



October 27, 2021

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Re: Request for Review of the Michigan Department of Environment Great Lakes and Energy's Compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

Dear Director Dorka and Principal Deputy Stoneman,

On behalf of Flint Rising, Environmental Transformation Movement of Flint, and St. Francis Prayer Center, the Great Lakes Environmental Law Center and Earthjustice call on the United States Environmental Protection Agency's ("EPA") External Civil Rights and Compliance Office ("ECRCO") to review whether the Michigan Department

of Environment, Great Lakes, and Energy (“EGLE”) is in compliance with Title VI of the Civil Rights Act of 1964,¹ and EPA’s implementing regulations.²

This request for a compliance review reflects EGLE’s ongoing practice of providing inadequate services and protection to communities of color, immigrant communities, and people with disabilities throughout Michigan. This request is sparked by the impending November 15, 2021, approval of an air permit for the Ajax asphalt plant that will be located in extremely close proximity to both residential housing and the St. Francis Prayer Center, which serves residents of the public housing community among others in Flint. The asphalt plant will emit air toxics, including lead, into the Flint community which, as is well known, has already been subjected to lead poisoning as well as other ongoing environmental exposures with devastating and lasting impacts. We expect EGLE to issue the air permit for the asphalt plant despite the fact that signatories, EPA, and United States Department of Housing and Urban Development (“HUD”) all submitted comments raising serious civil rights concerns about the disparate impact that would result to a low-income, predominantly Black community; by permitting this proposed asphalt plant, EGLE is worsening the disproportionate environmental harms facing this community. Indeed, the residents of federally funded housing River Park units live only 1,550 feet from the proposed plant location and the residents of the Ridgecrest Village units live 0.5 miles away from the proposed plant location. The harm could not be closer and the time to act more urgent. Once Ajax obtains the air permit, we expect construction to begin in short order.

While there is an immediate need for assistance, we are also asking for a broader review of EGLE’s compliance with Title VI because its permitting of the Ajax asphalt plant is not the first and likely not the last time that EGLE will fail to comply with civil rights laws. To date, EGLE has repeatedly done so without significant recourse. Specifically, as outlined more fully below, we ask that EPA require EGLE to pause its permitting process for the Ajax asphalt plant and evaluate the implications on the community; conduct a thorough Title VI compliance review of EGLE; and require that EGLE develop a detailed Title VI implementation plan that includes requiring the preparation of a cumulative impacts analysis prior to issuing permits. We will also be seeking support from HUD to ensure that the impacted HUD-funded housing residents are protected. We are submitting this letter to the Department of Justice (“DOJ”) given the interagency nature of the issues and the coordinating role that DOJ can play in conducting the compliance reviews. We urge your offices to act as quickly as possible to protect the impacted Flint community—even taking action before the permit decision is

¹ 42 U.S.C. § 2000d.

² 40 C.F.R. Part 7.

announced on Monday, November 15, 2021; every measure must be taken to ensure that EGLE pauses its permitting process until it can undertake an analysis of the cumulative risks posed by the addition of an asphalt plant to the Flint community.

I. BACKGROUND

A. Proposed Location of the Ajax Asphalt Plant

The proposed Ajax asphalt plant construction site is already over-populated with heavy industrial facilities, including Universal Coating Inc, Genesee Power Station, Ace-Saginaw Paving Company, Buckeye Terminals, Superior Materials, RJ Industrial Recycling, Genesee Recycling, Environmental Rubber Recycling, Emterra Environmental USA, and Lake State Railway Company.

The proposed Ajax asphalt plant, to be constructed within the industrial area, is itself located in very close proximity to residential housing and numerous community gathering centers; 2,970 people live within a 1-mile radius of the proposed asphalt plant.³ Two low-income public housing developments, River Park and Ridgecrest Village, are located directly to the south and southwest of the proposed site. Four mobile home parks are located within a 1-mile radius of the site along with three children's parks, a public beach, a county recreation area, a community garden, five churches, and an assisted living center. Within 1-mile of the proposed plant, 86% of the population identify as people of color, including 77% of the population identifying as Black and 10% of the population identifying as Hispanic. Forty-three percent of households have incomes of less than \$15,000 a year. The area's per capita income in 2018 was \$14,991.⁴

B. EGLE Has a History and Pattern of Discrimination on Environmental Permitting and Enforcement

EGLE has a history and pattern of discrimination on the basis of race or national origin in its environmental permitting and enforcement of environmental laws—whether it is the discriminatory placement of hazardous waste or other polluting facilities or failure to secure safe drinking water. Flint's drinking water crisis has

³ United States Environmental Protection Agency. 2020 version. EJSCREEN. Retrieved September 20, 2021, from <https://ejscreen.epa.gov/mapper/demogreportpdf.aspx?report=acs2018>. U.S. Census Bureau, American Community Survey (ACS) 2013-2017.

⁴ *Id.*

become the national symbol of what environmental racism looks like.⁵ There are several relevant examples in Flint and in other low-income, communities of color around the state that have been subjected to disproportionate environmental exposures as a result of EGLE's actions.

Indeed, the 2016 United States Commission on Civil Rights Report critiquing EPA's Compliance and Enforcement of Title VI and Executive Order 12898 referenced the "mass lead poisoning of residents of Flint, Michigan," a predominantly Black community and recognized that Flint residents had been exposed to polluted air long before the drinking water issues arose.⁶ A 2016 article in *The Nation* also noted, that decades earlier, Father Schmitter of the St. Francis Prayer Center had raised civil rights concerns about the placement of a power station in Flint when the community was already home to several hazardous facilities; the article explains that Father Schmitter said, "[h]e can't say exactly what the effect of the power plant has been on the surrounding community, which includes a school and public-housing units because 'nothing has ever been done to find out, by the state or the federal people.'"⁷ Tragically, almost thirty years later, the community and decisionmakers still lack an accurate assessment of the air emissions emanating from the many industrial facilities in this area or their effect on the surrounding community.

There are endless examples of the disproportionate harm caused by EGLE's implementation of environmental laws in Michigan. We detail a few examples here.

1. Genesee Power Station Permitting Process Leads to Disparate Air Pollution Exposure in Flint

The Genesee Power Station ("GPS") is located on the same street, less than 700 meters from the proposed Ajax asphalt plant. When the GPS facility was being permitted, MDEQ's⁸ public participation process was riddled with problems, including

⁵ U.S. Commission on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12898*, 104 (September 2016), https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf.

⁶ *Id.* ("[L]ong before people in Flint, Michigan, had to worry about brownish, putrid-smelling, lead-laced water, they worried about poisoned air.") (quoting Zoe Carpenter, *How the EPA has Failed to Challenge Environmental Racism in Flint – and Beyond*, *THE NATION* (January 28, 2016), available at <https://www.thenation.com/article/how-the-epa-has-failed-to-challengeenvironmental-racism-in-flint-and-beyond/>).

⁷ Zoe Carpenter, "How the EPA has Failed to Challenge Environmental Racism in Flint – and Beyond," *THE NATION*, *supra* note 6.

⁸ MDEQ is the predecessor name for EGLE.

that almost all of the hearings were held in Lansing, fifty miles away and when MDEQ held a meeting in the Black neighborhood in Flint, MDEQ arranged for armed and uniformed officers to be present, which was not a common practice. In the letter finding discrimination related to the GPS permitting, EPA's Office of Civil Rights issued "[a] finding of discriminatory treatment of African-Americans by [EGLE] in the public participation process for the GPS (Genesee Power Station) permit considered and issued from 1992 to 1994."⁹ EPA's Office of Civil Rights not only required MDEQ to improve its public participation processes and better access to residents with disabilities and limited-English proficiency, but it also required MDEQ to put a process in place to address environmental complaints and address specific concerns relating to odors, fugitive dust, and lead from the GPS.¹⁰

EPA's letter regarding the permitting of the GPS found discrimination focused on the public participation concerns, but EPA's investigation also considered the potential disparate impacts of air pollution in the community. Unfortunately, however, EPA's investigation (1) relied only on modeling and did not put in place any air monitors to assess the actual conditions in the community, and (2) improperly deemed attainment of the NAAQs to be sufficient evidence of a lack of adversity or harm.¹¹ In addressing the civil rights concerns flowing from EGLE's potential permitting of the Ajax asphalt plant, EPA should recognize the need for proximate air monitoring and the disparate harm that can be caused to communities even if environmental standards are met on their face.

In yet another example of disparate air pollution exposure, the St. Francis Prayer Center filed a Title VI Complaint regarding MDEQ's permitting of the Select Steel facility, also located in Flint. The issues raised in the Select Steel Complaint relate to MDEQ's failure to consider the cumulative effects of permitting another polluting facility in the Flint community, including the added emissions of VOCs, lead, and other air toxics, as well as the failures of public participation in the permitting process. Although EPA accepted the complaint for investigation, it notoriously concluded that there was no adverse harm.¹²

⁹ January 19, 2017, MDEQ Closure Letter for Administrative Complaint No. 01R-94-R5, <https://www.epa.gov/sites/default/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>.

¹⁰ *Id.* at 23, 31.

¹¹ See U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit, Chapter 1. See also Adversity and Compliance with Environmental Health-Based Thresholds, 78 Fed. Reg. 24, 739 (April 26, 2013) at 24741.

¹² See St. Francis Prayer Center Title VI Complaint Re: Select Steel Permit #579-97 – Michigan DEQ at 3, https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.htm.

2. The Flint Water Crisis Disproportionately Harmed Communities of Color

The Flint drinking water crisis put in stark relief the need for more civil rights protections for Flint residents.¹³ Although the conditions that led to the Flint Water Crisis date back to systemic racism from many decades earlier,¹⁴ the immediate events that precipitated the crisis involved the switch of the drinking water supply from Lake Huron to the Flint River by the state-appointed emergency manager for Flint in 2014. The city's lead service lines began leaching lead into the drinking water after the source of water was switched. Indeed, although the Flint River was highly polluted, no actions were taken to undertake corrosion control of the lead service lines in Flint; the failure to undertake corrosion control was a breach of the Safe Drinking Water Act's Lead and Copper Rule.¹⁵ Further, required sampling measures were not employed and resident concerns were ignored or dismissed. As the Flint Water Advisory Task Force noted in its 2016 report,

Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities.¹⁶

Again, several local and national groups, including St. Francis Prayer Center, sought federal help in addressing the civil rights concerns. These groups sought a Title VI compliance review regarding the mismanagement of the Flint Water Crisis by MDEQ and the Michigan Department of Health and Human Services ("MDHHS"). The Title VI Letter stated,

While EPA and HHS are currently engaged in extensive efforts to resolve the situation in Flint, to our knowledge none of these efforts or investigations squarely address the central role that race, national origin and disability have played and continue to play in precipitating and prolonging the crisis, nor non-compliance by MDEQ and MHHS with

¹³ The story of the Flint drinking water crisis has been detailed in many places. See e.g., FLINT WATER ADVISORY TASK FORCE, FINAL REPORT (2016).

¹⁴ U.S. Commission on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12898*, 104 (September 2016), *supra* note 5.

¹⁵ See *supra* note 11.

¹⁶ FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 56 n.20 (2016).

federal civil rights law, nor, particularly, the disproportionate impacts on African Americans.¹⁷

The Title VI letter called on EPA and HHS to undertake a compliance review of MDEQ and MDHHS' practice of providing inadequate services and protection to communities of color and requested that immigrant communities and people with disabilities be part of the solution in Flint. As the Title VI letter stated, "[t]he current disaster is not the first case of environmental injustice that has been caused or exacerbated by MDEQ or MDHHS, but it should be the last."¹⁸ Regrettably, to the extent a compliance review was undertaken following the Title VI letter, it did not result in substantive changes to disproportionate exposures in Flint, as exemplified in EGLE's anticipated permitting of the Ajax asphalt plant.

3. The Benton Harbor Water Crisis Disproportionately Harms The Black Community

Alas, the Flint water crisis was not even the last drinking water crisis in Michigan. The current water crisis in Benton Harbor, a predominantly Black community, is another call to action for EPA to step in and ensure the protection of civil rights of Michigan's residents. Like the Flint community, Benton Harbor's residents have been subjected to lead contamination in their public water system at levels that exceeded the action level set by the EPA's lead and copper rule, and that present an imminent and substantial endangerment to their health. In response to this crisis, on September 9, 2021, a large number of groups,¹⁹ including Flint Rising and the Environmental Transformation Movement and Great Lakes Environmental Law Center, filed a petition with EPA seeking emergency action under the Safe Drinking Water

¹⁷ Flint Title VI Letter, <https://earthjustice.org/sites/default/files/FlintLetterFinal.pdf> (quoting members of 1 Flint Water Advisory Task Force, Final Report 54 (Mar. 21, 2016), available at https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf ("Task Force Final Report")).

¹⁸ *Id.*

¹⁹ The full list of petitioners include Benton Harbor Community Water Council, Great Lakes Environmental Law Center, NRDC, Flint Rising, People's Water Board Coalition, Michigan Welfare Rights Coalition, Water You Fighting For, Safe Water Engineering, LLC, Highland Park Human Rights Coalition, Michigan Environmental Justice Coalition, Sierra Club Michigan Chapter, Dr. Mona Hanna-Attisha, Clean Water Action, Ecology Center, Freshwater Future, East Michigan Environmental Action Council, Detroit People's Platform, Campaign for Lead Free Water, For Love of Water, Environmental Transformation Movement of Flint.

Act.²⁰ The petition details the inadequate actions of EGLE in addressing the high lead levels in the drinking water and remains pending while, on the ground, Benton Harbor residents are dealing with the impact of environmental harm in their community.²¹

4. Detroit, MI Hazardous Waste Facility Siting—US Ecology

Twenty years after the seminal 1987 “Race and Toxic Waste” report, it is still true that “Michigan has the most egregiously disproportionate toxic waste burden in the nation.”²² Today, seven of the eight hazardous waste facilities accepting offsite hazardous waste in Michigan are licensed for locations where the percentage of communities of color or immigrant communities living within three miles of the facilities is above the statewide average. Across the state, 65% of the people living within 3 miles of a commercial hazardous waste facility are people of color (even though they make up only 25% of the total state population).

More recently, EGLE approved a license for the expansion of the U.S. Ecology North facility, a hazardous waste facility in an area of Detroit near Hamtramck. Within a three-mile radius of the U.S. Ecology North facility, 80% of the residents are minorities. Despite substantial public outcry, EGLE approved a license modification that increased the facility’s storage capacity nine-fold. As a result, the Great Lakes Environmental Law Center, on behalf of the Michigan Environmental Justice Coalition, Sierra Club’s Michigan Chapter, and several individuals, filed a Title VI Complaint with EGLE on July 27, 2020. The complaint remains outstanding over one year later.

²⁰ Petition For Emergency Action under the Safe Drinking Water Act, 42 U.S.C. § 300i and 42 U.S.C. § 300j-1(b) to Abate the Imminent and Substantial Endangerment to Benton Harbor, Michigan Residents from Lead Contamination in Drinking Water (Sept. 9, 2021), <https://www.glelc.org/news/2021/9/9/petition-emergency-action-epa-to-address-benton-harbor-lead-contaminated-water>.

²¹ After three years and after the petition was pending for one month, and in response to EPA engagement and significant public pressure, Michigan’s Governor Whitmer stepped in and ordered certain measures be taken to protect Benton Harbor’s residents from the contaminated drinking water. These measures included continued supply of free bottled water for residents, implementation of monitoring through safety standards for water testing, and increased coordination between administrations. See Press Release, The Office of Governor Gretchen Whitmer (October 14, 2021), <https://www.michigan.gov/whitmer/0,9309,7-387-90487-570500--,00.html>.

²² Great Lakes Environmental Law Center, *In Historic Complaint, Residents & Environmental Justice Advocates Demand Michigan Department of Environment, Great Lakes, and Energy Address Discriminatory Siting of Hazardous Waste Facilities*, THE DUMPING GROUND (Aug. 2, 2020), <https://www.glelc.org/news/2020/8/2/community-residents-environmental-justice-advocates-call-on-the-michigan-department-of-environment-great-lakes-and-energy-to-address-discrimination-in-location-of-hazardous-waste-facilities>).

5. River Rouge Air Pollution

In southwest Detroit and neighboring River Rouge lies what is known as the most polluted zip code in Michigan, 48217. The history of the area reflects years of industry expansion at the cost of the health of the largely Black/African American and sizable Hispanic population. Indeed, the population of zip code 48217 is 78.3% African American, and 14.7% white.²³ The area surrounding zip code 48217, which encompasses River Rouge, consists of more than two dozen major emissions reporting industrial facilities.²⁴ Industry actors in the area were repeatedly flagged by the MDEQ for noxious odor emission and exceeding legal emissions limits, but industry activity was nevertheless permitted to continue. This hazardous activity has led to a prevalence of respiratory disorders among area residents, with a 2012 study by the Michigan Department of Community Health finding that 48217 and the three surrounding zip codes have “significantly” higher rates of newly diagnosed cases of lung and bronchus cancers than the rest of Michigan.²⁵

II. EPA’S ECRCO SHOULD ACT NOW TO ENSURE EGLE COMPLIES WITH ITS TITLE VI OBLIGATIONS

A. Authority to Conduct Compliance Reviews

EPA has the authority and responsibility to investigate whether entities that receive federal funds are in compliance with Title VI.²⁶ EPA regulations provide that ECRCO:

[m]ay periodically conduct compliance reviews of any recipient’s programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that

²³ United States Census Data, search query “48217” (last visited Oct. 27, 2021), <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan/PST045219>.

²⁴ Steve Neavling, *Struggling to breathe in 48217, Michigan’s most toxic ZIP code*, METRO TIMES (Jan. 08, 2020), <https://www.metrotimes.com/detroit/struggling-to-breathe-in-48217-michigans-most-toxic-zip-code/Content?oid=23542211>. See also 2017 Flint Letter, *supra* note 16.

²⁵ See 2017 Flint letter *supra* note 16, but also MDCH, Southwest Detroit Cancer Incidence and Mortality Report: 1999 to 2008/2009 4 (Oct. 18, 2012), available at https://www.michigan.gov/documents/mdch/Southwest_Detroit_Cancer_Incidence_and_Mortality_Report10_18_12_402088_7.pdf.

²⁶ 40 C.F.R. 7.115(a).

discrimination may be occurring in such programs or activities.²⁷

If EPA has “reason to believe that discrimination may be occurring in such program or activities,” EPA may collect data and information from EGLE and conduct on-site reviews to ensure compliance.²⁸

As DOJ’s Title VI Legal Manual explains, “Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews.”²⁹ The standards outlined above must be read in light of this broad discretion to ensure that agencies can hold recipients accountable for noncompliance with federal law.

B. There is Sufficient “Reason to Believe” that EGLE Has Not Complied with Title VI.

As detailed above, EGLE’s environmental permitting and enforcement of environmental laws consistently have a disparate impact on communities of color and immigrant communities throughout Michigan, including Flint. Flint is a majority Black community protected under Title VI on the basis of race, color or national origin. Even before this threatened addition of air pollution to the community from an asphalt plant, Flint residents suffered unthinkable lead exposure that resulted in permanent neurological damage to the city’s children; lead exposure to the city’s adults; and reduced home values.³⁰ Considering that there is no safe level of lead exposure for children, it is concerning that EGLE is considering permitting a facility that will add any lead emissions to the air. In addition to the lead poisoning in Flint, and likely as a result of the exposure to air pollution including PM₁₀ and other air toxics, Flint residents suffer from disproportionately high rates of asthma and other respiratory diseases; higher rates of cardiovascular disease; and shorter life expectancies. Yet, as detailed in a separate letter to EPA Region 5, attached and incorporated herein, EGLE seems poised to add to the existing air pollution burden in the community, even though it lacks an accurate understanding of the background levels of PM₁₀ in the community.

²⁷ *Id.*

²⁸ 40 C.F.R. § 7.115(a).

²⁹ DOJ, *Title VI Legal Manual* (last updated Aug. 6, 2015), <https://www.justice.gov/crt/title-vi-legal-manual#Selection>.

³⁰ *See, e.g.*, Testimony of Ed Hoort at 0:38:15, Hearing of the Michigan Civil Rights Commission, Apr. 28, 2016 [audio recording].

1. EGLE's Failure to Consider Cumulative Impacts in Permitting Has a Disproportionate Effect on Communities of Color

As set forth in the Flint Groups' comment regarding the pending air permit for the asphalt plant, attached and incorporated fully herein, a cumulative impact analysis is imperative in Flint following the ongoing effects of the city's water crisis.³¹

As the Michigan Civil Rights Commission explained in the wake of the Flint water crisis,

[T]he Commission asserts that some cumulative impacts, even if unquantifiable, are sufficiently demonstrable and/or so widely accepted that the failure to consider them should be considered environmental injustice. For example, the Commission believes it is distributive environmental injustice when government:

- Fails to consider high childhood asthma rates in a downwind community when assessing a request to begin or increase a potentially harmful emission.³²
- Fails to consider the current air quality of an area when assessing a request to begin or increase an emission.
- Fails to consider other environmental harms and risks like water quality when assessing a request to begin or increase an air emission.
- Fails to consider existing aggravating factors like poor health, lack of health care, and malnutrition, and/or lack of access to healthy foods.

³¹ Earthjustice and Great Lakes Environmental Law Center Comments submitted to EGLE on behalf of their clients: Flint Rising, the Environmental Transformation Movement of Flint, and the St. Francis Prayer Center,

https://earthjustice.org/sites/default/files/files/2021.09.21_flint_group_comments_ajax_pti_permit.pdf.

³² Systemic Racism Through the Lens of Flint, Michigan Civil Rights Commission (citing to Hal Bernton, Seattle Times, "Weight of War: Gear that protects troops also injures them,"

https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf

The Commission stresses that the failure to consider cumulative effects in such examples is unjust.³³

EGLE has the clear authority to require a cumulative impact assessment regarding any toxic air contaminant pursuant to Mich. Admin. Code R. 336.1228 (Rule 228) and Mich. Admin. Code R. 336.1901(Rule 901). In addition, the Michigan Environmental Policy Act, MCL 324.1705(2), requires that EGLE consider the effect of the proposed permit on the environment and should not authorize conduct that will pollute, impair or destroy the air, water or other natural resources if "there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." Yet despite this clear authority, and the historical need, EGLE has failed to consider any cumulative risk assessment for toxic air contaminants relating to the Ajax asphalt plant. Its inaction has a direct disproportionate impact on the health of the Flint residents.

2. Failure to Require Proper Background Air Pollution Measurements for PM₁₀ in this Black community.

Pursuant to federal requirements,³⁴ EGLE is responsible for requiring permit applicants to demonstrate compliance with the national ambient air quality standards. EGLE has an obligation to deny a permit to install if it believes the operation of the proposed Plant will interfere with the maintenance of the air quality standard for any contaminant.³⁵ To this end, EGLE's Air Quality Division adopted policy and procedure AQD-022 which specifies when a new minor source must demonstrate that its emissions will not cause a violation of the NAAQS or any PSD increment.³⁶ AQD-022 requires any minor source that will cause emissions of PM₁₀ above the Significant Emissions Rate to provide a demonstration that its emissions will not cause a violation of the NAAQS or PSD increment.³⁷ This demonstration generally consists of both an air modeling analysis to predict ambient impacts and the collection of ambient air quality

³³ *Id.*

³⁴ 42 USC 7410(a)(1); 42 USC 7410(a)(2)(C); 40 CFR 51.160(b)(2).

³⁵ Mich. Admin. Code R, 336.1207(1)(b).

³⁶ DEQ Air Quality Division Policy and Procedure: AQD-022: Dispersion Modeling Guidance for Federally Regulated Pollutants, Last Revised Nov. 30, 2018, available at https://www.michigan.gov/documents/deq/DEQ-AQD-PP-022_483177_7.pdf

³⁷ *Id.*

data to establish the background level of ambient air pollution in the area where the source is to be located.³⁸

According to Ajax's permit application, the proposed Plant has the potential to emit PM₁₀ above the Significant Emissions Rate. As such, Ajax was required to demonstrate its PM₁₀ emissions would not cause a violation of the NAAQS or PSD increment. This demonstration was required to include providing ambient air quality data to establish the background level of PM₁₀ in the area where the proposed Plant is to be located.

Even though the neighborhood where the proposed Plant is to be located has some of the highest levels in the State of Michigan for many of the pollution indicators used by the EPA's environmental justice screening tool, EJSCREEN, EGLE authorized Ajax to utilize PM₁₀ air quality data collected by a monitor in Lansing, Michigan – which is approximately 50 miles from the proposed Plant. By considering data outside the relevant geographical area, EGLE failed to require proper background air pollution measurements for key pollutants to the detriment of the Flint community.

EGLE's decision to allow Ajax to rely on PM₁₀ air quality data collected at a monitor 50 miles away is in direct conflict with EPA guidance.

3. EGLE's Ongoing Failures in its Public Participation Practices

In managing the Ajax Asphalt Plant permitting process, EGLE has continued its history of failing to provide adequate public participation opportunities. The inadequacies and lack of accessibility of the public participation process is particularly concerning when the agency's record of EPA issued Title VI violations are brought to bear. As discussed above, EPA found that EGLE had discriminated against Black residents in its public participation practices surrounding the issuance of a permit for the Genesee Power Station, located on the same street, less than 700 meters from the proposed Ajax site.

As a result of two other Title VI resolution agreements involving Flint, EGLE committed to implementing its public participation policy as well as developing a limited-English proficiency ("LEP") policy. Under EGLE's LEP policy, a community

³⁸ See, DEQ, PSD Workbook: A Practical Guide to Michigan's Prevention of Significant Deterioration Regulations, at 97-105, Last Revised May 2014, available at <http://www.deq.state.mi.us/aps/downloads/permits/PSD%20Workbook.pdf>

needs assessment begins with the identification of needs and services for those that are with LEP and/or disabled.³⁹ Upon information and belief, EGLE failed to take steps to identify the needs of the community beyond listing an email address to request language interpretation or other accommodations in a letter that not every community member even received.

Flint is one of the nation's most stark examples of the growing digital divide. Roughly 40% of city residents lack access to broadband internet, double the percentage of households lacking access statewide.⁴⁰ Nearly 25% live in households without access to a computer.⁴¹ Given the specific characteristics of the population within one mile of the proposed site, the aforementioned lack of access is likely underestimated.

This lack of access means impacted residents also lack the ability to receive electronic notification of meetings. Even where notice is achieved, virtual meetings place an unreasonably high burden on the substantial numbers of residents lacking broadband or computer access entirely. Community elders often lack the technical literacy to determine meeting locations and times or to successfully join an online meeting. At the same time, while the printed notices that successfully arrived at the mailboxes of some community members were dated July 1, 2021, they were not actually received until weeks later. In addition, EGLE did not directly send public notice information (e.g. the Project Summary) to nearly 400 River Park Apartments and Ridgcrest Townhouses families. Instead, they sent two notices – to the management of each low-income housing complex. Several community members reported learning of their right to provide comment only through concerned neighbors or by word of mouth at community demonstrations. Many other impacted residents received no notice at all. Each of these factors reduced the ability of residents to participate in a decision-making process that could impact the health of their community substantially.

EGLE's initial failure to assess the community's needs later led to conflicting messages, confusing residents attempting to understand how best to participate in public meetings and through written comments. In response to pressure from a coalition of environmental justice activists, EGLE extended the comment period and provided additional hearings to account for communication problems. However, inconsistent information was posted in the various public documents visible on the website. Documents were not updated, potentially leading some residents to see only

³⁹ *Id.*

⁴⁰ U.S. Census Bureau, American Community Survey (ACS) and Puerto Rico Community Survey (PRCS), 5-Year Estimates.

⁴¹ *Id.*

the original August comment period deadline. Not realizing the comment period was extended, residents may have been led to believe their opportunity to provide public comment had been foreclosed.

Community members have been made to feel unheard and ignored, particularly upon the observation that some construction related activities have already begun taking place at the proposed site. One community member stated that activity around the plant site made it feel like “[EGLE and Ajax] are ready to continue no matter what we say here today.”⁴² These many factors have resulted in a palpable sense of futility and uncertainty regarding the meaningfulness of their participation in the permitting process.

Ultimately, the lack of clarity within the public participation process for this site did not meet the EPA or EGLE’s own expectations that the process “promotes and seeks active participation by the public in EGLE activities.”⁴³

III. CONCLUSION

Signatories ask that EPA thoroughly investigate EGLE’s compliance with Title VI of the Civil Rights Act as it relates to its permitting process of the Ajax asphalt plant. Further, in order to ensure EGLE’s compliance with civil rights obligations in the future, signatories ask that EPA:

- Require EGLE to pause its permitting process and evaluate whether a decision to permit the Ajax asphalt plant will have a "disproportionately high and adverse effect" on the basis of race or national origin and, further, identify alternatives that would avoid, minimize, or mitigate any disproportionately high and adverse effects that are found.
- Conduct a thorough compliance review of EGLE and, particularly, the actions, policies and practices that give rise to the impending decision to permit yet another polluting facility in close proximity to residential and other community gathering spaces in Flint. The review should evaluate the actions, policies, and practices of EGLE to ensure that possible areas of non-compliance are identified and addressed.

⁴² Dylan Goetz, “Flint Residents Unhappy With Proposed Asphalt Plant Near City’s Border”, *MLive*, August 12, 2021, <https://www.mlive.com/news/flint/2021/08/flint-residents-unhappy-with-proposed-asphalt-plant-near-citys-border.html>

⁴³ https://www.michigan.gov/egle/0,9429,7-135-3306_70585-381847--,00.html

- Require that EGLE develop a detailed Title VI implementation plan, that includes gathering air quality data localized to communities most impacted by permitting proposals and considers cumulative impacts of all proposals.

EPA must bring EGLE into full compliance with its Title VI obligations so every person and community in Michigan can benefit from equal protection under the law.

The Michigan Commission on Civil Rights' Flint Report still rings true:

Allowing environmental harm and risks to exist or be placed in locations where they will do the most harm, instead of where they will do the least, is a good example of how insidious systemic racism can be. This serves to propagate environmental injustice disproportionately effecting African Americans and/or other people of color when decisions are made.

We look forward to working with EPA's ECRCO to prevent further harm to the Flint community.

Sincerely,

/s/Debbie Chizewer

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