GREAT LAKES
ENVIRONMENTAL LAW CENTER

Protecting the world's greatest freshwater resources
and the communities that depend on it

September 30, 2016

Sent by email to MDCRDirector@Michigan.gov

Michigan Department of Civil Rights
Attn: Flint Water Crisis Testimony
110 West Michigan Avenue, Suite 900
Lansing, MI 48933

Re: Flint Water Crisis Testimony

Dear Commissioners:

On behalf of the Great Lakes Environmental Law Center, I want to thank you for inviting me to testify at your September 8, 2016 hearing on environmental justice and the water crisis in Flint. The focus the Commission has placed on the Flint crisis is necessary and valuable. I provide the following written testimony to complement my verbal testimony.

1. **Plans and policy guidance are important, but we need laws on the books with teeth.**

There is no single or perfect definition of "environmental justice" ("EJ"). The federal Environmental Protection Agency ("EPA") defines it as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." For purposes of this letter, that definition suffices to describe EJ advocates' two goals of better process and better substantive outcomes.

My verbal testimony addressed how effectively environmental justice legal tools could have addressed – and perhaps still can address – the Flint crisis and crises like it. Environmental injustice is a major and varied problem; as such, it requires major and varied EJ solutions. While it is important and helpful to have policy guidance in place for agencies, in order to provide needed and timely solutions, EJ tools need to have teeth

Laws on the books can provide much in the way of pre-decision process related to proposed agency actions that will have an effect on EJ communities: longer public comment periods; multiple public hearings held at times that accommodate work and school schedules; youth outreach and education; easy and early notice of and access to applications for permits (not merely draft versions of the permits); disparate impact studies; evaluation and regulation of

aggregate impacts and toxic hotspots; penalty policies that account for disproportionate impacts; required community host agreements; etc. However, even improved pre-decision process will not avoid every environmental injustice moving forward and cannot address environmental injustices whose seeds have already been sown. Citizens in EJ communities also need tools that can play a post-decision remedial function.

2. EJ advocates need litigation tools they can use to address existing environmental injustice that has grown out of a lack of enhanced process, and future environmental injustice linked to any breakdowns in enhanced process.

To meet the goals for fair treatment and meaningful involvement for vulnerable EJ communities, there are a number of EJ tools. Each tool provides different functions.

President Clinton's Executive Order 12898 from 1994 ("1994 Order"), titled Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, was one of the main initial pieces of the federal legal EJ landscape. It directed federal agencies to identify and address the disproportionately adverse health and environmental effects of their actions on minority and low-income populations. Federal agencies implement the 1994 Order, and certain other federal laws, in ways that both set EJ standards and that allow for enforcement of those standards. While it is crucial that agencies have this mandate, it is equally important to allow citizens to step in where the agencies are not effectively enforcing the law.

There are two litigation tools in particular that EJ advocates have attempted to use when agencies have not done enough. However, those tools have produced little success to date. They are the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Title VI of the Civil Rights Act.

The Equal Protection Clause has been interpreted to mean that recipients of federal money cannot discriminate on the basis of race, color, sex, or national origin. To establish an Equal Protection claim, plaintiffs must prove discriminatory intent, sometimes referred to in the case law as "racial animus" or "disparate treatment". Establishing intent has proved to be very difficult, and so many EJ litigation matters based on the Equal Protection Clause have not met with success. See Wyatt J. Sassman, Environmental Justice as Civil Rights, 18 RICHMOND J. LAW AND THE PUBL. INTEREST. 4 (2015); Carlton Waterhouse, Abandon All Hope Ye That Enter? Equal Protection, Title VI, And The Divine Comedy Of Environmental Justice, 20 FORDHAM ENVTL. LAW REV. 51 (2009).

Title VI of the Civil Rights Act makes it illegal to discriminate on the basis of race, color, or national origin in programs and activities receiving federal monies. Initially, EJ litigants were hopeful that they could pursue Title VI claims more easily than those based on the Equal Protection Clause because for some time, Title VI claims required a showing of disparate

impact as opposed to disparate treatment. Disparate treatment is intentional, while disparate impact refers to practices that on their face are neutral but that result in a disproportionate impact on protected groups. However, in 2001, the Supreme Court held that while agencies could bring Title VI claims, Title VI (specifically section 601) did not establish a private cause of action and so could not be utilized directly by EJ advocates. Federal agencies can enforce and otherwise implement Title VI, see Daria E. Neal, Recent Developments in Federal Implementation Of Executive Order 12,898 And Title VI Of The Civil Rights Act Of 1964, 57 HOW. L.J. 941 (2014), but citizens cannot take up the slack when agencies fall behind.

The Supreme Court breathed some life into the possibility of EJ advocates using another federal litigation tool when it decided Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015) ("Inclusive Communities"). In Inclusive Communities, the plaintiffs alleged disparate impact against the Texas housing agency under Title VIII of the Civil Rights Act, also known as the Fair Housing Act ("FHA"). The plaintiffs alleged that the agency had allocated tax credits for low-income residential development mainly in urban predominantly black neighborhoods while ignoring such allocations in suburban predominantly white neighborhoods. The claim was based on sections 804(a) and 805, which focus on sale and rental transactions.

The Supreme Court held that sections 804(a) and 805 of the FHA provide for private causes of action that could be established on the less burdensome theory of disparate impact. The Supreme Court provided numerous caveats and glosses to ensure that district courts vigorously examine the evidence advanced to pursue such claims. While the EJ community had the FHA in mind as early as the 1990s, Alice L. Brown and Kevin Lyskowski, Environmental Justice Litigation: Environmental Justice And Title VIII Of The Civil Rights Act Of 1968 (The Fair Housing Act), 14 VA. ENVTL. J.L. 741 (1995), Inclusive Communities has rekindled the thought of pursuing this federal litigation tool.

3. In spite of a favorable decision in Inclusive Communities, Michigan should develop litigation tools that EJ advocates can utilize when other modes of resolution fail to deliver.

With Inclusive Communities, there is hope that EJ advocates will be able to pursue certain federal litigation when necessary. There are still limitations, though. As the name suggests, the Federal Housing Act exists to address problems related to housing, and not every environmental injustice is related to housing. Also, though it can certainly be used to address wrongs committed by governments, the FHA has often been used to address wrongs committed by private persons and companies.

Furthermore, Inclusive Communities dealt with sections 804(a) and 805, but to deal with a situation like the Flint water crisis, the focus would likely have to be on section 804(b) of the FHA which makes it unlawful:

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(emphasis added). Since there have not really been any section 804(b) EJ lawsuits rooted in Inclusive Communities, there will be questions about what the meaning is of "services or facilities in connection therewith". Does "facilities" include the water line distribution network, which as we know in Flint contained the lead that leached out into the water delivered to residences? Does "services" include the provision of water, and does it also include the lack of improvements to the lines? We will likely get answers across to these kinds of questions in the coming years should EJ advocates push on the FHA door.

At the state level, some have raised the possibility of EJ advocates using the Elliott-Larsen Civil Rights Act ("ELCRA"). The ELCRA addresses discrimination based on religion, race, color, national origin, age, sex, height, weight, familial status, and marital status. It does so in the contexts of employment, public accommodations, education, and housing. It may be possible that EJ advocates will try to pursue litigation based on the ELCRA. However, given the language of the housing title, EJ claims may be limited to those involving sale or rental transactions. It may be more difficult for EJ advocates to use the ELCRA to address more systematic and indirect varieties of discrimination that stem from permitting, zoning, enforcement, and fiscal activity.

Michigan certainly needs regulations and policy guidance in place that require MDEQ, MDOT, and other state agencies to implement EJ goals by improving pre-decision process. To begin with, Michigan should adopt the Environmental Justice Plan of 2010 as soon as possible. Six years after adoption of the plan and a little over two years since the horrific and unacceptable environmental injustice of Flint, there is no reason to delay.

This Commission can also put rules and policy guidance into place. The Commission has a unique constitutional mandate. Article V section 29 of the Michigan Constitution provides for a civil rights commission and authorizes that commission to, among other things, make rules, hold hearings, take testimony, and issue appropriate orders. Until the 2010 plan is adopted, MDEQ and other agencies promulgate rules, and the legislatures provides statutory tools, this Commission should do everything within its constitutional authority – including rulemaking – to protect EJ communities that may be or have been harmed.

Ultimately, however, apart from regulations and guidance, Michigan needs statutory litigation tools that would allow EJ advocates to remedy post-decision harms like the harms currently being suffered by the residents of Flint. These statutory tools can be designed to provide benefits to EJ communities while also limiting abuse of the tools so as to reassure government and the regulated community. Without these citizen litigation tools, it is difficult to remedy past harms or future harms that will inevitably slip through the cracks of even an improved pre-decision process. The statutory tools can address the Equal Protection Clause and Title VI obstacles by allowing plaintiffs to proceed on a disparate impact theory. They can also focus on issues that tend to affect EJ communities, such as aging infrastructure, toxic hotspots, asymmetry of benefits and health and environmental risks, and aggregate impacts.

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One of the priorities of the Great Lakes Environmental Law Center is to support EJ communities, and as such we are thrilled that the Commission is willing to take advantage of its constitutional powers and considering how to prevent another Flint crisis through an EJ lens. As explained above, Michiganders in EJ communities do have legal tools available to them to address environmental injustice, but those tools are insufficient. We stand ready to assist the Commission as it moves forward with its work on this insufficiency. If there are any questions about our testimony, please contact me anytime.

Sincerely,

s/ Oday Salim

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Admitted in California (inactive) and Pennsylvania (active)
Awaiting admission in Michigan