



MICHIGAN DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY

Grievance Submittal Form

Nondiscrimination in Michigan Department of Environment, Great Lakes, and Energy (EGLE) Programs
Policy and Procedure Number 09-024

SECTION I. COMPLAINANT INFORMATION

FIRST NAME:

LAST NAME:

EMAIL ADDRESS:

TELEPHONE NUMBER:

MAILING ADDRESS:

CITY:

STATE:

ZIP:

SECTION II. INCIDENT INFORMATION

DATE OF INCIDENT:

DATE OF GRIEVANCE SUBMISSION:

LOCATION OF INCIDENT (Include street crossing, street number, Street, City, State, ZIP)

Please identify the parties harmed or potentially harmed by the alleged discrimination. Use additional pages if necessary.

List the state and/or federal statute(s) or regulation(s) that EGLE allegedly violated and detail with specificity the action(s) or inaction(s) by EGLE that support the alleged violation. Use additional pages if necessary.

Describe with specificity the action(s) or inaction(s) allegedly resulted in discrimination. Use additional pages if necessary.

SECTION III. CERTIFICATION

I certify under penalty of law that I am familiar with the information submitted and that, based on my experience and inquiry, I believe the submitted information is true, accurate, and complete.

Nicholas Leonard

Signature

Date

Print Name

Submit this form with any additional pages to:

Nondiscrimination Compliance Coordinator
Executive Office
Michigan Department of Environment, Great Lakes, and Energy
P.O. Box 30473
Lansing, MI 48909-7973

or by email to:

EGLE-NondiscriminationCC@Michigan.gov

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By electronic mail

July 27, 2020

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Re: Title VI Complaint Under Michigan Department of Environment, Great Lakes, and Energy Policy and Procedure 09-024

On behalf of the residents of Detroit, Hamtramck, and the state of Michigan, as well as the named individuals and organizations provided in Section II (“Complainants”) the Great Lakes Environmental Law Center is submitting this Complaint regarding the Michigan Department of Environment, Great Lakes, and Energy’s pattern of neglect and disregard for communities of color in regards to the licensing of commercial hazardous waste facilities that has resulted in these facilities being disproportionately located in communities of color.

On January 29, 2020, the Michigan Department of Environment, Great Lakes, and Energy approved a license modification for U.S. Ecology North that will allow the facility to increase its storage capacity nine-fold. It did this despite the fact that the facility is located in a densely populated low-income community of color that already includes another commercial hazardous waste facility just to the south as well as a number of other industrial sites that have caused nearby residents physical and mental harm. In doing so, EGLE is continuing a history of discriminatory practices that has plagued this neighborhood since the 1940’s.

The Michigan Department of Environment, Great Lakes, and Energy’s decision to allow U.S. Ecology North to significantly expand its operations is part of a larger pattern of neglect and disregard for low-income communities of color regarding commercial hazardous waste facilities. In Michigan, the disproportionate siting of commercial hazardous waste facilities in communities of color has been found the worst in the nation. Today, that pattern continues unabated. 65% of the people living within 3 miles of a commercial hazardous waste facility in Michigan are people of color despite being only 25% of Michigan’s total population. To make matters worse, commercial hazardous waste facilities hardly serve their own communities. In 2017, 70% of the waste sent to all commercial hazardous waste facility came from out of state, 25% came from another county within Michigan, and only 5% came from the county in which the commercial hazardous waste facility is located.

To put it simply, Michigan’s low-income communities of color are disproportionately bearing the burden of living near large commercial hazardous waste facilities. These facilities serve as the dumping ground for hazardous waste that comes from all over the country. The Complainants submit this Complaint and request that the Michigan Department of Environment, Great Lakes, and Energy conduct a thorough investigation of the issues raised herein.

I. Introduction

Since springing into the national consciousness in the 1980s, the environmental justice movement has compelled federal, state, and local governments to examine how environmental laws and regulations may result in communities of color bearing a disproportionate burden regarding environmental risks. The start of the environmental justice movement is often pinpointed at 1982 in Warren County, North Carolina, where residents protested North Carolina's decision to locate a hazardous waste landfill in a predominantly Black and low-income community. However, the roots of the environmental justice movement stretch back to the civil rights struggles of the 1960s, including Martin Luther King Jr. supporting Black garbage workers in their strike for equal pay and better working conditions. It is from the civil rights struggle that the environmental justice movement drew its core principles. One of these core principles of environmental justice was concisely described by Dr. King himself:

When the Constitution was written, a strange formula to determine taxes and representation declared that the Negro was sixty percent of a person. Today another curious formula seems to declare he is fifty percent of a person. Of the good things in life, the Negro has approximately one half those of whites. Of the bad things of life, he has twice those of whites.¹

At the heart of the environmental justice movement is rectifying the inequitable distribution of burdens and benefits that Martin Luther King decried. As a concept, environmental justice has been defined in many ways by government agencies and community activists. The United States Environmental Protection Agency has defined environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, or national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”² The concept of “fair treatment” in the context of the development, implementation, and enforcement of environmental laws means that “no group of people, including racial, ethnic, or socio-economic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, or commercial operations or the execution of federal, state, local and tribal programs and policies.”³

While today's laws no longer expressly codify racial segregation and unequal treatment, the legacy of racism continues to this day. As noted by environmental justice scholar and activist Dr. Robert Bullard:

The laws that codify racial segregation have been eradicated but the practices continue today, which is why you get refineries, chemical plants and landfills disproportionately in

¹ Rev. Martin Luther King Jr., The Southern Christian Leadership Conference Presidential Address, Aug. 16, 1967.

² U.S. Environmental Protection Agency, Environmental Justice, available at <https://www.epa.gov/environmentaljustice>

³ Robert Bullard, Paul Mohai, Robin Saha, and Beverly Wright, *Toxic Wastes and Race at Twenty 1987-2007: A Report Prepared for the United Church of Christ Justice & Witness Ministries*, March 2007 (Appendix A).

communities of color...The only way to reverse that is to change the idea that communities of color are dumping grounds for pollution.⁴

One of the primary environmental burdens that has historically been borne by Black communities is living near commercial hazardous waste storage, treatment, and disposal facilities. Such commercial facilities accept wide varieties of hazardous waste from far-reaching locations. These wastes are often the toxic byproducts of a wide variety of industrial processes, as well as contaminated soil or water extracted from contaminated sites from across the country. After the birth of the environmental justice movement in Warren County in 1987, the United Church of Christ analyzed the relationship between race and the location of commercial hazardous waste facilities. As described in more detail below, the study concluded that commercial hazardous waste facilities were disproportionately sited in Black communities nationwide. In its follow up report 20 years later, the United Church of Christ found that the trend of disproportionately siting commercial hazardous waste facilities in communities of color had continued unabated.

This problem is particularly egregious in Michigan. As noted by the United Church of Christ's 2007 study, the percentage of people of color living nearby commercial hazardous waste facilities is 66%, whereas the percentage of people of color living in all other areas of the state is 19%. This disproportionality was found to be the most severe in the entire country. This problem remained unaddressed. Today, 65% of the peoples living within 3 miles of a commercial hazardous waste facility are people of color, despite being only 25% of Michigan's total population.

The decision by the Michigan Department of Environment, Great Lakes, and Energy ("EGLE") to allow U.S. Ecology to significantly expand the capacity of its hazardous waste storage and treatment facility continues the discriminatory legacy of requiring communities of color to bear the disproportionate burden of living in communities that are dumping grounds for hazardous waste. Unfortunately, U.S. Ecology North ("Facility") does not exist in isolation. Throughout Michigan, commercial hazardous waste facilities are overwhelmingly located in low-income communities of color.

During the U.S. Ecology licensing process, community members repeatedly brought up their concerns regarding the disproportionate siting of commercial hazardous waste facilities in low-income communities of color. EGLE never responded to these concerns. Instead, it simply stated that EGLE "does not have the authority to consider whether the facility is needed or wanted when deciding whether to issue or deny a license."⁵ EGLE has a legal obligation, pursuant to the EPA's Title VI regulations, to ensure that its licensing decisions do not have a discriminatory effect. Instead of closely examining the proposed license to ensure that it would not have an unjustified adverse disparate impact on the surrounding community, EGLE continued its disappointing legacy of shirking its Title VI obligations to communities of color which

⁴ Oliver Milman, *Robert Bullard: 'Environmental justice isn't just slang, it's real,'* THE GUARDIAN, December 20, 2018, <https://www.theguardian.com/commentisfree/2018/dec/20/robert-bullard-interview-environmental-justice-civil-rights-movement> (last visited Jul 23, 2020).

⁵ Michigan Department of Environment, Great Lakes, and Energy, Responsiveness Summary, Proposed Hazardous Waste Management Facility Operating License, Jan. 29, 2020 (Appendix B)

perpetuates the environmental injustice of commercial hazardous waste facilities in Michigan being disproportionately located in communities of color.

Now, the Complainants are submitting this Complaint for relief under EGLE Policy and Procedure 09-024, Nondiscrimination in EGLE Programs regarding EGLE's decision to issue an amended license to U.S. Ecology North on January 29, 2020, permitting the significant expansion of its hazardous waste storage capacity.⁶ Pursuant to EGLE Policy and Procedure 09-024, any person or group may submit a complaint alleging discrimination of any kind by EGLE, including discrimination by EGLE that may constitute a violation of 40 C.F.R. Part 7 or any state or federal statutes or regulations that EGLE enforces.⁷ Here, the Complainants allege that EGLE's decision to issue the amended license to U.S. Ecology North is in violation of Title VI of the Civil Rights Act of 1964 and the EPA's Title VI regulations described in 40 C.F.R. Part 7. Specifically, the Complainants allege as follows:

- EGLE discriminated on the basis of national origin by failing to identify limited English proficient persons living nearby U.S. Ecology North and by failing to provide adequate translation and interpretation services at its community meeting held on March 28, 2019 in violation of 40 C.F.R. Part 7.
- EGLE's decision to approve the license modification regarding the U.S. Ecology North, which permits a significant expansion of the Facility's hazardous waste storage capacity, violates 40 C.F.R. Part 7.
- EGLE's failure to adopt policies or regulations requiring the consideration of racial and economic demographic information in hazardous waste licensing decisions has established a pattern or practice of discrimination on the basis of race, color, and national origin in violation of 40 C.F.R. Part 7 and 42 U.S.C. § 2000d.

II. Complainants

Complainant Michigan Environmental Justice Coalition ("MEJC") is a statewide coalition of individuals, organizations, and academic institutions. MEJC works to achieve a clean, healthy, and safe environment for Michigan's most vulnerable residents in alignment with the principles of environmental justice that were drafted and adopted by the delegates to the First National People of Color Environmental Leadership Summit held on October 24-27, 1991.⁸

Complainant Sierra Club is the nation's largest non-profit, grassroots environmental organization with more than 60 chapters throughout the country. Sierra Club's purpose is to protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. Sierra Club's Michigan Chapter has been active in furthering environmental justice throughout the state.

⁶ EGLE Policy and Procedure 09-024, Nondiscrimination in EGLE Programs, Last revised Jan. 21, 2020 (Appendix C).

⁷ Id.

⁸ Principles of Environmental Justice, First National People of Color Environmental Leadership Summit, Last modified Apr. 6, 1996, available at <https://www.ejnet.org/ej/principles.html>

Complainant Pamela McWilliams is a resident of Detroit, Michigan. Her primary residence is immediately to the south of U.S. Ecology North. She is concerned about the operation of U.S. Ecology North as well as EGLE's decision to approve an amended license for the Facility to allow it to significantly expand its hazardous waste storage capacity. Specifically, she is concerned that the expansion of U.S. Ecology North's operations will result in increased adverse impacts for nearby residents.

Complainant Irene Sinclair is a resident of Detroit, Michigan. Her primary residence is immediately to the south of U.S. Ecology North. She is concerned about the operation of U.S. Ecology North as well as EGLE's decision to approve an amended license for the Facility to allow it to significantly expand its hazardous waste storage capacity. Specifically, she is concerned that the expansion of U.S. Ecology North's operations will result in increased adverse impacts for nearby residents.

Complainant Kheir Arabi is a resident of Detroit, Michigan. His primary residence is immediately to the west of U.S. Ecology North. He is concerned about the operation of U.S. Ecology North as well as EGLE's decision to approve an amended license for the Facility to allow it to significantly expand its hazardous waste storage capacity. Specifically, he is concerned that the expansion of U.S. Ecology North's operations will result in increased adverse impacts for nearby residents. He is also concerned about EGLE's failure to identify limited English proficient persons living nearby U.S. Ecology North, as well as its failure to provide adequate translation and interpretation services.

Complainant Mark Covington is a resident of Detroit, Michigan. His primary residence is immediately to the east of U.S. Ecology North. He is concerned about the operation of U.S. Ecology North as well as EGLE's decision to approve an amended license for the Facility to allow it to significantly expand its hazardous waste storage capacity. Specifically, he is concerned that the expansion of U.S. Ecology North's operations will result in increased adverse impacts for nearby residents.

Complainant Sharon Buttry is a resident of Hamtramck, Michigan, and is an active participant in the Coalition to Oppose the Expansion of U.S. Ecology. She is concerned about the operation of U.S. Ecology North as well as EGLE's decision to approve an amended license for the Facility to allow it to significantly expand its hazardous waste storage capacity. Specifically, she is concerned that the expansion of U.S. Ecology North's operations will result in increased adverse impacts for nearby residents.

III. Factual Background

To understand how commercial hazardous waste facilities in Michigan have come to be so disproportionately located in low-income communities of color, it is necessary to examine the history of race and housing in places such as Detroit, as well as the history of the environmental justice movement.

A. History of Race and Housing in Detroit

From 1910 to 1970, Detroit's Black population increased from 5,741 to 660,428.⁹ The most rapid increase came in the 1940s when Detroit saw its Black population double from roughly 150,000 residents to 300,000 residents.¹⁰ This influx of Black residents was part of the Great Migration, which saw six million Black southerners leave their homes in search of better lives away from the Jim Crow South in the rapidly industrializing North. The rapid increase in the number of Black residents from the South led observers to call Detroit "the northernmost southern city" or "the largest southern city in the United States."¹¹ With the influx of Black residents came a rise in racism, which was clearly exhibited in the growing practice of race-based residential segregation throughout Detroit.

Throughout much of the early and mid-20th century, racial covenants restricting the sale of property to Black residents was a commonly used tool to maintain housing segregation in a rapidly changing Detroit. Upon arrival in the 1940s, most Black residents were forced into overcrowded neighborhoods such as "Paradise Valley" and "Black Bottom" on Detroit's near-eastside. In addition to these neighborhoods, Black enclaves were also established in pockets of Detroit, including a Black enclave nearby the current U.S. Ecology North facility on the border of Hamtramck. Notably, Black neighborhoods throughout Detroit were consistently redlined for mortgages in the 1940s. This policy of redlining Black neighborhoods was officially and expressly approved by federal housing policy.

The primary sources used by lenders to determine eligibility for mortgages and home loans were Security Maps and Surveys developed by Federal Home Loan Bank Board officials.¹² These maps, such as the one provided in Figure 1 below, subdivided Detroit into four sections. The factors most important to determining a neighborhood's classification was the level of racial homogeneity, and the absence of a "lower grade population."¹³ Neighborhoods with even a relatively small Black population, such as the neighborhood nearby the U.S. Ecology North facility, were given a "D" rating. Additionally, areas that were perceived as "shifting" or were experiencing "infiltration" by "an undesirable population" were given a "D" rating.¹⁴ An area's classification had severe consequences. Residents in areas rates "C" or "D" were very unlikely to qualify for mortgages, and builders and developers were unlikely to receive financial backing for developments in such neighborhoods.¹⁵ In short, federal housing policy legitimized and backed systemic discrimination against Blacks in housing in Detroit and throughout the country.¹⁶

As a result of the widespread use of restrictive, race-based covenants in real estate transactions and redlining, a rapidly increasing influx of Black residents were trapped in densely packed neighborhoods with deteriorated housing at inflated prices. By 1947, of the 545,000 housing units available in Detroit, only 47,000 were available to Blacks.¹⁷ Unable to move to newly

⁹ U.S. Department of Commerce, Bureau of the Census, *United States Census of Population*, 1910-1970 (Washington, D.C.: U.S. Government Printing Office, various years).

¹⁰ *Id.*

¹¹ Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit*, at 23, Princeton University Press (1996) (hereinafter, "Sugrue")

¹² Sugrue at 43.

¹³ *Id.* at 43-44.

¹⁴ *Id.* at 44.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

developed housing units and unable to obtain financing for home improvements, Black neighborhoods and enclaves throughout Detroit became overcrowded and physically deteriorated. Black residents converted all types of buildings into housing for the increasing numbers of new residents. In 1943, eighteen Black families lived in a former church that had been converted into an apartment building.¹⁸ In 1946, Lester Velie described housing discrimination as “Detroit’s Time Bomb.”¹⁹

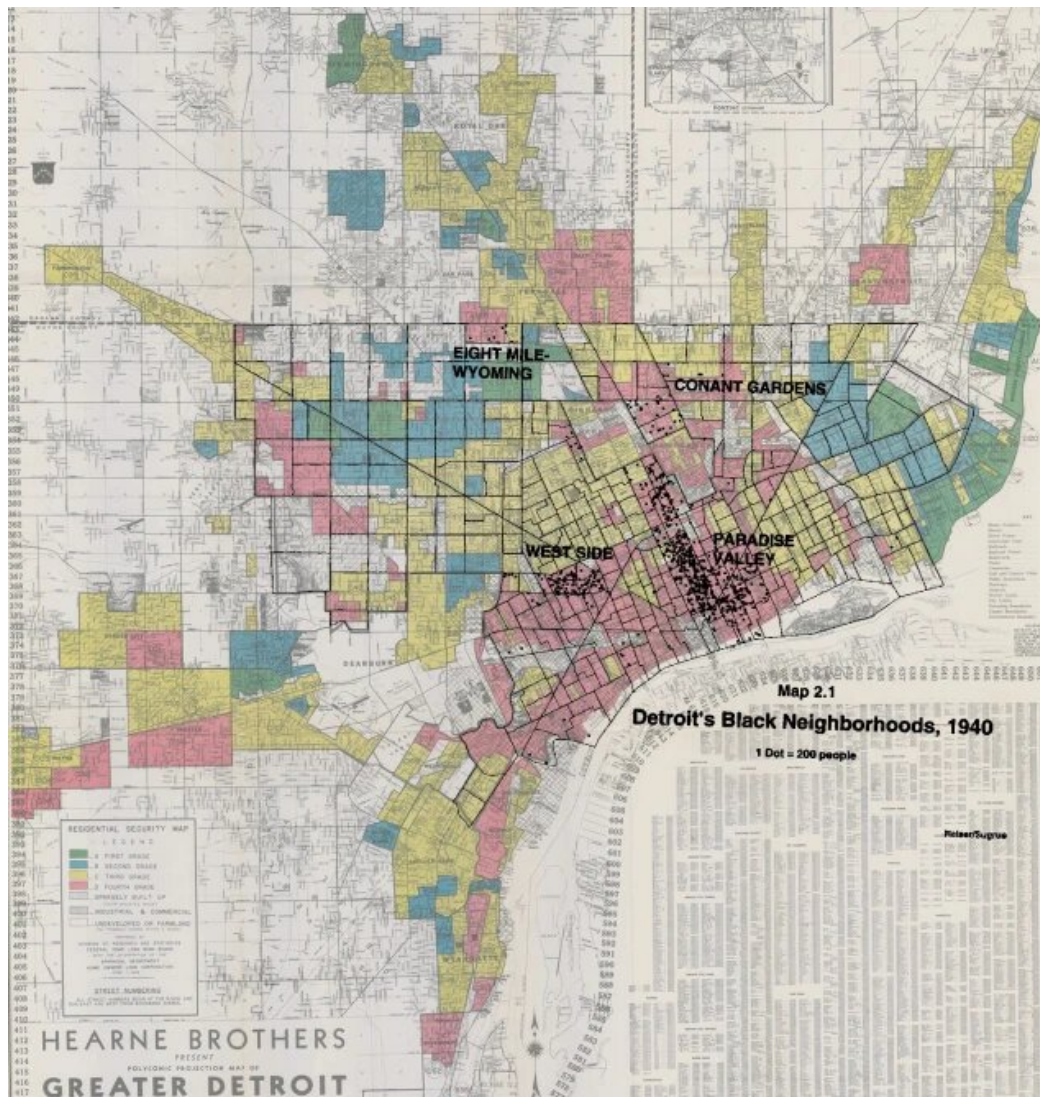


Figure 1 - Residential Security Map Prepared by the Federal Home Loan Bank Board (1939) Superimposed by 1940 Mapped Locations of Detroit’s Black Neighborhoods.

¹⁸ Id. at 42.

¹⁹ Lester Velie, Housing: Detroit’s Time Bomb: Racial Rivalry is the dynamite that makes it dangerous, Collier’s Weekly, Nov. 23, 1946, pp. 14-15.

The overcrowding and deterioration of Detroit's Black neighborhoods lead to municipal plans for "slum clearance." While there have been various methods of slum clearance, one such method was targeting Black neighborhoods for industrial development. As Detroit was experiencing a large increase in its Black population, its City Planning Commission was developing its "industrial renewal" policy to revitalize the City's industrial base.²⁰ To attract industrial developers, in 1951, the City established industrial corridors in its Master Plan and proposed to the condemnation and demolition of substandard residential structures that have a blighting effect in industrial districts.²¹ As demonstrated by Figure 2 below, the industrial corridors proposed in Detroit's 1951 Master Plan coincided very closely with Detroit's Black neighborhoods show in in Figure 1, which had been redlined for new residential developments and mortgages due in large part to federal housing policy.

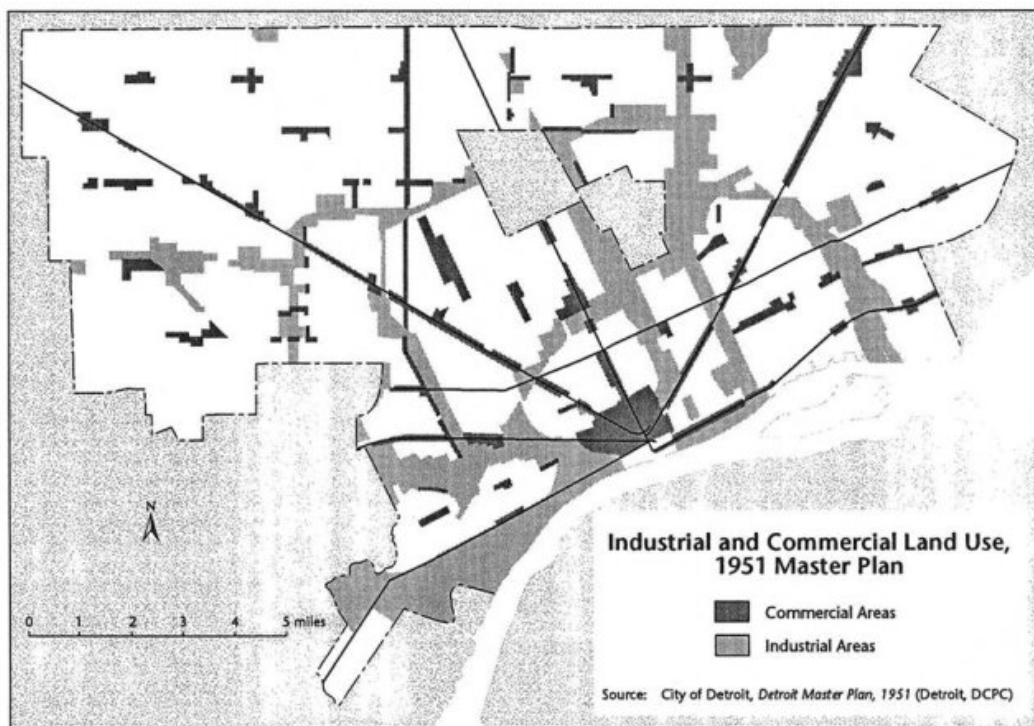


Figure 2 - Map from City of Detroit's 1951 Master Plan Proposing Industrial and Commercial Areas.²²

B. History of Environmental Justice

The widespread practice of racial housing discrimination throughout much of the 20th century ensured that people of color were purposefully restricted from moving to predominantly white neighborhoods and trapped in deteriorating and overcrowded neighborhoods. To make things worse, the Detroit government engaged in slum clearance efforts, which targeted Black communities for condemnation and demolition to make room for industrial developments. This

²⁰ Sugrue at 164.

²¹ Id.

²² City of Detroit, *City of Detroit Master Plan 1951, Industrial and Commercial Land use* (1951).

long-standing practice of housing discrimination and siting industrial developments near communities of color eventually led to the rise of the environmental justice movement.

The story of the environmental justice movement often starts in North Carolina when the Governor decided to landfill more than 30,000 gallons of PCB-contaminated soil in Warren County. North Carolina's decision to foist this environmental burden on this community was no accident. Warren County contained the highest percentage of Black residents in North Carolina and was also the poorest county in the state.²³ While Blacks composed only 24% of the state's population, they were 63% of the population of Warren County.²⁴ The per capita income for Warren County residents was approximately \$7,000 in 1982, compared to \$9,200 for the state. Warren County ranked 92nd out of 100 counties in median household income in 1980.²⁵ To put it bluntly, residents in Warren County in 1982 were predominantly Black and low-income.

The Governor's decision to locate a PCB landfill in a predominantly Black and low-income community galvanized what is held by many to be the United States' first national environmental justice protest. Local residents were joined by national civil rights leaders, including Reverend Leon White of the United Church of Christ's Commission for Racial Justice, Reverends Joseph Lowery, Ben Chavis, and Fred Taylor of the Southern Christian Leadership Conference, and District of Columbia Delegate Walter Fauntroy of the Congressional Black Caucus.²⁶ When the state attempted to start dumping PCB waste at the landfill, hundreds of protestors laid in the road to block the trucks. As a result, more than 55 protestors were arrested.²⁷ All told, more than 414 protestors were arrested over the course of several days of protests.²⁸

The decision by North Carolina to site a hazardous waste landfill in a Black community was indicative of a broader, national problem. Dr. Charles Cobb, the director of the United Church of Christ's Commission on Racial Justice, gave voice to these concerns:

We must move in a swift and determined manner to stop yet another breach of civil rights. We cannot allow this national trend to continue. If it means that every jail in this country must be filled, then I say let it be. The depositing of toxic wastes within the black community is no less than attempted genocide.²⁹

The protests soon galvanized multiple reports that demonstrated the truth behind the concern that hazardous waste facilities were being disproportionately sited in communities of color. In 1982, Walter E. Fauntroy requested that the United States General Accounting Office (GAO) determine the correlation between the location of hazardous waste landfills and the racial and

²³ Robert Bullard. *Dumping in Dixie: Race, Class, and Environmental Quality*, <http://www.ciesin.org/docs/010-278/010-278chpt2.html> (last visited Jul 23, 2020).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Special to the New York Times, *55 Arrested in Protest at a Toxic Dump in Carolina*, THE NEW YORK TIMES, September 16, 1982, <https://www.nytimes.com/1982/09/16/us/55-arrested-in-protest-at-a-toxic-dump-in-carolina.html> (last visited Jul 23, 2020).

²⁸ Robert Bullard. *Dumping in Dixie: Race, Class, and Environmental Quality*, <http://www.ciesin.org/docs/010-278/010-278chpt2.html> (last visited Jul 23, 2020).

²⁹ Urban Environment Conference, Inc., *Taking Back Our Health: An Institute on Surviving the Toxic Treat to Minority Communities* (Washington, D.C.: Urban Environment Conference, Inc., 1985)

economic status of the surrounding communities.³⁰ This investigation focused on offsite hazardous waste landfills that are not a part of or contiguous to any industrial facility located in the Southeast EPA Region IV. The report found that the three of the four offsite hazardous waste landfills located in the Southeast were located in communities that were composed of over 50% Black residents and that at least 26% of the population in each community had an income below the federal poverty level.³¹

C. United Church of Christ Report – Toxic Waste and Race

In addition to the GAO report which analyzed the racial and economic demographics of the communities surrounding offsite hazardous waste landfills in the Southeast, in 1987 the United Church of Christ's Commission for Racial Justice conducted a national survey of commercial hazardous waste facilities and the racial and economic demographics of the communities surrounding such facilities.³² This report concluded that:³³

- Race proved to be the most significant among variables tested in association with the location of a commercial hazardous waste facility.
- Communities with the greatest number of commercial hazardous waste facilities also had the highest composition of people of color. Specifically, in communities with two or more commercial hazardous waste facilities, the average percentage of people of color of the population was more than three times that of communities without any such facilities.
- Communities with a single commercial hazardous waste facility have an average percentage of people of color that is twice that of communities without any such facilities.
- While socioeconomic factors are an important factor in the location of a commercial hazardous waste facility, race proved to be the predominant factor.
- Incomes and home values were substantially lower when communities with commercial hazardous waste facilities were compared to those without such facilities.

The protests in Warren County served as a galvanizing moment, forever entwining the environmental and civil rights movements to form the environmental justice movement. While many advancements in environmental justice have been made, little progress has been made to address the disproportionate siting of commercial hazardous waste facilities in communities of color.

In 2007, the United Church of Christ surveyed the racial composition of communities living near commercial hazardous waste facilities 20 years after its original and groundbreaking study. The study's findings found that the trends identified in the 1987 report had continued unabated, as illustrated by Figure 3 below:

³⁰ United States General Accounting Office. *Siting of hazardous waste landfills and their correlation with racial and economic status of surrounding communities*. (1983) (Appendix D).

³¹ *Id.*

³² United Church of Christ. *Toxic Wastes and Race in the United States*, (1987), available at <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf>

³³ *Id.*

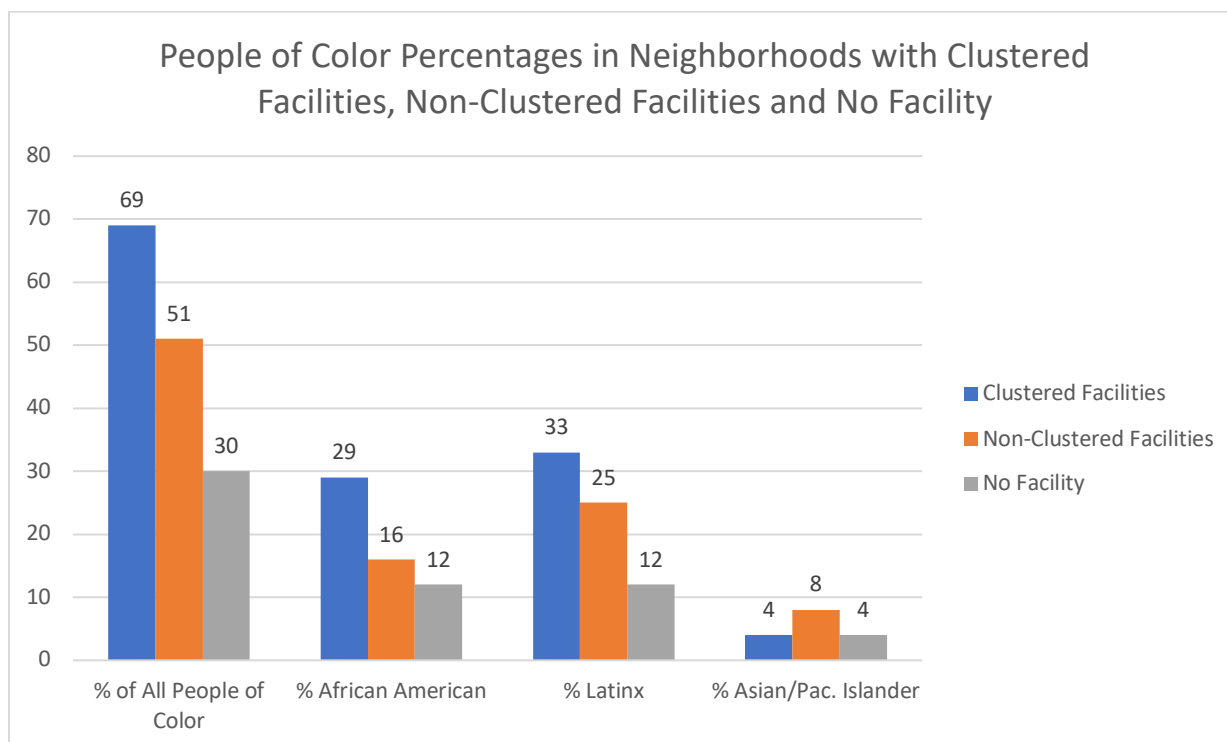


Figure 3 - Chart Comparing Percentages of People of Color in Neighborhoods with Clustered Facilities, Non-Clustered Facilities, and No Facilities.³⁴

The disproportionate location of commercial hazardous waste facilities in communities of color is a national problem. Of the 44 states that have a licensed and operating commercial hazardous waste facility 40 have disproportionately high percentages of people of color living in communities with a commercial hazardous waste facility (commonly referred to as a “host community”).³⁵ In Michigan, the problem is particularly acute. As illustrated by Figure 4 below, the 2007 United Church of Christ report found that Michigan had the largest difference in the country between the percentage of people of color in host communities compared to non-host communities:

³⁴ Robert Bullard, Paul Mohai, Robin Saha, and Beverly Wright, *Toxic Wastes and Race at Twenty 1987-2007: A Report Prepared for the United Church of Christ Justice & Witness Ministries*, March 2007 (Appendix A)

³⁵ *Id.*

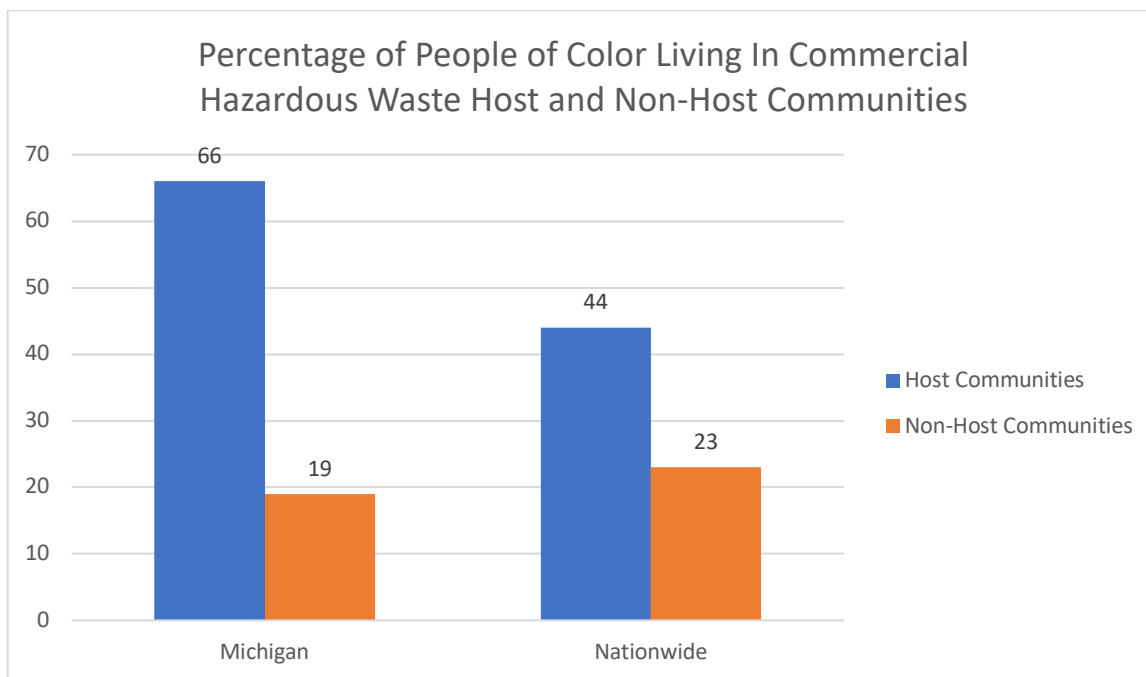


Figure 4 - Chart Comparing Percentage of People of Color Living in Commercial Hazardous Waste Host Communities with Percentages in Non-Host Communities in Both Michigan and Nationwide.³⁶

In summary, more than 20 years after the birth of environmental justice, significant racial disparities in the distribution of commercial hazardous waste facilities persist throughout the country.³⁷ Nowhere is this more true than Michigan, where the racial disparity regarding the location of commercial hazardous waste facilities is at its most severe.³⁸

D. U.S. Ecology North Hazardous Waste Facility

As discussed above, the neighborhood surrounding the U.S. Ecology North facility was one of Detroit's first Black enclaves in the 1940s. Despite the pervasiveness of housing discrimination and "slum clearance" efforts that sought to transform the neighborhood into an industrial corridor, to this day, it remains a vibrant and diverse community. It includes people such as Complainant Ms. McWilliams has lived in her home to the south of U.S. Ecology North for 33 years and who loves her neighborhood but is genuinely concerned about pollution from nearby industrial sites. It also includes people like Complainant Mr. Arabi, who lives to the west of U.S. Ecology North in the predominantly Yemeni-American community.

³⁶ Id.

³⁷ Id.

³⁸ Id.

i. Demographics of the Surrounding Community

The communities that exist within a 3-mile radius of the Facility, while diverse, are disproportionately people of color and low-income as demonstrated by Figure 5 below:³⁹

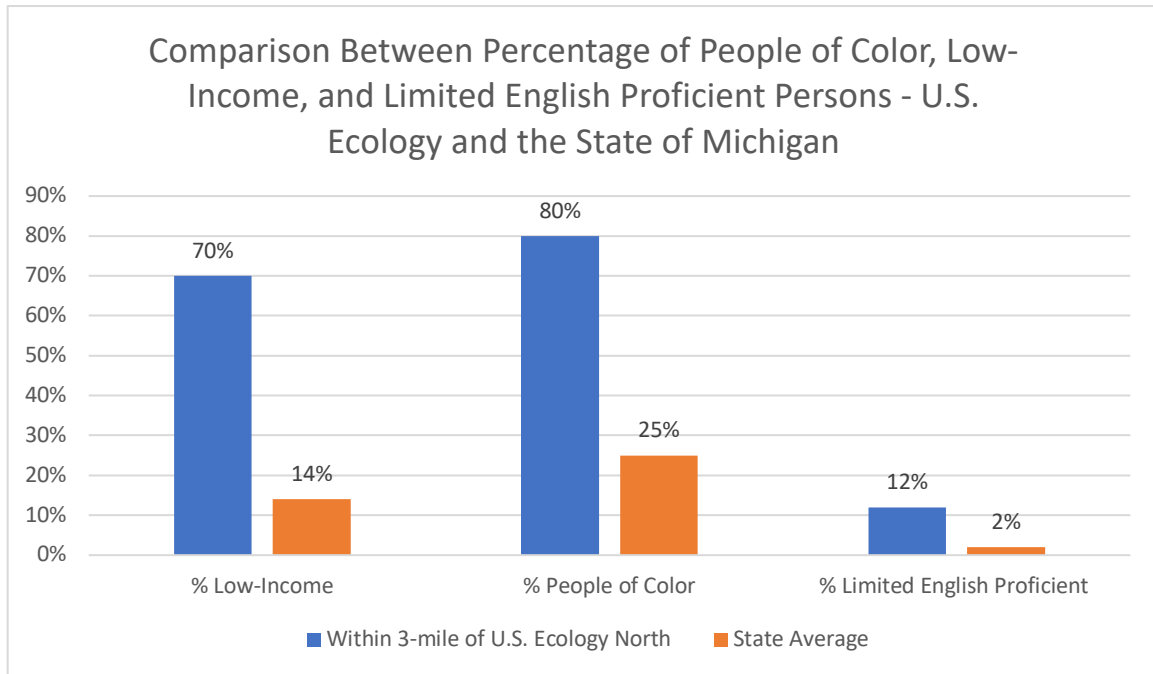


Figure 5 - Chart Comparing Percentages of People of Color, Low-Income, and Limited English Proficiency within 3 miles of U.S. Ecology North v Statewide Data.⁴⁰

In its summary of the history of the U.S. Ecology North facility, EGLE states that the “surrounding area has gone from residential to industrial.”⁴¹ This callous statement ignores the history of housing discrimination and slum clearance for industrial activity that turned what was once one of Detroit’s few Black enclaves into a community that is disproportionately composed of low-income people of color. EGLE’s statement is also plainly incorrect, as thousands of people live nearby the Facility. Specifically, 2,005 people live within a 0.5-mile radius of the Facility and 8,910 people live within a 1-mile radius of the Facility.⁴² As illustrated by the map below, the Facility is just over 200 meters from the nearest occupied residential housing, 300 meters from a church, and 500 meters from a children’s playground. In all, four playgrounds, five parks, seven nursing homes, three mosques, 11 churches, four pre-school head start programs, three elementary and middle schools, and a high school are located within a 1.5-mile

³⁹ Low-income refers to any person whose ratio of household income to poverty level in the past 12 months was less than 2.

⁴⁰ EJSCREEN Report (Version 2019), 3-mile ring centered at U.S. Ecology North; LEP data from U.S. Census Bureau. (2017). 2011-2015 ACS 5-year Estimates. Retrieved from <https://data.census.gov/>

⁴¹ Michigan Department of Environmental Quality. US Ecology Detroit North (formerly Dynecol) Summary Report. https://www.michigan.gov/documents/deq/USE_565_summary_529374_7.pdf

⁴² United States Environmental Protection Agency. 2019 version. EJSCREEN. Retrieved July 22, 2020, from <https://ejscreen.epa.gov/mapper/demogreportpdf.aspx?report=acs2017>. US Census Bureau, American Community Survey (ACS) 2013-2017.

radius of this hazardous waste facility. The neighborhood surrounding U.S. Ecology is plainly not “industrial.”

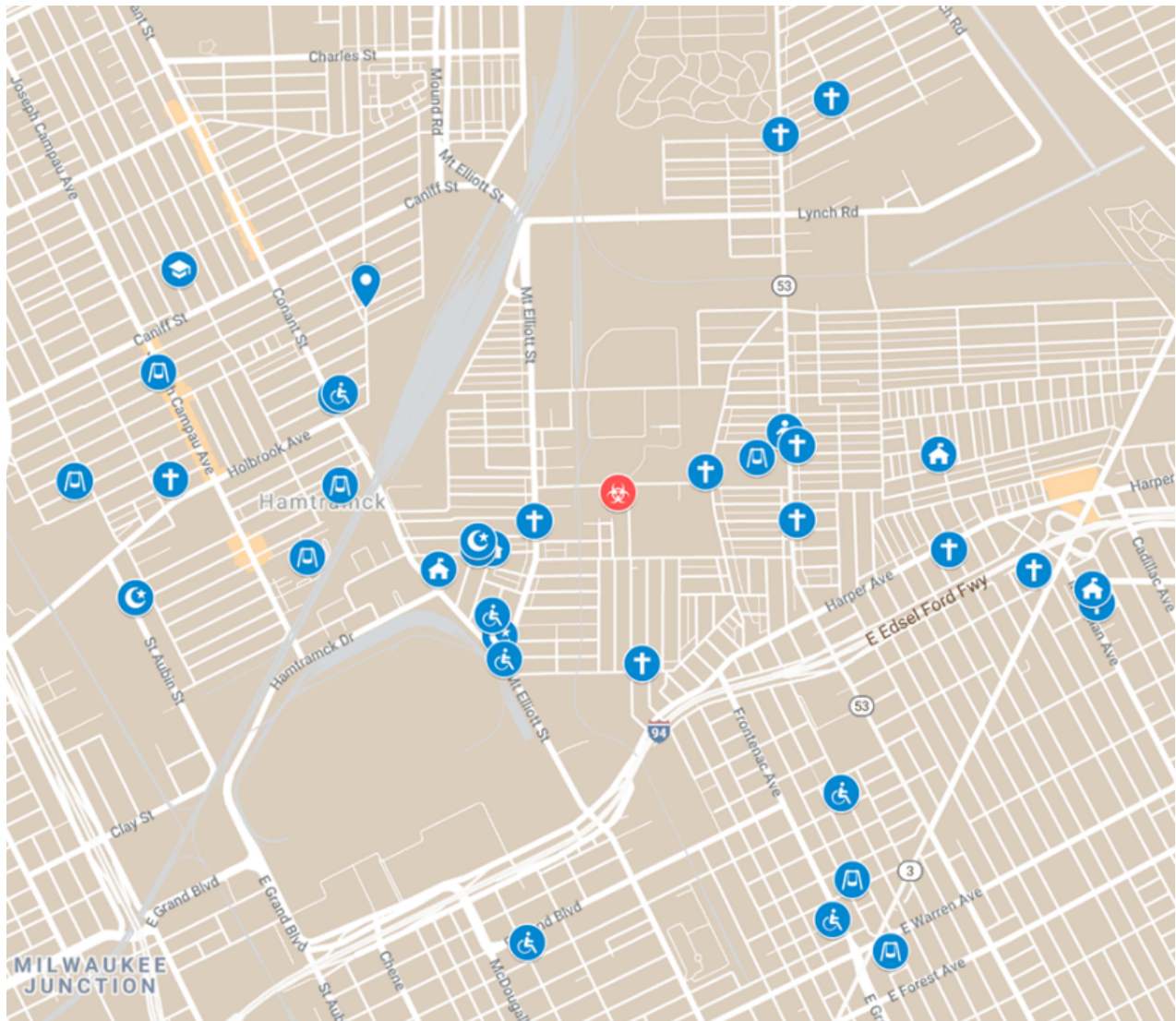


Figure 6 - Map of schools, houses of worship, playgrounds, parks, and nursing homes within 1.5 miles of US Ecology North

The effect in asserting the falsehood that the “surrounding area has gone from residential to industrial” in response to the concerns of citizens is to deny the existence of these communities. In reality, US Ecology North exists in a slim industrial zone surrounded on three sides by residential housing (green in the image below).⁴³ 3,730 housing units are located within a 1-mile radius of the facility.⁴⁴

⁴³ City of Detroit, Zoning Portal. <https://zoning.detroitmi.gov/projects/381907/guide/location>

⁴⁴ United States Environmental Protection Agency. 2019 version. EJSCREEN. Retrieved July 22, 2020: from <https://ejscreen.epa.gov/mapper/demogreportpdf.aspx?report=acs2017>. US Census Bureau, American Community Survey (ACS) 2013-2017.

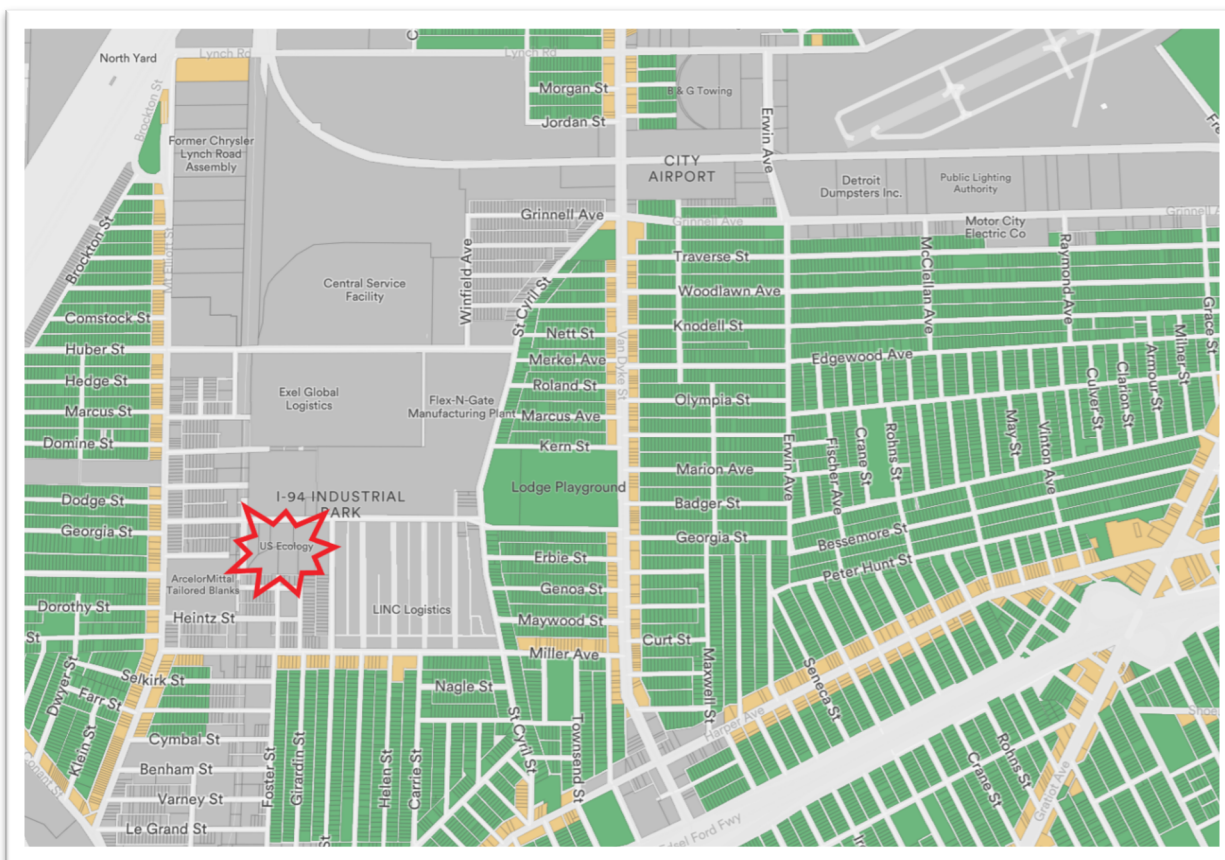


Figure 7 – Map of Residential Areas Nearby U.S. Ecology North⁴⁵

The sheer density of residential housing in the census tract where the Facility is located makes for an average population density of 1,120 individuals per square mile, over six times the state average population density.⁴⁶ A half-mile to the east marks the start of another census tract, hosting a population density of 5,209 people per square mile, over 25 and a half times the state average population density.⁴⁷ The census tract beginning a mere .25 miles west of the Facility hosts a population density of 7,567 individuals per square mile, 43 times the state average population density.⁴⁸ Beginning less than one mile from the facility is the densest census tract in the entire state of Michigan outside of the Michigan State University Campus in East Lansing.⁴⁹ Located in Hamtramck, the tract has a population density of 19,323 individuals per square mile, 109 times the state average population density.⁵⁰

⁴⁵ City of Detroit, Zoning Portal. <https://zoning.detroitmi.gov/projects/381907/guide/location>

⁴⁶ United States Census Bureau, 2008-2012 ACS 5 Year Dataset. (2013). Retrieved from EPA Community FERST

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

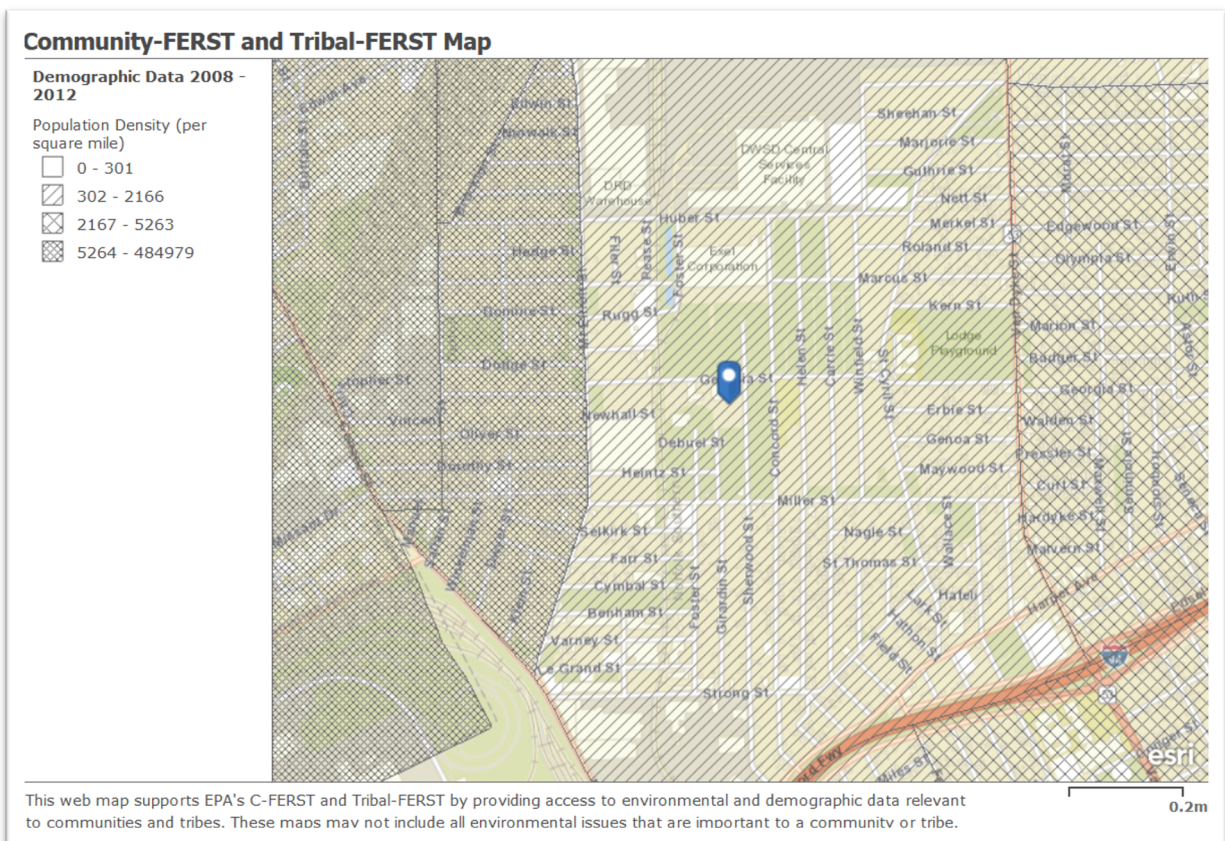


Figure 8 - Map of Population Density Near U.S. Ecology North by Census Tract⁵¹

In short, EGLE's assertion that the area surrounding U.S. Ecology North has transitioned from a residential to an industrial area is not only incorrect, but it is also having the harmful effect of continuing the erasure of the many people of color that do live nearby the Facility.

To place U.S. Ecology North in context, it is helpful to compare it to another commercial hazardous waste facility in Michigan. Comparing the demographics of the communities surrounding U.S. Ecology North with that of Drug and Laboratory Disposal, Inc, which is the only commercial hazardous waste facility in Michigan that is outside of the metro-Detroit area, helps to bring the environmental injustice into focus. Residing in Allegan County, Drug and Laboratory Disposal Inc.'s census tract has an average density of 305 people per square mile.⁵² The only other census tract within a mile of the facility hosts a density of only 247 individuals per square mile.⁵³ More people live within a three-mile radius of U.S. Ecology North encompassing 28 square miles than within an 11-mile radius of Drug and Laboratory Disposal, an area encompassing a total of 380 square miles⁵⁴ Accompanying the area's low density is the smallest percentage of minorities, the lowest percentage of low-income households and limited English proficiency individuals within 3 miles of any of Michigan's commercial hazardous waste

⁵¹ United States Census Bureau, 2008-2012 ACS 5 Year Dataset. (2013). Retrieved from EPA Community FERST

⁵² United States Census Bureau, 2008-2012 ACS 5 Year Dataset. (2013) Retrieved from <https://data.census.gov/>

⁵³ Id.

⁵⁴ Id.

facilities, as well as the lowest amount of tonnage received both as a total and that which came from out of state.

Table 1 - Demographic and Tonnage Data Comparison Between U. S. Ecology North and Drug and Laboratory Disposal⁵⁵

Facility	LEP per square mile within 3 miles	% Minority within 3 miles	Total Tons of Hazardous Waste Received	Total Tons of Hazardous Waste from MI	Total Tons of Hazardous Waste from Outside County	Percent of Total Tons of Hazardous Waste from Out of State
Drug and Laboratory Disposal	5	7%	942	850	812	9.7%
US Ecology North	468	80%	22,409	18,069	17,776	19.4%

In summary, the communities surrounding U.S. Ecology North are socioeconomically vulnerable, which puts them at risk for just the type of expansion that U.S. Ecology North proposed to EGLE. Almost 40 years after the residents of Warren County steadfastly declared their right to live free of the disparate burden of toxins, the residents living nearby U.S. Ecology North staged numerous protests and packed public hearings to oppose the state's decision to allow their community to be a dumping ground for hazardous waste.⁵⁶ In comment after comment, they decried the inequity inherent in approving a major expansion of a commercial hazardous waste facility in a low-income community of color, and the adverse impacts that such a decision will bring. The Detroit and Hamtramck community has proudly built upon the legacy

⁵⁵ U.S. Census Bureau. 2011-2015 ACS 5-year Estimates. (2017). Retrieved from <https://data.census.gov/>; United States Environmental Protection Agency, RCRAInfo Public Extract. Retrieved from <https://rcrapublic.epa.gov/rcra-public-export/?outputType=CSV>.

⁵⁶ See generally *Neighbors, Residents Protest Expansion of Hazardous-Waste Plant*, <https://www.publicnewsservice.org/2017-08-23/water/neighbors-residents-protest-expansion-of-hazardous-waste-plant/a59071-1> (last visited Jul 22, 2020).; *Group rallies against expansion of waste facility near Detroit-Hamtramck border*, <https://www.detroitnews.com/story/news/local/detroit-city/2019/06/29/group-rallies-against-expansion-waste-facility-near-detroit-hamtramck-border/1607128001/> (last visited Jul 22, 2020); Sarah Cwiek, *Protesters keep up the fight against U.S. Ecology Detroit expansion*, <https://www.michiganradio.org/post/protesters-keep-fight-against-us-ecology-detroit-expansion> (last visited Jul 22, 2020); Steve Neavling, *Expansion of hazardous waste plant in Detroit smacks of "environmental racism," Rep. Robinson says*, DETROIT METRO TIMES, <https://www.metrotimes.com/news-hits/archives/2020/01/31/expansion-of-hazardous-waste-plant-in-detroit-smacks-of-environmental-racism-rep-robinson-says> (last visited Jul 22, 2020); Mary Schuermann Kuhlman, *Michiganders find solidarity in fighting hazardous waste*, DETROIT METRO TIMES, <https://www.metrotimes.com/news-hits/archives/2020/02/12/michiganders-find-solidarity-in-fighting-hazardous-waste> (last visited Jul 22, 2020).

of Warren County. It has also been informed by the mountains of data and research that the Warren County protests inspired that continues to pile the now irrefutable evidence that discrimination, whether outright in the past or self-perpetuating in the present, continues to impact decision making when siting hazardous waste facilities.⁵⁷

North Carolina, 1982



Michigan, 2019



ii. Environmental Quality of the Surrounding Area

The community understands the reality: that the operation of U.S. Ecology North presents serious public health risks for nearby residents. However, U.S. Ecology North does not exist in isolation. In addition to the Facility, numerous other industrial facilities are located nearby, including Strong Steel, Universal Logistics, and Flex-n-Gate. When the impact of all these facilities is considered cumulatively, it is apparent that the community is subject to a disproportionate level of a variety of environmental risks. As shown by Table 2 below, the 3-mile ring centered at the US Ecology facility ranks in the 90th percentile or higher for seven

⁵⁷ See Bonam, C. M., Bergsieker, H. B., & Eberhardt, J. L. (2016). Polluting Black space. *Journal of Experimental Psychology: General*, 145(11), 1561–1582. (Where a national sample of over 400 white U.S. citizens were asked to read a proposal to build a potentially hazardous chemical plant near a residential neighborhood. Half of the participants were told the nearby neighborhood is mostly black, while the other half was told that the area is mostly white. Even though all participants read the same proposal, they were less likely to report opposition to building the chemical plant when the nearby neighborhood was mostly black.)

harmful environmental indicators, including levels of particulate matter, diesel particulate matter, the cancer risk from air toxins, risk of respiratory hazards, and proximity to sites mandated to produce Risk Management Plans.⁵⁸ Tied for worst of all indicators, the community is in the 94th percentile in the state for its proximity to hazardous waste.⁵⁹ A mere 6% of the state faces a higher risk in this regard.

Environmental Indicators: 3-mile Ring Centered at 6520 Georgia St, Detroit, MI			
Variable	Statewide Average	Within 3mi radius of US Ecology	Percentile in State
Particulate Matter (PM 2.5 in ug/m3)	8.56	9.61	90
Ozone (ppb)	44.0	45.7	88
NATA Diesel PM (ug/m3)	0.34	0.68	94
NATA Air Toxics Cancer Risk (risk per MM)	24	30	94
NATA Respiratory Hazard Index	0.29	0.37	93
Traffic Proximity and Volume (daily traffic count/distance to road)	660	1800	91
Lead Paint Indicator (% pre-1960s housing)	38%	80%	87
Superfund Proximity (site count/km distance)	0.15	0.07	53
RMP Proximity (facility count/km distance)	0.53	2.00	94
Hazardous Waste Proximity (facility count/km distance)	1.00	3.70	94
Wastewater Discharge Indicator (toxicity-weighted concentration/m distance)	0.23	1.00E-05	49

Table 1 – Comparing EPA Environmental Indicators Within 3-Mile Ring Centered at U.S. Ecology North Facility with Michigan Statewide Average and Area’s Percentile For Each Indicator as Compared to Rest of State of Michigan.

When the demographic and environmental indicators generated by the EPA’s EJSCREEN are combined, the picture facing communities among whom this hazardous waste site stands becomes clear. In this area, one of the most densely populated sites in the state, the EPA tool estimates residents are within the 87th to 97th percentile in the state for every applicable Environmental Justice risk.⁶⁰

⁵⁸ United States Environmental Protection Agency. 2019 version. EJSCREEN. Retrieved July 22, 2020: from https://ejscreen.epa.gov/mapper/ejscreen_SOE.aspx.

⁵⁹ Id.

⁶⁰ United States Environmental Protection Agency. 2019 version. EJSCREEN. Retrieved July 22, 2020: from https://ejscreen.epa.gov/mapper/ejscreen_SOE.aspx.

Environmental Justice Indexes: 3-mile Ring Centered at 6520 Georgia St, Detroit, MI	
Variable	Percentile in State
EJ Index for Particulate Matter (PM 2.5)	92
EJ Index for Ozone	92
EJ Index for NATA Diesel PM	95
EJ Index for NATA Air Toxics Cancer Risk	93
EJ Index for NATA Respiratory Hazard Index	93
EJ Index for Traffic Proximity and Volume	95
EJ Index for Lead Paint Indicator	93
EJ Index for Superfund Proximity	90
EJ Index for RMP Proximity	97
EJ Index for Hazardous Waste Proximity	96
EJ Index for Wastewater Discharge Indicator	87

Table 2 - EJSCREEN Report (Version 2019)

The Environmental Justice Index reaching the second-highest percentile of risk is, even before this expansion, the proximity to hazardous waste. When combining the area's data on demographics with that of nearby hazardous waste sites, the Environmental Justice Index for hazardous waste proximity for the 3-mile ring centered at the US Ecology facility is already at a higher risk of environmental injustice due to hazardous waste than 96% of Michigan, before any additional expansion of capacity has begun.⁶¹

iii. Location of Origin Regarding Hazardous Waste Received by U.S. Ecology North

As detailed above, the communities surrounding U.S. Ecology North are diverse and vibrant but are also socioeconomically and politically vulnerable because they are predominantly composed of low-income people of color. Given this vulnerability, these communities have been targeted for industrial development since the 1950s, which has resulted in a number of industrial sites locating in this dense urban neighborhood. This has caused the surrounding communities to be exposed to high levels of a variety of environmental risks.

To make matters worse, their community is serving as a hazardous waste dumping ground that primarily serves other communities throughout the state and country. Data from US Ecology North's 2017 Biennial Report shows that 98.38% of the waste received by the Facility came from outside of Wayne county. A summary of the place of origin for wastes received by U.S. Ecology North is provided in Table 4 below:

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⁶¹ Id.

Table 4 - Place of Origin Regarding Wastes Received by U.S. Ecology in 2017 ⁶²					
	Total Tons Received	From In-State	From Wayne County	From Other MI Counties	From Out of State
Tons	22,409	18,069	292	17,776	4,340
Percent	-	80.63%	1.62%	79.01%	19.37%

E. Commercial Hazardous Waste Facilities in Michigan

U.S. Ecology North does not exist in isolation. It is one of several commercial hazardous waste facilities that exist throughout Michigan. Unfortunately, most commercial hazardous waste facilities in Michigan are similar to U.S. Ecology North in that they are disproportionately located in low-income communities of color. Additionally, most of the hazardous waste received by these facilities originated outside of Michigan.

i. Demographic Data Regarding Communities Nearby Commercial Hazardous Waste Facilities

Michigan currently houses eight hazardous waste facilities permitted to accept offsite waste.⁶³ As demonstrated by Table 5 below, of these eight facilities, seven are in communities where the percentage of people of color within a three-mile radius of the facility is at or above the statewide average.⁶⁴ Five are located in communities where within a three-mile radius of the facility, the percentage of low-income residents is above the statewide average.⁶⁵

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⁶² 2017 Biennial Report, U.S. Ecology North

⁶³ Michigan Department of Environmental Quality, Waste Data System, <https://www.deq.state.mi.us/wdsp/AdvancedSearch.aspx> (last visited Jul 22, 2020).

⁶⁴ United States Environmental Protection Agency. 2019 version. EJSCREEN. Retrieved July 22, 2020: from https://ejscreen.epa.gov/mapper/ejscreen_SOE.aspx.

⁶⁵ Id. (EPA calculates “percent low-income” as percent of individuals whose ratio of household income to poverty level in the past 12 months was less than 2 as a fraction of individuals for whom ratio was determined. Calculated from the Census Bureau's American Community Survey 5-year summary estimates.)

Demographic Data of MI Hazardous Waste Treatment Facilities Accepting Offsite Waste Compared to State Averages			
Specific Site Name	City, County	% Low Income within 3 Mi Radius *	% Minority within 3 mi Radius
Wayne Disposal Inc.	Belleville, Wayne	30%	39%
Michigan Disposal Waste Treatment Plant	Belleville, Wayne	30%	39%
US Ecology Detroit North	Detroit, Wayne	70%	80%
PSC Environmental Services	Detroit, Wayne	55%	79%
US Ecology Detroit South	Detroit, Wayne	65%	75%
Gage Products Co.	Ferndale, Oakland	44%	54%
Drug & Laboratory Disposal, Inc.	Plainwell, Allegan	29%	7%
Republic Industrial and Energy Solutions	Romulus, Wayne	46%	40%
Michigan Average		33%	25%

Table 3 - EJSCREEN Report (Version 2019), 3-mile ring centered on Michigan commercial hazardous waste facilities

When analyzed cumulatively, of all the Michiganders living within 3-miles of a commercial hazardous waste facility accepting offsite waste, 55% are low-income, and 65% are minorities as defined by the US Census Bureau. As shown by Figure 9, while the total population of individuals living within 3-miles of these facilities makes up just 5% of Michigan's population, it makes up 14% of the state's total population of minorities.

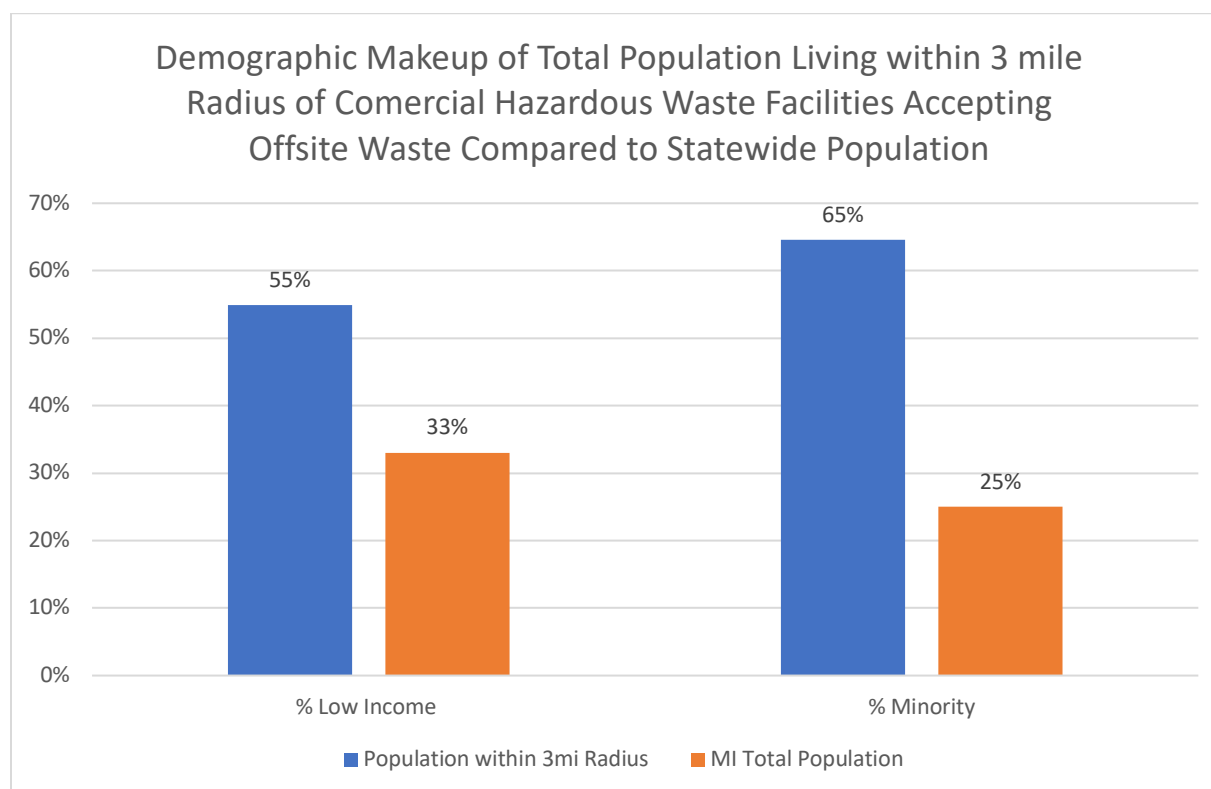


Figure 9

In addition to commercial hazardous waste facilities being disproportionately located in low-income communities of color, they are also disproportionately located in limited English proficient communities. 21,975 individuals with limited English proficiency, 7 percent of the statewide total, live within 3 miles of Michigan's eight hazardous waste facilities.⁶⁶ As illustrated by Table 6, the density of limited English proficient individuals within 3 miles of each of the eight facilities exceeds the Michigan average.⁶⁷ In total, the average density of limited English proficient individuals within the areas encompassing the 3-mile radii of all of the facilities is 148 per square mile, greater than the Michigan average of 3.1 per square mile by a factor of nearly 48.⁶⁸

<i>Table 6 - Density of LEP persons per square mile for area within 3-mile radius of each commercial hazardous waste facility</i>	
Facility	Density of LEP per square mile within 3-mile radius of facility
Michigan Average	3.1
Republic Industrial	77.64
Michigan Disposal	25.73
Wayne Disposal	25.73
Drug and Laboratory Disposal, Inc.	5.02
PSC Environmental Services	20.67
EQ Detroit	401.98
US Ecology North	468.72
Gage Products Co	159.41

Six of the eight facilities reside in Wayne County, with one more sitting a mere 495 meters from the county's border. Wayne County hosts the largest and most densely populated Limited English Proficiency communities in the state, with an average density of limited English proficient persons per square mile that is 3,817% that of the state average.⁶⁹

ii. Location of Origin Regarding Hazardous Waste Received by All Michigan Commercial Hazardous Waste Facilities

As discussed above, Michigan's trend of siting commercial hazardous waste facilities in low-income communities of color has continued unabated for several decades. In 2007, the United Church of Christ found Michigan to be the worst state when it came to disproportionately siting commercial hazardous waste facilities in communities of color. That legacy of environmental injustice has to date been left intact, unchallenged, and unaltered.

⁶⁶ U.S. Census Bureau. 2011-2015 ACS 5-year Estimates. (2017). Retrieved from <https://data.census.gov/>

⁶⁷ Id.

⁶⁸ U.S. Census Bureau. 2011-2015 ACS 5-year Estimates. (2017). Retrieved from <https://data.census.gov/>

⁶⁹ Id.

To make matters worse, there does not appear to be any logistical justification for siting commercial hazardous waste facilities in these communities. As shown by Table 7, all but one of these facilities imported over 90% of their hazardous waste from outside the county they are located.⁷⁰ In total, 222,034 tons of hazardous waste were imported into Michigan in 2017, roughly equivalent to the weight of Chicago's Sears Tower⁷¹ or 8 Statue of Liberties.⁷² As shown by Figure 10, the imported waste traveled from far and wide, including 317 tons making the over 7,000 mile trip across the world from the Northern Mariana Islands, 1000 miles off the coast of Japan, to make Michigan its resting place.⁷³



Figure 10 – Map demonstrating the location of origin for shipments of hazardous waste received by commercial hazardous waste facilities in Michigan

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⁷⁰ Id.

⁷¹ History & Facts—Willis Tower, <https://www.willistower.com/history-and-facts> (last visited Jun 29, 2020).

⁷² Mailing Address: Liberty Isl, New York & NY 10004 Phone:363-3200 Contact Us, *Statue Statistics—Statue of Liberty National Monument (U.S. National Park Service)*, <https://www.nps.gov/stli/learn/historyculture/statue-statistics.htm> (last visited Jun 29, 2020).

⁷³ United States Environmental Protection Agency, 2017 Hazardous Waste Interstate Shipments and Receipts, https://public.tableau.com/shared/M4D9KK239?:display_count=y&:origin=viz_share_link&:embed=y (last visited Jul 22, 2020).

Table 7 – Percentage of Hazardous Waste Received from Out of State and from In-State/Out of County for Each Michigan Commercial Hazardous Waste Facility

Facility	County	Total Tons Received⁷⁴	Percent from Out of State	Percent from Out of County/In-State
Republic Industrial	Wayne	8,672.31	14.30%	27.30%
Michigan Disposal	Wayne	122,535.3	91.00%	97.90%
Wayne Disposal	Wayne	17,085.48	49.30%	96.90%
Drug and Laboratory Disposal, Inc.	Allegan	942.12	9.70%	96.00%
PSC Environmental Services	Wayne	71,712.77	53.10%	93.10%
EQ Detroit	Wayne	52,582.3	86.00%	96.60%
US Ecology North	Wayne	22,409.78	19.40%	98.70%
Gage Products Co	Oakland	20,611.04	68.70%	99.50%
Totals		316,548	70%	25%

⁷⁴ United States Environmental Protection Agency, RCRAInfo Public Extract. Retrieved from <https://rcrapublic.epa.gov/rcra-public-export/?outputType=CSV>.

As shown in Table 8, Ohio is the top importer of hazardous waste to Michigan.

Tons of Hazardous Waste Imported to Michigan by State (2017)	
Ohio	76,857
New Jersey	21,284
Illinois	17,944
Indiana	15,972
New York	15,685
Pennsylvania	14,320
Wisconsin	10,059
Kentucky	9,133
Missouri	8,241
Minnesota	7,216

Table 4

While the originating locations of this hazardous waste encompass a broad geographic scope, the same cannot be said for the distribution upon reaching Michigan. As shown by Figure 11, despite making up only 17.5% of the state's population, Wayne County is the destination for 94% of offsite hazardous waste arriving from other states.⁷⁵

Figure 12 below, generated through the EPA's EJSCREEN, visualizes the overlap between proximity to hazardous waste and the presence of large communities of minorities.⁷⁶ The initial layer identifies locales where residents live in close proximity to hazardous waste based on statewide percentiles. The highest percentiles, 80-90, 90-95, and 95 to 100, are identified as yellow, orange, and red, respectively.

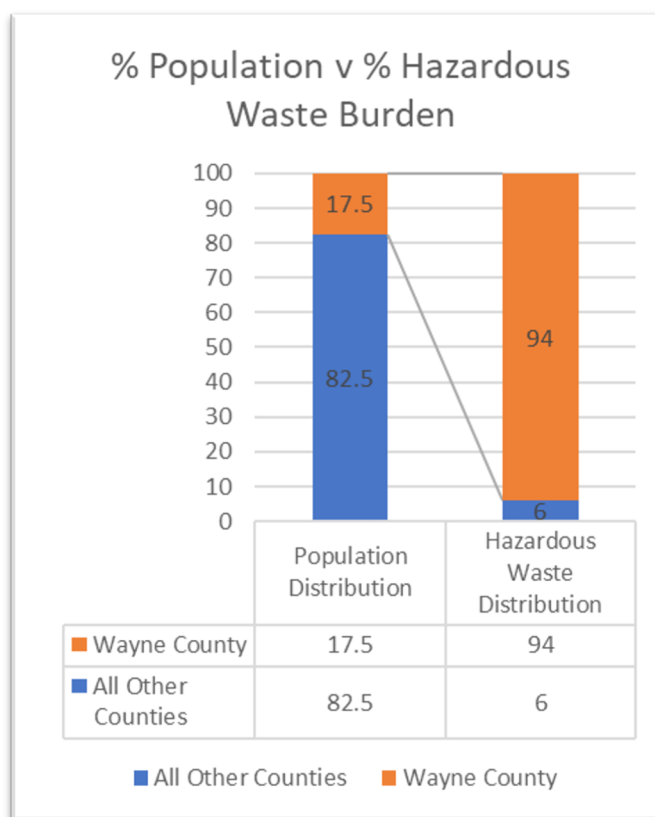


Figure 11 – Chart comparing the percentage of the state population in Wayne county to the percentage of out-of-state hazardous waste received by Wayne County commercial hazardous waste facilities

⁷⁵ United States Environmental Protection Agency, RCRAInfo Public Extract. Retrieved from <https://rcrapublic.epa.gov/rcra-public-export/?outputType=CSV>

⁷⁶ United States Environmental Protection Agency. 2019 version. EJSCREEN. Retrieved July 22, 2020: from https://ejscreen.epa.gov/mapper/ejscreen_SOE.aspx

Transposed on top of this layer is the minority makeup of populations across the state, denoted by transparent gray dots where their respective size reflects the percentage of minorities making up the population. Nearly all areas within the 80th to 100th percentile of proximity to toxic waste are overwhelmingly blanketed by the minority population layer. At the same time, few high percentage minority populations are found in areas that are not near commercial hazardous waste facilities.

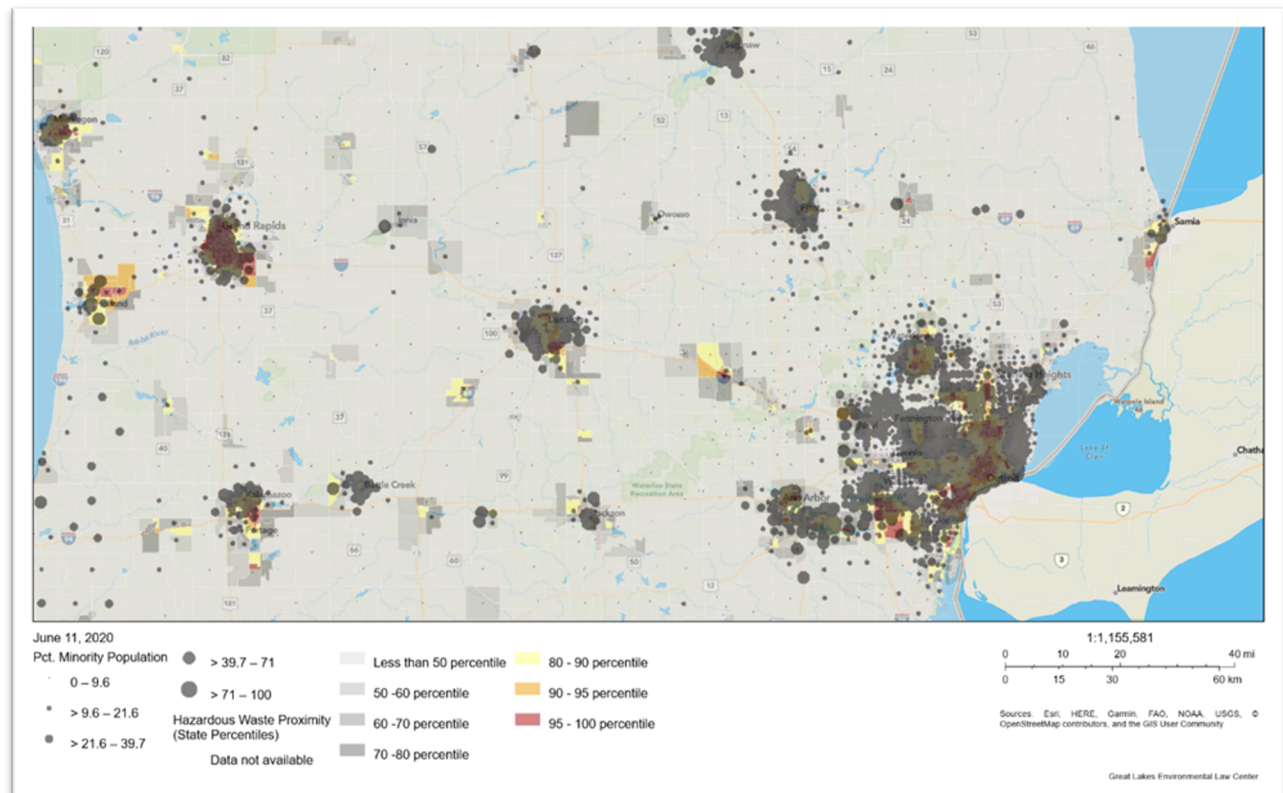


Figure 12 – Map overlaying the percentage of minority population with proximity to a hazardous waste facility

III. Legal Background

Since the origins of the environmental justice movement, communities of color have often turned to Title VI of the Civil Rights Act of 1964 (“Title VI”) for redress when a federally supported state environmental program has the purpose or effect of discrimination against individuals based on their race, color, or national origin. Section 601 of Title VI requires that “[n]o 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.”⁷⁷ In addition to Section 601, Section 602 directs federal agencies that are empowered to extend financial assistance to issue rules, regulations, or orders of general applicability, “which shall be consistent with achievement of the objectives” of

⁷⁷ 42 USCS § 2000d

Title VI.⁷⁸ In accordance with Section 602, the EPA first promulgated its Title VI regulations in 1973.⁷⁹

In addition to Section 602, Executive Order 12898, which was signed by President Clinton in 1994, directs the EPA to make achieving environmental justice part of its mission “by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁸⁰ To accomplish the environmental justice goals outlined in Executive Order 12898, federal agencies may implement policies affecting the funding distributed to state agencies.⁸¹

Since its adoption in 1964, the Civil Rights Act has served as the principal federal authority prohibiting state agencies from engaging in discrimination on the basis of race, color, or national origin. The passage of this statute was one of the crowning legislative achievements of the civil rights movement of the 20th century. Soon to follow the Civil Rights Act was the passage of a multitude of federal environmental laws throughout the 1970s and 1980s. Most of these federal environmental laws rely on the framework of cooperative federalism. Pursuant to this framework, federal environmental laws establish the baseline standards, and require states, through their respective environmental regulatory departments, to adopt and implement state laws and regulations in a manner that is sufficient to meet the federal baseline standards. Given the central role of state environmental regulatory departments in the implementation of federal environmental laws, it is no surprise that the environmental justice movement has frequently turned to Title VI of the Civil Rights Act for redress. Further, Executive Order 12898 has essentially melded the concept of environmental justice to Title VI regulations promulgated by federal agencies such as the EPA. These regulations function independently of state and federal environmental laws to ensure that state environmental regulatory agencies' activities are furthering environmental justice and are not perpetuating our nation's legacy of environmental racism.

A. Federal Laws Governing Hazardous Waste Permitting

Like most federal environmental laws, federal laws regarding hazardous waste storage, treatment, management, and disposal rely on the concept of cooperative federalism. The Resource Conservation and Recovery Act (“RCRA”) of 1976 is the principal federal law that governs the regulation of hazardous waste generation, transportation, storage, treatment, and disposal.⁸² The EPA then commonly authorizes states to administer and enforce state laws and regulations that are at least as stringent as federal requirements.⁸³ Under RCRA, states do have

⁷⁸ 42 USCS § 2000d-1

⁷⁹ 38 FR 17968 (1973), as amended by 49 FR 1656 (1984) (codified at 40 CFR part 7).

⁸⁰ “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 Fed. Reg. 7629 (Feb. 11, 1994)

⁸¹ Environmental Protection Agency, *Title VI EJ Comparison*, <https://www.epa.gov/sites/production/files/2015-02/documents/title-vi-ej-comparison.pdf> (last visited Jul 10, 2020).

⁸² 42 U.S.C. § 6901. (Pub. L. 89–272, title II, § 1002, as added Pub. L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2796; amended Pub. L. 95–609, § 7(a), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 98–616, title I, § 101(a), Nov. 8, 1984, 98 Stat. 3224.); 42 U.S.C. § 6905, 6912(a), and 6926.

⁸³ 42 U.S.C. § 6926(b).

the authority to enact more stringent requirements than those described in RCRA and its corresponding regulations.⁸⁴

Regarding permitting, section 6925(c)(3) provides that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines *necessary to protect human health and the environment*."⁸⁵ The EPA has noted that this omnibus clause provides permitting agencies with the discretion to take a more refined look at the public health and environmental impacts of hazardous waste facilities in light of allegations that operations of the facility could have a disproportionate impact on low-income or minority populations.⁸⁶ This omnibus clause could be used to require an analysis of the following issues:

- Cumulative risks due to exposure from pollution sources in addition to the applicant facility;⁸⁷
- Unique exposure pathways and scenarios (e.g., subsistence fishers, farming communities);⁸⁸
- Sensitive populations (e.g., children with levels of lead in their blood, individuals with poor diets).⁸⁹

As shown by Table 9 below, many states have used the authority reserved to them under RCRA to adopt laws, regulations, and policies aimed at ensuring that hazardous waste facilities are not disproportionately sited in communities of color.

⁸⁴ 42 U.S.C. § 6929

⁸⁵ 42 U.S.C. § 6925(c)(3)

⁸⁶ *Id.*; See 50 Fed. Reg. Vol. 50. No. 135. 28,723. where EPA states "Section 3005(c) provides that each RCRA permit issued under section 3005 shall contain such terms as the Administrator deems necessary to protect human health and the environment. The Congressional intent underlying this amendment is to authorize the Agency to impose permit conditions beyond those mandated by the regulations, such as new or better technologies or other new requirements. The purpose of this amendment is to upgrade facility requirements in order to protect human health and the environment. The Agency believes that the authority to *issue* permits containing conditions deemed necessary to protect human health and the environment must encompass the authority to *deny* permits where necessary to afford such protection. To hold otherwise would deprive this statutory amendment of its intended effect." (emphasis in original, internal quotations omitted). See also *In Re Ecolotec, Inc.* RCRA Appeal No. 87-14. (1988) (where EPA Administrator finds Agency's conclusion that it had "no authority to deny [a] permit application based on [a] City's concerns because the facility complies with existing location standards and other RCRA regulations... is clearly erroneous" citing RCRA 3005(c)(3).)

⁸⁷ *EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting*. MEMORANDUM. 3. Dec. 1, 2000. Also see *In Re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 66 (EAB 1995).

⁸⁸ *Id.*

⁸⁹ *Id.*

Table 9 – Table of State Laws Regarding the Location of Hazardous Waste Facilities

State	Statutory Language
Arkansas AR ST § 8-7-223	Prohibits any hazardous waste landfill disposal facility off the site of generation shall be <i>located within one-half (½) mile of any occupied dwelling</i>
Colorado CO ST § 25-15-505: (a) (I), II)	Requires permitting agency to take into consideration: (I) the <i>density of population in the areas neighboring</i> such proposed site; (II) The <i>density of population</i> in the areas that are <i>adjacent to any portion of delivery roads</i> to such proposed site and that lie <i>within a fifty-mile radius</i> of such proposed site
Florida FL ST § 403.7211: (2)	Prohibits any hazardous waste facility from: (b) Any location within <i>1,500 yards of any hospital, prison, school, nursing home facility, day care facility, stadium, place of assembled worship</i> , or any other similar site... (c) Any location within <i>1,000 yards of any residence</i> .
Kentucky KY ST § 224.46-520: (1)(c)	[T]he cabinet... shall consider...: (c) An evaluation of the <i>social and economic impacts</i> of the proposed action on the affected community, to include, at a minimum, <i>changes in property values, community perception</i> and other <i>psychic costs</i> , and the <i>costs and availability of public services, facilities</i> and <i>improvements required to support the facility</i> and protect public health, safety, and the environment
Louisiana LA R.S. 30:2178: (2)(b)	A facility or proposed facility may be deemed to pose undue health risks for the following nonexclusive reasons: (vii) The <i>number and density of existing hazardous waste disposal facilities</i>
Maryland MD ENVIR § 7-402: (b)	These facilities shall be located subject to the following considerations: (9) That there is due consideration for the <i>equitable geographic distribution of sites</i> , including: (ii) Consideration of those subdivisions that presently have sites, to <i>avoid to the extent feasible certifying sites disproportionately in any one subdivision</i>

Missouri MO ST 260.431: 1	The size and nature of the <i>buffer zone</i> shall be determined by the department but <i>shall extend at least three hundred feet</i> from the facility, on property owned or leased by the applicant. The department shall consider the <i>proximity of schools, businesses and houses, the prevailing winds</i> , and other factors which it deems relevant when establishing a buffer zone.
New York NY ENVIR CONSER § 27-1102: 2	Requires the permitting agency to develop a state hazardous waste plan to ensure the <i>equitable geographic distribution of hazardous waste facilities</i> .
Oklahoma OK ST T. 27A § 2-7-114 A	[N]o permit shall be issued for the off-site disposal of hazardous waste or for the off-site treatment of hazardous waste by incinerator at a new hazardous waste facility proposed to be located within <i>eight (8) miles of the corporate limits of an incorporated city or town...</i>

New York’s requirement for its permitting agency to develop a statewide hazardous waste management plan to ensure the equitable distribution of hazardous waste facilities is remarkably similar to a provision in Michigan law. MCL 324.11110(2)(f) requires EGLE to develop a statewide hazardous waste management plan to ensure the “reasonable geographic distribution” of hazardous waste facilities. Through this Plan, the permitting agency considers issues related to environmental justice when making its determination to grant, conditionally or otherwise, or deny a license for a new or expanded industrial hazardous waste facility.⁹⁰

B. State Laws Governing Hazardous Waste Permitting

EGLE has been authorized to implement Michigan’s hazardous waste program by the EPA.⁹¹ As part of this program, any person that wants to construct a new hazardous waste treatment, storage, or disposal facility or to expand or enlarge an existing facility beyond its previously authorized design capacity must first obtain an operating license from EGLE.⁹²

MCL 324.11123 describes the content requirements regarding an application “for an operating license for a proposed treatment, storage, or disposal facility or the expansion, enlargement, or alteration of a treatment, storage, or disposal facility beyond its original authorized design capacity or beyond the area specified in an existing operating license, original construction permit, or other authorization.” The application must “demonstrate[e] that the applicant has considered each of the following:

⁹⁰ New York State Department of Environmental Conservation, Division of Environmental Remediation, New York State Hazardous Waste Facility Siting Plan, at 6-11 (Oct. 2010)

⁹¹ See, Michigan State StATS Report, Mar. 31, 2020.

⁹² Mich. Admin. Code, R. 299.9501(1).

(i) The risk and impact of accidents during the transportation of hazardous waste to the treatment, storage, or disposal facility.

(ii) The risk and impact of fires or explosions from improper treatment, storage, and disposal methods at the treatment, storage, or disposal facility.

(iii) The impact on the municipality where the proposed treatment, storage, or disposal facility is to be located in terms of health, safety, cost, and consistency with local planning and existing development, including proximity to housing, schools, and public facilities.

(iv) The nature of the probable environmental impact, including the specification of the predictable adverse effects on each of the following:

(A) The natural environment and ecology.

(B) Public health and safety.

(C) Scenic, historical, cultural, and recreational values.

(D) Water and air quality and wildlife.⁹³

Where EGLE receives an operating license application that technically complies with the requirements outlined in section 11123(2), a review process is initiated. “[T]he department shall [r]eview the plans of the proposed treatment, storage, or disposal facility to determine if the proposed operation complies with this part and the rules promulgated under this part... The review shall include, but ***need not be limited to***, a review of air quality, water quality, waste management, hydrogeology, and the applicant's disclosure statement.”⁹⁴

Similar to the EPA’s omnibus clause, EGLE is also authorized to require a license applicant to comply with permit terms and conditions to ensure the protection of human health and the environment or, in situations where such permit terms may be inadequate, to deny the license application. Mich. Admin. Code, R. 299.9602 requires all hazardous waste treatment, storage, and disposal facilities to be operated in a manner that will prevent exposure of humans or the environment to harmful quantities of hazardous waste or hazardous waste constituents and to prevent the pollution, impairment, or destruction of the natural resources of the state. Mich. Admin. Code, R. 299.9521(3) requires each operating license issued under Part 111 to include conditions necessary to “protect human health and the environment.” The EPA has interpreted similar language in federal regulations to authorize the EPA to incorporate environmental justice considerations into its licensing process.

In addition to Part 111 and its corresponding regulations, MCL 324.11115 also requires EGLE to ensure that its decision to issue a hazardous waste license is consistent with Michigan’s hazardous waste management plan. Michigan's original hazardous waste management plan was

⁹³ MCL 324. 11123 (2)(k)(i)-(iv)

⁹⁴ MCL 324. 11125 (1)(a), (b) (emphasis added)

adopted by the Commission of Natural Resources on January 25, 1982.⁹⁵ The legislature expressly required that this plan be updated by January 1, 1990.⁹⁶ Additionally, the legislature required that the updated plan provide for “a reasonable geographic distribution of treatment, storage, and disposal facilities” and to include “criteria for determining acceptable locations for such facilities.”⁹⁷ The criteria must include a consideration of several factors, including the demography of the area surrounding the hazardous waste facility, waste generation patterns, environmental factors, and public health factors.⁹⁸

Despite the statutory mandates to update the state hazardous waste management plan and to ensure that hazardous waste licensing decisions are consistent with such plan, EGLE’s Materials Management Division was unable to produce a copy of Michigan’s updated hazardous waste management plan.

C. U.S. Ecology North Hazardous Waste License

On January 29, 2020, EGLE issued an amended operating license to U.S. Ecology North. This license allows U.S. Ecology North to expand its storage capacity from 76,118 tons to 676,939 tons, which is a nearly 9-fold increase.⁹⁹ Additionally, the license enables U.S. Ecology to convert three 30,000-gallon pits for the treatment of hazardous waste. With these three pits, U.S. Ecology North is allowed to treat 600 gallons of hazardous waste per day.¹⁰⁰

The license includes several terms, conditions, and plans with which the Facility must comply. This includes a waste analysis plan, contingency plan, and environmental monitoring requirements.

i. Waste Analysis Plan

The Waste Analysis Plan exists to make sure the Facility only accepts authorized wastes and fully complies with state and federal regulations. This plan is particularly essential since the acceptance of unauthorized wastes can lead to particularly catastrophic consequences due to the improper storage and handling of hazardous waste. In 2018, the acceptance of non-conforming waste at a U.S. Ecology facility in Idaho resulted in an explosion at the facility that killed one person and injured three more.¹⁰¹ Also, in 2018, the acceptance of non-conforming waste at another U.S. Ecology facility in Idaho caused four drums containing hazardous waste to explode at the facility.¹⁰²

⁹⁵ MCL 324.11110 (2017).

⁹⁶ MCL 324.11110.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Michigan Department of Environmental Quality, US Ecology (MID 074 259 565) Capacity Comparison Table (2019). https://www.michigan.gov/documents/deq/USE_565_Capacity_Comparison_Table_529373_7.pdf

¹⁰⁰ Id.

¹⁰¹ Cause of deadly explosion at US Ecology site released, KTVB7, <https://www.ktvb.com/article/news/local/investigation-into-the-explosion-at-us-ecology-that-killed-1-man-finds-the-cause-of-the-accident/277-f29df15a-6aad-4e61-a601-ee96319e894e> (last visited Jul 24, 2020).

¹⁰² Tami Thatcher Guest columnist, *Following regs could have prevented barrel explosion*, POST REGISTER, https://www.postregister.com/opinion/guest_column/following-regs-could-have-prevented-barrel-explosion/article_8a6eb93c-f521-5615-ae9b-e9850125d8fd.html (last visited Jul 24, 2020).

Regarding hazardous waste generated off-site, the Waste Analysis Plan requires the following:

1. For all shipments of hazardous waste, U.S. Ecology North personnel must review all paperwork, including the manifests to ensure it is accurate and complete;
2. For all shipments of hazardous waste, U.S. Ecology North personnel must conduct a visual inspection to ensure the containers are closed, there are no irregularities in the shipment, the labels are correct, and the number and type of containers match the manifest;
3. For at least 10% of the containers from each approved waste stream shipment, U.S. Ecology North will perform a fingerprint analysis and compared to the waste profile information provided by the generator.

Additionally, the license prohibits placing incompatible wastes and materials in the same container.¹⁰³ However, neither the license of the Waste Analysis Plan requires a compatibility analysis before hazardous wastes are repackaged, or before treatment. The Waste Analysis Plan does reference “pre-treatment analyses” to ensure that aggregated wastes are amenable to the same treatment, but it is unclear if or when such analyses are required.¹⁰⁴

ii. Contingency Plan

The Contingency Plan establishes the procedures to be followed in the event of an emergency situation at U.S. Ecology North, such as a fire, explosion, or any unplanned release of hazardous waste or hazardous waste constituents to the air, soil, or water. It designates emergency coordinators at the Facility, procedures for identifying the release of hazardous waste or hazardous waste constituents, procedures for identifying potential hazards to human or environmental health, and Facility evacuation procedures.¹⁰⁵

iii. Environmental Monitoring Requirements

In general, all hazardous waste storage and treatment facilities must conduct regular groundwater monitoring and soil monitoring.¹⁰⁶ These programs serve as safeguards for the public and the environment by ensuring that any hazardous waste or hazardous waste constituents that may be released into the environment are detected. EGLE has the authority to waive the requirements for groundwater monitoring under two circumstances. First, a waiver is allowable if all treatment, storage, and waste handling is conducted indoors or under a structure that protects from precipitation and runoff.¹⁰⁷ Second, a waiver is permissible if EGLE finds, based on the opinion of a qualified geologist or geotechnical engineer, that there is no potential for migration of a

¹⁰³ Michigan Department of Environment, Great Lakes, and Energy, US Ecology Michigan, Inc. Operating License. https://www.michigan.gov/documents/egle/egle-mmmd-hws-USE565oplicense_679799_7.pdf.

¹⁰⁴ Michigan Department of Environment, Great Lakes, and Energy, US Ecology Waste Analysis Plan, https://www.michigan.gov/documents/deq/deq-owmrp-hws-draft_USE_565_Attachment_1_Waste_Analysis_Plan_494455_7.pdf

¹⁰⁵ Michigan Department of Environment, Great Lakes, and Energy, US Ecology Contingency Plan, https://www.michigan.gov/documents/deq/deq-owmrp-hws-draft_USE_565_Attachment_4_Contingency_Plan_494462_7.pdf.

¹⁰⁶ Mich. Admin. Code, R. 299.9611(2)(b), (d).

¹⁰⁷ Mich. Admin. Code, R 299.9611(3)(a).

liquid to the uppermost aquifer during the active life and post-closure care period.¹⁰⁸ EGLE may waive the requirement for soil monitoring if the owner or operator demonstrates it is not required.¹⁰⁹

In the license at issue, EGLE waived the requirement for both groundwater monitoring and soil monitoring. It's reasoning for waiving the soil monitoring requirement as that all areas where hazardous waste is handled must be paved with concrete and asphalt and that specific areas, such as the container management building storage bays and the treatment area unloading pad, must be coated with chemical-resistant materials to prevent any release to the soil from storage or treatment activities.¹¹⁰

Notably, EGLE has previously issued groundwater and soil monitoring waivers to this Facility. The first soil monitoring waiver was granted in 1989. The application for the waiver stated that any hazardous waste that may be released would be detected by the groundwater monitoring program. However, in 2003, the requirement for groundwater monitoring was also waived. Now, despite the addition of new hazardous waste storage buildings and the new use of three 30,000-gallon pits for hazardous waste treatment operations, EGLE has decided to renew both waivers.

D. EPA's Title VI Regulations and Environmental Justice

As a federal agency that is authorized to extend financial assistance, the EPA has promulgated Title VI regulations pursuant to Section 602. These regulations are described in 40 C.F.R. Part 7 ("EPA's Title VI Regulations").¹¹¹ EPA's Title VI Regulations apply to all applicants for and recipients of EPA assistance in the operation of programs or activities.¹¹² As a recipient of EPA financial assistance, EGLE submitted assurance that it would comply with EPA's Title VI Regulations along with its applications for funding.¹¹³ EGLE has also acknowledged its Title VI obligations in its RCRA Work Plan. Finalized in September of 2019, its "[RCRA] Work Plan for Fiscal Years 2020 and 2021" states openly that "[s]ince EGLE is a recipient of federal funds for administration of its RCRA Program, EGLE needs to incorporate EJ into their RCRA Program" and that the agency "recognizes that incorporating EJ into all aspects of the RCRA decision-making process is a top priority to the U.S. EPA."¹¹⁴ The agency states that that, in its efforts to integrate Environmental Justice principles into the state program, it has "[i]ncluded [an] EJ evaluation step into permit application review process."¹¹⁵

¹⁰⁸ Mich. Admin. Code, R. 299.9611(3)(b).

¹⁰⁹ Mich. Admin. Code R. 299.9611(4).

¹¹⁰ Michigan Department of Environment, Great Lakes, and Energy, US Ecology Responsiveness Summary, https://www.michigan.gov/documents/egle/egle-mmmd-hws-USE565ResponseSummaryEN_679676_7.pdf.

¹¹¹ 40 CFR 7.35.

¹¹² 40 CFR 7.15.

¹¹³ 71 FR 14207

¹¹⁴ Michigan Department of Environment, Great Lakes, and Energy. *Work Plan for Fiscal Years 2020 and 2021*. 7 (2019). https://www.michigan.gov/documents/deq/deq-whm-hwp-Fiscal-Year-RCRA-Grant-WorkPlan_342754_7.pdf.

¹¹⁵ Id.

Pursuant to the EPA's Title VI Regulations, EGLE is obligated to comply with several requirements aimed at eliminating discrimination on the basis of race, color, or national origin. Relevant to this complaint are the following requirements:

- EGLE shall not exclude any person from participation in, deny any person the benefits of, or subject any person to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or sex.¹¹⁶
- EGLE shall not use criteria or methods of administering its program or activity that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex.¹¹⁷

Central to the EPA's Title VI implementing regulations is the *consequence* of agency policies and decisions, not their *intent*. As such, they include prohibitions against both intentional and unintentional discrimination by EGLE and other EPA funded agencies.¹¹⁸

Unintentional discrimination includes those actions that have a disproportionately adverse effect on individuals of a certain race, color, or national origin. Despite not being formalized in writing, a neutral policy or decision understood as a "standard operating procedure, "a failure to act, or a failure to proactively adopt an important policy can also constitute a violation of Title VI."¹¹⁹ Recipients of federal financial assistance are prohibited from utilizing criteria or methods of administration that have the effect, ***even if unintentional***, of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program's objectives.¹²⁰

The Supreme Court, in *Alexander v Choate*, affirmed that "agency regulations designed to implement the purposes of Title VI [could be used to redress] actions having an unjustifiable disparate impact on minorities."¹²¹ The Court went on to find that Federal agencies had the power to determine "what sorts of disparate impacts upon minorities constituted significant social problems, and were readily enough remediable, to warrant altering the practices of the Federal grantees that had produced those impacts."¹²²

While many environmental laws, regulations, policies, and decisions are neutral on their face, they can still produce unintentional discriminatory effects that violate Title VI. For this reason, EGLE's "Title VI obligation is layered upon its separate, but related obligations under the

¹¹⁶ 40 CFR 7.30.

¹¹⁷ 40 CFR 7.35(b).

¹¹⁸ 40 CFR § 7.35, *supra* note 109.

¹¹⁹ See, e.g., *Maricopa Cty.*, 915 F. Supp. 2d at 1079 (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by " broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

¹²⁰ 40 CFR § 7.35, *supra* note 109.

¹²¹ *Alexander v. Choate*, 469 U.S. 287 (1985), , JUSTIA LAW , <https://supreme.justia.com/cases/federal/us/469/287/> (last visited Jul 2, 2020). Reading the holding in *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983)(see also *Guardians Ass'n*, 463 U.S. at, 584 n.2(White, J.); *id.* at 623 n.15 (Marshall, J.); *id.* at 642–45 (Stevens, Brennan, Blackmun, JJ.).

¹²² *Id.*

Federal or state environmental laws governing its environmental permitting program.”¹²³ Therefore, the mere fact that a state agency such as EGLE can demonstrate their actions comply with relevant federal and state environmental laws “does not constitute per se compliance with Title VI.”¹²⁴

i.) Permitting Decisions Under Title VI

Similarly, the “question of whether or not individual facility operators are in violation of [environmental laws] is distinct from whether the permitting agencies' decision to grant permits to the operators had a discriminatory impact on the affected communities.”¹²⁵ The fact that EGLE does not select the site in a license application does not relieve it of the responsibility of ensuring that its actions in issuing licenses for such facilities do not have a discriminatory effect.¹²⁶ Within the context of Title VI, the issuance of a license by EGLE or any other recipient of EPA funding is the “necessary act that allows the operation of a source that could give rise to adverse disparate effects on individuals.”¹²⁷ To operate, the owners of a facility must both “comply with local zoning requirements” and “obtain the appropriate environmental permit.”¹²⁸ An EPA funding recipient’s operation of a licensing program is independent of local government zoning activities.

ii.) Discriminatory Effects Analysis

For complaints pursuing an administrative investigation based on the discriminatory effects standard in EPA's Title VI Regulations the agency must determine whether a facially neutral policy or practice resulted in an “unjustified adverse disparate impact.”¹²⁹ A four-step analysis is used to determine whether a state agency’s decision had a discriminatory effect:¹³⁰

- 1) Identify the specific policy at issue¹³¹
- 2) Establish adversity/ harm¹³²
- 3) Establish disparity¹³³

¹²³ F.R. 65, No. 124. 39691. (2000)

¹²⁴ Id. at 39690.

¹²⁵ *Californians v. United States EPA*, 2018 U.S. Dist. LEXIS 56105, *35

¹²⁶ F.R. 65, No. 124. 39691. (2000)

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ Environmental Protection Agency, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39,650 (June 27, 2000) (Appendix E)

¹³⁰ Elements of a Title VI disparate impact claim are like the analysis of cases decided under Title VII. *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (Codified in Title VII at 42 U.S.C. § 2000e–2(k).)

¹³¹ *Texas Dep’t of Hour. & Cmty. Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2523 (2015). “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”

¹³² E.g., *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 487 *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J.) (discussing the methods used to “evaluate the ‘adversity’ of the impact” and considering whether the impacts at issue were “sufficiently adverse” to establish a *prima facie* case), *rev’d on other grounds*, 274 F.3d 771 (3d Cir. 2001).

¹³³ *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 576–77 (2d Cir. 2003).

4) Establish causation.¹³⁴

Where the evidence sufficiently meets the standards of the four-part test, the complainants have sufficiently established a “prima facie case:” a finding must be in their favor, provided their evidence is not sufficiently rebutted by the other party. Once a prima facie case is established, the burden shifts to the agency, which must then produce a “substantial legitimate justification” for the challenged policy or practice.¹³⁵ Not every reason is legally sufficient to rebut a prima facie case.¹³⁶ The explanation of its reason must be clear and reasonably specific.¹³⁷ To be a “substantial legitimate justification,” it must also be demonstrably related to a significant, legitimate goal.¹³⁸ The agency’s interest in policy implementation must then be weighed against the substantial public interest in preventing discrimination.¹³⁹

A finding of a “substantial legitimate justification” for its policy is not in itself exculpatory. Instead, the agency must then determine if there are “less discriminatory alternatives.”¹⁴⁰ Where the evidence shows that “less discriminatory alternatives” exist, the policy must be found to violate Title VI, even where the agency demonstrates a “substantial legitimate justification” for its discriminatory actions.¹⁴¹

“It is possible to have a violation of Title VI or EPA’s Title VI regulations based solely on discrimination in the procedural aspects of the permitting process (e.g., public hearings, translations of documents) without a finding of discrimination in the substantive outcome of that process (e.g., discriminatory human health or environmental effects). Likewise, it is possible to have a violation due to discriminatory human health or environmental effects without the presence of discrimination in the public participation process.”¹⁴²

The EPA has noted that Title VI concerns are often raised by communities that “believe they are suffering from adverse effects caused by multiple sources.”¹⁴³ For such communities, filing a Title VI complaint about a license issued to a specific facility “is a way to focus attention on the

¹³⁴ *Flores v. Arizona*, 48 F.Supp. 2d 937, 952 (D. Ariz. 1999)

¹³⁵ *N.Y. Urban League*, 71 F.3d at 1036, *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999) (citing *Georgia State Conf.*, 775 F.2d at 1417)

¹³⁶ *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322, 1350 (3d Cir. 1981) (en banc) (“The content of the rebuttal or justification evidence cannot be determined in the abstract. It must be related to the precise impacts suggested by the plaintiffs’ evidence.”)

¹³⁷ See *Texas Dep’t of Cnty. Affairs v. Burdine*, 450 U.S. 248, 254-55, 258 (1981).

¹³⁸ *Georgia State Conf. v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). (“Substantial legitimate justification” in a disparate impact case, is similar to the Title VII employment concept of “business necessity,” which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.)

¹³⁹ *Gashi v. Grubb & Ellis Property Management Servs.*, 801 F. Supp. 2d 12, 16 (D. Conn. 2011)(citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 929, 937 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988) (“After the defendant presents a legitimate justification, the court must weigh the defendant’s justification against the degree of adverse effect shown by the plaintiff.”))

¹⁴⁰ *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407-1413; *Georgia State Conf.*, 775 F.2d at 1417.

¹⁴¹ See, e.g., *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984). (conducting a thorough review of alternative sites for highway or other methods, such as light rail or public transportation)

¹⁴² Environmental Protection Agency, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39,650 (June 27, 2000)

¹⁴³ *Id.*

cumulative impacts.”¹⁴⁴ As such, a Title VI analysis should include an analysis of cumulative impact, which is an assessment of the total exposure to multiple environmental stressors, including exposures originating from numerous sources.¹⁴⁵

A finding of a violation of Title VI and EPA’s implementing regulations must be supported only by the lowest legal standard of proof, a mere preponderance of the evidence.¹⁴⁶ If the facts alleged are found to be more than 50% likely to be true, even by the slightest infinitesimal amount, a finding of discrimination must be made.

IV. Title VI Complaints

EGLE has discriminated on the basis of national origin a number of times during the course of its consideration of the license modification regarding U.S. Ecology in violation of 40 C.F.R. § 7.30 and 40 C.F.R. § 7.35.(b).

Additionally, the Complainants believe that EGLE’s decision to issue the license modification requested for the U.S. Ecology North facility, which allows a significant expansion of the Facility’s storage and treatment capacity in a low-income community of color that is already the host community for another commercial hazardous waste facility and a number of other industrial sources, amounts to discrimination on the basis of race, color, and national origin in violation of 40 C.F.R. § 7.30 and 40 C.F.R. § 7.35(b).

Lastly, the Complainants believe that EGLE’s regulations and policies that govern the licensing process for commercial hazardous waste facilities are discriminatory on the basis of race, color, and national origin, as these regulations and policies have led to the disproportionate siting of commercial hazardous waste facilities in low-income communities of color.

A. EGLE discriminated on the basis of national origin by failing to identify limited English proficient persons living nearby the U.S. Ecology North facility and by initially failing to identify limited English proficient persons living near the Facility and by failing to provide adequate translation and interpretation services at its community meeting held on March 28, 2019 in violation of 40 C.F.R. Part 7.

EGLE is prohibited from administering any program or activity in a manner that has the effect of subjecting individuals to discrimination on the basis of national origin.¹⁴⁷ Additionally, Executive Order 13166 requires the EPA to ensure that recipients of federal funds, such as EGLE, provide meaningful access to limited English proficient persons.¹⁴⁸ To this end, in 2004, the EPA published policy guidance that “suggests a general framework that EPA-assisted

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ *In Re Genesee Power Station*. Complaint No. 01R-94-R5. Environmental Protection Agency (2017). <https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html>.

¹⁴⁷ 40 CFR 7.35(b)

¹⁴⁸ 40 CFR 7.35(b)

programs and activities may use to provide meaningful access to LEP persons.”¹⁴⁹ This guidance specifies that EGLE must take “reasonable steps to ensure meaningful access to their programs and activities by LEP persons.”¹⁵⁰ What amounts to “reasonable steps” is dependent on a number of factors, including the number of LEP persons served, the frequency with which LEP individuals come into contact with the program, the nature and importance of the program, activity, or service, and the resources available to the department.¹⁵¹

The prohibition against discrimination on the basis of national origin contained in the EPA’s Title VI regulations is closely related to the requirements described in Executive Order 13166. In *Lau v. Nichols*, the United States Supreme Court interpreted regulations promulgated by the Department of Health, Education, and Welfare, including a regulation similar to that of the EPA, to prohibit conduct that has a disproportionate effect on limited English proficient persons.¹⁵² Additionally, the Court has noted that where an inability to speak and understand the English language exclude individuals from effectively participating in a federally-supported program, the department in charge of administering that program must take “affirmative steps to rectify the language deficiency” in order to ensure its program is open and available to all individuals.¹⁵³

EGLE regulations require any person that desires to expand or enlarge their facility’s previously authorized design capacity or area of a treatment, storage, or disposal facility first to obtain an operating license.¹⁵⁴ Before making a decision, EGLE must provide the public with a meaningful opportunity to provide input. Specifically, EGLE must do the following:

- Provide notice within a reasonable period that an application for the license has been submitted to EGLE;¹⁵⁵
- Assess the need, on a case-by-case basis, for an information repository;¹⁵⁶
- Before making a final decision on a major license modification or operating license application, prepare a draft major license modification and fact sheet;¹⁵⁷
- Publish a public notice that a draft major license modification has been prepared and allow at least 60 days for public comment;¹⁵⁸
- Hold a public hearing and provide at least 30 days’ notice prior to the public hearing;¹⁵⁹

These robust public participation requirements are meant to ensure that all people, but particularly those that live nearby a hazardous waste facility, are engaged in the licensing process from when the application for the license is submitted to when EGLE makes its final decision.

¹⁴⁹ Environmental Protection Agency, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 FR 35602, <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁵³ *Lau v. Nichols*, 414 U.S. 563, 568 (1980); *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980).

¹⁵⁴ Mich. Admin. Code R. 299.9501

¹⁵⁵ Mich. Admin. Code, R. 299.9511(3).

¹⁵⁶ Mich. Admin. Code, R. 299.9511(5).

¹⁵⁷ Mich. Admin. Code, R. 299.9511(7).

¹⁵⁸ Mich. Admin. Code, R. 299.9511(7).

¹⁵⁹ Mich. Admin. Code, R. 299.9511(e); Mich. Admin. Code, R. 299.9514.

They are required by the 1995 RCRA expanded public participation rule, which was meant “to promote EPA objectives for ‘early and often’ public involvement.”¹⁶⁰

In this case, U.S. Ecology submitted a revised license application, which proposed the significant expansion of the Facility’s storage and treatment capacity, on March 4, 2013.¹⁶¹ After receiving the application, EGLE held a public comment period from July 15, 2015, through October 12, 2015, and held a public hearing on August 18, 2015, at the Hamtramck Public Library.¹⁶² However, before opening the public comment period and hosting the public hearing, EGLE failed to assess demographic information to determine if there were limited English proficient persons living nearby U.S. Ecology North. Unfortunately, as discussed in more detail in Section I above, there are a significant number of limited English proficient persons in this community. Specifically, of the 110,982 individuals living within 3 miles of the Facility, 13,246, or approximately 12%, speak English less than “very well.”¹⁶³ This far exceeds Michigan’s limited English proficient population, which is approximately 2% statewide. One need not go far from the U.S. Ecology North facility to identify a dense community with many limited English proficient persons. The Facility is located approximately 1,600 feet from the Masjid Mu’ath Bin Jabal, which is a mosque and a charter school. The mosque is the focal point for the surrounding neighborhood, which is almost entirely made up of Yemeni-Americans many of whom are limited in their English proficiency.

EGLE’s failure to identify the sizeable limited English proficient community that lives near U.S. Ecology North essentially foreclosed such individuals from meaningfully participating early in the licensing process as required by RCRA and Michigan’s corresponding laws and regulations. As previously mentioned, the EPA’s Title VI regulations required EGLE to take affirmative steps to identify limited English proficient persons and to provide such persons with the appropriate translation and interpretation services. This requirement is particularly important in the context of hazardous waste facility licensing, considering the emphasis RCRA places upon requiring state agencies to engage early and often with the public.

As noted above, EGLE was required to provide public notice when the license application was received from U.S. Ecology. To the Complainants’ knowledge, this notice was never translated by EGLE into any languages other than English. Additionally, EGLE did make the decision to provide a public information repository, but no translated notice alerting limited English proficient speakers to the availability of this repository was ever created. Lastly, EGLE provided no translated notice regarding either the 2015 public comment period or public hearing, provided no translated documents at the public hearing, and made no interpretation services available at the public hearing.

It was not until the Great Lakes Environmental Law Center sent a letter to EGLE on June 7, 2018, that the Department even became aware of the large limited English proficient community

¹⁶⁰ United States EPA, Public Involvement in Environmental Permits: A Reference Guide, EPA-500-R-00-007, at 2-27, Aug. 2000.

¹⁶¹ Michigan Department of Environment, Great Lakes, and Energy, Materials Management Division, Fact Sheet, Jan. 2020.

¹⁶² *Id.*

¹⁶³ U.S. Census Data, Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (2015 American Community Survey 5-Year Estimates)

living nearby U.S. Ecology North. In this letter, the Great Lakes Environmental Law Center highlighted the large number of limited English proficient persons, noted that EGLE had not provided and translation or interpretation services to this community in violation of the EPA's Title VI regulations, and urged EGLE to re-open the public comment process, host an additional public hearing, and provide translation and interpretation services to non-English speakers. Initially, EGLE refused this request. It was not until the Great Lakes Environmental Law Center sent an additional letter to EGLE on July 23, 2018, signed by hundreds of Bengali and Yemeni-Americans reiterating its concerns that EGLE agreed to the requests, including re-opening the public comment period and hosting a local public meeting with translation and interpretation services.

After agreeing to re-open the public comment period and host another public hearing, EGLE staff met with community members to discuss EGLE's plan for meaningfully engaging non-English speakers at the community meeting and during the public comment period. After this meeting, EGLE re-opened the public comment period from February 22, 2019, to April 12, 2019, and held its second public meeting on March 28, 2019.

The Complainants raise two specific complaints regarding the EPA's Title VI Regulations and its prohibition against discrimination on the basis of national origin.

First, EGLE excluded limited English proficient persons from participating in the public engagement process required by RCRA and Michigan's corresponding laws and regulations from the date EGLE received the license application on March 4, 2013, until it re-opened the public comment period and hosted an additional public meeting with translation and interpretation services in early 2019 in violation of Title VI. The EPA's Title VI Regulations prohibit conduct that has a disproportionate effect on limited English proficient persons.¹⁶⁴ To satisfy its Title VI obligations and to avoid discrimination based on national origin, EGLE was required to take "affirmative steps to rectify the language deficiency."¹⁶⁵ EGLE plainly failed in meeting this obligation from 2013 through 2019. EGLE failed to conduct any demographic analysis to identify the large community of limited English proficient individuals living nearby U.S. Ecology North, including the large Yemeni-American community that lived just to the west of the Facility. Even when this issue was brought to the attention of EGLE by the June 7, 2018 letter from the Great Lakes Environmental Law Center, it still initially refused to provide any opportunity for limited English proficient individuals to provide input regarding the U.S. Ecology North licensing decision. It was not until a follow-up letter was sent by the Great Lakes Environmental Law Center that EGLE committed to addressing the issue. It is also clear that EGLE's failure to meet its Title VI obligations it owed to limited English proficient persons from 2013 until early 2019 subjected such persons to harm. Limited English proficient persons living nearby U.S. Ecology were left in the dark about a major change in operations at a large, commercial hazardous waste storage and treatment facility in their neighborhood for six years. As such, limited English proficient persons were given less time to review the relevant fact sheets and proposed license terms, which are required by law, and were only allowed to provide input late in the licensing process long after English speakers had already had their say.

¹⁶⁴ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁶⁵ *Id.*

Second, the Complainants believe that the translation and interpretation services provided by EGLE at its public meeting regarding the U.S. Ecology North license on March 28, 2019, were insufficient to ensure limited English proficient persons could meaningfully participate at the meeting in violation of Title VI. At this meeting, EGLE experienced significant technical difficulties, which limited its ability to communicate with limited English proficient individuals. Additionally, many attendees complained that the translation services provided by EGLE were not adequate. Based on these shortcomings, EGLE hindered the ability of affected individuals and their respective communities to meaningfully engage in the agency's decision making process regarding the issuance of a hazardous waste license allowing U.S. Ecology North to expand its storage and treatment operations significantly in their community. In so doing, EGLE failed to satisfy its obligations to provide sufficient translation and interpretation services to limited English proficient persons under the EPA's Title VI regulations.

B. EGLE's decision to approve the license modification regarding the U.S. Ecology North, which permits a significant expansion of the Facility's hazardous waste storage and treatment capacity, violates 40 C.F.R. Part 7

As noted by the EPA, compliance with environmental laws does not constitute per se compliance with Title VI.¹⁶⁶ Commonly, permits and licenses, such as the one issued to U.S. Ecology North, simply control pollution rather than prevent it. Additionally, nothing in RCRA or Part 111 of the Michigan Natural Resources and Environmental Protection Act required EGLE to consider cumulative effects of multiple sources located in a concentrated area. Nor does either statute require EGLE to consider whether its decision to approve issue a license to a hazardous waste storage and treatment facility like U.S. Ecology North will have a disproportionate impact on persons of a particular race, color, or national origin. To put it simply, EGLE's Title VI obligation "exists in addition to the Federal or state environmental laws governing its permitting program."¹⁶⁷

The EPA's Title VI regulations prohibit EGLE from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin."¹⁶⁸ As applied to the permitting or licensing process, EGLE may not issue a license that is either intentionally discriminatory or that have a discriminatory effect based on race, color, or national origin.¹⁶⁹ In determining whether its decision to allow U.S. Ecology North to significantly expand its hazardous waste storage and treatment operations had a discriminatory intent, EGLE must determine whether that decision resulted in an unjustified adverse disparate impact. As discussed in Section 1, U.S. Ecology North is in a community that is disproportionately people of color when compared to state and national averages. Additionally, this community is uniquely impacted by several adverse impacts associated with the operation of a hazardous waste storage and treatment facility such as U.S. Ecology North.

1. Environmental Impacts Associated with U.S. Ecology North

¹⁶⁶ U.S. EPA Title VI Guidance, at 39,680.

¹⁶⁷ Id.

¹⁶⁸ 40 CFR 7.35(b)

¹⁶⁹ EPA Title VI Guidance, 39,668.

The operation of a large hazardous waste storage and treatment facility in the middle of a dense urban neighborhood creates numerous adverse environmental impacts that have potentially severe consequences for the health of nearby families. These include: impacts associated with the spill or release of hazardous wastes; chemical reactions associated with the improper storage or treatment of hazardous wastes which can result in catastrophic events, such as explosions; the discharge of excessive levels of hazardous substances into the sewer system, and; air quality impacts due to fugitive and stack emissions from the Facility, emissions from diesel trucks carrying shipments of hazardous waste to and from the Facility, and odors from the Facility.

i. Hazardous Waste Storage and Treatment

The first and most obvious adverse impact is the ever-present risks associated with spills or releases of hazardous waste at or near the Facility, as well as chemical reactions associated with improper hazardous waste storage or treatment, which can result in catastrophic events, such as explosions.

In the past, there have been violations of hazardous waste storage requirements at U.S. Ecology North. Specifically, during a 2018 inspection, EGLE staff observed that acid wastes and base wastes in Bays 4, 5, and 7 were stored “literally side by side.”¹⁷⁰ This practice violated the Facility’s permit, which required acid and base wastes not to be stored together and to always be separated by at least one row.¹⁷¹

The proper storage and handling of hazardous waste is of utmost importance. In 2018, there was an explosion at a U.S. Ecology hazardous waste facility in Grand View, Idaho due to the improper storage of hazardous waste.¹⁷² According to U.S. Ecology, the cause of the explosion was a chemical reaction between water, magnesium, and the presence of non-conforming materials that was not a part of the facility’s approved waste stream.¹⁷³ The explosion killed one employee at the facility and hospitalized three others.¹⁷⁴ While catastrophic, if a similar type of explosion event were to occur at U.S. Ecology North, the consequences would be more severe. The U.S. Ecology facility in Grand View, Idaho is in an isolated area, with no surrounding land uses. As previously detailed in Section I, U.S. Ecology North is in a dense urban neighborhood.

Communities of color and low-income are generally more vulnerable to the impact of disasters than people with a higher socioeconomic status.¹⁷⁵ As a result, communities such as those that exist around U.S. Ecology North may experience more material losses and greater damage to or

¹⁷⁰ James Day, Michigan Department of Environment, Great Lakes, and Energy, Post Inspection Letter to US Ecology, August 7, 2018. https://drive.google.com/drive/u/0/folders/12XLrHG4KdEivjAjfTWiLC6Bj1MW_Bc7.

¹⁷¹ Id.

¹⁷² Environmental Protection Agency, US Ecology Waste Disposal Facility Explosion. https://response.epa.gov/site/site_profile.aspx?site_id=14031.

¹⁷³ US Ecology releases investigation report into deadly 2018 Grand View facility explosion, KIVI (2019), <https://www.kivitv.com/news/us-ecology-releases-investigation-report-into-deadly-2018-grand-view-facility-explosion> (last visited Jul 24, 2020).

¹⁷⁴ One person killed, three hospitalized in explosion at US Ecology site near Grand View, KIVI (2018), <https://www.kivity.com/news/explosion-at-us-ecology-idaho-site-near-grand-view> (last visited Jul 24, 2020).

¹⁷⁵ Substance Abuse and Mental Health Services Administration, Greater Impact: How Disasters Affect People of Low Socioeconomic Status (2017), https://www.samhsa.gov/sites/default/files/dtac/srb-low-ses_2.pdf.

destruction of their homes due to living in homes with lower quality construction.¹⁷⁶ As noted in the following subsections, residents living nearby U.S. Ecology North are already dealing with such impacts. Additionally, studies have found people living in low-income communities of color may lack access to the transportation resources needed to comply with evacuation orders.¹⁷⁷ One study of residents impacted by Hurricane Katrina found that Black residents were less likely to have evacuated before the hurricane, and more likely to have been unable to do so.¹⁷⁸ To put it simply, emergency response procedures for low-income communities of color, such as those that surround U.S. Ecology North, must take these unique vulnerabilities into account.

The license approved by EGLE fails to address the unique risks that exist when a large hazardous waste facility exists in a low-income community of color.

First, the Waste Analysis Plan is insufficient to ensure that hazardous wastes received at U.S. Ecology North are accepted, stored, and treated in the manner necessary to avoid a catastrophic event such as that which occurred at U.S. Ecology's Idaho facility. The Waste Analysis Plan describes the process by which waste is received, identified, and stored. For all incoming shipments of hazardous waste, the Waste Analysis Plan requires personnel at U.S. Ecology North to review the shipping manifest to ensure that it is accurate and complete and to inspect the containers visually.¹⁷⁹ The license also requires U.S. Ecology to perform a fingerprint screening analysis for at least 10% of the containers from each approved waste stream per shipment to confirm that it matches the waste profile information and analytical results provided by the generator.¹⁸⁰ Similarly, U.S. Ecology's Idaho facility that experienced an explosion due to inadequate hazardous waste screening and analysis procedures had an identical requirement in its RCRA permit.¹⁸¹ As noted by the EPA, performing a fingerprinting analysis for 10% of the incoming hazardous waste containers of each waste stream shipped from each generator is the *minimum* to provide a sufficient waste profile knowledge to ensure accurate waste representation.¹⁸² Hazardous wastes are often a complex mixture of chemicals, and to define them requires a laboratory analysis.¹⁸³ Waste generators may not maintain adequate records of the components of their waste streams.¹⁸⁴ Given the U.S. Ecology North is located in a densely populated high-risk community, the Complainants believe more robust requirements regarding fingerprinting for incoming waste shipments are necessary.

Second, once hazardous waste shipments are received, the license lacks adequate waste compatibility analysis requirements to ensure that wastes combined into a single container for

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Thiede, B. C., & Brown, D. L. (2013). Hurricane Katrina: Who Stayed and Why? *Population Research and Policy Review*, 32(6), 803-824. <https://doi.org/10.1007/s11113-013-9302-9>

¹⁷⁹ Condition 3.A(2)(a); (b).

¹⁸⁰ Id.

¹⁸¹ Idaho Department of Environmental Quality, US Ecology Idaho, Inc. Waste Analysis Plan (2019), <https://www.deq.idaho.gov/media/60178892/us-ecology-site-b-grand-view-att2.pdf>.

¹⁸² Environmental Protection Agency, *Waste Analysis at Facilities that Generate, Treat, Store, and Dispose of Hazardous Wastes* (2015), <https://www.epa.gov/sites/production/files/2015-04/documents/tsdf-wap-guide-final.pdf>

¹⁸³ U.S. EPA, *A Method for Determining the Compatibility of Hazardous Waste*, EPA 600/2/-80-076 (Apr. 1980), available at <https://www.epa.gov/sites/production/files/2016-03/documents/compat-haz-waste.pdf>

¹⁸⁴ Id.

storage or in a single tank for treatment will not cause a violent reaction. The license only requires a pre-treatment analysis to ensure aggregated wastes are amenable to the same treatment and will destroy, remove, or stabilize constituents.¹⁸⁵ It does not specify what the pre-treatment analysis must entail, nor does it require any pretreatment analysis before wastes are transferred from one container to another.

Third, the contingency plan is inadequate, given the unique vulnerabilities of the surrounding community. Neither the Facility's license nor the 54-page Contingency Plan makes any reference as to how personnel at the Facility will notify or engage with nearby residents in the case of an emergency.

Fourth, while EGLE stated that all hazardous waste handling operations must take place on areas paved with concrete or asphalt, this requirement is not reflected anywhere in the license. Even if it were, it is unclear why this reasoning alone would be a sufficient basis for waiving the soil monitoring requirement. There are clearly areas at U.S. Ecology North that are unpaved. These areas could become contaminated, and the contaminated soil may be transported off-site through any number of means, including wind dispersal.

In addition to concerns regarding the U.S. Ecology North license, the Complainants are also concerned about the cumulative impacts associated with living in close proximity to two commercial hazardous waste facilities. U.S. Ecology South exists at 1923 Fredrick Street in Detroit, which is less than 2 miles away from U.S. Ecology North. While U.S. Ecology North has received 13 violation notices regarding violations of hazardous waste storage and treatment regulations over the previous five years, U.S. Ecology South has received 10. Additionally, U.S. Ecology South has been cited 17 times by EGLE's Air Quality Division for violations of Mich. Admin. Code, R. 336.1901(b) due to odor violations. As discussed below, residents living nearby U.S. Ecology North have complained about odors as well.

Obviously, the storage and treatment of hazardous wastes is an extremely dangerous activity. The nine-fold increase in U.S. Ecology North's hazardous waste storage capacity will mean there will be more hazardous waste allowed to come to the Facility, which increases the risks for nearby community members. Given the Facility's location in a dense, low-income community of color, the Complainants believe that the license fails to protect nearby residents from the adverse impacts associated with the Facility. Specifically, the Waste Analysis Plan, Contingency Plan, and lack of soil monitoring will subject to the residents living nearby the Facility to adverse impacts. As detailed in Section I above, this community is overwhelmingly a community of color, making this adverse impact disproportionate for the purposes of 40 C.F.R. Part 7.

Additionally, the Complainants believe that allowing U.S. Ecology North to expand when it is located less than 2 miles from U.S. Ecology South exacerbates these adverse environmental impacts. EGLE did not consider the cumulative impacts of its licensing decision regarding U.S. Ecology North. This analysis is required by 40 C.F.R. Part 7.

ii. Discharge of Hazardous Substances into the Sewer System

¹⁸⁵ Permit Condition 3.A(2)(f)

Another common adverse impact is exceedances of discharge limits required by the Facility's Industrial Pretreatment Program permit. Nearby residents can be exposed to effluent discharges with excessive levels of hazardous substances during sewer backup events. Such an event occurred in 2013 when a resident on Badger Street in Detroit alerted government officials with the City of Detroit that a "yellow foamy substance" was coming out of a storm sewer across from U.S. Ecology.¹⁸⁶ Additionally, nearby residents have expressed concerns that the sewage that, from time to time, backs up into their basement contains hazardous substances discharged by U.S. Ecology North into the sewer system. Rufus McWilliams, who lives near U.S. Ecology North, has noted that during periods of heavy rain, sewage backs up into the basements of homes. When this occurs, the entire house would have an "egg-like odor."¹⁸⁷ Other residents have also experienced sewer backups into their basement during periods of heavy rain and have complained about such backups causing a "chemical" odor.¹⁸⁸

Over the past ten years, U.S. Ecology has exceeded discharge limits in its Industrial Pretreatment Program permit over 150 times.¹⁸⁹ Recently, these violations have included the following:

- Exceedance of arsenic limit on September 28, 2016;
- Exceedance of cobalt/copper limit on November 10, 2016;
- Exceedance of biochemical oxygen demand limit on December 12, 2016;
- Exceedance of titanium limit on February 27, 2016;
- Exceedance of titanium limit on March 24, 2017;
- Exceedance of copper limit on April 28, 2017;
- Exceedance of copper limit on June 6, 2017;
- Exceedance of phosphorus and silver limits on August 14, 2017;
- Exceedance of copper limit on June 6, 2018.

In addition to the hazardous substances regulated by U.S. Ecology North's Industrial Pretreatment Permit, recent reports have also indicated that elevated levels of PFAS have been discharged into the sewer system. When nearby residents experience basement backups, they are exposed to these extremely hazardous substances in their homes, which may cause significant adverse health effects.

iii. Odors, Dust, and Truck Traffic

The expansion of U.S. Ecology North's operations will also cause increased air quality and odor issues for nearby residents. Residents in the nearby area, including Ms. McWilliams, have

¹⁸⁶ Complaint/PEAS Incident Report Form, Office of Waste Management and Radiological Protection, PEAS No. 13-116, Sept. 10, 2013 (Appendix F)

¹⁸⁷ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Deposition of Rufus McWilliams, at 38 (Appendix G)

¹⁸⁸ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Deposition of Dernise Jackson, at 30 (Appendix H)

¹⁸⁹ Keith Matheny, *US Ecology's permit violations anger Detroit neighbors*, DETROIT FREE PRESS, <https://www.freep.com/story/news/local/michigan/detroit/2016/11/16/usecology-hazardous-waste-detroit-sewer/89963514/> (last visited Jul 24, 2020).

claimed that U.S. Ecology North is the source of rotten egg and chemical odors.¹⁹⁰ Other residents have reported experiencing similar odors and have stated that the fumes and odors make them feel “tense, nauseated, and always on edge,” as well as suffering a “loss of appetite.”¹⁹¹ Additionally, residents have reported that they have stopped using the outdoor area of their residence, and have stopped inviting people to their residence due to the odors.¹⁹²

These odors described by residents are clear violations of Mich. Admin. Code, R. 336.1901, which prohibits any person from causing or permitting the emission of an air contaminant in amounts that cause, either alone or in reaction with other air contaminants, injurious effects to human health or safety, or unreasonable interference with the comfortable enjoyment of life and property.¹⁹³ The community surrounding the U.S. Ecology North facility is disproportionately composed of people of color when compared to the state and national averages. As such, this adverse effect is having a disproportionately negative impact on people of color in violation of 40 C.F.R. Part 7.

In addition to odors, nearby residents have also frequently complained about the dust that inundates their neighborhood. Ms. McWilliams has stated that the dust in her neighborhood can cause breathing issues and aggravate her asthma.¹⁹⁴ It also prevents her from opening the doors and windows of her home.¹⁹⁵ Due to the level of dust in her neighborhood, Ms. McWilliam’s doctor recommended that she get an air filtration system for her home.¹⁹⁶ An analysis of dust fall samples taken in the neighborhood has revealed that the total suspended solids deposited in the area is between 559 and 958 milligrams per square meter per month.¹⁹⁷ These levels are well above standards utilized to measure nuisance standards, such as Australia’s standard of 120 milligrams per square meter per month, and are likely causing significant adverse health impacts.¹⁹⁸

U.S. Ecology North, along with several other industrial facilities in the area, are causing this dust problem. The entrance to U.S. Ecology North is on Sherwood Street which is partially unpaved. Additionally, portions of U.S. Ecology North are unpaved. When large trucks and heavy equipment travel on unpaved roads or portions of the Facility, they can cause spikes in fugitive dust, which can have serious adverse impacts on the health of nearby residents. Additionally, the diesel exhaust emissions from trucks traveling to and from U.S. Ecology North and other

¹⁹⁰ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Deposition of Pamela Williams, at 80 (Appendix I)

¹⁹¹ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Psychological Evaluation of Darin Fowler (Appendix J)

¹⁹² *Id.* at 5.

¹⁹³ Mich. Admin. Code, R 336.1901.

¹⁹⁴ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Psychological Evaluation of Pamela McWilliams, at 3 (Appendix K)

¹⁹⁵ *Id.*

¹⁹⁶ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Deposition of Pamela Williams, at 58 (Appendix I)

¹⁹⁷ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Preliminary Report for Deposition Sampling, Noise Monitoring, and Air Sampling Program for the Neighborhood in the Vicinity of the I-94 Industrial Park, at 14 (Appendix L)

¹⁹⁸ The State of Queensland, *Particles & Air pollutants* (2017), <https://www.qld.gov.au/environment/pollution/monitoring/air/air-pollution/pollutants/particles> (last visited Jul 24, 2020).

industrial sites in the area can have significant health effects on nearby residents, including acute effects such as asthma attacks and chronic effects such as lung cancer.¹⁹⁹ The expansion of U.S. Ecology North's storage capacity will result in more diesel trucks going to and from the Facility. This, along with the trucks going to and from other nearby industrial facilities such as Universal Logistics, have a significant adverse effect on the health of nearby residents.

2. Property Values

In addition to the environmental risks that people living nearby U.S. Ecology North are exposed to daily, they have also experienced a decrease in their property values due to their homes being located nearby a large commercial hazardous waste facility. Several studies have found that hazardous waste sites have a statistically significant adverse impact on neighboring property values. One study performed a meta-analysis of 46 North American studies issued from 1971 to 2008 and concluded that all classes of waste sites affect real estate prices.²⁰⁰ Another study surveyed suburban Boston households and estimated that distance from a hazardous waste disposal site is valued at \$330 to \$495 per mile per year.²⁰¹ The negative impact that a hazardous waste facility may have on property values can extend as far as five and three-quarter miles from the facility itself.²⁰²

Overall, peer-reviewed research indicates that proximity to hazardous waste sites reduces residential property values by anywhere from 2 to 12%.²⁰³ An expert reviewing U.S. Ecology North's impact on nearby property values has opined that it is "reasonable to expect" that the reports of the frequency and severity of U.S. Ecology North's environmental violations would have a "corresponding, deleterious impact on residential property values in the neighborhood."²⁰⁴ Additionally, the expert noted that if EGLE were to grant U.S. Ecology regulatory approval to expand its Facility, that it could potentially reduce home values in the neighborhood by as much as 12% from their pre-2015 levels.²⁰⁵

Of course, U.S. Ecology North does not exist in isolation. Residents living in the neighborhood are also confronted with adverse effects from several other industrial facilities, including Strong Steel, Universal Logistics, and Flex-N-Gate. Living nearby each of these industrial facilities further depresses nearby residents' property values. An expert that surveyed the full, cumulative impact of these industrial activities on property values opined that nearby residents experienced as much as a 60% permanent reduction in their property value.²⁰⁶ The estimated property value

¹⁹⁹ Environmental Protection Agency, Health Assessment Document for Diesel Engine Exhaust (2002). <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=29060>.

²⁰⁰ John B. Braden, Xia Feng, DooHwan Won, *Waste Sites and Property Values: A Meta-Analysis, Environmental and Resource Economics*, 50, 175-201 (2011).

²⁰¹ V. Kerry Smith & William H. Desvousges, *The Value of Avoiding a LULU: Hazardous Waste Disposal Sites*, 68 Rev. Econ. Stat. 293, 298 (1986).

²⁰² Gerald E. Smolen & Gary Moore, *Economic Effects of Hazardous Waste Landfills on Surrounding Real Estate Values in Toledo, Ohio*, Ohio State Univ. Center for Real Estate Education and Research, Feb. 1991.

²⁰³ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Robert A Simons LLC Brief regarding Property Values (Appendix M)

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ Id.

reduction for Ms. McWilliams was 40%.²⁰⁷ Potential adverse cumulative impacts from stressors must be considered pursuant to the EPA's Title VI Regulations.²⁰⁸ An assessment of cumulative impacts requires consideration of total exposure from multiple environmental stressors, including exposures originating from multiple sources.²⁰⁹

The estimated impacts on property values of nearby residents that are attributable to U.S. Ecology North and other nearby industrial facilities is significant. Additionally, these impacts are being disproportionately borne by a community that is disproportionately composed of people of color when compared to state and national averages. As such, this adverse effect is having a disproportionate impact on people of color in violation of 40 C.F.R. Part 7.

3. Psychological Effects

As detailed in the subsections A and B above, U.S. Ecology North and the other nearby industrial facilities regularly cause a number of significant adverse effects that impact the lives of the people living in nearby neighborhoods. Living in a community with elevated levels of air pollution, odors, the potential for catastrophic events due to the mishandling of hazardous waste, truck traffic, loud noises, and destructive vibrations has taken a severe mental toll on residents. A licensed psychologist has interviewed several residents living nearby U.S. Ecology North to examine whether they have been subjected to emotional injuries due to the adverse effects experienced by residents from the environmental impacts discussed above.

The psychologist's evaluation of Ms. McWilliams is particularly telling. In her home of 33 years, Ms. McWilliams has been subjected to "[e]xplosions and vibrations that make her home shake" and that have even shaken shingles off the roof and cracked windows.²¹⁰ The fumes, odors, and dust from nearby industrial facilities, including U.S. Ecology North, have caused breathing difficulties and aggravate her asthma. On particularly bad days, Ms. McWilliams has resorted to wearing a mask in her home.²¹¹ She frequently cannot open her doors and windows because of the dust, fumes, odors, and air pollution.²¹² The noises, heavy truck traffic, and explosions are described as "disturbing and frightening" and interrupt her sleep.²¹³ Ms. McWilliams has expressed that she loves her home and her neighbors and would prefer to remain in her home, but only if the industrial pollution is stopped.²¹⁴ The psychologist concluded that Ms. McWilliams had suffered "significant emotional anguish from exposure to, experiencing and witnessing the environmental toxins emanating from industrial complexes, Strong Steel, Flex-N-Gate, Universal Logistics, and U.S. Ecology North."²¹⁵ Additionally, the psychologist concluded that these adverse and cumulative environmental effects "has created and/or exacerbated feelings of

²⁰⁷ Id.

²⁰⁸ Environmental Protection Agency, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39,650 (June 27, 2000), available at <https://www.govinfo.gov/content/pkg/FR-2000-06-27/pdf/00-15673.pdf>.

²⁰⁹ Id.

²¹⁰ *Mosetta Jackson et al. v. U.S. Ecology et al.*, Case No. 18-000608-CZ, Wayne County Cir. Court, Psychological Evaluation of Pamela McWilliams, at 2 (Appendix K)

²¹¹ Id.

²¹² Id.

²¹³ Id.

²¹⁴ Id.

²¹⁵ Id.

anxiety, despair, futility, and vulnerability” in a manner that is ”pervasive, profound, long-lasting, and affect every aspect of her life.”²¹⁶ These conclusions were consistent with other examinations performed by the psychologist of other residents of the same neighborhood. The psychologist concluded that while the details of each account were unique to each person, “the collective concerns are unanimous and overwhelming” and that each person living in the neighborhood felt inundated by adverse effects associated with U.S. Ecology North, and other nearby industrial facilities, but also “powerless to protect themselves.”²¹⁷

The EPA’s Title VI regulations exist to ensure that communities such as this are not forced to continue to bear the brunt of the adverse environmental effects that result from industrial facilities such as U.S. Ecology North. The EPA has expressly stated that 40 C.F.R. Part 7 requires consideration of cumulative impacts from other nearby sources that may be exacerbating the adverse effects that are being disproportionately borne by communities of color.

Instead of addressing these issues in the licensing process, EGLE callously dismissed them. Instead of carefully considering who lives nearby U.S. Ecology North and whether they may be owed protection under Title VI as a community of color, it stated that the community has transitioned from residential to industrial. Additionally, when hundreds of residents raised concerns regarding the inequity that is inherent in EGLE’s pattern of predominantly approving the siting of hazardous waste facilities in communities of color, it simply responded that it “does not have the authority to consider whether the facility is needed or wanted when deciding whether to issue or deny a license.”²¹⁸ However, this mischaracterizes and dismisses many residents and the Complainants’ true concern, which is EGLE’s approval of hazardous waste facility licenses that allows for the disproportionate siting of such facilities in communities of color is discriminatory in violation of Title VI. This dismissal exacerbates the psychological harm described in this subsection, as it contributes to the feeling of powerlessness of the residents.

The psychological effects experienced by residents that are attributable to U.S. Ecology North and other nearby industrial facilities is significant. Additionally, these impacts are being borne by a community that is disproportionately composed of people of color when compared to state and national averages. As such, this adverse effect is having a disproportionate impact on people of color in violation of 40 C.F.R. Part 7.

C. EGLE’s failure to adopt policies or regulations requiring the consideration of racial and economic demographic information in hazardous waste licensing decisions has established a pattern or practice of discrimination on the basis of race, color, and national origin.

The issues discussed above regarding U.S. Ecology North are not unique. Other Michiganders across the state that live nearby commercial hazardous waste facilities are dealing with similar issues. Below is a summary of environmental hazards associated with other commercial hazardous waste facilities across the state:

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ Responsiveness Summary at 2.

- Petro-Chem Processing Group of Nortru LLC
 - Releases from the facility have caused a variety of contamination issues, including PFAS and VOC contamination.
 - Have received 27 notices of violation in the past 5 years from EGLE pursuant to Part 111
- Republic Industrial and Energy Solutions
 - Have received 24 notices of violation in the past 5 years from EGLE pursuant to Part 111
- Drug and Laboratory Disposal, Inc.
 - Have received 11 notices of violation in the past 5 years from EGLE pursuant to Part 111
- Gage Products Co.
 - Have received 18 notices of violation in the past 5 years from EGLE pursuant to Part 111
- Michigan Disposal
 - Have received 3 notices of violation in the past 5 years from EGLE pursuant to Part 111
- Wayne Disposal
 - Have received 6 notices of violation in the past 5 years from EGLE pursuant to Part 111

Additionally, the communities nearby the other commercial hazardous waste facilities have another thing in common: they are disproportionately composed of people of color.

As discussed in Section I, Michigan is the worst state in the nation regarding the disproportionate siting of commercial hazardous waste facilities in communities of color. This is partially because EGLE does not consider demographic information regarding the surrounding community when making its licensing decisions pursuant to Part 111 of the Michigan Natural Resources and Environmental Protection Act. EGLE's failure to consider demographic information is made worse by the fact that MCL 324.11110 required the Department to update its state hazardous waste management plan to include criteria for ensuring that there was a reasonable geographic distribution of hazardous waste treatment, storage, and disposal facilities.²¹⁹ These criteria were required to include a consideration of demography, environmental factors, and public health factors for determining acceptable locations for hazardous waste facilities.²²⁰ Once the updated state hazardous waste management plan was adopted, EGLE was statutorily required to not issue a license for a hazardous waste facility unless it decided that the issuance of the license would be consistent with the plan.²²¹ However, EGLE never amended its state hazardous waste management plan, and in failing to do so, never incorporated the consideration of demographics into its consideration determining acceptable locations for hazardous waste facilities. As a result, commercial hazardous waste facilities have continued to be disproportionately located in communities of color throughout Michigan. Now, in the case of U.S. Ecology North, the adverse effects associated with these facilities is being compounded by the increasing intensity of its operations.

The Complainants believe EGLE's failure to amend its state hazardous waste management plan to require the consideration of demography, environmental factor, and public health factors amounts to intentional discrimination in violation of 42 U.S.C. § 2000d. Claims of intentional

²¹⁹ MCL 324.11110(2)(f).

²²⁰ Id.

²²¹ MCL 324.11115.

discrimination can be based on facially neutral laws or practices.²²² To prove intentional discrimination by a facially neutral policy, it must be shown that the policy was promulgated or reaffirmed because of, not merely in spite of, its adverse impact.²²³ Determining whether an invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.²²⁴ The impact of a neutral policy or practice can be used as evidence of intentional discrimination.²²⁵

Here, the failure to adopt criteria that would require the consideration of a location's demography in determining whether a proposed location is an acceptable location for a hazardous waste facility has led to Michigan being the worst state in the country regarding the disproportionate siting of hazardous waste facilities in communities of color. This is a part of EGLE's unfortunately poor history regarding environmental justice, which has included a rare determination by the EPA that EGLE has engaged in discriminatory treatment of African Americans in the public participation process,²²⁶ as well as the Flint Water Crisis. If this criterion were adopted, it would impact EGLE's licensing decisions, such as the one it made regarding U.S. Ecology North, because such decisions must be consistent with the plan.²²⁷

The Michigan legislature clearly mandated EGLE to update the state hazardous waste plan in 1990 to ensure a "reasonable geographic distribution" of hazardous waste facilities throughout the state.²²⁸ The Michigan legislature also clearly mandated EGLE to include the consideration of demography as one of its criteria for ensuring such a reasonable geographic distribution of such facilities.²²⁹ EGLE failed to make such amendments to the state hazardous waste management plan, and as such never considered such criteria in its decision to issue a license to U.S. Ecology North that authorizes a significant expansion of its hazardous waste storage and treatment operations despite the surrounding community being disproportionately composed of people of color. In instances where a state agency continues implementing a policy that fails to prevent discrimination prohibited by Title VI despite previous commitments to do so, such a policy may amount to intentional discrimination.²³⁰ That is the case here. EGLE was required to update its state hazardous waste plan 30 years ago to ensure the reasonable geographic distribution of hazardous waste facilities and was required to include demography as one of the criteria. Its blatant failure to do so has had a severe impact on communities of color throughout Michigan and amounts to intentional discrimination in violation of 40 C.F.R. Part 7.

V. Less Discriminatory Alternatives

²²² See, *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

²²³ *Homer v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994).

²²⁴ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

²²⁵ *Almendares v. Palmer*, 284 F.Supp.2d 799, 805 (N.D. Ohio, 2003)

²²⁶ U.S. EPA, Determinations Regarding EPA File No. 01R-94-R5, Jan. 19, 2017, available at <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>

²²⁷ MCL 324.11115.

²²⁸ MCL 324.11110(2)(f).

²²⁹ *Id.*

²³⁰ *Almendares v. Palmer*, 284 F.Supp.2d 799, 807 (N.D. Ohio, 2003)

Throughout the licensing process for U.S. Ecology North, EGLE consistently refused to accept recommendations that would have led to outcomes that were less discriminatory.

- Regarding the identification of limited English proficient persons, EGLE could have proactively identified this community upon receiving U.S. Ecology North's license application, and immediately developed plans to provide adequate translation and interpretation services. While EGLE recently published a draft Limited English Proficiency Plan, this Plan still relies on EGLE's various divisions and district offices to identify proper methods for identifying LEP individuals and for determining the need for public involvement and public engagement.²³¹ As such, this remains a serious and ongoing issue.
- EGLE could have considered the cumulative effects that result from the operation of numerous industrial sites, including two commercial hazardous waste facilities, in making its determination as to whether the license U.S. Ecology North adequately protects the public health.
- EGLE could have amended its state hazardous waste management plan to provide for the reasonable geographic distribution of hazardous waste facilities as required by law, which could include the consideration of demographic information in the context of licensing decisions for commercial hazardous waste facilities.

VI. Jurisdiction

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d et seq., provides that no person 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 covered by Title VI. Congress intended that its policy against discrimination by recipients of Federal assistance be implemented, in part, through administrative rulemaking. EPA has promulgated Title VI regulations that apply to state agencies that are recipients of financial assistance from the EPA.

Title VI specifically defines what amounts to a program or activity. It is defined 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."²³² If any part of an entity receives federal funds, the whole entity is covered by Title VI.²³³ Additionally, EPA's Title VI regulations define a recipient as "any state... instrumentality of a state...[or] public agency... to which Federal financial assistance is extended directly or through another recipient."²³⁴ EGLE has received millions as recipients of financial assistance from the EPA.²³⁵ Since the year US Ecology submitted its request for a revised license in 2013, over a billion dollars in financial assistance to the agency have been obligated by the EPA. As a recipient of

²³¹ Michigan Department of Environment, Great Lakes, and Energy, Draft Limited English Proficiency Plan, at 5 (Apr. 6, 2020), available at <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>

²³² 42 U.S.C. § 2000d-4a.

²³³ *Ass'n. of Mex.-Am. Educ. v. California*, 195 F.3d 465, 474-5 (9th Cir. 1999), rev'd in part on other grounds, 231 F.3d 572 (9th Cir. 2000) (en banc)

²³⁴ 40 CFR § 7.25

²³⁵ Spending by Prime Award (Awarding Agency EPA, Recipient Environment Great Lakes and Energy). USASPENDING.GOV, <https://usaspending.gov/#/search>.

federal financial assistance from the EPA at the time the discrimination occurred, EGLE is subject to the provisions of Title VI.

EGLE Policy and Procedure 09-024 provides that any person or group may submit a complaint alleging discrimination of any kind by EGLE, including discrimination that may constitute a violation of 40 C.F.R. Part 7 or any state or federal statutes or regulations that EGLE enforces.

This Complaint fully complies with all requirements described in EGLE Policy and Procedure 09-024 regarding the submittal of a complaint. It has been submitted in writing via electronic mail and signed by the Complainants' legal counsel. The Complaint provides all of the requisite information. The Grievance Submittal Form (EQP0120) has not been submitted because the form is not available online at the link provided by EGLE.

This Complaint has been filed in response to EGLE's decision to issue a modified license to U.S. Ecology North. The license was issued on January 29, 2020. As such, this Complaint is timely because it was filed within 180 days of the issuance of the license in accordance with EGLE Policy and Procedure 09-024.

This Complaint has also been filed in response to EGLE's failure to update its state hazardous waste management plan to ensure the reasonable geographic distribution of hazardous waste facilities and to require the consideration of demographics in licensing decisions. Such noncompliance, which is having a discriminatory effect on people of color, is ongoing. As such, this Complaint is timely because the nature of the violation is ongoing.

VII. Relief

The Complainants request that EGLE accept this complaint and investigate whether it has committed any acts of unlawful discrimination, including those acts of discrimination alleged in this complaint that may constitute a violation of 40 C.F.R. Part 7, and other state and federal statutes.

Further, the Complainants request that EGLE be brought into compliance with 40 C.F.R. Part 7, and other state and federal statutes. To do so may include, but not be limited to, the following forms of relief:

- Amending the license issued to U.S. Ecology North to adequately address the issues raised herein to ensure local community members are sufficiently protected from the adverse impact;
- Revising the state hazardous waste management plan to stop the disproportionate siting and expansion of commercial hazardous waste facilities in low-income communities of color in accordance with 40 C.F.R. Part 7. Immediately cease granting any licenses to new or existing commercial hazardous waste facilities until such revisions to the state hazardous waste management plan are complete and in effect;
- Requiring the EGLE Materials Management Division to adopt policies and procedures for the identification of limited English proficient persons and the provision of translation and interpretation services.

In accordance with EGLE Policy 09-024, the Complainants request to engage in an informal resolution process to address the issues raised in this Complaint.

Sincerely,

/s/Nicholas Leonard

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