilizing its full authority to enforce nondiscrimination under Title VI.<sup>38</sup>
- b. In its enforcement of Title VI, the EPA has narrowly defined disparate impact as relating to environmental risk from pollution. It has not included odors, noise, smoke, traffic, or other hazards that may disrupt children's development and contribute to health conditions such as asthma.<sup>39</sup>
- c. Enforcement under Title VI is limited to changing future practices. If, for example, the Illinois Environmental Protection Agency (IEPA) has issued operating permits to industrial facilities disproportionately impacting communities of color, the EPA cannot revoke those permits under Title VI. It may however, work with the IEPA to change future permitting practices.<sup>40</sup>
- d. Despite testimony from both EPA and IEPA officials that the State of Illinois environmental justice program is one of the strongest in the country,<sup>41</sup> certain panelists voiced concerns about the EPA Office of Civil Rights in its efforts to enforce Title VI. They cited long delays in case processing, and attempts to mediate cases rather than investigate and enforce standards.<sup>42</sup> In part in response to these criticisms, the State of Illinois reported several recent efforts to strengthen community engagement and provide increased transparency in its environmental justice programs.<sup>43</sup>

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<sup>37</sup> Waterhouse Testimony. *Transcript*, p.24 line 03 through p.25 line 02; Walts Testimony. *Transcript*, p. 329 lines 04-10.

<sup>38</sup> Waterhouse Testimony. *Transcript*, p 19 line 04 through p. 20 line 03 & p. 25 line 10 through p. 26 line 19; Wasserman Testimony. *Transcript* p. 143 line 02 through p. 144 line 03; Walts Testimony. *Transcript*, p. 312 line 17 through p. 313 line 23.

<sup>39</sup> Waterhouse Testimony. *Transcript*, p. 20 line 04 through p.21 line 10 & p. 27 line 12 through p. 28 line 08.

<sup>40</sup> Harley Testimony, *Transcript*, p 80 line 03 through p. 81 line 14.

<sup>41</sup> Walts Testimony, *Transcript*, p. 315 lines 13-19; Page Testimony. *Transcript*, p. 297 line 17 through p. 298 line 12.

<sup>42</sup> Harley Testimony. *Transcript*, p. 65 line 11 through p. 66 line 02; Wasserman Testimony. *Transcript*, p.98 line 16 through p. 99 line 02 & p.140 line 02 through p. 143 line 01; See <http://www.epa.illinois.gov/topics/environmental-justice/grievances/index> for current Illinois resolutions and settlements. (last accessed May 05, 2015).

<sup>43</sup> Page Testimony, *Transcript*, p. 299 line 14 through p. 301 line 11 & p. 302 line 11 through p. 306 line 12 & p. 307 line 23 through p. 309 line 02.

4. Small particulate matter in the air, regardless of the makeup of the particulate, poses a significant threat to human health.<sup>44</sup>
  - a. Children under the age of 18 and adults over the age of 64 are most at risk for respiratory illness such as asthma and Chronic Obstructive Pulmonary Disease (COPD).<sup>45</sup>
  - b. Diesel emissions are a significant source of such pollution, especially for those living near highways, rail yards, and construction sites.<sup>46</sup>
  - c. Higher concentrations of fine particulate matter exist in Chicago and East St. Louis; both areas may fail to meet one or more federal air quality standards.<sup>47</sup>
  - d. Coal fired power plants are among the single largest sources of air pollution in America today.<sup>48</sup> Many older plants continue to operate without the pollution controls required of new facilities; though even with required pollution controls, coal-fired energy produces more air pollution than alternative energy sources.<sup>49</sup>
5. Insufficient data exists to accurately assess air quality in high risk areas; the limited data that is currently available is not disaggregated by race, color, national origin, or other federally protected category.<sup>50</sup>
  - a. Current air quality monitoring data is aggregated by region, which is insufficient to measure the exposure faced by individuals living near areas with higher than average emissions.<sup>51</sup> Air pollution reduction goals must be disaggregated at the local level.<sup>52</sup>
  - b. While Illinois is currently meeting minimum standards for air quality monitoring under the federal Clean Air Act,<sup>53</sup> there are fewer monitors in Chicago than there are in other major urban areas throughout the country, and there is currently only one

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<sup>44</sup> Urbaszewski Testimony. *Transcript*, p. 73 line 15 through p. 75 line 16.

<sup>45</sup> Mudd Testimony. *Transcript*, p. 41 lines 08-20 & p. 67 lines 11-16.

<sup>46</sup> Mudd Testimony. *Transcript*, p. 42 lines 03-10; Urbaszewski Testimony. *Transcript*, p. 73 line 15 through p. 75 line 16.

<sup>47</sup> Urbaszewski Testimony. *Transcript*, p. 47 lines 13-18.

<sup>48</sup> Urbaszewski Testimony. *Transcript*, p.53 lines 04-06; Nannicelli Testimony. *Transcript*, p. 187 lines 18-22 & p. 188 line 21 through p. 189 line 01.

<sup>49</sup> Urbaszewski Testimony. *Transcript*, p. 53 lines 07-17.

<sup>50</sup> Mudd Testimony. *Transcript*, p. 42 lines 03-21.

<sup>51</sup> Mudd Testimony. *Transcript*, p. 41 line 21 through p. 42 line 02 & p. 42 lines 11-13; Urbaszewski Testimony. *Transcript*, p. 73 line 15 through p. 75 line 16.

<sup>52</sup> Sylvester Testimony. *Transcript*, p. 239 line 20 through p. 240 line 04.

<sup>53</sup> 42 U.S.C. § 7401, et seq.

- monitor in all of Lake County, IL.<sup>54</sup> The placement of available air quality monitors may disproportionately neglect low income communities of color at the highest risk for contamination.<sup>55</sup>
- c. Due to mishandling of air quality data between 2011 and 2013, insufficient continuous data exists for the EPA to make a determination about Waukegan's air quality in relation to the federal Clean Air Act.<sup>56</sup> Without a classification, the EPA cannot compel the state to implement pollution control measures or advise the public of air quality problems. This data will be unavailable until 2018.<sup>57</sup>
  - d. High concentrations of fine particulate matter exist within one thousand feet of roadways. However, air quality measurements collected by the EPA are designed to monitor general background levels of particulate matter. Therefore, these measurements do not capture the exposure faced by people living, working, and going to school very near major roadways.<sup>58</sup> Some studies in Washington and New York have attempted to measure this impact, though the data has not been sustained over time due to a lack of funding.<sup>59</sup>
  - e. The EPA is currently looking at new technologies to collect additional air quality data.<sup>60</sup> Some low-cost monitoring technology may be available in the future, though its development is currently in the early stages of evaluation.<sup>61</sup>
6. Communities impacted by industrial contamination may not benefit economically from the offending industry, especially when considering the health and environmental costs.<sup>62</sup> This is particularly important because the purported economic benefits of industrial development are often used to justify disparate environmental and health impacts on low-income communities of color.

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<sup>54</sup> Mudd Testimony. *Transcript*, p. 72 lines 10-17; Nannicelli Testimony. *Transcript*, p. 190 lines 07-15.

<sup>55</sup> Klipp Testimony. *Transcript*, p. 171 line 20 through p. 172 line 14; Villalobos Testimony. *Transcript*, p. 281 lines 08-12. See Appendix E for mapping of current air quality monitors and their placement in the Chicagoland area by vulnerable population. Submitted by Panelist Susan Mudd.

<sup>56</sup> 42 U.S.C. § 7401, et seq.

<sup>57</sup> Klipp Testimony. *Transcript*, p. 172 line 15 through p. 173 line 10; Mudd Testimony. *Transcript*, p. 72 line 18 through p. 73 line 12.

<sup>58</sup> Urbaszewski Testimony. *Transcript*, p. 74 line 22 through p. 75 line 16.

<sup>59</sup> Urbaszewski Testimony. *Transcript*, p. 75 line 17 through p. 76 line 01.

<sup>60</sup> Mudd Testimony. *Transcript*, p. 42 line 22 through p. 43 line 05.

<sup>61</sup> Urbaszewski Testimony. *Transcript*, p.76 lines 02 through 07.

<sup>62</sup> Waterhouse Testimony. *Transcript*, p.28 line 17 through p.30 line 22; Wasserman Testimony. *Transcript*, p. 88 lines 13-18 & p. 117 lines 12-16; Ortiz Testimony. *Transcript*, p. 156 lines 09-10 & p. 216 line 08 through p. 218 line 03 & p. 164 lines 15-20; Klipp Testimony. *Transcript* p. 170 lines 05-09.

- a. Residents in Chicago and Waukegan living near coal-fired power facilities testified that a majority of jobs, especially career-oriented, high wage positions are held by individuals who commute rather than those living in the community near the facility.<sup>63</sup> Furthermore, advocates have estimated that economic losses from emergency room visits, parent days off work to tend to children with asthma, and lost revenues for local businesses far outweigh any local tax benefits to the community.<sup>64</sup>
- b. Electricity generated by the coal-fired power facilities in Chicago and Waukegan is primarily sold out of state, rather than serving the impacted community.<sup>65</sup>
- c. Industrial facilities in Illinois are often not required to decontaminate their sites after operations cease.<sup>66</sup> This leaves community members and local tax payers with the economic burden of cleanup costs, deterring future investment and delaying economic development opportunity.<sup>67</sup> This burden may be particularly devastating for economically disadvantaged communities in need of renewal.<sup>68</sup> It was reported that the City of Waukegan has spent over \$8 million over the past five fiscal years for land remediation from industrial contamination.<sup>69</sup>
- d. Some studies suggest remediation of a contaminated site takes an average of 9 years before the land is again safe for human use, though testimony from Waukegan suggested remediation efforts have taken 20-30 years, and is still in progress.<sup>70</sup>

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<sup>63</sup> Wasserman Testimony. *Transcript*, p. 88 lines 19-22 & p. 89 lines 18 – 19 & p. 90 lines 05-12; Nannicelli Testimony. *Transcript*, p. 187 lines 03-09; Davis Testimony. *Transcript*, p. 134 line 16 through p.138 line 18.

<sup>64</sup> Wasserman Testimony. *Transcript*, p.91 lines 06 – 22; Nannicelli Testimony. *Transcript*, p. 189 line 23 through p. 190 line 06.

<sup>65</sup> Wasserman Testimony. *Transcript*, p. 89 line 19 through p. 90 line 04; Nannicelli Testimony. *Transcript*, p. 187 lines 12-17.

<sup>66</sup> Nannicelli Testimony. *Transcript*, p. 193 lines 08-11; Sylvester Testimony. *Transcript*, p. 254 line 02 through p. 255 line 12; Wheat Testimony. *Transcript*, p. 322 lines 07 – 23; Villalobos Testimony, *Transcript*, p. 336 lines 01-15; *Note: though a majority of panelists cited cases in which remediation had not been required, Ken Page of the IEPA stated that in some cases remediation may be required. See: Page Testimony. Transcript*, p. 334 line 03 through p. 335 line 13.

<sup>67</sup> Wasserman Testimony. *Transcript*, p. 120 line 20 through p. 122 line 19; Ortiz Testimony. *Transcript*, p. 153 line 10 through p. 154 line 01 & p. 158 line 01 through p. 159 line 06; Villalobos Testimony. *Transcript*, p. 277 line 18 through p. 278 line 01 & p. 279 line 20 through p. 280 line 02 & p. 282 line 21 through p. 283 line 12.

<sup>68</sup> Ortiz Testimony. *Transcript*, p. 159 lines 02-06 & p. 218 lines 04-22; Nannicelli Testimony. *Transcript*, p. 183 lines 15-18 & p. 185 lines 14 -24; Villalobos Testimony. *Transcript*, p. 283 lines 13 through p. 285 line 21.

<sup>69</sup> Villalobos written testimony. Appendix C, p. 44.

<sup>70</sup> Wheat Testimony. *Transcript*, p. 324 lines 02-13; Villalobos Testimony. *Transcript*, p. 336 line 16 through p. 337 line 05.

- e. Declining home values due to environmental contamination disproportionately impacts communities of color. African American families tend to build their wealth based on property ownership at a higher rate than white families.<sup>71</sup>
7. “Clean energy” alternatives such as solar can be economically viable and help to meet consumer demand.<sup>72</sup> Solar energy may help low income individuals control their own energy costs and provide economic stimulus to struggling communities.<sup>73</sup> Additionally, solar energy production may be a viable use for “brownfields” that are unsafe for other uses due to previous industry contamination.<sup>74</sup>
- a. Solar energy can help provide communities with local jobs, by re-training homebuilders, electricians, and other skilled trades’ workers to bring affordable solar energy to residents.<sup>75</sup>
  - b. Grant and rebate programs available to homeowners who wish to participate in solar energy initiatives can result in large scale local economic investment, and help homeowners control the long term costs of their power—though they are not always available in underserved communities.<sup>76</sup>

### **Recommendations**

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>77</sup> In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Illinois Advisory Committee submits the following recommendations to the Commission. The Committee recommends that the U.S. Commission on Civil Rights consider these findings and recommendations in their 2016 Statutory Enforcement Report to Congress and the President.

The Committee notes that at the time of this memorandum’s approval, some public comment may be pending. The Committee reserves the right to issue additional and/or amended

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<sup>71</sup> Davis Testimony. *Transcript*, p. 105 line 20 through p. 106 line 15.

<sup>72</sup> Albrecht Testimony. *Transcript*, p. 221 line 22 through p. 223 line 15 & p. 225 line 23 through p. 226 line 13.

<sup>73</sup> Albrecht Testimony. *Transcript*, p. 226 line 14 through p. 228 line 02 & p. 228 line 09 through p. 229 line 02 & p. 231 line 23 through p. 232 line 23.

<sup>74</sup> Albrecht Testimony. *Transcript*, p. 225 lines 06-22 & p. 231 line 23 through p. 232 line 23.

<sup>75</sup> Albrecht Testimony. *Transcript*, p. 226 line 23 through p. 228 line 03.

<sup>76</sup> Albrecht Testimony. *Transcript*, p. 228 line 04 through p. 229 line 02.

<sup>77</sup> 45 C.F.R. § 703.2.

recommendations based on such comment, at the conclusion of the 30-day open comment period following the date of approval, May 06, 2016.

1. As part of their 2016 statutory enforcement report on environmental justice, the U.S. Commission on Civil Rights should:
  - a. In addition to considering environmental justice as related to coal ash disposal, consider other sources of land and water contamination such as petroleum coke, polychlorinated biphenyls, lead contamination, and other heavy metals; as well as air quality concerns such as high exposure to diesel emissions and other sources of fine particulate matter. In particular, the Commission should consider the *cumulative* effect of these contaminants on environmental justice communities, and the extent to which a failure on the part of regulators to study such a cumulative effect may result in inadequate environmental justice protection.
  - b. Conduct a complete legal review of related federal law, including but not limited to the Toxic Substance Control Act;<sup>78</sup> the Safe Drinking Water Act;<sup>79</sup> the Clean Water Act;<sup>80</sup> the Clean Air Act;<sup>81</sup> the Federal Insecticide, Fungicide, Rodenticide Act;<sup>82</sup> and the Resource Conservation Recovery Act.<sup>83</sup> Such a review should include an analysis of civil rights protections provided under each law, in order to identify any gaps in civil rights protections. The review should also identify any gaps in protections from particular pollutants that are not currently controlled, and make recommendations to Congress for addressing related areas of civil rights concern.
  - c. Make a direct inquiry to the EPA regarding the designation of industrially contaminated sites as “superfund” sites. The Commission should inquire as to how sites receive a “superfund” designation, and whether or not consideration for disparate impact on federally protected categories is given.
  - d. Issue a recommendation that the U.S. Congress conduct a study of environmental justice enforcement requirements under Title VI of the Civil Rights Act.<sup>84</sup> Based on this study, the Congress should allocate the financial resources necessary for the EPA, Office of Civil Rights to conduct routine, proactive reviews of their funds recipients in addition to responding to Title VI complaints.

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<sup>78</sup> 15 U.S.C. § 2601 et seq.

<sup>79</sup> 42 U.S.C. § 300f et seq.

<sup>80</sup> 33 U.S.C. § 1251 et seq.

<sup>81</sup> 42 U.S.C. § 7401 et seq.

<sup>82</sup> 7 U.S.C. § 136 et seq.

<sup>83</sup> 42 U.S.C. § 6901 et seq.

<sup>84</sup> 42 U.S.C. § 2000(d).

2. The U.S. Commission on Civil Rights should issue the following formal recommendations to the EPA:
  - a. The agency should prohibit direct industry contributions to their Community Advisory Groups, established to make local recommendations on the cleanup of contaminated “superfund” sites. In lieu of direct financial contributions to community development and cleanup efforts, the EPA should establish a general fund to be distributed equitably to all superfund communities in the region.
  - b. The agency should limit the number of industry representatives and their affiliates permitted to participate in Community Advisory Groups, such that industry participation does not exceed that of the community. Community Advisory Group members designated as “community” representatives should be prohibited from employment or other financial conflicts of interests with the relevant industry (self or spouse).
  - c. The agency should prohibit its state partners, and any recipients of EPA funds, from allowing industrial facilities in their jurisdiction to operate without the appropriate permits. As a condition of permitting, industrial facilities should be required to set aside funding reserved for environmental remediation upon retirement, regardless of the reason for closure. Such requirements should be made uniform at the national level, to prevent disparate economic incentives in interstate commerce. The agency should conduct a study to determine appropriate remediation fund reserve guidelines.
  - d. The agency should increase coordination between its bureaus of land, air, and water, and require all regulators under its environmental justice purview to consider the cumulative impact of multiple sources of contamination on a single community when issuing operating permits.
  - e. The agency’s Office of Civil Rights should conduct a study of the placement of air quality monitoring equipment by its Air Data division. The office should ensure that available air quality monitors capture readings near areas with higher than average emissions, and that communities with high environmental justice demographic indicators<sup>85</sup> are adequately represented. Furthermore, air quality data should be disaggregated at the neighborhood level, so that concerns of disparate impact may be appropriately assessed.

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<sup>85</sup> U.S. EPA, EJSCREEN: Environmental Justice Screening and Mapping Tool: Overview of Demographic Indicators, *available at* <https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen> (last accessed May 06, 2015).

## **B2. Illinois Advisory Committee March 9 Briefing Transcript**

The full transcript of the Illinois Advisory Committee to the U.S. Commission on Civil Rights Hearing held on March 9, 2016 is available at [http://www.usccr.gov/pubs/SAC\\_AdvisoryMemo.pdf](http://www.usccr.gov/pubs/SAC_AdvisoryMemo.pdf).

## **B3. Illinois Advisory Committee March 9 Public Briefing Written Testimony**

The full written testimony for the Illinois Advisory Committee to the U.S. Commission on Civil Rights Public Hearing on Environmental Justice Concerns in the State of Illinois, held on March 9, 2016 is available at [http://www.usccr.gov/pubs/SAC\\_AdvisoryMemo.pdf](http://www.usccr.gov/pubs/SAC_AdvisoryMemo.pdf).

## **B4. Illinois Advisory Committee March 9 Briefing Panelists Biographies**

The Panelists' Biographies of the Illinois Advisory Committee to the U.S. Commission on Civil Rights Hearing held on March 9, 2016 is available at [http://www.usccr.gov/pubs/SAC\\_AdvisoryMemo.pdf](http://www.usccr.gov/pubs/SAC_AdvisoryMemo.pdf).

## **B5. Illinois Advisory Committee March 9 Briefing Agenda and Minutes**

The Illinois Advisory Committee to the United States Commission on Civil Rights hosted a public meeting (hearing) regarding Environmental Justice concerns in the State. Specifically, the Committee examined factors contributing to disproportionately poor air quality on the basis of race, color, or national origin. The public meeting was held on Wednesday March 9, 2016 at the National Museum of Mexican Art, 1852 W. 19<sup>th</sup> Street, Chicago, Ill 60608. The address of the U.S. Commission on Civil Rights, Midwestern Regional Office, is 55 West Monroe, Suite 410, Chicago IL 60603. The Agenda and Meeting (hearing) minutes are reproduced below.

### Agenda

#### Opening Remarks and Introductions (10:30-10:40am)

Juan Carlos Linares, Chairman, Illinois Advisory Committee to the U.S. Commission on Civil Rights

Marty Castro, Chairman, U.S. Commission on Civil Rights

#### Academic or Data Focused Panel (10:45am -12:00pm)

Carlton Waterhouse, Professor of Law and Dean's Fellow, Indiana University Robert H.

McKinney School of Law (Via Conference Call)

Sylvia Hood Washington, Environmental Health Research Associates, LLC

Susan Mudd, Environmental Law & Policy Center

Brian Urbaszewski, Director, Environmental Health Programs, Respiratory Health Association

Keith Harley, Attorney at Law, Environmental Law Program, Chicago Legal Clinic

#### Community Panel (12:10pm-1:25pm)

Peggy Salazar, Southeast Environmental Task Force

Christine Nannicelli and Faith Bugel, Sierra Club

Dr. Antonio Lopez, Executive Director, and Kim Wasserman, Little Village Environmental Justice Organizations

Naomi Davis and Jean Paul Thomas, Blacks in Green

#### Lunch (1:25pm-2:25pm)

#### Community Panel (2:25-3:35pm)

Dulce Ortiz, Clean Power Lake County

Barbara Klipp, Co-Founder of Incinerator Free Lake County

Celeste Flores, Most Blessed Trinity Catholic Parish

Susana Figueroa, Faith in Place, Lake County Office

#### Industry Panel (3:45pm-4:30pm)

Barry Matchett, NRG (not confirmed)

Lisa Albrecht, renewable Energy Specialist, Solar Service, Inc.

Omar Duque, President and CEO, Illinois Hispanic Chamber of Commerce

#### Government Panel (4:45pm-6:15pm)

Stephen Sylvester, Assistant Attorney General of Environmental Bureau, Office of Illinois Attorney General Lisa Madigan

Christopher Wheat, Chief Sustainability Officer, City of Chicago

Alan Walts and Michele Jencius, U.S. Environmental Protection Agency

Ken Page, Environmental Justice Officer, Illinois Environmental Protection Agency

David Villalobos, Waukegan 4<sup>th</sup> Ward Alderman

Open Forum (6:20-6:50pm)

**ILLINOIS ADVISORY  
COMMITTEE TO THE U.S.  
COMMISSION ON CIVIL  
RIGHTS MEETING MINUTES**

March 09, 2016

The Illinois Advisory Committee to the U.S. Commission on Civil Rights (Committee) convened at the National Museum of Mexican Art, 1852 W. 19th Street, Chicago IL to hear testimony regarding civil rights related to environmental justice in the State. Juan Carlos Linares chaired the meeting and performed the initial roll call of committee members present. The meeting was open to the public and took place from 10:30 AM to 6:45 PM CST.

**Attendance**

State Advisory Committee Members:

*Present*

1. Juan Carlos Linares  
(Chair)
2. Cindy Buys
3. Salina Greene
4. Reyahd Kazmi
5. Evelyn Rodriguez
6. Sweta Shah
7. William Howard
8. Richard Garcia
9. Bryant Jackson-Green
10. Anne Wortham
11. Kendric Cobb

*Absent*

1. James Botana
2. Tabassum Haleem
3. Johnathan Bean
4. Joanna Bohdziewicz-Borowiec
5. Trevor Copeland
6. Malik Nevels

Commission Staff Present

1. Carolyn Allen
2. Martin Castro
3. Darren Fernandez
4. Chloe Gremaud (USCCR Intern)
5. Mauro Morales
6. David Mussatt
7. Christina Rosales (USCCR Intern)
8. Melissa Wojnaroski (DFO)

Members of the Public Present

1. Emily Rosenwasser, The Sierra Club
2. Saul Carreno, Carreno Consultant
3. Alex Carreno, Chicago-Kent College of Law
4. Adam Gasper
5. Valeria Velasquez, Chicago-Kent College of Law
6. Jacqueline Nwia, U.S. EPA, Region V
7. Kelly Nichols, Moms Clean Air Force
8. America Ferrera
9. Brad Schneider, Schneider for Congress
10. Robert Bourret, Schneider for Congress
11. Henson, Schneider for Congress
12. Booker Vance, Faith in Place
13. Brad Frost, Illinois EPA
14. James Gignac, Office of the Attorney General, State of Illinois

**Meeting Notes/Decisions Made:**

The Committee heard testimony regarding civil rights and environmental justice in Illinois, according to the following agenda:

## Opening Remarks and Introductions (10:30-10:40am)

- Juan Carlos Linares, Chairman, Illinois Advisory Committee to the U.S. Commission on Civil Rights
- Marty Castro, Chairman, U.S. Commission on Civil Rights

## Academic or Data Focused Panel (10:45am -12:00pm)

- Carlton Waterhouse, Professor of Law and Dean's Fellow, Indiana University Robert H. McKinney School of Law (Via Conference Call)
- Sylvia Hood Washington, Environmental Health Research Associates, LLC
- Susan Mudd, Environmental Law & Policy Center
- Brian Urbaszewski, Director, Environmental Health Programs, Respiratory Health Association
- Keith Harley, Attorney at Law, Environmental Law Program, Chicago Legal Clinic

## Community Panel (12:10pm-1:25pm)

- Kim Wasserman, Little Village Environmental Justice Organizations
- Naomi Davis, Blacks in Green
- *Peggy Salazar, Southeast Environmental Task Force (no show)*

## Break (1:25pm-2:25pm)

## Community Panel (2:25-3:35pm)

- Christine Nannicelli, Sierra Club/Dulce Ortiz, Clean Power Lake County
- Barbara Klipp, Co-Founder of Incinerator Free Lake County
- Susana Figueroa, Faith in Place, Lake County Office

## Industry Panel (3:45pm-4:30pm)

- Lisa Albrecht, renewable Energy Specialist, Solar Service, Inc.
- Stephen Sylvester, Assistant Attorney General of Environmental Bureau, Office of Illinois Attorney General Lisa Madigan
- *Omar Duque, President and CEO, Illinois Hispanic Chamber of Commerce (no show)*
- *Barry Matchett, NRG (no show)*

## Government Panel (4:45pm-6:15pm)

- Christopher Wheat, Chief Sustainability Officer, City of Chicago
- Alan Walts and Michele Jencius, U.S. Environmental Protection Agency
- Ken Page, Environmental Justice Officer, Illinois Environmental Protection Agency
- David Villalobos, Waukegan 4<sup>th</sup> Ward Alderman

## Open Forum (6:20-6:50pm)

Closing Remarks (6:50pm-7:00pm)

No decisions were made and no votes taken. The proceedings were recorded by a court reporter; a transcription will be available for inclusion in the public record within 30 days.

**Next meeting**

TBD

**Meeting Adjourned**

6:45 PM CST

## **B5. Illinois Environmental Regulatory Group June 2016 Public Comments on Illinois Advisory Committee Final Memo**

The Illinois Environmental Regulatory Group (IERG) submitted Public Comments regarding the Illinois Advisory Committee Final Memorandum to the U.S. Civil Rights Commission on June 3, 2016, is reproduced on the following page. The Illinois Environmental Regulatory Group, 215 East Adams Street, Springfield, Il, 62701 is an Affiliate of the Illinois Chamber of Commerce. The memo below was addressed to: David Mussat, Chief, Regional Programs Unit, U.S. Commission on Civil Rights, 55 West Monroe Street, Suite 410, Chicago, Illinois, 60615.

*This advisory memorandum is the work of the Illinois Advisory Committee to the U.S. Commission on Civil Rights. The memorandum, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this memorandum and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government.*

***Re: Comments of the Illinois Environmental Regulatory Group Regarding the Illinois Advisory Committee's Advisory Memorandum to the U.S. Commission on Civil Rights***

Dear Mr. Mussat:

The Illinois Environmental Regulatory Group (“IERG”) appreciates this opportunity to submit this public comment to the Illinois State Advisory Committee (“Illinois Committee”) regarding its Advisory Memorandum (“Final Memorandum”) to the U.S. Commission on Civil Rights (“U.S. Commission”), which was drafted in support of the U.S. Commission’s 2016 Statutory Enforcement Report. IERG respectfully requests that this comment be included in the record for the Illinois Committee’s Final Memorandum, and is providing the same to the U.S. Commission for its consideration in conjunction with the Final Memorandum. IERG is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce and is comprised of fifty (50) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. IERG represents the interests of its member companies in the crafting and implementation of environmental policies and programs and is accordingly interested in the outcome of the Illinois Committee’s efforts in this regard.

**I. Background**

At the November 20, 2015, meeting of the Illinois Committee, the U.S. Commission staff informed the Illinois Committee of the topic of study for its 2016 Statutory Enforcement Report. Ill. Advisory Comm. to the U.S. Comm’n on Civil Rights, Meeting Minutes, 1 (Nov. 20, 2015) (“November Meeting Minutes”). As stated in the Illinois SAC Information Request, “[s]pecifically, the Commission will be studying the civil rights implications inherently associated with placing coal ash disposal facilities near low-income and minority communities.” U.S. Office of Civil Rights Evaluation, Illinois SAC Information Request, 1 (Nov. 20, 2015). The Illinois Committee was asked to support this endeavor by soliciting testimony on this topic. November Meeting Minutes at 1.

An Environmental Justice Subcommittee of the Illinois Committee was formed, and the subcommittee held meetings on December 18, 2015, December 23, 2015, and January 12, 2016 to discuss the information to be gathered in order to support the Commission’s report. At the December 23, 2015 meeting, the subcommittee determined it was unable to conduct a study of the environmental impact of coal ash disposal facilities and decided to limit the scope of the Illinois Committee’s memorandum to the “potential disparities as related to the civil rights impacts of coal ash disposal in Illinois.” Ill. Advisory Comm. to the U.S. Comm’n on Civil Rights, Env’tl. Justice Subcomm., Meeting Minutes, 1 (Dec. 23, 2015). The subcommittee also determined it would conduct a case study comparing two Chicago coal-fired power plants that were closed in 2012 with a coal-fired plant in Waukegan that remains open. *Id.*

The U.S. Commission issued a news release on January 11, 2016, announcing a briefing

regarding its 2016 Statutory Report on environmental justice. The release characterized the report as encompassing “[U.S.] EPA’s work under Title VI of the Civil Rights Act of 1964 and Executive Order 12,898, with a focus on the civil rights implications of the placement of coal ash disposal facilities near minority and low income communities.” Press Release, U.S. Comm’n on Civil Rights, U.S. Comm’n on Civil Rights Announces Briefing Related to its 2016 Enforcement Report (Jan. 11, 2016).

The subcommittee presented its draft project proposal at the Illinois Committee’s January 22, 2016 meeting. The project proposal framed the Commission’s objective as “studying potential environmental and health disparities related to the disposal of coal ash in the U.S. on the basis of race or color.” Ill. Advisory Comm. to the U.S. Comm’n on Civil Rights, Project Proposal, 1-2 (Jan. 2016). However, the proposal stated the scope of the project “is limited to an examination of factors contributing to disproportionately poor air quality in Chicago on the basis of race, color, or national origin, particularly in the neighborhoods of Little Village, South Lawndale, Pilsen, and the Southeast side [of Chicago].” *Id.* at 2.

The Illinois Committee held a public hearing on March 9, 2016. The individuals who testified were divided into panels categorized by the focus of the testimony. The included panels were: academic or data focused; community; industry; and government. The academic or data focused panel included: Carlton Waterhouse, Professor of Law, Indiana University Robert H. McKinney School of Law; Sylvia Hood Washington, Environmental Health Research Associates, LLC; Susan Mudd, Environmental Law & Policy Center; Brian Urbaszewski, Director, Environmental Health Programs, Respiratory Health Association; Keith Harley, Attorney, Environmental Law Program, Chicago Legal Clinic. Ill. Advisory Comm. to the U.S. Comm’n on Civil Rights, Final Advisory Memorandum, app. B at 4 (May 6, 2016) (“Final Memorandum”). Two separate community panels testified, and these speakers included: Kim Wasserman, Little Village Environmental Justice Organizations; Naomi Davis, Blacks in Green; Christine Nannicelli, Sierra Club; Dulce Ortiz, Clean Power Lake County; Barbara Klipp, Incinerator Free Lake County; and Susana Figueroa, Faith in Place, Lake County Office. *Id.* at 4-5. The industry panel participants included: Lisa Albrecht, Solar Service, Inc. and Stephen Sylvester, Assistant Attorney General of Environmental Bureau, Office of Illinois Attorney General. IERG understands that Sylvester was moved from the government panel to the industry panel in order to fill open slots, and though he spoke on the industry panel, he was not originally intended to represent the viewpoint of industry. *Id.* at 5. The government panel consisted of: Christopher Wheat, Chief Sustainability Officer, City of Chicago; Alan Walts, U.S. EPA; Michele Jencius, U.S. EPA; Ken Page, Environmental Justice Officer, Illinois EPA; and David Villalobos, Waukegan 4th Ward Alderman. *Id.* In addition to the panels at the public meeting, written testimony was submitted by Lisa Albrecht, Solar Service, Inc.; Sylvia Hood Washington, Environmental Health Research Associates, LLC; and Mike Estadt, KCBX Terminals Company. Final Memorandum, app. C.

The Illinois Committee held a meeting on April 1, 2016. At this meeting, the Committee

discussed which themes and findings from the March 9, 2016 hearing should be included in its advisory memorandum to the Commission. Ill. Advisory Comm. to the U.S. Comm'n on Civil Rights, Meeting Minutes, 1 (Apr. 1, 2016). These included: the effectiveness of Title VI to ensure nondiscrimination; the Illinois EPA budget and ability to enforce existing regulations; the failure of energy companies to clean up sites after they are no longer in use; varying levels of threat from environmental contaminants; small particulate matter; wealth disparities; and clean energy alternatives. *Id.* Coal ash ponds in Waukegan were included as subtheme to varying levels of threat from environmental contaminants. *Id.*

The Illinois Committee issued a draft memorandum on April 26, 2016, and the Final Memorandum was approved on May 6, 2016. Notice of the Illinois Committee's meeting to discuss this approval was published in the *Federal Register* on May 4, 2016, and the public was invited to submit written comments regarding the Final Memorandum within 30 days of the meeting date. 81 FR 26774.

## **II. The Final Memorandum is Incongruous with the Scope of U.S. Commission's Statutory Report.**

As detailed above, the U.S. Commission's 2016 Statutory Enforcement Report is focused upon the civil rights implications of placing coal ash disposal facilities near low-income and minority communities, and the working title of the Commission's report is *Environmental Justice: Toxic Materials, Poor Economies, and the Impact on the Environment of Low-Income, Minority Communities*. Press Release, U.S. Comm'n on Civil Rights, U.S. Comm'n on Civil Rights Announces Briefing Related to its 2016 Enforcement Report (Jan. 11, 2016). The Illinois Committee's Final Memorandum falls short of supporting the U.S. Commission's study of this issue because the findings obtained by the Committee, which "result[ed] directly from testimony received," do not actually address coal ash disposal. Final Memorandum at 3.

To open the March 9, 2016, public hearing, Illinois Committee Chairman Juan Carlos Linares framed the Committee's purpose as "hear[ing] testimony regarding the environmental justice issues here in Illinois in support of the Commission's statutory enforcement report on that topic." Final Memorandum, app. A at 4. Martin Castro, Chairman of the U.S. Commission, noted the "particular focus on the national level is coal ash". *Id.* at 8. He reiterated that sentiment following the completion of the hearing, saying "I think you had a broad range of witnesses discussing a broad range of issues including coal ash but other areas, lead, issues related to pet coke. . . . Now, much of what we did in Washington relates to the coal ash issue and does not deal with the specific states." *Id.* at 345.

None of the findings in the Illinois Committee's Final Memorandum contain the words "coal ash" or "coal ash disposal." The first finding, "Industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations," is the only finding that tangentially touches on

the U.S. Commission’s topic of study. Final Memorandum at 3. The footnote to this finding cites six panelists and multiple pages of testimony. *Id.* at n. 9. Of these six panelists, only one, Hood Washington, spoke specifically to the issue of coal ash disposal. She stated that there are 24 coal ash disposal sites in Illinois. Final Memorandum, app. A at 38. None of these sites are in Chicago, and the closest location to Chicago is Joliet, where there are four sites. *Id.* However, Hood Washington offered no analysis of the disparate impacts of these sites may or may not have on minority or low-income communities.

This testimony about the specific locations of coal ash disposal sites was an anomaly during the public hearing because the Illinois Committee had decided that the scope of its inquiry would be “an examination of factors contributing to disproportionately poor air quality in Chicago on the basis of race, color, or national origin, particularly in the neighborhoods of Little Village, South Lawndale, Pilsen, and the Southeast side [of Chicago].” Ill. Advisory Comm. to the U.S. Comm’n on Civil Rights, Project Proposal, 2 (Jan. 2016); Final Memorandum at 1. The Illinois Committee’s project proposal further stated that “the subcommittee focused on these communities because they were populated by majority Latino communities that have organized around environmental justice for years.” Project Proposal at 2.

Thus, the Illinois Committee’s focus for the project was misaligned from the start, not only due to the subcommittee’s choice to focus on specific Chicago neighborhoods, but also because of the decision to tailor the public hearing discussion to factors contributing to poor air quality. The power plants that were previously located in these neighborhoods closed in 2012. *See* Final Memorandum, app. A at 263. Furthermore, the environmental issue most associated with coal ash disposal is groundwater contamination. *See* ILL. ENVIR. PROTECTION AGENCY, IN THE MATTER OF: COAL COMBUSTION WASTE SURFACE IMPOUNDMENTS AT POWER GENERATING FACILITIES: PROPOSED NEW 34 ILL. ADM. CODE 841, *Statement of Reasons*, 3 (Oct. 28, 2013) (“The presence of these contaminants threatens groundwater as these contaminants are soluble and mobile.”).

By framing the project and the testimony elicited at the public hearing in these terms, the Illinois Committee missed its opportunity to meaningfully contribute to the national discussion regarding coal ash disposal. The Illinois Committee, in its Final Memorandum, could have concluded, had it looked, that coal ash facilities in Illinois do not impose a disparate impact on low-income or minority communities; such information could have proved valuable to the U.S. Commission in its assessment of the issue. Instead, the Committee has developed a Final Memorandum that is off topic and primarily focused on a small portion of the state. To the extent that the U.S. Commission deems to include any of the findings or recommendations of the Illinois Committee’s Final Memorandum in its report to Congress and the President, IERG suggests that it make clear that the Illinois Committee did not provide any information regarding civil rights issues related to coal ash disposal. Further, as described below, IERG has serious concerns about the findings and recommendations included in the Final Memorandum and would discourage the U.S. Commission from their inclusion in its report.

### III. The Findings Contained Within the Final Memorandum are Unsupported by the Record and Devoid of Context.

Beyond the Final Memorandum being far outside the scope of the U.S. Commission's topic of study, the report also contains many findings that are either devoid of analysis and unsupported by the testimony provided at the public hearing, or without context to ground them into reality. A great deal of the Final Memorandum consists of conclusory statements reiterated from the conclusions espoused by the panelists. By the Illinois Committee's own admission, the assertions put forth by the panelists were not "independently verified by the Committee." Final Memorandum at 3. The Committee also noted that the lack of involvement by industry representatives "prevented [it] from obtaining the intended range of perspectives. It is within this context that the Committee presents the findings and recommendations that follow." *Id.* Although IERG cannot speak for all industry representatives that may have declined to participate in the Illinois Committee's efforts, it strongly suspects that the lack of willingness to participate stems from the Committee's apparent bias at the outset of the efforts, as illustrated by its decision to disregard the U.S. Commission's charge to the Committee.

Two glaring examples of a lack of support for the findings are the first finding, "Industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations", and the fifth finding, "Insufficient data exists to accurately assess air quality in high risk areas; the limited data that is currently available is not disaggregated by race, color, national origin, or other federally protected category." *Id.* at 3, 8. These findings are presented as conclusions, and neither the sub-findings nor the testimony elicited provide any further explanation or context for the conclusion.

Finding one has several citations to multiple panelists; however, only one panelist, Ortiz, actually provided statistical data to support the conclusion that minority populations are disproportionately more likely to live in closer proximity to areas of pollution exposure. Ortiz mentioned the statistical breakdown of the Waukegan population and pointed to a proximity analysis performed by U.S. EPA regarding the Waukegan coal plant. *See* Final Memorandum, app A. at 154, 156-57. The other panelists cited in footnote nine merely stated the Committee's ultimate conclusion:

- Waterhouse stated "race is the greatest prediction of exposure" and "[n]ative populations are disproportionately burdened by pollution". *Id.* at 15.
- Urbaszewski asserted that "[c]ompared to the state of Illinois as a whole, African- Americans and Latinos are disproportionately concentrated in these urban areas that fail to meet air quality standards." *Id.* at 47.
- Figueroa noted "my family are [*sic*] the example of thousands of families that are being impacted by the coal plant . . . and other types of pollution that is

being released to our air and water by the industrial pollutants that reside in minority low-income communities.” *Id.* at 199.

- Davis stated that she has “an alert on my phone, a wind alert . . . that goes off all the time which is associated with the pet coke phenomenon on Chicago’s southeast side.” *Id.* at 126.

These statements fail to provide any support or context to the Committee’s finding. Rather, it appears as though the Committee took the statements made by the participants as true on their face and simply inserted them into its Final Memorandum. Without accurate data to support this finding, it is not credible, and it is nearly impossible for the U.S. Commission to utilize this finding in its own report.

Finding five is supported by one page of testimony from Mudd. Final Memorandum at 8. The finding reported by the Committee is taken verbatim from Mudd’s testimony. Final Memorandum, app. A at 42. This testimony and the subsequent finding are provided without any context about the actual requirements of the Clean Air Act (“CAA”). As stated in the Illinois EPA’s 2014 Annual Air Quality Report (the most recent report available), the Illinois air monitoring network is designed to measure air quality across the state in conformity with federal guidelines. ILL. ENVT’L PROTECTION AGENCY, 2014 ANNUAL AIR QUALITY REPORT 37 (2014). The monitoring network aligns with the Illinois State Implementation Plan, and the Illinois EPA submits an updated monitoring plan to U.S. EPA every year. *Id.* The monitoring plan meets the requirements set forth in 40 CFR Part 58, utilizing the five different types of monitoring stations available to collect data. *Id.* Several of these stations observe concentrations in high population areas or in areas where poor air quality is combined with high population exposure. *Id.* at 37-40.

Furthermore, Cook County has more monitoring stations than any other county in the state. *Id.* at 42. One of the five types of monitor systems, special purpose monitoring stations (“SPMS”) networks, are designed “to provide data as a supplement to stations used in developing local control strategies, including enforcement actions.” *Id.* at 39. There is also no requirement within the CAA or the regulations that Illinois EPA or U.S. EPA disaggregate monitoring data by race, color, national origin, or other federally protected category. As such, the fifth finding is greatly out of context with the practicalities of implementing and enforcing the CAA and the regulation that governs what data is collected, how monitors are sited, and the purposes for such programs.

Within this same vein, the Committee’s aside about the lack of industry participation in the public hearing is no excuse for the clear slant of the Final Memorandum. It is the Illinois Committee’s role to collect information to support the U.S. Commission’s chosen topic of study. Instead, the Committee completely ignored the specific subject matter and did not present a balanced picture of air quality in southeast Chicago.

#### **IV. The Final Memorandum Ignores the Fact that Illinois has a Strong Environmental Justice Program with Many Achievements.**

The Final Memorandum takes a very skeptical view of the Illinois EPA's environmental justice program. The Committee notes that "[d]espite testimony from EPA and IEPA officials that the State of Illinois environmental justice program is one of the strongest in the country, some advocates feel that the EPA Office of Civil Rights has been 'insincere' in its efforts to enforce Title VI." Final Memorandum at 7. The testimony provided by Walts, an official with U.S. EPA, directly contradicts this statement. Walts stated "Illinois EPA does have a very strong environmental justice program when you look across the states in this country, and they also are in full compliance with Title VI, which cannot be said of all states in this country." Final Memorandum, app A. at 315. Page provided testimony that he coordinates environmental justice activities throughout each bureau of the Illinois EPA. *Id.* at 298.

Unlike the instances cited above where the Committee exhibited a willingness to reiterate unsubstantiated conclusions offered by panelists, the Committee decided not to take a panelist's testimony at face value, including that of the very person who implements environmental justice policies in Illinois. This does a great disservice to the environmental justice accomplishments that have been achieved in Illinois, and the sub-finding creates a skewed picture of the public participation policy and grievance procedure in place in Illinois. As discussed by Page and further detailed on the Illinois EPA's website, the Agency undertakes a great deal of public engagement and outreach regarding environmental justice issues. These include small group meetings in instances of permit actions requiring public notice; informational hearings on public participation requirements in the permitting process; and outreach sessions for instances of local siting approval. ILL. ENVT'L PROTECTION AGENCY, ENVT'L JUSTICE POLICY, <http://www.epa.illinois.gov/topics/environmental-justice/ej-policy/index>.

The Illinois EPA also has a grievance procedure that is overseen by Page and requires the Agency to resolve a complaint within 120 days of its filing. ILL. ENVT'L PROTECTION AGENCY, ENVT'L JUSTICE GRIEVANCE PROCEDURE, <http://www.epa.illinois.gov/topics/environmental-justice/grievance-procedure/index>. Page testified that this "grievance procedure has worked well for us as well as the community." Final Memorandum, app. A at 301. The testimony provided by Harley spoke of the delays and frustrations he experienced when filing complaints with the U.S. EPA Office of Civil Rights. *Id.* at 65. The abilities and procedures encountered at the federal agency should not be conflated with the achievements and procedures of the state agency.

Unlike other states, Illinois also has an Environmental Justice Commission, which is comprised of legislators; state agency officials; and individuals representing communities with environmental justice concerns, environmental health experts, and members of the business community. 415 ILCS 155/10(a). This Commission advises state agencies on environmental justice issues, ensures Illinois EPA's policies adequately address environmental justice concerns,

and conducts reviews of local laws to ensure they address issues of environmental justice. 415 ILCS 155/10(d).

The Illinois EPA and the Environmental Justice Commission have ensured greater public participation and community engagement across Illinois. It is important that the Illinois Committee accurately portray the achievements of the environmental justice program in Illinois to ensure that the U.S. Commission has a complete understanding of environmental justice in the state and thus, can ensure that any potential improvements it recommends are focused upon the correct agency and its procedures.

## **V. Conclusion**

IERG has concerns about the scope of the Final Memorandum, the lack of support and conclusory nature of the Illinois Committee's findings, and the skewed portrayal of environmental justice policies in Illinois. Given the admitted shortcomings in both the methods for gathering and weighing information, coupled with the apparent bias of the Illinois Committee, IERG strongly cautions any reader of the Final Memorandum, and the U.S. Commission in its consideration of its contents, from giving too much credibility to the findings and recommendations contained therein. IERG hopes these comments are of value to the Illinois Committee and the U.S. Commission and appreciates your consideration thereof.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alec M. Davis', with a stylized flourish at the end.

Alec M. Davis

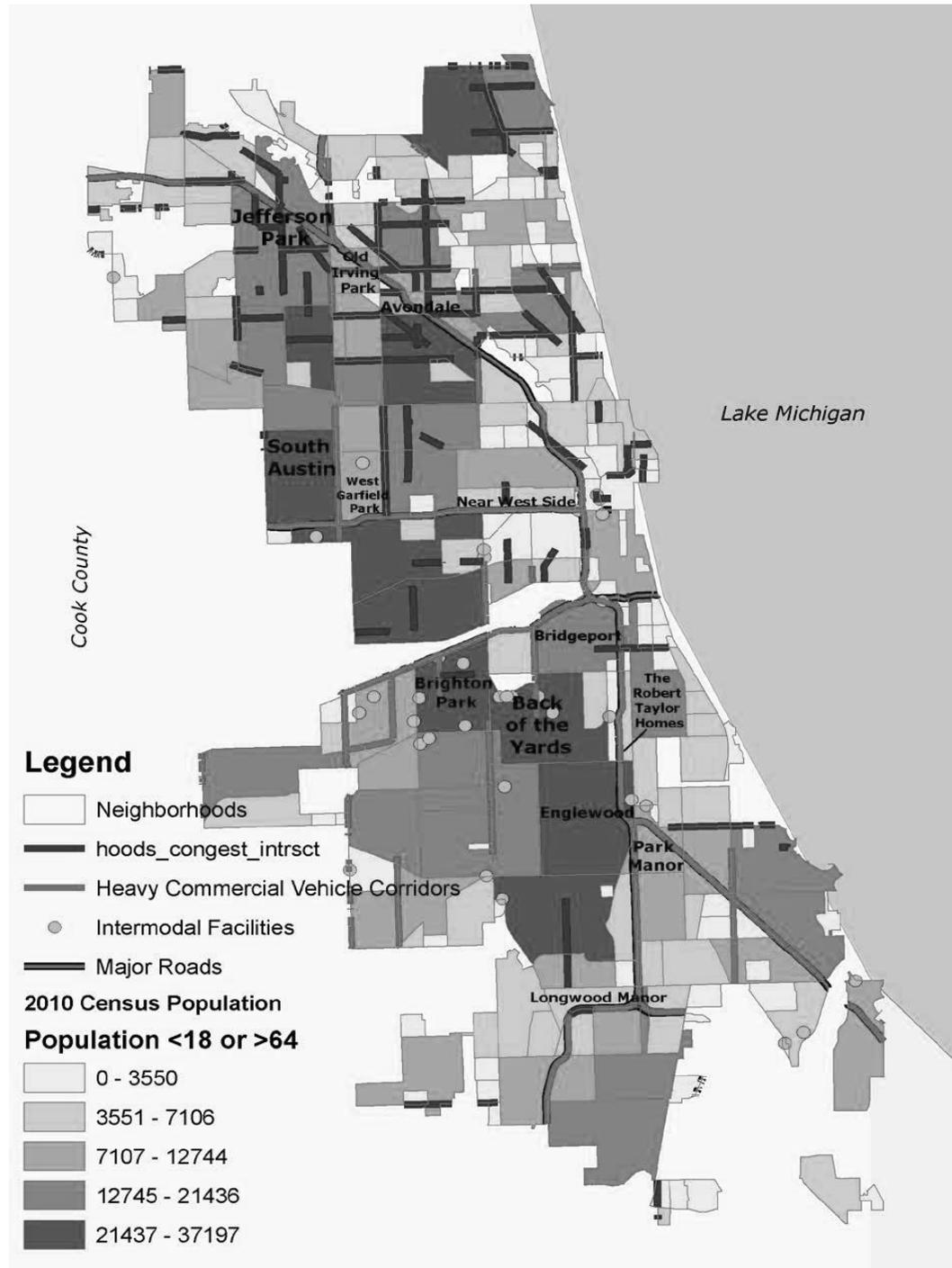
Executive Director

Cc: Martin R. Castro, Chairman, U.S. Commission on Civil Rights

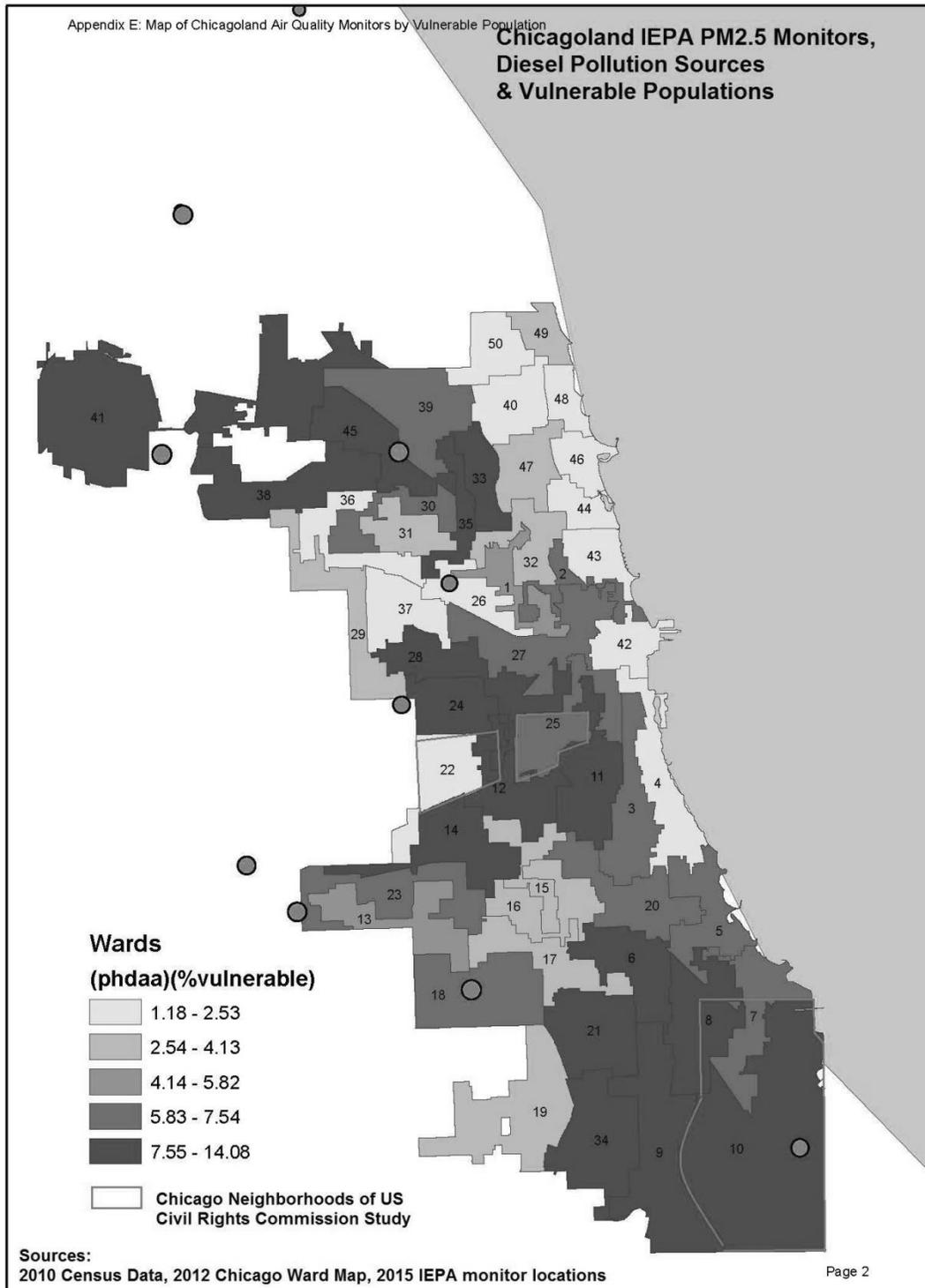
## B6. Maps

The Mudd maps in color are available at [http://www.usccr.gov/pubs/SAC\\_AdvisoryMemo.pdf](http://www.usccr.gov/pubs/SAC_AdvisoryMemo.pdf).

### Vulnerable Populations by Age (<18 and >65)



## Chicagoland IEPA PM2.5 Monitors, Diesel Pollution Sources & Vulnerable Populations



## B7. Additional Resources

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2. Hood-Washington, Sylvia. *Packing Them In: An Archeology of Environmental Racism in Chicago, 1865-1954*. Lexington Books, December 2004.
3. Wilson, Adrian et.al. *Coal Blooded: Putting Profits Before People*. National Association for the Advancement of Colored People; Indigenous Environmental Network; and Little Village Environmental Justice Network. 2012. Available at <http://www.naacp.org/pages/coal-blooded1> (last accessed May 06, 2016)
4. Economic Innovation Group, *The Distressed Communities Index*. Available at <http://eig.org/dci> (last accessed May 06, 2016)
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7. Zhant, Yue et. al. *Ethnic Differences in the Effect of Asthma on Pulmonary Function in Children*. American Journal of Respiratory and Critical Care Medicine Vol. 183 (2011).
8. Cooper, Kenneth J. *Residential Segregation Contributes to Health Disparities for People of Color*. America's Wire. Available at: <http://americaswire.org/drupal7/?q=content/residential-segregation-contributes-health-disparities-people-color> (last accessed May 06, 2016)
9. *Where You Live Matters: 2015 Fair Housing Trends Report*. National Fair Housing Alliance. Available at <http://www.nationalfairhousing.org/Portals/33/2015-04-30%20NFHA%20Trends%20Report%202015.pdf> (last accessed May 06, 2016)
10. Katz, Cheryl. *People in Poor Neighborhoods Breathe More Hazardous Particles*. Scientific American, November 2012. Available at: <http://www.scientificamerican.com/article/people-poor-neighborhoods-breathe-more-hazardous-particles/> (last accessed May 06, 2016)
11. *State of the Air: Health Effects of Ozone and Particle Pollution*. American Lung Association (2016). Available at: <http://www.lung.org/our-initiatives/healthy-air/sota/health-risks/> (last accessed May 06, 2016)
12. Boehmer, Tegan et. al. *Residential Proximity to Major Highways – United States 2010*. Morbidity and Mortality Weekly Report, Centers for Disease Control and Prevention. November 2013. Available at: [http://www.cdc.gov/mmwr/preview/mmwrhtml/su6203a8.htm?s\\_cid=su6203a8\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/su6203a8.htm?s_cid=su6203a8_w) (last accessed May 06, 2016)

**Appendix C: North Carolina Advisory Committee Memorandum**

The North Carolina Advisory Committee Memorandum to the U.S. Commission on Civil Rights on June 29, 2016, regarding Civil Rights and Environmental Justice in North Carolina is reproduced herein as Appendix C.

*This advisory memorandum is the work of the North Carolina Advisory Committee to the U.S. Commission on Civil Rights. The memorandum, which may rely on studies and data generated by third parties, is not subject to an independent review by Commission staff. State Advisory Committee reports to the Commission are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. State Advisory Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this memorandum and the findings and recommendations contained herein are those of a majority of the State Advisory Committee members and do not necessarily represent the views of the Commission or its individual members, nor do they represent the policies of the U.S. Government.*

## C1. North Carolina Advisory Committee June, 2016 Memorandum

On April 7, 2016, the North Carolina Advisory Committee (Committee) to the United States Commission on Civil Rights convened a public meeting in the City of Walnut Cove (Stokes County) North Carolina to hear testimony regarding environmental justice issues in the state, particularly issues related to coal ash disposal and its civil rights impacts on communities based upon race and color<sup>1</sup>. The following advisory memorandum results from the testimony provided during the April 7, 2016 meeting of the North Carolina Advisory Committee, as well as related testimony submitted to the Committee. This memo is intended to focus specifically on concerns of disparate impact regarding hazardous environmental contamination on the basis of race, color, or other federally protected category. This memo, and the recommendations included within it, was adopted by a majority of the Committee on June 29, 2016.<sup>2</sup>

### **Background**

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.<sup>3</sup> The United States Environmental Protection Agency (EPA) regulations implementing Title VI further bar disproportionate impact, not only intentional discrimination, in the administration of environmental programs, including siting and enforcement for recipients of federal financial assistance.<sup>4</sup> On February 11, 1994, President Clinton's Executive Order 12898 further required each federal agency, "to the greatest extent practicable and permitted by law, make achieving environmental justice part of its' mission by identifying and addressing, as appropriate, disproportionately high, and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>5</sup>

The Committee notes that the U.S. Commission on Civil Rights (Commission) is presently conducting a study on the EPA's compliance with Title VI and Executive Order (E.O.) 12898 as part of its' 2016 statutory enforcement report to be submitted to Congress and the President.

Specifically, the Commission is studying potential environmental and health disparities related to

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<sup>1</sup> See Appendix A.

<sup>2</sup> Minutes and records of this meeting can be found at <http://facadatabase.gov/committee/meeting.aspx?mid=141077&cid=266>

<sup>3</sup> 42 U.S.C. § 2000d (1988).

<sup>4</sup> 40 C.F.R. §§ 7.30 and 7.35, available at <https://www.law.cornell.edu/cfr/text/40/7.30> and <https://www.law.cornell.edu/cfr/text/40/7.35> (last accessed May 23, 2016)

<sup>5</sup> Exec. Order No. 12,898, 32 C.F.R. § 651.17 (1994) available at <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf> (last accessed July 14, 2016). Despite this direct mandate to address concerns of environmental justice, the Order explicitly denies private enforcement or judicial review of the Order. Therefore, it is not binding on any executive department or independent regulatory agency.

the disposal of coal ash in the United States on the basis of race or color. To fulfill this study, the Commission has requested its advisory committees to consider undertaking studies on environmental justice generally, and coal ash disposal facilities where applicable. As such, and in keeping with their duty to inform the Commission of: (1) matters related to discrimination or a denial of equal protection of the laws; and (2) matters of mutual concern in the preparation of reports of the Commission to the President and the Congress,<sup>6</sup> the North Carolina Advisory Committee submits the following findings and recommendations to the Commission regarding environmental justice in North Carolina. These findings and recommendations are intended to highlight the most salient civil rights themes as they emerged from the Committee's inquiry. In recognition of the Commission's continued study on this topic, in lieu of providing a detailed discussion of each finding presented, the Committee offers a general outline of themes, along with appropriate additional resources, as topics of reference for the Commission's 2016 statutory enforcement report.

### **Coal Ash Disposal Spill 2014**

On February 2, 2014, a metal pipe in the Duke Energy Coal Ash pond burst open and leaked an estimated 82,000 tons of coal ash and 24 million gallons of contaminated water into the Dan River in Eden North Carolina.<sup>7</sup> For a week, heavy metals such as arsenic, selenium, chromium, and mercury spilled into the river. According to news reports, coal ash was found as far as 70-80 miles downstream coating the bottom of the river, and in some locations, the coating was as much as 5 feet deep.<sup>8</sup> The spill contaminated a river which runs through North Carolina and Virginia, and the water from that river is used for livestock, crop irrigation, recreation, subsistence fishing, canoeing, and drinking.

The spill occurred in the context of several investigations and lawsuits on coal ash sites throughout North Carolina, and the severity of the spill brought greater attention to the environmental hazard that exists throughout the state. For example, in August 2013, the North Carolina Department of Environment & Natural Resources (NCDENR) filed a complaint and motion for injunctive relief against Duke Energy for coal ash contamination of groundwater and surface water.<sup>9</sup> In this lawsuit, the Dan River was cited for "unpermitted surface water discharge and for groundwater contamination from coal ash, with violations of state standards for

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<sup>6</sup> 45 C.F.R. § 703.2.

<sup>7</sup> *Coal Ash*, Catawba River-keeper, available at <http://www.catawbariverkeeper.org/issues/coal-ash> (last accessed July 14, 2016).

<sup>8</sup> David Zucchino, *Duke Energy Receives 5 More Citations Weeks after Coal Ash Spill*, Los Angeles Times, (March 3, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-nc-coal-ash-spill-20140303-story.html#axzz2vCYJAXfi>

<sup>9</sup> Pl.'s Compl & Mot. for Inj. Relief, ADD PINCITE, May 23, 2013. See Appendix B.

antimony, arsenic, boron, iron, manganese, total dissolved solids, and sulfates.”<sup>10</sup> In addition, the Catawba River-keeper Foundation, a non-profit environmental protection advocacy group in North and South Carolina, filed a lawsuit against Duke Energy for violation of the Clean Water Act at various sites including the Dan River site.<sup>11</sup> Furthermore, according to the Catawba River-keeper, in 2009 the EPA had made multiple suggestions to Duke Energy to monitor its sites in North Carolina; and, in 2010 the EPA listed the Dan River and 11 other coal ash ponds in North Carolina as “‘High Hazard’, meaning there was a potential for loss of life and economic catastrophe.”<sup>12</sup> While the Dan River spill was the most severe, there had been several other coal ash spills throughout North Carolina in the past.<sup>13</sup>

After the February 2014 spill, Duke Energy subsidiaries pled guilty to 9 charges of violations of the Clean Water Act, and agreed to pay \$68 million in fines and spend \$34 million on “environmental projects and land conservation that will benefit rivers and wetlands in North Carolina and Virginia.”<sup>14</sup> Additionally, Duke Energy entered into a \$3 million cleanup agreement with the EPA.<sup>15</sup> However, some organizations estimate the total cleanup cost could be as much as \$300 million.<sup>16</sup>

Following the Dan River spill, public scrutiny on enforcement of coal ash ponds has increased. According to Catawba River-keeper, the catastrophic release of coal ash into the Dan River is one example of the hazards posed by coal ash disposal. Other potential hazards include daily untreated discharges from coal ash ponds and seepage of contaminants from coal ash into the groundwater, particularly in unlined coal ash ponds.<sup>17</sup> There are 4 unlined coal ash waste ponds designated by the EPA as “High Hazard” on the banks of the Catawba-Wateree River, and a

<sup>10</sup> *Duke Energy Dan River Coal Ash Spill Updates: What We Know, What We Need to Know*, Catawba River-keeper, available at <http://www.catawbariverkeeper.org/issues/coal-ash-1/duke-energy-dan-river-coal-ash-spill-what-do-we-currently-know-what-do-we-need-to-know/?searchterm=None> (last accessed July 14, 2016).

<sup>11</sup> *Catawba River-keeper Foundations, Inc. v. Duke Energy Carolinas, LLC*. No. 3:13-CV-00355-MOC-DSC.2013 WL 8216647, at \*1. (N.C.W.D. Dec. 4, 2013). See Appendix C.

<sup>12</sup> *Duke Energy Dan River Coal Ash Spill Updates. What We Know, What We Need to Know*, Catawba River-keeper, available at <http://www.catawbariverkeeper.org/issues/coal-ash-1/duke-energy-dan-river-coal-ash-spill-what-do-we-currently-know-what-do-we-need-to-know/?searchterm=None>

<sup>13</sup> *Ibid.*

<sup>14</sup> *Duke Energy Subsidiaries Plead Guilty and Sentenced to Pay \$102 Million for Clean Water Act Crimes*, Dept. of Justice, available at <https://www.justice.gov/opa/pr/duke-energy-subsidiaries-plead-guilty-and-sentenced-pay-102-million-clean-water-act-crimes> (last updated May 14, 2015).

<sup>15</sup> *Case Summary: Duke Energy Agrees to \$3 Million Cleanup for Coal Ash Release in the Dan River*, U.S. EPA, available at <https://www.epa.gov/enforcement/case-summary-duke-energy-agrees-3-million-cleanup-coal-ash-release-dan-river> (last accessed July 14, 2016).

<sup>16</sup> Craig Jarvis, *Dan River Coal Ash Spill Damage Could Top \$300 Million*, The News & Observer, available at <http://www.newsobserver.com/news/politics-government/state-politics/article10148612.html#storylink%3Dmsearch> (Nov. 6, 2014).

<sup>17</sup> *Coal Ash.*, Catawba River-keeper, available at <http://www.catawbariverkeeper.org/issues/coal-ash> (last accessed July 14, 2016).

dozen other coal ash basins which pose severe threats to drinking water.<sup>18</sup> Walnut Cove is the location of one such ash ponds; and, in the wake of the Dan River spill, it is a cause of increased concern for its residents. Beyond the looming risk of another major spill, the contamination of groundwater by the unlined basin has allegedly caused decades of health crises in the area, according to residents from whom the Committee heard. Finally, Appalachian Voices, another environmental advocacy non-profit, purports that the Belews Creek ash pond in Walnut Cove holds 20 times the amount of ash that the Dan River site contained and is held back by a dam that the EPA has deemed at risk of killing residents if it were to fail.<sup>19</sup>

### **Overview of Testimony**

The Committee approached this project from a neutral posture, and at the direction of a designated subcommittee, sought input from involved stakeholders representing all relevant perspectives. During the April 07, 2016 Committee meeting in Walnut Cove, the Committee heard from academic experts and legal professionals in the fields of environmental law and health; community advocates; local, state, and federal government officials; a representative of Duke Energy; and individual community members impacted by environmental contamination near their homes.<sup>20</sup> In addition, the Committee received a number of written statements offering supplemental information on the topic.<sup>21</sup>

All invited parties who were unable to attend personally were offered the opportunity to send a delegate, or, at a minimum, to submit a written statement offering their perspective on the civil rights concerns in question. Despite several outreach attempts, no representatives from the EPA were present at the Committee's hearing despite the fact that Congress, in its authorizing statute of the Commission, stated, "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."<sup>22</sup> Regrettably, such limited participation prevented the Committee from obtaining the intended range of perspectives. It is within this context that the Committee presents the findings and recommendations that follow.

### **Observations**

The following findings result directly and exclusively from the testimony received, and it reflects the views of the cited panelists. While each assertion has not been independently verified by the Committee, panelists were chosen to testify due to their professional experience, academic

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<sup>18</sup> Ibid.

<sup>19</sup> *Dan River Coal Ash Spill*, Appalachian Voices, available at <http://appvoices.org/coalash/dan-river/> (last accessed July 14, 2016).

<sup>20</sup> See Appendix D for full transcript.

<sup>21</sup> See Appendix E for written responses.

<sup>22</sup> 42 U.S.C. § 1975b(e).

credentials, subject matter expertise, diversity of opinion and political ideology, and firsthand experience with the topics at hand.

1. Industrially produced toxic waste and air pollutants are disproportionately concentrated in and around communities of color, particularly Black, Latino, and American Indian populations.
  - a. According to testimony heard, 69 percent of all African Americans live within 30 miles of power plants that pollute the air with toxic chemicals.<sup>23</sup>
  - b. The affected community in Walnut Cove surrounding the Duke Energy coal ash pond is made up of 74 percent people of color. The low income population of Walnut Cove is 1.5 times higher than the U.S. average, and the percentage of residents with below a high school education is below state and federal average.<sup>24</sup>
  - c. Walnut Cove has many low income homeowners whose wealth is mainly tied to the value of their property.<sup>25</sup> Water contamination has led to dramatic devaluation of their property. Devaluation of homes makes it difficult for residents who would like to move away from the contaminated area to do so.
  - d. Contamination has been found in drinking water, recreational lakes and rivers, deep in the groundwater table,<sup>26</sup> and personal wells.
  - e. Walnut Cove being a rural town, many residents grow their own food and many practice agriculture as their profession, rely on clean water, and land for their livelihood. With contaminated water and soil, their chief source of income is threatened, and the risk of exposure to toxic chemicals is compounded as residents eat fruits, vegetables, livestock, and fish that are exposed to the contaminated water.
    - i. 19 of 20 fish species in a local lake were completely eliminated due to water contamination.<sup>27</sup>
    - ii. There were reports of hunters killing deer that were covered in deformations and tumors.<sup>28</sup>

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<sup>23</sup> Saddler Testimony. Transcript, p. 222 lines 10-11

<sup>24</sup> Evans Testimony. Transcript, p. 208 lines 5-14

<sup>25</sup> Hairston Transcript, p. 93 lines 10-18

<sup>26</sup> Armijo Testimony. Transcript, p. 77 lines 9-12

<sup>27</sup> Taylor Testimony. Transcript, p. 68 lines 15-16

<sup>28</sup> Brewer Testimony. Transcript, 120 line 6-7

- iii. Older residents in the community remember their gardens, homes, and houses getting covered with thick layers of coal ash that would erode the paint.
- f. The frequency of such expensive and serious health issues places a heavy burden on a community like that of Walnut Cove where many inhabitants do not have health insurance and are struck with life threatening illnesses at a relatively young age life, sending them to nursing homes at unusually young ages.<sup>29</sup>
- g. In 2015, Duke gave \$17 million in financial assistance grants to causes in North Carolina and \$20 million to help people access affordable energy efficiency. However, the representative was unsure whether or not Walnut Cove residents received any of the financial assistance.<sup>30</sup>
- h. The area surrounding the Coal Ash pond has extremely high rates of the health effects associated with the toxins found in coal ash such as cancer, rare forms of leukemia,<sup>31</sup> respiratory illnesses, neurological problems, heart problems, learning disabilities, heart attacks, and strokes at a young age.<sup>32</sup> The high frequency of these illnesses is not limited to the 1500 surrounding feet, but extends for miles around the community. Living in a community with such high health risk has also caused psychological distress to community members.<sup>33</sup>

The community feels that there is little political recourse available. The affected community of Walnut Tree is in the extraterritorial jurisdiction of the Town of Walnut Cove which means they are unable to vote for representation on the town board of commissioners.<sup>34</sup>

- i. There are nearly 900 coal ash ponds in the United States and the EPA has determined that they disproportionately impact low income and minority communities.<sup>35</sup>
- j. Duke Energy has an unlined Coal Ash pond that is 380 acres and 12 stories

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<sup>29</sup> Monet Testimony. Transcript, p. 97 line 23

<sup>30</sup> McIntire Testimony. Transcript, p. 201 lines 14-22.

<sup>31</sup> Armijo Testimony. Transcript, p. 73 line 19

<sup>32</sup> Hairston Testimony. Transcript, p. 14 line 12-14

<sup>33</sup> Garlock Testimony. Transcript, p. 185 line 10

<sup>34</sup> Taylor Testimony. Transcript, p. 71 lines 7-20

<sup>35</sup> Evans Testimony. Transcript, p. 205 line 14

deep<sup>36</sup> in Walnut Cove which is located near drinking water sources, rivers, and lakes. Water in the surrounding areas has been found to contain toxins such as arsenic, lead, mercury, cadmium, chromium, and selenium.

- i. The contaminated water is not only drinking water but also recreational waters that are heavily used for fishing, boating, and swimming.
  - ii. Much of the local water that is affected is located in privately held wells which are not monitored or regulated by the EPA<sup>37</sup>
- k. Duke Energy's own research has shown that there are thousands of gallons of contaminated groundwater that is flowing into a river that is used for drinking and recreation.<sup>38</sup>
  - n. The people of Walnut Cove (Stokes County) in a three-mile radius of the Duke Energy power plant, have been breathing in coal ash daily for decades. Proximity to the power plant "infringes on residents' basic rights to clean air, clean water, safe soil, and most importantly their right to good health."
  - o. Duke Energy's coal ash pond is near a river and blocked by a dam. This dam has been deemed high risk because if it were to fail, drinking water within 10 miles downstream would be contaminated with toxic coal ash.<sup>39</sup>
  - p. The transportation of coal ash threatens air quality. Even when trucks are tightly sealed, there have been findings of high rates of heavy metals in the air.<sup>40</sup>
2. The environmental protection laws that exist prohibits the contamination of water by improper disposal of toxic waste. Furthermore, there are provisions that protect the civil rights of communities from disproportionate damage based on race, ethnicity, and socioeconomic status. However, without proper enforcement by state and federal regulatory agencies, these laws fail the communities who depend on them.<sup>41</sup>
    - a. A Coal Ash Management Commission was formed in order to oversee coal ash

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<sup>36</sup> Kellogg Testimony. Transcript, p. 24 line 15

<sup>37</sup> Fry Testimony. Transcript, p. 175 lines 21-25

<sup>38</sup> Scott Testimony. Transcript, p. 149 line 9-12

<sup>39</sup> Taylor Testimony. Transcript, p. 67 line 21

<sup>40</sup> Vick Testimony. Transcript, p. 114 line 10

<sup>41</sup> Castro Testimony. Transcript, p. 12 line 10-21

cleanup. However, this commission was disbanded by the Governor’s office.<sup>42</sup> This has caused concern among community members who found comfort in a third-party group overseeing the coal ash cleanup. This concern is compounded by the fact that the NCDEQ has moved the risk classification of the Duke Energy coal ash pond from high risk to low intensity risk.<sup>43</sup>

- b. The Coal Ash Management Act mandated that water testing be conducted in the 1500 feet surrounding the Duke Energy plant. This testing was conducted by Duke Energy.
  - i. The groundwater reports that were mandated by the NCDEQ and conducted by Duke Energy were lacking in scope of area researched as well as lacking in detailed findings.<sup>44</sup>
  - ii. The representative of Duke Energy noted that the company “volunteered to deliver water to these folks when [they] weren't required to.”<sup>45</sup>
- c. Testing within a 1500- foot radius was not fully completed<sup>46</sup> and many feel that the size of the radius is insufficient as the community of people facing high rates of health issues extends for miles around the coal ash pond.
- d. Upon testing water in the surrounding area, the NCDEQ and the NC Department of Health and Human Services sent out letters warning residents not to drink their water. The water testing led to the sending out of “do not drink” letters to hundreds of residents. However, these letters were then rescinded after the change of the standards of regulation on iridium and hexavalent chromium that had been established by the Department of Health and Human Services.<sup>47</sup> Residents who first received do not drink warnings that were rescinded are concerned about the safety of their drinking water, but are unable to appeal to the NCDEQ or Duke Energy to attain clean water as it has been deemed safe.
- e. The NCDEQ is no longer conducting tests on water quality, which leaves the responsibility of water testing to individuals or nonprofits with limited

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<sup>42</sup> Kellogg Testimony. Transcript, p. 25 line 6

<sup>43</sup> Dalton Testimony. Transcript, p. 116 lines 17-24

<sup>44</sup> Kellogg Testimony. Transcript, p. 45 lines 7-19

<sup>45</sup> McIntire Testimony. Transcript, p. 202 lines 4-5

<sup>46</sup> Harrison Testimony. Transcript, p. 154 Line 17

<sup>47</sup> Kellogg Testimony. Transcript, p. 42 line 8-21

economic and scientific resources. Furthermore, in the case of individuals learning that their water is contaminated, they see no recourse when the testing is not conducted by the Government.

- f. While community involvement and advocacy is critical, lack of adequate involvement by the NCDEQ and EPA places the community in greater danger and places a heavy burden on the affected community. The affected community was not aware that the coal ash pond was the cause of the high rates of severe health problems until 2012 when nonprofits started investigating. However, the Duke Energy plant has been in the area since the 1970s.
- g. Community members feel as though there is collusion between the Governor's Administration and Duke Energy<sup>48</sup>
  - i. Duke Energy attended a private dinner at the governor's mansion with the chief of environmental law enforcement who at the time had many pending charges against Duke Energy.<sup>49</sup>
  - ii. The NCDEQ objected to and opposed the cleanup of Duke Energy sites that the company was attempting to cleanup.<sup>50</sup>
  - iii. The governor held undisclosed stocks in Duke Energy until the 2014 Dan River Spill.<sup>51</sup>
  - iv. There is a loophole in regulation on the disposal of toxic coal ash in landfills. The coal ash pond in Walnut Cove is classified by the state as mine reclamation rather than as a landfill. Therefore, it avoids coal ash regulation.<sup>52</sup>
- h. Duke Energy claims to adhere to industry standards on managing coal ash. In the past, coal ash was stored in basins and now they're moving to store it in dry and lined landfills. The company has reused 38 percent of the ash that it produced in North Carolina.<sup>53</sup>
  - i. After the Dan River spill, Duke Energy accelerated the closure of coal ash

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<sup>48</sup> Kellogg Testimony. Transcript, p. 22 line 7

<sup>49</sup> Holleman Testimony. Transcript, p. 248 lines 11-20

<sup>50</sup> Blake Testimony. Transcript, p. 238 line 9

<sup>51</sup> Wood Testimony. Transcript, p. 242 line 1

<sup>52</sup> Vick Testimony. Transcript, p. 113 line 5

<sup>53</sup> McIntire Testimony. Transcript, p. 195 lines 3-9

basins in advance of federal regulation and the NC Coal Ash Management Act.<sup>54</sup>

- j. Community members do not have a clear picture of available legal recourse.
3. There has been insufficient scientific research conducted on the health and environmental risks associated with coal ash.
    - a. Health effects of fly ash, which is radioactive, are unknown because of lack of scientific studies.<sup>55</sup>
    - b. The environmental and health risks associated with coal ash are compounded by fracking.
      - i. The dam protecting coal ash pond is at risk of earthquakes which fracking in the area could cause.<sup>56</sup>
      - ii. Fracking adds additional contamination risks to drinking water.<sup>57</sup>
    - c. Much of the scientific investigation into the risks of coal ash have been nonprofit and community led, and do not carry the necessary scientific legitimacy.
    - d. The Duke Energy Representative argued that the science indicates that the company's coal ash "impoundments are not influencing nearby wells. The evidence also tells us the groundwater is moving away from our neighbors in North Carolina." In situations where Duke Energy found evidence of potential for groundwater well contamination, the company took action to work with local water management.<sup>58</sup>
  4. Mr. Tom Reeder, a representative of the NCDEQ, stated in his testimony that the NCDEQ and Governor McCrory are taking steps to redress decades of Coal Ash pollution.
    - a. Governor McCrory filed four lawsuits against Duke Energy to regulate their coal ash and groundwater contamination.<sup>59</sup> In September 2015, the EPA and Duke settled a lawsuit over the violation of the Clean Air Act with regards to

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<sup>54</sup> McIntire Testimony. Transcript, p 197 lines 18-23

<sup>55</sup> Kellogg Testimony. Transcript, p. 24 line 19

<sup>56</sup> Evans Testimony. Transcript, p. 124 line 9

<sup>57</sup> Evans Testimony. Transcript, p. 122 line 21

<sup>58</sup> McIntire Testimony. Transcript, p. 200 line 16-25

<sup>59</sup> Reeder Testimony. Transcript, p. 85 line 7-10

13 illegally modified coal-fired units without pollution controls or permits. Two of the energy plants remain open.<sup>60</sup>

- b. Governor McCrory filed two lawsuits against Duke Energy for coal ash violations.<sup>61</sup>
  - c. In response to questions of the State's ability to offset the costs of health issues caused by environmental issues, the representative of the NCDEQ responded that he had no expertise in the area as he is an environmental regulator.<sup>62</sup>
  - d. The NCDEQ emphasized that the process of cleaning up and regulating coal ash is a complicated issue: Tom Reeder said that it would be an issue he would work on "until the day [he] retire[s]."<sup>63</sup>
  - e. Mr. Reeder claimed that the NCDEQ would conduct "a complete environmental justice screen for any permit for a coal ash landfill in North Carolina" in accordance with Title VI of the 1964 Civil Rights Act. The NCDEQ will then hold a public hearing for new permits. Then the NCDEQ will ask the USCCR, EPA Office of Civil Rights, and the NC Advisory Commission to review the "environmental justice screen."<sup>64</sup>
  - f. The representative of Duke claimed the company was committed to "closing ash basins."<sup>65</sup>
5. Title VI of the 1964 Civil Rights Act, in addition to other regulations, exist to withdraw funding and enforce compliance with civil rights norms.
- a. Environmental justice means the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."<sup>66</sup>
  - b. Federally funded groups such as the North Carolina Department of Environmental Quality are subject to Title VI prohibitions on discrimination.

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<sup>60</sup> Kellogg Testimony. Transcript, p. 28 line 9

<sup>61</sup> Reeder Testimony. Transcript, p. 86 line 4

<sup>62</sup> Reeder Testimony. Transcript, p. 98 line 13

<sup>63</sup> Reeder Testimony. Transcript, p. 99 line 16

<sup>64</sup> Reeder Testimony. Transcript, p. 88 line 3-21

<sup>65</sup> McIntire Testimony. Transcript, p. 195 line 10

<sup>66</sup> Taylor Testimony. Transcript, p. 62 lines 21-25

- c. Executive Order 12898 “requires federal agencies to identify and address as appropriate disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations.”<sup>67</sup>
- d. Many advocates and community members feel that the regulatory agencies and elected officials have failed to take the issue of environmental justice seriously.

### **Recommendations**

Among their duties, advisory committees of the Commission are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.<sup>68</sup> Based on the information received on April 7, 2016, the North Carolina Advisory Committee submits the following recommendations for the Commission’s consideration:

1. The NCDEQ and EPA should take action that proactively prevents low income communities and communities of color from being disproportionately affected by coal ash disposal. Based upon testimony the Committee heard, these agencies should consider the following and assess whether taking such steps would decrease the disparate impact on communities of color:
  - a. The NCDEQ should change the risk level of coal ash ponds from low to high level risk.
  - b. As a part of its monitoring of areas where coal ash storage occurs, the NCDEQ should complete a thorough testing of water in the 1500- foot radius of all coal ash ponds, and expand testing to a larger radius.
  - c. The EPA and NCDEQ should reassess acceptable levels of iridium, hexavalent chromium, and other toxins in water. The NCDEQ and EPA should strengthen the regulation(s) on coal ash storage, to ensure that the minimum standard for all coal ash storage is in lined, watertight landfills away from drinking water sources.
  - d. The NCDEQ, EPA, and Duke Energy should look into long term solutions to prevent coal ash leakage and contamination such as conversion into cement

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<sup>67</sup> Taylor Testimony. Transcript, 63 Line 2-8

<sup>68</sup> 45 C.F.R. § 703.2.

and other waste disposal options which do not risk leakage into the air or water.

2. The EPA should conduct an investigation to see whether the state of North Carolina is in compliance with all EPA regulations including civil rights laws.
3. The EPA should ensure that the programs it funds, like NCDEQ, be more considerate of the disproportionately high adverse human health and environmental effects that their regulation on coal ash has on minority populations.
4. The EPA should investigate the risk level of residents living the closest to coal ash ponds and potentially provide the economic means for them to be relocated.
5. The EPA and Duke Energy should investigate the safest way to excavate coal ash from existing ponds that does not disparately impact communities of color.
6. The affected community of Walnut Tree should be annexed into the Town of Walnut Cove in order to have political representation.
7. In addition to considering environmental justice as related to coal ash disposal, the Commission should consider other sources of land and water contamination such as fracking; as well as air quality concerns such as high exposure to diesel emissions and other sources of fine particulate matter. The Commission should consider the cumulative effect of these contaminants on environmental justice communities, and the extent to which a failure on the part of regulators to study such a cumulative effect may result in inadequate environmental justice protection.
8. The NC Department of Health and Human Services should immediately conduct a thorough health and cancer cluster study, through the University of North Carolina medical school, of the affected Walnut Cove area using guidelines established by the Centers for Disease Control and the Council of State and Territorial Epidemiologists. These results should be directly reported to the Governor, Lt. Governor, Speaker of the House and Senate President Pro Tempore.
9. The State of North Carolina and the EPA should investigate ways to compensate community members for health care expenses and land devaluation that has resulted from coal ash contamination.
10. Beyond the monitoring of coal ash disposal sites that already occurs, the EPA should investigate the lasting effects of coal ash disposal on areas after the waste has been disposed of and relocated.

## **C2. North Carolina Advisory Committee April 7, 2016 Briefing Transcript**

The full transcript of the North Carolina Advisory Committee to the U.S. Commission on Civil Rights Briefing held on April 7, 2016 is available upon request to [publicaffairs@usccr.gov](mailto:publicaffairs@usccr.gov).

## **C3. North Carolina Advisory Committee April 7, 2016 Written Testimony**

The full written testimony for the North Carolina Advisory Committee to the U.S. Commission on Civil Rights Briefing on Environmental Justice Concerns in the State of Illinois, held on April 7, 2016 is available upon request to [publicaffairs@usccr.gov](mailto:publicaffairs@usccr.gov).

## **C4. North Carolina Advisory Committee April 7, 2016 Briefing Panelists' Biographies**

The Panelists' Biographies of the North Carolina Advisory Committee to the U.S. Commission on Civil Rights Briefing held on April 7, 2016 is available upon request to [publicaffairs@usccr.gov](mailto:publicaffairs@usccr.gov).

## C5. North Carolina Advisory Committee April 7 Briefing Agenda and Minutes

### Agenda

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|-------|---|---|
| I.    | Introductory Remarks by Chairman:<br>Ms. Matty Lazo-Chadderton                | 9:00 a.m.   |
| II.   | Panel 1:<br>Rev. Gregory Hairston<br>Sarah Kellogg<br>Tracey Edwards          | 9:10 a.m. – 10:10 a.m.<br>Rising Star Baptist Church<br>Appalachian Voices<br>Community Advocate  |
| III.  | Break:  | 10:20 a.m. – 10:30 a.m.   |
| IV.   | Panel 2:<br>Caroline Armijo<br>Chandra Taylor<br>Tom Reeder<br>David Hairston | 10:30 a.m. – 11:30 p.m.<br>Citizens Against Coal Ash<br>Southern Environmental Law Center<br>NC Department of Environmental Quality<br>Volunteer Activist |
| V.    | Open Comments Period AM:  | 11:30 – 11:50   |
| VI.   | Lunch:  | 11:50 p.m. – 1:20 p.m.  |
| VII.  | Panel 3:<br>Marie Garlock<br>Peter Harrison<br>Will Scott<br>Dr. Rebecca Fry  | 1:20p.m. – 2:30 p.m.<br>Breast Cancer Action<br>Water-keeper Alliance<br>Yadkin River-keeper<br>Associate Professor at UNC                                |
| VIII. | Break:  | 2:30p.m. – 2:40 p.m.  |
| IX.   | Panel 4:<br>Mark D. McIntire<br>Amy Adams<br>Lisa Evans<br>Rev Rodney         | 2:40 p.m. – 4:00 p.m.<br>Duke Energy<br>Appalachian Voices NC Campaign Coordinator<br>Earth Justice<br>North Carolina NAACP                               |
| X.    | Open Comments Period:   | 4:00 – 5:00 p.m.  |
| XI.   | Adjournment   | 5:00 p.m.   |

## Appendix D: Affected Agency Comments on Draft Report

<i>Area of Focus</i>	<i>EPA Issue of Concern on Draft Report or US CCR Question</i>	<i>Explanation of Concern or Response to US CCR Question</i>
Environmental Justice (EJ)	<p><b>USCCR Question:</b> How is the Office of Environmental Justice (OEJ) incorporating environmental justice into EPA's mission?</p>	<p>OEJ has made substantial progress over the past eight years furthering the inclusion of environmental justice considerations throughout EPA's business practices. EPA's strong and deep commitment to advancing environmental justice is apparent from the robust environmental justice work outlined in the <a href="#">EJ 2020 Action Agenda</a>. Building on <a href="#">Plan EJ 2014</a>, EPA's previous strategic plan for environmental justice, the EJ 2020 Action Agenda is an agency-wide strategy for the next five years focusing on improving the health and environment of overburdened communities; working with partners to expand our positive impact on overburdened communities; and demonstrating progress on significant national environmental justice challenges. Achieving this vision will help make the communities we serve healthier, cleaner and more sustainable.</p> <p>Over the past several years EPA has successfully worked to integrate environmental justice into its programs, policies and activities through Plan EJ 2014, a comprehensive suite of guidance, policies and tools. This ground-breaking strategic plan focused on agency-wide areas critical to advancing environmental justice, including rulemaking, permitting, compliance and enforcement and community-based programs. Some accomplishments of Plan EJ 2014 include <a href="#">EJSCREEN</a>, an environmental justice screening and mapping tool; <a href="#">EJ Legal Tools</a>, which identifies key legal authorities for EPA policy makers to consider in advancing environmental justice; and the <a href="#">Technical Guidance for Assessing Environmental Justice in Regulatory Analysis</a>, which is designed to help EPA analysts evaluate potential environmental justice concerns associated with EPA rulemaking actions.</p> <p>The Agency is currently working to address environmental justice issues directly in communities through the <a href="#">Making a Visible Difference in Communities</a> initiative. This cross-agency effort provides coordinated and targeted technical expertise and resources to overburdened communities and supports their efforts to improve environmental outcomes.</p>
EJ	<p><b>USCCR Question:</b> What is OEJ's budget and staffing?</p>	<p>OEJ has approximately 22 full-time employees with a budget of approximately \$4.5 million.</p>
EJ	<p><b>USCCR Question:</b> How many Environmental Justice Coordinators does EPA have? Are there Environmental Justice Coordinators in each EPA region?</p>	<p>Every Region and National Program Manager (NPM) have an EJ Coordinator.</p>

<p>EJ</p>	<p><b>USCCR Question:</b> What is the difference between a DCRO and an Environmental Justice Coordinator? What are the differences in Responsibility?</p>	<p>The responsibilities of EJ Coordinators vary by Region as each EPA Region has a unique internal structure. In general, however, Regional EJ Coordinators are responsible for just that – coordinating and supporting the environmental justice efforts, both internal and external, of each Region. This includes much community based and direct outreach efforts by Regional staff, community level communications and engagement, internal strategic commitments and planning of the Region, and coordination more broadly with the Office of Environmental Justice and EJ Coordinator colleagues within the Regions and NPMs.</p> <p>The duties and responsibilities of DCROs are delineated in EPA Orders 4700 and 4701, which together establish a protocol for processing complaints of discrimination that brings program and regional offices throughout the agency into a collaborative process for coordinating and committing the analytical resources, expertise, and technical support needed to address civil rights compliance. (<i>Attached are the Orders.</i>)</p>
<p>EJ</p>	<p><b>EPA Issue of Concern:</b> Generalizations re: EJ at EPA are distortive and unsupported. The Draft Report conflates the narrower issues of civil rights investigations under Title VI and the CCR rulemaking with EPA’s larger EJ effort, which is far broader. EPA’s considerable EJ progress, chiefly through implementation of our EJ strategic plans, is left unexplored and unacknowledged.</p>	<p>EPA has a broad and deep EJ program that is in no way captured by the Commission’s review of one regulation and one office’s work processing civil rights complaints.</p> <ul style="list-style-type: none"> <li>-For example, the EJ 2020 Action Agenda is ignored.</li> <li>-Building on Plan EJ 2014, EPA’s previous strategic plan for environmental justice, the EJ 2020 Action Agenda is an agency-wide strategy for the next five years focusing on             <ul style="list-style-type: none"> <li>-improving the health and environment of overburdened communities;</li> </ul> </li> </ul>

		<p>-working with partners to expand our positive impact on overburdened communities; and          -demonstrating progress on significant national EJ challenges.          -Achieving this vision will help make the communities we serve healthier, cleaner and more sustainable.</p> <p>EPA is concerned that the report appears to conflate the narrower issue of civil rights investigations and the development of one regulation with the much broader work across the entire agency that EPA does to promote environmental justice. The report focuses on civil rights and regulatory development and does not explore the considerable environmental justice progress accomplished at the Agency, chiefly through implementation of our EJ strategic plans. The environmental justice work at EPA extends well beyond review of Title VI complaints and one particular regulatory development action. The Council’s review of the Office of Civil Rights complaint process and one rule done by the Office of Land and Emergency Management does not provide a basis for the unsupported and sweeping generalizations in this report about environmental justice at EPA.</p>
<p>EJ</p>	<p><b><i>EPA Issue of Concern:</i></b>          Over the past several years, EPA has successfully worked to integrate EJ into its programs, policies and activities through Plan EJ 2014, a comprehensive suite of guidance, policies and tools, which the Commission ignores.</p>	<p>This ground-breaking strategic plan focused on agency-wide areas critical to advancing EJ, including rulemaking, permitting, compliance and enforcement and community-based programs. Some accomplishments of Plan EJ 2014 include:          -EJSCREEN, an environmental justice screening and mapping tool;          -EJ Legal Tools, which identifies key legal authorities for EPA policy makers to consider in advancing environmental justice; and the          -Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, which is designed to help EPA analysts evaluate potential environmental justice concerns associated with EPA rulemaking actions.</p>
<p>EJ</p>	<p><b><i>EPA Issue of Concern:</i></b>          The Draft Report ignores that the Agency is currently working to address EJ issues directly in communities through the Making a Visible Difference in Communities initiative.</p>	<p>This cross-agency effort provides coordinated and targeted technical expertise and resources to overburdened communities and supports their efforts to improve environmental outcomes.</p>

<p><b>EPA Regulatory Action</b></p>	<p><b>USCCR Question:</b> Please explain the discrepancy in percentages of minority populations affected in EPA's Final Coal Ash Rule's Environmental Justice analysis and the Regulatory Impact Analysis. What accounted for the 4 percent discrepancy? How many landfill/surface impoundments/facilities were left out of the calculation when determining the impacted the [sic] minority and low-income populations in both the Final Rule's Environmental Justice analysis and the Regulatory Impact Analysis?</p>	<p>There is no discrepancy between the percentage of minority populations in the RIA and EJ analysis; the different figures represent the difference between EPA's initial and final estimates, which incorporated the results of more sophisticated modeling.</p> <p>The final analyses filtered out plants that were expected to close all coal-fired units by 2016. This was a total of 64 plants, 50 of which had CCR units.</p> <p>The total number of CCR units was 123 (slightly over 10%). 24 Landfills and 99 surface impoundments</p>
<p><b>EPA Regulatory Action</b></p>	<p><b>USCCR Question:</b> Is EPA's legislative affairs office (or Solid Waste office) currently working with OMB to increase EPA's regulatory power over coal ash?</p>	<p>There are bills pending in the House and the Senate, and the Administration has issued a SAP opposing them. The trade press have reported that work is being done on a possible compromise but EPA has not been requested to provide an Administration position on any such bill.</p>
<p><b>EPA Regulatory Action</b></p>	<p><b>USCCR Question:</b> How many states have adopted the final coal ash rule?</p>	<p>Currently Virginia is the only state that has completed its process. Kansas's SWMP has been conditionally approved, pending the adoption of legislation. We are in the process of working with a number of other states including DE and IN.</p>

<p><b>EPA Regulatory Action</b></p>	<p><b><i>USCCR Question:</i></b> In what way is EPA communicating with states or relevant state agencies about the progress of adopting the Final Rule into their waste management plans? What types of technical assistance is EPA providing with regard to the Final Coal Ash Rule? How many states have told EPA that they have more stringent state laws already?</p>	<p>Following signature of the CCR final rule in December 2014, EPA stood up a national implementation workgroup comprised of program staff from EPA Headquarters and Regional offices. This workgroup meets every other week to discuss implementation issues, to include any issues related to the development of solid waste management plans. In turn, EPA Regional office staff are in communication with their respective states, and issues or concerns raised to Regional staff are discussed with the national implementation workgroup. EPA has also engaged with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) on various implementation issues. ASTSWMO is an organization representing states and territories with a mission to enhance and promote effective state programs. For example, EPA has discussed CCR rule implementation at semiannual and annual meetings of its members, to include specifically discussing adoption of the CCR rule into state programs and the development of solid waste management plans. In addition, EPA has offered assistance in the form of teleconferences with individual states to discuss the rule, providing EPA staff or management at EPA Regional meetings of its states, and reviewing and providing comment on draft state regulations and draft solid waste management plans. EPA has also provided additional guidance on implementing the rule through</p> <p>The posting of written questions and answers on EPA’s website. Finally, EPA conducted a number of target outreach and information sharing activities with stakeholders by making presentations at a number of public events (e.g., conferences and meetings).</p> <p>Several states have informed EPA that certain aspects of their state CCR programs contain elements that are more stringent than the minimum federal requirements in the CCR rule. EPA made clear at the time the CCR rule was finalized that the CCR rule will not affect these state requirements and that the rule does not preclude a state from adopting more stringent requirements where they deem that appropriate.</p>
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<p><b>EPA Regulatory Action</b></p>	<p><b>USCCR Question:</b> What was EPA Region 4's role in the decision to transport coal ash from the Kingston, Tennessee spill to Arrowhead Landfill in Uniontown, Alabama? How would EPA Headquarters describe that role? Was there any thought as to whether that role would trigger an environmental justice analysis as directed by Executive Order 12,898?</p>	<p>The USCCR draft report mischaracterizes EPA Region 4's role in the decision to dispose of the ash in the Perry County/Arrowhead Landfill as "permitting" and "siting." EPA has no permitting or siting authority for municipal solid waste landfills, including the Perry County/Arrowhead Landfill. Rather, Alabama is approved by EPA to implement the solid waste program and as a result. The permit for the Perry County/Arrowhead Landfill and other solid waste disposal facilities in Alabama are under the legal authority of the Alabama Department of Environmental Management (ADEM) and local governments. EPA does not retain separate authority for this program or exercise veto authority over individual permit decisions. The Perry County/Arrowhead Landfill was already permitted by the Alabama Department of Environmental Management to accept waste materials such as coal ash prior to EPA's approval of the Perry County/Arrowhead disposal option. In addition, the Perry County/Arrowhead Landfill was authorized to accept waste from the State of Tennessee prior to the December 22, 2008, coal ash release following approval of the Perry County Commission on December 9, 2008.</p> <p><b>EPA Region 4's Role:</b> Pursuant to an Administrative Order and Agreement on Consent (AOC) entered into between EPA and TVA on May 11, 2009, the cleanup at the TVA Kingston Site was conducted in accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the National Oil and Hazardous Substance Pollution Contingency Plan (a.k.a., National Contingency Plan or "NCP"). In terms of off-site disposal of TVA Kingston coal ash waste at the Perry County/Arrowhead Landfill, the NCP's Off-Site Rule, 40 C.F.R. § 300.440 (a.k.a., "CERCLA Off-Site Rule" or simply "Off-Site Rule"), requires that before a site is selected for off-site shipment of materials generated as part of a CERCLA response action, EPA must conduct a review of the receiving facility for any relevant violations or releases under any applicable federal or state environmental programs. On January 16, 2008, EPA Region 4 determined that the Perry County/Arrowhead Landfill met the standard for receipt of CERCLA wastes under the Off-Site Rule: <i>i.e.</i>, that at that</p>
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		<p>time the Perry County/Arrowhead Landfill did not have any relevant violations or releases under any federal or state environmental programs.</p> <p>As required by the AOC, TVA performed an “Off-Site Options Analysis” to evaluate options for disposal of the coal ash waste. EPA Region 4 then conducted a thorough review of TVA’s Options Analysis to ensure that the selected disposal facility was operating in compliance with applicable solid waste management regulations and that potential risks to the community, especially vulnerable populations, were addressed. In addition, TVA and EPA met with six local elected officials, including county commissioners, a Mayor, and a City Council member, to discuss the use of the landfill. All of the officials strongly supported the disposal of the ash material in the landfill. EPA management, including the Director of the Superfund Division at Region 4, also met with a number of community members in June 2009 (and again on September 16, 2009) to hear public concerns and answer questions regarding the use of the Perry County/Arrowhead Landfill as a disposal site. EPA and ADEM inspectors also visited the landfill to ensure compliance with applicable regulations. EPA Region 4 approved TVA’s Options Analysis on July 2, 2009.</p> <p>Specifically, EPA Region 4 found that:</p> <ul style="list-style-type: none"><li>-The Perry County/Arrowhead Landfill meets or exceeds all technical requirements specified in the AOC in that it has a composite liner that includes a compacted clay liner and a high density polyethylene liner, a leachate collection system, a 100 ft. buffer that surrounds the property, regular groundwater monitoring, financial assurance, and permit provisions for closure and post-closure care;</li><li>-The Perry County/Arrowhead Landfill has the capacity to accommodate the volume of coal ash waste anticipated to be removed from the CERCLA time-critical removal action at the TVA Kingston Site, and the Perry County/Arrowhead Landfill prevailed in a competitive bidding process to secure the disposal contract;</li></ul>
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		<p>permittee complies with its permit, and ADEM enforces any violations, the regulatory framework should ensure that the operation of the landfill will not adversely affect public health or the environment.</p>
		<p>The draft report claims to have examined “EPA’s permitting and siting decisions” (<i>see</i> Executive Summary, p. 10), but as EPA has repeatedly explained,</p>

<p><b>EPA Regulatory Action</b></p>	<p><b><i>EPA Issue of Concern:</i></b> Key conclusions in the draft report regarding EPA’s decisions w/r/t disposal of coal ash from the TVA spill and the final coal combustion residuals (CCR) rule under the Resource Conservation and Recovery Act (RCRA) appear to rest on a significant misunderstanding of the legal framework under which EPA operates, as well as how risk assessments are conducted.</p>	<p>The draft report claims to have examined “EPA’s permitting and siting decisions” (see Executive Summary, p. 10), but as EPA has repeatedly explained,</p> <ul style="list-style-type: none"> <li>-State regulatory authorities bear primary responsibility for the kinds of permitting and siting decisions at issue.</li> <li>-EPA has no permitting authority for the disposal of any solid waste, including coal ash, in any landfill.</li> <li>-At the time of the TVA spill, coal ash was a solid waste.</li> <li>-Federal law (i.e., RCRA) does not require permits for the management or disposal of industrial solid wastes; although permits can be required for municipal solid waste landfills, RCRA extends that authority exclusively to states with an approved municipal solid waste landfill program. <i>See</i> 42 U.S.C. 6944, 6945(c).</li> <li>-EPA has no authority to veto the state’s individual permit decisions or to impose additional permit restrictions or conditions.</li> <li>-The draft report also fails to accurately describe the limitations on EPA’s authority to establish requirements related to the siting of solid waste landfills.</li> </ul>
<p><b>EPA Regulatory Action</b></p>	<p><b><i>EPA Issue of Concern:</i></b> The draft report summarily concludes that the final CCR rule “does not protect minority and low income communities” because EPA lacks enforcement authority and because these communities could not realistically afford to bring suit to enforce the regulation (Chapter 3 conclusion).</p>	<ul style="list-style-type: none"> <li>-But this fails to account for the more complex system that, in practice, determines whether a federal regulation is protective.</li> <li>-Most environmental requirements are enforced, when necessary, by a combination of federal, state, and private actors.</li> <li>-The draft report wholly discounts, without any basis or analysis, the potential for state enforcement and actions brought by environmental groups, such as the Southern Environmental Law Center.</li> <li>-It also presumes widespread non-compliance; but in fact, available evidence suggests that facilities are largely seeking to comply with the CCR rule.</li> </ul>

<p><b>EPA Regulatory Action</b></p>	<p><b><i>EPA Issue of Concern:</i></b> The draft report mischaracterizes the conclusions of EPA’s risk assessments.</p>	<p>-The draft cites exclusively to a single risk estimate from the draft risk assessment, and assumes that this risk estimate was generally applicable to all situations or communities. -But in fact, that upper-end estimate was based on very specific waste characteristics, management practices, and resulting exposure estimates, which are not applicable to the majority of sites that involve different wastes and exposure conditions. -EPA’s risk assessment contained a range of risk numbers, and whether a particular numeric estimate is reflective of the actual risks a community faces can only be determined by evaluating the specific conditions at that location. (And in fact, the cited estimate was revised in EPA’s final risk assessment to reflect risks that were an order of magnitude lower.)</p>
<p><b>Office of Civil Rights (OCR)</b></p>	<p><b><i>USCCR Question:</i></b> How many post award compliance reviews have you done since 2010?</p>	<p>OCR has completed one post-award compliance review since 2010. On December 15, 2011, EPA entered into an Agreement with the Louisiana Department of Agriculture and Forestry (LDAF) to resolve a civil rights complaint filed under Title VI of the Civil Rights Act of 1964 (Title VI) and a limited English proficiency (LEP) Compliance review conducted by EPA pursuant to its authority under Title VI. As stated in OCR’s External Compliance and Complaints Program Strategic Plan (FY2015-2020), OCR’s goal is to strengthen post-award compliance reviews. Beginning in the current fiscal year, OCR will increase the number of compliance reviews conducted and plans to initiate two compliance reviews in 2016. By FY 2018, OCR has a goal of completing six reviews annually. By FY 2021, eleven reviews annually and by FY 2024, twenty-two reviews annually.</p>
<p><b>OCR</b></p>	<p><b><i>USCCR Question:</i></b> Are all offices utilizing EPA Form 4700-4 before granting federal assistance?</p>	<p>The EPA Office of Grants and Debarment (OGD) directs applicants for EPA grants to <a href="https://www.epa.gov/grants/epa-grantee-forms">https://www.epa.gov/grants/epa-grantee-forms</a>, that contains all of the forms that must accompany EPA grant applications, including EPA Form 4700-4. The EPA Grantee Forms page is updated with the current OMB approved forms. In addition, the current approved EPA Form 4700-4 is also available in Grants.gov website at <a href="http://apply07.grants.gov/apply/forms/sample/EPA4700_4_2_1-V2.1.pdf">http://apply07.grants.gov/apply/forms/sample/EPA4700_4_2_1-V2.1.pdf</a>.</p>

OCR	<p><b>USCCR Question:</b> Besides reviewing EPA Form 4700-4, what other ways do you ensure that applicants for EPA financial assistance have been already or will be complaint with EPA's nondiscrimination regulations in pre-award compliance?</p>	<p>-OCR provides outreach and technical assistance for applicants for and recipients of EPA funding so that they can understand their responsibilities related to applicable Federal nondiscrimination laws.</p> <p>-In addition, OCR is developing policy guidance for applicants and recipients in the form of a Civil Rights Compliance Toolkit, which will soon be rolled out in phases. The Toolkit will help all recipients of EPA financial assistance understand their legal obligations, such as, the necessary elements of a compliance program and the general framework for analyzing claims of discrimination.</p> <p>-In an effort to increase transparency and reach the largest audience, EPA will make the Toolkit available in multiple formats. However, in its web-based format, it will be an easy-to-use, interactive document. This corresponds with OCR's reinvigorated efforts to provide information to recipients, complainants, and external stakeholders through a revamped external website to make it easier for the public to quickly and simply obtain useful information about pertinent federal civil rights matters.</p>
OCR	<p><b>USCCR Question:</b> How many awards of financial assistance did EPA grant in FY2015 and FY2016?</p>	<p>In FY 2015, EPA awarded financial assistance to 2105 grantees. FY2016 is not complete. As of June 14, 2016, the number of grantees is 1198. These numbers reflect EPA prime recipients of financial assistance only.</p>
OCR	<p><b>USCCR Question:</b> What guidance has OCR provided to the program offices?</p>	<p>EPA Orders 4700 and 4701 establish a protocol for processing complaints of discrimination that brings program and regional offices throughout the agency into a collaborative process for coordinating and committing the analytical resources, expertise, and technical support needed to address civil rights compliance. While OCR retains the primary authority and responsibility for carrying out the civil rights program, the orders clearly emphasize a "One-EPA" commitment with the support of a network of Deputy Civil Rights Officials (DCROs) established under the Orders to support the civil rights mission and ensure its success throughout EPA.</p> <p>OCR and the DCROs meet monthly to share information and ideas relevant to civil rights engagement and enforcement, as well as more frequently on individual case matters to exchange information regarding specific programmatic, policy, regulatory, technical or scientific information relevant to those specific cases.</p> <p>See Interim Case Resolution Manual, at Chapter 1 and Appendix Section 8.2 (discussing DCROs and appending Orders 4700 and 4701) <a href="https://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf">https://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf</a>.</p>

OCR	<p><b>USCCR Question:</b> How has EPA attempted to incorporate the views of community stakeholders when settling a complaint since Angelita C?</p>	<p>One of EPA's goals is to promote appropriate involvement by complainants and recipients in the nondiscrimination complaint process. See Interim Case Resolution Manual, at Section 3.1 (Dec. 15, 2015)  <a href="https://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf">https://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf</a> ; EPA, Role of Complainants and Recipients in the Title VI Complaint and Resolution Process, at page 2 (May 4, 2015)  <a href="https://www.documentcloud.org/documents/2178959-final-roles-of-complainants-and-recipients-issue.html">https://www.documentcloud.org/documents/2178959-final-roles-of-complainants-and-recipients-issue.html</a>.</p> <p>For instance, in appropriate cases, OCR may request and consider the complainant's input on potential resolution issues and may forward the suggested resolution issues to the recipient for further discussion with OCR. OCR may undertake the gathering of such additional information, in appropriate cases, because the information could help it evaluate whether informal resolution is in the agency's best interest.</p> <p>In addition, depending on the complaint, OCR may use its enforcement discretion to seek and consider the complainant's input on potential terms of a resolution agreement between OCR and the recipient.</p> <p>Also, on December 1st, 2015, EPA Administrator McCarthy sent a Notice of Proposed Rulemaking to amend EPA's nondiscrimination regulation to the Federal Register as part of EPA's ongoing efforts to strengthen its external civil rights compliance program. In January 2016, as part of this process, EPA held listening sessions regarding the proposed modifications in five cities around the country. Listening sessions were held in Chicago, Illinois; Houston, Texas; Research Triangle Park, North Carolina; Oakland, California and two sessions in Washington, D.C. At these sessions, attendees, including community stakeholders and advocates, heard from EPA about the proposed modifications and were provided an opportunity to engage with EPA representatives about the proposed action.</p>
OCR	<p><b>USCCR Question:</b> Since issuing interim case resolution manual in December 2015, how many complaints have you processed?</p>	<p>Since issuing the Interim Case Resolution Manual on December 15, 2015, OCR has resolved 15 cases. During that same time period, OCR received 25 complaints.</p>
OCR	<p><b>USCCR Question:</b> What is OCR's budget and staffing?</p>	<p><i>OCR will follow up with the Commission about specific information relating to its budget and staffing.</i></p>

<p style="text-align: center;"><b>OCR</b></p>	<p><b><i>USCCR Question:</i></b> How many DCRO’s does EPA have? Are there DCRO’s in each EPA region? We understand this may be a collateral duty for regional employees.</p>	<p>Although OCR retains the primary authority and responsibility for carrying out the civil rights program, EPA Order 4700 clearly emphasize a “One- EPA” commitment with the support of a network of Deputy Civil Rights Officials (DCROs). DCROs support the civil rights mission and ensure its success throughout EPA. EPA currently has 23 Deputy Civil Rights Officials who represent each regional and HQ program office. DCROs are high-level career members of the Senior Executive Service.</p> <p>The DCROs are a critical resource in support of EPA’s civil rights program. The DCROs serve as civil rights champions throughout the EPA, and provide prompt programmatic, regulatory, analytical, scientific, and technical expertise and support in addition to their vast network of critical stakeholder contacts at a regional level and in specific program areas. By maximizing the use of the EPA’s preexisting, in-house expertise, EPA relies less on developing redundant competencies in OCR or using costly contracts to fill gaps in OCR’s technical and scientific expertise to effectively investigate and resolve environmental civil rights cases consistent with the agency’s commitment to sound science and civil rights law. Robust internal collaboration will ensure a constructive feedback loop between OCR and the DCRO network — where knowledge and expertise is shared, and grows along institutional pathways, and where civil rights is championed throughout the agency. The active feedback loop between OCR and the DCROs at key stages of the case investigation and resolution</p>
		<p>process furthers the promptness, efficiency, and effectiveness of case resolution.</p>

<p style="text-align: center;"><b>OCR</b></p>	<p><b>US CCR Question:</b> EPA OCR received 25 Title VI complaints in 2015. OCR stated that 15 were resolved?          Did OCR use the recently issued Case Resolution Manual to resolve those 15 Title VI complaints? Were the Title VI complaints resolved within the time-lines set forth in the Case Resolution Manual and/or the regulations? How was each Title VI complaint resolved (rejected, referred, dismissed, etc.)? Was the Case Resolution Manual instrumental in helping staff classify each Title VI complaint addressed and resolved as rejected, referred, dismissed, etc.?</p>	<p>OCR is confused by question 6 because it is not consistent with the scope of the question for which OCR previously provided its numbers. The Commission’s original request was: “Since issuing interim case resolution manual in <i>December 2015</i>, how many complaints have you processed?”          OCR responded: “Since issuing the Interim Case Resolution Manual on <i>December 15, 2015</i>, OCR has resolved 15 cases. During that same time period, OCR received 25 complaints.” In responding, it was unclear as to what the Commission meant by the term “processed.” Accordingly, OCR provided the number of cases it resolved from December 15, 2015 to June 28, 2016, as well as the number of cases that it received during that time period. The cases received are not necessarily the same as the ones that were closed.          Of the 15 resolved, 11 were rejected for lack of jurisdiction, with one of those 11 cases being referred to a state agency. Two complaints were withdrawn by the complainants. Two cases were closed with a finding of insufficient evidence to support a conclusion of noncompliance.          From June 28, 2016 through July 6, 2016, OCR resolved three additional cases beyond the 15 initially reported to the Commission. All three were rejected due to lack of jurisdiction. Since the date the Interim Case Resolution Manual (CRM) was issued, OCR has utilized the Interim Case Resolution Manual to provide procedural guidance to OCR case managers to ensure EPA’s prompt, effective, and efficient resolution of civil rights cases. To the extent that any case, or portion thereof, predates the issuance of the CRM, it was not utilized for case resolution.</p>
<p style="text-align: center;"><b>OCR</b></p>	<p><b>USCCR Question:</b> How many Title VI complaints are currently in jurisdictional review? What is the oldest complaint under jurisdictional review? What is OCR’s plan for resolving the outstanding complaints?</p>	<p>As of June 27, 2016, OCR has 32 cases in jurisdictional review. The oldest case is from July 2013. OCR plans to resolve all outstanding complaints pursuant to the procedural guidance set forth in the CRM for resolving all of its civil rights cases.</p>

OCR	<p><b><i>EPA Issue of Concern:</i></b> The Draft Report accuses OCR of “systemic neglect” in the face of tangible evidence already received from OCR to the contrary. More broadly, the Commission ignores OCR’s current record, citing previously published data (e.g., the Deloitte Report, the Center for Public Integrity, and the Commission’s own 2003 Report) as if it were new evidence supportive of new conclusions.</p>	<p>OCR has provided evidence to the Commission of the Agency’s progress, which the Draft Report ignores. OCR staff met with the Commission twice (on September 14 and November 19, 2015) to discuss the Commission’s study, provide an overview of OCR’s mission and operations, and respond to the Commission’s questions.</p> <p>In those meetings, OCR</p> <ul style="list-style-type: none"> <li>-presented highlights of recent accomplishments,</li> <li>-shared OCR’s recently-developed 5-year strategic plan for the External Compliance and Complaints Program,</li> <li>-described various accountability measures for improving the case resolution process, including <ul style="list-style-type: none"> <li>-an Interim Case Resolution Manual (issued on December 1, 2015);</li> <li>-a Notice of Proposed Rulemaking to amend OCR’s nondiscrimination regulation (issued on December 15, 2015);</li> <li>-the implementation of the EXCATS case and document management system; and</li> <li>-a planned roll-out of a Civil Rights Compliance Toolkit for recipients.</li> </ul> </li> </ul> <p>EPA also provided information to the Commission about its</p>
		<ul style="list-style-type: none"> <li>-Deputy Civil Rights Officials (DCROs) network; and its</li> <li>-Title VI Case Management Protocol,</li> <li>-which together establish a protocol for processing complaints of discrimination by incorporating a cadre of senior-level officials in EPA’s regional offices and national programs.</li> <li>-The DCRO network creates not only accountability for civil rights compliance across the agency’s program and regional offices, but establishes a collaborative process for coordinating and committing programmatic, regulatory, analytical, scientific, and technical expertise and support to the civil rights complaint resolution process.</li> </ul>
OCR	<p><b><i>EPA Issue of Concern:</i></b> The Draft Report fails to acknowledge that some of OCR’s accountability measures have only been in place for a relatively</p>	<p>This is an inadequate time period for the Commission to judge whether OCR’s efforts have been successful.</p>

	short period of time (6 months in some instances).	
OCR	<b><i>EPA Issue of Concern:</i></b> The Commission highlights OCR's staffing and resource-constraint issues.	The time and effort that OCR has spent cooperating with the Commission in this process has diverted those limited resources from the very mission the Commission wants to promote, including -the resolution of its existing complaint docket, -development of critical guidance, and -proactive compliance review efforts.
OCR	<b><i>EPA Issue of Concern:</i></b> The Commission refers to OCR's external compliance program as the "External Compliance Division" (p.15) and that it is responsible for promoting environmental justice.	OCR's external compliance program is the "External Compliance and Complaints Program." OCR's External Compliance and Complaints Program is responsible for enforcing several federal civil rights laws that together prohibit discrimination on the bases of race, color, national origin (including limited English proficiency), disability, sex and age, in programs or activities that receive financial assistance from EPA (Title VI, Title IX, Section 504, the Age Discrimination Act of 1975, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972). OCR is responsible for carrying out compliance with these federal nondiscrimination statutes through a variety of means, including complaint investigation, compliance reviews, technical assistance and outreach activities.
OCR	<b><i>EPA Issue of Concern:</i></b> The Commission states that the Office of Civil Rights is supposed to have a Director of Civil Rights and office in each of EPA's ten regions, but currently only has a Director of Civil Rights in Region 1.	OCR currently has an Acting Director, Lilian Dorka. She is located in EPA Headquarters in Washington, D.C., not Region 1. Past OCR Directors have also been located in Washington, D.C. In addition, as outlined above, EPA has DCROs within each EPA regional and program office to serve as that office's primary point of accountability for assisting OCR with promptly, effectively, and efficiently meeting the EPA's civil rights responsibilities and goals. DCROs provide executive support in furthering the EPA's commitment to creating a model civil rights program.
OCR	<b><i>EPA Issue of Concern:</i></b> The Commission reports that External Compliance operates with "nine staff members."	OCR will follow up with the Commission about specific information relating to its budget and staffing.