

**Testimony of Sara R. Gosman**  
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**Before the**  
**Michigan Civil Rights Commission**  
**Hearing on Flint Water Situation: Environmental Injustice**  
**September 8, 2016**

Good afternoon Chair Horwitz, Chair Demashkieh, and Honorable Commissioners. I am Sara Gosman, Assistant Professor at the University of Arkansas School of Law. I teach and research in the areas of environmental and energy law. Prior to joining the law faculty at the University of Arkansas, I was a lecturer at the University of Michigan Law School and taught a seminar on environmental justice as well as other environmental law courses. I was also a member of the Environmental Justice Working Group that drafted the Environmental Justice Plan for the State of Michigan. I appreciate the opportunity to return to Michigan and testify today, and want to thank you for taking up environmental justice as an issue of civil rights.

**Introduction**

The Flint water crisis is a textbook example of environmental injustice. Members of the Flint community were neither fairly treated nor given the opportunity for meaningful participation in the decisions that affected their health. An environmental justice plan that could have given the community a voice was first weakened, then never implemented. Changes in state leadership are partially to blame. But the primary reason for the state's lack of an environmental justice policy was the strong opposition from business and industry organizations, who viewed environmental justice as a threat to economic growth and to their permits. Both the Granholm and the Snyder administrations were not willing to act in the face of this opposition.

Thus, the story of Flint is not just one of governmental indifference to the health of a poor community of color. It is also the story of a broken environmental policymaking process in which economic interests play an outsize role, and environmental justice is viewed as a special interest issue rather than an issue of civil rights. This broken system, combined with the lack of democratically elected leadership at the local level, failed to protect the people of Flint.

**The Legal Framework**

The Safe Drinking Water Act, like most federal environmental laws, is based on a cooperative federalist framework: the U.S. Environmental Protection Agency (EPA) sets federal minimum drinking water standards while state environmental agencies implement standards that are at least as stringent as the federal standards through delegated programs.<sup>1</sup> The Michigan Department of

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<sup>1</sup> 42 U.S.C. § 300g-2.

Environmental Quality (DEQ) has “primacy” to regulate public water systems in the state, which includes authority to issue permits and enforce drinking water standards under federal oversight.<sup>2</sup>

In administering delegated programs such as the drinking water program, the DEQ must ensure that it does not violate federal and state civil rights law. There are two primary sources of civil rights law in the field of environmental justice: the equal protection clauses of federal and state constitutions, and Title VI of the Civil Rights Act of 1964. As a recipient of federal funds from the EPA, the DEQ must comply with Title VI and EPA’s implementing regulations. Under the equal protection clauses of the U.S.<sup>3</sup> and Michigan constitutions<sup>4</sup> and under the Title VI statute,<sup>5</sup> the DEQ is prohibited from intentionally discriminating against Flint residents because of their race.<sup>6</sup> In addition, under EPA’s Title VI regulations, the DEQ is prohibited from acting in a manner that has the effect of subjecting residents to discrimination on the basis of their race.<sup>7</sup>

In practice, civil rights law has not been successful at addressing environmental injustices. Courts have been loath to find intentional discrimination in an environmental justice case, since it is difficult to separate race from technical issues and land use decisions.<sup>8</sup> EPA’s Title VI program is widely criticized for its ineffectiveness.<sup>9</sup> Since 1994, EPA has found only one recipient—a California state agency—in “preliminary” violation of these regulations.<sup>10</sup> This complaint and two other complaints involving state agencies were resolved by settlement.<sup>11</sup> EPA

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<sup>2</sup> *Id.*

<sup>3</sup> U.S. CONST. amend. XIV, § 1.

<sup>4</sup> MICH. CONST. art. I, § 2.

<sup>5</sup> 42 U.S.C. § 2000d.

<sup>6</sup> *See* *Alexander v. Choate*, 469 U.S. 287 (1985) (holding that Section 601 of Title VI prohibits intentional discrimination); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (holding that equal protection clause of U.S. Constitution prohibits intentional discrimination); *Harville v. State Plumbing & Heating, Inc.*, 553 N.W.2d 377 (Mich. Ct. App. 1996) (holding that equal protection clause of Michigan Constitution prohibits intentional discrimination).

<sup>7</sup> 40 C.F.R. § 7.35(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 . . . 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.”) The EPA enforces this requirement through an administrative complaint process. The Supreme Court has ruled that there is no private right of action to enforce Title VI regulations in court. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>8</sup> *See* CONG. RESEARCH SERV., R42952, NONDISCRIMINATION IN ENVIRONMENTAL REGULATION: A LEGAL ANALYSIS 3-4 (2013) (reviewing cases and concluding that “as a general rule, litigants asserting disproportionate environmental harms have not been successful when claiming denial of equal protection”).

<sup>9</sup> *See, e.g., Environmental Justice Denied*, THE CENTER FOR PUBLIC INTEGRITY, <https://www.publicintegrity.org/environment/environmental-justice-denied> (last visited Sept. 10, 2016).

<sup>10</sup> Letter from Rafael DeLeon, Dir., Office of Civil Rights, EPA, to Christopher Reardon, Acting Dir., Cal. Dep’t of Pesticide Regulation (Apr. 22, 2011), <https://www.epa.gov/sites/production/files/2016-04/documents/title6-c42211-preliminary-finding.pdf>.

<sup>11</sup> *See* Title VI-Settlements and Decisions, EPA, <https://www.epa.gov/ocr/title-vi-settlements-and-decisions##settlement> (last updated Apr. 18, 2016).

required the agencies to improve public participation efforts, transparency, and staff training; the only substantive environmental requirement was to conduct additional air quality monitoring.<sup>12</sup>

Yet if ever there were a successful case of racial discrimination, it would be Flint. The DEQ arguably discriminated in effect by incorrectly applying safe drinking water requirements to a majority-African-American community, thus creating a disparate and adverse impact under EPA's Title VI regulations. Whether the DEQ intentionally discriminated is a much harder question. There does not appear to be any direct evidence of intent, but the DEQ's active resistance to acknowledging a problem could be circumstantial evidence. In a request to EPA to open a Title VI investigation, Earthjustice contends that intent could be based on evidence that the DEQ "manipulated lead testing procedures and results in order to maintain the illusion that Flint was not experiencing a lead problem," and "outright refused to require Flint to apply corrosion control to its system for months despite heightened calls for relief from Flint residents."<sup>13</sup>

To my knowledge, the only civil rights claim to emerge from Flint is Earthjustice's Title VI request. (Earthjustice also requested that the U.S. Department of Human and Health Services conduct a Title VI investigation of the Michigan Department of Health and Human Services.<sup>14</sup>) No one has brought an equal protection or Title VI lawsuit against the DEQ.

### **The History of Environmental Justice Policy in Michigan**

The DEQ's environmental justice policy efforts have largely been driven by the EPA's implementation of Title VI and the potential loss of federal funds. While Title VI was enacted in 1964 and the EPA issued regulations in 1972, the EPA did not begin to enforce the requirements until 1993.<sup>15</sup> A year later, President Clinton directed each federal agency to "ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin" under Title VI.<sup>16</sup> Since then, the DEQ has been the subject of at least eight Title VI complaints involving six controversies.<sup>17</sup>

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<sup>12</sup> *See id.*

<sup>13</sup> Letter from Marianne Engelman Lado & Christine Ernst, Atty's, Earthjustice, to Jocelyn Samuels, Dir., Office for Civil Rights, U.S. Dep't of Health and Human Servs. et al. 18 (July 12, 2016), <http://earthjustice.org/sites/default/files/FlintLetterFinal.pdf>.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 30-31 (2003).

<sup>16</sup> Presidential Memorandum Accompanying Executive Order 12,898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994).

<sup>17</sup> *Complaints Filed with EPA under Title VI of the Civil Rights Act of 1964*, EPA, <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> (last updated Mar. 2, 2016). EPA

The first two Title VI complaints against the DEQ involved the Flint community and lead. In 1992, the St. Francis Prayer Center filed a complaint challenging a permit issued to the Genesee Power Station to operate a wood-waste incinerator in Genesee Township, on the border of Flint.<sup>18</sup> At issue were lead emissions from the incinerator, a particular problem because of high blood lead levels in children in the area.<sup>19</sup> EPA never resolved the complaint, and the incinerator continues to operate.<sup>20</sup> In 1998, the Prayer Center filed a second complaint challenging a permit issued to Select Steel to operate a steel mini-mill in Flint itself.<sup>21</sup> In a contentious decision, EPA found that the DEQ's decision to issue a permit to Select Steel did not violate Title VI because the permit was in compliance with the Clean Air Act's health-based standards.<sup>22</sup> The steel mini-mill, which was never built, would have emitted lead as well as dioxin.<sup>23</sup>

In response to these Title VI complaints and the growing controversy over environmental injustices, the DEQ convened its first working group on environmental justice policy in 1998.<sup>24</sup> The group considered four issues: (1) the role of local government, (2) identification of environmental justice areas, (3) public participation, and (4) the definition of disparate impacts.<sup>25</sup> In 1999, the group issued its final report with recommendations.<sup>26</sup> All the members agreed that the DEQ should use demographic data to screen certain permit applications for environmental justice issues and should improve its public participation procedures and outreach together with applicants.<sup>27</sup> But the members could not agree on how to measure disparate adverse impacts, a critical Title VI determination.<sup>28</sup> These recommendations were never implemented.<sup>29</sup>

Although the first attempt to develop a policy failed, the issue did not go away. In a 2002 decision on a Title VI complaint, the EPA "strongly urge[d]" the DEQ to finalize its policy.<sup>30</sup>

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does not list any 2015 or 2016 complaints on its website. Of the complaints listed, three involved the same injection well in Romulus.

<sup>18</sup> Kary L. Moss, *Environmental Justice at the Crossroads*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 35, 44-45 (2000).

<sup>19</sup> *Id.*

<sup>20</sup> See *Complaints Filed with EPA under Title VI of the Civil Rights Act of 1964*, *supra* note 17; see also Robin Bravender, *EPA: Civil Rights Advocates Despair after Decades of Agency Inaction*, GREENWIRE, Feb. 19, 2015, <http://www.eenews.net/stories/1060013679> (quoting Rev. Phil Schmitter as saying "It's kind of a race. Is the Second Coming going to happen, or am I going to hear from the EPA? Right now, I'm betting on the Second Coming.")

<sup>21</sup> Moss, *supra* note 18, at 56.

<sup>22</sup> THE LAW OF ENVIRONMENTAL JUSTICE 41-42 (eds. Michael B. Gerrard & Sheila R. Foster et al., 2008).

<sup>23</sup> *Id.*

<sup>24</sup> See ENVIRONMENTAL JUSTICE WORKGROUP, ENVIRONMENTAL JUSTICE RECOMMENDATIONS 1-2 (1999). The working group included representatives of state agencies, local government, industry, and the community.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> *Id.* at 9, 15-16.

<sup>28</sup> *Id.* at 19.

<sup>29</sup> See ENVIRONMENTAL JUSTICE PLAN FOR THE STATE OF MICHIGAN AND DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT 3 (2010). The DEQ did adopt a community outreach plan in 2001 that drew from the recommendations. *Id.*

<sup>30</sup> Letter from Karen D. Higginbotham, Acting Dir., Office of Civil Rights, EPA, to Russell J. Harding, Dir., DEQ & Deborah Ann Romak 4 (Nov. 15, 2002).

The next year, a coalition of environmental justice advocates asked newly elected Governor Jennifer Granholm to take up the issue. In response, DEQ Director Steven Chester requested that the agency's Environmental Advisory Council develop recommendations for a statewide policy.<sup>31</sup> Using the 1994 federal executive order as a template, the Council recommended that each state agency develop an environmental justice plan and the Governor establish an interagency working group, advised by a citizens' panel.<sup>32</sup> But the Council went further and suggested that the Governor consider "mechanisms for individual communities to further environmental justice interests," including a "petition process to address the concerns that any group identifiable by race, color, national origin, or income, is or will be disproportionately and negatively impacted as a result of the development, implementation, and enforcement of environmental laws."<sup>33</sup> The DEQ and the Department of Civil Rights (DCR) transmitted the Council's recommendations to Governor Granholm in 2006.<sup>34</sup>

### **The Development of a Plan**

In 2007, Governor Granholm issued an Executive Directive on Environmental Justice, which incorporated many of the Council's recommendations.<sup>35</sup> In the Directive, the Governor tasked the DEQ with developing and implementing a state environmental justice plan. The plan was to, among other requirements:

- [i]dentify and address discriminatory public health or environmental effects of state laws, regulations, policies, and activities;
- provide policies and procedures for state departments and agencies to ensure that environmental justice principals [sic] are incorporated into departmental and agency decision-making and practices; and
- recommend mechanisms for members of the public, communities, and groups to assert adverse or disproportionate social, economic or environmental impact upon a community and request responsive state action.<sup>36</sup>

The Governor also directed the DEQ to establish a working group of state officials and members of the public that would help develop the state plan, offer recommendations, and review implementation of the plan.<sup>37</sup> The new Environmental Justice Working Group held its first meeting in July 2008.<sup>38</sup> The working group was composed of twenty-six members, including representatives from industry, environmental justice organizations, tribes, local government,

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<sup>31</sup> ENVIRONMENTAL ADVISORY COUNCIL, RECOMMENDATIONS FOR AN ENVIRONMENTAL JUSTICE POLICY FOR MICHIGAN 1 (2006).

<sup>32</sup> *Id.* at 2-3.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> Letter from Steven E. Chester, Dir., DEQ & Linda V. Parker, Dir., DCR, to Jennifer Granholm, Governor of Mich. (Feb. 17, 2006).

<sup>35</sup> Mich. Exec. Directive No. 2007-23 (2007).

<sup>36</sup> *Id.* at 2-3.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *See* ENVIRONMENTAL JUSTICE PLAN, *supra* note 29, at 3.

academia, and several state agencies.<sup>39</sup> State participation varied. Representatives from the Department of Community Health, for example, attended five of twelve meetings.<sup>40</sup>

The working group was divided into six subgroups to consider individual topics: (1) public participation, (2) integration into DEQ activities, (3) assessment of disparate impacts, (4) interdepartmental integration, (5) a petition process, and (6) the role of local government.<sup>41</sup> I led the subgroup on the petition process and was a member of the subgroup on integration into DEQ activities. The other members of the petition process subgroup represented DTE Energy, the Sierra Club, the DEQ, and the Department of Natural Resources.

### **The Petition Process**

Over several months, the subgroup reviewed different models for resolution of environmental justice complaints. The subgroup found three distinct approaches: (1) a formal grievance procedure, similar to the federal Title VI complaint process; (2) informal assistance from state environmental advocates; and (3) a petition process involving an interagency workgroup.<sup>42</sup> The subgroup agreed that the petition process was the best approach because it combined a formal mechanism to consider complaints with environmental justice coordinators who could work with communities.<sup>43</sup> The process also took into account the reality that environmental justice issues are rarely within the exclusive domain of one agency.

The subgroup recommended a process in which communities could file a petition with an Interdepartmental Working Group (IWG) composed of representatives from the Governor's office, the DEQ, the then-Department of Community Health, the DCR, and other state agencies.<sup>44</sup> The petition would require the signatures of 50 residents, including at least 25 from the affected community.<sup>45</sup> In determining whether to accept a petition, the IWG would consider whether there was a likely disparate impact; the severity of the environmental, economic and/or social impact; the severity of the other environmental, economic, and/or social issues facing the community and cumulative effects; the authority of the state to address the problem; the ability of coordinated state action to resolve the problem successfully; whether there was a pending lawsuit or administrative challenge; and other concerns raised by the community.<sup>46</sup> If the IWG

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<sup>39</sup> Environmental Justice Working Group Invited List (2008). I was invited to join the working group after the first meeting and remained an active member through December 2010, when the final plan was released.

<sup>40</sup> According to the meeting minutes, representatives of the Department of Community Health attended three meetings near the beginning (September 8, 2008; October 5, 2009; November 9, 2009), and two at the end (July 29, 2010 (presentation); November 29, 2010). *See also* DEQ Environmental Justice Work Group Meeting Summary of Jan. 12, 2009 (noting that participation from the Department of Community Health is "crucial" and encouraging the department to provide information on disparate impacts on health).

<sup>41</sup> *See* ENVIRONMENTAL JUSTICE PLAN, *supra* note 29, at 3.

<sup>42</sup> *See* Petition Process Subgroup Second Draft Report 2-3 (Aug. 17, 2009).

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.* at 5. The subgroup referred to the IWG as an "interagency committee" in its report.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 6.

accepted the petition, a state environmental justice coordinator in the Governor's office would work with coordinators in the DEQ and other agencies to develop an action plan.<sup>47</sup>

The proposed process was based on one that New Jersey used from 2004 to 2009.<sup>48</sup> The subgroup thoroughly researched the New Jersey experience to understand why the process lasted only five years. In its report to the full working group, the subgroup explained that it had “discussed the advantages and disadvantages of the process with two former [environmental justice] coordinators, the chair of the advisory council, and a community organizer who submitted a petition.”<sup>49</sup> From these conversations, the subgroup concluded that the “process was successful in solving some problems,” and had “given communities an advocate within the government, an opportunity to organize, and more information.”<sup>50</sup> But the process also “lacked resources and commitment from top state officials.”<sup>51</sup> Based on these lessons learned, the subgroup felt the process would be successful in Michigan if the “process [was] supported at the highest levels of state government, especially within the Governor's office;” additional resources were available to hire the needed environmental justice coordinators; and “[e]veryone involved in the process [was] clear about what the process can and cannot accomplish.”<sup>52</sup>

When the subgroup presented its recommendation to the full working group, several members had questions about the process. But the most vocal opposition came from Michigan Department of Transportation (MDOT) members. They argued that MDOT should be exempt from the petition process since the agency already took community concerns into account.<sup>53</sup>

### **The Draft Plan**

DEQ Director Chester combined the subgroup reports and shared a draft with the working group in November 2009. At that point, business and industry members raised several concerns about the scope of the petition process and the authority of the IWG.<sup>54</sup> Director Chester revised the text to clarify that the process “is not intended to interfere with existing permitting or project timelines,” that “denial of a petition is not subject to appeal,” and that “commitments are based on the agencies' existing legal authority and are conducted within the agencies' existing legal duties.”<sup>55</sup> But the business and industry members refused to support the Draft Environmental

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<sup>47</sup> *Id.* at 6-7.

<sup>48</sup> See N.J. Exec. Order 96 (2004), <http://nj.gov/infobank/circular/eom96.htm>; N.J. Exec. Order 131 (2009), <http://www.state.nj.us/infobank/circular/eojsc131.htm>.

<sup>49</sup> See Petition Process Subgroup Second Draft Report, *supra* note 42, at 4.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See DEQ Environmental Justice Work Group Meeting Minutes of Oct. 5, 2009, at 3 (“MDOT has asked if they need to participate in state process if there is a federal process available under Title VI. MDOT's concern is that communities may use the state process as an avenue to slow projects down.”)

<sup>54</sup> See DEQ Environmental Justice Work Group Meeting Minutes of Nov. 9, 2009, at 3.

<sup>55</sup> Draft Michigan Environmental Justice Plan 28-29 (Dec. 3, 2009).

Justice Plan even with additional changes,<sup>56</sup> and it was released for public comment in December 2009 with the caveat that members of the working group did not necessarily endorse the plan or its adoption.<sup>57</sup>

The state received forty-five comments, of which forty-one were related to the Draft Environmental Justice Plan.<sup>58</sup> The comments were evenly divided.<sup>59</sup> Eleven commenters were opposed to parts of the plan or the whole plan, including six business and industry organizations.<sup>60</sup> Four of the organizations were already represented on the working group.<sup>61</sup> The commenters contended that the plan would slow the permit process, discourage economic growth in urban areas, and be too resource intensive.<sup>62</sup> They also argued that the threshold of fifty signatures was too low and would open the petition process to abuse.<sup>63</sup> Eleven commenters generally supported the plan or a more stringent version, including four environmental organizations and one legislator.<sup>64</sup> In addition, four commenters specifically requested that the plan include tribes.<sup>65</sup> The remaining comments were either neutral or were student papers.<sup>66</sup>

### **The Final Plan**

The direction of policymaking changed significantly after the public comment period, from an open process to one that occurred behind closed doors. The state purportedly rewrote the Draft Environmental Justice Plan to address public comments, but aside from a new chapter on tribal consultation, the revisions only addressed the unsubstantiated concerns of the business and industry organizations who were members of the working group. In effect, the state removed policymaking from a range of stakeholders and deferred to the interests of the regulated parties.

Just after the Draft Environmental Justice Plan was released for public comment, Governor Granholm combined the DEQ and the Department of Natural Resources into one agency, the

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<sup>56</sup> See DEQ Environmental Justice Work Group Meeting Minutes of Dec. 7, 2009, at 2. Compare Draft Michigan Environmental Justice Plan, *supra* note 55, at 28-29, with Draft Michigan Environmental Justice Plan (Dec. 11, 2009). Director Chester added “whether the petitioners have taken advantage of existing public comment and participation procedures associated with those permits or projects” to the criteria for accepting a petition, and clarified that because the “IWG does not have independent regulatory authority, it cannot require state agencies to take actions beyond their respective state and federal authority.”

<sup>57</sup> Draft Michigan Environmental Justice Plan, *supra* note 56, at ii.

<sup>58</sup> List of EJ Comments Spreadsheet.

<sup>59</sup> I assisted the state in compiling the public comments and analyzed them together with Michigan Law students.

<sup>60</sup> *Id.*

<sup>61</sup> They were the Michigan Manufacturers Association, the Michigan Chamber of Commerce, the Detroit Chamber of Commerce, and Consumers Energy.

<sup>62</sup> See, e.g., Letter from Doug Roberts, Dir. of Env'tl. & Energy Policy, to Rebecca Humphries, Dir., DNRE (Apr. 9, 2010).

<sup>63</sup> *Id.*

<sup>64</sup> List of EJ Comments Spreadsheet, *supra* note 58. The state chapter of the Sierra Club commented, but the chapter is a separate part of the organization.

<sup>65</sup> *Id.* One commenter was Professor Kyle Powys Whyte, who later joined the working group.

<sup>66</sup> *Id.* Nine papers were submitted by students in an environmental justice class taught by Professor Paul Mohai at the School of Natural Resources and Environment, University of Michigan.

Department of Natural Resources and Environment (DNRE), under Director Rebecca Humphries.<sup>67</sup> In May 2010, the DNRE canceled the working group's meeting so that DNRE Director Humphries could review the plan and public comments.<sup>68</sup> At the next meeting in July, DNRE staff stated that the public comments had raised significant concerns and Director Humphries had met with Governor Granholm to agree on a new direction for the plan.<sup>69</sup> The DNRE would focus on capacity building and improved public participation under a new, part-time environmental justice coordinator.<sup>70</sup> There would no longer be a petition process, and interagency efforts would focus on existing programs.<sup>71</sup>

In November 2010, the new environmental justice coordinator sent a revised draft of the plan to the working group.<sup>72</sup> The DNRE issued the final Environmental Justice Plan the next month after editing it further to respond to business and industry concerns. With the exception of a new chapter on tribal consultation, the final plan was significantly weaker than the draft plan. The DNRE removed the petition process and the references to permitting; replaced specific commitments on compliance, enforcement, and remediation with general ones; and substantially edited the local government recommendations to avoid references to regulation.<sup>73</sup>

To justify these changes, the final Environmental Justice Plan cited the public comments from business and industry, particularly the concern that the draft plan would impact economic growth in urban areas.<sup>74</sup> Neither DNRE nor the commenters provided any support for this claim. The draft plan did not impose any direct costs on businesses in environmental justice areas, and indirect costs from the DNRE's additional public participation measures and review of disparate impacts were not likely to be significant. Judging by the New Jersey experience, the threshold of 50 signatures would not have led to costs from frivolous complaints: communities filed only seven petitions during five years. Finally, the focus on costs ignored the other side of the ledger: the incentives offered to businesses, the health and environmental benefits, and the intangible benefits of ensuring fair treatment and a meaningful opportunity to participate in decisions.

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<sup>67</sup> See Mich. Exec. Order 2009-45 (2009), [http://www.michigan.gov/documents/gov/EO\\_2009-45\\_296199\\_7.pdf](http://www.michigan.gov/documents/gov/EO_2009-45_296199_7.pdf). Director Chester, the strongest champion of an environmental justice plan, left the state in January 2010.

<sup>68</sup> E-mail from Frank Ruswick, DNRE, to Environmental Justice Working Group (May 11, 2010).

<sup>69</sup> DEQ Environmental Justice Work Group Meeting Minutes of July 29, 2010, at 2.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2, 4. In September 2010, I and several other members of the working group sent a letter to DNRE to convey our concerns about the new direction of the plan. Letter from Rhonda Anderson, Field Organizer, Sierra Club et al., to Frank Ruswick & Bryce Feighner, DNRE (Sept. 22, 2010). The letter noted that public comment was equally divided and that resource constraints were taken into account in drafting the plan.

<sup>72</sup> Email from Cindy Salmon, DNRE to Environmental Justice Working Group (Nov. 3, 2010) (on behalf of Bryce Feighner, DNRE).

<sup>73</sup> Compare Draft Michigan Environmental Justice Plan, *supra* note 56, with ENVIRONMENTAL JUSTICE PLAN, *supra* note 29.

<sup>74</sup> ENVIRONMENTAL JUSTICE PLAN, *supra* note 29, at 4 (describing comments objecting to the draft plan because it “would adversely effect [sic] economic growth in urban areas and slow down the permitting processes”).

I voted to support the plan because I believed it was better than no plan at all. The business and industry members refused to support the plan, even though the DNRE accepted almost all of their proposed changes.<sup>75</sup> Instead, they voted to remain neutral.<sup>76</sup> A month after the plan was finalized, Governor Rick Snyder entered office. His administration, which vowed to streamline environmental regulation and cut red tape,<sup>77</sup> never implemented the Environmental Justice Plan.

### **The Plans and Flint**

If the Draft Environmental Justice Plan had been adopted and implemented, I cannot say for sure that the Flint water crisis would have been prevented. But it would have made it much less likely. The petition process in the draft plan was designed for situations such as the one in Flint. The process would have allowed Flint residents to elevate their concerns by filing a petition with the IWG. Because the IWG would have included directors of the DEQ and the Department of Health and Human Services as well as the Governor's environmental policy advisor, there would have been recognition at the highest levels of the problems in Flint. And if the IWG accepted the petition, there would have been an action plan to address the problems.

But even the final Environmental Justice Plan would have made the water crisis less likely. The plan required the DEQ to integrate environmental justice into its operations and its strategic planning, and to train staff to be aware of environmental justice issues.<sup>78</sup> It also required the DEQ to prioritize monitoring and responses to complaints in environmental justice areas.<sup>79</sup> Thus, the staff in the drinking water program would at least have been aware of environmental justice issues and should have prioritized a response to the Flint community. While there was no petition process, the final plan directed the IWG to consider developing its own mechanism.<sup>80</sup> The final plan also directed the IWG to place particular emphasis on issues that transcend departmental jurisdictions.<sup>81</sup> If the IWG had developed such a mechanism, there could have been an avenue for Flint residents to bring their concerns to the state.

### **The Policy Future**

Looking forward, the state could remedy its failure by adopting and implementing a protective environmental justice policy. It does not have to look far. The Draft Environmental Justice Plan is a good basis for such a policy. The plan addresses four key issues: (1) meaningful public participation, (2) integration in governmental decision-making, (3) interagency cooperation, and (4) a means for the public to request responsive state action. To ensure that the policy continues in effect beyond the current administration, the plan should be adopted by rule. Rulemaking

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<sup>75</sup> See DEQ Environmental Justice Work Group Meeting Minutes of November 29, 2010.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> See, e.g., REINVENTING MICHIGAN (2011),

[https://www.michigan.gov/documents/snyder/Accomplishments\\_372765\\_7.pdf](https://www.michigan.gov/documents/snyder/Accomplishments_372765_7.pdf).

<sup>78</sup> See ENVIRONMENTAL JUSTICE PLAN, *supra* note 29, at 11-12.

<sup>79</sup> *Id.* at 13.

<sup>80</sup> *Id.* at 22-23.

<sup>81</sup> *Id.* at 23.

would also provide Flint residents and other members of the public with notice and an opportunity for comment. While the plan could be implemented under the state's existing authority, a statute authorizing an environmental justice policy would be preferable.

### **Conclusion**

The history of environmental justice policy in Michigan is one of stymied action and missed opportunities. The state has considered policies for almost twenty years—and never implemented them. Yet there is a silver lining to the many years of policy discussion: good policy proposals have emerged that could be the basis of a strong environmental justice plan. I hope that this Commission will encourage the state to finally implement such a policy. The state cannot change the past, but it can ensure justice for Flint and other communities in the future.