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Dissenting Statement of Commissioner Gail Heriot to the U.S. Commission on Civil Rights'  
Report on Environmental Justice: Examining the Environmental Protection Agency's  
Compliance and Enforcement of Title VI and Executive Order 12,898

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# **Dissenting Statement of Commissioner Gail Heriot to the U.S. Commission on Civil Rights' Report on Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898**

## ***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 73 & 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

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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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 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 77. 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

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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 a the Moapa Band of Paiute Indians concerning coal ash (see Report at 53-54) and that Waukegan, Illinois, the location of another plant is majority minority (see Report at 55). In addition, the report notes that Lisa Hallowell, 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 55. 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*, 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. 12-14.

<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 53.

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

***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>

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>

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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 1 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 2 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.

<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.

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 35 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 74.<sup>9</sup>

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>

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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 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

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 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>

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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 plants. 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.

<sup>12</sup> Report at 55 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. <http://data.sagepub.com/sagestats/document.php?id=place-84179>

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 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).

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<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.



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 5. 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

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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).

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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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 78. 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 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. I would feel better about her recommendation if there were a showing of violations of Title VI or of

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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 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.

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 6. 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 *supra* at 18. 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.

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

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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-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 chinks 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, 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 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.

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, Belews 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.

### ***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>

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<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>.

<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

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 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

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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), [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), <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.

<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

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

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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 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.



aunts. 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

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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.

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.”

Report at 74.

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 75 \_\_\_\_.

<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 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,

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

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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 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).

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.

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

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<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”).

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 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>

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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).

<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

***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,

“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 1.

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 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 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

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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 80.

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: The can make arguments based on duly enacted rules promulgated pursuant to Title VI. Indeed, this may account for my first point.

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 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

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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.

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

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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



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.17 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 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 ....”

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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.

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 6. 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 Ebusu, *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 & Ebusu, 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 & Ebusu 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 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.

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.

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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.

<sup>47</sup> Michael Vagg, Anti-Fluoride Activists Should Put Their Tinfoil Hat Theories to Rest, *The Guardian* (Sept. 18, 2013), <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>.

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 65 (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.

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

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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;

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.**

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 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

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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>;

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 52 (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 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,

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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.



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 5 \_\_\_\_. 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 the 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 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

## ***E. 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 1.

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 evidence of disproportionality or lack thereof. Most

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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/>.

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).