Addendum to Written Testimony for Committee on Natural Resources
Legislative Hearing on H.R. 2021, Environmental Justice for All Act
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Re: Questions for the Record from Representative Cohen

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1. We sometimes hear that new policies to address environmental injustice of the type you described in your opening statement are not needed because we have NEPA, the Clean Water Act, Clean Air Act, and other laws. Can you respond to that point of view?

As stated in written testimony submitted for the February 15, 2022, hearing of the House Committee on Natural Resources regarding H.R. 2021, the Environmental Justice for All Act, in the absence of comprehensive environmental justice laws, environmental justice communities currently rely on a patchwork of statutes, regulations, and executive orders insufficient to address structural inequality. Environmental protections that respond directly to the impact of environmental racism are scant[1] as "the major environmental statutes do not address the prospect that their benefits and burdens might turn out to be unequally distributed in ways that add to cumulative disadvantage[,] nor [do they] provide measures to avert disparate impact[.]"[2]

The National Environmental Policy Act (NEPA)[3] remains essential in the fight against environmental racism, requiring federal agencies to involve potentially affected parties in deliberations about projects with significant environmental effects and to consider potential environmental, economic, and public health impacts on environmental justice communities.[4] NEPA requires that all federal agencies "study and disclose" the environmental impact of any major federal action that significantly affects the environment.[5] The NEPA assessment process requires public engagement with "affected communities submitting comments during the NEPA process and seeking judicial review if the agency fails to complete the process correctly[.]"[6] NEPA additionally mandates consultation with Indigenous Peoples and Tribal Nations—a requirement

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[1] *See* Brenda Mallory & David Neal, *Practicing on Uneven Ground: Raising Environmental Justice Claims under Race Neutral Laws*, 45 Harvard Env't L. R. 295, 299 (2021).
[2] Jedediah Purdy, The Long Environmental Justice Movement, 44 Ecology L.Q. 809, 825 (2018).
[3] Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4347).
[4] THE WHITE HOUSE, MEMORANDUM FOR THE HEADS OF ALL DEPARTMENTS AND AGENCIES, RE: EXECUTIVE ORDER ON FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (Feb. 11, 1994).
[5] Wyatt G. Sassman, Community Empowerment in Decarbonization: NEPA's Role, 96 Wash. L. Rev. 1511, 1516 (2021).
[6] Id. at 1517.

also subject to judicial review.[7] Moreover, in implementing NEPA and pursuant to Executive Order 12898, *Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations* (E.O. 129898), federal agencies conduct environmental justice analyses "to determine whether a project will have a disproportionately adverse effect on minority or low income populations."[8] In essence, NEPA ensures that the input of affected communities is evaluated and considered prior to expenditures of public resources—including when no action is the best option. Though often requiring litigation to enforce,[9] NEPA operates from the principle that, when those most affected are consulted at every stage, better decisions are made.

However, while the requirements of public participation, government-to-government Tribal consultation, and analysis of potential impacts on environmental justice communities may serve a preventative function by elevating key concerns and enhancing analysis, enforcement of NEPA remains limited in scope to procedural violations. Even legal challenges seeking more searching environmental justice analysis have fallen short,[10] much less providing environmental justice communities a tool to address environmental racism head-on. As stated in a recent article co-authored by Brenda Mallory, now chair of the White House Council on Environmental Quality Chair, and David Neal, a senior attorney at the Southern Environmental Law Center

> any judicial victory under NEPA would at most require additional analyses or the consideration of alternatives, which can only indirectly lead to substantive relief. Environmental justice claims under NEPA, a race-neutral environmental law, are inherently process-oriented and are not a substitute for claims for substantive protections for communities of color that are threatened with new sources of industrial pollution or who have experienced disproportionate, cumulative pollution from existing sources.[11]

The Clean Water and Clean Air Acts do not fill the substantive gap left by NEPA. As the EPA's Office of Inspector General stated in 2020, "[t]here is no precise threshold to determine when a community is overburdened[, which] means that it is often easier for a community that has seven facilities to get an eighth facility approved than for a community that has no existing facilities to get one approved."[12] Limited as they are to establishing standards for and regulating individual pollutants, neither the Clean Air Act[13] nor the Clean Water Act[14] provide a mechanism to account for the cumulative impacts of multiple sources and uses of pollution on individual bodies and whole communities. These environmental statutes, along with the Resource Conservation and

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[7] NEPA EVALUATION OF CULTURAL RESOURCES, TRIBAL VALUES, AND ENVIRONMENTAL JUSTICE: LESSONS FROM STANDING ROCK INDIAN TRIBE, ET AL. V U.S. ARMY CORPS OF ENGINEERS AND THE DAKOTA ACCESS PIPELINE CONTROVERSY, 2017 NO. 5 RMMLF-INST 13A, 13A-12, 13A-13 (Nov. 2, 2017).
[8] Id. at 13A-25.
[9] *See e.g.* Ellen M. Gilmer, *Dakota Access Pipeline Loses Appeal, Fueling Shutdown Fight*, Bloomberg Law (Jan. 26, 2021).
[10] Mallory and Neal, supra n. 1 at 307.
[11] Id.
[12] OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2022 at 28 (Nov. 12, 2021) https://www.epa.gov/system/files/documents/2021-11/certified_epaoig_20211112-22-n-0004.pdf.
[13] Marie L. Miranda et al., *Making the Environmental Justice Grade: The Relative Burden of Air Pollution Exposure in the United States*, 8 INT. J. ENV'T. RES. AND PUBLIC HEALTH, 1755, 1755 (2011).
[14] 33 U.S.C. § 1251(a).

Recovery Act[15] and others, operate under a "cooperative federalism framework"[16] with implementation delegated to states—as with the Clean Air Act, through which federal agencies set "health-based standards, and the states determin[e] how to meet those standards[.]"[17] However, federal delegation to states has not been paired with mechanisms to "compel or even strongly encourage state agencies" to proactively address environmental justice—as evidenced by the implementation of the Safe Drinking Water Act relative to "the circumstances that resulted in the contamination of Flint's drinking water supply with lead."[18] Thus, environmental permits are routinely issued that allow regulated entities to increase levels of pollution without evaluating or accommodating adverse, cumulative, or disparate impacts on the surrounding community. Without federal statutory mandates designed to address these inequities, residents of environmental justice communities cannot even rely on citizen suit provisions provided for in many environmental statutes. The lack of air and water quality monitoring to understand baseline pollution levels in environmental justice communities only compounds the problem.[19]

The absence of explicit, substantive protections does not mean that federal agencies cannot or should not take affirmative steps to address the inequitable distribution of burdens and benefits that stem from environmental racism. In fact, since 1994, E.O. 12898 has mandated that federal agencies "identif[y] and address[...] disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...to the greatest extent practicable and permitted by law." Dr. Beverly Wright of the Deep South Center for Environmental Justice has described EO 12898 as "groundbreaking" yet "limited"[20]—and the executive order remains underenforced.[21] Presidential administrations have made commitments to tackling environmental justice enforcement to varying degrees,[22] with actions taken pursuant to executive orders[23] issued at the start of the Biden Administration a notable and holistic example.[24] In truth, however, even when administrations lean into every opportunity to address environmental racism, discretionary authority is time-limited.

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[15] 42 U.S.C. §6901 et seq.
[16] Rachael E. Salcido, Retooling Environmental Justice, 39 UCLA J. Envtl. L. & Pol'y 1, 23–24 (2021).
[17] Id.
[18] David Konisky, "Flint, Federalism, and Environmental Justice in the United States," MIT Press Blog (Feb. 16, 2016).
[19] U.S. GAO, AIR POLLUTION: OPPORTUNITIES TO BETTER SUSTAIN AND MODERNIZE THE NATIONAL AIR QUALITY MONITORING SYSTEM (Nov. 12, 2020), https://www.gao.gov/products/gao-21-38.
[20] Adam Mahoney, What Biden Could Learn From Bill Clinton's Unfinished Work on Environmental Justice, Grist (Feb 24, 2021), https://grist.org/politics/joe-biden-environmental-justice-executive-order-bill-clinton/.
[21] *See e.g.* William C.C. Kemp-Neal J.D., Environmental Racism: Using Environmental Planning to Lift People Out of Poverty, and Re-Shape the Effects of Climate Change & Pollution in Communities of Color, 32 Fordham Envtl. L. Rev. 295, 320 (2021)(citing Sandra G. O'Neil, Superfund: Evaluating the Impact of Executive Order 12898, 115.7 ENVTL. HEALTH PERSPECTIVES 1087, 1089 (July 2007), https://www.ncbi.nlm.nih.gov/pme/artieles/PMC1913562).
[22] *See e.g.* Plan EJ 2014: Legal Tools, U.S. EPA (Sep. 2011), https://www.epa.gov/sites/default/files/2015-02/documents/ej-legal-tools.pdf; Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, EPA (June 2016), https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.
[23] Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021); Exec. Order No. 13990, 86 FR 7037 (Jan. 20, 2021); Exec. Order No. 14008, 86 FR 7619 (Jan. 20, 2021).
[24] *See generally* Federal Environmental Justice Tracker, Harvard Environmental & Energy Law Program (n.d.) (designed to provide up-to-date information on the Biden administration's environmental justice commitments, and progress made on those commitment).

Environmental justice protections remain easy to roll back[25] and even easier to ignore.[26] Addressing environmental racism requires legislation to convey to federal agencies, regulated industries, federal funding recipients, and affected communities a consistent understanding of expectations, obligations, and mechanisms for accountability and an unwavering national commitment to environmental justice.

2. Why is it so important to make sure that the disparate environmental impacts experienced by communities of color are addressed through the amendments to the Civil Rights Act proposed by the Environmental Justice for All Act?

As stated in written testimony submitted for the February 15, 2022, hearing of the House Committee on Natural Resources regarding H.R. 2021, Environmental Justice for All Act, environmental justice communities have not been able to depend on civil rights enforcement by federal agencies to fill the gap in environmental law.[27]

Title VI of the Civil Rights Act of 1964[28] prohibits recipients of federal funding from discrimination based on race, color, or national origin, either through intentional discrimination or through actions that, while neutral on their face, have a disproportionate and adverse impact. Title VI applies broadly to recipients of funding from the family of environmental, agricultural, natural resource, land management, energy, and disaster recovery agencies. As such, Title VI should be one of the most salient tools to remedy the harms created by racial segregation and prevent future injustice as we respond to the impacts of the climate crisis. However, the United States Supreme Court's decision in *Alexander v. Sandoval*[29] has barred any non-federal parties from bringing disparate impact lawsuits and placed enforcement against disparate impact discrimination solely in the hands of federal agencies.[30]

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[25] Amy Patronella & Saharra Griffin, *Communities of Color Bear the Brunt of Trump's Anti-Environmental Agenda*, CTR. FOR AM. PROGRESS (Feb. 27, 2020), https://www.amerieanprogress.org/issues/green/news/2020/02/27/480820/eommunities-color-bear-brunt-trumps-anti-environmental-agenda/.

[26] *See e.g.,* JOSÉ TOSCANO BRAVO, AMY LAURA CAHN, JEANNIE ECONOMOS, AND RACHEL STEVENS, FEDERAL DERELICTION OF DUTY: ENVIRONMENTAL RACISM UNDER COVID-19 (Sept. 2021), https://www.vermontlaw.edu/sites/default/files/2021-08/Federal-Dereliction-of-Duty-Full-Report.pdf.

[27] *See, e.g.,* DELOITTE CONSULTING LLP, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS (Order #EP10H002058) 1–2 (noting EPA's failure to "adequately adjudicate[] Title VI complaints . . . . has exposed EPA's Civil Rights programs to significant consequences which have damaged its reputation internally and externally."); Kristen Lombardi et al., Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why, Ctr. for Pub. Integrity, (2015) (noting EPA "the civil-rights office rarely closes investigations with formal sanctions or remedies," so EPA's Office of Civil Rights "appeared more ceremonial than meaningful, with communities left in the lurch."); U.S. Comm'n on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898, at 2 (2016) ("U.S. Comm'n on Civil Rights Environmental Justice Report") ("The [United States Commission on Civil Rights], academics, environmental justice organizations, and news outlets have extensively criticized EPA's management and handling of its Title VI external compliance program."); see also Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Pa. J.L. & Soc. Change 281, 295–300 (2019).

[28] 42 U.S.C. § 2000d (1964) et seq.

[29] *Alexander v. Sandova*l, 532 U.S. 275, 292 (2001).

[30] *Id*. at 293.

Title VI mandates that every federal agency ensure compliance by its funding recipients and investigate complaints of discrimination, authorizing agencies to effectuate compliance by terminating or refusing grant funding or "any other means authorized by law." In the absence of a private right of action, severe and longstanding deficiencies in civil rights enforcement and oversight have enabled funding recipients to permit the siting of waste and fossil fuel facilities and infrastructure that exacerbate racially disproportionate pollution burdens, approve transportation projects that split communities of color, and deny equitable participation of people with limited English proficiency in siting and permitting decisions.

Federal agency response to and resolution of complaints have historically been subject to delay, requiring litigation to enforce agency deadlines.[31] Agencies, funding recipients, and the communities they are mandated to protect from discrimination lack comprehensive guidance on civil rights compliance.[32] Complainants with firsthand knowledge have been systematically sidelined from the investigation and resolution of civil rights complaints.[33] Agencies that refuse to assert jurisdiction over complaints or make findings of discrimination, much less wield their power to withhold or delay funding, send a message to funding recipients that compliance is optional.

A 2019 comment letter to the U.S. Department of Housing and Urban Development (HUD) submitted by Earthjustice (2019 Earthjustice letter) on behalf of residents of Flint, Michigan, and Tallassee and Uniontown, Alabama, among others, highlights mechanisms by which the U.S. Environmental Protection Agency (EPA) has circumvented Title VI enforcement.[34] The 2019 Earthjustice letter called attention to barriers to disparate impact claims brought by communities under Title VI to reveal the danger of an analogous approach promulgated under the Fair Housing Act by HUD under the Trump Administration.[35] The resultant lack of oversight over funding recipients, paired with a systematic marginalization of complainants from the investigation and resolution of complaints, has tangible impacts on environmental justice communities. As stated in the 2019 Earthjustice letter:

> [T]he U.S. government and experts have recognized that environmental discrimination is a significant problem in this country and has been for decades.[36] In recognition of that

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[31] Court Declares that EPA Failed To Protect Civil Rights, Yale Law School (April 3, 2018) https://law.yale.edu/yls-today/news/court-declares-epa-failed-protect-civil-rights.

[32] *See generally* Comment Letter: Environmental Justice and Civil Rights with Appendices to Administrator Regan (w/ Appendices) (Title VI Alliance, November 2021) https://www.prrac.org/letter-to-administrator-regan-et-al-re-enviro-justice-and-civil-rights-with-appendices-11-24-21/.

[33] *Id.*at 15-16.

[34] *See* Attachment A, Letter from Earthjustice et al. to Office of General Counsel, U.S. Department of Housing and Urban Development, Re Docket No. FR-6251-P-01: Notice of Proposed Rulemaking: Reinstatement of HUD's Discriminatory Effects Standard (Aug. 21, 2021).

[35] HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854 (proposed Aug.19, 2019) (to be codified at 24 C.F.R. pt. 100).

[36] *See generally* Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous WasteSites (1987); U.S. Gov't Accounting Office, Siting of Hazardous Waste Landfills and Their Correlation with Race and Economic Status of Surrounding Communities (GAO/RCED-83-168), 3–4 (1983), http://archive.gao.gov/d48t13/121648.pdf; Mikati et al., *supra* note 22, at 480–85 (concluding that at local, state andnational level, non-whites are burdened by environmental harms disproportionately to Whites). For an

> problem, EPA enacted regulations in 1973 codifying that discrimination can be proven through a disparate impact analysis. Those regulations provide that a recipient of federal funds may not directly or indirectly use criteria or methods of administering its program, or choose a site or location of a facility, that has "the effect" of excluding individuals, denying them benefits, or otherwise subjecting them to discrimination because of race, color, national origin, or sex.[37]
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> Yet, EPA has woefully failed to hold recipients of federal funds accountable for discriminatory acts and policies, which has subjected the agency to repeated criticism from multiple sources.[38] For example, EPA's Office of Civil Rights, now called the External Civil Rights Compliance Office, has rejected or dismissed a majority of the hundreds of Title VI complaints it has received.[39] A 2015 Center for Public Integrity investigative study showed that even where there was a reason to believe a recipient of federal funding had a discriminatory policy, the Office of Civil Rights failed to conduct an investigation.[40]
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> [O]ver time, EPA has informally applied needlessly heightened standards . . . when conducting a disparate impact analysis. As a result, . . . EPA has repeatedly concluded that no discrimination—or "insufficient evidence of discrimination"—exists under a disparate impact analysis in situations where a sensical and unencumbered application of the disparate impact standard would have led to the opposite conclusion. Indeed, in the 46 years since EPA's Title VI anti-discrimination regulations became effective, EPA has only once concluded that a prima facie case of alleged discrimination under the disparate impact framework was established.[41]

The 2019 Earthjustice letter details EPA's repeated failures to enforce the Title VI obligations of the Michigan Department of Environmental Quality [MDEQ], despite long-standing harmful conditions in Flint, Michigan:

> As the recent lead-in-water crisis has brought into stark relief, the community of Flint, Michigan has long suffered from environmental and civil rights injustices. Flint is a majority African American community with a poverty rate nearly three times the national average, ranking near last in various public health metrics compared to other areas of

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annotated bibliography of articles documenting environmental discrimination, see Luke W. Cole & Sheila R. Foster, *From TheGround Up: Environmental Racism and the Rise of the Environmental Justice Movement*, 167–83 (2001).

[37] *See* 40 C.F.R. § 7.35(b), (c).

[38] See supra n. 27.

[39] *See* U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 27, at 40; *see also* Yue Qiu & Talia Buford, *Decades of Inaction*, Ctr. for Pub. Integrity (Aug. 3, 2015), https://publicintegrity.org/environment/decades-of-inaction/.

[40] U.S. Comm'n on Civil Rights Environmental Justice Report, *supra* note 27, at 40 (citing Kristen Lombardi et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Ctr for Pub. Integrity (2015), http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why.

[41] *See* Marianne Engelman Lado, *supra* note 27, at 303–05; Agreement between the California Department of Pesticide and Regulation & the U.S. EPA, Aug. 24, 2011, https://www.epa.gov/sites/production/files/2016-04/documents/title6-settlement-agreement-signed.pdf.

Michigan.[42] Decades of redlining, racially restrictive covenants, and harassment have led to the racially segregated Flint of today—the city has been labeled the most segregated non-Southern city in the country.[43]

For decades, community activists have fought back against the disproportionate burdens that state permitting agencies have placed on the people of Flint.[44] In 1992, the St. Francis Prayer Center submitted a complaint to EPA, alleging that [MDEQ] violated the civil rights of the people of Flint in the permitting of a wood-burning incinerator in their community.[45] Just four years later, when MDEQ permitted another polluting facility in Flint—the *Select Steel* steel mill—the Prayer Center submitted another civil rights complaint to EPA contesting the disproportionate burdens faced by Flint residents.[46] While it took EPA just a few months to issue the findings of its investigation into the Select Steel complaint, EPA did not issue findings on the 1992 complaint until 2017—a quarter-century later. In both cases, EPA discounted allegations of disparate impacts under arbitrary standards. . . .[47]

[In *Select Steel*,] EPA recognized that the facility would emit pollutants such as lead and volatile organic compounds into the air, but nevertheless closed the complaint on the basis that the alleged harms were not sufficiently "adverse" because modeling showed that the airshed would remain in attainment with National Ambient Air Quality Standards.[48] Thus, EPA concluded, it need not review whether the effect of the siting was disparate because, in EPA's eyes, the effect was insignificant—even though there is no safe level of lead exposure, and volatile organic compounds are also harmful. In essence, EPA determined that harm from pollution that was deemed "acceptable" under environmental laws categorically could not result in a violation of civil rights law.[49]

Indeed, EPA's injection of undefined "significance" into a disparate impact assessment

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[42] Flint Water Advisory Task Force, Final Report at 15 (Mar. 2016), https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf ("Flint Water Advisory Task Force Final Report").

[43] Peter J. Hammer, The Flint Water Crisis: History, Housing and Spatial-Structural Racism, Testimony BeforeMichigan Civil Rights Commission Hearing on Flint Water Crisis (July 14, 2016), https://www.michigan.gov/documents/mdcr/Hammer_PPt_for_MCRC_Flint_07-14-16_552224_7.pdf.

[44] *See* Emily L. Dawson, *Lessons Learned from Flint, Michigan: Managing Multiple Source Pollution in UrbanCommunities*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 367, 367 (2001).

[45] Letter from Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center, to Mr. Valdas Adamkus, Regional Administrator, Region 5, U.S. EPA (Dec. 15, 1992) enclosing letters dated Dec. 15, 1992, toMr. Herb Tate, Environmental Equity, US EPA and Mr. William Rosenberg, U.S. EPA.

[46] Letter from Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center, to Ms. Diane E. Goode, Director, Office of Civil Rights, U.S. EPA (June 9, 1998).

[47] Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA, to Heidi Grether, Dir., Michigan Department of Environmental Quality (Jan. 19, 2017), https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf; EPA, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (1998) ("Select Steel Investigative Report")

[48] *See* Select Steel Investigative Report, at 16.

[49] *Id.* at 27.

> can lead and has led to disastrous consequences. EPA's *Select Steel* investigation found that in Genesee County, the county where Flint is located, 8% of children already had elevated blood lead levels (above the then-CDC level of 10microg/dL) and that African-American children there were four times more likely to have very high blood lead levels (over 15 microg/dL) than white children,[50] making the addition of a known lead-emitting facility a source of dangerous impacts disparately suffered by the community. Yet EPA shrugged off the facility's impact on blood lead levels as "de minimis."[51] So too did EPA disregard the lead emissions from the Genesee power plant, about which the community had complained starting in 1992. Decades later, the Flint Water Advisory Task Force found that MDEQ bore "primary responsibility" for the Flint Water Crisis that began in 2014 due, in part, to its "cultural shortcomings that prevent it from adequately serving and protecting the public health of Michigan residents."[52] Had EPA scrutinized—and potentially rectified—these "cultural shortcomings" of MDEQ in the 1990s, instead of letting them fester for decades, the Flint water crisis may have been abated or avoided.
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> [With respect to the 1992 permit hearings, EPA eventually found] that MDEQ had engaged in intentional discrimination in its handling of the 1992 permit hearings. But by the time EPA made this finding in 2017, it was too little too late, and EPA had long lost the opportunity to address the policies and practices of MDEQ that would eventually help cause the disastrous Flint water crisis.[53]

EPA's 2017 determination remains the agency's only formal finding of discrimination to date. With this finding, EPA ordered MDEQ to (1) improve its public participation program to reduce risk of future disparate treatment, (2) improve its foundational non-discrimination program, and (3) establish an appropriate process to address environmental complaints.[54] Two additional Title VI complaints regarding public participation for permitting in Genesee County resulted in EPA entering into resolution agreements with both MDEQ—now the Michigan Department of Environment, Great Lakes, and Energy ("EGLE")—and the county to ensure non-discriminatory public participation.[55]

As evidenced in the context of a 2021 draft air permit for a hot mixed asphalt plant in Flint, Michigan, EGLE's permitting processes still lack adequate public participation processes and remain deficient in the analysis of the permitting decision's adverse impact on classes protected by Title VI.[56] Despite having the authority to undertake a cumulative risk assessment, and

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[50] Select Steel Investigative Report, at 32.
[51] *Id.* at 31.
[52] Flint Water Advisory Task Force Final Report, supra note 42, at 28.
[53] *See* Marianne Engelman Lado, supra n. 27 at 292.
[54] Talia Buford, *Rare Discrimination Finding by EPA Civil Rights Office*, THE CENTER FOR PUBLIC INTEGRITY (Jan. 25, 2017), https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/.
[55] EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE., U.S. ENVTL. PROT. AGENCY, IN REPLY TO: COMPLAINT NO. 17RD-16-R5 (2019), https://www.epa.gov/sites/default/files/2019-12/documents/resolution_letter_and_agreement_for_complaint_17rd-16-r5.pdf.
[56] Mich. Dep't of Env't, Great Lakes, and Energy, *Proposed Project Summary: AJAX Materials Corporation - Flint, Genesee County, Michigan*, 1 (July 2021). http://www.deq.state.mi.us/aps/downloads/permits/PubNotice/APP-2021-0019/APP-2021-0019PPS.pdf

despite calls by the public and EPA Region 5 for such a study, EGLE has to date refused to do so.[57] This is not simply EGLE's failing; it is symptomatic of EPA's civil rights enforcement program.[58]

The Earthjustice letter also profiles the impact of an "arbitrarily imposed[,] onerous[,] and ill-defined 'causality" requirement'"[59] to disparate impact claims that has led the EPA to disregard legitimate allegations of the disproportionate impacts born by predominately Black communities in Uniontown and Tallassee, Alabama.

The 2019 Earthjustice letter illustrates the situation in Uniontown, Alabama, as follows:

> Uniontown, Alabama, is a city of fewer than 3,000, where 88% of its residents are African American, and residents have a median household income of $13,800.[60] Once thriving with local businesses, it is now known for its environmental contamination. A cheese plant, a catfish mill, and a sewage lagoon are all located nearby, but those sites are dwarfed by Arrowhead Landfill, a municipal solid waste landfill. Arrowhead, which sits on what was once a plantation, is authorized to receive up to 15,000 tons of commercial and industrial waste per day from 33 states. After the largest coal ash spill to date occurred in majority white Roane County, Tennessee in 2008, the coal ash was dredged up and shipped more than 300 miles and dumped at the Arrowhead Landfill. As a result, today the landfill site holds 4 million tons of this coal ash, whose contents contain toxins such as mercury and arsenic that are known to cause cancer, neurological damage, and other detrimental health effects. . . .[61]
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> In 2013, dozens of residents of Uniontown, Alabama filed a complaint with EPA, alleging that the renewal of the permit [by the Alabama Department of Environmental Management (ADEM)] for the Arrowhead Landfill and the permit modification, allowing an increase of its size by two-thirds, adversely and disparately impacted the surrounding, primarily African American, community. Even before the expansion, the permit authorized 15,000 tons of waste per day, twice the amount permitted at the next largest landfill in Alabama at the time.[62] And the landfill had already received and held 4 million tons of coal ash. The Complaint alleged impacts related to odors, increased population of flies and birds, increased noise from heavy machinery, increased emission of fugitive dust, illnesses,

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[57] U.S. ENVTL. PROT. AGENCY, DETAILED PERMIT COMMENTS AJAX MATERIALS CORPORATION PTI APP-2021-0019 (2021); Ron Fonger, EPA Recommends Further Study Before Genesee Township Asphalt Plant Gets Permit, Michigan Live (Sept. 16, 2021), https://www.mlive.com/news/flint/2021/09/epa-recommends-further-study-before-genesee-township-asphalt-plant-gets-permit.html.

[58] OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, Report NO. 20-E-0333, IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION (2020).

[59] 2019 Earthjustice Letter at 11.

[60] American Community Survey 5-year estimates from Census Reporter Profile Page for Uniontown, AL, U.S.Census Bureau (2017), https://censusreporter.org/profiles/16000US0177904-uniontown-al/.

[61] *See, e.g.,* Environmental Integrity Project, Coal's Poisonous Legacy: Groundwater Contaminated by Coal Ash Across the U.S., 9–11, (Mar. 4, 2019), https://earthjustice.org/sites/default/files/files/National%20Coal%20Ash%20Report%203.4.19.pdf; Kristen Lombardi, *Thirty Miles from Selma, a Different Kind of Civil Rights Struggle*, Ctr. for Public Integrity (Aug. 5, 2015), https://publicintegrity.org/environment/thirty-miles-from-selma-a-different-kind-of-civil-rights-struggle/.

[62] Uniontown Complaint, at 7–8.

contaminated water, believed degradation of a community cemetery, and decline of property values, about which many community members had previously complained.[63]

Residents had submitted a study showing health impacts, and the record contained evidence that there had been an increase in flies and birds. Even without such evidence, straightforward logic compels a conclusion that renewing (the equivalent of granting) a permit for an enormous landfill, containing toxic coal ash and other industrial waste, causes adverse harms to the surrounding community. And once a finding of disproportionate adverse impact is made, the question shifts to the justification for the action and whether there is a less discriminatory alternative for achieving the objective.

Yet EPA used the cloak of "causality" in 2018 to find no prima facie case of discrimination. EPA ignored record evidence by residents that there had been an increase in pests and a decrease in quality of life—which should have been sufficient evidence of adverse harm on its own. And even though ADEM allowed Arrowhead to use "alternates" for daily cover of the landfill, such as coal ash, in violation of state law requiring soil cover, EPA concluded it was "unable to identify any functions" related to that decision that could result in the alleged increased populations of flies and birds. . . .[64]

At bottom, EPA indicated that the absence of "scientific proof of a direct link" compelled it to conclude that there was no evidence that [ADEM's] permitting decisions caused any impact to the community. But the action of ADEM—approving the renewal and modification of the permit—clearly caused the adverse impacts; absent the permit, the facility would not be operating, or absent the permit terms ADEM had set, the facility would be operating with different conditions and requirements.

EPA's determinations that causation could not be established with respect to other parts of the Uniontown complaint were similarly far-fetched. The complainants alleged that they believed the permits interfered with the ability of community members to visit the cemetery because of loud nearby equipment and an acrid odor.[65] EPA nonsensically determined that causation could not be established because the cemetery was not within the operational boundaries of the landfill. But sound and odor do not stop at operational boundaries. EPA further stated that it decided that "it would not investigate substantively the alleged harm of diminution of property values" and, as a result, concluded that there "is insufficient evidence in the record to suggest that ADEM's permitting actions themselves resulted in a sufficiently significant harm with regard to property values."[66] Of course, if an agency not only fails to recognize that the decision to permit the facility directly causes adverse impacts, but also refuses to investigate or consider evidence of an obvious harm, it can and will find no causation.

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[63] Uniontown Complaint; Uniontown Closure Letter.
[64] Letter from Lilian S. Dorka, Dir., U.S. EPA, External Civil Rights Compliance Office, Office of Gen. Counsel, to Marianne Engelman Lado, Yale Law Sch., Envtl. Justice Clinic 15 (Mar. 1, 2018).
[65] *Id.* at 16.
[66] *Id.* at 18.

As outlined in the 2019 Earthjustice letter, EPA employed a similar approach in response to civil rights complaints filed by residents of Tallassee, Alabama:

> Located just north of the civil rights landmarks of Tuskegee University, the majority African-American community members of Ashurst Bar/Smith outside of Tallassee, Alabama have lived off their land for generations, some owning property in the area since the end of the Civil War. This unbroken lineage of Black land ownership makes Ashurst Bar/Smith unusual in the State, since many Black communities could not own land in Alabama until the passage of [Title VI].[67] But the ever-expanding Stone's Throw Landfill immediately next to the community continues to displace community members and threatens to turn this historical community into yet another unfortunate example of black land loss.[68] The Ashurst Bar/Smith Community Organization ("ABSCO") has fought against the expansion and negative impacts from the landfill at the local, county, and federal level. They submitted a civil rights complaint to EPA in 2003 concerning a permit modification that allowed further expansion of the landfill, but when EPA finally issued findings on its investigation in 2017, it disregarded the community's disparate impact allegations . . . .[69]
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> In its closure letter, as it did with Uniontown, EPA systematically discounted the various harms alleged in the complaint under the assertion that there was "insufficient evidence in the record to show a causal link" between the permit modification and the alleged harm.[70] For example, the 2003 ABSCO complaint raised the "alternate" daily cover issue also raised in the Uniontown complaint: ABSCO alleged that ADEM's grant of a waiver from the statutory requirement to use daily soil cover caused harm to the community by increasing exposure to rodents, wild dogs, and other pests, and the record contained evidence that community members had observed increases in these pests since the 2003 modification.[71] EPA acknowledged that it was "possible" that the permit modification increased these pests, but, despite the record evidence and without further investigation, inexplicably concluded that it "could not establish a causal link between the 2003 permit modification and any changes in animal population numbers."[72] Yet after ABSCO filed a new Title VI complaint regarding ADEM's renewal of the landfill's permit in 2017, EPA did a more searching review and found that the evidence did "establish a causal

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[67] *See, e.g.*, Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. Black Studies, 646, 646–47 (Oct. 2013).
[68] *See* Ctr. for Social Inclusion, *Regaining Ground: Cultivating Community Assets & Preserving Black Land* at 6(2011), http://www.centerforsocialinclusion.org/wp-content/uploads/2014/07/Regaining-Ground-Cultivating-Community-Assets-and-Preserving-Black-Land.pdf.
[69] Letter, Tallassee Waste Disposal Center Expansion/Impact on the Ashurst Bar/Smith Community (Sept. 3, 2003) (sender and recipient redacted) ("Tallassee Complaint") (attached to this letter as Attachment 3); Letter to Karen D. Higginbotham, Dir., U.S. EPA Office of Civil Rights (Dec. 8, 2003) (sender redacted); Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA Office of Gen. Counsel, to Marianne Engelman Lado et al., Visiting Clinical Professor of Law, Yale Law Sch. at 2–3 (Apr. 28, 2017), https://www.epa.gov/sites/production/files/2017-05/documents/06r-03-r4_closure_recipient_redacted.pdf ("2017 Tallassee Closure Letter").
[70] Letter from Lilian S. Dorka, Dir. External Civil Rights Compliance Office, Office of Gen. Counsel, U.S. EPA, to Marianne Engelman Lado et al., Visiting Clinical Professor of Law, Yale Law Sch. (Apr. 28, 2017).
[71] 2017 Tallassee Closure Letter, *supra* note 35, at 11.
[72] *Id.* at 11–12.

> connection" between the alleged harms stemming from the landfill's failure to use proper daily soil cover, but EPA steadfastly refused to make a finding of disparate impact. . . .[73]

Residents of Uniontown and the Ashurst Bar/Smith community outside of Tallassee continue to contend with the impacts of the Arrowhead and Stone's Throw landfills, in combination with other challenges. A recent article co-authored by myself, Jan-Michael Archer, and Benjamin Eaton describes current conditions in Uniontown.

> Residents worry daily about exposures to carcinogenic air pollutants such as particulate matter, nitrogen dioxide and lead, plus ammonia, hydrogen sulfide, volatile organic compounds and other hazardous air pollutants. They know that if the air smells bad, likely it is also bad for them to breathe. The water is bad, too. Studies have found lead and arsenic in Uniontown's drinking water. It carries a foul aroma and causes rashes on peoples' skin. Improperly treated sewage . . . enters nearby creeks from an outdated wastewater treatment system, as it has for decades. Community members endure a litany of health issues, and health care is hard to find from the few rural clinics available.[74]

ABSCO President Ron Smith details current conditions for communities adjacent to the Stone's Throw landfill in Tallassee. Like Uniontown residents, residents of the Ashurst Bar-Smith community continue to experience cumulative impacts on health and welfare and a lack of enforcement by ADEM.

> There is constant industrial traffic, day and night, and the school bus driver has for years had to take extra precautions for students entering the bus because the drivers ignore the bus stop signs. Nuisance animal populations are thriving and are a concern for safety, especially packs of wild dogs and coyotes, while vultures encircle resident homes and yards. Residents near the landfill complain of foul-smelling and ill-colored tap water and water from the tap is contaminated to the point that in one case it failed the test for use in home dialysis. Surface and ground waters have been contaminated and are currently impacting and threatening the health and welfare of 50,000 citizens in three counties. The air is unbearably foul, especially during adverse atmospheric conditions, causing respiratory problems and forcing families who can afford it to move off their land. Those who remain cannot enjoy their property. Overall, there is no monitoring of the community's health or provisions for health care. Yet, when the community opposed the siting and/or expansion of the landfill in public hearings, responses from EPA funding recipient ADEM are sarcastically degrading.[75]

The conditions described flow from a systematic failure to enforce Title VI. The impacts of the heightened standards imposed by EPA are exacerbated by the lack of rights of complainants

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[73] Letter from Lilian S. Dorka, Dir., External Civil Rights Compliance Office, U.S. EPA Office of Gen. Counsel, to Marianne Engelman Lado et al., (Dec. 10, 2018) at 20. In its second analysis, EPA found that ADEM's failure to adequately enforce daily cover requirements of the permit did cause harm, but nevertheless failed to find disproportionality based on a faulty analysis of only 3 of the state's 32 municipal solid waste landfills. *Id.*

[74] Amy Laura Cahn, Jan-Michael Archer, and Benjamin Eaton, *Alabama Landfill Fight Tests EPA's Enviro Justice Promises*, Law 360 (Feb. 15, 2020) https://www.law360.com/articles/1465095/alabama-landfill-fight-tests-epa-s-enviro-justice-promises.

[75] Email from Ron Smith to Amy Laura Cahn (Feb. 22, 2022).

from affected communities who are at best consulted and at worst sidelined to the point that investigations, resolution agreements, and remedies ignore community needs and lived realities—or there is no remedy at all. Sections 4, 5, and 6 of H.R. 2021 would restore the right of individuals to legally challenge discrimination—including environmental discrimination—prohibited under Title VI. This would restore to communities—and the courts—the power to ensure that discrimination does not occur without consequence.