EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

By email and in-person delivery

May 11, 2016

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DOCR (S-30)
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Re: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

Dear Ms. Proll, Ms. Goodwill, Ms. Neal, and Ms. Golightly-Howell:

The Brandywine | TB, Southern Region Neighborhood Coalition ("Brandywine TB Coalition") and Patuxent Riverkeeper (collectively, "Complainants") submit this complaint against the Maryland Public Service Commission ("PSC"), the Maryland Department of the Environment ("MDE"), and the Maryland Department of Natural Resources ("MDNR") for issuing a Certificate of Public Convenience and Necessity ("CPCN") to Mattawoman Energy, LLC on November 13, 2015, for the construction of a nominally-rated 990 megawatt natural gas-fired power plant in Brandywine, Maryland. Authorizing construction of the Mattawoman gas plant in this predominantly black community already overburdened by local pollution sources will have an unjustified disproportionate adverse impact on the basis of race in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and the implementing regulations of the United States Department of Transportation ("DOT"), 49 C.F.R. Part 21, and the United States Environmental Protection Agency's ("EPA"), 40 C.F.R. Part 7.

Title VI prohibits entities receiving federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin. 42 U.S.C. § 2000d. As entities receiving financial assistance from DOT or EPA, the PSC, MDE, and MDNR are subject to Title VI's prohibition against discrimination. The issuance of the

CPCN violates that prohibition by disproportionately subjecting the black residents of Brandywine to air pollution and other negative impacts based on their race.

Complainants request that the DOT Departmental Office of Civil Rights and the EPA Office of Civil Rights accept this complaint and investigate whether the PSC, MDE, and MDNR violated Title VI of the Civil Rights Act and its implementing regulations.[1] For reasons of economy, we request that these investigations be consolidated, and that EPA and DOT collaborate and coordinate on remedial approaches. Because the coordinating entity at the state level—the PSC—is funded by DOT, we request that DOT take the lead role at the federal level. We also request that the Civil Rights Division of the Department of Justice play an active role in coordinating these federal investigative and enforcement actions, consistent with the mission of the Federal Coordination & Compliance Section.

Complainants request that the state agencies be brought into compliance by requiring them to withdraw issuance of the CPCN and withhold issuance of a new CPCN unless and until they: a) conduct a full and fair analysis of disparate impacts from the proposed facility (including air quality monitoring and modeling, a health assessment, a cooperative community needs assessment, and a comprehensive traffic assessment in Brandywine); b) conduct a full and fair consideration of alternatives that would avoid such disparate impacts; and c) require that any decision to issue a new or revised CPCN is conditioned on Mattawoman taking steps to ameliorate the negative impacts of the Mattawoman project upon Brandywine's predominantly black community, including regularly conducting and reporting on air quality monitoring for all pollutants of concern and taking measures to ameliorate traffic congestion.[2] If the PSC, MDE, and MDNR do not come into compliance voluntarily, Complainants request that DOT and EPA suspend or terminate the federal financial assistance that those agencies receive.[3]

I. PARTIES

A. Complainants

[1] If either DOT or EPA rejects this complaint, Complainants request that the other agency conduct an investigation alone or jointly with other federal agencies, as appropriate. *See* 28 C.F.R. § 42.408(b) ("Where a federal agency lacks jurisdiction over a complaint, the agency shall, wherever possible, refer the complaint to another federal agency . . . .").

[2] At a minimum, the PSC, MDE, and MDNR should condition the extant CPCN on satisfaction of these requirements.

[3] *See, e.g.*, Letter from Peter M. Rogoff, Adm'r, Fed. Transit Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n, & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010), available at http://www.bart.gov/sites/default/files/docs/BART_MTC_Letter_On_OAC.pdf (notifying state agencies that they were "in danger of losing federal funding" from the Federal Transit Administration because of Title VI noncompliance).

Brandywine TB Coalition is a community-based membership organization dedicated to encouraging smart and sustainable development in Brandywine and southern Prince George's County, Maryland. Its goals include protecting the environment, improving public health, creating jobs, expanding economic opportunity, and improving overall quality of life. In addition to its organizational work to ensure that Brandywine receives its fair share of the benefits of development without shouldering an unfair share of its costs, Brandywine TB Coalition has many members in Brandywine and its immediate environs who will be adversely affected by the approved power plant. The board and membership of the Brandywine TB Coalition reflect the racial demographics of the local community.

Patuxent Riverkeeper is a nonprofit organization dedicated to the restoration and preservation of the Patuxent River and its watershed. Its mission goes beyond water quality to encompass the environmental health of local communities, particularly those suffering from acute environmental injustice such as Brandywine. Patuxent Riverkeeper has been a robust advocate in opposition to environmentally unsustainable development. It has joined in lawsuits challenging air and water pollution from the nearby Chalk Point generating station, and opposed pollution trading schemes that would cause certain communities to bear a disproportionate pollution burden. Several members of Patuxent Riverkeeper live in Brandywine and will be adversely affected by the Mattawoman gas plant.

B. Recipients

The PSC is an "independent unit in the Executive Branch" of the State of Maryland. MD Code, Public Utilities, § 2-101. Under Maryland law, the PSC is responsible for the issuance of CPCNs, which are prerequisite to the construction of power generating stations in Maryland. MD Code, Public Utilities, §§ 7-207, 208. Other state, federal, and private entities participate in the CPCN process, and the PSC plays a coordinating role. The PSC is required to consider "the public safety, the economy of [Maryland], the conservation of natural resources, and the preservation of environmental quality" as it carries out its duty to supervise and regulate utilities. MD Code, Public Utilities, § 2-113. As described below, the PSC is a recipient of federal funds.

MDE is an agency of the State of Maryland, charged with protecting Maryland's environment. MD Code, Environment § 1-401. MDE's responsibilities include the administration of state and federal anti-air pollution laws. MD Code, Environment §§ 1-301(a), 2-103(b). *See also id.* § 2-102. MDE plays a key role in the development of CPCNs for generating facilities: The PSC is required to incorporate into the CPCN requirements of federal and state environmental laws identified by MDE as well as "methods and conditions" for achieving compliance with those requirements, and the PSC is prohibited from adopting any methods or conditions that MDE determines are inconsistent with federal and state environmental laws. MD Code, Public Utilities § 7-208(g). The requirements identified by MDE are incorporated into

the CPCN as licensing conditions, and are binding on the recipient upon issuance of the CPCN. MDE is a recipient of federal funds.

Like MDE, MDNR is an agency of the State of Maryland. MDNR is charged with managing and preserving the state's natural resources. MD Code, Natural Resources § 1-101. MDNR administers Maryland's Power Plant Research Program, which plays an important role in the CPCN application process by conducting studies that include "plant site evaluation and related environmental and land use considerations," and making recommendations to the PSC on the merits of applications and conditions to be incorporated into the final CPCN. *See* MD Code, Natural Resources §§ 3-303, 3-306. MDNR is a recipient of federal funds.

II. JURISDICTION

Title VI's prohibition on discrimination applies to all recipients of federal funds: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Acceptance of federal funds, including DOT and EPA assistance, creates an obligation on the recipient to comply with Title VI and the federal agencies' implementing regulations.[4] As explained below, the PSC, MDE, and MDNR are programs or activities receiving federal financial assistance, and are therefore subject to the requirements of Title VI and applicable implementing regulations.

A. Program or Activity

The PSC, MDE, and MDNR are programs or activities within the ambit of Title VI. Title VI defines program or activity as "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a. Accordingly, if any part of a listed entity receives federal funds, the whole entity is covered by Title VI. *Ass'n of Mex.-Am. Educ. v. California*, 195 F.3d 465, 474-75 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (en banc).

The PSC, MDE, and MDNR are agencies or instrumentalities of the State of Maryland. Accordingly, they meet the definition of program or activity under Title VI and must comply with Title VI in implementing all of their work, regardless of how they spend the funds received from DOT and EPA.

B. Federal Financial Assistance

[4] Regulations for both EPA and DOT require that applicants for agency funds give "assurance" that they will comply with the agency's Title VI implementing regulations. 40 C.F.R. § 7.80(a)(1) (EPA regulations); 49 C.F.R. § 21.7a(1) (DOT regulations).

The PSC, MDE, and MDNR are recipients of federal financial assistance as defined in DOT and EPA's Title VI implementing regulations.

DOT regulations define "[r]ecipient" as "any State. . . or any political subdivision thereof, or instrumentality thereof, any public or private agency, institution, or organization, or other entity, or any individual, in any State . . . to whom Federal financial assistance is extended, directly or through another recipient. . . ." 49 C.F.R. § 21.23. Similarly, EPA's Title VI regulations define a "[r]ecipient" as "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient . . . ." 40 C.F.R. § 7.25.

The PSC receives federal financial assistance in the form of pipeline safety base grants awarded by DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA"). According to PHMSA, the PSC received a Natural Gas Pipeline Safety Base Grant in the amount of $533,783 and a Hazardous Liquid Pipeline Safety Base Grant in the amount of $39,331 for fiscal year 2016.[5]

MDE and MDNR receive federal financial assistance in the form of grants from EPA. According to USASpending.gov, as of May 2, 2016, MDE has received $2,368,937 from EPA in fiscal year 2016 so far, including Performance Partnership Grants totaling $1,985,937.[6] For the same period, MDNR has received $1,818,966 from EPA so far.[7]

Because the PSC receives financial assistance from DOT, it is subject to Title VI and DOT regulations. Because MDE and MDNR receive financial assistance from EPA, they are subject to Title VI and EPA regulations.

C. Timeliness

Both DOT and EPA require that Title VI complaints be filed within 180 days of the alleged discriminatory act. 49 C.F.R. § 21.11(b) (DOT Title VI regulations); 40 C.F.R. § 7.120(b)

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[5] *PHMSA Announces over $54 Million in Pipeline Safety Grants to Support State Pipeline Safety Programs*, PHMSA (Sept. 1, 2015), http://phmsa.dot.gov/pipeline/phmsa-announces-over-54-million-in-pipeline-safety-grants-to-support-state-pipeline-safety-programs. In addition, the PSC is a recipient of federal funds because PHMSA awarded the PSC Pipeline Safety Base Grants in the amount of $566,311 in fiscal year 2015 and $456,035 in fiscal year 2014, the most recent fiscal years for which data on these programs is available through USASpending.gov.

[6] USASpending, http://www.usaspending.gov (enter "169640062," then select "Environmental Protection Agency" under "By Agency" and "2016" under "By Fiscal Year").

[7] USASpending, http://www.usaspending.gov (enter "033425385," then select "Environmental Protection Agency" under "By Agency" and "2016" under "By Fiscal Year").

(EPA Title VI regulations).[8] This complaint is timely because it is based on the CPCN granted to Mattawoman Energy, LLC on November 13, 2015, for the construction of a nominally-rated 990 megawatt natural gas-fired power plant.

D. Other Jurisdictional and Prudential Considerations

This complaint satisfies all other jurisdictional and prudential considerations laid out in Title VI, DOT and EPA's implementing regulations, and EPA's Interim Case Resolution Manual. Specifically, this complaint is in writing and is submitted by groups that are authorized to submit a complaint on behalf of individuals who are directly impacted by violations of Title VI.[9] DOT and EPA have subject matter jurisdiction over this complaint because it alleges discrimination based on race in violation of Title VI of the Civil Rights Act of 1964.

This complaint also contains unique civil rights allegations that have not been alleged in any court proceeding, including allegations specific to the Mattawoman plant and systemic allegations relating to the criteria, methods, and procedures of the PSC, MDE, and MDNR, and their systemic and disproportionate effects on the basis of race.

A state court challenge to the CPCN, *In Re: In the Matter of Petition of John T. Bradley, et al. for Judicial Review of the Decision of Public Service Commission of Maryland, Civil Action No. 24-C-15-006830*¸ Circuit Court for Baltimore City, presents no obstacle to accepting and investigating this complaint. The petitioners in that case do not make civil rights allegations, much less "the same civil rights allegations."[10] Instead, the petitioners in state court request that the CPCN be remanded to the PSC on two bases only: First, that the PSC did not articulate the basis of its decision to issue the CPCN sufficiently to enable judicial review; and second, that the PSC erroneously denied the petitioners' intervention in the administrative proceeding concerning

[8] DOT and EPA have authority to waive or extend the 180-day deadline. 49 C.F.R. § 21.11(b); 40 C.F.R. § 7.120(b).

[9] EPA, Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigations Guidance), 65 Fed. Reg. 39,667, 39,672 (June 27, 2000) (listing jurisdictional criteria applicable to Title VI complaints).

[10] EPA's *Interim Case Resolution Manual* ("CRM") suggests that EPA's Office of Civil Rights ("OCR") might decline to review a Title VI complaint if "[t]he same civil rights allegations have been filed by the complainant against the same recipient with state or federal court individually or through a class action." As the CRM recognizes, this consideration is not a jurisdictional bar to accepting and investigating a complaint, but rather a prudential rule governing the timing of investigations. It does not and could not justify a refusal to exercise jurisdiction over a complaint meeting the jurisdictional requirements of Title VI. In any event, in this matter "the same civil rights allegations" have not been presented to any court. Further, the CRM provides that "[a] complaint may be re-filed with OCR within 30 calendar days following termination of the court proceeding if there has been no decision on the merits or settlement of the complaint civil rights allegations. (Dismissal with prejudice is considered a decision on the merits.)" *Interim CRM* (Dec. 1, 2015) at 12.

the CPCN. *See* Petitioners' Memorandum in Support of Petition for Judicial Review (attached as Exhibit 8). The petitioners do not allege violations of Title VI or any other civil rights law or obligation.

Moreover, this complaint seeks unique relief from DOT and EPA — compliance with Title VI. Complainants ask DOT and EPA to investigate this complaint and take steps to remedy noncompliance with Title VI by the PSC, MDE, and MDNR, including suspending or terminating their federal funding if necessary. This relief is not available through the pending action in Baltimore City Circuit Court. If the petitioners in state court are successful, the PSC may be required to grant intervention to those petitioners or to provide a more detailed justification for its decision to issue the CPCN, but the court decision will not prevent the PSC, MDE, and MDNR from continuing the discriminatory approach reflected in the CPCN of November 13, 2015.

III. BACKGROUND

A. Brandywine

Brandywine is an unincorporated community in Prince George's County, Maryland, located approximately 11 miles southeast of Washington, D.C. According to the U.S. Census Bureau, the Brandywine census-designated place has a land area of approximately 21 square miles and a a population of 6,719 that is 72.2 black.[11] Brandywine has a long history as a farming community, but in recent years and decades it has been the site of significant development as the population of the Washington, D.C. metropolitan area has grown. Two major roads, MD Route 5 and US Route 301, run through the community, leading to severe traffic congestion and concomitant problems of noise, air pollution, and safety for residents.

Exhibit 1 to this complaint is a map showing the community of Brandywine, the approved location of the Mattawoman gas plant, and the location of the other fossil fuel-fired power plants that are either in operation or under construction in and around Brandywine. According to data from EJScreen, the population within ten miles of the approved location of the Mattawoman gas plant is 67 percent black, and the population within five miles is also 67 percent black.[12]

As Exhibit 1 shows, Brandywine is bordered by several other fossil fuel-fired power plants. Brandywine is already home to an operational 289 megawatt natural gas-fired power plant known as Panda Brandywine.[13] A 2563 megawatt coal, oil, and natural gas-fired power plant, Chalk Point Generating Station, is located approximately 12 miles southeast of

[11] U.S. Census FactFinder, http://factfinder.census.gov (search "Brandywine CDP, MD").

[12] EPA, EJSCREEN: Environmental Justice Screening and Mapping Tool, https://www.epa.gov/ejscreen.

[13] Maryland Power Plant Research Program, *Electricity in Maryland Fact Book 2014* at 11 (attached as Ex. 9).

Brandywine.[14] In addition to the Mattawoman plant that is the subject of this complaint, two more fossil fuel-fired power plants are under construction near Brandywine: the 755 megawatt gas-fired PSEG Keys Energy Center less than one mile east,[15] and the 725 megawatt gas-fired CPV St. Charles Energy Center approximately 5 miles south.[16] When all of the approved fossil-fuel fired power plants are constructed, there will be a total of three large gas-fired power plants in the immediate vicinity of Brandywine, all within three miles of one another. There will be a total of five large fossil fuel-fired power plants within 13 miles of Brandywine.

Exhibit 2 is a map showing the proximity of the Mattawoman, Keys, and Panda Brandywine fossil fuel-fired power plants to the public schools in Brandywine. Students at these schools are at risk from air pollution, noise, and traffic associated with the power plants.

Brandywine is the site of numerous open pit sand or gravel mines, a coal ash disposal facility, a facility that processes soil contaminated with petroleum products and heavy metals, and the Brandywine DRMO Superfund site, which was used to store hazardous military and governmental waste.[17] The Superfund site poses a potential risk to groundwater. Given that many Brandywine residents still rely on well water, the heavy industrial activity in residential parts of this community is particularly concerning. For instance, a facility that treats soil contaminated with petroleum products and heavy metals is centrally located within Brandywine. According to the company's website, its treatment process produces air pollutants, such as sulfur and nitrogen oxides, that will also be emitted by the local power plants.[18] A coal ash disposal site and several active sand and gravel mines contribute to air quality so poor that residents in some parts of town cannot open their windows, and a layer of ash and dust regularly gathers on homes and cars.

Brandywine is located in Prince George's County, which is designated as failing to attain national air quality standards for ozone, and until recently was also designated nonattainment

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[14] *Id.*

[15] *PSEG Keys Energy Center*, PSEG, https://www.pseg.com/family/power/fossil/stations/keys_energy.jsp.

[16] *About CPV St. Charles*, St. Charles Energy Center, http://www.cpvstcharles.com/about-sc.php.

[17] According to EPA, the risk to groundwater from the Brandywine DRMO site is still under investigation. *EPA Superfund Program, BRANDYWINE DRMO, BRANDYWINE, MD,* U.S. EPA, https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0304462. *See also*, Juliet Eilperin, "Environmental justice issues take center stage," *The Washington Post* (Nov. 21, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/21/AR2010112103782.html.

[18] Oil Operations Permit No. 2010-OPS-14480 (Nov. 30, 2009) (attached as Exhibit 10); Soil Safe, Thermal Desorption, http://www.soilsafe.com/services/thermal_desorption.

for fine particulate matter, or PM 2.5.[19] According to the U.S. Census Bureau, the population of Prince George's County is 64.7 percent black.

Despite the high number of nearby power plants and other pollution sources, the cumulative impacts of this pollution on the health and welfare of Brandywine's residents have not been adequately studied. Many Brandywine residents feel they been forced to bear an unfair and disproportionate share of the cost of development while receiving little benefit, economically or in terms of quality of life.

B. Approval of the Mattawoman Plant.

Mattawoman Energy, LLC filed an application for a Certificate of Public Convenience and Necessity with the Maryland PSC on July 19, 2013.[20] At that time, Mattawoman proposed to build a gas-fired power plant with a capacity of 859 megawatts and a 230-kilovolt transmission line. Mattawoman requested a waiver of the normal requirement to provide notice at least two years before beginning construction, which the PSC granted. The PSC delegated the proceeding to the Public Utility Law Judge Division, which oversaw the following process:

- On July 30, 2013, the PSC set a deadline of August 22, 2013, for filing petitions to intervene in the proceeding. The PSC ordered the company to publish notice of the August 22 deadline in a newspaper of general circulation by August 19.

- Mattawoman's advertisement ran in the *Enquirer-Gazette* on August 15, less than one week before the deadline for filing petitions to intervene. No other efforts were made to inform the community of the impending deadline. The *Enquirer-Gazette* is an obscure local paper, one of a group of local weeklies that was in terminal financial straits and that have recently been closed or sold to newspapers outside the area. The *Enquirer-Gazette* had few, if any, paid subscribers in the town or zip code of Brandywine during 2013-2015, and no longer offers home delivery anywhere in Prince George's County.

- On October 16, 2013, well after the August 22 deadline for intervention, the U.S. Air Force filed a petition to intervene in the proceeding. The PSC granted the petition to intervene on November 13, 2013.

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[19] Prince George's County was designated non-attainment for fine particulate matter until November 2014, when it was re-designated as a maintenance area for that pollutant. U.S. EPA, *Maryland Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants*, Green Book Nonattainment Areas (April 22, 2016), https://www3.epa.gov/airquality/greenbk/anayo_md.html.

[20] The docket for the CPCN proceedings is available on the PSC website, http://www.psc.state.md.us/ (search for matter number 9330).

- Many residents of Brandywine who eventually heard about plans to build a gas plant nearby did not realize that those plans were in addition to the already-approved Keys plant. They mistakenly assumed that only one new large gas plant was proposed to be sited in their community.

- On September 9, 2013, the PSC issued an order to expedite decision on the application. The order provided for a final decision within ten months, in July 2014.

- On February 19, 2014, the PSC suspended the proceeding indefinitely at the request of MDNR, which had learned that several aspects of the project were not ready for review, and in fact were still in the early stages of planning.

- On October 29, 2014, the PSC recommenced the proceeding, with a new target date in July 2015 for a final decision.

- Mattawoman revised its CPCN application several times in 2014 and 2015, including a major revision on January 30, 2015, that increased the capacity of the plant from 859 megawatts to 990. On March 13, 2015, the PSC reset the schedule for the proceedings, with a new target date of September 30, 2015, for its final decision.

- Following further revisions to Mattawoman's application received in mid-2015, on July 9 the PSC scheduled a new public hearing and comment deadline of August 20, 2015.

- On July 21, 2015, the PSC held a public hearing at the Brandywine Volunteer Fire Department.

- On August 17, 2015, fifteen residents of Prince George's County and three residents of Charles County filed a petition to intervene in the proceeding. On September 25, 2015, the PSC denied the local residents' petition to intervene, calling it untimely and unfairly prejudicial to Mattawoman and the government.

- MDE and MDNR recommended approving the plant subject to conditions without conducting any environmental justice review or review of the potential for the project to have disparate racial impacts.

- On October 13, 2015, the PSC published a tentative order proposing to grant Mattawoman a CPCN. The PSC stated that the proposed order would become final on November 13 unless an administrative appeal was filed by a party to the proceeding. Because the local residents had been denied intervention three weeks earlier, they could not appeal the proposed order.

- On November 13, 2015, noting that no administrative appeals had been filed, the PSC reissued its tentative order as a final order.[21]

C. Public Comments.

In written submissions and at public hearings, concerned community members alerted the PSC to the adverse impacts of the proposed Mattawoman plant and the racially disparate nature of those impacts. At the July 21, 2015 public comment hearing, citizens testified before the PSC and voiced concern about the following aspects of the proposed Mattawoman plant and the CPCN application proceedings:

- Increased traffic during construction of the plant, exacerbating Brandywine's existing problem with traffic congestion.

- The cumulative impact of having multiple large fossil fuel power plants in a concentrated area on local air quality, including increased emissions of ozone precursors.

- The absence of local air quality monitoring stations in Brandywine, and Prince George's County's persistent failure to attain national air quality standards for ozone.

- Shortcomings and defects in the modeling of air quality impacts, including failure to consider emissions from local road traffic.

- Failure to adequately notify or engage the local community in the CPCN application proceedings.

- Failure to consider the racially disparate impact of the Mattawoman plant and other facilities on Brandywine's predominantly black community.

- The transformation of Brandywine into a "sacrifice zone" for the region's development through the construction of the Mattawoman plant and other large fossil fuel plants nearby.

The briefs submitted to the PSC in support of the citizens' unsuccessful petition to intervene identify shortcomings in the CPCN approval process, including failure to provide adequate public notice of the proceedings and failure to include in the proceedings any party

[21] Order No. 87243, PSC Case No. 9330, Dkt. No. 126 (Nov. 13, 2015). The full order is attached as Exhibit 5 to this complaint.

fairly representing the interests of the local community.[22] Citizens' briefs also notified the PSC of the applicability of Title VI of the Civil Rights Act to federally-funded Maryland agencies and the concomitant requirement to conduct an environmental justice analysis of the proposed plant in light of the surrounding area's predominantly black population.[23]

D. The PSC Decision.

The PSC's final order grants Mattawoman a CPCN subject to conditions written by MDE and MDNR.[24]

The order acknowledges the negative impacts of the power plant, but fails to require the Mattawoman Plant to take reasonable steps to ameliorate those impacts. The PSC finds that the concentration of pollution sources in Brandywine is "unfortunate" and notes that "the negative impacts of the plant fall most severely on Brandywine while the benefits are distributed across a much larger geographic area":

> An allegation was made in public comments that the Brandywine area was targeted for new projects by power plant companies due to its racial and economic demographics. I find that there is no evidence of any improper motive or conduct by Mattawoman in its choice of a location for the Project. It is very hard to find locations in Maryland which have the infrastructure needed to support a power plant that does not have other areas of legal restrictions which makes those locations unsuitable. It is unfortunate for Brandywine that it is a suitable and legally available area for proposed power plant projects. If a proposed plant to be sited in Brandywine meets all legal requirements (at all governmental levels), the fact that other plants are located nearby is not a legal restriction to another one being built. This is true even though the negative impacts of a plant fall most severely upon Brandywine while the benefits are distributed across a much larger geographic area.[25]

The PSC acknowledges that there will be noise pollution from the plant, but finds that the noise pollution is "limited." With regard to air and water pollution, the PSC simply defers to the conclusion of MDE and MDNR that all environmental laws will be satisfied: "If the state experts were not convinced that [the gas plant can be constructed and function within all

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[22] Notice on behalf of Proposed Intervenors Mattawoman Watershed Society, (the Citizens) and Reply to Response of Mattawoman Energy LLC to Joint Petition to Intervene, PSC Case No. 9330, Dkt. No. 113 (Sept. 17, 2015).

[23] *Id.* at A4-A5.

[24] Initial Recommended Licensing Conditions, PSC Case No. 9330, Dkt. No. 83 (July 10, 2015) ("CPCN Conditions"). The CPCN Conditions are attached as Exhibit 6 to this complaint.

[25] Order No. 87243, PSC Case No. 9330, Dkt. No. 126 (Nov. 13, 2015) at 10-11.

applicable air and water laws and regulations], they would have testified to that effect and would have opposed the Project's construction. I place my trust in their experience[.]"

The PSC agrees that notice to the public was ineffective because notice was placed in newspapers not read by the public.

The PSC refers to the community's concerns about environmental justice as "strident." Based on a finding of no evidence of intentionally racist conduct by Mattawoman Energy, the PSC concludes that the community's concerns are unfounded, stating that the concentration of pollution sources in Brandywine "is not a legal restriction to another one being built." The PSC does not address whether the CPCN will have a racially discriminatory effect.

IV. LEGAL BACKGROUND

DOT regulations implementing Title VI state that "[n]o person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies." 49 C.F.R. § 21.5(a). These regulations also include the following prohibitions of specific discriminatory acts by recipients of federal funds:

> (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program. . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.
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> (3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

49 C.F.R. § 21.5(b).

> A recipient may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this rule applies, on the grounds of race, color, or national origin; or if

> the purpose is to, or its effect when made will, substantially impair the accomplishment of the objectives of this part.

49 C.F.R. § 21.5(d).

EPA regulations implementing Title VI state that "[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin[.]" 40 C.F.R. § 7.30. The regulations also provide a non-exclusive list of specific, prohibited discriminatory acts:

> (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.
>
> (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 grounds 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.

These regulations make clear that discrimination on the basis of race is a violation of Title VI whether it is the purpose of the decision or its effect. 49 C.F.R. § 21.5(d); 40 C.F.R. § 7.35(c).

V. VIOLATIONS OF TITLE VI

Complainants allege that the PSC, MDE, and MDNR have discriminated against the predominantly black community in and around Brandywine on the basis of race by issuing a CPCN to Mattawoman Energy, LLC for construction of the Mattawoman gas plant.

1. Issuance of the CPCN constitutes discrimination on the basis of race because the CPCN will adversely and disproportionately impact the black community in and around Brandywine by:
    a. contributing to air pollution in a black community that is already overburdened by several local sources of pollution and afflicted by poor air quality;
    b. contributing to noise in a black community already afflicted by noise;

c. contributing to traffic congestion in a black community already afflicted by traffic congestion and lack of public transportation; and
d. depressing property values in a black community already afflicted by lack of economic opportunity.

The PSC, MDE, and MDNR had the capacity to prevent these racially disproportionate adverse impacts by not issuing the CPCN, or requiring that the facility be sited or operated in a manner that would eliminate or mitigate its racially disproportionate impact.

2. The PSC, MDE, and MDNR used criteria and methods that have the effect of discriminating on the basis of race by issuing the CPCN without
   a. performing an assessment of the potential for the CPCN to have a racially disproportionate adverse impact;
   b. conducting or requiring air quality monitoring in the community;
   c. conducting or requiring a community health impact assessment;
   d. conducting or requiring a community needs assessment; or
   e. adequately notifying or involving local residents.

3. The CPCN for the Mattawoman plant continues a pattern and practice by the PSC, MDE, and MDNR of utilizing criteria and methods that have the effect of discriminating on the basis of race.

For each of the above reasons, the issuance of this CPCN constitutes prohibited discrimination on the basis of race under Title VI of the Civil Rights Act of 1964 and DOT and EPA regulations.

These allegations are detailed below.

VI. ADVERSE IMPACT

The decision to approve the Mattawoman gas plant will adversely affect the community of Brandywine and other residents in the vicinity of the Mattawoman gas plant. These adverse impacts will result directly from the Mattawoman power plant and from the cumulative impact of the Mattawoman plant in combination with the many pollution sources and patterns of inequitable development already present in the community.

The PSC, MDE, and MDNR do not deny that Brandywine will suffer adverse impacts from the approval of the Mattawoman plant, or that the benefits of the approval will mostly accrue elsewhere. The PSC specifically found that approval of the Mattawoman plant is "unfortunate for Brandywine."

A. Ozone Precursor Emissions

The Mattawoman plant will degrade air quality in and around Brandywine. First, it will contribute to already unhealthy levels of ground level ozone. The air in Prince George's County, which includes Brandywine, already fails to meet the national air quality standard for ozone, which was set by EPA at the level determined to be requisite to protect public health.[26] Approval of the Mattawoman plant will make this air quality problem worse by increasing local emissions of two major contributors to the formation of ground-level ozone, nitrogen oxides and volatile organic compounds.

Maryland has recognized that reducing nitrogen oxides is the most urgently needed measure to reduce harmful ozone. "Reducing locally produced [nitrogen oxides] on peak days limits ozone production, keeping local ozone levels lower."[27]

The CPCN authorizes the Mattawoman plant to emit 220.7 tons per year of nitrogen oxides and 144.1 tons per year of volatile organic compounds.[28] According to Maryland regulations, emissions of these pollutants are "significant" if they exceed 25 tons per year. COMAR 26.11.17.

Ozone causes serious harm to human health, as Maryland recognized in its state implementation plan for ozone:

> "When it is breathed into the lungs, ozone reacts with lung tissue. It can harm breathing passages, decrease the lungs' working ability and cause coughing and chest pains; eye and throat irritation; breathing difficulties even for healthy individuals, but especially for those with respiratory problems such as allergies, asthma, bronchitis and emphysema; and greater susceptibility to respiratory infection."[29]

According to EPA's 2013 Integrated Science Assessment for Ozone, ozone exposures are also shown to increase risks of hospitalization for acute myocardial infarction, coronary atherosclerosis, stroke, and heart disease, even at ambient ozone levels well-below current air quality standards.[30]

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[26] EPA, *Green Book Nonattainment Areas: 8-Hr Ozone (2008) Nonattainment Area/State/County Report* (April 22, 2016), available at https://www3.epa.gov/airquality/greenbook/hnca.html#Ozone_8-hr.2008.

[27] MDE, *Technical Support Document for COMAR 26.11.38 - Control of NOx Emissions from Coal-Fired Electric Generating Units* (May 26, 2015) at 20, available at http://www.mde.state.md.us/aboutmde/AboutMDEHome/Documents/TSD_Phase1_with_Appendix.pdf.

[28] CPCN Conditions at 7 (Ex. 6).

[29] Metropolitan Washington Air Quality Committee, Ozone SIP (May 23, 2007) at 1-1, https://www.mwcog.org/uploads/pub-documents/9FhcXg20070525084306.pdf.

[30] EPA, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* (Feb. 2013), available at https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492.

MDE states that Mattawoman will be required to secure emissions reduction credits for nitrogen oxide and volatile organic compounds at a ratio of 1.3 to 1, but the reductions need not occur in Brandywine, or even in Prince George's County. Mattawoman can use offsets from other areas so long as pollution from the other area "contribute[s]" to pollution in the area of the plant. COMAR 26.11.17.04(D). MDE authorizes the use of offsets from other states, and allows the use of credits from Philadelphia in all areas of Maryland except Baltimore.[31]

B. Nitrogen Dioxide Emissions

The Mattawoman plant will also cause cumulatively unhealthy levels of nitrogen dioxide, a pollutant linked to heart disease, asthma, and stroke. Mattawoman Energy's own analysis predicts violations of the 1-hour air-quality standard for that pollutant near the plant, according to the Environmental Review Document submitted to the PSC, and shows that the Mattawoman plant's direct emissions will be responsible for about two percent of total nitrogen dioxide pollution in the vicinity of the plant.[32] The company later increased its estimated nitrogen dioxide emissions,[33] and the Maryland agencies approved the increase.

The PSC, MDE, and MDNR approved the project by excluding significant sources of nitrogen dioxide from the modeling. Specifically, while Mattawoman had included the pollution from major pollution sources located between ten and thirty kilometers away, MDNR prepared a new analysis that excluded most of those sources, saying that EPA did not require that their pollution be included.[34] Only by excluding that pollution from the analysis did MDNR arrive at calculations showing no violations of the nitrogen dioxide air quality standards.

According to EPA, nitrogen dioxide levels will be even higher in vehicles and near roadways than the levels predicted based on data from air quality monitors.[35] "Individuals who spend time on or near major roadways can experience short-term NO2 exposures considerably higher than measured by the current network. In fact, in-vehicle concentrations can be 2-3 times higher than measured at nearby area-wide monitors."[36] Further, harmful nitrogen oxide emissions from motor vehicles increase dramatically at lower speeds, especially during stop and go traffic when roads are congested. But neither Mattawoman nor the Maryland agencies

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[31] MDE, *Emission Reduction Credits Frequently Asked Questions* at 2 (attached as Ex. 11).

[32] Environmental Review Document, PSC Case No. 9330, Dkt. No. 1 (July 19, 2013) at 5-8.

[33] Supplemental Environmental Review Document ("SERD"), PSC Case No. 9330, Dkt. No. 57 (Jan. 30, 2015) at Appendix J, Table 7-1B.

[34] MDNR - Power Plant Research Program, *Environmental Review of the Proposed Mattawoman Energy Center Project*, PSC Case No. 9330, Dkt. No. 83 (July 10, 2015) at 4-81.

[35] EPA, *Nitrogen Dioxide: Health*, available at https://www3.epa.gov/airquality/nitrogenoxides/health.html.

[36] *Id*.

included local motor vehicles in the emissions used for their modeling. The combined impact of vehicle and power plant emissions near roadways poses a serious threat to the health of the community, including people in the private residences, senior home, and elementary school, middle school, and high school located in close proximity to both the power plants and the roads that already experience congestion and will experience increased congestion resulting from construction of the Mattawoman gas plant and other recently approved power plants.[37]

C. Fine Particulate Matter Emissions

The CPCN also authorizes the Mattawoman plant to emit 147 tons per year of fine particulate matter ($PM_{2.5}$). It also will lead to increased diesel exhaust from vehicles and heavy machinery, especially during construction of the plant. This pollution threatens adverse direct and cumulative impacts for the local population, including serious health problems.

According to MDE and EPA, fine particulate matter damages the respiratory system and the cardiovascular system, causing "decreased lung function, chronic bronchitis, respiratory symptoms such as asthma attacks and difficulty breathing, nonfatal heart attacks, irregular heartbeat, and premature death in individuals with pulmonary or cardiac disease."[38] Children, the elderly, and individuals with pre-existing pulmonary or cardiac disease are the most susceptible.

EPA recognizes that "diesel exhaust contains significant levels of small particles" and that "diesel particulate matter is likely to cause cancer in humans and cause other acute and chronic health effects."[39]

Recent studies also strongly suggest a link between fine particulate matter exposure during pregnancy and autism. One 2014 study by the Harvard School of Public Health found that a woman who lives in an area that is in the highest 25 percent of fine particulate matter levels during pregnancy is more than twice as likely to have a child diagnosed with autism spectrum disorder than a woman who lives in an area in the lowest 25 percent.[40] The correlation

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[37] Prince George's County Planning Dept correspondence at 8 ("truck traffic conflicts . . . could pose major challenges for commuters"), 11 (giving failing grades for traffic congestion to several intersections in Brandywine) (attached as Ex. 12).

[38] Washington DC-MD-VA 1997 PM2.5 Redesignation Request at 1 (May 22, 2013), http://www.mwcog.org/environment/air/downloads/PM/PM2.5%20RR_Final%20Version.pdf.

[39] EPA Region 1, *Diesel Exhaust and Your Health*, https://www3.epa.gov/region1/eco/diesel/health_effects.html.

[40] Raz, Raanan, et al., Autism Spectrum Disorder and Particulate Matter Air Pollution before, during, and after Pregnancy: A Nested Case–Control Analysis within the Nurses' Health Study II Cohort, *Environ. Health Perspect.* 123:264–270 (March 2015), available at http://dx.doi.org/10.1289/ehp.1408133.

was strongest for exposures during the third trimester, and did not hold for exposure to coarse particles, helping to rule out potential confounding variables.

Mattawoman did not collect any data on levels of fine particulate matter already in the air in Brandywine. Instead the company's air quality analysis uses data collected ten miles away, at an equestrian center in Upper Marlboro. Upper Marlboro is northeast of Brandywine, while most of the largest sources of fine particulate matter in the area are in Brandywine or south of Brandywine.[41]

Air quality readings in Upper Marlboro barely meet national air quality standards adopted in 1997.[42] The state of Maryland has informed EPA that it "agree[s] with the scientific community who believe that more stringent . . . fine particle standards are needed."[43]

There is no safe level of exposure to fine particulate matter, and EPA's air quality standards for fine particulate matter are not set at a level of zero risk.

Mattawoman claims that the plant will not cause exceedances of air quality standards for fine particulate matter, but the company admits it only modeled some of the plant's fine particulate matter emissions. Fine particulate matter is made up of both filterable particulate matter, which is emitted directly from the stack, and condensable particulate matter, which forms in the atmosphere as a result of chemical reactions between other pollutants, including nitrogen oxides, sulfur dioxide, and ammonia. Mattawoman's air quality analysis models filterable particulate matter, but not condensable particulate matter, even though condensable particulate matter accounts for a significant fraction of the total fine particulate matter that the plant will produce.[44]

Condensable fine particulate matter is addressed only "qualitatively," without hard data.[45] Mattawoman predicts that overall fine particulate matter in the DC-MD-VA region will decline, relying on the planned deactivation of coal-fired generation units at Chalk Point and Dickerson.[46] But the owner of those generation facilities, NRG Energy, cancelled the planned deactivation of those units on February 29, 2016.[47]

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[41] Environmental Review Document, PSC Case No. 9330, Dkt. No. 1 (July 19, 2013) at 2-14, 2-16.

[42] Redesignation Request at 7, http://www.mwcog.org/environment/air/downloads/PM/PM2.5%20RR_Final%20Version.pdf.

[43] MWCOG, *Washington DC-MD-VA 1997 $PM_{2.5}$ Maintenance Plan* (May 22, 2013) at 17.

[44] Revised Air Assessment Report, Appendix J at 5-2, PSC Case No. 9330, Dkt. No. 57 (Jan. 30, 2015).

[45] *Id.* at 5-2, 5-14.

[46] *Id.* at 5-16; Environmental Review Document, PSC Case No. 9330, Dkt. No. 1 (July 19, 2013) at 2-14, 2-16.

[47] PJM list of withdrawn deactivation requests (attached as Ex. 14), http://www.pjm.com/~/media/planning/gen-retire/withdrawn-deactivation-requests.ashx.

The plant's contribution to fine particulate matter pollution will also be higher than estimated because Mattawoman, MDE, DNR, and the PSC did not consider the plant's high emissions of ammonia in the analysis of fine particulate matter pollution.[48] Ammonia is a constituent of fine particulate matter, and can be both filterable and condensable. Mattawoman estimates that it will emit 198 tons per year of ammonia, which is approximately five times more ammonia than is emitted by the largest source of ammonia currently operating in the state of Maryland.[49] Maryland authorized these very high ammonia emissions, and the resulting contribution to deadly fine particulate matter, in an effort to control acid rain.[50] (Because ammonia has a high (basic) pH, it helps to balance out the low (acidic) pH of other pollutants emitted by the plant.)

D. Noise and Traffic Congestion

According to Mattawoman's application, noise from the facility will exceed regulatory limits at nearby homes. Noise levels will be loudest during startup, which often occurs during the early morning hours, disturbing people's sleep. Startup will occur over 250 times a year, according to Mattawoman's environmental review documents.[51] Mattawoman's consultant provided recommendations for keeping noise to an acceptable level[52], but the CPCN does not require Mattawoman to implement those recommendations. Even though Mattawoman's application identifies startup noise as the major concern, the CPCN only requires Mattawoman to monitor noise generated during regular operations.[53] The regulatory limits that Mattawoman predicts will be exceeded were adopted to prevent noise that "[m]ay jeopardize . . . health, general welfare, or property." Md. Code Ann., Envir. § 3-102.

Mattawoman's consultant also identified ideal goals (below the regulatory limits) needed to keep noise from the plant at a level that will not disturb daily life for nearby residents, taking into account noise levels that already exist in the community. The consultant found that, given the design of the plant and its close proximity to homes, those ideal noise levels cannot be achieved.[54] Although Brandywine Elementary School is less than a half mile

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[48] Revised Air Assessment Report, Appendix J at 5-15 to 5-16, PSC Case No. 9330, Dkt. No. 57 (Jan. 30, 2015).

[49]MDNR ERD, Dkt. No. 83 at 4-83; MDE, Response to Comments Received on the Mattawoman Energy Center Project, PSC Case No. 9330, Dkt. No. 112 (Sept. 16, 2015) at 4.3.8.

[50] SERD, Case No. 9330, Dkt. No. 57 (Jan. 30, 2015) at Appendix J 5-15 to 5-16 (Revised Air Assessment Report).

[51]*Id.* at Appendix J 5-4.

[52] *Id.* at Appendix I 14-15.

[53] CPCN Conditions at 56 (Ex. 6).

[54] SERD, Case No. 9330, Dkt. No. 57 (Jan. 30, 2015) at Appendix I 16.

away from these homes no consideration was given to whether noise disturbances will adversely affect schoolchildren.

The Brandywine area already suffers from severe traffic congestion.[55] Approval of the Mattawoman plant, alone and in combination with approval of the Keys plant, will worsen traffic congestion in and around Brandywine. This is an adverse impact in itself. Further, additional traffic and slower-moving traffic, including stop-and-go traffic, will increase levels of fine particulate matter and nitrogen dioxide near the roadways, where community members live, work, and go to school.

The contribution to traffic congestion will be worst during construction of the plant, a two-year period when up to 645 workers will need access to the site.[56]

According to the Prince George's County planning department, truck traffic during construction could pose major challenges for commuters in the area. The planning department originally recommended installation of additional traffic signals to address congestion, but concluded that traffic impacts would be acceptable after revising its analysis procedures.[57]

The CPCN includes no conditions to address the community's traffic concerns, except a requirement to submit plans to the Maryland State Highway Administration, which "reserves the right" to require improvements.[58]

E. Economic Impacts

These harmful impacts and others may depress local property values. Both home-buyers and renters are less willing to pay for housing near fossil fuel-fired power plants than they are for other comparable housing, depressing property values. Housing prices decline by between three and five percent, on average, within two miles of gas-fired and coal-fired power plants. When the power plant is large (>275 megawatts), housing prices decline by 5.5 percent, on average.[59] Brandywine, which will have three large fossil fuel-fired power plants as a result of the Mattawoman approval, is at risk of even greater declines in property values, compared to what property values would be without the power plants.

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[55] ERD, Case No. 9330, Dkt. No. 1 (July 2013) at pdf 290 (intersection operates "below acceptable standards"); Prince George's County Planning Dept correspondence at 8 ("truck traffic conflicts . . . could pose major challenges for commuters"), 13 (giving failing grades for traffic congestion to several intersections in Brandywine) (attached as Ex. 12).

[56] *Id.* at Appendix K 20.

[57] Prince George's County Planning Dept correspondence at 8, 14 (Ex. 12).

[58] CPCN Conditions at 56-57 (Ex. 6).

[59] Davis, Lucas. *The Effect of Power Plants on Local Housing Values and Rents: Evidence From Restricted Census Microdata* (June 18, 2008) at 17, 20 (attached as Ex. 15).

The company admits that the plant will stimulate "little if any" local commercial activity.[60]

VII. DISPROPORTIONALITY

The adverse impacts described above will be borne disproportionately by the black community of Brandywine and black residents who live, work, and go to school in the vicinity of the Mattawoman gas plant and other local pollution sources. The population of Brandywine is 72.2 percent black,[61] and the population within 10 miles and five miles of the site designated for the Mattawoman plant is 67 percent black.[62] In stark contrast, the population of the state of Maryland is only 30 percent black.

Three large (>250 megawatts) fossil fuel-fired power plants are located in or immediately outside of Brandywine, more than any other community in the state. Five large fossil fuel-fired power plants are located within thirteen miles of Brandywine, a concentration not repeated anywhere else in the state. Brandywine is home to 23 percent of the large fossil fuel-fired power plants in the state (3 out of 13), even though it has only .17 percent of the land area of the state (21 square miles out of 12407), and .12 percent of the population of the state (6719 people out of 5.773 million), according to 2010 U.S. Census data.

The racially discriminatory impact of siting five large fossil fuel-fired power plants in or near Brandywine continues a pattern that holds throughout the state of Maryland. Across the entire state, power plants are concentrated in counties with larger percentages of black residents. Prince George's County, in which Brandywine is located, will have both the highest number of large fossil fuel-fired power plants (4) and the highest percentage of black residents (64.5).[63] In stark contrast to Prince George's County, the fourteen Maryland counties with the lowest percentages of black residents (fifteen percent or less) have only three large fossil fuel-fired power plants among them, for an average of .2 power plants per county. Howard County has no large fossil fuel fired power plants (operating or permitted), and Montgomery County has only one, even though those Maryland counties have broadly similar land use patterns and income levels to Prince George's County. But while the population of Prince George's County is 64.5 percent black, the population of Howard County is only 17.5 percent black, and the population of Montgomery County is only 17.2 percent black.

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[60] ERD, Case No. 9330, Dkt. No. 1 (July 2013) at 5-8.

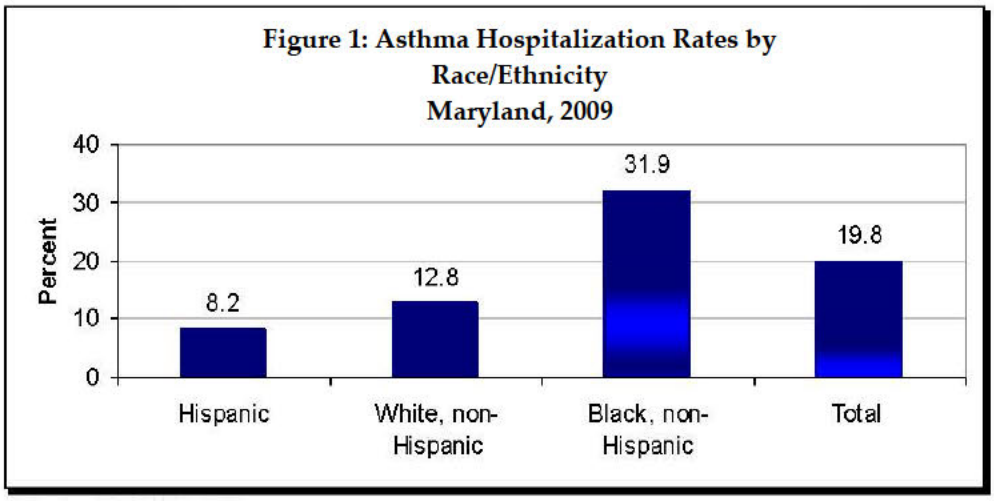
[61] Unless otherwise noted, the demographic information discussed in this section is from the U.S. Census Bureau.

[62] EPA, EJSCREEN: Environmental Justice Screening and Mapping Tool, https://www.epa.gov/ejscreen.

[63] Maryland Power Plant Research Program, *Electricity in Maryland Fact Book 2014* (attached as Ex. 9).

Marylanders living within ten miles of a power plant are disproportionately likely to be black. While the population of Maryland is only 30 percent black, the population within ten miles of a large power plant is 36 percent black.[64] This is true even though the black population of Maryland is concentrated in urban areas, where siting a large power plant is difficult or impossible.

Consistent with these patterns in the siting of pollution sources and resulting poor air quality, black Marylanders suffer from worse health outcomes in almost every category than their white counterparts. These disparities include higher rates of fatal heart disease and stroke; conditions which are caused or exacerbated by pollutants produced by fossil fuel-fired power plants.[65] Blacks also bear a disproportionate share of the asthma burden in Maryland. For example, as shown in Figure 1, non-Hispanic blacks have the highest asthma hospitalization rates out of any group in Maryland – more than double the rate of non-Hispanic whites.[66]



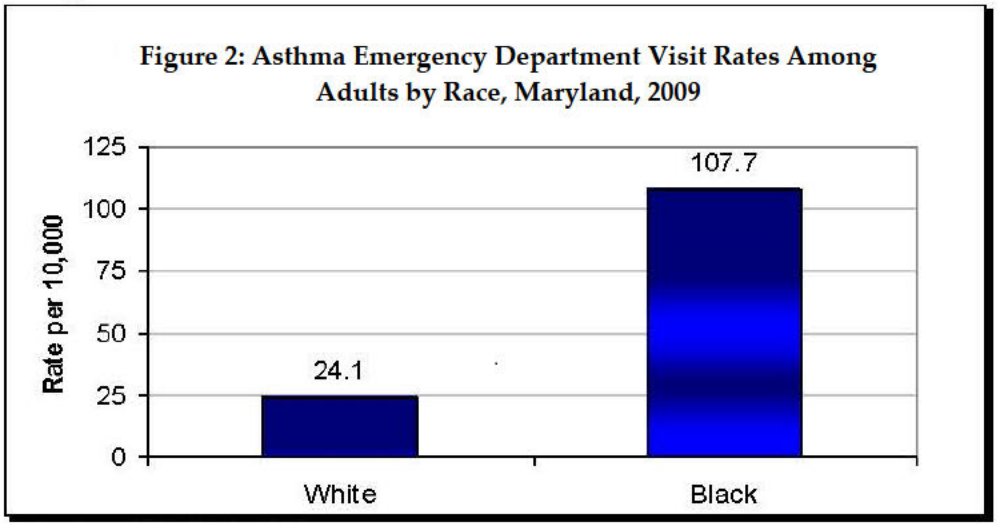
Black Marylanders are over 4 times as likely as white Marylanders to visit the emergency department for asthma (Figure 2).[67]

[64] Analysis using data from EJSCREEN.

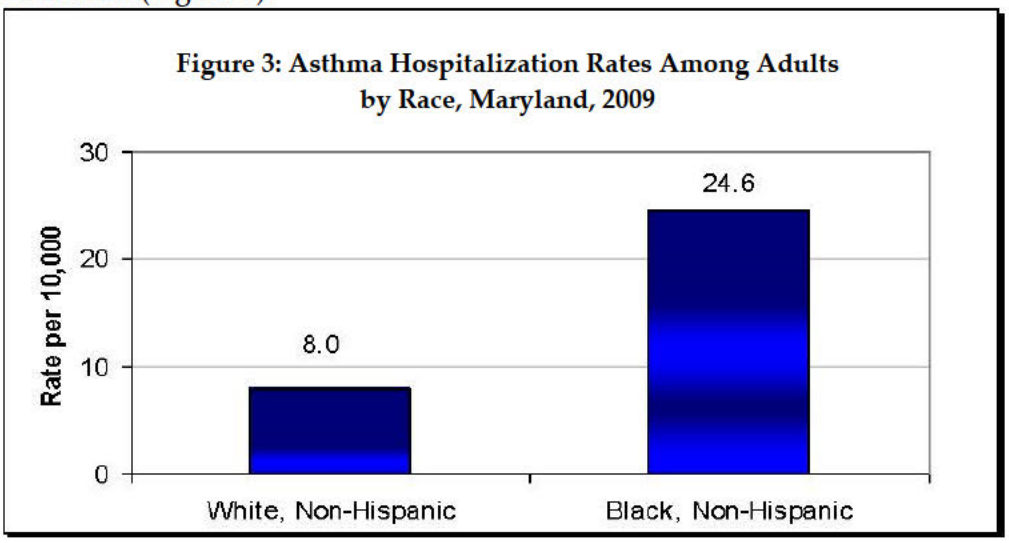
[65] Maryland Department of Health and Mental Hygiene ("DHMH"), *Maryland Chartbook of Minority Health and Minority Health Disparities Data* (Dec. 2012) at 15, available at: https://sph.umd.edu/sites/default/files/files/Maryland%20Health%20Disparities%20Data%20Chartbook%202012%20021413.pdf.

[66] DHMH, *Asthma in Maryland 2011*, at 57, available at: http://phpa.dhmh.maryland.gov/mch/Documents/Asthma_in_Maryland-2011.pdf.

[67] *Id.* at 52.



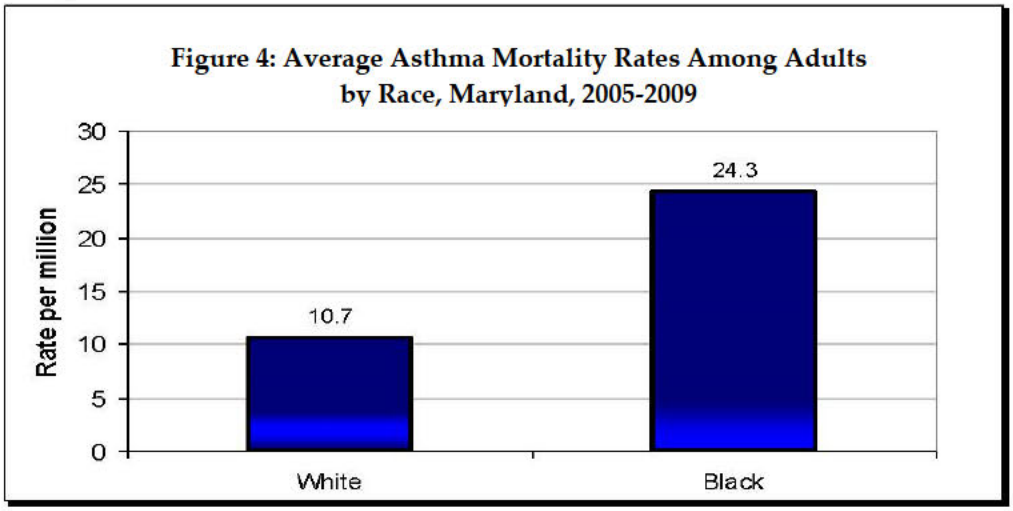
Furthermore, they are over 3 times as likely as white, non-Hispanic Marylanders to visit the hospital for asthma (Figure 3).[68]



Black Marylanders are nearly 2.5 times more likely to die from asthma than white Marylanders (Figure 4).[69]

[68] *Id.*

[69] *Id.* at 53.



VIII. CRITERIA AND METHODS FOR PLANT APPROVAL

No review was conducted, by the PSC, MDE, or MDNR, of the potential for the Mattawoman gas plant to have a disparate impact on the basis of race, individually or cumulatively in combination with other pollution sources and other unchecked development. After community members presented evidence of disproportionate adverse impacts at the public hearings, the PSC stated that disproportionate adverse impacts are no obstacle to issuance of the CPCN.[70] That is wrong as a matter of law, and clearly demonstrates that the Maryland agencies are in violation of Title VI and the implementing regulations of DOT and EPA.

No air quality monitoring in Brandywine or within ten miles was done for review of this project, and no already-existing data was available for this area. Data from a monitor at an equestrian center in Upper Marlboro, MD, more than ten miles away, was used for the assessment of fine particulate matter. Data from a monitor at a park in Prince William County, approximately 45 miles away in rural Virginia, was used for the assessment of nitrogen dioxide. No mathematical modeling whatsoever was conducted for ozone. No information was collected on weather or prevailing winds in the Brandywine community. Instead, some of the analysis used weather information from Dulles airport, located in Virginia more than 40 miles away, while other analysis used weather information from Reagan National Airport, located in Virginia more than 15 miles away. No analysis was done of the air quality impacts in Brandywine or the surrounding area resulting from increased traffic and traffic congestion. Issuance of the CPCN without adequate analysis of these potential adverse cumulative impacts constitutes use of a criteria or method that has the effect of discriminating on the basis of race.

[70] Order No. 87243, PSC Case No. 9330, Dkt. No. 126 (Nov. 13, 2015) at 10-11.

As detailed above, and as recognized by the PSC, notice of this project to the people of Brandywine was ineffective. Local residents were denied the opportunity to participate fully in the decision-making process. The failure of the PSC, MDE, and MDNR to notify or involve the affected local community in the decision whether to issue the CPCN constitutes use of a criteria or method that has the effect of discriminating on the basis of race.

The CPCN for the Mattawoman plant continues a pattern and practice by the PSC, MDE, and MDNR of utilizing criteria and methods that have the effect of discriminating on the basis of race. Across the entire state of Maryland, blacks are more likely to live within ten miles of a fossil fuel-fired power plant. And fossil fuel-fired power plants are dramatically more likely to be sited in counties with higher percentages of black residents.

Individually and collectively, these criteria and methods used by the PSC, MDE, and MDNR to decide whether and on what terms to issue the CPCN constitute prohibited discrimination in violation of Title VI of the Civil Rights Act of 1964 and the regulations of DOT and EPA. They constitute "criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race" under 49 C.F.R. § 21.5(b)(2), and "criteria or methods of administering [the] program or activity which have the effect of subjecting individuals to discrimination because of their race" under 40 C.F.R. § 7.35.

IX. LESS DISCRIMINATORY ALTERNATIVES

The following less discriminatory alternatives were available to the PSC, MDE, and MDNR:

1. Afford the Brandywine community greater opportunities for participation in the permitting process, including providing meaningful, effective notice to all local residents and granting them intervention in the CPCN proceeding on an equal footing with Mattawoman Energy, the state agencies, and the U.S. Air Force.
2. Conduct a thorough and meaningful review of the potential for the project to impose disproportionate burdens on the basis of face, and evaluate the reasons why black Marylanders are disproportionately exposed to the harmful effects of fossil-fuel-fired power generation throughout the state.
3. Require Mattawoman Energy to conduct ambient air quality monitoring in Brandywine for all pollutants of concern, including ozone, nitrogen dioxide, and fine particulate matter, to conduct a thorough health assessment in the community and the area, to make reports to the PSC, MDE, MDNR, and the community, and to expeditiously address air quality violations, as conditions of the CPCN.
4. Impose conditions through the CPCN to reduce traffic congestion and associated air pollution, including provision of public transportation, coordination of construction

schedules with the other power plants in the area, and installation of additional traffic signals.

5. Meaningfully evaluate alternative sites where construction and operation of a large gas plant would not disproportionately impact the black community.
6. Determine that new solar and wind capacity, promotion of energy efficiency, or both would serve the public interest better than construction of yet another polluting fossil-fuel-fired power plant, or at least evaluate those alternatives.

X. RELIEF

Complainants request that the DOT Departmental Office of Civil Rights and the EPA Office of Civil Rights accept this complaint and investigate whether the PSC, MDE, and MDNR violated Title VI of the Civil Rights Act and its implementing regulations.[71] For reasons of economy, we request that these investigations be consolidated, and that EPA and DOT collaborate and coordinate on remedial approaches. Because the coordinating entity at the state level—the PSC—is funded by DOT, we request that DOT take the lead role. We also request that the Civil Rights Division of the Department of Justice play an active role in coordinating these federal investigative and enforcement actions, consistent with the mission of the Federal Coordination & Compliance Section.

Complainants request that the state agencies be brought into compliance by requiring them to withdraw issuance of the CPCN and withhold issuance of a new CPCN unless and until they: a) conduct a full and fair analysis of disparate impacts from the proposed facility (including air quality monitoring and modeling, a health assessment, and a community needs assessment); b) conduct a full and fair consideration of alternatives that would avoid such disparate impacts; and c) require that any decision to issue a new or revised CPCN is conditioned on Mattawoman taking steps to ameliorate the negative impacts of the Mattawoman project upon Brandywine's black community.[72] The PSC, MDE, and MDNR must also revise their regulations and procedures to adopt environmental justice as an explicit consideration and goal in all decisions related to fossil fuel-fired power generation.

The PSC, MDE, and MDNR must take steps to ameliorate the negative impacts of the Mattawoman project upon Brandywine's predominantly black community. They must mandate regular air quality monitoring for ozone, nitrogen dioxide, fine particulate matter, and all other air pollutants of concern, with at least two air quality monitors within the Brandywine

[71] If either DOT or EPA rejects this complaint, Complainants request that the other agency conduct an investigation alone or jointly with other federal agencies, as appropriate. *See* 28 C.F.R. § 42.408(b) ("Where a federal agency lacks jurisdiction over a complaint, the agency shall, wherever possible, refer the complaint to another federal agency . . . .").

[72] At a minimum, the PSC, MDE, and MDNR should condition the extant CPCN on satisfaction of these requirements.

community (one along a congested roadway) and a third at the elementary school, independently monitored, as well as regular reporting of the results of this monitoring to the authorities and the public. If this monitoring and reporting discloses unhealthy levels of air pollution, effective, expeditious measures must be taken to protect public health. The agencies must mandate measures to ameliorate traffic congestion and associated air pollution, including coordination of construction schedules with the other power plants in the area, installation of traffic signals, and a feasibility study of improved public transportation. In all of these matters, the PSC, MDE, MDNR, and Mattawoman Energy, LLC should engage fully with a representatives of the local community, including the Community Development Exchange, a community-based non-profit entity affiliated with the Complainant groups and located at 8787 Branch Avenue, Suite 17, Clinton, MD 20735, and be guided by the community needs assessment.

If the PSC, MDE, and MDNR do not come into compliance voluntarily, Complainants request that DOT and EPA suspend or terminate the federal financial assistance that those agencies receive.[73]

Sincerely,

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[73] *See, e.g.*, Letter from Peter M. Rogoff, Adm'r, Fed. Transit Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n, & Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010), available at http://www.bart.gov/sites/default/files/docs/BART_MTC_Letter_On_OAC.pdf (notifying state agencies that they were "in danger of losing federal funding" from the Federal Transit Administration because of Title VI noncompliance).

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