



By email and U.S. Mail

July 12, 2016

Jocelyn Samuels
Director, Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Room 509F, HHH Building
Washington, D.C. 20201
jocelyn.samuels@hhs.gov

Lilian Dorka
Interim Director, Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1210A
1200 Pennsylvania Ave., NW
Washington, DC 20460
Dorka.Lilian@epa.gov

Daria Neal
Deputy Chief
Federal Coordination & Compliance Section
Civil Rights Division
U.S. Department of Justice
daria.neal@usdoj.gov

Re: Request for Review of the Michigan Department of Environmental Quality and Michigan Department of Health and Human Services' Compliance with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973

Dear Ms. Dorka, Ms. Samuels, and Ms. Neal:

The ACLU of Michigan, Community Development Organization, Crossing Water, Food & Water Watch, Genesee County Hispanic Latino Collaborative, Michigan Voice, IHM Justice, Peace and Sustainability Office, Jesus People Against Pollution, Michigan Coalition for Human Rights, Michigan Faith in Action, Natural Resources Defense Council, Ocean Future, Original United Citizens of Southwest Detroit, Parents for Nontoxic Alternatives, Sierra Club, St. Francis Prayer Center, Southeast Michigan Synod of the Evangelical Lutheran Church of America, Sugar Law Center for Economic and Social Justice, Water Alliance, Water You Fighting For, West End Revitalization Association, Yemen American Benevolent Association, Marc Brenman, Robert García, Gregg P. Macey, Father Phil Schmitter, and Pastor Monica Villarreal (collectively, "Signatories") call on the United States Environmental Protection Agency ("EPA") Office of Civil Rights ("OCR") and the United States Department of Health and Human Services ("HHS") OCR to review whether the Michigan Department of Environmental Quality ("MDEQ") and Michigan Department of Health and Human Services ("MDHHS") are in compliance with Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d et seq. ("Title VI") and agency implementing regulations, 40 C.F.R. Part 7 and 45 C.F.R. Part 80, as well as Section

504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (“Section 504”) and its implementing regulations, 40 C.F.R. Part 7 and 45 C.F.R. Part 84.

As the Flint Water Advisory Task Force concluded, the Flint Water Crisis stands as a powerful demonstration of environmental injustice, one that raises serious questions about the role of race and ethnicity in governmental decision-making and racial and ethnic inequality in government services:

The facts of the Flint water crisis lead us to the inescapable conclusion that this is a case of environmental injustice. Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities. Moreover, by virtue of their being subject to emergency management, Flint residents were not provided equal access to, and meaningful involvement in, the government decision-making process.¹

Adding insult to injury, the long overdue response to the crisis coordinated by MDHHS failed to adequately serve Flint’s most vulnerable residents, including those with limited English proficiency (“LEP”) and disabilities.² Unfortunately, these failures are not unique within Michigan. The Flint water crisis is the tragic result of the chronic refusal of MDEQ and MDHHS to comply with their civil rights obligations. Surely recent events in Flint provide more than ample reason to believe that MDEQ and MDHHS have violated Title VI and Section 504, and we ask EPA and HHS to initiate compliance reviews of these agencies.

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

¹ Flint Water Advisory Task Force, *Final Report 54* (Mar. 21, 2016), available at https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf (“Task Force Final Report”).

² While it is not always clear to those outside the process who is administering which response programs in Flint, it nonetheless appears that MDHHS, a recipient of HHS funds, and the Governor’s Office bear primary coordination responsibilities. It is also Signatories’ understanding that these entities implemented the emergency response between October 1, 2015 and January 16, 2016. To the degree that HHS, EPA or other federal agencies were involved in failures to adequately serve groups within Flint because of their language, ability, race or culture in the wake of the crisis, we ask that these agencies engage in a frank assessment of their processes and procedures for meeting their own civil rights obligations in this and future emergency response efforts.

particular ethnic groups, and people with disabilities. Acknowledging and redressing MDEQ and MDHHS' practice of providing inadequate services and protection to communities of color, immigrant communities and people with disabilities must be part of the solution in Flint. The current disaster is not the first case of environmental injustice that has been caused or exacerbated by MDEQ or MDHHS, but it should be the last.³ Though this request remains timely, Flint and other communities impacted by these agencies' noncompliance with civil rights laws have already waited far too long for a government entity to counter these injustices. It is therefore vital that HHS OCR and EPA OCR review MDEQ and MDHHS' compliance with Title VI and Section 504 in a timely fashion. We are submitting this letter, also, to the Department of Justice ("DOJ") given the interagency nature of the issues and the request, with the hope that DOJ will both help to coordinate and, also, lend its expertise to the effort to conduct the compliance review.⁴

EPA OCR and HHS OCR have the unique authority to root out the practices and policies at MDEQ and MDHHS that resulted in the inadequate and adverse treatment of Flint as a whole, and its African American and immigrant communities, as well as people with disabilities, in particular. Signatories submit that this is an exceptionally clear case of facts that

³ Notably, community representatives have previously filed multiple complaints with EPA alleging that MDEQ failed to comply with civil rights law and EPA OCR has repeatedly failed to identify the clear red flags signaling a pattern of noncompliance at MDEQ over time. *See Complaints Filed with EPA Under Title VI of the Civil Rights Act of 1964*, EPA (last updated Mar. 2, 2016), <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> (11D-06-R5, filed Aug. 2, 2006 and rejected; 21R-99-RS, filed Sept. 1, 1999 and rejected on the ground of "unauthorized rep"; 18R-99-R5, filed July 1, 1999 and rejected as untimely; 09R-98-R5, filed June 1, 1998 and rejected as untimely). In each of these cases, EPA neglected to consider whether the allegations created reason to believe that MDEQ was in noncompliance. Two complaints focused particularly on MDEQ's decisions to permit facilities in Flint itself, raising concerns about the racially disparate impact of polluting facilities on Flint residents. In its controversial "Select Steel" decision, EPA dismissed allegations on the ground that the Flint-based facility would have no adverse impact despite predicted emissions of volatile organic compounds (VOCs), lead, mercury and other air toxins. Letter from Ann Goode, Dir., EPA OCR, to Fr. Schmitter et al. (Oct. 30, 1998), *available at* https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html. The oldest complaint pending at EPA also alleged that MDEQ's decision to permit a facility in Flint violated Title VI. *Complaints Filed with EPA Under Title VI of the Civil Rights Act of 1964*, EPA (last updated Mar. 2, 2016), <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> (showing that complaint number 01R-94-R5 was accepted July 1, 1994). Signatories want to make clear that the compliance review sought in this letter is not a substitute for resolution of the particular allegations in the complaint accepted for investigation in 1994.

⁴ *See* DOJ review of the Ferguson, Missouri Police Department's compliance with Title VI. Civil Rights Div., DOJ, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. DOJ's review provided a comprehensive examination of policies and practices that culminated in a white police officer killing an unarmed African American teenager, Michael Brown. DOJ addressed the racially discriminatory practices that led to Michael Brown's death instead of simply investigating the altercation as a solitary incident. In doing so, DOJ addressed some of the root causes of the tragedy and frustration in Ferguson.

should trigger a compliance review. EPA OCR and HHS OCR will rarely have more substantial “reason to believe”⁵ that there is a “possible failure”⁶ of funding recipients to comply with civil rights obligations. More importantly, by bringing MDEQ and MDHHS into compliance with federal civil rights laws, HHS OCR and EPA OCR will address some of the systematic failures that led to the crisis, and help Michigan start on the long road toward regaining the trust of its citizens.

I. Authority to Conduct Compliance Reviews

EPA OCR and HHS OCR have the authority and responsibility to investigate whether entities that receive federal funds are in compliance with Title VI and Section 504.⁷ Taken together, these two civil rights laws prohibit recipients such as MDEQ and MDHHS,⁸ from engaging in activities that subject individuals to discrimination on the basis of race, color, national origin, or disability.⁹

EPA regulations provide:

The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.¹⁰

EPA thus has authority to collect data and information from MDEQ to ensure compliance and to conduct on-site reviews if it has “reason to believe” MDEQ may be in non-compliance.¹¹

Similarly, HHS regulations provide:

⁵ 40 C.F.R. § 7.115(a) (applicable EPA regulation).

⁶ 45 C.F.R. § 80.7(c) (applicable HHS regulation).

⁷ See 40 C.F.R. 7.115(a); 45 C.F.R. § 80.7 and (c); 45 C.F.R. §84.61 (applying HHS Title VI enforcement regulations, including compliance review procedures outlined in 45 C.F.R. § 80.7, to HHS Section 504 enforcement); *see also* DOJ, *Title VI Legal Manual* (last updated Aug. 6, 2015),

<https://www.justice.gov/crt/title-vi-legal-manual#Post-award> (“Federal agencies are required to maintain an effective program of post-award compliance reviews”).

⁸ MDEQ and MDHHS are recipients of federal funds from EPA and HHS, respectively. USASpending, <http://www.usaspending.gov> (last visited June 24, 2016) (enter “929327880” and “113704139” in the “Search for Recipient” field).

⁹ 42 U.S.C. § 2000d and 29 U.S.C. § 794(a).

¹⁰ 40 C.F.R. § 7.115(a) (postaward compliance: periodic review).

¹¹ 40 C.F.R. § 7.115. EPA regulations require that the agency provide recipients with notice of the review. *Id.* at (b).

Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.¹²

HHS regulations further require HHS to “make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part” and mandate that the investigation include, where appropriate, pertinent policies and practices, the circumstances under which the noncompliance may have occurred, and other factors to its determination.¹³ HHS regulations also explicitly require that recipients keep and provide HHS with access to information that may be necessary for the investigation.¹⁴

A. Standards for Compliance Reviews

EPA and HHS are thus responsible for ensuring that recipients of funds from their respective agencies comply with Title VI and Section 504. EPA OCR may periodically initiate reviews and also has authority to conduct on-site reviews of a funding recipient’s compliance with Title VI or Section 504 if it has “reason to believe that discrimination may be occurring in such programs or activities.”¹⁵ HHS OCR “shall from time to time review” the practices of its funding recipients to determine whether they are in compliance with Title VI and Section 504 and “will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply.”¹⁶ Entities applying for funding from both EPA and HHS must provide assurances with their application that they will operate programs or facilities in compliance with Title VI and Section 504.¹⁷

¹² 45 C.F.R. § 80.7(a).

¹³ 45 C.F.R. § 80.7(c).

¹⁴ 45 C.F.R. § 80.6.

¹⁵ 40 C.F.R. 7.115(a).

¹⁶ 45 C.F.R. § 80.7(a) and (c); 45 C.F.R. § 84.61.

¹⁷ Recipients of federal funds from EPA are required to complete a Preaward Compliance Review Report for all Applicants and Recipients Requesting EPA Financial Assistance, Form 4700-4, and must provide assurance of compliance with federal civil rights statutes and EPA regulations in accordance with the term and condition set forth by EPA for recipients of federal funds. EPA, *Civil Rights Obligations* (Jan. 25, 2013). Among other things, EPA’s terms and conditions include the following:

In accepting this assistance agreement, the recipient acknowledges it has an affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.

Id.; 45 C.F.R. 80.4(a)(1) (HHS recipient assurance of compliance with Title VI); 45 C.F.R. 84.5 (HHS recipient assurance of compliance with Section 504).

Generally, as DOJ’s Title VI Legal Manual makes clear, “Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews.”¹⁸ The standards outlined above, which set a low bar, must be read in light of this broad discretion to ensure that agencies can hold recipients accountable for noncompliance with federal law. Under HHS regulations, the information provided in this letter alone is more than sufficient to “indicate[] a possible failure to comply,” and thus creates a nondiscretionary duty in HHS OCR to investigate MDHHS’ compliance with Title VI and Section 504. EPA has authority to initiate a review, and even public information about the Flint water crisis and MDEQ’s role in Wayne County more than meet the “reason to believe” standard applicable to on-site reviews. Neither standard requires definitive proof of a failure to comply with Title VI or Section 504, and the public information that Signatories are transmitting with this letter provide EPA with ample “reason to believe” that MDEQ is not meeting civil rights requirements. Given their clear statutory and regulatory authority to prevent discrimination by funding recipients, EPA OCR and HHS OCR must fill the gaping hole in accountability for the events that have occurred in Flint.

B. Discrimination Defined

EPA and HHS regulations implementing Title VI and Section 504 prohibit both intentional discrimination and activities that are not intentionally discriminatory but nonetheless have an unjustifiable disparate impact on the basis of race, color, national origin and disability.

EPA regulations implementing Title VI state that “[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin[.]” 40 C.F.R. § 7.30. The regulations also prohibit funding recipients from engaging in a non-exclusive list of specific discriminatory acts. Recipients may not:

- (1) Deny a person any service, aid or other benefit of the program or activity;
- (2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program or activity;

¹⁸ DOJ, *Title VI Legal Manual* (last updated Aug. 6, 2015), <https://www.justice.gov/crt/title-vi-legal-manual#Selection>. In certain jurisdictions, an on-site compliance review may only be conducted where it is “reasonable” to do so under the Fourth Amendment. *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 100 (5th Cir. 1992); but see *United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005) (holding that Fourth Amendment rights may be waived without any reservation that searches pursuant to the waiver be reasonable).

(3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program or activity;

(4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program or activity;

....

(b) A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35.

HHS regulations implementing Title VI largely mirror EPA's regulations by providing a broad prohibition on subjecting individuals to discrimination on the basis of race, color, or national origin. 45 C.F.R. § 80.3(a). HHS regulations also prohibit a list of acts similar to those proscribed by EPA's regulations. *Id.* at (b).

Similarly, in implementing Section 504, HHS regulations state that “[n]o qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.” 45 C.F.R. § 84.4(a). HHS regulations specifically state that in providing services, funding recipients may not:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

....

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

....

A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

Id. at (b).

C. Limited English Proficiency

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI implementing regulations promulgated by the Department of Health, Education and Welfare, the precursor to HHS, at 45 C.F.R. § 80.3(b), prohibit actions by funding recipients that deny equal access to services to individuals with limited English proficiency ("LEP"), because such actions constitute discrimination on the basis of national origin. On August 11, 2000, President Clinton issued Executive Order 13,166, titled "Improving Access to Services for Persons with Limited English Proficiency." 65 Fed. Reg. 50,121. The order required federal agencies to issue guidance documents to help federal funding recipients provide appropriate and non-discriminatory services to individuals who are LEP. That same month, DOJ issued its own guidance addressed to "Executive Agency Civil Rights Officers" setting forth general principles for agencies developing guidance for recipients pursuant to the Executive Order. Enforcement of Title VI of the Civil Rights Act of 1964 - National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123 (Aug. 16, 2000) ("DOJ LEP Federal Guidance"). Both EPA and HHS subsequently issued guidance pursuant to the Executive Order.

EPA and HHS' guidance set forth the same four factors that funding recipients should balance in providing services to individuals and communities that are LEP:

Recipients are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons. While designed to be a flexible and fact-dependent standard, the starting point is an individualized assessment that balances the following four factors: (1)

The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.

Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. 35,602, 35,606 (June 25, 2004); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311-02, 47,314 (Aug. 8, 2003) ("Revised HHS LEP Guidance").

Summarized, these regulations and guidance documents require MDEQ and MDHHS to protect the environment, drinking water and public health of Michigan residents in a manner that does not discriminate on the basis of race, color, national origin or ability. Providing inadequate services in a manner that disproportionately affects people of color, immigrants, or individuals with disabilities without sufficient justification is a violation of these regulations.

II. Background

A. The Flint Water Crisis¹⁹

On October 1, 2015, MDHHS acknowledged that drinking water in Flint had been contaminated with dangerously high levels of lead for more than a year.²⁰ The city's many lead service lines ("LSLs") began leaching lead when Flint's state-appointed Emergency Manager decided to source the city's drinking water from the Flint River.²¹ In 1967, Flint signed a long-term water supply contract with the Detroit Water and Sewerage Department ("DWSD") to provide drinking water to Flint residents. DWSD draws its water from Lake Huron, which is a relatively high quality water source.²² By comparison, the Flint River has been a dumping ground for all manner of industry since almost the beginning of the century, and receives high concentrations of chloride every winter when Michiganders salt their roads and walkways. As

¹⁹ Detailed background information can be found in the Task Force Final Report; see also *Disaster Day by Day: A detailed Flint crisis timeline*, Bridge Magazine, Ctr. for Mich., Feb. 4, 2016, <http://bridgemi.com/2016/02/flint-water-disaster-timeline/> ("Bridge Magazine timeline").

²⁰ "Blood Lead Levels in Flint Talking Points," available at <http://somcsprod2govm001.usgovcloudapp.net/files/dhhs.pdf> at 203. See also Bridge Magazine timeline at Part 3.

²¹ Lindsey Smith, *Reporter's notebook: Some state officials still in denial or misinformed over Flint River decision*, Mich. Radio, Dec. 17, 2015, <http://michiganradio.org/post/reporter-s-notebook-some-state-officials-still-denial-or-misinformed-over-flint-river-decision>.

²² Task Force Final Report at 27, n. 34.

a result, water from the Flint River is nineteen times more corrosive than the water that DWSD withdraws from Lake Huron.²³ DWSD has long treated its water with anti-corrosive agents in order to prevent leaching from LSLs into water that eventually makes its way to Detroit and Flint taps.²⁴

Prior to the switch to Flint River water, the Flint Utilities Department had not consistently operated a water treatment facility for decades. Because Flint was under state-run emergency management on April, 2014, MDEQ's Office of Drinking Water and Municipal Assistance ("ODWMA") directed Flint's transition away from DWSD. Critically, MDEQ informed Flint water treatment officials that corrosion control was not necessary for water from the Flint River. Instead, MDEQ instructed Flint to conduct two six-month testing periods to determine whether corrosion control was in fact needed.²⁵ Legal experts at EPA and elsewhere have concluded that this instruction amounted to a grave breach of the Safe Drinking Water Act's ("SDWA") Lead and Copper Rule,²⁶ which requires all municipalities with more than 50,000 residents to employ corrosion control in their water distribution systems. 40 C.F.R. §141.81(a)(1).

Moreover, the studies on which MDEQ based its decision were fundamentally flawed. First, MDEQ provided sampling instructions that encouraged flushing pipes for several minutes before a sample was taken;²⁷ second, MDEQ did not require Flint to test the most at-risk homes, as the SDWA requires, or even to test a statistically representative array of homes. As a result, samples did not capture the highest lead levels for a given faucet, and the small number of randomly tested homes did not adequately represent lead problems across the city.²⁸

MDHHS compounded the crisis by failing to recognize or respond to the public health consequences of MDEQ's failures. MDHHS did not track down the origin of a massive Legionellosis outbreak that emerged in 2014 after the switch to Flint River water, and did not inform city residents of the potential threat to public health. Instead, MDHHS published a

²³ Siddhartha Roy, *Test Update: Flint River water 19X more corrosive than Detroit water for Lead Solder; Now What?*, Flint Water Study Updates (Sep. 11, 2015), <http://flintwaterstudy.org/2015/09/test-update-flint-river-water-19x-more-corrosive-than-detroit-water-for-lead-solder-now-what/>.

²⁴ Task Force Final Report at 16.

²⁵ *Id.*

²⁶ Memorandum from Peter Grevatt, Director, EPA Office of Ground Water and Drinking Water, to EPA Regional Water Division Directors (Nov. 3, 2015), available at https://www.epa.gov/sites/production/files/2015-11/documents/occt_req_memo_signed_pg_2015-11-03-155158_508.pdf.

²⁷ Memorandum from Miguel Del Toral, Regulations Manager, to Thomas Poy, Chief, EPA Region 5 Ground Water and Drinking Water Branch (June 24, 2015), available at <http://flintwaterstudy.org/wp-content/uploads/2015/11/Miguels-Memo.pdf>.

²⁸ Email from Marc Edwards to EPA Region 5 officials (Sept. 21, 2015), available at http://www.eenews.net/assets/2016/05/13/document_daily_07.pdf; Mich. Office of the Auditor Gen., *Performance Audit Report: Community and Noncommunity Water Supplies* 13-14 (Mar. 2016), available at http://www.audgen.michigan.gov/finalpdfs/15_16/r761032015.pdf.

report in May 2015 declaring that the outbreak was over – a determination that proved to be completely premature.²⁹ Similarly, an MDHHS epidemiologist and data analyst separately found a spike in the number of Flint children whose blood lead levels exceeded CDC's action level in the summer of 2014, right after the switch to Flint River water. Despite considerable public outcry raising the concern that the water was a problem, MDHHS attributed this spike to seasonal variation and did not conduct any further investigation.³⁰

EPA expert Miguel Del Toral began sounding the alarm on Flint's water system after receiving water samples from a Flint resident and signatory to this letter, LeeAnne Walters, that showed dramatically high levels of lead in February 2015.³¹ MDEQ responded to initial EPA inquiries by incorrectly asserting that Flint was receiving corrosion control, and did not correct this assertion until months later.³² Del Toral explained the effects of the lack of corrosion control to MDEQ officials on multiple occasions, but was met with intransigence.³³ MDEQ refused to introduce corrosion control measures until their second six-month testing period was concluded. When the six-month testing period conducted using MDEQ's flawed methods concluded that Flint water did not exceed EPA's action level for lead, MDEQ staunchly resisted introducing corrosion control to the system.³⁴ These decisions clearly had an adverse impact on the health of Flint residents, and particularly on children in Flint.

MDHHS and MDEQ's failures to protect Flint residents are even more striking when set in the context of the consistent, well-organized feedback provided by the people of Flint. Flint residents familiar with the Flint River's long history of industrial contamination have expressed shock that the River was even considered as a source of drinking water given its reputation as a polluted waterway.³⁵ Many began complaining about the taste, odor and color of the city's

²⁹ Task Force Final Report at 33.

³⁰ Bridge Magazine timeline at Part 3, July 28, 2015, 2:57 p.m.

³¹ Bridge Magazine timeline at Part 2, February 26, 2015.

³² *Id.*

³³ Jim Lynch, *Whistle-blower Del Toral Grew tired of EPA 'cesspool'*, The Detroit News, Mar. 29, 2016, <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/03/28/whistle-blower-del-toral-grew-tired-epa-cesspool/82365470/>.

³⁴ Bridge Magazine timeline at Part 3, July 21, 2015.

³⁵ Zackary Canepari & Charlie Leduff, *Flint and America's Corroded Trust*, Mother Jones, May/June 2016, available at <http://www.motherjones.com/environment/2016/04/flint-water-lead-crisis-snyder-mad-max>. ("Many of the residents I spoke with couldn't believe that the Flint River was even considered a source of water."); see also Sara Sidner, Mallory Simon & Sarah Jorgensen, *Emails: Michigan governor's aides pushed for 'urgent' fix to Flint water crisis*, CNN, Feb. 28, 2016, <http://www.cnn.com/2016/02/28/us/flint-governor-emails/> ("To anyone who grew up in Flint as I did, the notion that I would be getting my drinking water from the Flint River is downright scary."); Testimony of Elaine Connor at 1:08:36, Hearing of the Michigan Civil Rights Commission, Apr. 28, 2016 [audio recording] ("When this water thing first started, when they said they were gonna switch over the water, I immediately stopped drinking it, because years ago when I was going to college we did a test on the water and it was just atrocious. I figured nothing had changed."); Testimony of Wantez Davis at 1:45:38 ("I remember when the emergency manager first decided to switch us to the Flint river I told the emergency manager that he should not do that, I

water immediately after the switch took place. Between April 2014 and October 2015, complaints about the water in Flint steadily mounted. In 2014, the city issued multiple boil water advisories, and in 2015 put out a notification that city drinking water exceeded maximum contaminant levels for carcinogenic disinfectant byproducts. Flint residents reported that tap water was deeply discolored.³⁶

Flint residents contacted government officials at every level to register their concerns. MDEQ and MDHHS remained unfazed, and in many instances MDEQ in particular responded with outright derision, condescension and defensiveness.³⁷ Governor Snyder's Chief of Staff described the discrepancy between Flint residents' distress and MDEQ and MDHHS' response in an email addressed to the director of MDHHS³⁸ in the summer of 2015:

I'm frustrated by the water issue in Flint. I really don't think people are getting the benefit of the doubt. Now they are concerned and rightfully so about the lead level studies they are receiving from DEQ samples. Can you take a moment out of your impossible schedule to personally take a look at this? These folks are scared and worried about the health impacts and they are basically getting blown off by us (as a state we're just not sympathizing with their plight).³⁹

Despite having their failure to respond adequately to Flint residents highlighted by the Governor's Office, MDEQ and MDHHS do not appear to have reevaluated their approach to the situation in Flint.

In August, 2015, Virginia Tech professor Marc Edwards published the results of water tests performed on Flint homes, concluding that Flint had a major problem of lead

admonished him. I did it based on common logic and common sense because I understood that the Flint river was polluted from the auto industry, and I know that that issue was never resolved.") (A recording of the hearing is available upon request).

³⁶ In January 2015, Michigan State Representative Sheldon Neeley sent Governor Snyder a letter pleading for a solution to Flint's water problems and stated that his constituents were "on the verge of civil unrest." *Neeley Sends Letter to Governor Concerning Flint Water Crisis*, Mich. House Democrats (Jan. 29, 2015), <http://housedems.com/article/neeley-sends-letter-governor-concerning-flint-water-crisis>; see also James Felton, *Flint residents frustrated with water problems*, WNEM, Sept. 8, 2014, <http://www.wnem.com/story/26478562/flint-residents-frustrated-with-water-problems>; Bridge Magazine timeline at Part 2, January 2, 2015 and Early February 2015.

³⁷ See Task Force Final Report at 2; Emily Lawler, *DEQ spokesman also resigns over Flint water crisis, says city 'didn't feel like we cared'*, MLive, Dec. 30, 2015, http://www.mlive.com/lansing-news/index.ssf/2015/12/deq_spokesman_also_resigns_ove.html.

³⁸ The email was addressed to one of MDHHS' predecessor agencies, the Department of Community Health. The Michigan Department of Community Health and Michigan Department of Human Services merged in 2015 to create MDHHS.

³⁹ Mark Brush, *Email from Snyder's Chief of Staff: People in Flint are "getting blown off by us,"* Mich. Radio, Jan. 7, 2016, <http://michiganradio.org/post/email-snyders-chief-staff-people-flint-are-getting-blown-us>.

contamination in its drinking water. MDEQ refused to reexamine its policies in Flint, and instead disparaged Dr. Edwards and accused him of fear-mongering.⁴⁰ MDHHS refused to provide Dr. Edwards with data regarding blood lead levels in children during the relevant period despite repeated requests.⁴¹

In September 2015, Dr. Mona Hanna-Attisha requested the same data on Flint children's blood lead levels, and was also rebuffed.⁴² Dr. Hanna-Attisha then published her own findings on the blood lead levels of children admitted to her medical center, which indicated that blood lead levels in children had risen dramatically since the switch to Flint River water. Like MDEQ, MDHHS responded with defensiveness, criticizing Dr. Hanna-Attisha's approach and telling the public that there was no reason to be concerned. An internal email from MDHHS director Nick Lyons requested an analysis of MDHHS data that would allow him to "make a strong statement with a demonstration of proof that the blood lead levels seen are not out of the ordinary."⁴³ A few days later, MDHHS was finally made to concede that Dr. Hanna-Attisha's analysis was correct.⁴⁴

On October 1, 2016, once the Governor's Office, MDHHS and MDEQ were forced to acknowledge the crisis in Flint, the city was rapidly switched back to DWSD water. However, because of the damage caused by corrosive Flint River water over the preceding year and a half, Flint's pipes continue to leach harmful constituents such as lead.⁴⁵ MDHHS helped to coordinate emergency services to Flint residents, which included public service advisories and the provision of water filters and water bottles. Because very few of these services were offered in languages other than English, and because Spanish, Arabic, Hmong, Mandarin, American Sign Language ("ASL") and other language interpreters were not on hand at distribution sites or when visiting residents in their homes, many Flint residents remained unaware of the crisis, or were unable to take advantage of emergency services. According to a January 28, 2016 report aired on National Public Radio, immigrants who were undocumented and people who were LEP faced numerous barriers to accurate information and clean water.⁴⁶ The reporter, Tracy

⁴⁰ Bridge Magazine timeline at Part 3, September 8, 2015 through September 9, 2015.

⁴¹ Siddhartha Roy, *Michigan Health Department Hid Evidence of Health Harm Due to Lead Contaminated Water: Allowed False Public Assurances by MDEQ and Stonewalled Outside Researchers*, Flint Water Study Updates (Dec. 21, 2015), <http://flintwaterstudy.org/2015/12/michigan-health-department-hid-evidence-of-health-harm-due-to-lead-contaminated-water-allowed-false-public-assurances-by-mdeq-and-stonewalled-outside-researchers/>.

⁴² *Id.*

⁴³ Bridge Magazine timeline at Part 3, September 28-29, 2015.

⁴⁴ *Id.* at October 1, 2015.

⁴⁵ *Id.* at October 16, 2015.

⁴⁶ Tracy Samilton, *Around the Nation: Flint's Undocumented Migrants Hesitate to Request Help During Water Crisis*, Nat'l Pub. Radio (Jan. 28, 2016), available at <http://www.npr.org/2016/01/28/464664785/flint-s-undocumented-immigrants-hesitate-to-ask-for-help-during-water-crisis>; see also Jacob Wheeler, Ctr. for Mich., *What Government Owes Flint's Poisoned Immigrant Community*, Bridge Magazine, May 24, 2016, http://www.mlive.com/news/index.ssf/2016/05/what_government_owes_flints_po.html (reporting on

Samilton, spoke to a Flint resident named Maria who reportedly did not watch English language news and had only found out about the toxicity of the water in mid to late January. The federal government declared a federal emergency in Flint on January 16, 2016.

B. Wayne County

While the apathy of Michigan's agencies in the face of the Flint crisis is now infamous, MDEQ routinely displays indifference to the manner in which its programs impact communities of color. In Wayne County, Michigan, ample evidence suggests that MDEQ has demonstrated a pattern and practice of ignoring the disproportionate burden of pollution borne by the local community when making permitting and enforcement decisions. MDEQ has recurrently granted emissions limit increases and other permit expansions in overburdened communities of color; entered weak enforcement actions when industrial sources repeatedly violated their permit limits; and ignored the communities' health concerns, despite comments from community groups consistently raising concerns about the disproportionate health impacts on low-income immigrant communities and communities of color.⁴⁷

Over time and as a result of a series of decisions by MDEQ, sources of contamination have become increasingly concentrated in specific areas within the state. University of Michigan scientists have described 48217 (a portion of Wayne County) as the state's most polluted zip code.⁴⁸ The population of 48217 is 86.3% African American, and 9% white.⁴⁹ Neighboring Dearborn is more than one-third Arab American,⁵⁰ 47% of Dearborn residents speak a language other than English⁵¹ and more than 28% have incomes that fall below the poverty line.⁵²

Spanish speaking Flint residents who first learned of the dangers of drinking the water from family members in Mexico).

⁴⁷ See, e.g., Comment of Sierra Club et al. re: Draft Permits to Install No. 215-11B (Trenton Channel) and 40-08G (River Rouge) (Mar. 11, 2015); Comment of Great Lakes Envtl. Law Ctr. re: PTI No. 51-08C; EES Coke Battery, LLC; Zug Island, River Rouge, Michigan (Nov. 10, 2014); Comment of Great Lakes Envtl. Law Ctr. re: US Ecology Michigan Permit (Sept. 11, 2015) (Copies of these comments are available upon request).

⁴⁸ Tina Lam, *48217: Life in Michigan's Most Polluted ZIP Code*, Detroit Free Press, June 20, 2010, <http://www.gcmmonitor.org/detroit-mi-48217-life-in-michigans-most-polluted-zip-code/>.

⁴⁹ American Fact Finder, U.S. Census Bureau, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited June 24, 2016) (Search for "48217", then click on "2014 American Community Survey – Demographic and Housing Estimates").

⁵⁰ *New Americans in Michigan*, American Immigration Council, <http://www.immigrationpolicy.org/just-facts/new-americans-michigan> (last visited July 11, 2016) (Arab Americans represented 46.5% of Dearborn's population in 2013).

⁵¹ American Fact Finder, U.S. Census Bureau, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited July 1, 2016) (Search for "Dearborn city, Michigan", then click on "Origins and Language," "2014 American Community Survey – Language Spoken at Home").

⁵² American Fact Finder, U.S. Census Bureau, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited July 1, 2016) (Search for "Dearborn city, Michigan", then click on "Poverty").

The concentration of polluting sources has an adverse impact on communities and the health of the residents. A portion of Wayne County, including 48217 and Dearborn, was designated as a nonattainment area for the 2010 sulfur dioxide ("SO₂") national ambient air quality standard in 2013.⁵³ The concentration of a number of large SO₂ emitting facilities in a single neighborhood correlates with the striking prevalence of respiratory disorders among area residents.⁵⁴ In 2008, following an exhaustive survey, the Michigan Department of Community Health ("MDCH") coined Detroit "the epicenter of asthma burden in Michigan," stating that the severity of the asthma burden in Detroit warrants "immediate attention."⁵⁵ MDCH found that the prevalence of asthma among adults in Detroit was 50% higher than the statewide average.⁵⁶ Likewise, rates of asthma hospitalization in Detroit (for both children and adults) were found to be three times higher than that of Michigan as a whole and rates of asthma death over two times higher than overall state numbers.⁵⁷ A 2012 study by MDCH found that 48217 and the three surrounding zip codes have "significantly" higher rates of newly diagnosed cases of lung and bronchus cancers than the rest of Michigan.⁵⁸

Pollution also takes a toll on the educational achievement of the predominantly African American, Latino and Arab students of Wayne County's most overburdened communities. Ninety-two schools are located in the nonattainment area. In 2011, a study conducted by the University of Michigan found that air pollution from industrial sources near Michigan public schools (including those in the nonattainment area) jeopardizes not only children's health, but their academic success, and that students of color bear a disproportionately high share of the air pollution burden. More particularly, "schools located in areas with the highest air pollution levels had the lowest attendance rates—a potential indicator of poor health—and the highest proportions of students who failed to meet state educational testing standards."⁵⁹ The Detroit Alliance for Asthma Awareness lists asthma as the leading chronic condition causing school absenteeism in Detroit, as well as the leading cause of preventable hospitalizations for children

⁵³ *Sulfur Dioxide (2010) Nonattainment Area Partial County Descriptions*, EPA (last updated June 17, 2016), <https://www3.epa.gov/airquality/greenbook/tnp.html#2162>.

⁵⁴ Zoë Schlanger, *Choking to Death in Detroit: Flint Isn't Michigan's Only Disaster*, Newsweek, Mar. 30, 2016, <http://www.newsweek.com/2016/04/08/michigan-air-pollution-poison-southwest-detroit-441914.html>.

⁵⁵ Elizabeth Wasilevich et al., MDCH, *Chapter 12: Detroit - The Epicenter of Asthma Burden*, in *Epidemiology of Asthma in Michigan* (2008), available at https://www.michigan.gov/documents/mdch/14_Ch12_Detroit_Epicenter_of_Asthma_276687_7.pdf.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ MDCH, *Southwest Detroit Cancer Incidence and Mortality Report: 1999 to 2008/2009* 4 (Oct. 18, 2012), available at https://www.michigan.gov/documents/mdch/Southwest_Detroit_Cancer_Incidence_and_Mortality_Report10_18_12_402088_7.pdf.

⁵⁹ Paul Mohai et al., *Air Pollution Around Schools Is Linked To Poorer Student Health And Academic Performance*, 30 Health Affairs 852 (May 2011) available at <http://content.healthaffairs.org/content/30/5/852.full.pdf+html>.

under 18.⁶⁰ Detroit schools located in the most polluted zones had the highest percentage of students of color – 81.5% of African American students, 62.1% of Latino students, and only attended school in places ranked in the top 10% for dirtiest air in the state. By comparison, only 44.4% of white children attended school in these areas of concentrated air pollution.⁶¹

MDEQ has repeatedly ignored these well-documented health impacts when setting permit limits in Wayne County. MDEQ recently proposed a plan to address SO₂ nonattainment in the 48217 area that wholly failed to reduce emissions below federal standards protective of human health.⁶² MDEQ publicly dismissed the SO₂ problem in the area as merely “theoretical” based on an “extreme” modeling scenario.⁶³

MDEQ’s lack of regard for low-income immigrant communities and communities of color extends beyond SO₂ pollution. 48217 is surrounded by industry, including an oil refinery, steel production, waste incineration, and hazardous waste disposal, among other sources of emissions and pollution. According to EPA’s Toxics Release Inventory, three facilities located within 48217 released 244,900 pounds of reportable wastes in 2014.⁶⁴ MDEQ has consistently accommodated industry requests for emissions increases or permit expansions. For example, in 2014, MDEQ approved a permit allowing A.K. Steel the right to increase its emission of several air pollutants, including PM2.5 and SO₂.⁶⁵ Located in Dearborn, the A.K. Steel facility regularly registers the highest PM2.5 levels in Michigan,⁶⁶ and has been the subject of 44 separate Notices of Violation in the last six years, including 1,660 violations of its permit and Michigan’s state

⁶⁰ Asthma Initiative of Mich., *Detroit Alliance for Asthma Awareness*, <http://getasthmahelp.org/detroit-alliance-for-asthma-awareness.aspx> (last visited June 24, 2016).

⁶¹ Paul Mohai et al., *Air Pollution Around Schools Is Linked To Poorer Student Health And Academic Performance*, 30 Health Affairs 852,855 (May 2011) available at <http://content.healthaffairs.org/content/30/5/852.full.pdf+html>.

⁶² See Comments of Sierra Club et al. re: MDEQ’s Proposed Sulfur Dioxide One-Hour National Ambient Air Quality Standard State Implementation Plan (Oct. 5, 2015) (Copies available upon request).

⁶³ Jim Lynch, *Michigan’s Tactics for Cutting Air Pollution Under Fire*, The Detroit News, Mar. 10, 2015, <http://www.detroitnews.com/story/news/local/michigan/2015/03/09/michigans-tactics-cutting-air-pollution-fire/24683209/>; Sarah Cwiek, *State plan to curb Wayne County sulfur dioxide blasted at public hearing*, Mich. Radio, Sept. 24, 2015, <http://michiganradio.org/post/state-plan-curb-wayne-county-sulfur-dioxide-blasted-public-hearing>.

⁶⁴ 2014 TRI Factsheet: ZIP Code – 48217 , available at https://iaspub.epa.gov/triexplorer/tri_factsheet.factsheet?pzip=48217&pyear=2014&pDataSet=TRIQ1

⁶⁵ See PTI 182-05B; “Figures: Permitted Pollutants from Severstal Dearborn That Would Rise under Revision,” *The Detroit Free Press* (Mar 11, 2014), available at <http://web.archive.org/web/20140530110615/http://www.freep.com/article/20140311/NEWS02/303110038/Permitted-pollutants-from-Severstal-Dearborn-would-rise-sharply-under-revision>.

⁶⁶ MDEQ, Data Completeness and Quarterly Averages of Fine Particulate Material in Michigan (last updated Mar. 21, 2016), available at http://www.michigan.gov/documents/deq/DEQ-AQD-PM25_summary_291638_7.pdf?20140327151952; MDEQ, 98th Percentile PM2.5 Values Averaged over 3 Years (last updated Mar. 21, 2016), available at http://www.michigan.gov/documents/deq/deq-aqd-amu-monitoring-pm25-24hr-summary_403178_7.pdf?20140327151952.

implementation plan (“SIP”) in one 90-day period. A review of MDEQ’s air permitting decisions over the last eight years reveals that MDEQ has only denied one air permit in that timeframe.

III. Reason to Believe that MDEQ Has Failed to Comply with Title VI

MDEQ’s unjustifiable failures in Flint had a disparate impact on the basis of race and should trigger a compliance review: the population of Flint is majority-African American – that is, approximately 57 percent Black, 4 percent multi-racial, and 37 percent White, as compared to the population of Michigan as a whole, which is 14 percent Black, 2 percent multi-racial, and 80 percent White.⁶⁷ Both Flint and Michigan as a whole are between 4 and 5 percent Latino.⁶⁸ And the manifold consequences of the disaster in Flint on the city’s majority-African American residents include:

- Lead exposure resulting in or risking permanent neurological damage to an unknown number of the city’s children;
- Lead exposure of an unknown number of the city’s adults;
- Trauma for parents who unwittingly exposed their children to unsafe water;
- Reduced home values.⁶⁹

Lead is a potent neurotoxin, and its effects on child brain development are irreversible. There is scientific consensus that there is no safe level of lead exposure for children.⁷⁰ Studies have recorded negative effects on intelligence and attention with even a one microgram per deciliter increase of lead in children’s blood.⁷¹ Research has also tied childhood lead exposure to a host of neurological and emotional problems.⁷²

MDEQ demonstrated callous and unjustifiable indifference to the concerns of Flint’s residents – most of whom are African American – before, during and after the switch to Flint

⁶⁷ *QuickFacts*, U.S. Census Bureau, <http://www.census.gov/quickfacts/> (last visited June 24, 2016) (enter “Flint city, Michigan” and “Michigan”).

⁶⁸ *Id.*

⁶⁹ See, e.g., Testimony of Ed Hoort at 0:38:15, Hearing of the Michigan Civil Rights Commission, Apr. 28, 2016 [audio recording].

⁷⁰ See, e.g., *Lead*, Ctrs. for Disease Control and Prevention (last updated Jan. 29, 2016), <http://www.cdc.gov/nceh/lead/>.

⁷¹ See Health Canada, *Final Human Health State of the Science Report on Lead* 57–58 (2013), available at http://www.hc-sc.gc.ca/ewh-semt/alt_formats/pdf/pubs/contaminants/dhhssrl-rpecscepsh/dhhssrl-rpecscepsh-eng.pdf.

⁷² See, e.g., World Health Org., Fact Sheet N°379, Lead Poisoning and Health (reviewed Aug. 2015), available at <http://www.who.int/mediacentre/factsheets/fs379/en/>.

River water. Despite noting the poor quality of water in the Flint River, MDEQ disregarded the complaints of residents and failed to take the most basic steps to protect their health and meet the requirements of the SDWA. MDEQ ignored repeated and well-reasoned warnings from the EPA and reputable outside researchers about water quality in Flint and its impact on residents. And MDEQ failed to take action to protect Flint residents despite being aware that state employees located in Flint were provided bottled water while residents were not,⁷³ and that water in at least one home tested extremely high for lead in early 2015.⁷⁴

There is ample basis for EPA to investigate whether MDEQ's actions and methods of administration were discriminatory in intent as well as effect. In order to make a finding of intentional discrimination, the record need not contain evidence of evil motive on the part of an individual or MDEQ.⁷⁵ Evidence of intent can be found circumstantially from a variety of sources, including the statements of decision-makers, the historical background and sequence of events leading to the decision at issue, departures from standard procedure, such as the failure to consider factors normally taken into account, administrative history, any past history of discriminatory conduct, and evidence of a substantial disparate impact on the basis of race or national origin.⁷⁶ Among other things, here there is evidence in the public record that MDEQ manipulated lead testing procedures and results in order to maintain the illusion that Flint was not experiencing a lead problem.⁷⁷ Perhaps most concerning of all, MDEQ staff outright refused to require Flint to apply corrosion control to its system for months despite heightened calls for relief from Flint residents. These failures to provide the same services to a majority African American city that are provided and expected in Michigan's white cities provide more than a

⁷³ See Paul Egan, *Amid Denials, State Workers in Flint Got Clean Water*, Detroit Free Press, Jan. 29, 2016, <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/01/28/amid-denials-state-workers-flint-got-clean-water/79470650/>.

⁷⁴ Bridge Magazine timeline at Part 2, February 26, 2015.

⁷⁵ DOJ, Title VI Legal Manual 43 (2001), available at <https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf>.

⁷⁶ *Id.* at 43-44, relying on *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.* 429 U.S. 252, 266-68 (1977).

⁷⁷ See, e.g., Mark Brush, *Expert Says Michigan Officials Changed Flint Lead Report to Avoid Federal Action*, Mich. Radio, Nov. 5, 2015, <http://michiganradio.org/post/expert-says-michigan-officials-changed-flint-lead-report-avoid-federal-action>.

sufficient basis to launch an investigation into whether MDEQ discriminated against African Americans in violation of Title VI and EPA's implementing regulations.⁷⁸

III. MDHHS' Possible Failure to Comply with Title VI and Section 504

Like MDEQ, MDHHS failed to protect Flint residents, the majority of whom are African American, as well as members of the Latino community in Flint. MDHHS made extraordinary efforts to downplay public health concerns in Flint rather than remedy them.⁷⁹ Despite intense and vocal public concern regarding Flint drinking water, MDHHS failed to properly assess the causes of a major outbreak of Legionnaire's disease in Flint, and took no action when its own experts found a spike in Flint children's blood lead levels in the summer of 2014, directly after the switch to Flint River water. MDHHS' abdication of responsibility for the health of Flint had a disparate impact on the city's majority-African American residents on the basis of race and national origin and more than indicate a possible failure to comply with Title VI and HHS regulations.

When the state finally began to respond to the crisis, MDHHS, in combination with other state and federal agencies, oversaw an emergency response that further prolonged the crisis for Flint's immigrants and residents with mobility, hearing and sight-related disabilities.

A. Inadequate Services on the Basis of National Origin

MDHHS's response to the crisis was inadequate and resulted in disparate impacts on individuals who are LEP. Flint's population includes thousands of immigrants, approximately 1,000 of

⁷⁸ MDEQ's callous indifference to the concerns of Flint residents is reminiscent of the experience of residents of West Dallas who lived in the shadow of the West Dallas RSR lead smelter in the 1950s through 1980s. As recounted by Robert D. Bullard in *Dumping in Dixie: Race, Class, and Environmental Quality*, officials in Dallas were told in the early 1970s that children who lived near lead smelters had high blood lead levels and yet the city refused to enforce lead emissions standards. Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* 46–51 (3d ed. 2000). Citizens groups and hundreds of angry citizens raised their voices, feeling “their plight was being ignored because they were poor, black, and politically powerless,” and yet city government was unresponsive. *Id.* at 49. The failure of government agencies that are recipients of federal funds to protect communities of color from environmental exposure will continue to recur until EPA develops a strong civil rights compliance and enforcement program, one that exercises its affirmative authority to ensure compliance with the law.

⁷⁹ Dr. Marc Edwards of Virginia Tech outlines his experiences with MDHHS in a blog post claiming that the agency intentionally hid evidence of lead problems in Flint. Siddhartha Roy, *Michigan Health Department Hid Evidence of Harm Due to Contaminated Water: Allowed False Public Assurances by MDEQ and Stonewalled Outside Researchers* (Dec. 21, 2015), <http://flintwaterstudy.org/2015/12/michigan-health-department-hid-evidence-of-health-harm-due-to-lead-contaminated-water-allowed-false-public-assurances-by-mdeq-and-stonewalled-outside-researchers/>.

whom are estimated to be undocumented.⁸⁰ Despite the vital public health concerns at stake, many immigrants who are LEP in Flint did not hear about the crisis for months because almost all official information about the crisis was provided in English.⁸¹ Signatories are aware, either personally or through work in the community, of Flint residents who are LEP who primarily speak Spanish, Arabic, Hmong and Mandarin. These residents are entitled to translation of documents related to the crisis, and interpretation for emergency services.

Flint's immigrant community experienced additional barriers to services when MDHHS announced that officials at water distribution centers would ask for a form of government-issued photo identification,⁸² which is not available to undocumented immigrants in Flint. Word spread quickly through Flint's immigrant community that identification was needed in order to obtain water, further limiting this community's access to resources.⁸³ The use of police officers and members of the National Guard dressed in uniform to distribute resources in a community where many have learned not to trust the police was also culturally inappropriate.⁸⁴ While MDHHS' precise involvement in these language and staffing decisions is unclear to the Signatories, it is indisputable that MDHHS was on the front line of the state's emergency response to the crisis. HHS should thus investigate whether MDHHS was wholly or partially responsible for decisions related to the provision of emergency services that appear to discriminate against Flint residents on the basis of national origin.

⁸⁰ See *Lack of Information in Spanish Continues to Be Barrier in Flint Water Crisis*, Fox News Latino, June 8, 2016, <http://latino.foxnews.com/latino/news/2016/06/08/lack-information-in-spanish-continues-to-be-barrier-in-flint-water-crisis/>; see also Jeanne Carstensen, *Flint's Undocumented Residents Face Unique Challenges Amid Water Crisis*, Pub. Radio Int'l, Feb. 24, 2016, <http://www.pri.org/stories/2016-02-24/flints-undocumented-residents-face-unique-challenges-amid-water-crisis>.

⁸¹ See Ali Harb, *Arab American Residents Hit Hard by Flint Crisis*, Arab Am. News, Jan. 21, 2016, http://www.arabamericannews.com/news/news/id_11700/Arab-American-residents-hard-hit-by-Flint-crisis.html; see also Testimony of Art Reyes at 1:23:10, Hearing of the Michigan Civil Rights Commission, Apr. 28, 2016 [audio recording] ("On January 24th...the state of Michigan had not translated materials about how to deal with lead in the water in Spanish at that time. There were door hangers saying where locations for the fire stations were that many people were afraid to go to because they had been requiring ID, so an organization that we were working with in Detroit, the Detroit Hispanic Development Corporation, actually had to translate the state's materials for us so that we actually had language accessible materials to people in their homes. These were folks who did not know.")

⁸² See News Release, Michigan Dep't of Health & Human Servs., State Offering Extended, Weekend Hours for Water Filter Distribution at Lippincott GCCARD; Nearly 5,000 NSF Certified Filters Issued by MDHHS to Flint Residents Since Monday (Oct. 7, 2015), available at <http://www.michigan.gov/mdhhs/0,5885,7-339--366758--,00.html> ("MDHHS clients in the city of Flint who are active recipients should bring valid identification and a copy of their water bill to their local MDHHS office. Flint residents who are not active MDHHS clients should bring identification and their city of Flint water bill to a GCCARD location.")

⁸³ Jacob Wheeler, Ctr. for Mich., *What Government Owes Flint's Poisoned Immigrant Community*, Bridge Magazine, May 24, 2016, http://www.mlive.com/news/index.ssf/2016/05/what_government_owes_flints_po.html.

⁸⁴ See, e.g. Testimony of Victoria Arteaga, 0:55:55 and Anna Hill, 1:20:43, Hearing of the Michigan Civil Rights Commission, Apr. 28, 2016 [audio recording].

There is no evidence that MDHHS considered the four factors outlined in HHS LEP guidance when making decisions about how to provide information about water quality and emergency services – for example, whether to provide interpreters or translate documents. These factors would surely have militated in favor of providing LEP services:

- (1) There are thousands of immigrants in Flint, an unknown number of whom have limited English proficiency;
- (2) all people in Flint needed access to these emergency services;
- (3) emergency services were critical to preventing potentially irreversible medical harm; and
- (4) while Signatories are not privy to the specific budget constraints surrounding the emergency response, they are aware that tens of millions of state dollars have been expended in Flint, a mere fraction of which would have been sufficient to provide LEP services.

The failure to provide adequate services to individuals who are LEP raises significant questions about whether MDHHS failed to comply with Title VI.

B. Inadequate Services for Flint Residents with Disabilities

Flint residents with disabilities were and are similarly ill-served by the state's emergency response. The failure to provide home delivery of bottled water raises significant questions of discrimination against people who have disabilities that prevent or hinder them in traveling to water distribution sites. A resident who identified as Deaf testified at a recent hearing by the Michigan Civil Rights Commission that he felt left behind by the emergency response, and that he and other family members who are deaf had not been provided with the same health and safety information that was available to Flint's hearing residents. Moreover, government emergency responders visiting homes to test water arrived without interpreters or the ability to communicate in ASL.⁸⁵ As a result of this inadequate emergency response, individuals with certain disabilities remained unaware of the crisis for longer, and continued to consume tainted water when others in the community had been adequately warned. While once again it is not always clear whether MDHHS or some other government body was responsible for these decisions, much of the problematic emergency response occurred prior to the involvement of federal agencies. Given MDHHS' prominent role in the state of Michigan's emergency response efforts, and evidence of significant and ongoing violations of Section 504 that have been and are occurring as part of that response, HHS should promptly investigate the

⁸⁵ Testimony of Danny Kennedy at 2:58:03, Hearing of the Michigan Civil Rights Commission, Apr. 28, 2016 [audio recording].

degree to which MDHHS was involved in decisions resulting in the inadequate provision of emergency services to people with disabilities in Flint.

Conclusion

The task force appointed by the state of Michigan found what is obvious to Signatories and observers of the Flint crisis:⁸⁶ MDEQ and MDHHS would never have treated a white, affluent city with the callousness that characterized their approach to Flint. This fundamental injustice has caused Flint residents, and especially Flint's children, irreparable harm. Though disparities in environmental protection in Wayne County have not been the focus of national attention, children of color in Wayne County and across Michigan are saddled with health burdens at an early age because MDHHS and MDEQ similarly refuse to protect them. Title VI was written to prevent precisely this kind of institutional racism – the failure of recipients of federal funds to provide equal protection – and to ensure that recipients of federal funds are accountable for discriminatory actions, policies and practices. As President Kennedy said in 1963,

Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.⁸⁷

It is thus incumbent on EPA and HHS to give effect to the rights enshrined in Title VI and Section 504. Signatories ask that EPA and HHS thoroughly investigate these agencies' compliance with the law. In order to ensure MDEQ and MDHHS' compliance with their civil rights obligations in the future, Signatories ask that EPA and MDHHS:

- Conduct a thorough compliance review of MDEQ and MDHHS and, particularly, the actions, policies and practices that gave rise to the Flint Water Crisis and, also, the concentration of polluting sources in Wayne County. A paper review of MDEQ and MDHHS promises and formal positions would be wholly insufficient: the review should evaluate the actions, policies, and practices of each of the agencies to ensure that possible areas of non-compliance are identified and addressed.
- Require that MDEQ and MDHHS develop detailed inter and intra-agency Title VI and Section 504 implementation plans, and provide detailed assistance and feedback on those

⁸⁶ Editorial, *The Racism at the Heart of Flint's Crisis*, N.Y. Times, Mar. 25, 2016, at A1, available at <http://www.nytimes.com/2016/03/25/opinion/the-racism-at-the-heart-of-flints-crisis.html>; Julia Craven & Tyler Tynes, *The Racist Roots of Flint's Water Crisis*, Huffington Post, Feb. 3, 2016, http://www.huffingtonpost.com/entry/racist-roots-of-flints-water-crisis_us_56b12953e4b04f9b57d7b118.

⁸⁷ John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, 1963 Pub. Papers 483, 492 (June 19, 1963).

plans. MDEQ and MDHHS should solicit input from affected populations on these plans, which should include but not be limited to the following:

- Plans to provide multiple venues for additional public input where agency decisions or programs affect communities under emergency management;
- Retention of adequate LEP and ASL interpretation services as part of the agencies' emergency plans;
- Training of disaster/emergency response personnel on how to communicate with individuals who have hearing, speaking or sight-related disabilities, are limited English proficient, or are undocumented.
- Require MDEQ and MDHHS to coordinate Title VI and Section 504 compliance across state agencies.
- Require MDEQ and MDHHS to evaluate, in consultation with affected populations, whether a decision will have a "disproportionately high and adverse effect" on the basis of race or national origin and, if so, create mechanisms to ensure that it will only be carried out if further mitigation measures or alternatives that would avoid, minimize, or mitigate the disproportionately high and adverse effect are not practicable.⁸⁸

EPA and HHS must bring MDEQ and MDHHS into full compliance with their Title VI and Section 504 obligations so every person and community in Michigan can benefit from equal protection under the law.

We would welcome the opportunity to meet with you to discuss the concerns and recommendations raised in this letter.

⁸⁸ See Department of Transportation Updated Environmental Justice Order 5610.2(a), 77 Fed. Reg. 27,534 (May 10, 2012).

Sincerely,



Marianne Engelman Lado
Christine Ernst
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
mengelmanlado@earthjustice.org
cernst@earthjustice.org
(212) 845-7393 (Marianne Engelman Lado)⁸⁹

On behalf of:

Sharon Allen
Rick Carter
Nakiya Wakes
Michigan Faith in Action

Ali Baleed Almalkani
Yemen American Benevolent Association

Ruben D. Arvizu
Ocean Future

Marc Brenman
IDARE LLC

Rana Elmir
Michael J. Steinberg
ACLU of Michigan

Leslie Fields
Sierra Club

Robert García
The City Project

⁸⁹ Special thanks to Laurie Williams of Sierra Club and Mariana Lo and Alok Disa of Earthjustice for their contributions to this letter.

Michael Hood
Crossing Water

Lynna Kauchek
Food & Water Watch

Dr. Charlotte Keys
Jesus People Against Pollution

Rev. Dr. Donald P. Kreiss
Southeast Michigan Synod of the Evangelical Lutheran Church of America

Yanna Lambrinidou
Parents for Nontoxic Alternatives

Vincent Martin
Original United Citizens of Southwest Detroit

Gregg P. Macey
Brooklyn Law School*

Melissa Mays
Water You Fighting For

Sarah Nash and Elizabeth Walters, IHM
IHM Justice, Peace and Sustainability Office

San Juana Olivares
Genesee County Hispanic Latino Collaborative

John Philo
Rashida Tlaib
Sugar Law Center for Economic and Social Justice

Kim Redigan
Michigan Coalition for Human Rights

Cyndi Roper
Michigan Voice

Father Phil Schmitter
St. Francis Prayer Center

Paul Schwartz
Water Alliance
Pastor Monica Villarreal
Lutheran Immigration & Refugee Services and Lutheran Services of America*

Anjali Waikar
Natural Resources Defense Council

LeeAnne Walters
Community Development Organization

Omega and Brenda Wilson
West End Revitalization Association

* For identification purposes only.

cc.

Keith Creagh
Director
Michigan Department of Environmental Quality
Constitution Hall
525 West Allegan Street
P.O. Box 30473
Lansing, MI 48909-7973

Nick Lyon
Director
Michigan Department of Health and Human Services
Capitol View Building
201 Townsend Street
Lansing, Michigan 48913