



ENVIRONMENTAL LAW & POLICY CENTER

May 15, 2023

BY EMAIL ONLY

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Re: Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Regarding Civil Rights Violations by the Indiana Department of Environmental Management against the people of color in Northern Lake County.

Dear Administrator Regan, Acting Director Hoang, and Deputy Chief Neal:

Gary Advocates for Responsible Development (“GARD”), through the undersigned counsel, refiles this complaint against the Indiana Department of Environmental Management (“IDEM”) for violating Title VI of the Civil Rights Act of 1964 and its implementing regulations (“Title VI”) by expressly refusing to consider and address the disparate discriminatory adverse effects of its decision to renew the federally enforceable State operating permit (“FESOP”) for Maya Energy. For the reasons stated below, GARD requests that the United States Environmental Protection Agency (“EPA”) investigate whether IDEM violated Title VI by refusing to consider the disparate adverse impacts of its decision to renew Maya Energy’s permit, and whether the agency’s policy of misapplying Title VI has resulted in the discriminatory siting of industrial facilities in Northern Lake County.

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We further request that the United States Department of Justice (“DOJ”) play a coordinating and oversight role to ensure the consistent application and effective implementation of Title VI to this complaint process.¹

I. Introduction

By granting a renewal of the Maya Energy FESOP, IDEM is allowing environmental injustice to continue unabated in Northern Lake County. The state agency acknowledges that the community surrounding the proposed waste facility is predominantly Black, already overburdened with sources of air pollution, and plagued by significant health disparities. IDEM also received comments from EPA Region 5, GARD, and others cautioning that renewing the FESOP for Maya Energy would harm the local population, including a K-12 school less than 100 ft. from the proposed site. Yet IDEM expressly denies any obligation to avoid, mitigate, or prevent the adverse disparate impacts Maya Energy would create, insisting that Title VI does not empower it to do so. And IDEM expressly abdicates any responsibility to “resolve the historical issues that lead to the development of the area through an individual permitting decision.”² In dismissing GARD’s appeal of the permit renewal, the Indiana Office of Environmental Adjudication (“OEA”) reiterated that position, stating that it did “not have statutory authority to review Title VI claims” and that “[t]here exist no statutes or regulations authorizing IDEM to deny a permit based solely on environmental justice concerns.”³

As explained below, this policy misreads Title VI. It also has the effect of maintaining and exacerbating the disparate siting of air pollution permits issued in Gary and Northern Lake County. In the interest of protecting the public health of overburdened communities of color, GARD urges EPA to correct IDEM’s blatant disregard of Title VI of the Civil Rights Act and remedy the discriminatory impact of its permitting policy, including the decision to renew Maya Energy’s permit. GARD seeks revocation of the Maya FESOP and for IDEM to adopt a permitting policy that complies with Title VI and incorporates environmental justice concerns into its permitting decisions. Furthermore, GARD asks that EPA and IDEM remedy the disparate siting of air pollution facilities in Northern Lake County by revising future permit renewals for major source and synthetic minor facilities to mitigate the adverse health impacts on the surrounding EJ communities.

¹ Executive Order 12250, charges DOJ with ensuring the “consistent and effective implementation” of federal civil rights laws, and explicitly directs the Attorney General to “coordinate the implementation and enforcement by Executive agencies” of nondiscrimination provisions including Title VI. Exec. Order No. 12250, 45 FR 72995 (Nov. 2, 1980); *See* Exec. Order No. 14096, 88 FR 25251 (Apr. 21, 2023) (directing the Attorney General to assess agency efforts to ensure compliance with civil rights laws in programs that potentially affect human health or the environment.); *See also* DOJ Title VI Legal Manual, at Section III (“DOJ Title VI Manual”), <https://www.justice.gov/crt/fcs/T6manual>.

² IDEM, Addendum to Technical Support Document for FESOP Renewal No. F089-44483-00594 (“ATSD”), at 10 (attached as Exhibit 1).

³ *In re Maya Energy LLC*, Cause No. 22-A-J-5198, 2023 1, 15 OEA (attached as Exhibit 2).

II. Parties

A. Gary Advocates for Responsible Development

Gary Advocates for Responsible Development (“GARD”) is an Indiana nonprofit corporation primarily comprised of residents of Gary, Indiana, and surrounding communities. GARD’s mission is to promote economic development in the City of Gary that prioritizes environmental sustainability – including protecting the environment and assuring the environmental integrity of the City and its resources; creating sustainable and living-wage jobs for Gary residents, including job training when necessary; and promoting the health and prosperity of all Gary residents. Members of GARD include residents of neighborhoods bordering the proposed Maya Energy facility, the owner of a business adjacent to the proposed site, and individuals who frequent the area.

B. Indiana Department of Environmental Management

Respondent IDEM is an administrative agency of the State of Indiana responsible for implementing “federal and state regulations to protect human health and the environment.” The agency’s mission, consistent with Indiana’s Environmental Policy, is “to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.”⁴ Thus, IDEM must “safeguard the air resource through the prevention, abatement, and control of air pollution by all practical and economically feasible methods.”⁵ As a result, IDEM, Office of Air Quality (OAQ) is responsible for, *inter alia*, reviewing and approving construction and operating permits for stationary sources of air emissions. IDEM receives federal funding to support its implementation of the Clean Air Act.⁶ For that reason, IDEM acknowledges that “[t]here is no doubt that Title VI prohibitions apply to permitting decisions by recipients, such as IDEM.”⁷

III. Jurisdiction

Under Section 601 of Title VI of the Civil Rights Act of 1964 (“Title VI”), “[n]o person in the United States shall, on the ground of race, color, or national origin, . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸ Title VI is concerned with how the effects of the programs and activities

⁴ IC § 13-12-3-1.

⁵ IC § 13-17-1-1.

⁶ ATSD, at 7.

⁷ *Id.*

⁸ 42 U.S.C. § 2000d.

of a federal funding recipient are distributed based on race, color, or national origin.⁹ “EPA and other federal agencies are authorized to enact regulations to achieve the law’s objectives in prohibiting discrimination,” including through regulations preventing federal funding recipient actions that cause racially disparate impacts.¹⁰

GARD files this administrative complaint with EPA pursuant to 40 C.F.R. § 7.120. The Office of External Civil Rights and Compliance (OECRC), which is located in EPA’s Office of Environmental Justice and External Civil Rights, carries out the agency’s federally-mandated responsibility to enforce Title VI and conduct complaint investigations. When evaluating complaints for acceptance, EPA regulations require the complaint to (1) be in writing; (2) allege a discriminatory act that violates the EPA’s nondiscrimination regulations; (3) identify a recipient of EPA financial assistance as the entity that committed the alleged discriminatory act; and (4) be received by OECRC within 180 calendar days of the alleged discriminatory act. *Id.* This complaint satisfies all of these requirements, was originally filed by GARD within the requisite 180-day time period, and is being refiled within the permitted 60-day deadline.

IV. Background and Procedural History

A. Northern Lake County Has a Polluted Legacy

The Maya Energy facility is being sited in Northern Lake County, an area that has long faced “disproportionate environmental burdens and related health risks from the extreme concentration of polluting industries in the area.”¹¹ Northern Lake County often referred to as (“Region”) sits at the northwestern edge of Indiana, on the shores of Lake Michigan, and is

⁹ Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,680 (June 27, 2000).

¹⁰ EPA, U.S. EPA’s External Civil Rights Compliance Toolkit, Chapter 1, at 8, (Jan. 18, 2017) <https://www.epa.gov/ogc/chapter-1-us-epas-external-civil-rights-compliance-office-compliance-toolkit-chapter-1> (“Civil Rights Compliance Toolkit”); *See also* Exec. Order No. 14096, 88 FR 25251, 25255 (directing federal agencies to ensure that all programs or activities receiving Federal financial assistance that potentially affects human health or the environment comply with Title VI).

¹¹ Kim Ferraro, Julie Peller, *Assessment of Environmental Justice Needs in Northern Lake County Communities*, Hoosier Environmental Council, at 3, (2014) (“HEC EJ Needs Assessment”) (attached as Exhibit 3), (“they breathe some of the most polluted air in the country, live near highly polluted waterways, and suffer from elevated asthma and cancer rates.”); Erin McCormick, *Revealed: the 10 worst places to live in US for air pollution*, The Guardian (March 8, 2023) <https://www.theguardian.com/us-news/2023/mar/08/10-most-air-polluted-places-to-live-us> (“Four of the state’s top 10 highest polluting industrial facilities were in Northwest Indiana.”).

largely made up of three cities: Gary, East Chicago, and Hammond, Indiana.¹² Black and Latino individuals are the predominant demographic, making the area largely nonwhite.¹³

	Gary	East Chicago	Hammond ¹⁴
Population	75,486	28,000	76,185
People of Color Population	67,301	26,282	47,697
% People of Color	89%	94%	63%

Black people began moving to the Region in the early to mid twentieth century, seeking to escape the Jim Crown South and work in local heavy industry. Eastern European and Mexican immigrants began arriving around the same time.¹⁵ Residential areas immediately near industrial facilities were less desirable but due to racism and xenophobia, Black and Mexican-Americans were stuck living there.¹⁶ Those racist attitudes were institutionalized through redlining, the discriminatory grading, and mapping, of Black communities as undesirable areas with high financial risk, encouraging lenders to exclude Black people and their neighborhoods from equitable financial lending practices.¹⁷ Conversely, their white counterparts were able to obtain federal loans and private mortgages--fleeing to neighboring counties, or the southern and central portions of Lake County. Without access to capital, many Black and Latino people were stuck in

¹² HEC EJ Needs Assessment, at 4 (“For residents of Gary, Hammond and East Chicago...environmental justice remains out of reach”); See McCormick, *supra* note 11, (“The most polluted portion of the region, including most of Gary and the city of East Chicago, has long been a mecca of the steel industry. While job cuts in recent decades have left some parts abandoned and blighted, many factories still operate. Air pollution experts have faulted the state of Indiana for its lack of controls on emissions. It leads the nation in the amount of industrial toxic pollution emissions per square mile.”).

¹³ U.S. Census Bureau QuickFacts (attached as Exhibit 4).

¹⁴ *Id.*

¹⁵ Chris Harris, *The History and Legacy of Redlining in Greater Gary*, Our Gary Stories (Apr. 13, 2021) <https://www.ourgarystories.com/post/the-history-and-legacy-of-redlining-in-greater-gary>.

¹⁶ *Id.*

¹⁷ *Id.* (“It should be clear that Gary and many Northern Lake County communities were economically disadvantaged by these federal investment practices...the city and surrounding municipalities were graded a miserly 16% desirable city to invest in 1940...and 42% of The Greater Gary area were considered too hazardous to invest.”).

their toxic and impoverished neighborhoods, and also lacked the political power to stop the siting of additional industrial facilities that further worsened local pollution and living conditions.¹⁸

Over the years, the historically redlined areas of Gary and East Chicago were treated as “sacrifice zones” and repeatedly subjected to intense industrial development and toxic land uses.¹⁹ A report by the Hoosier Environmental Council in 2014 assessing the environmental justice needs of the area noted the immense heavy industrial activity in the Region, including three of the nation’s largest integrated steel mills and one of the world’s largest oil refineries.²⁰ The report also found

countless industrial facilities including smelters, toxics recyclers, chemical companies and manufacturing facilities. Also, there are 52 CERCLA/Superfund sites, 423 hazardous waste sites, more than 460 underground storage tanks (USTs), three wastewater treatment works, and 15 combined sewer overflows (CSOs).²¹

¹⁸ Emiliano Aguilar, *East Chicago’s Failed Utopian Visions*, (Jul. 21, 2021) <https://beltmag.com/1920s-east-chicago-failed-utopian-vision-segregation-industrialization/> (“In 2000, [the U.S. Census’ dissimilarity index declared] the Gary Metropolitan Division, which consists of...cities such as Gary, Hammond,...and East Chicago, [as] the most segregated metropolitan area of the United States.”); See Exec. Order No. 14096. 88 FR 25251 President Biden’s recent executive order, recognizes that communities with environmental justice concerns “face entrenched disparities” stemming from the racist legacy of segregation, redlining, and the historical placement of polluting industries and hazardous waste sites in communities of color.

¹⁹ See generally Donovan Moxley, *Exploring the ecological legacy of redlining maps used by the Home Owner’s Loan Corporation in Indianapolis: 80 years later*, (2018) <https://urbanforestry.indiana.edu/publications/Moxley%202018,%20Poster%20Paper.pdf> (“the method employed here should be replicable for other cities with redlining histories in Indiana and other states with comparable spatial datasets”); See The Climate Reality Project, *Sacrifice Zones 101*, <https://www.climateRealityProject.org/sacrifice-zones#:~:text=QUICK%20FACTS%20%20Sacrifice%20zones%20are%20areas%20where,to%20experience%20polluted%20air%20and%20groundwater.%20More%20items>. Populated areas with high levels of pollution and environmental hazards are referred to as “sacrifice zones” because the health and safety of people in these communities is being sacrificed for the economic prosperity of others.

²⁰ HEC EJ Needs Assessment, *supra* note 11, at 4 (Exhibit 3).

²¹ *Id.*

This abundance of pollution has caused the Region to be ranked as having the fourth worst air pollution in the country.²² A 2009 study found that air quality outside of schools in East Chicago and Gary exposed children to higher levels of airborne toxins, including a variety of metals, combustion byproducts, and volatile organic compounds (VOCs), than anywhere else in the U.S.²³ This high exposure to air pollution is particularly dangerous because children’s lungs are still developing “and their innate defenses against inhaled pollutants may be impaired.”²⁴ While “EPA estimates that residents in the northern part of Lake County are breathing air that is so polluted that it exposes residents to the eighth highest risk of cancer in the nation.”²⁵ Overall, the statistics show that the communities of color in Northern Lake County are forced to bear a disproportionate burden of Indiana’s air pollution and have the health disparities to show for it.²⁶ IDEM’s decision to permit an additional toxic facility here is a great cause for concern.²⁷

²² *Id.* at 5.

²³ *Id.* Black children in Indiana are disproportionately afflicted by asthma. In 2011, 9.6% of Indiana adults and 9.5% of Indiana children currently had an asthma diagnosis, compared to 21.8% of Non-Hispanic (NH) black children. *See* Indiana State Department of Health, *Asthma and Minority Health*, at 1, (2013), https://www.in.gov/health/cdpc/files/Minority_Health_FS_August_2013_FINAL3.pdf.

²⁴ HEC EJ Needs Assessment, at 5; *See* Pramod Dwivedi, Hesam Lahsae, *Burden of Asthma in Indiana*, Indiana State Department of Health (2011) https://www.in.gov/health/cdpc/files/BR_Asthma_5-11-11gw.pdf (“Burden of Asthma in Indiana”) (“When children miss school because of asthma, usually an adult family member misses a day of work, thus impacting families, employers, and communities economically”).

²⁵ HEC EJ Needs Assessment, at 5, citing U.S. EPA, 2005 National-Scale Air Toxics Assessment, available at <http://www.epa.gov/ttn/atw/nata2005>.

²⁶ Data from 2009 indicated that Lake County had the highest hospitalization rate for asthma in Indiana, while residents of color bear the highest rates of asthma. *See* Burden of Asthma in Indiana, at 21, 24 (finding that Black people were hospitalized three times more often than white people and have a significantly higher mortality rate for asthma); *See also* Indiana Department of Public Health, *Asthma’s Impact in Indiana*, (May 2022) https://www.in.gov/health/cdpc/files/2021_GeneralAsthma_FactSheet.pdf (“[I]t would be irresponsible to not highlight the health disparities seen in Asthma...these disparities are caused by complex factors that include systemic and structural racism.”).

²⁷ Molly Devore, *Let's end this: IDEM hosts public hearing as Gary solid waste plant seeks air permit renewal*, *NWI Times* (Mar. 2, 2022) (quoting Susan Thomas legislative coordinator for Just Transition Northwest Indiana "If these industries are allowed in Gary, the message continues to be: You are black, you are brown, you are poor, you are a sacrifice zone. How much more can one community bear? We have reached the tipping point already.") (https://www.nwitimes.com/news/local/lake/gary/lets-end-this-idem-hosts-public-hearing-as-gary-solid-waste-plant-seeks-air-permit/article_9b69c805-c73c-5c0d-8dbd-5ddb6ff215e4.html); The White House, *President Biden Signs Executive Order to Revitalize Our Nation’s*

B. The Proposed Maya Energy Waste Facility

On April 27, 2017, IDEM issued a new source construction and FESOP for Maya Energy LLC (“Maya Energy”) to operate a stationary material recovery and recycling facility for municipal solid waste and construction & demolition debris.²⁸ Precisely what the company will produce is unclear, but it is expected to process up to 2,200 tons of waste, of which more than 70% will be municipal solid waste (MSW), starting as early as 5:00 am, six days per week.²⁹ The proposed site lies on the edge of the overwhelming Black neighborhood of Glen Park in Gary, Indiana, and is less than 100 feet from the Steel City Academy, a K-12 school with approximately 450 students.

Despite IDEM’s approval of the FESOP, Maya has not built its facility, even after the company received a one-year construction extension on the permit in December 2019. In 2022, Maya applied to renew its initial permit for an additional ten years. During IDEM’s public comment period on the proposed renewal, the Gary City Council and the mayor of Gary opposed its construction. Students, teachers, and parents at the Steel City Academy have similarly opposed the facility because it would create noise, odors, constant truck traffic, and diesel air pollution.³⁰ Members of GARD submitted extensive comments opposing the renewal of the

Commitment to Environmental Justice for All, (Apr. 21, 2023)

<https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/21/fact-sheet-president-biden-signs-executive-order-to-revitalize-our-nations-commitment-to-environmental-justice-for-all/> (“For far too long, communities across our country have faced persistent environmental injustice through toxic pollution, underinvestment in infrastructure...and other disproportionate environmental harms often due to a legacy of racial discrimination including redlining.”).

²⁸ The Facility will receive waste from Lake County, Chicago, and the Chicago Metro area.

²⁹ The principal behind the venture claims half of the waste trucked to the facility will be turned into a feedstock that can be burned to produce energy, while the remaining waste will be recycled or shipped to a landfill. However, a consultant for Maya Energy informed the media that it will not be an energy facility and will solely focus on recycling waste. This uncertainty about what the facility will produce is troubling considering the abundance of waste facilities already located in the area. See Kari Lydersen, *In Gary, Indiana, students lament revival of controversial ‘energy’ facility*, Energy News Network (July 29, 2019) (<https://energynews.us/2019/07/29/in-gary-indiana-students-lament-revival-of-controversial-energy-facility/>).

³⁰ Kari Lydersen, *Charter school and waste facility each promise new hope for Gary, but can they co-exist?* Energy News Network (Apr. 25, 2018) (<https://energynews.us/2018/04/25/charter-school-and-waste-facility-both-promise-new-hope-for-gary-but-can-they-co-exist/>), “They see Maya Energy as a glorified ‘dump’ that would bring stinking refuse and heavy truck traffic to the oasis of education and peace they are trying to carve out in Gary. The fact that Maya Energy proposes to accept much of its waste from Chicago only adds insult to injury, as they see it,

Maya permit on various grounds including IDEM’s failure to consider local concerns over environmental justice.³¹ Local residents also expressed concerns that locating a waste facility in a flood plain may endanger a nearby artesian well, due to the possibility of heavy rains and floods washing contaminants from the Maya facility into a well that provides the community with fresh drinking water.³² But, IDEM declined to analyze how the only public well in the Region may be affected because it is not related to air quality.³³

In addition, EPA Region 5 submitted comments that highlighted the various environmental justice issues that would result from renewing the Maya Energy permit.³⁴ Specifically, EPA determined that the “neighborhoods around the proposed facility have some of the highest levels in the state for many environmental justice indexes reported by EJScreen.”³⁵ Furthermore, the majority-Black neighborhood of Glen Park, which would be directly impacted by the facility’s operations, exceeds the 80th percentile for indexes measuring ozone, diesel particulate matter, air toxics cancer risk, air toxics respiratory hazards, traffic proximity, Superfund proximity, and many others.³⁶ Due to the area’s high disparities, racial composition, nonattainment for ozone, and location near a school, EPA recommended that IDEM conduct an environmental justice analysis to evaluate the potential effects that the facility will have on the community and the degree to which these effects will be disproportionately high and adverse.³⁷

On April 26, 2022, IDEM approved the FESOP renewal for Maya Energy. IDEM acknowledged the EJScreen statistics and issues raised by comments from the EPA and the

continuing a legacy of treating the industrial, impoverished city as a repository for the operations and waste products that richer cities don’t want.”

³¹ ATSD, *supra* note 2, at 35-55 (Exhibit 1).

³² Meredith Colias-Pete, *Gary’s artesian spring, a rare and longtime water source for locals, may get safer off-road access*, Chicago Tribune (Jan. 18, 2021) (<https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-env-gary-artesian-spring-st-0119-20210118-fdi2oxngifgpdpliu7j4tizgz4-story.html>) (“For decades, residents ... have long used the rare well ... for its water, which bubbles up naturally from an aquifer. For those who prefer it, the water is said to contain minerals and medicinal properties... Indiana has 15 artesian wells...most of which are located in the central part of the state. The Gary one is Northwest Indiana’s only artesian well. The water is regularly tested.”).

³³ ATSD, at 17 (Exhibit 1).

³⁴ Letter from John Mooney, U.S. EPA Region 5, to Jenny Acker, IDEM, dated March 11, 2022 (“EPA Comments”) (attached as Exhibit 5).

³⁵ *See Id.* at 28-35; *see also* Exhibit 5.

³⁶ *Id.*

³⁷ *Id.* at 2-3.

public but refused to address the disproportionate impact the facility would have on the surrounding community or consider the negative health consequences.³⁸ IDEM reasoned that “IDEM, OAQ cannot resolve the historical issues that lead to the development of the area through an individual permitting decision.”³⁹ Instead, IDEM asserted that it fulfilled its Title VI obligations simply by involving the public in the permitting process and complying with all Indiana environmental regulations.⁴⁰

GARD challenged the permit with the IDEM Office of Environmental Adjudication (OEA) and later filed a Title VI complaint with the EPA.⁴¹ On January 31, 2023, EPA dismissed GARD’s Title VI complaint without prejudice due to the pending OEA proceeding, allowing GARD to refile within 60 days after its resolution.

On March 15, 2023, the OEA granted Maya’s motion to dismiss GARD’s challenge to IDEM’s renewal of the FESOP.⁴² The OEA rejected all of GARD’s arguments, including that IDEM violated its obligations under Title VI of the Civil Rights Act, stating “[t]here exist no

³⁸ ATSD, *supra* note 2, at 7-17.

³⁹ *Id.* at 10. IDEM’s reasoning is appalling considering that their refusal to consider and avoid disparate impacts will only exacerbate the “historical issues” that plague the Region. Furthermore, this is not an “individual permitting decision,” but the continuation of a permitting policy that explicitly ignores the requirements of Title VI.

⁴⁰ *Id.* (“IDEM, OAQ believes that it has complied with the requirements of Title VI and EPA’s implementing regulations. This is evidenced by the significant public participation throughout all stages of this permitting process...[IDEM] recognizes and understand[s] the ... environmental justice concerns...these concerns can be balanced with [IDEM’s] commitment to public involvement in the permitting process...as well as [IDEM’s] obligation to regulate emissions and enforce permit conditions.”).

⁴¹ Both the Petition for Review with the OEA and the Title VI complaint were filed by GARD and signed by the leadership in what was, at that time, an unincorporated volunteer citizens’ group. Nonetheless, in its caption and throughout its decision, the OEA refers only to Dorreen Carey, one of the GARD members who signed the petition challenging the permit.

⁴² *In re Maya Energy LLC*, at 14-17.

statutes or regulations authorizing IDEM to deny a permit based solely on environmental justice concerns.”⁴³ GARD now refiles its Title VI complaint.⁴⁴

V. IDEM’s Failure to Consider the Disparate Impacts of its Permitting Decisions Violates Title VI of the Civil Rights Act and its Implementing Regulations

EPA’s Title VI regulations forbid recipients of federal funding from using “criteria or methods of administering its program” or choosing “a site or location of a facility that has” the effect of subjecting protected groups, including communities of color, to discrimination.⁴⁵ 40 C.F.R. § 7.35(b)-(c). One way to establish that a policy or practice violates EPA’s Title VI regulations is to make a *prima facie* showing that a policy or practice has an adverse effect that falls disproportionately on a racial group.⁴⁶ To make such a showing, a complainant must (1) identify the policy or practice at issue; (2) establish adversity; (3) establish significant disparity; and (4) establish causation.⁴⁷

Once a *prima facie* showing of a ‘disparate impact’ is established, the burden shifts to the recipient to demonstrate the existence of a substantial legitimate justification for the policy or practice.⁴⁸ Generally, a recipient must establish that the challenged policy was “necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.”⁴⁹ Even if there is a justification for the policy or practice, it may still constitute a violation if there are less discriminatory alternatives that would achieve the same purpose.⁵⁰

⁴³ *Id.* at 15. The administrative law judge’s opinion ignores EPA’s Title VI regulations, which explicitly prohibits recipients from undergoing siting decisions that have discriminatory effects. More importantly, it reflects a broader sentiment at IDEM that seems to abdicate the agency’s responsibility to comply with established Title VI law.

⁴⁴ The OEA also dismissed the City of Gary’s petition to review the Maya permit. The City has appealed the OEA’s decision to Lake County Superior Court. *See City of Gary v. Ind. Dep’t of Env. Mngmt.*, 45D10-2304-MI-215 (Lake Cty. Super. Ct.) (attached as Exhibit 6).

⁴⁵ *See* Civil Rights Compliance Toolkit at 8.

⁴⁶ *See* DOJ Title VI Manual, Section VII at 6.

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*; *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).

⁴⁹ Civil Rights Compliance Toolkit, at 9.

⁵⁰ *Id.* at 10-11.

EPA is responsible for this inquiry, and “if such an alternative is available to the recipient, even if the recipient establishes a justification, the policy or practice will still violate disparate impact regulations.”⁵¹

A. GARD Can Establish a *Prima Facie* Showing of Disparate Impact in the Approval of the Permit Renewal for Maya Energy Caused by IDEM’s Policy of Ignoring Its Title VI Obligations

IDEM granted Maya Energy a renewal without considering the adverse impact the facility’s operation would have on students of Steel City Academy, residents of the Glen Park community, and communities of color in Northern Lake County. In doing so, IDEM took the position that it lacked the authority to deny or modify the permit or take other steps to mitigate its impact to comply with Title VI; instead, IDEM insists that it has no choice but to grant all permits that comply with Indiana air quality regulations, regardless of disparate impact. As explained below, IDEM’s position is legally incorrect and amounts to a policy or practice that – both in general and in connection with the Maya Energy permit in particular -- has an adverse, disparate impact on Black and Latino communities in violation of Title VI.

1. IDEM’s refusal to adequately consider the disparate impacts of its permitting decisions is the facially neutral policy or practice at issue

a. IDEM’s “Nondiscrimination Policy”

The policy GARD challenges is IDEM’s “Nondiscrimination Policy” and its express refusal to account for the disparate impacts of its permitting decisions. IDEM’s Nondiscrimination Policy rests on the legal premise that if there is significant public involvement in the permitting process, and if a facility complies with Indiana Air Quality regulations, then a permitting decision does not violate Title VI.⁵² Hence, IDEM’s policy is to grant all permits that meet CAA permitting requirements regardless of the environmental justice or civil rights impacts. IDEM stated this policy in response to comments from EPA and others, and the OEA reiterated it in dismissing GARD’s Petition for Review.⁵³

⁵¹ *Id.* (“[I]f there are no mitigation measures that can address the unjustified disparate impacts, denial of the permit may be the only means of avoiding a Title VI violation.”).

⁵² ATSD, at 7-10 (IDEM explains that its policy to prevent discrimination is achieved through creating a permit that complies with Indiana regulations, and through an equitable public comment process. Thus, failing to explain how it accounts for and prevents its decisions from resulting in disparate discriminatory effects on protected classes); IDEM, *Nondiscrimination Policy*, at 1 (2018) https://www.in.gov/idem/health/files/idem_policy_A-008-AW-18-P-R5.pdf.

⁵³ *In re Maya Energy FESOP Renewal*, Cause No. 22-A-J-5198 (Ind. Off. Env. Adj. March 15, 2023), at 14, fn. 13, 15.

In its comments on Maya Energy’s proposed permit renewal, EPA Region 5 recommended that IDEM conduct an environmental justice analysis to determine what adverse health effects and disparate impacts would result from siting the facility in the area, how to mitigate those effects, and to allow these inquiries to inform their permitting decision.⁵⁴ EPA specifically noted that “the siting of this facility may raise civil rights concerns.”⁵⁵

IDEM’s response to those comments acknowledged that “there is no doubt that... Title VI prohibitions apply to permitting decisions by recipients, such as IDEM,” but refused to conduct a disparate impact analysis. IDEM also recognized that EJScreen statistics showed the surrounding area falls within the “75th percentile for the environmental and socioeconomic indexes.”⁵⁶ However, IDEM never explicitly recognized that the facility is in a majority-Black area and that siting the facility there will create a racial disparity against protected classes. Instead, the agency asserted that it “cannot resolve historical issues that lead to the development of the area through an individual permitting decision.”⁵⁷ IDEM also refused to consider other adverse impacts on the local community because they were not directly covered by air pollution regulations.⁵⁸ Those impacts include noise, odor, tailpipe emissions from diesel trucks, and potential impairment of a local artesian well’s water quality.⁵⁹ Instead, IDEM reasoned that its permitting decision is solely based on the ability of the source to comply with air permit requirements and other “applicable state and federal air quality rules” in place to protect human health and the environment.⁶⁰ The agency also stated that its compliance with Title VI was evidenced “by the significant public participation throughout all stages of this permitting process.”⁶¹

⁵⁴ EPA Comments, *supra* note 34, at 2.

⁵⁵ *Id.*

⁵⁶ ATSD, *supra* note 2, at 10.

⁵⁷ *Id.*

⁵⁸ *Id.* at 10-17.

⁵⁹ Nitrogen Oxides and Particulate matter are emitted from the burning of diesel to operate freight trucks, school buses, and heavy-duty vehicles. These pollutants are known to be associated with lung and cardiovascular disease, premature death, and other health issues. Higher exposure to both pollutants increases one’s chances of dying from COVID-19. Kristoffer Tigue, *Diesel Emissions in Major US Cities Disproportionately Harm Communities of Color*, *New Studies Confirm*, Inside Climate News (Oct. 27, 2021) <https://insideclimatenews.org/news/27102021/diesel-pollution-environmental-justice/> (“low-income neighborhoods and communities of color experience an average of 28 percent more nitrogen dioxide pollution than higher-income and majority-white neighborhoods.”)

⁶⁰ ATSD, at 7.

⁶¹ *Id.* at 10.

On appeal, Indiana’s Office of Environmental Adjudication (“OEA”) affirmed and reiterated IDEM’s policy in upholding the permit renewal, stating that there “exist no statutes or regulations authorizing IDEM to deny a permit based solely on environmental justice concerns” and that it “does not have statutory authority to review Title VI claims.”⁶²

Taken together, IDEM’s and OEA’s statements amount to an unambiguous policy that IDEM will not analyze or address adverse disparate impacts in connection with its air permitting decisions. Instead, the agency considers compliance with Indiana’s air pollution regulations, coupled with some enhanced public involvement, sufficient to satisfy the State’s obligations under Title VI. And IDEM applied that policy in approving the Maya Energy permit without any environmental justice analysis or adding even the most minimal conditions to remediate the disparate impact it imposes on the protected classes of people in the surrounding area.

b. IDEM’s Nondiscrimination policy misreads the law.

IDEM’s Nondiscrimination policy effectively operates as follows: If a permitting decision has significant public involvement, and if the facility complies with Indiana Air Quality regulations, no discrimination occurs, and Title VI is complied with. This premise is wrong as a matter of law. As EPA’s Guidance expressly states, “compliance with Title VI requires consideration of adverse, disparate impacts caused by permitting decisions” and therefore, requires more than mere compliance with federal air quality laws.⁶³ Additionally, IDEM not only has an obligation, under Title VI, to meaningfully involve people of color in the permitting process, but to also avoid, account for, and/or mitigate disparate impacts imposed on them.⁶⁴ However, IDEM’s Nondiscrimination Policy fails to incorporate these established Title VI principles.⁶⁵

“State, local, and other recipients of federal financial assistance have an independent obligation to comply with federal civil rights laws with respect to all of their programs and

⁶² *In re Maya Energy FESOP Renewal*, Cause No. 22-A-J-5198 (Ind. Off. Env. Adj. March 15, 2023), at 14, fn. 13, 15.

⁶³ *See also S. Camden Citizens* 145 F. Supp. 2d, 477, 480 (holding that “it is abundantly clear from my review of the EPA materials that the EPA construes the regulations to impose a burden on recipients of EPA funding...to consider the potential adverse, disparate impacts of their permitting decisions which are independent of environmental regulations such as the NAAQS.”).

⁶⁴ *See* 40 C.F.R. § 7.30. Title VI prohibits the exclusion of individuals on the basis of race from participating in a program or activity receiving financial assistance, and prohibits recipients from subjecting individuals to discriminatory effects.

⁶⁵ ATSD, at 7. It is worth noting that in the ATSD IDEM cites to the *S. Camden Citizens* decision to prove its compliance with Title VI. Unfortunately, IDEM failed to incorporate any of the relevant and authoritative the reasoning contained in the case.

activities, including environmental permitting program”.⁶⁶ Title VI obligations exist in addition (and not subordinate) to the federal or state environmental laws governing the environmental permitting program.⁶⁷ Title VI regulations call for an analysis of foreseeable harms, and requires recipients to analyze the adverse impacts of their permitting decisions regardless of compliance with other environmental laws.⁶⁸

As the court explained in *South Camden Citizens* (the only case to squarely address the issue), interpreting Title VI otherwise would eviscerate the statute’s purpose of preventing federal funding recipients from having racially discriminatory impacts.⁶⁹ “Environmental justice is not merely a box to be checked,” and a proper Title VI analysis, as explained by EPA, includes a determination of affected populations, adverse health impacts, and less discriminatory alternatives.⁷⁰

IDEM’s belief that Title VI environmental justice concerns can be addressed by the agency’s supposed “commitment to public involvement in the permitting process,” also eviscerates the purpose of Title VI.⁷¹ While excluding protected populations from participation violates Title VI, that does not mean including those populations fully satisfies Title VI.⁷² Even

⁶⁶ EJ Permitting FAQ, at 6; *See also S. Camden Citizens*, 145 F. Supp. 2d 446, 480-81, 490 (applying an earlier version of the EPA Draft Guidance on the same point).

⁶⁷ Draft Revised Investigation Guidance, 65 Fed. Reg. at 39680.

⁶⁸ *S. Camden Citizens*, 145 F. Supp. 2d, 490, 495 (holding that there is a “severe defect” in a permitting process that relies exclusively on compliance with environmental regulations such as the NAAQS, without considering its obligations under Title VI.”).

⁶⁹ *Id.* at 477, 481; *See also* Draft Revised Investigation Guidance, 65 Fed. Reg. at 39680.

⁷⁰ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020); *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (“The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low-income populations.”); *See* Megan Quinn *EPA’s Carlton Waterhouse: Environmental justice means thinking beyond regulatory requirements*, Waste Dive (May 12, 2022) <https://www.wastedive.com/news/environmental-justice-waterhouse-epa-waste-recycling/624284/> (quoting Dr. Carlton Waterhouse “Environmental justice begins with understanding what impacts you’re having across all of your activities in the communities where you are located.”).

⁷¹ ATSD, at 10.

⁷² *See* 40 C.F.R. § 7.30.

if the public is allowed to participate in the permitting process, the decision to approve a permit can still result in discriminatory effects prohibited by Title VI.⁷³

In short, IDEM’s policy – that the state is somehow allowed to ignore the disparate impacts of permits that comply with minimum Clean Air Act standards – amounts to a renunciation of Title VI and U.S. EPA should not allow it to stand.

2. Permitting a large trash processing facility near a K-12 school located in a heavily polluted region establishes the requisite adversity

“Most cases applying the Title VI disparate impact standard do not explicitly address adversity as a separate element”; instead, courts frequently assume that the impacts alleged were sufficiently adverse, impliedly recognizing a wide range of harms.⁷⁴ And when evaluating allegations of harm and adversity, EPA will consider environmental harms and adverse health effects as well as non-health harms such as depressed property values, nuisance odors, traffic congestion, and noise.⁷⁵

Public comments submitted during the permitting process identified a number of adverse impacts from the proposed Maya Energy facility and the large number of trucks it will bring.⁷⁶ EPA emphasized that 10 of the 12 environmental justice indices for the area surrounding the proposed facility exceed the 80th percentile in the state.⁷⁷ These indices include high rates of ozone, diesel particulate matter, air toxics cancer risk, air toxics respiratory hazard, lead paint, traffic proximity, and Superfund site proximity.⁷⁸ The area’s health statistics also show a low life expectancy rate, and prevalent asthma and heart disease rates.⁷⁹

⁷³ See 40 C.F.R. § 7.30. Title VI provides that No person shall be “excluded from participation in, be denied the benefits of, or be subjected to discrimination” by a recipient. These regulations carry both a prohibition against procedural discrimination and the discriminatory effects of a recipient’s actions.

⁷⁴ DOJ Title VI Manual, Section VII at 12 (“the expansive language of Title VI and its implementing regulations support this approach.”).

⁷⁵ Civil Rights Compliance Toolkit, *supra* note 10, Chapter 1 FAQs, at 4; *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984).

⁷⁶ ATSD, *supra* note 2, at 2-28.

⁷⁷ EPA Comments, *supra* note 32, at 1-2.

⁷⁸ *Id.*

⁷⁹ EPA EJScreen <https://ejscreen.epa.gov/mapper/>.

The Maya facility will likely increase the concentration of adverse impacts in the local community.⁸⁰ These include an increase in mobile and stationary sources of emissions, air pollution, respiratory problems, traffic, noise, and possible contamination of a local aquifer in an area that is already overburdened with health and environmental issues.⁸¹ Operating a solid waste facility processing up to 2,200 tons of trash each school day will also adversely affect the children (and staff) of the K-12 school across the street. IDEM acknowledged these impacts, but, consistent with its policy of ignoring its Title VI obligations, insisted that these harms could not be addressed in its permitting decisions, and that others were addressed by its commitment to public involvement in the permitting process.⁸² It also asserted that Maya Energy's compliance with applicable air quality laws means that no harm would result.⁸³ As explained above, this reasoning is legally wrong and does not prevent GARD from establishing adversity, both with respect to IDEM's grant of the Maya Energy permit and the broader policy that this permitting decision reflects and implements.

3. IDEM's decision to permit yet another source of air pollution in a predominantly Black area establishes a significant racial disparity

Typically, establishing a disparate impact requires "a comparison between the proportion of persons in the protected class who are adversely affected by the challenged practice and the proportion of persons not in the protected class who are adversely affected."⁸⁴ If the challenged practice affects a significantly higher proportion of protected class members than non-protected members, a disparity exist.⁸⁵

As explained above, Northern Lake County has a disproportionate number of pollution sources and a predominantly non-white population. According to EJScreen, more than 67,000 people live within a three-mile radius of Maya Energy's proposed facility, 79% (53,260) of

⁸⁰ ATSD, at 17-20 ("Many commenters expressed concern over the local air quality (e.g., serious ozone nonattainment status of Lake County), its effect on human health, and the impact of additional air pollution from this source on human health and the environment").

⁸¹ *Id.* at 15-16. Maya Energy is located in a flood zone, causing residents to believe that rain and floods at or near the facility will lead to the pollution of local wetlands, rivers, lakes, streams, and the community artesian well near Chase Street.

⁸² *Id.* at 16 ("OAQ does not have legal authority to deny an air permit or to include additional permit terms that are based on concerns about these potential impacts").

⁸³ *Id.* at 10.

⁸⁴ DOJ Memo, Section VII at 15 ("A disparity analysis begins with two initial steps; First, the protected class of persons should be identified, then statistical evidence should be utilized to illustrate the disparity on the protected class").

⁸⁵ *Id.*

whom are people of color, and one-third of whom are children under the age of 18.⁸⁶ The 3-mile area around the facility holds some of the highest levels in the state for various environmental justice indices reported on EJScreen. More than 95,000 people of color live within a five-mile radius of the facility and make up around 63% of the total population.⁸⁷ In approving the permit, IDEM acknowledged that “EJ Screen shows that the area within a 5-mile radius of the proposed site generally falls within the 75th percentile for the environmental and socioeconomic indexes.”⁸⁸ But IDEM declined to further analyze how the Maya Energy permit would adversely affect Black people more than it would other demographics, creating a disparity.⁸⁹ Nor did it attempt to analyze how it could prevent this disparity or impose permit conditions or requirements that would lessen it, stating that it “cannot resolve historical issues that lead to the development of the area through an individual permitting decision.” As explained above, this reasoning is legally wrong and does not prevent GARD from establishing a significant racial disparity, both with respect to IDEM’s grant of the Maya Energy permit and the broader policy that this permitting decision reflects.

4. IDEM’s policy of refusing to consider the adverse disparate impacts of its permitting decisions is causing the predominantly Black residents of Northern Lake County to be overburdened with air pollution

Once a disparity is identified, it must then be causally linked to the recipient’s challenged policy.⁹⁰ Typically, establishing causation requires “statistical evidence of a kind and degree sufficient to show that the practice in question has” injured members of a particular group due to their membership in a protected class.⁹¹ And the statistical disparities must be sufficiently significant that they “raise ... an inference of causation.”⁹² Importantly, the causation element is not a fault-based inquiry; the sole question at this phase of the case should be whether the

⁸⁶ EJSCREEN Census 2010 Summary Report (attached as Exhibit 7). This is consistent with the U.S. Census Bureau’s latest demographic data for Gary, Indiana. *See* Exhibit 4.

⁸⁷ EJSCREEN Census 2010 Summary Report. (Exhibit 7)

⁸⁸ ATSD, at 10.

⁸⁹ *Id.*

⁹⁰ DOJ Title VI Manual, Section VII at 26; *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (complainants must “allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities.”).

⁹¹ DOJ Title VI Manual. Section VII at 27; *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (emphasis added) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).

⁹² DOJ Title VI Manual, Section VII at 27-28. Causation is established where the evidence illustrates that the recipient’s policy or practice operates in this manner, allowing agencies to be certain that a disparity is not caused by chance.

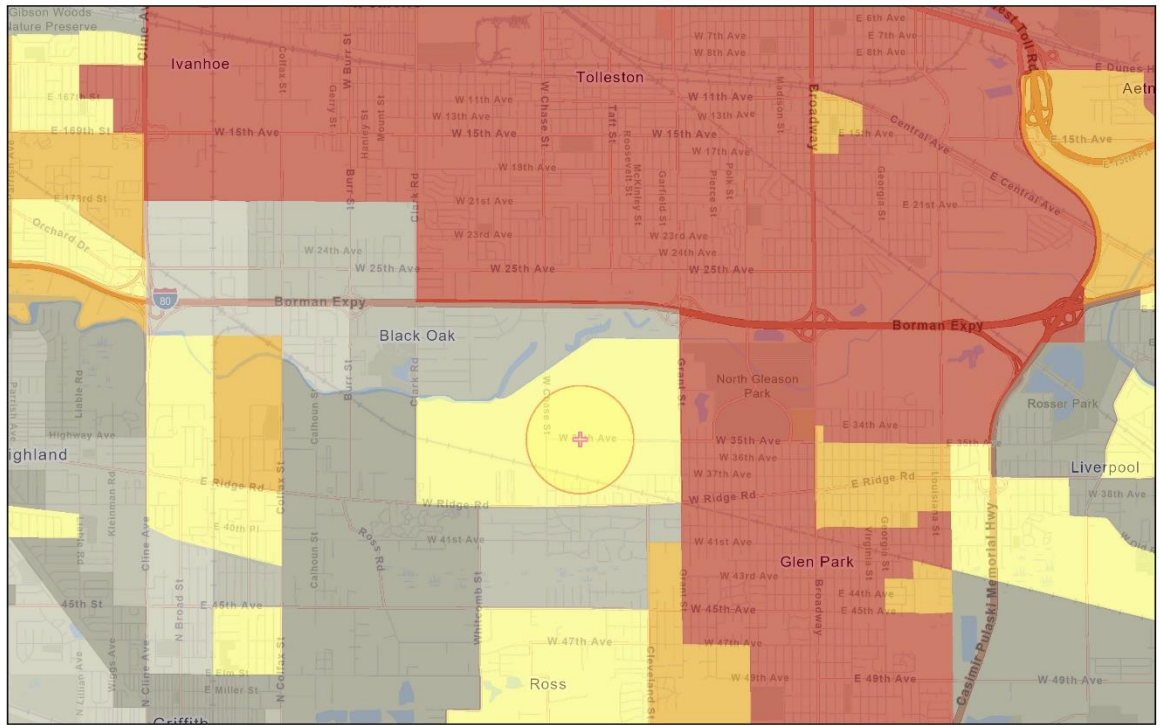
recipient's policy affects people of different races disproportionately.⁹³ As explained below, we believe that statistical evidence shows that IDEM's permitting policy and Maya Energy decision has injured people of color in Northern Lake County on the basis of race.

a. The decision to renew the Maya Energy permit will cause an adverse disparate impact on the predominantly nonwhite population near the proposed facility

The maps below were pulled from the EPA's EJScreen tool and they illustrate how IDEM's decision to grant the FESOP renewal affects nonwhite residents disproportionately. The EJScreen data supports a logical inference that operation of the Maya facility will only increase the numerous health disparities the local community suffers. Thus, IDEM's renewal of the Maya Energy permit will cause disparate, adverse harms to protected communities in the surrounding area, including the students and staff of Steel Academy.

⁹³ *Id.* (explaining that environmental justice cases may involve using other forms of causation analysis, "one that explores the concrete proof connecting the recipient's practice to the alleged harms." When a recipient's decision to permit a facility is alleged to cause harm, establishing causation may involve scientific or other quantifiable proof that the challenged practice actually caused the alleged adverse impacts. However, when such proof is unobtainable, "the statistical tests discussed above will suffice.").

Map 1- Concentration of People of Color near the Maya Facility



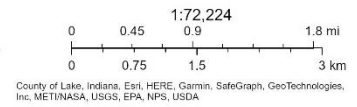
5/12/2023

People of Color
(State Percentiles)

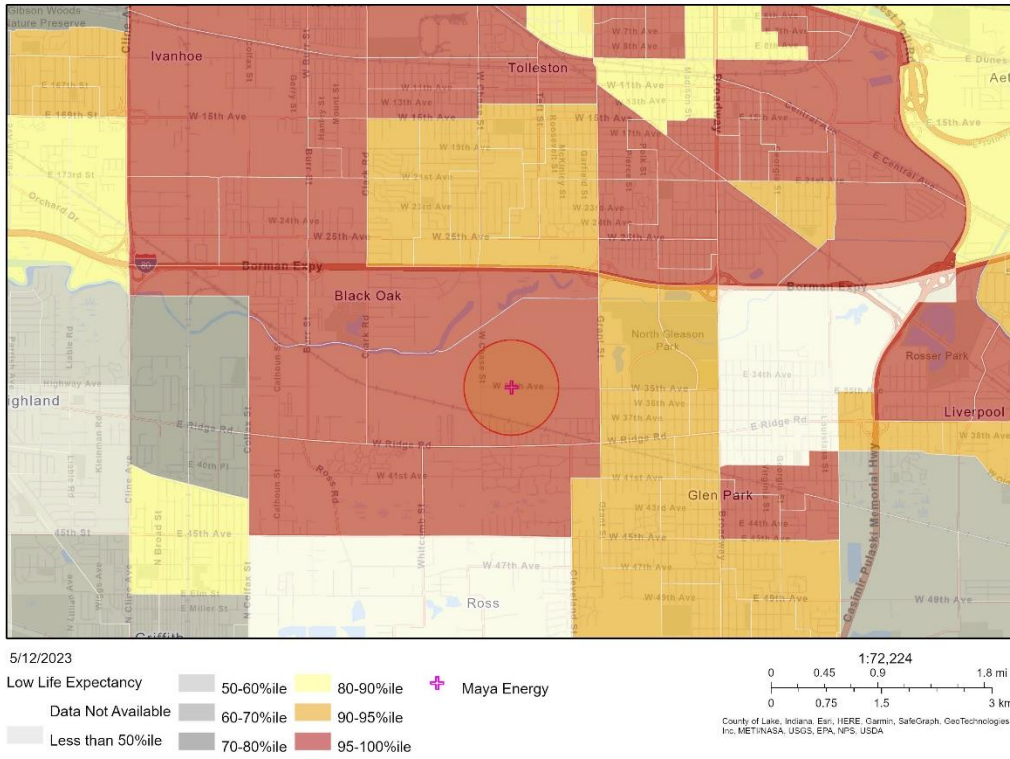
Less than 50 percentile

- 50 - 60 percentile
- 60 - 70 percentile
- 70 - 80 percentile
- 80 - 90 percentile
- 90 - 95 percentile
- 95 - 100 percentile

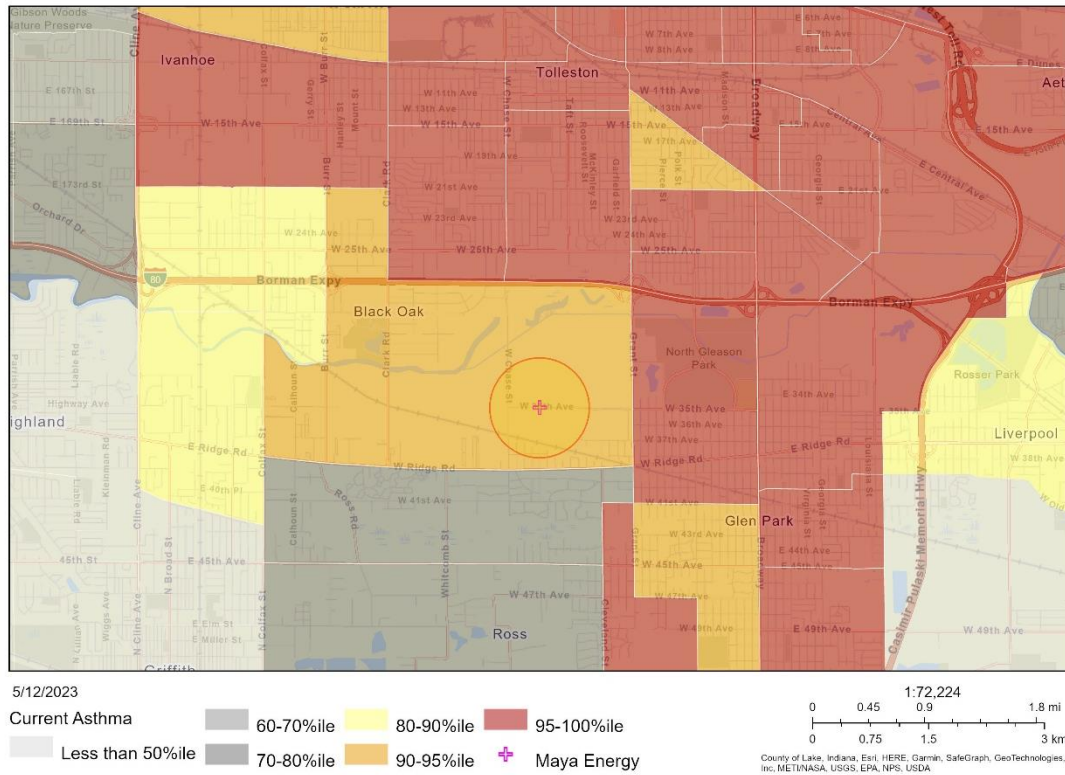
- Data not available
- Maya Energy



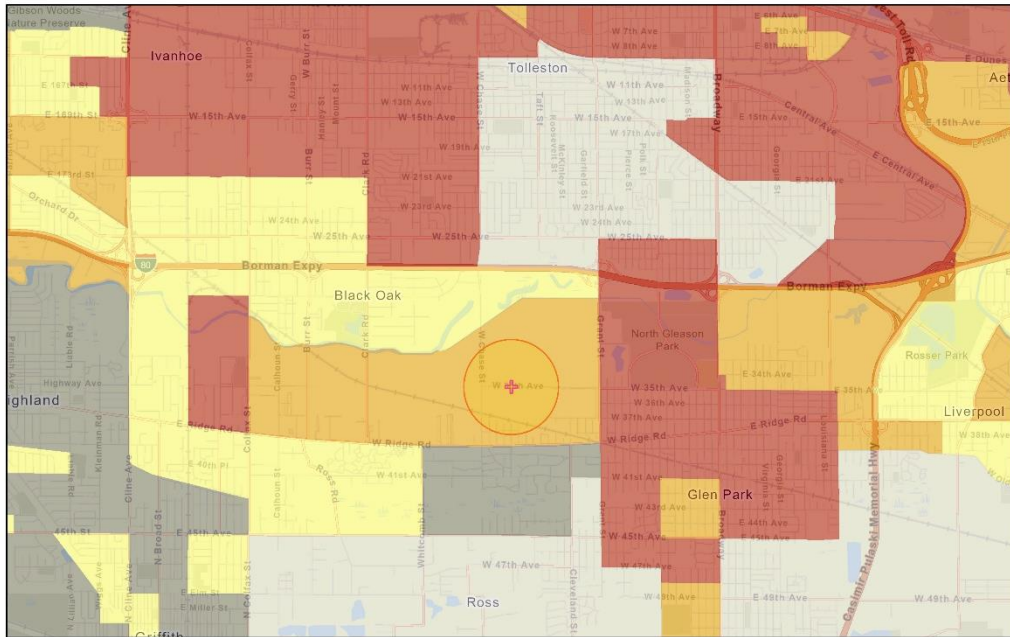
Map 2 – The Surrounding area has a low life expectancy



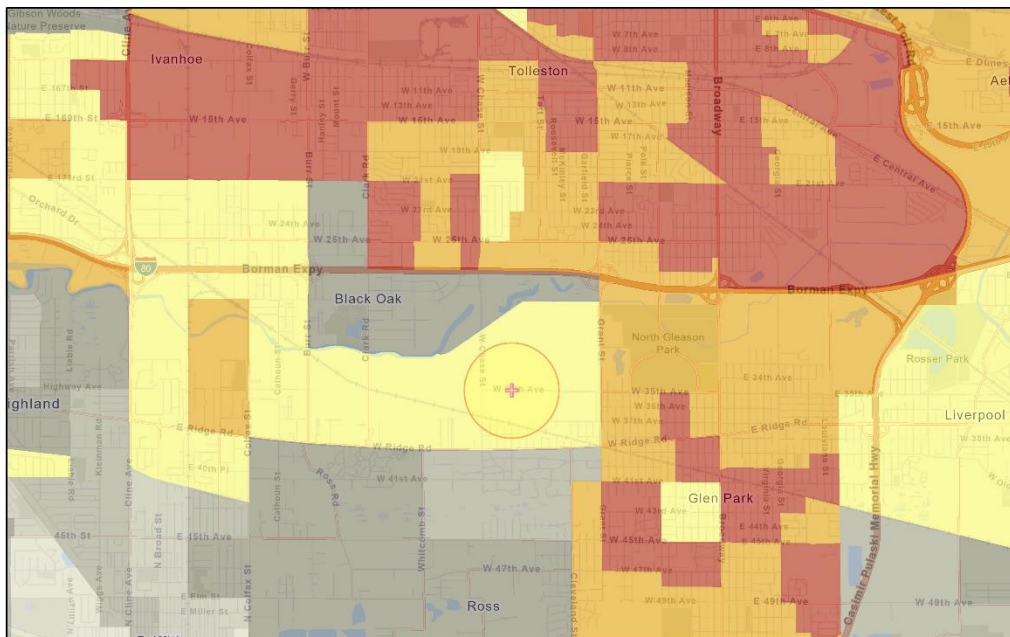
Map 3 – Asthma rates near the facility are extremely high



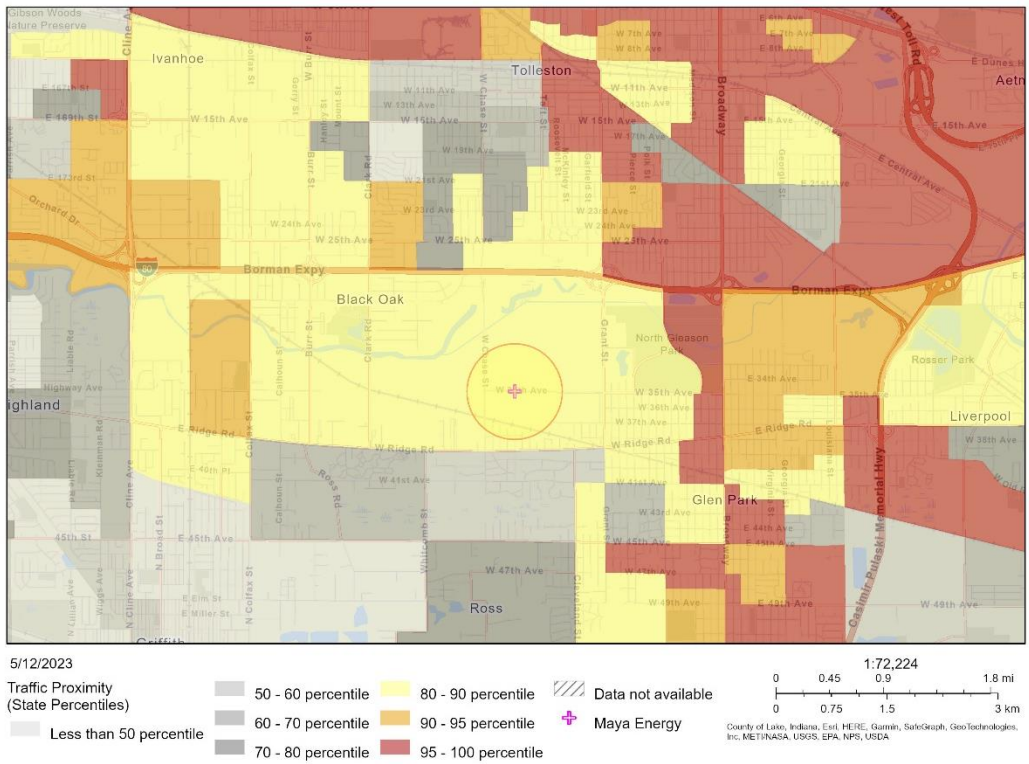
Map 4 – Cancer rates are high near the facility



Map 5 – The area is already overburdened with Diesel Particulate Matter



Map 6 – The area already has high amounts of traffic



b. IDEM’s policy of refusing to consider the adverse disparate impacts of its permitting decisions caused the predominantly Black residents of Northern Lake County to be overburdened with air pollution

IDEM’s refusal to comply with its Title VI obligations has resulted in a disproportionate number of air pollution and waste facilities being permitted in and near communities of color in Northern Lake County. Had IDEM complied with its obligation to consider the disparate impact of such permits, it could have lessened the burden on minority communities in Northern Lake County years ago. IDEM’s blind approval of permits for industrial facilities in Northern Lake County has resulted in the proliferation of stationary sources of air pollution as well as the disproportionate volume of air pollution emitted into communities of color. IDEM’s policy of ignoring its Title VI obligations will guarantee that the disparate adverse impacts of industrial pollution overburdening Gary will continue. And IDEM’s renewal of the Maya Energy permit pursuant to that policy will itself cause disparate, adverse harms to protected communities in the surrounding area, including the students and staff of Steel City Academy.

To further illustrate the causal relationship between IDEM’s permitting actions and the adverse health impacts imposed on the residents of color in Northern Lake County, ELPC conducted its own statistical analysis, which can be seen below (Figures 1 & 2).⁹⁴ In this

⁹⁴ In this analysis, we used data from various sources, including [demographic data](#) from the 2018 census tract level, obtained from [ArcGIS Data and Map](#). We also used data on operating

analysis, we mapped the locations of major sources and synthetic minors (as defined by the Clean Air Act), and analyzed their distribution throughout Lake County and how their dispersion correlated with race. By mapping the facilities and categorizing the racial distribution, we can better understand how IDEM's permitting policy shapes the relationship between the location of industrial facilities and the demographics of the surrounding areas.⁹⁵ This visualization helps to identify potential patterns or disparities in exposure to emissions or pollution across different population groups in Lake County.

Figures 1 & 2 illustrate the disproportionate exposure to emissions and pollution experienced by people of color in Lake County, making the Title VI environmental justice issues that exist in the Region undeniable. Our statistical analysis shows that 65% of major source facilities (41 out of 63), 64% of solid waste facilities (11 out of 17), and 45% of synthetic minors (15 out of 33) are in predominantly nonwhite census tracts. And based on IDEM's express policy of not considering disparate impacts (and environmental justice concerns) when issuing permits, there is a clear causal connection between the agency's stated policy and the disparity of facilities that exist in Northern Lake County. Furthermore, it is logical to infer that this resulting disparity of polluting facilities in Northern Lake County is causally linked to the aforementioned health disparities, including those illustrated above in Maps 1-6.

facilities with air permits, classified as major and synthetic minor sources, from the [USEPA ECHO database](#), excluding minor sources of pollution. Additionally, we incorporated solid waste facility locations from IDEM [IDEM letterhead \(in.gov\)](#) and greenhouse gas emissions (GHG) data from the [FLIGHT database](#). Finally, we filtered the data to focus on Lake County, Indiana.

⁹⁵ *S. Camden Citizens*, 145 F. Supp. 2d, 495 (“The EPA has acknowledged that because recipients are responsible for permitting, they are also responsible for considering the distribution of the facilities which they permit with respect to the classes protected by the Civil Rights Act of 1964. The [Title VI] regulations therefore support the conclusion that a recipient's permitting decisions are causally linked to the distribution of facilities as a matter of law”).

Environmental Injustice – The Disparity of Polluting Facilities in Lake County (Figure 1)

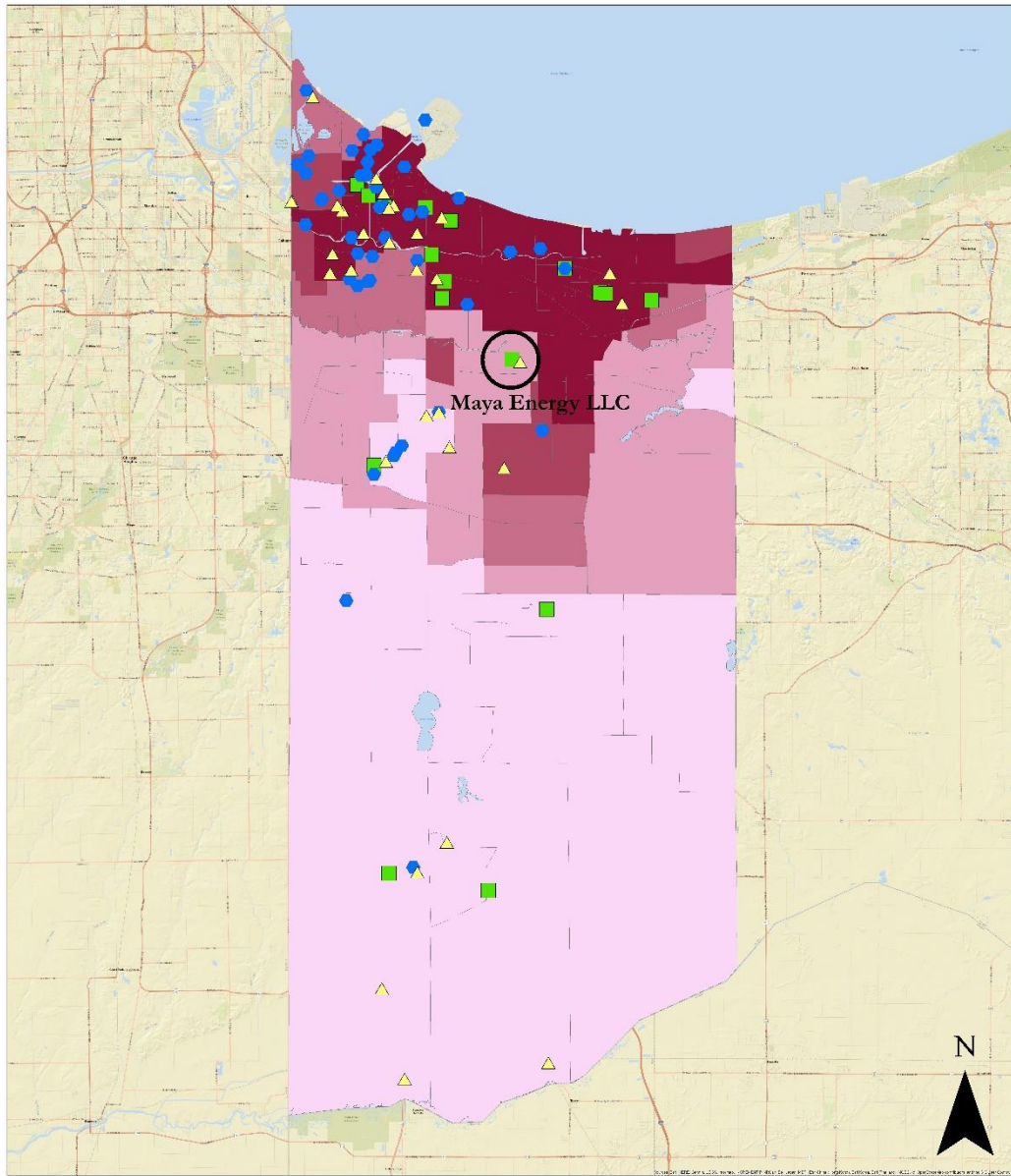


Figure 1 displays major source facilities as blue circles, synthetic minor facilities as yellow triangles, and solid waste facilities as green squares. Based on the obtained data sources, there are 63 operating major air pollution facilities, 33 synthetic minor facilities, and 17 solid waste facilities in Lake County. Among these, 15 synthetic minor, 41 major, and 11 solid waste facilities are located in tracts with over 80% non-white populations.

- ▲ Synthetic Minor Air Pollution Facility
 - Major Air Pollution Facility
 - Solid Waste Facility
- Lake County Census Tract
Non-White Population Percentage
- 0 - 20
 - 20- 40
 - 40- 60
 - 60- 80
 - 80 - 100

Environmental Injustice – Lake County GHG Disparity (Figure 2)⁹⁶

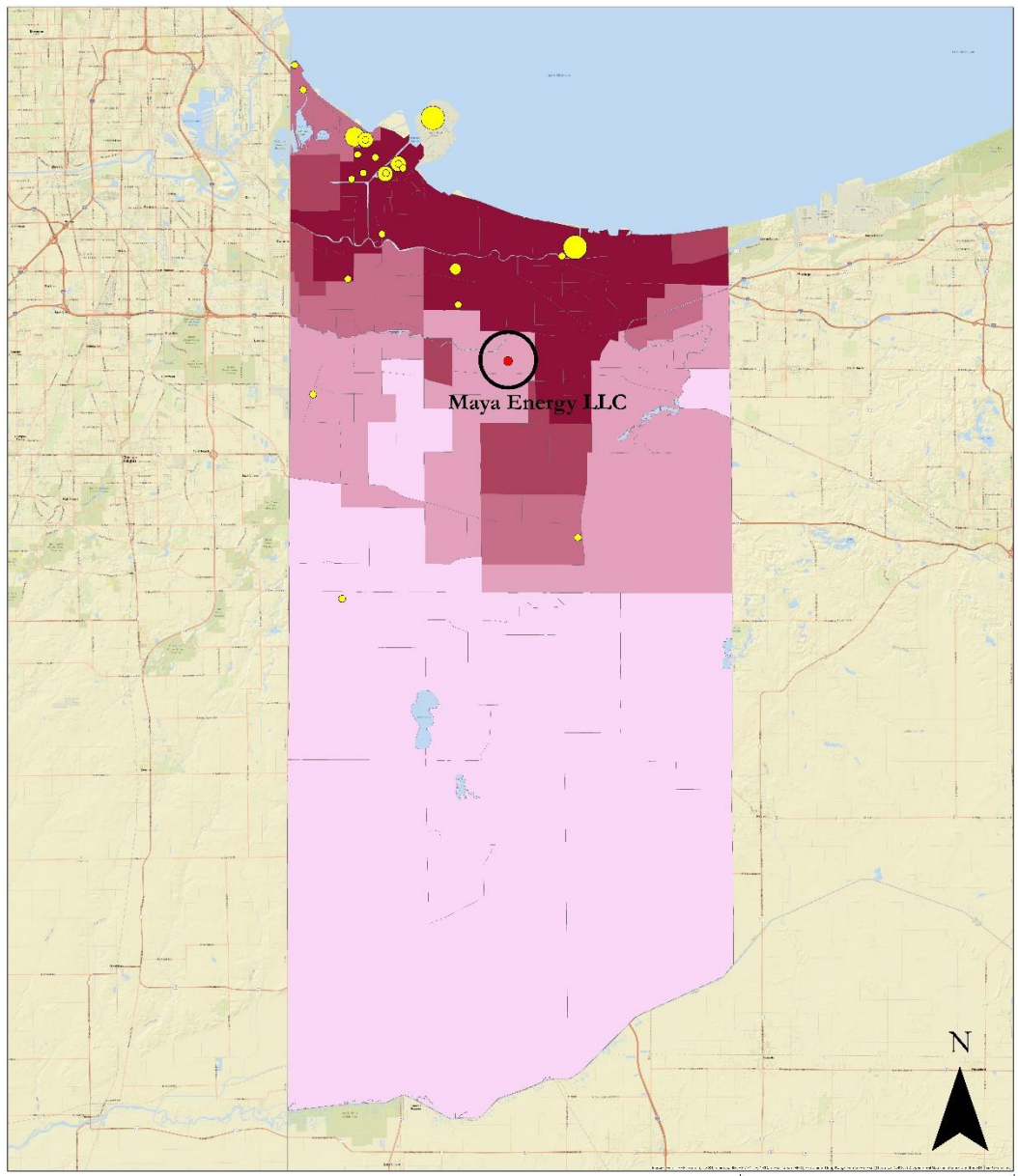
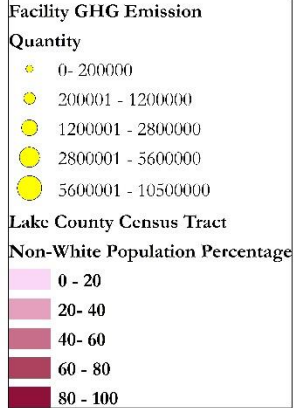


Figure 2 displays the facilities and their greenhouse gas (GHG) emissions in metric tons of CO₂ equivalent. The darker colors indicate higher percentages of non-white populations, while larger circles represent higher levels of GHG emissions from facilities. Notably, there is a significant number of facilities with the highest GHG emissions located in tracts with over 80% non-white populations.



B. IDEM Cannot Justify Its Failure to Comply with Title VI

Once a *prima facie* case of discrimination is shown, the burden shifts to IDEM to justify its policy and show that there are no less discriminatory alternatives. As explained below, IDEM cannot meet that burden.

1. IDEM Has No Substantial Legitimate Justification

Generally, a recipient must “show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission.”⁹⁷ And EPA will evaluate whether the policy was “necessary” by requiring that the justification bear a “manifest demonstrable relationship” to the challenged policy.⁹⁸ In its Draft Investigation Guidance, the EPA identified two forms of legitimate justifications: (1) a demonstration that the permitting action will provide a public health or environmental benefit to the affected population; (2) a demonstration that the permitting action will have economic benefit, if the benefit is “delivered directly to the affected population.”⁹⁹

IDEM has not even attempted to establish any such justification. Instead, it relies solely on the legal argument that the agency lacks authority to deny or modify permits, or even to perform a detailed environmental justice analysis, so long as a permit meets minimal air quality standards. As explained above, IDEM’s argument is incorrect and does not amount to a “substantial justification” for either its broader policy or its grant of the Maya Energy permit. Furthermore, IDEM’s failure to analyze the impacts of Maya Energy’s operations prevents it from demonstrating that the facility will provide a public health or environmental benefit. The agency has also failed to show the economic benefits that will directly flow to the community. IDEM may argue that its decision to renew Maya Energy’s permit was justified by a need for additional waste recycling in Lake County and the Chicago metro area. Any such need, however

⁹⁶ Facilities responsible for generating significant GHG emissions often produce other pollutants, such as particulate matter (PM2.5) and ground-level ozone precursors like nitrogen oxides (NOx) and volatile organic compounds (VOCs). When these precursors react with sunlight, they form ground-level ozone (O3), which has immediate harmful effects on the exposed local population. Lake County is currently classified as ozone nonattainment, and the Maya facility along with its diesel trucks will likely add to this NAAQS violation. It is essential to recognize that GHG emissions can simultaneously contribute to local air pollution and climate change posing a variety of risks.

⁹⁷ Draft Revised Investigation Guidance, at 39683; Civil Rights Compliance toolkit, chapter 1 FAQs, 4.

⁹⁸ Civil Rights Compliance toolkit, *supra* note 10, chapter 1 at 9.

⁹⁹ *S. Camden Citizens*, 145 F. Supp. 2d, 497 (“OCR will generally consider not only the recipient's perspective, but the views of the affected community in its assessment of whether the permitted facility, in fact, will provide direct, economic benefits to the community. However, a justification may be rebutted if EPA determines that a less discriminatory alternative exists”).

doubtful, would not justify renewing a permit for such a facility at this location, thereby forgoing compliance with Title VI.

2. There Are Less Discriminatory Alternatives Available to IDEM

Even if IDEM could provide a substantial legitimate justification for ignoring its Title VI requirements (which it cannot do), there are less discriminatory alternatives available with respect to the Maya Energy facility and IDEM has not tried to, and cannot, demonstrate otherwise. Most obviously IDEM could have required consideration of alternative sites. The Maya Energy facility has not yet been constructed and its permit does not indicate that there is any unique characteristic of its proposed site that prohibit the selection of a site with a less adverse impact on Title VI's protected classes. IDEM also had the opportunity to consider ways to mitigate the adverse impacts of its permitting decision, but failed to do so because the agency supposedly "has no authority to create any permit limits or measures that exceed what is legally required for a regulated source."¹⁰⁰ In fact, as shown above, IDEM has such authority and must use it to comply with Title VI.

VI. Conclusion & Relief

For the reasons set forth above, we believe IDEM has violated its duty under Title VI of the Civil Rights Acts of 1964 by disregarding the disproportionate impacts and adverse effects of its permitting actions. Northern Lake County is a predominantly nonwhite area plagued with health disparities that are caused or exacerbated by an abundance of air pollution. Despite being aware of these environmental justice issues, IDEM chose a policy of ignoring the disparate impact of its permitting actions that resulted in Northern Lake County being used as a sacrifice zone for the most noxious and heavily-polluting industries. And the decision to grant a renewed permit for the Maya Energy waste facility is a continuation of this environmentally unjust policy. As a result, GARD requests that the EPA Office of External Civil Rights Compliance accept this complaint and investigate the Title VI violations committed by IDEM.

GARD respectfully requests that EPA utilize all applicable authority and leverage its federal funding to provide the following relief:

1. Conduct a thorough investigation of IDEM's discriminatory permitting practices and issue a formal Notice of Noncompliance.
2. The revocation of the Maya Energy FESOP, until both a cumulative impact analysis and a Title VI evaluation are completed to determine whether the facility should be permitted.
3. Require IDEM to create and enforce a Non-Discrimination Policy that evaluates the potential for disparate impacts on communities protected by

¹⁰⁰ Draft Revised Investigation Guidance, at 39683. Less discriminatory alternatives for a permitting action can include "practicable mitigation measures" that "modify permit conditions to lessen or eliminate the demonstrated adverse disparate impacts."

Title VI and contains procedures to mitigate and/or prevent those potential disparities.

4. Advise IDEM on how to develop criteria and methods for its permitting program that are fair, equitable, and compliant with Title VI and consistent with the spirit of environmental justice.
5. Require IDEM to implement an internal review policy that allows the state agency to determine if its actions comply with Title VI.
6. Mitigate the disparate siting of air pollution facilities in Northern Lake County by revising future permit renewals for major source and synthetic minor facilities, to account for the adverse health impacts on the surrounding EJ communities.
7. Condition all future grants and monetary awards to IDEM on the state agency's assurance that it will comply with Title VI and implement environmental justice throughout its programs and activities.

We further request that GARD and its counsel be involved in the investigation and resolution of this complaint, including the development of any Informal Resolution Agreement. We look forward to working with OECRC to remedy the decades of environmental injustice perpetuated by IDEM's permitting practices, and to prevent the addition of more toxic facilities and harmful activities in the Northern Lake County Area.

Respectfully submitted,

/s/ Ellis Walton

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