OBSERVATIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REGARDING MOSSVILLE ENVIRONMENTAL ACTION NOW, PETITION NO. 242-05

Introduction

The Government of the United States ("United States") appreciates the opportunity to provide the following timely[1] Observations regarding Report No. 43/10 (March 17, 2010) on admissibility, and Petitioners' submissions, including their Second Amended Petition and Petitioners' Observations on the Government's Reply, dated July 28, 2008 ("Petition" or "Pet.") and their Additional Observations Regarding the Merits, dated July 30, 2010 ("Additional Observations"). In Report No. 43/10, the Inter-American Commission on Human Rights ("Commission") ruled admissible the Petitioners' claims based on alleged violations of Articles II and V of the American Declaration on the Rights and Duties of Man ("American Declaration"). The Commission declared inadmissible all other claims in the Petition, specifically those based on Articles I, IX, XI, and XXIII of the American Declaration. Petitioners in their Additional Observations[2] ask the Commission to reconsider its decision on the inadmissibility of their claims under Articles I and XI, and offer additional information concerning the merits of their claim as stated in the Petition.

The Petition alleges that the Petitioners' human rights under the American Declaration have been violated because laws in the United States that protect the environment, public health, and civil rights "fail to remedy the environmental degradation and associated health threats suffered by Mossville residents." Pet. at 29. Petitioners assert that the conditions in Mossville amount to "environmental racism" because "disproportionate permitting of polluting facilities in the African American community of Mossville" results in "African Americans in Mossville bear[ing] a racially disproportionate burden of severe industrial pollution." *Id.* at 8. These concerns, so expressed, are serious and warrant evaluation by responsible authorities. And, as described below, the United States' engagement in the evaluation of those concerns is longstanding and ongoing.

Petitioners' allegations of insufficient legal protections and government disregard of their concerns arise within the context of perhaps the world's most robust, sophisticated, and well-supported system for the protection of the environment and public health. The Petition ignores

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[1] The Commission requested this submission by December 17, 2010. *See* letters to the United States of August 9, September 8, and November 4 (all 2010).

[2] Contrary to its title, the Petitioners' submission in is in part a request for reconsideration of the Commission's admissibility decision.

numerous aspects of this system, including the multiple avenues available under domestic environmental, civil rights, and tort law to remedy the conditions that they allege. In these circumstances, the Commission should reject Petitioners' claims that deficiencies in the U.S. legal system violate their human rights under the American Declaration. Thorough evaluation of the governing domestic legal framework and the facts concerning the Government response in Mossville confirms that the Commission correctly decided that the majority of the claims asserted in the Petition were inadmissible and, further, demonstrates that all claims should have been ruled inadmissible. If the Commission nonetheless reaches the merits of any claim in the Petition, these Observations establish that the claims lack merit and should be denied in their entirety.

The United States' actions to evaluate the nature and degree of the concerns presented in the Petition, and to determine what response is appropriate, disprove any suggestion that the United States has been unresponsive to the Petitioners' concerns. As these Observations make plain, the Petition is neither complete nor accurate in its portrayal of the response of expert government agencies to the concerns that have been raised about Mossville or the legal framework within which they are being addressed. The United States Environmental Protection Agency ("EPA") is actively evaluating the Mossville area for potential remediation, investigating the integrity of the Mossville drinking water supply, inspecting Mossville-area facilities and enforcing applicable environmental requirements against them, and aggressively reaching out to the Mossville community in an effort to empower it and to address concerns consistent with federal executive "environmental justice" policies. The Agency for Toxic Substances and Disease Registry ("ATSDR"), a federal public health agency, is also reaching out forcefully to the Mossville community through education and public health initiatives, in addition to its significant efforts to evaluate dioxin exposure levels and to biomonitor Mossville residents. EPA and ATSDR have undertaken, and continue to undertake, these actions in conjunction with responsible state agencies.

Review by this Commission of the merits of the Petition in light of such ongoing government action would be premature, as it would require the Commission to interpret and reconcile arguments about complex technical evidence that is still being gathered. The Commission is also being asked to second-guess determinations made by government agencies with the specialized technical expertise to address these issues. Even worse, such review would require the Commission to pre-judge the determinations of these agencies before they have had the opportunity to fully consider the evidence.

The United States respectfully submits that the evaluation and balancing of such multifaceted and technical matters is properly accomplished through domestic administrative processes and by domestic administrative bodies with the requisite authority and scientific expertise. Individuals and groups like Petitioners are able to participate in these processes and to obtain judicial review of their results. The domestic mechanisms for addressing concerns such

as those raised by Petitioners are fair and transparent and should be accorded substantial deference.

Multiple federal and state statutes and regulations require the protection of all environmental media (air, land, and water), apply to Mossville-area facilities, and provide governments and private citizens powerful mechanisms to enforce them. These Observations describe numerous avenues available to Petitioners under the domestic legal system that they have failed to pursue and exhaust, ranging from administrative processes, to "citizen suits" against Mossville-area polluters and the EPA under the major federal environmental statutes, to challenges concerning environmental standards that they contend are legally required but have not been promulgated are inadequate, to "toxic tort" actions in state court against Mossville-area polluters.

The Petitioners' contention that such remedies are neither available to them nor effective is belied by the fact that at least some of the Petitioners have prevailed at least four times in litigation against EPA, the State of Louisiana, and Mossville-area industries. Their results have included: a court setting aside an EPA air emissions standard; an EPA commitment to develop a new standard by a date certain; a consent decree under which EPA and the State of Louisiana are acting to establish stricter pollution limits for Mossville-area waters; and an approximately $44 million civil suit settlement with Mossville-area companies that, among other things, financed the relocation of many Mossville residents.

These Observations proceed as follows. Section I describes how the United States' legal system comprehensively addresses the issues of environmental protection, public health, and civil rights that are raised in the Petition. Section II describes the significant Government efforts that respond to concerns about environmental and public health conditions in Mossville. Section III describes the Petitioners' failure to satisfy the requirement to exhaust the many potential domestic remedies available to them. Section IV demonstrates that if the Commission reaches the merits, the Petitioners' claims under Articles II and V[3] misstate and inaccurately characterize applicable human rights law, the requirements of the American Declaration, and this Commission's jurisprudence and, furthermore, do not present sufficient facts or reliable evidence to support a finding of a violation of the Petitioners' rights.

[3] Although the United States is prepared to dispute Petitioners' claims under Articles II and V on the merits, these claims should have been ruled inadmissible and the United States therefore requests that the Commission reconsider its ruling on their admissibility. This request is appropriate, particularly as the Petitioners' Additional Observations seeks to reopen the question of the admissibility of their claims under Articles I and XI.

I. The Protection of the Environment, Public Health, and Civil Rights Within the Domestic System

Sections II and III of these Observations describe the actions the United States has taken and continues to take in response to environmental concerns in the Mossville area and the array of domestic remedies that the Petitioners have neither pursued nor exhausted. To help place those discussions in context, this Section describes in general terms the protection of the environment, public health and civil rights within the domestic legal system of the United States. That system is robust and comprehensive, consisting of relevant judicial and administrative mechanisms under federal and state law. Additionally pertinent to Petitioners' claims are federal civil rights laws, federal executive policies that promote environmental justice, and rights existing and enforceable under the common law.[4]

A. Statutes and Regulations to Protect the Environment and Public Health[5]

The United States' legal system includes a broad array of environmental laws and regulations that work together to regulate activities that impact the environment and public health. This system is among the most sophisticated and effective in the world. Environmental regulation in the United States is based on the concept of "cooperative federalism," whereby responsibilities and authorities for environmental protection are shared between the federal Government and the states, including Louisiana. Although there are some differences under the various statutory regimes, in practice this generally means that state agencies, subject to federal Government approval and oversight, implement federally-established laws, standards, and programs. Most commonly, state agencies serve as the primary permitting and enforcement authorities, while federal agencies have standard-setting and oversight responsibilities, as well as independent and overarching enforcement authority. Federal and state environmental laws provide standards that set limits on acceptable levels of pollution, permitting systems to implement those standards, mechanisms to remedy environmental harm resulting from past actions, avenues for public participation throughout the regulatory process, and a range of tools

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[4] By necessity, these Observations summarize and generalize with respect to relevant federal and Louisiana law in order to provide the Commission with a meaningful overview. Citations to statutes and regulations are provided in the event the Commission seeks a more thorough analysis of the applicable provisions. Furthermore, to the extent these Observations discuss or suggest potential claims and remedies that the Petitioners may have against the United States or its agencies (particularly in Section III *infra*), these Observations do not concede that any such claim would succeed, nor does the United States concede any alleged fact or waive any defenses it may have, jurisdictional or otherwise. The United States furthermore reserves the right to present additional facts and evidence at the appropriate stage of these proceedings if the Commission deems any claim admissible.

[5] For the convenience of the Commission, a Glossary of the acronyms used in this and later sections is attached at the end of these Observations.

for enforcement that are available to the federal and state governments and members of the public.

Significantly, all of these statutes authorize private citizens to sue industrial facilities for violations of requirements under the statute, regulations, or the facility's permit. Moreover, though there is some variation among programs, the process for issuing permits under the programs described below is subject to public notice, an opportunity for the public to comment upon and influence permit conditions, and an opportunity to challenge (administratively and/or in court) permits that are issued.

Federal pollution control statutes protect human health and the environment by, among other things, regulating the release of pollutants into the air, land, and water. The primary federal pollution control statutes in the United States are the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1376, which controls discharges of pollutants into U.S. waters; the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671, which regulates emissions of pollutants into the air from stationary and mobile air pollution sources; and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992, which regulates from "cradle to grave" the management and disposal of hazardous and non-hazardous solid waste. A fourth statute, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j-26, applies health-based controls to the levels of pollutants in water used for drinking, bathing, cooking, and other purposes and grants EPA emergency powers to address contamination in drinking water that may present an imminent and substantial endangerment to public health.

Some federal standards under the programs described below could broadly be described as technology-based, as they are premised on setting numeric limits on the amount of pollution emanating from a facility based on reductions that can be achieved by certain control technologies. Some standards are health-based (also known as "risk-based"), for instance drinking water standards that prohibit pollutants in drinking water above a threshold determined to be adverse to public health or air pollution limits beyond technology controls that take into account the health risks of certain hazardous air pollutants.

The Clean Air Act regulates emissions into the air from stationary and mobile sources. A central purpose of the CAA is achieving a healthful level of ambient air quality by controlling six specific pollutants (known as "criteria pollutants"). The standards for these pollutants are known as national ambient air quality standards ("NAAQS"), are set by EPA, are monitored, and must be achieved by states through federally-approved state implementation plans. 42 U.S.C. §§ 7409-10.[6] The CAA also contains extensive requirements for toxic or hazardous air pollutants, whereby EPA sets national emissions standards ("NESHAPs") for industrial categories of

[6] The State of Louisiana implements its CAA Air Act permitting and enforcement authority under the Louisiana Air Control Law. La. Rev. Stat. Ann. §§ 30:2051 *et seq.*

stationary sources of hazardous air pollutants. 42 U.S.C. § 7412. Several of the Mossville-area plants identified in the Petition are subject to federally-issued NESHAPs. As detailed below, EPA is required to set standards for major sources[7] of these pollutants that initially are based upon the emission control performance of the *best*-performing sources of these pollutants and, subsequently, upon the risk to public health posed by such sources.

EPA generally sets emissions standards for the various categories of sources of hazardous air pollutants with reference to technologies and other mechanisms that are available to control emissions of those pollutants. *Id.* Standards for major sources require "the maximum degree of reduction in emissions of hazardous air pollutants" that EPA concludes is achievable, and are referred to as the "maximum achievable control technology" or "MACT." For example, MACT standards for new major sources must be at least as stringent as the pollution control level achieved in practice by the *best controlled* similar source. 42 U.S.C. § 7412(d)(3). For existing major sources in a category with at least 30 sources nationwide, the standards must be at least as stringent as the control level achieved by the *best performing 12 percent* of existing sources. 42 U.S.C. §§ 7412(d)(3)(A) and (B).

Notwithstanding the stringency of these minimum, initial requirements, based as they are on the *best performing* sources within a category, the CAA authorizes EPA to impose even stricter limits after taking into account costs, energy, and non-air environmental impacts. Additionally, the CAA requires EPA to revisit the standards for major sources and promulgate a risk-based emissions standard if EPA determines after implementation of the technology-based standards that additional controls are required "to provide an ample margin of safety to protect public health." 42 U.S.C. § 7412(f)(2)(A).[8]

The Clean Water Act protects the integrity of U.S. waters through National Pollutant Discharge Elimination System ("NPDES") permits, which limit the level of pollutants allowed in discharges to U.S. waters. All discharges of pollutants into waters from pipes and similar

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[7] A "major" source emits or has the potential to emit 10 tons per year or more of any one hazardous air pollutant, or 25 tons per year or more of any combination of hazardous air pollutants. Any stationary source of hazardous air pollutants that is not a "major" source is known as an "area" source. 42 U.S.C. § 7412(a)(1)-(2). A different definition of "major" applies to sources of the six non-hazardous (*i.e.*, criteria) pollutants subject to the NAAQS. Section 112 of the CAA also requires the regulation of certain area sources, as to which EPA can set MACT standards, as described above, or other standards based on generally available control technologies and management practices. 42 U.S.C. § 7412(d)(5).

[8] The CAA also requires EPA to review NESHAPs periodically to determine whether the standards should be tightened further due to advancements in technologies and other hazardous air pollutant emission reduction approaches. 42 U.S.C. § 7412(d)(6). The NESHAPs program also authorizes EPA to develop a health-based emissions standard that provides an "ample margin of safety" for sources of emissions of a limited set of hazardous air pollutants for which EPA has established a health threshold (*i.e.*, a level below which harm does not occur). 42 U.S.C. § 7412(d)(4).

conveyances (known as "point sources"), including from Mossville-area facilities, are subject to NPDES discharge requirements. 33 U.S.C. §§ 1311(a), 1342. EPA has set technology-based standards for point sources (*i.e.*, a numeric limit on the amount of a given pollutant that can be discharged) as well as separate standards limiting the amount of specifically-identified toxic chemical discharges. States, for their part, set further standards meant to protect a level of water quality that will permit particular water bodies to be used for particular purposes. 33 U.S.C. §§ 1311(b), 1313, 1314(b), 1317. In issuing NPDES permits, the permitting authority (usually the state[9]) applies technology- and water quality-based standards to establish facility-specific effluent limitations for the discharger receiving the permit. 33 U.S.C. §§ 1314, 1342.

Another federal statute, the Safe Drinking Water Act, deals with contaminants in drinking water and ensures "that water supply systems serving the public meet minimum national standards for protection of public health."[10] Under the SDWA, the federal government promulgates primary drinking water regulations for public water systems targeting contaminants that EPA has determined may have an adverse effect on human health, and secondary drinking water regulations which EPA deems necessary to protect public welfare. 42 U.S.C. §§ 300f(1)-(2). In Louisiana, the SDWA is administered by Louisiana Department of Health and Hospitals (LDHH). The SDWA requires owners and operators of public water systems, such as the Mossville Waterworks District No. 2, to monitor their systems for the presence of regulated contaminants and report monitoring results and deficiencies to the public and enforcement authorities. *See* 40 C.F.R. § 141.32(b)(1)-(2). EPA also has emergency authority to take a variety of emergency enforcement actions to address "imminent and substantial endangerment[s]" to public health if EPA determines that state and local authorities have not acted to protect the health of affected persons. 42 U.S.C. § 300i.

RCRA is the primary federal law regulating the handling and disposal of solid and hazardous waste from its creation, through its transportation, to its treatment and ultimate disposal. Those who generate and transport hazardous waste must manage and store these wastes in accordance with EPA regulations (or state regulations in authorized states[11]). More extensive requirements, including the requirement to secure a permit, apply to facilities for the treatment, storage, and disposal ("TSD") of hazardous wastes. 42 U.S.C. §§ 6901 *et seq.* The permitting regulations governing TSD facilities are required to include criteria for the siting of such facilities "as necessary to protect human health and the environment." 42 U.S.C. §

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[9] The State of Louisiana exercises broad permitting and other authority under the CWA framework pursuant to its state law, the Louisiana Water Control Law. La. Rev. Stat. Ann. §§ 30:2071 *et seq.*

[10] H.R. Rep. No. 93-1185, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6454.

[11] The State of Louisiana has implemented a permitting program according to the RCRA framework through its Hazardous Waste Control Law. La. Rev. Stat. Ann. §§ 30:2171 *et seq.*

6924(o)(7). In conjunction with the CAA, RCRA also regulates air emissions at hazardous waste TSD facilities. 42 U.S.C. § 6924(n).

RCRA empowers both EPA and members of the public to seek a remedy in the federal courts where the handling, storage, treatment, transportation, or disposal of solid or hazardous waste may pose an "imminent and substantial endangerment to health or the environment," 42 U.S.C. §§ 6972, 6973, including situations where the hazardous pollutants have migrated from the permitted facility to other areas, such as residential areas. RCRA also authorizes EPA to require facilities to undertake what that statute refers to as "corrective action" to address hazardous releases at facilities subject to RCRA, and RCRA permits must "require . . . corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u)-(v). EPA can issue an order requiring such corrective action as EPA deems necessary to protect human health or the environment, or EPA may commence a civil judicial action for appropriate relief. 42 U.S.C. § 6928(h).[12]

Another federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA", also known as the "Superfund" law), 42 U.S.C. §§ 9601 *et seq.*, focuses on cleaning up environmental contamination, as opposed to regulating the release of pollution through permits,[13] and is important to the government response to the alleged conditions in Mossville. CERCLA gives EPA broad authority to respond to releases of hazardous substances and resulting threats to the public health. 42 U.S.C. § 9604. EPA is authorized to perform (or to order responsible private parties to perform) immediate, emergency response actions as well as long-term clean ups of contaminated sites. Pursuant to the statute and a set of EPA regulations known as the National Contingency Plan ("NCP"), EPA can implement (or, again, order to be implemented) a broad range of response actions ranging from comprehensive investigation of environmental conditions, removal of contamination at the source (*e.g.*, contaminated soils or stockpiles of waste materials), treatment of contaminated groundwater, provision of alternative water supplies, and, where circumstances warrant, relocation of affected populations. Among the nation's most contaminated sites are those that EPA has evaluated and placed on the National Priorities List ("NPL"). EPA has begun to

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[12] Failure to comply with an EPA corrective action order is subject to monetary penalties pursuant to a civil enforcement action in court or EPA administrative proceedings. 42 U.S.C. §§ 6928(g), (h); 40 C.F.R. Part 22; 40 C.F.R. §§ 24.02(a), 24.19.

[13] Although CERCLA is not structured in the same way as the four statutes discussed above in terms of the federal/state relationship, many states, including Louisiana, have analogous authorities patterned after the federal scheme. *See* La. Rev. Stat. Ann. §§ 30:2271 *et seq*.

evaluate whether Mossville should be placed on the NPL and has completed the first step in that process, a Preliminary Assessment ("PA").

The programs described above are all supported by powerful enforcement authority through which the federal and state governments, as well as private citizens and groups through "citizen suits," can sue to halt illegal pollution (for instance, unpermitted emissions or emissions in excess of permit limits), to obtain civil penalties, or to abate conditions that may endanger the public. The major environmental statutes have similar enforcement mechanisms that include administrative measures (such as notices of violation and administrative compliance and penalty orders) and judicial measures (such as civil actions to obtain injunctive relief and substantial civil penalties as well as criminal enforcement authority). To take just one example, the CAA authorizes EPA to pursue several means of enforcement when it discovers a violation of the CAA, its regulations or permit requirements. EPA may bring a civil judicial action against owners and operators of sources regulated under the CAA in order to seek an injunction to halt violations of the statute and assess and recover civil penalties for each day of violation. 42 U.S.C. § 7413(b). EPA may also issue administrative orders requiring violators to comply with applicable requirements and assessing civil administrative penalties (up to a statutorily-prescribed amount). 42 U.S.C. § 7413(d)(1). Criminal penalties are also available for certain CAA violations. 42 U.S.C. §§ 7413(a)(3)(D) and (c).[14]

B. Legal Mechanisms to Challenge Government Action in Court

Under the above programs, members of the public are given broad rights of participation as well as the ability to challenge Government actions in court. Administrative proceedings such as rulemakings to promulgate or revise emission standards and permit proceedings typically involve notice to the public and an opportunity to comment on the state or federal government's proposed action. When the Government takes definitive administrative action -- be it the promulgation of a regulation, issuing a permit or some other action -- such actions typically are subject to challenge and judicial review in federal or state court.

Two bedrock principles underlie the United States' legal system, including the scheme of environmental regulation. First, final administrative action by the Government, or in some instances the Government's failure to act, is generally subject to review in the courts. Second, citizens have the right to petition the Government to take action. Any final action taken by the Government in response (including an express refusal to act) or a Government failure to respond is subject to judicial review. These rights are embodied in specific provisions of the various federal environmental statutes and implementing regulations[15] or, in the absence of such

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[14] The CWA and RCRA contain similar enforcement mechanisms. *See* 33 U.S.C. § 1319; 42 U.S.C. § 6928.

[15] These are discussed as pertinent *infra*.

provisions, can be enforced through the Administrative Procedure Act (APA).[16] Though the procedures differ somewhat, a federal agency generally is subject to suit with respect to actions it takes in performing duties mandated by statute (so-called non-discretionary or mandatory duties) as well as actions that are within the agency's discretionary authority.[17] In either case, federal courts are empowered to "hold unlawful and set aside" any final agency action that is, *inter alia*, arbitrary, capricious, an abuse of discretion, or not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory authority; or that has been taken without observing procedure required by law. 5 U.S.C. § 706(2)(A).

The APA also provides mechanisms to compel Government action. As to non-discretionary duties, federal courts can compel agency action that has been "unlawfully withheld." 5 U.S.C. § 706(1). Where an agency has discretionary authority, but not a mandatory duty, to act, interested persons must first administratively petition the agency to take such action. 5 U.S.C. § 555(b). Any final action the agency takes in response to a petition is subject to judicial review. *See* 5 U.S.C. § 706(2)(A). Moreover, if the agency fails "within a reasonable time" to respond to the petition, an interested person may seek judicial review of the agency's inaction and ask a court to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1).

C. The Protection of Constitutional and Civil Rights and United States Government Policies to Promote Environmental Justice

These Observations also address two components of the domestic legal system that partially overlap with, and in some cases extend, laws that protect the environment and public health. First, the United States has a thoroughgoing system for the vindication and protection of civil rights. The United States Constitution and related federal statutes, most notably Title VI of the Civil Rights Act of 1964, guarantee Mossville residents the right to equal protection under the law and prohibit Louisiana agencies from implementing the various environmental laws in a manner that results in discriminatory effects. These rights are enforceable in federal court and through EPA's administrative complaint process. *See infra* Section III.I.

Second, the United States has developed a set of executive policies to help ensure environmental and public health protection for all persons and communities in the United States by focusing attention on environmental and health conditions in minority and low-income

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[16] 5 U.S.C. § 552 *et seq.*; *see also* analogous provisions under Louisiana law, La. Rev. Stat. Ann. § 49:950 *et seq.* (Louisiana Administrative Procedure Act); La. Admin. Code tit. 33, § 901 (petitions for rulemaking); La. Admin. Code tit. 33, § 1103 (petitions for declaratory ruling).

[17] 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.")

communities. Executive Order 12,898[18] directs each federal agency, including EPA, "[t]o the greatest extent practicable and permitted by law" to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." The Executive Order further provides that: "Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin."[19]

Because minority, low-income, and indigenous populations have historically been underrepresented in federal agency decision-making, one aim of Executive Order 12,898 is to improve access to information and public participation of these populations in environmental decision making. EPA created the Office of Environmental Justice[20] to implement the Executive Order's policies. EPA's environmental justice efforts seek to recognize the needs of overburdened communities by decreasing environmental burdens, increasing environmental benefits, and working alongside community stakeholders to build healthy and sustainable neighborhoods. In January 2010, EPA Administrator Lisa P. Jackson identified the promotion of

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[18] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[19] A Presidential Memorandum that accompanied Executive Order 12,898 addressed the fact that environmental and civil rights statutes provide many opportunities for addressing environmental hazards facing low-income and minority communities. *See* Memorandum, "Executive Order on Federal Actions to Address Environmental Justice in Minority and Low-Income Population," Feb. 11, 1994. We note, additionally, that Executive Order 12,898 states that it does not create any new rights for individuals and is not legally enforceable against the United States or subject to judicial review.

[20] EPA defines "environmental justice" as the *fair treatment* and *meaningful involvement* of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. "Fair treatment" means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies. "Meaningful involvement" means that: (1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected. *Interim Guidance on Considering Environmental Justice*, Exhibit B, at 3.

environmental justice as one of EPA's key priorities,[21] and EPA has been a leader within the United States government in terms of working to incorporate environmental justice into its programs and policies. For instance, EPA recently developed Plan EJ 2014 (*see* Exhibit A), a four-year plan to develop stronger relationships with communities and increase EPA's effort to improve the environmental conditions and public health in overburdened communities. Another indicator of EPA's intensified efforts in this area is that EPA issued in July 2010 *Interim Guidance on Considering Environmental Justice During the Development of an Action* (*see* Exhibit B)[22] to further guide EPA's implementation of Executive Order 12,898.

These recent initiatives and EPA's environmental justice policies, in general, focus attention on the consideration that minority, low-income, and indigenous populations deserve the same degree of protection as everyone else from environmental and health hazards as well as equal access to the environmental decision making process.[23] As is pertinent here, EPA Region 6 has designated Mossville as an environmental justice community[24] so that, among other things, steps are taken to ensure that Mossville is not disproportionately burdened.

D. Addressing Contamination Issues Through State Law Tort Action

The domestic legal system also provides common-law causes of action in Louisiana state court to address injuries or damages caused by environmental contamination from Mossville-area industrial facilities. These common-law actions – such as trespass or nuisance actions or other claims commonly referred to as "toxic torts" – can result in court-ordered abatement of polluting conditions as well as monetary and other damage payments and are addressed more fully *infra* in Section III.H.

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[21] *See* Memorandum from EPA Admin. L. Jackson entitled *Seven Priorities for EPA's Future*, available at http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/.

[22] This guidance document applies to EPA actions that include regulations, policy statements, risk assessments, guidance documents, models that may be used in future rulemakings, and strategies that are related to regulations. Exhibit B at 1.

[23] Environmental justice policies are further promoted and supported through the Interagency Working Group on Environmental Justice which, among other things, coordinates the expertise and resources of federal government agencies working on environmental justice issues. The September 2010 meeting of the Interagency Working Group was attended by five cabinet members, including the Administrator of the EPA.

[24] Mossville has been so designated according to EPA Region 6's "EJ Index Methodology," which considers, *inter alia*, a community's percentage of minority and economically-stressed individuals and the likelihood of impact from industrial operations. EPA, *Degree of Vulnerability and Potential Environmental Justice Index Demographic Analysis System, Version 4.2.1, User's Guide* (Jan. 1996).

II. The Government Is Actively Responding to Conditions in Mossville

The United States takes the situation described by Petitioners seriously, views it with concern, and has been diligent in its efforts to evaluate and address potential environmental and public health conditions in Mossville since well before the filing of the Petition. These efforts include: actions taken by both EPA and the Louisiana Department of Environmental Quality ("LDEQ") through regulatory and enforcement programs to address pollutants emitted by Mossville facilities; ongoing investigations of environmental and health conditions pursuant to CERCLA or as part of studies conducted by the ATSDR and the Louisiana Department of Health and Hospitals ("LDHH"); and vigorous community outreach. As will be seen, the Government response in Mossville addresses multiple environmental media and includes input from the local community and industry. Moreover, EPA Region 6's specific efforts regarding Mossville have included many proactive steps to help ensure that Mossville is not disproportionately burdened.[25]

We discuss these initiatives in detail below and refer the Commission to the *Timeline of Government Actions* (Exhibit C) and EPA's October 2010 *Summary of Actions* statement (Exhibit D) for a broader overview of the completed, ongoing and anticipated initiatives by EPA, ATSDR, and various state agencies concerning Mossville.[26]

A. Government Action to Control Pollution in Mossville

The United States seeks to reduce emissions and potential exposure in Mossville through vigorous permitting requirements and enforcement programs. These efforts help to achieve and maintain air and water quality by improving compliance with federal and state pollution control statutes . They also may be directed at remediation of historical environmental contamination.

1. Controlling Pollution Through Permits

Several federal-state regulatory permit programs operate in the Mossville area. First, under the CAA, the LDEQ functions as the permitting authority and issues both pre-construction permits and operating permits to regulate industrial sources in the state. Permit applications are reviewed by the state to ensure that appropriate air pollution control is employed and that air quality will be protected. Proposed pre-construction permits and operating permits are generally

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[25] Such measures, that go beyond any statutory requirements, have included, *inter alia*, the funding and facilitation of environmental investigation and monitoring; measures to empower the Mossville community, including improved dialogue with and access to EPA decision makers; and improved communication, including through sessions for education and training. EPA Region 6 has also formulated several "action items" for Mossville. *See* www.epa.gov/region6/6dra/oejta/ej/ej_pdfs/ejmatrix.pdf.

[26] Another useful resource is the EPA Region 6 website for "Calcasieu Parish Activities," which includes Mossville and provides access to several of the documents referenced in these Observations. *See* http://www.epa.gov/region6/6sf/louisiana/calcasieu/la_calcasieu_calcinit.html.

opened for public review and comment before being issued by the LDEQ. EPA exercises oversight responsibilities over the LDEQ permitting programs by conducting program evaluations, reviewing proposed state regulations and Louisiana's State Implementation Plan ("SIP") submittals, and through EPA's authority to review individual permits to ensure compliance with the CAA and the SIP. EPA also works with the LDEQ to address concerns raised by public comments during the review period.

Mossville-area facilities[27] are subject to CAA requirements for both criteria pollutants and, most pertinent here, hazardous air pollutants (also known as air toxics).[28] According to Toxic Release Inventory submittals, between 1998 and 2009, emissions of air toxics decreased 36% in Calcasieu Parish. These reductions partially result from the promulgation and implementation of new federal control technology standards for hazardous air pollutants and state air toxics regulations that have been incorporated into air pollution permits. One example of how these requirements have been incorporated at local facilities is PPG Industries, which operates incinerators that burn RCRA hazardous wastes and are subject to requirements under both RCRA and the CAA. When PPG's RCRA permit for these units was renewed in 2009, the new permit incorporated, *inter alia*, new CAA requirements for hazardous air pollutants with more stringent requirements for emissions of dioxins/furans,[29] some metals, particulate, carbon monoxide and chlorine. Moreover, the permit was renewed only after PPG demonstrated compliance with the permit's technology-based emissions standards. In light of this modified permit, PPG is projected to decrease its emissions of hazardous air pollutants.[30]

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[27] The United States has focused its analysis in these Observations on the Mossville-area facilities specifically identified in the Petition. We note that while the Petition identifies 14 industrial facilities located near Mossville (*see* Pet. at 36, Table 1), one of those facilities (Air Liquide) has been out of operation since approximately March 2007 and another (PHH Monomers) appears to be a component of the PPG Industries facility and is not identified as a separate operating facility in government databases.

[28] Georgia-Gulf, Sasol, Conoco-Phillips, Lyondell, PPG Industries, and Entergy are all major sources of hazardous air pollutants subject to NESHAPs and, in some cases, the requirement to apply maximum achievable control technology (or MACT).

[29] Dioxins/Furans is the short name for a family of toxic substances that share a similar chemical structure and toxicity. They are reported together when they are found contemporaneously.

[30] Permit modifications for Mossville-area facilities, such as the above, are generally subject to public notice and comment procedures and information about them is publicly available through LDEQ permit databases. *See, e.g.,* *http://www.deq.louisiana.gov/apps/pubNotice/show.asp?qPostID=5683&SearchText=PPG&startDate=1/1/2005&endDate=12/15/2010&category*= and *http://www.deq.louisiana.gov/apps/pubNotice/show.asp?qPostID=5784&SearchText=PPG&startDate=1/1/2005&endDate=12/15/2010&category*= (regarding PPG Industries permit renewal and modification). There is no indication that Petitioners participated in the LDEQ process to renew and modify the PPG Industries permit.

In consultation with EPA and the state, and as a result of community concerns raised in 1998 and 1999 about hazardous air pollutants in Lake Charles, local industries voluntarily funded a special air toxics study. The Calcasieu Parish Air Monitoring Study added five air toxic monitoring stations in the area and analyzed thousands of samples (at a cost of $1.5 million) to better understand chronic levels of exposure and to take corrective action. In the two years of study, state standards for long term exposure were exceeded only twice, and in each instance corrective action was undertaken. Furthermore, national initiatives, such as a 2000 refinery compliance initiative and the 2001 Episodic Release Initiative, evaluated the cause and prevention of short term, acute exposure to hazardous air pollutants caused by flaring, upsets, and other unplanned emissions from multiple petroleum refining and chemical producing facilities in Louisiana and Texas (including the PPG Industries facility discussed above). As of 2000, various programs and practices resulted in a 28% reduction in the number of reported releases and a 48% reduction in the quantity of pollutants released to the benefit of communities located near such facilities.[31]

Second, under the CWA, EPA has authorized the LDEQ to administer the NPDES program for discharges in Louisiana. The LDEQ issues or renews NPDES permits while EPA oversight ensures that the LDEQ program is administered according to the CWA by reviewing draft permits, ensuring conformity of the LDEQ's program with the requirements of the NPDES program, and providing technical assistance. Of the facilities cited in the Petition, eight have individual NPDES permits issued by the LDEQ, all but one of which will be subject to renewal in 2012 or 2014. The amount of pollutants that can be discharged pursuant to an NPDES permit may be reduced during the renewal process for several reasons,[32] such as when applicable water quality standards are made more stringent or when a surface water body that does not meet applicable water quality standards is subject to a total maximum daily load ("TMDL") and more stringent effluent limitations.[33]

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[31] A description of the program and the results can be found at: http://www.epa.gov/region6/6en/a/erri07-5fin.pdf. Other EPA efforts are currently underway, such as EPA Region 6's work with groups like the Louisiana Bucket Brigade and initiatives by EPA's Office of Air Quality Protection and Standards to identify best management practices and to strengthen federal rules for reducing hazardous air pollutants, especially at refineries. These projects will eventually yield greater protection in communities located near refineries, such as Mossville.

[32] In addition to changes during permit renewal, NPDES permits include a "reopener" provision that allows the permitting agency (the LDEQ here) to terminate, modify, or revoke and reissue discharge permits.

[33] Although Petitioners do not raise any specific concerns about the NPDES permits program in the Mossville area, mechanisms are nonetheless in place to address them. Where such concerns are raised about the NPDES program or specific permitted facilities, EPA generally will review NPDES permit requirements and discharge reports to assess compliance, coordinate with the EPA Enforcement Division and state agencies, and, if warranted, coordinate with the Office of Environmental Justice and Tribal Affairs. As discussed *supra*, individual NPDES permits are also subject to public notice and comment, and final permits can be challenged in court.

EPA and the LDEQ have taken a number of actions under the CWA permitting program to reduce discharges of pollutants into waters in the Mossville area. In 2002, EPA approved several TMDLs for the Calcasieu Estuary, which introduced, among other things, pollutant loading requirements to reduce discharges of copper, mercury, and other pollutants in Bayou Verdine and the Calcasieu River that would previously have been exempt from such requirements.[34] Additionally, in 2008 EPA began regulating discharges from vessels (historically exempt under the NPDES program) through the issuance of the Vessel General Permit, which introduced effluent limits and monitoring and reporting requirements.[35] The Vessel General Permit is significant to the Mossville area because the nearby Port of Lake Charles is the 12th largest port in the nation and accommodates a high volume of oil tank, chemical tank, and freight vessels in the Calcasieu Ship Channel. Finally, based on citizens' concerns, the LDEQ added dioxin monitoring requirements to LPDES permits for facilities in the Calcasieu River area.

Finally, the LDEQ is authorized by EPA to issue and renew RCRA permits. Several of the facilities discussed in the Petition have state-issued RCRA permits as TSD facilities or as generators of hazardous waste. Some of these permits also require the permit holder to take corrective action to clean up hazardous waste contamination at their facility. All owners and operators of TSD facilities must submit a comprehensive permit application to the LDEQ that covers the full range of TSD standards, including, *inter alia*, air emissions provisions and a demonstration that any waste handling methods meet RCRA's requirements for protecting human health and the environment. As part of the public participation process prior to the issuance, modification or renewal of a permit, the LDEQ invites comments on a draft permit from the public and EPA. EPA's oversight process includes comprehensive review of some LDEQ permits, and the LDEQ must satisfactorily address or refute any EPA comments before issuing the final permit or making the modification.

2. Enforcement Initiatives

In order to achieve its enforcement goals, EPA employs several tools in both administrative and judicial fora to bring companies into compliance with the law, deter violations, and work to achieve supplemental and beneficial environmental projects that are not

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[34] *See Total Maximum Daily Load for the Calcasieu Estuary* (2002) available at: http://www.epa.gov/waters/tmdldocs/2613_calctoxics(f).pdf. Additional information as to EPA's establishment of these TMDLs is available at: http://epadev.induscorp.com/epadevdb_tmdl_web/waters_list.tmdl_report?p_tmdl_id=2613. As we address in Section III.G, EPA approved these TMDLs in accordance with the terms of a 2002 consent decree that settled federal litigation against EPA and the State of Louisiana and in which Petitioners intervened.

[35] Final NPDES General Permit for Discharges Incidental to the Normal Operation of a Vessel, 73 Fed. Reg. 79,473 (Dec. 29, 2008) available at: http://edocket.access.gpo.gov/2008/pdf/E8-30816.pdf.

required by law but enhance the environmental programs. From an enforcement standpoint, a look back at the last ten years reveals extensive enforcement activities in Calcasieu Parish, including the Mossville area. With specific reference to the industrial facilities identified in the Petition, EPA and the LDEQ have engaged in joint enforcement and compliance efforts, including conducting inspections, implementing reporting requirements, issuing notices of violation ("NOVs") and administrative orders, pursuing judicial enforcement actions, entering into judicially approved consent decrees (typically following opportunities for public comment), and pursuing the clean-up of contaminated sites.

The various regulatory programs require extensive and regular reports that enable EPA and LDEQ to monitor compliance. In addition to mandatory reporting requirements, Mossville-area companies are encouraged to participate in EPA's Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Program by implementing systematic self-audits and reporting programs at their companies.[36] EPA and the LDEQ also employ regular on-site inspections of facilities in and near Mossville to ensure their compliance with applicable requirements. These compliance inspections often concern more than one program and most of the facilities discussed in the Petition have been inspected by EPA and LDEQ multiple times, including EPA inspections as recently as July 2010.

EPA and LDEQ have also actively enforced applicable environmental requirements under the CAA, the CWA and RCRA in the Mossville area through administrative orders, RCRA corrective action (*i.e.*, clean up) requirements, and civil judicial action. Some form of enforcement action under these programs has been pursued as to most Mossville-area facilities, often by both EPA and LDEQ and often under more than one program. For instance, several of the facilities addressed in the Petition, among them Georgia Gulf and PPG Industries, have received RCRA corrective action orders from EPA or have been required to take corrective action as a condition of their state-issued RCRA permits.[37]

Resolution of administrative or civil judicial enforcement action typically results in appropriate injunctive (or remedial) action and penalties. For example, the PPG Industries facility near Mossville was subject to a 2003 EPA administrative penalty order (under multiple programs) for $99,000 and multiple compliance orders under the LDEQ water program with substantial penalties. Sasol entered into a federal consent decree under the CWA in 2000, under which it paid a $630,000 civil penalty; Sasol also paid $150,000 in penalties for violations of the state-administered RCRA program. Resolution of these enforcement actions may also provide

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[36] *See* http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy51100.pdf.

[37] Actions required to be performed by these facilities have included improved management of contaminated soil and waste waters, the operation of groundwater recovery wells, remediation of groundwater contamination, and soil excavation.

for supplemental environmental projects ("SEPs"), environmentally beneficial projects that violators perform that go beyond legally-mandated requirements and that are related to the initial violation.[38] Examples of SEPs obtained through enforcement settlements within the last 10 years at Mossville-area facilities include: (1) Air Liquide funding a $422,000 community-based project and donating a 2-acre parcel of land to be used as a fire and emergency response station; (2) ConocoPhillips spending approximately $500,000 on SEPs in communities surrounding their facilities, including in Lake Charles, Louisiana; and (3) CITGO Petroleum spending over $5 million on SEPs in a global settlement, a portion of which will have a positive impact on Mossville residents.

Finally, a significant aspect of the United States' enforcement of environmental programs in Mossville has been the cleanup of the Calcasieu Estuary and related EPA enforcement actions under CERCLA, including as described below an EPA administrative order and federal consent decrees addressing releases of hazardous substances from two Mossville-area facilities addressed in the Petition.[39] In 1999 through 2001, EPA began a CERCLA investigation for the Calcasieu Estuary Site (funded by the Superfund)[40] that included Bayou Verdine and Bayou d'Inde. In addition to being close to Mossville, EPA's estuary cleanup area addresses releases from facilities near Mossville and the investigation of site conditions included areas near Mossville pertinent to the Petition. The site investigation also generated data that EPA and ATSDR have reviewed as part of their effort to respond to concerns in Mossville.

After an initial round of sampling, ConocoPhillips began voluntary efforts to perform studies in the Bayou. Those studies identified an area in Bayou Verdine that contained elevated levels of ethylene dichloride. Pursuant to two EPA administrative orders issued in 2002, ConocoPhillips and Sasol North America began to address releases of hazardous substances from their facilities in the Mossville area. On October 12, 2010, the United States and the State of Louisiana lodged two consent decrees which settled claims for the Calcasieu Estuary Site against ConocoPhillips and Sasol North America under CERCLA. The first consent decree requires the companies to perform clean-up work of hazardous substances along Bayou Verdine (estimated to cost $10 million) and to reimburse Government response costs of approximately $4.5 million. The second consent decree settles natural resource damage claims for the injury to, and destruction or loss of natural resources pursuant to the CWA. The consent decrees were filed in the U.S. District Court for the Western District of Louisiana and were open for public comment

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[38] *See* http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsep-herm2-mem.pdf.

[39] The facilities are those owned by Sasol and ConocoPhillips. *See, e.g.*,Pet. at 36 (Table 1), 62-66.

[40] Costing in excess of $10 million, this investigation of the estuary was the largest and most expensive remedial investigation ever conducted by EPA Region 6.

for thirty days, after which the United States is permitted to seek court approval of the consent decrees.[41]

B. Government Evaluation of Conditions in Mossville

Largely in response to requests and concerns raised by the Mossville community, the United States also has undertaken extensive investigation of environmental and health conditions in Mossville. As we describe below, EPA is presently investigating under CERCLA conditions of potential contamination throughout Mossville and conducting an assessment of Mossville's drinking water system, while ATSDR has conducted numerous health assessments and continues to review data concerning potential exposures in Mossville.

1. EPA's Ongoing CERCLA Investigation

CERCLA authorizes EPA to investigate, remove and remediate any release of hazardous substances or remove a substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare or the environment. Since August 2009, EPA has been evaluating the Mossville area to determine whether Mossville should be placed on the NPL. A Preliminary Assessment ("PA") was initiated in August 2009 at the request of the community and completed in February 2010. EPA provided the community with basic information on the Superfund process and solicited input by inviting members of the community to participate in the PA and Site Investigation ("SI") processes through a series of public meetings. The PA focused on the review of existing data, identification of contaminants of concern, evaluation of potential receptor pathways, and the determination of whether to proceed to the more extensive SI. Based on the results of the PA, EPA determined to proceed to the next phase and is conducting an SI for Mossville.

Activities conducted as part of the SI have included: testing tap water; conducting field sampling from over 100 locations including residential taps, private wells, soils, sediments and the public water system; collecting supplemental field samples from residential taps, fish tissue; collecting passive soil gas samples; and re-sampling soil, tap water, surface water, and sediment for dioxins. The SI, which is expected to be complete in February 2011, will further document site conditions and contribute to EPA's determination as to whether Mossville should be added to the NPL.

In April 2010, EPA finalized the report of its investigation on the Mossville drinking water supply,[42] the results of which were shared with the Mossville community in August

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[41] The public comment notice informs the public, among other things, of its right to request a meeting in accordance with RCRA Section 7003(d), 42 U.S.C. § 6973(d). The notice also provides a website for the public to view a copy of the proposed consent decree. *See* http://www.federalregister.gov/articles/2010/10/19/2010-26238/notice-of-lodging-of-consent-decree-under-the-comprehensive-environmental-response-compensation-and.

2010.[43] EPA's evaluation found that the Mossville Waterworks Number 2 of Ward 4 water system is in full compliance with applicable drinking water requirements. The report also noted numerous improvements that could be made to the infrastructure and management of the system that would promote future compliance with the drinking water standards. EPA has stated that it plans to develop a program to help to address these issues.[44]

If placed on the NPL, the Mossville site would undergo further investigations under CERCLA to assess the nature and extent of public health and environmental risks associated with the site and to determine what response action, if any, is warranted. EPA has a range of response actions that it could select in light of its evaluation of the site. S*ee* discussion *supra* Section I.A.

2. Investigation of Exposures and Health Conditions in Mossville

Much of the investigation of exposures and health conditions in Mossville has been conducted by ATSDR, a federal public health agency. ATSDR's mission is to provide and use the best science, take responsive public health actions, and provide trusted health information to prevent harmful exposures and disease related to toxic substances. ATSDR performs Public Health Assessments and Health Consultations that consider a population's characteristics and the population's likely level of exposure to environmental contaminants to determine if site-related exposures are of concern. Where levels of concern are identified, ATSDR will recommend public health activities to reduce or mitigate these exposures. ATSDR also relies on these evaluations to provide the scientific justification for advising federal, state, and local agencies on actions to prevent or reduce human exposure to hazardous substances.

ATSDR typically conducts a Public Health Assessment for every site on, or proposed for, the NPL. CERCLA also authorizes ATSDR to initiate a variety of public health response actions including pilot and epidemiologic studies, registries, health surveillance (such as medical monitoring), and health education. *See* 42 U.S.C. § 9604(i). ATSDR generally works with communities and other appropriate entities in designing the specific public health response actions for a site's target population.

ATSDR has undertaken and continues to carry out substantial work in Mossville, including the evaluation of dioxin exposure levels. Initially, ATSDR became involved with assessing dioxin levels from biomonitoring data from Calcasieu Parish residents supplied to EPA

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[42] EPA, "Water System Evaluation of the Mossville Waterworks Number 2 of Ward 4 Water System, Calcasieu Parish, LA," April 29-30, 2010.

[43] *Summary of Actions*, Exhibit D, at 1.

[44] *Summary of Actions*, Exhibit D, at 2.

by a local law firm in 1997. After confirming that 3 of the 11 Calcasieu Parish residents who lived near Mossville had elevated dioxin levels,[45] ATSDR initiated an investigation in and around Mossville, and the biomonitoring of 28 Mossville residents indicated that 12 had elevated dioxin levels.[46] A second investigation a few years later retested many of the initial 28 participants and also included extensive environmental sampling in and around their homes, including indoor and attic dust, well water, and residential soil.[47] ATSDR also compiled data from a lengthy questionnaire to residents to assess participants' residential and occupational histories, lifestyle, and other factors that may influence their exposure. This investigation confirmed that some residents continued to have elevated levels of dioxin; however, the individuals with high levels were all older than 45 years of age, while those who did not have elevated levels were all under 45 years of age. These findings, along with a lack of environmental levels above guidelines used to determine if further actions are warranted, led ATSDR to conclude that those with excess levels were exposed historically and that no compelling information indicated a current problem.

In 2002, ATSDR initiated another study to biomonitor for dioxin exposure throughout Calcasieu Parish. This multimillion dollar study, using both a comparison parish in Louisiana (Lafayette Parish) and nationally representative data, found that residents in Calcasieu Parish had dioxin levels similar to those in the comparison populations. These findings were the same for populations near the industrial corridor west of Lake Charles, including Mossville. ATSDR also monitored as part of this exposure study, and is still analyzing, polychlorinated biphenyls and volatile organic compounds ("VOCs").[48]

EPA and the LDEQ, in conjunction with industry, have also conducted exposure monitoring for VOCs and dioxin in Calcasieu Parish, as they undertook in 2000 a pilot study to monitor for 104 VOCs and 24 targeted dioxin and dioxin-like compounds at five locations (one of which was located in Mossville). The results indicated that dioxin concentrations in Calcasieu Parish were consistently lower than the concentrations for industrialized urban areas. Concentrations in Calcasieu Parish were also significantly lower than the EPA acute action level.

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[45] *See* Health Consultation, Calcasieu Parish (Calcasieu Estuary), Lake Charles, Calcasieu Parish, Louisiana, Oct. 16, 1998 (http://www.atsdr.cdc.gov/HAC/pha/PHA.asp?docid=720&pg=0).

[46] *See* Health Consultation, Exposure Investigation Report, Calcasieu Parish (Calcasieu Estuary), Lake Charles, Calcasieu Parish, Louisiana, Nov. 19, 1999 (http://www.atsdr.cdc.gov/HAC/pha/PHA.asp?docid=712&pg=0).

[47] *See* Health Consultation, Exposure Investigation Report, Calcasieu Parish (Calcasieu Estuary), Lake Charles, Calcasieu Parish, Louisiana, March 13, 2006 (http://www.atsdr.cdc.gov/HAC/pha/CalcasieuEstuary/CalcasieuEstuaryHC031306.pdf).

[48] *See* Serum Dioxin levels in Residents of Calcasieu Parish, Louisiana, October 2005 (http://www.atsdr.cdc.gov/document/Calcasieu%20Final%20Report.pdf).

The average concentration of dioxins/furans in the air for the Mossville monitor was also lower than the concentration for industrialized urban areas.[49]

Public health monitoring and evaluation encompassing the Mossville area also includes a parish-wide cancer study by the LDHH, with the support of federal agencies, which determined that "there is no clear pattern indicating that Calcasieu Parish has any consistently higher rate for most cancers. The exceptions are melanoma of skin for whites and cancer of the lung for women."[50] Additionally, industries have undertaken voluntary monitoring of fish and shellfish in the Calcasieu Estuary, and the LDEQ and LDHH have issued public advisories when appropriate.[51]

C. United States Outreach to the Mossville Community

Beginning as early as 1997 and continuing today, the United States has undertaken a variety of measures to reach out to members of the Mossville community, to bring together relevant parties (government, citizens, and industry), and to identify and respond to environmental and human health concerns in the Mossville area. Such efforts are an essential component of EPA's environmental justice strategy to communicate with and empower members of potentially overburdened communities. To better coordinate these efforts, EPA established several workgroups covering a broad array of issues (environmental characterization, demographics, health data, health education/outreach, and media).

In addition to these regular meetings with the public, and the community's increased access to EPA decision-makers, EPA has intensified community outreach by planning and sponsoring workshops about the regulatory and permitting process to enhance the community's ability to participate in the public comment process. EPA has also been working with various community-based organizations to develop a proposal to improve access to healthcare for industrial workers and the community and to develop an industry partnership for such a proposal. EPA also continues to evaluate issues concerning the sustainability of the Mossville community, including by developing industry support for a plan to increase buffer zones between industrial

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[49] Results of the Calcasieu Parish Air Monitoring Study have been compiled in the 2001 Annual Report (July 16, 2002) and the 2002 Annual Report (Mar. 21, 2003). For further information about the study and analysis of certain of the results, *see also* Gibbs, Hansen & Ferrario, *Ambient Air Sampling for Dioxins, Furans and Coplanar PCBs in an Urban Industrialized Corridor in Calcasieu Parish, Louisiana* (2003) (available at: http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=435875).

[50] *See* Health Consultation, Assessment of Cancer Incidence from the Louisiana Tumor Registry - 1988 to 2004, Calcasieu Parish, Louisiana, September 27, 2007 (http://www.atsdr.cdc.gov/hac/pha/CalcasieuCancer/CalcasieuCancerHC92707.pdf).

[51] For a representative advisory, *see* http://www.deq.louisiana.gov/portal/LinkClick.aspx?fileticket=81zJeEBxJpE%3d&tabid=1631.

and residential areas and to enhance opportunities for residents to relocate. *See Summary of Actions*, Exhibit D, at 2.

ATSDR's outreach efforts within Mossville and Calcasieu Parish have included working through community leaders and groups representing the residents, including Petitioner Mossville Environmental Action Now ("MEAN"), Restore Explicit Symmetry to Our Ravaged Earth ("RESTORE"), and Calcasieu League for Environmental Action Now ("CLEAN"). A meeting with members of these organizations was held at ATSDR headquarters in Atlanta on December 8, 2009, to identify ways ATSDR and the leaders could work together to reach out to the community and address health concerns while ATSDR continued its data analysis. Monthly email updates, direct mail, and community visits keep the group engaged. In addition, two of the concerns identified by the community -- health education for local community and access to health care -- resulted in a month-long health promotion campaign in Mossville that covered numerous health topics and the creation of a workgroup to provide technical assistance to Mossville community leaders in pursing access to additional health care.[52] This workgroup regularly advises a subcommittee of Mossville/Calcasieu Parish medical, financial, and education personnel; local elected officials; and industry liaisons and business leaders.[53] The subcommittee was formed to work toward, among other things, creating a primary care wellness clinic in Mossville.

In sum, substantial Government effort has been devoted to addressing the environmental, public health, and exposure concerns raised in the Petition, including efforts to better enable members of the Mossville community to engage in available administrative processes.

III. <u>The Petitioners Have Not Exhausted Domestic Remedies Available to Them</u>

A. The Commissions Standards for Exhaustion

The foregoing has shown that the United States has brought substantial resources to bear in response to the serious concerns that have been raised about Mossville. This section addresses the Petitioners independent and substantial burden to exhaust the many remedies available to them under domestic law to address their concerns before invoking the Commission's authority. For their claims to be admissible, Petitioners must demonstrate that "remedies of the domestic legal system have been *pursued* and *exhausted*." Rules of Procedure, Art. 31(1) (emphasis added); *see also* Statute, Art. 20(c) (Commission must "verify . . . whether the domestic legal

[52] This workgroup is in addition to those discussed above.

[53] This workgroup includes: the manager of the Louisiana Bureau of Primary Care Rural Health, EPA's Region 6 CERLA Director, EPA Region 6 Environmental Justice Community Involvement Office, ATSDR's Chief of Health Promotion and Community Involvement, and members of MEAN (two of whom also serve as Chair and Co-Chair on the sub-committee).

procedures and remedies . . . have been *duly applied and exhausted*.") (emphasis added). The Petitioners must make an exhaustion demonstration regarding all domestic legal procedures that are suitable for remedying the alleged violations, in whole or in part. The Commission's rules enumerate three narrowly circumscribed exceptions to this vital requirement. Specifically, exhaustion of domestic remedies is not required only upon a showing that: (1) relevant domestic legislation "does not afford due process of law"; (2) the Petitioners have "been denied access" or were otherwise "prevented" from pursuing remedies under domestic law; or (3) there has been "unwarranted delay" in rendering a final judgment under domestic law. Rules of Procedure, Art. 31(2); Report No. 43/10 at ¶ 25. The Petition does not meaningfully address this provision and does not show that any of these exceptions apply here.

Petitioners rely exclusively, then, on prior decisions of this Commission suggesting that they may be excused from pursuing a particular avenue if they can show that they would have no reasonable prospect of success. *See* Pet. at 14; Report No. 43/10 at ¶ 32. Before Petitioners can be excused from exhausting a particular remedy, they must still identify and address for the Commission's evaluation the remedy in question and present "evidence . . . upon which [the Commission] can effectively evaluate the likely outcome" of a claim pursuant to domestic procedures as to which the Petitioners contend they have no reasonable prospect of success. Report No. 43/10 at ¶ 32. Absent a showing by Petitioners that their specific claims have not succeeded and could not succeed in United States administrative fora and courts, they have failed to satisfy this requirement.

B. Petitioners Must Pursue and Exhaust *All* Remedies Available to Them, Not Just Potential Claims Against the United States Federal Government

The Petition alleges violations of the Petitioners' rights that stem from environmental and health conditions that affect the Mossville community. The Petitioners have cast their claims, variously, as a matter of "environmental racism" or disproportionate impacts resulting from an imperfect system of environmental regulation. The issues that Petitioners raise are real, significant, and have received (and are receiving) serious consideration within the United States Government as the foregoing shows. However, Petitioners cannot evade the exhaustion requirements of Article 31(1) simply by describing their claim in such a narrow and specific way -- as strictly a matter of "environmental racism" -- that it does not match a single, all-encompassing cause of action that could be pursued in United States courts. Rather, all of Petitioners' complaints arise out of alleged contamination of their environment, and the assertion that state and federal legislation and regulation have failed to address that contamination adequately. If, as is the case, domestic remedies exist that would, if successfully pursued, abate or eliminate that contamination or otherwise address the harms alleged in the Petition, the Petitioners must pursue those remedies until they have been exhausted before resorting to this Commission.

In this regard, the exhaustion of remedies analysis under the Rules and Statute of this Commission requires this Commission to examine the *full* array of domestic remedies that can address the Petitioners' core claim that the "damaging effects of industrial pollution and contamination . . . interferes with their fundamental human rights." *See, e.g.,* Pet. at 8. In conducting such an examination, the Commission need not and should not arbitrarily narrow its consideration of the avenues Petitioners could pursue.[54] For the exhaustion requirement, it is immaterial under what body of law, using what names for causes of action, or against whom the Petitioners could seek relief. Before coming to this Commission, they must pursue domestic remedies that would reduce or eliminate their alleged injuries, in whole or in part.

As we set forth below,[55] remedies that address Petitioners' root concern – exposure to industrial pollution and contamination -- are available under federal and state statutes and regulations that protect the environment, public health and civil rights; under the common law (*e.g.*, under nuisance, trespass, and other such "toxic tort" theories); and in federal and state courts and administrative bodies. For the exhaustion requirement to be genuine and meaningful, Petitioners must pursue remedies against any entity that can be compelled to act to address their concerns, be it the United States, the State of Louisiana, or private Mossville-area industries. Thus, to the extent a citizen suit under a federal environmental statute or a nuisance suit under state common law against a polluter could lead to a court order to abate the pollution at issue, a measure of the Petitioners' alleged injuries would be addressed. Such available remedies, therefore, must be pursued and exhausted before Petitioners' claims can be deemed admissible.

Indeed, the Commission correctly concluded as much in deeming inadmissible the Petitioners' claims under Article I and Article XI and deeming not colorable the Petitioners' claim under Article IX. The Petitioners offer no basis for the Commission to reconsider those rulings in their Additional Observations. The United States further submits that remedies available to the Petitioners would just as effectively address the claims that the Commission has so far deemed admissible under Article II and V. In short, a domestic remedy that addresses the underlying environmental condition *ipso facto* addresses any right under the American Declaration (be it to life, equality, health or privacy) that is allegedly infringed by the environmental condition in question. Consequently, and for the reasons addressed below, the

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[54] Petitioners own concession that "[u]nder United States administrative laws, it is possible for citizens to seek judicial review of the actions of an agency, such as EPA" suggests a broad array of potential remedies. Pet. at 29. Petitioners, of course, have done this themselves. *See infra* Sections III.E and III.G.

[55] The following supplements the previous arguments concerning exhaustion of remedies at pages 5-7 of the Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Mossville Environmental Action Now, Petition No. 242-05, Precautionary Measure No. 25-05 ("United States First Response"), which response is incorporated herein by reference.

Commission should also have deemed Petitioners' claims under Articles II and V to be inadmissible.

The Petitioners claim that they have no recourse under domestic law, despite the fact that the United States has a robust system to protect the environment, public health and civil rights that includes the ability to bring judicial actions of various types against federal and state agencies as well as polluters. In the face of a federal legal system with, *inter alia,* CERCLA, the CAA, the CWA, the Safe Drinking Water Act, RCRA, and Title VI of the Civil Rights Act of 1964 (not to mention complementary authorities under Louisiana law), Petitioners have much to explain regarding their pursuit and exhaustion of domestic remedies. As will be seen in the examples that follow, the ability to seek legal remedies is closely related to, and in some cases predicated upon, the broad rights of the public to meaningfully participate in all aspects of environmental regulation -- from standard-setting to facility siting to permitting to enforcement. The public can also petition the Government to take action on environmental matters and seek review in court of the resulting Government action or inaction. Petitioners give these considerable powers short shrift, however, confining their discussion to a footnote with a multitude of citations to the federal statutes and regulations that authorize the legal remedies they have failed to pursue. Pet. at 24 n.48.

The remainder of this section addresses several categories of domestic legal remedies that Petitioners could pursue, including: "citizen suits" under the environmental statutes against EPA or industrial facilities in Mossville; remedies related to EPA's assessment and possible clean up under CERCLA; challenges to the establishment or revision of pollution control standards applicable to Mossville-area industries; challenges to the issuance, renewal or modification of permits for Mossville-area industrial facilities; and administrative petitions for further Government action regarding environmental conditions in Mossville and judicial challenges of Government action (or inaction) that results. This section also considers various actions that could be pursued under state law, including actions that are analogous to those available under the federal environmental statutes as well as state common-law theories (*i.e.*, nuisance and other actions, commonly known as "toxic torts"). Finally, this section addresses available remedies under federal civil rights laws that Petitioners have not pursued.

C. Petitioners Can File Citizen Suits Under the Federal Environmental Statutes[56]

Petitioners ignore completely a broad category of actions they could pursue to address their concerns about environmental conditions in Mossville. Every major environmental statute on pollution control applicable to the facilities and conditions at issue in Mossville authorizes "citizen suits" whereby Petitioners could file an action against Mossville industries of concern

[56] This section focuses on provisions under the federal statutes, but we note that additional remedies are available under analogous provisions of the Louisiana Environmental Quality Act (EQA), La. Rev. Stat. Ann. § 30:2026.

for violating applicable requirements or against EPA to compel the performance of a non-discretionary (*i.e.*, mandatory) duty under the statute in question. The Petitioners observe that the Mossville-area facilities of concern are regulated by and have permits issued pursuant to the CAA, the CWA, and RCRA. Citizen suits under these statutes are vital to the United States' system of environmental regulation, not least because citizen suits complement and supplement government enforcement by enabling those most affected by pollution to ensure compliance with environmental protection laws when federal, state, and local governments do not. *See Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (as to the CAA citizen suit provision, "Congress [has] made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests.").

The citizen suit provisions of these major federal pollution control statutes are patterned after one another and authorize the same two basic types of claims.[57] The first type of claim is against any person alleged to be in violation of, *inter alia*, the statute, an implementing regulation, or a permit condition. Courts are authorized in citizen suits under these provisions to enforce the statutory, regulatory, or permit requirement that is alleged to have been violated and to assess appropriate civil penalties. The second type is a claim against EPA for failing to perform a duty under the statute that is not discretionary (also known as a mandatory duty). The statutes authorize courts to order EPA to perform the mandatory duty in question. *See generally* 42 U.S.C. § 7604 (CAA); 33 U.S.C. § 1365 (CWA); 42 U.S.C . § 6972 (RCRA).[58] Another important element of such claims is that courts are authorized to award citizen plaintiffs, as appropriate, their costs of litigation, including attorney fees. *See, e.g.*, 42 U.S.C. § 7604(d).

The RCRA citizen suit provision differs from those in the CAA and the CWA in that it authorizes a third type of claim against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).[59] Courts have found that the threshold for circumstances that "may present an imminent and substantial endangerment" is not especially

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[57] The Safe Drinking Water Act's citizen suit provision, 42 U.S.C. § 300j-8, is also similarly structured and authorizes suits against any person alleged to be in violation of its requirements for the provision of safe drinking water and against EPA for failure to perform a duty that is not discretionary. This provision is pertinent given the Petitioners' claims concerning unhealthy drinking water. *See, e.g.*, Pet. at 66.

[58] Such a claim is similar to claims under the APA, 5 U.S.C. § 706(1), discussed *infra* Section I.B.

[59] The terms "solid waste," "hazardous waste," and "disposal" are very broadly defined, *see* 42 U.S.C. §§ 6903(3), (5), (27), and likely would encompass the pollutants and various means by which Petitioners assert those pollutants have contaminated the Mossville community.

high.[60] Were Petitioners to pursue and succeed in such a suit, the available remedies could address many, if not all, of their claimed injuries, as the court is authorized to enforce all waste disposal requirements applicable to the facility, restrain any further contribution to the endangerment by the facility, order "such other action as may be necessary" (including a clean-up of the facility) and impose appropriate civil penalties. 42 U.S.C. § 6972(a).

This is but one example of the type of claim that the Petitioners are required to pursue and exhaust before proceeding to this Commission. There is no indication that they have done so, even though the Petition alleges that Mossville residents are endangered as a consequence of hazardous pollutants released from the industrial facilities there.[61] Moreover, as the Petition amply demonstrates, Petitioners are well-acquainted with the operations and pollutants generated by Mossville-area industrial facilities, including the permits they possess and the volumes and means of release of some pollutants. Petitioners have undertaken to determine which releases from particular facilities have caused some of the alleged contamination in Mossville and have prepared a report analyzing connections between specific industrial facilities and contamination in Mossville. *See* Pet. at 36, 51-76 (discussing *Industrial Sources of Dioxin Poisoning in Mossville, Louisiana: A Report Based on the Government's Own Data* (2007)).

Thus, despite their demonstrated ability to gather pertinent information about the facilities in question and their understanding of the available legal tools, Petitioners do not address the availability of citizen suits against these facilities, let alone present evidence that they have exhausted this remedy or that any such action does not have a reasonable prospect of success. Given the availability of such suits and Petitioners' failure to demonstrate that they have pursued them, their claims are inadmissible.

D. Petitioners Have Remedies Available Under CERCLA and that Process is Ongoing

We have already discussed, *supra* Section II.B, the manner in which the United States, through EPA and ATSDR, is responding to environmental contamination issues in Mossville through CERCLA. EPA's process is underway to determine whether Mossville should be added to the NPL and whether a Superfund cleanup is appropriate. This process is largely a

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[60] An imminent endangerment "does not require actual harm, but threatened or potential harm" and "does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present." *Cox v. City of Dallas, Texas*, 256 F.3d 281, 299 (5th Cir. 2001) (internal quotations omitted). Further, "the endangerment must be ongoing, but the conduct that created the endangerment need not be." *Id.* (quoting *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1316 (2d Cir. 1993)). An endangerment is substantial if it is "serious." *Cox*, 256 F.3d at 300.

[61] *See, e.g.*, Pet. at 23 ("The health and environment of Mossville residents are clearly jeopardized by the multitude of toxic chemicals, each with its own harmful effects, released by surrounding industrial facilities.").

consequence of the Government's responsiveness to citizen involvement.[62] EPA has completed a Preliminary Assessment and is currently preparing a more extensive Site Investigation. If as a result of these evaluations EPA were to place Mossville on the NPL, a comprehensive investigation of environmental conditions in Mossville would be undertaken and EPA could take (or order to be taken) a wide range of response actions ranging from removal of contamination at the source to treatment of contaminated groundwater or, where circumstances warrant, relocation of affected populations. Clearly, until this process is complete, it is premature to make any determination as to whether Mossville residents have been negatively impacted by the United States' system of environmental regulation as alleged.

If EPA takes final action not to place Mossville on the NPL, that final action by EPA would be subject to judicial review under the APA, 5 U.S.C. § 706(1), to ensure that EPA's decision accords with the law and is not arbitrary or capricious. Similarly, if EPA does place Mossville on the NPL and selects or performs a response action for the site that Petitioners believe to be inadequate or otherwise not in accordance with CERCLA, they could petition EPA to take further action and obtain judicial review of EPA's response. As these CERCLA processes are presently underway, and given the Petitioners' ability to challenge in court EPA decisions regarding Mossville to which they object, there remain legal remedies to be pursued and exhausted that go to the heart of the claims underlying the Petition.

E. Petitioners Can Comment On and Challenge Environmental Standards Applicable to the Industrial Facilities in Mossville

The Commission correctly acknowledged one category of domestic remedies that Petitioners can pursue, and have in fact successfully pursued: judicial challenges to environmental regulations that establish the standards applicable to Mossville-area industries. As sources of air pollutants regulated by the CAA, pollutant discharges to waters governed by the CWA and hazardous waste generation, treatment, storage and disposal regulated by RCRA, the facilities about which Petitioners complain must comply with an array of standards that, when initially promulgated or later revised, are subject to "notice and comment" rulemaking requirements and judicial review. Regulations may be promulgated or revised by federal or Louisiana agencies. In either case, domestic administrative law calls for notice to the public and an opportunity to comment on proposed regulations (be they new or modified) and allows any final regulations to be challenged in court. Standards that do not satisfy applicable legal

[62] Had EPA not initiated a PA for Mossville, Petitioners could have "petition[ed] [EPA] to conduct a preliminary assessment of the hazards to public health and the environment," as to which EPA "shall, within 12 months after the receipt of any such petition, complete such assessment or provide an explanation of why the assessment is not appropriate." 42 U.S.C. § 9605(d). EPA's compliance with this provision is subject to judicial review under the CERCLA citizen suit provision, 42 U.S.C. § 9659(a)(2), or the APA, 5 U.S.C. § 706(1), as appropriate.

requirements can be vacated by the court or remanded to the agency for revision consistent with the court's decision.

Furthermore, as the Commission also correctly noted, some standards adopted by regulation under the CAA, the CWA and RCRA, and applicable to Mossville-area facilities, require EPA to consider public health. On this point, Petitioners greatly oversimplify the United States' environmental protection system as presuming that regulatory permits are "protective of human health and environment via technological controls already employed by similar polluting companies." Pet. at 19. This critique misses the mark, not least because it mischaracterizes the United States' system of environmental protection. Numerous environmental standards are premised upon public health considerations, either exclusively or in combination with technology-based requirements. Moreover, even if a regulatory standard is not developed pursuant to a public health-based directive, technology-based standards generally are based upon the best-performing pollution controls in a given industry and, thus, can be stringent and highly effective in reducing the amount of pollution that is released.

For example, several CAA provisions applicable to the emissions of Mossville industries require standards that take account of public health. The central feature of the CAA is the NAAQS program and the regulation of six pollutants known as "criteria pollutants" that EPA has determined "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The national primary ambient air quality standards to regulate these pollutants must be based on criteria that provide "an adequate margin of safety, [and] are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The standards are subject to review, and revision as appropriate, every five years. *Id.* (d)(1).

Additionally, several of the facilities operating near Mossville are sources of listed hazardous air pollutants regulated by Section 112 of the CAA.[63] As discussed *supra*, these standards (NESHAPs) can be extremely stringent in the first instance, as they are numerical limits representing the maximum degree of emissions reduction achievable by the *best - performing* sources in the relevant category of sources. The statute provides a further mechanism whereby EPA must revisit within eight years these technology-based standards to ensure that they "provide an ample margin of safety to protect public health." 42 U.S.C. § 7412(f)(2). The CAA also authorizes EPA to establish NESHAPs for smaller sources of hazardous pollutants, known as "area" sources, if EPA determines that such sources present "a

[63] To the extent a Mossville-area facility emits a pollutant that is not listed, Petitioners can petition EPA to add that pollutant to the list of hazardous air pollutants. 42 U.S.C. § 7412(b)(3).

threat of adverse effects to human health or the environment (by such sources individually or in the aggregate)." 42 U.S.C. § 7412(c)(3).[64]

When EPA develops emission standards under the CAA or when EPA periodically reviews and revises such standards as required by law, it proceeds through rulemaking that provides notice to the public and the opportunity for the public to comment.[65] The Mossville industries about which Petitioners complain are subject to many standards under the various environmental programs (some of which, as noted, are health-based), and the Petitioners have had or will have a full opportunity to participate in administrative rulemaking that promulgates or revises applicable standards. The Petitioners are also able to seek judicial review of any standard or revision to a standard that they believe does not comply with the applicable statute or is insufficiently protective of public health.

Two concrete examples arising under the CAA illustrate Petitioners' ability in this regard. First, as this Commission has observed, the Petitioners have effectively and successfully challenged EPA's hazardous air pollutant emissions standard for manufacturers of polyvinyl chloride and copolymer (the "PVC NESHAP"). After submitting comments on EPA's proposed PVC NESHAP, Petitioners filed in federal court a petition for review of EPA's final regulation and prevailed. The court found that EPA improperly set emissions limits for the hazardous air pollutants emitted from PVC manufacturing facilities, vacated EPA's standard, and ordered EPA to reconsider and, at a minimum, properly explain the standards it set. *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1243 (D.C. Cir. 2004). Unsatisfied with the pace of EPA's action in responding to the court's order, Petitioners filed a second lawsuit to force faster action by EPA (in a different federal court, this time under the CAA citizen suit provision, 42 U.S.C. § 7604) and secured a settlement agreement whereby EPA has agreed to issue emissions standards for hazardous air pollutants from PVC manufacturing facilities by January 2012.[66] The Commission's analysis of the exhaustion requirement in Report No. 43/10 does not address this ongoing case, which is a clear indication that Petitioners have not exhausted their remedies.

The second example concerns an emissions standard applicable to Mossville-area facilities. Despite the opportunity to do so, Petitioners did not participate in an EPA rulemaking

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[64] We also note that EPA standards for solid waste incinerators (which operate proximate to Mossville) must include for new units siting requirements that "minimize, on a site-specific basis, to the maximum extent practicable, potential risks to public health or the environment." 42 U.S.C. § 7429(a)(3).

[65] The same is also generally true when EPA promulgates or revises standards under the CWA and RCRA.

[66] The Petition (Table 1, at 36) identifies two PVC manufacturers among the 14 facilities it addresses: Certainteed and PHH Monomers. Although Certainteed is subject to the NESHAP for vinyl chloride, 40 C.F.R. part 61, subpart F, it is not a "major" source of the hazardous air pollutants covered by the PVC NESHAP. PHH Monomers does not appear in EPA's database of permitted facilities.

that considered revising that standard, nor did they participate in later litigation challenging EPA's decision not to revise it. Ethylene dichloride and vinyl chloride monomer manufacturers identified in the Petition are subject to EPA's 1994 NESHAP for the synthetic organic chemical manufacturing industry.[67] EPA reviewed that standard as required by the CAA to determine whether health-based standards (also known as "residual risk" standards) were required "to provide an ample margin of safety to protect public health." 42 U.S.C. § 7412(f)(2)(A). Based upon, *inter alia*, a comprehensive residual risk assessment, EPA decided that such standards were not warranted, and its determination was upheld by the court. *NRDC and Louisiana Environmental Network v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008).[68] Petitioners cite this decision as a supposed indication of the futility of challenging such standards. *See* Add'l Observ. at 15. However, their own success in the PVC NESHAPs litigation before the same court belies this claim. It is furthermore unknown, because of their failure to pursue this remedy, what impact Petitioners' involvement in EPA's rulemaking or the subsequent litigation could have had on the outcome.

We briefly note here similar processes and opportunities for Petitioners under the CWA and RCRA. Under the CWA, dischargers of toxic pollutants that EPA has determined are injurious to human health are subject to effluent standards that must "be at that level which the Administrator determines provides an ample margin of safety." 33 U.S.C. § 1317(a)(4). These standards are reviewed and, if appropriate, revised at least every three years. 33 U.S.C. § 1317(a)(3).[69] Under RCRA, standards for generators of hazardous waste and the owners and operators of hazardous waste TSD facilities are to be promulgated "as may be necessary to protect human health and the environment," 42 U.S.C. §§ 6922(a), 6924(a), including with respect to identifying an "acceptable location of new and *existing* treatment, storage, and disposal facilities as necessary to protect human health and the environment." 42 U.S.C. § 6924(o)(7) (emphasis added). Such regulations are subject to revision "from time to time." 42 U.S.C. § 6924(o). As under the CAA, Petitioners have the ability to participate in administrative proceedings related to these standards and can challenge in court EPA's final standards.

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[67] 59 Fed. Reg. 19,402 (Apr. 22, 1994) (codified at 40 C.F.R. part 63, subparts F, G, and H). Incidentally, this technology-based standard has reduced hazardous air pollutant emissions from controlled emission points by 95-98% and total hazardous air pollutant emissions from sources subject to it by approximately 500,000 tons per year. *See* 71 Fed. Reg. 34,422, 34,425 (June 14, 2006).

[68] *See id. at* 1083 ("If EPA determines that the existing technology-based standards already provide an 'ample margin of safety,' then the agency is free to readopt those standards during a residual risk rulemaking."), 1086 ("EPA adequately responded to each of the alleged deficiencies in the residual risk assessment.").

[69] *See also* 33 U.S.C. § 1311(m)(2) (requiring "adequate margin of safety" in effluent limitations in discharge permits), 33 U.S.C. § 1313(d) (where necessary to achieve water quality standards, requiring states to develop a load of pollutants that includes a "margin of safety").

Petitioners' other arguments as to why they lack effective access to domestic legal remedies are also unavailing and do not undercut the fundamental correctness of the Commission's inadmissibility finding. Petitioners first complain about the "protracted" nature of litigation to challenge environmental regulations. Add'l. Observ. at 8. However, the unremarkable observation that it takes time, even significant amounts of time, to pursue domestic legal remedies does not render those remedies ineffective, unavailable, or lacking a reasonable prospect of success. To the contrary, Petitioners succeeded in invalidating an EPA air emission standard that they believed was too lax. They pursued further domestic remedies by filing, and then settling, a second lawsuit that sought to compel EPA to take action (*i.e.*, issue new PVC standards) that the Petitioners contended was taking too long.[70]

Petitioners also claim that they have no domestic remedies to pursue because courts must give EPA, as the expert agency, a degree of deference when evaluating a challenge to an EPA regulation. Add'l Observ. at 16-17. Although it is true that U.S. courts typically give expert agencies deference under domestic law, Petitioners' own success in challenging an EPA CAA standard despite the court affording EPA "great deference," 370 F.3d at 1238, belies this assertion and demonstrates that EPA's regulations can successfully be challenged. Indeed, that the actions of federal agencies are subject to rigorous and searching judicial review in United States courts, and sometimes are overturned despite the principle of deference, is beyond serious debate.

Simply put, Petitioners have domestic legal remedies in this regard and are not excused from their obligation to pursue and exhaust them because the legal process can be less than expeditious or may include principles acknowledging an agency's technical expertise.

F. Petitioners Can Comment Upon, Potentially Influence, and Challenge Individual Permitting Decisions for Mossville Industrial Facilities

In addition to their ability to seek court review of environmental regulations they consider too lax, Petitioners also have domestic remedies to influence, and if necessary challenge

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[70] In an attempt to minimize their successful pursuit of domestic remedies, Petitioners erroneously assert that the United States put forward a "false claim" in highlighting Petitioners' victory in *Mossville Environmental Action Now v. EPA*. Add'l Observ. at 8. Petitioners refer to the lone sentence in the United States First Response that discussed this case which, in hindsight, may not have sufficiently elaborated on the court's order in that case or the status of the regulation on remand. Although one can hardly imagine a more thorough "revision" of an EPA standard than the court vacating it and sending it back to the agency (*see Mossville Environmental Action Now v. EPA*, 370 F.3d at 1243), it perhaps would have been more accurate to state in the United States First Response that the case resulted in an order to revise the standard. Petitioners correctly point out that EPA is in the process of promulgating a new standard to replace the one vacated as a result of Petitioners' lawsuit. However, the *schedul*e for EPA's action was one *agreed to by Petitioners*. Thus, Petitioners are plainly in error to suggest United States government inaction on this subject or United States government misrepresentation of the record.

in court, environmental permits issued to Mossville-area facilities. All of the pertinent regulatory programs addressed in the Petition – the CAA, the CWA and RCRA – operate in accordance with a federal/state partnership whereby the State of Louisiana (specifically, the LDEQ) implements federal standards in accordance with a federally-approved program. The federal Government, through EPA, maintains a vital oversight authority, can comment upon and object to proposed state permits that do not comply with the law, and has independent authority to directly enforce the applicable standards.

In the first instance, Petitioners can participate in state administrative proceedings concerning new permits or renewals and modifications of existing permits under these programs. Indeed, Petitioners concede that "public participation is important" and that they "have the right to participate in governmental decision-making." Pet. at 24, 41 (respectively). Petitioners can participate in public hearings for proposed permits (when provided) and comment upon proposed permits. *See, e.g.*, La. Admin. Code tit. 33, §§ 707-21, 803 (2010) (the LDEQ must provide notice, hold hearings, consider public comments in hazardous waste permitting and site remediation decisions). To take just one example, under the Louisiana Hazardous Waste Control Law, applicants for commercial hazardous waste treatment, storage, and disposal facility permits must submit information about the number and density of existing facilities in a 2-mile area, and identify any existing community health problems that may be aggravated by the operation of their facility. La. Admin. Code tit. 33, § 405(A) (2010). Additionally, no waste management units may be located within 200 feet of any area that may result in an undue risk to human health, and in reviewing permit applications the LDEQ must "assess the impact of a location of a commercial hazardous waste treatment, storage, or disposal facility on the citizens of the surrounding area, the local infrastructure, and the environment." *Id.* Petitioners, therefore, have the opportunity to object to proposed permits that fail to account for such site-specific potential health impacts. If the LDEQ nevertheless issues a final permit that fails to adequately address those comments or is otherwise objectionable to Petitioners, they can challenge such a permit before state administrative bodies or in state court. La Rev. Stat. Ann. § 49:964(A)(1).[71]

Even though EPA is not the permitting authority under these programs, Petitioners have administrative and judicial recourse against EPA if they believe a permit violates federal environmental standards. For example, under the CAA, along with completing notice-and-comment proceedings for an operating permit, LDEQ submits the proposed permit to EPA, which has 45 days to review it. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). EPA may object to a permit if it does not comply with the CAA or Louisiana's implementation plan,

[71] The foregoing shows the inaccuracy of Petitioners' sweeping assertion that the domestic "environmental legal framework . . . *requires* the issuance of permits to numerous polluting facilities . . . in close proximity to residential communities." Pet. at 24 (emphasis added). Government agencies are sufficiently authorized to exercise their discretion to decline to issue permits in such circumstances.

in which case EPA will send the permit back to the LDEQ to correct the deficiencies. If, on the other hand, EPA does not object to a permit, any person (including the Petitioners) can petition EPA to object to the permit, and EPA must object to the permit if the petitioner meets the threshold requirements and demonstrates that the permit does not comply with the CAA or the state implementation plan. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1), (d). EPA's denial of such a petition is subject to judicial review. 42 U.S.C. 7661d(b)(2); *see also* 42 U.S.C. § 9607(b)(1).

G. Petitioners Can Sue Federal Agencies or Petition Them to Address Alleged Deficiencies in the Domestic Regulatory System

As the Commission has correctly observed (Report No. 43/10 at ¶ 35), there are domestic remedies that Petitioners have failed to exhaust because, under the domestic legal system, they are generally able to challenge the action (or inaction) of federal agencies. We have already discussed as a pertinent example the Petitioners' successful challenge to EPA's emissions standard for hazardous air pollutants from PVC manufacturers. This section provides additional examples and describes more generally avenues the Petitioners could pursue to address the inadequacies of environmental regulation that they allege.

In some instances, Petitioners can sue EPA directly, under the APA or the citizen suit provision of an environmental statute, to perform a non-discretionary (or mandatory) duty. A critically important example here is that Petitioners have already successfully done this against EPA and the State of Louisiana under the CWA, as their Additional Observations acknowledge (Add'l Observ. at 20). The Petitioners intervened in federal court litigation that resulted in a consent decree in 2002,[72] under which the State of Louisiana agreed to take certain actions concerning the establishment of total maximum daily loads ("TMDLs") of pollutants[73] for water bodies in Louisiana, including water bodies in and near Mossville. The consent decree also required EPA to take certain actions either as oversight of Louisiana's administrative actions or in the event Louisiana failed to perform. EPA has already issued TMDLs for Mossville-area waters as a consequence, s*ee supra* Section II.A.1, which again confirms the availability and effectiveness of domestic remedies available to the Petitioners.

Petitioners have further options under the CAA. We discussed *supra* at Section I.A how Section 112 of the CAA requires EPA to promulgate NESHAPs, including stringent technology-based MACT standards for major sources of hazardous air pollutants. 42 U.S.C. § 7412(d)(2). After the implementation of these standards, EPA must assess the risk to public health remaining

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[72] *Sierra Club and Louisiana Environmental Action Network v. EPA, et al.*, Civ. No. 96-0527 (E.D. La.).

[73] These TMDLs strengthen effluent limitations for water bodies as to which technology-based standards and water quality-based effluent limitations do not protect a level of water quality that permits particular water bodies to be used for identified purposes.

from hazardous air pollutant emissions and promulgate a health-based standard if the risk remaining from that major source category does not protect public health with an "ample margin of safety." *Id.* § 7412(f)(2). If EPA fails to perform these duties, for example, by failing to promulgate the initial MACT standard or a "residual risk" standard for major sources of hazardous air pollutants in a particular source category, Petitioners could file a citizen suit seeking to compel EPA to take appropriate, legally-mandated action. 42 U.S.C. § 7604(a)(2).

Petitioners are also able to administratively petition EPA to re-open or revise (*i.e.*, strengthen) an existing emission standard, based for example on new information. Indeed, a concrete example of such an administrative remedy occurred in January 2009 when certain environmental groups petitioned EPA to re-open and revise more than 30 NESHAPs in light of recent court decisions vacating some EPA standards as not complying with the requirements of Section 112 of the CAA. *See* Exhibit E. One of the standards addressed by that administrative petition is the hazardous organic NESHAP for the synthetic organic chemical manufacturing industry that applies to some Mossville-area facilities and is discussed *supra* in Section III.E.

Petitioners have additional options where the EPA duty at issue is discretionary. For instance, CERCLA authorizes citizens to petition EPA to perform a Preliminary Assessment to determine if a site should be included on the National Priority List. 42 U.S.C. § 9605(d). RCRA provides another example of administrative relief Petitioners could seek to tighten standards applicable to Mossville-area facilities that handle hazardous wastes, as it permits any person to petition EPA to promulgate, amend, or repeal any regulation. 42 U.S.C. § 6974(a). After receiving a petition, EPA must take action in response "[w]ithin a reasonable time." *Id.* Judicial review of EPA final action in response to the petition, or failure to act within a reasonable time, is available under the APA as described above.

More generally, the APA authorizes citizens to petition EPA to undertake rulemaking on other matters within EPA's competence, and any denial of such a petition must be in writing.[74] Any resulting action by EPA, or failure to act within a reasonable time, is subject to judicial review under the relevant statute or the APA. *See supra* Sections I.B and III.C. Thus, Petitioners could seek rulemaking or other administrative action from EPA to address the deficiencies they perceive in the United States' regulatory scheme for environmental protection, such as improvements to the manner in which permitting decisions account for the proximity between the permit applicant and residential areas or other polluting facilities.[75] Of course, there

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[74] *See* 5 U.S.C. § 553(e) ("[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule"); 5 U.S.C. § 555(b) ("an interested person may appear before an agency . . . for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding . . . in connection with an agency function"), (e).

[75] Comparable remedies are available under state law, as the Louisiana Environmental Quality Act provides numerous mechanisms to petition for a rulemaking to adopt, amend, or rescind any regulation, comment upon state

is no guarantee that EPA or a state agency would proceed in the manner requested by Petitioners, as the outcome of any such petition would largely depend on Petitioners demonstrating the appropriateness of the requested action.

H. Petitioners Have Effective Remedies Against Polluting Facilities Under State Tort Law

Petitioners acknowledge in passing that they previously settled "a lawsuit against two companies operating facilities in Mossville." Pet. at 32. However, when they later refer to the fact that "residents [in the Bel Air section of Mossville] relocated as a result of severe and extensive industrial toxic pollution," *id.* at 78-79, they do not explain that the relocation resulted from the settlement of their successful state law tort claims. In 1995, approximately 2,800 Mossville residents (including at least some of the Petitioners) filed a class-action lawsuit[76] against Condea Vista and E.I. du Pont Nemours, the then-current and former owners of the vinyl chloride production facility now owned by Georgia Gulf and Sasol and located to the east of and adjacent to Mossville.[77] The case was a cause of action for toxic tort (alleging, *inter alia*, trespass, nuisance, emotional distress, and diminution of property value) and concerned chemical contamination released from that facility. The case was settled in April 1998, pursuant to which the plaintiffs received a total of approximately $44 million: $15 million in damages from du Pont, $15 million in damages from Condea Vista, and $13.875 million from Condea Vista for the voluntary "buyout" of 550 parcels of property so that plaintiffs could re-locate.[78]

Petitioner Sally Comeaux was the lead plaintiff in the civil tort action and presumably participated in the settlement, although she appears not to have availed herself of the option to relocate, as the Petition states that she still lives across the street from the Georgia Gulf facility.[79] Another Petitioner, David Prince, was a plaintiff and it was reported in 2000 that he accepted a

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administrative action, request hearings, and challenge agency action or inaction. *See generally* La. Admin. Code tit. 33, §§ 901-09. Also, similar to the federal scheme, the Louisiana Administrative Procedure Act provides an avenue for judicial review of agency adjudications. La. Rev. Stat. Ann. §§ 49:951(1)(3), 49:964.

[76] *Comeaux v. Condea Vista et al.*, No. 95-6359 (La. 14th Jud. Dist. Ct. 1995). Details of the suit and settlement are available through 1998 LA Jury Verdicts and Sett. LEXIS 1423, Exhibit F.

[77] The facility is discussed repeatedly in Petitioners' filings. *See, e.g.*, Pet. at 10, 51-52, 58-59.

[78] "Paying Neighbors to Move," The Sun, Dec. 6, 1998; "Pollution Lawsuit Settled for $45 Million," Times-Picayune, Mar. 18, 1998. That figure roughly accords with a 2001 regulatory filing by Georgia Gulf (which had purchased the Condea Vista facility) that indicated the cost of the settlement to Condea Vista was $42.1 million.

[79] Pet. at 10. The Petition does not mention her role in the 1995 lawsuit but, rather, obliquely refers to the fact that her neighborhood was "abandoned by most Mossville residents as a result of groundwater contamination from nearby industrial facilities" without mentioning that most residents of that area accepted the voluntary buyout of their homes. *Id*.

monetary settlement *in lieu* of relocation.[80] As of 2004, it has been reported that approximately 98 Mossville households had taken advantage of the voluntary buyout.[81]

That the situation was such that it resulted in Petitioners' entitlement to such remedies is of course unfortunate, but the point for purposes of this proceeding is that the domestic legal system provides powerful and effective recourse against those directly responsible for toxic exposures and contamination. That many Mossville residents received monetary compensation and were relocated as the result of a single court action concerning just one facility confirms the potential availability and efficacy of domestic remedies. Furthermore, any Petitioner who has pursued and obtained relief in domestic proceedings plainly cannot come before this Commission and request the same relief.[82]

In addition to not elaborating on the 1998 legal settlement, Petitioners have not addressed their ability to file additional tort law claims for nuisance (or other torts collectively referred to as "toxic torts") against the owners and operators of other polluting facilities. *See* La. Civ. Code Ann. art. 667. They could seek in such a lawsuit the many forms of relief that are available in toxic tort cases, such as abatement of the polluting conditions, the payment of damages (including for the purposes of relocation or property buyouts), or the imposition of punitive damages. The United States respectfully disagrees with the Commission's suggestion that such tort remedies against private parties are not relevant or "effective" for purposes of the instant exhaustion analysis. Report No. 43/10 at ¶¶ 30, 31. To the contrary, a direct cause of action against polluters is an important aspect of environmental regulation in the United States. Moreover, such remedies are effective in view of the fact that Mossville residents, including some Petitioners, have secured through state law tort actions a major component of the relief they seek here, *i.e.*, relocation.

I. Petitioners Have Not Pursued, Let Alone Exhausted, Their Remedies Under U.S. Civil Rights Laws

Petitioners to date have not pursued available avenues under U.S. civil rights laws to address conditions in Mossville, most notably Title VI of the Civil Rights Act of 1964 and EPA's regulations implementing Title VI which, together, are intended to ensure that state

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[80] "Civil Rights Issues Enter New Arena: The Search for Environmental Justice," Newshouse News Service, June 13, 2000.

[81] "Habitat-Greenpeace Mix Causes Chemical Reaction; PVC Makers Accuse Environmental Group of Abusing Charity," Times-Picayune, Apr. 8, 2004.

[82] *See* Pet. at 93 (seeking relocation as a remedy). In the United States' view, at a minimum, in order for the Commission to be able to assess the Petitioners' claims, each Petitioner needs to disclose to the Commission his or her involvement in, and eligibility for, the remedies provided in the 1998 settlement.

programs receiving federal funds do not discriminate on the basis of race, color, or national origin. Specifically, Title VI provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Federal agencies that extend federal assistance or grants to programs and activities, such as state agencies responsible for environmental permitting and enforcement, are required to promulgate regulations to effectuate the objectives of Title VI. 42 U.S.C. § 2000d-1. EPA's regulations are codified at 40 C.F.R. part 7 and provide, *inter alia*, 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. Pertinent here, EPA's regulations prohibit state permitting programs receiving EPA assistance from "using criteria or methods of administering its program which *have the effect*" of discriminating on the basis of race, color, or national origin. 40 C.F.R. § 7.35(b) (emphasis added). In other words, facially neutral policies or practices of state agencies that result in discriminatory effects that lack a substantial legitimate justification violate EPA's Title VI regulations. EPA's regulations also establish a process under which citizens, like Petitioners, can file complaints with EPA's Office of Civil Rights ("OCR") concerning alleged discrimination by a recipient of EPA assistance, which complaint EPA will investigate and which can lead to enforcement action by EPA or referral to the United States Department of Justice. 40 C.F.R. § 7.120-.130.

Petitioners are generally correct that, while private individuals may sue the United States or a Louisiana agency in federal court for a violation of their right to equal protection of the law, such a claim requires proof of intentional discrimination.[83] That such intent must be shown in order to prevail in such cases, by itself, does not mean that Petitioners would have no reasonable prospect of success, and Petitioners offer no support for their claim that that it is "virtually impossible to prove intentional discrimination." Pet. at 26. Indeed, evidence of discriminatory intent need not be direct but, rather, can be circumstantial and inferred from a "clear pattern" of action that cannot otherwise be explained. The United States Supreme Court has identified multiple indicia of such a pattern that may support a claim, such as the government's historical practices, the sequence of government action, or the fact that the challenged government action differs from past practice. *Arlington Heights*, 429 U.S. at 266.

Nor can Petitioners avoid their obligation to pursue their own civil rights claim by pointing to the fact that a single court, whose decision does not bind the court that would hear a

[83] *Alexander v. Sandoval*, 532 U.S. 275, 280-281 (2001); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

case brought by Petitioners, disallowed a claim by a citizen group that sought to *directly* enforce Title VI regulations against a state environmental agency. Pet. at 27. That case, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001), merely re-affirmed that filing suit in federal court requires evidence of discriminatory intent (as opposed to evidence of discriminatory *effect*) and held that federal agency Title VI implementing regulations that expressly prohibit discriminatory *effects* cannot be directly enforced by private individuals in court. *Id.* Nothing in *Sandoval*, *South Camden*, or any other authority cited by Petitioners prevents them from bringing a properly substantiated claim against the United States alleging intentional discrimination in the denial of equal protection under the law or against the State of Louisiana or one of its agencies under Title VI of the Civil Rights Act of 1964 for intentional discrimination. They have, at most, shown that filing such a civil rights claim in federal court would present potentially significant evidentiary hurdles, not that it would be futile. This Commission requires more before the duty to exhaust can be excused.

Moreover, the fact that Petitioners cannot *directly* enforce EPA's Title VI regulations in federal court (for instance, by suing a Louisiana permitting agency) does not mean that they have no remedy under United States civil rights laws. Significantly, Petitioners can pursue a claim under EPA's Title VI regulations by filing an administrative complaint with OCR. Petitioners can seek Title VI enforcement against any Louisiana agency in receipt of EPA assistance that Petitioners believe has applied criteria or methods, for instance in the environmental permitting of Mossville-area industrial facilities, that "have the effect" of discriminating against Mossville residents on the basis of race, color, or national origin.[84] Of course, this is the essence of Petitioners' claims about "disproportionate permitting of polluting facilities in the African American community of Mossville" causing "African Americans in Mossville [to] bear a racially disproportionate burden of severe industrial pollution." Pet. at 8.

If OCR accepts a timely administrative complaint[85] alleging such discriminatory effects, EPA's regulations provide that OCR will investigate the allegations and assess whether an impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin.[86] If the complaint is not dismissed and a prima facie case of discrimination is found, the subject of the complaint is given an opportunity to provide a justification for its action, and OCR is to determine whether there was a less discriminatory alternative and whether

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[84] *See* 40 C.F.R. § 7.120-.130; 40 C.F.R. § 7.31(b)-(c).

[85] Before OCR can accept a complaint, it must determine, *inter alia*, whether the allegedly discriminatory act occurred within 180 days of the filing of the complaint. 40 C.F.R. § 120(b). If the complaint is untimely, OCR will dismiss it or waive the time limit for good cause. *Id.*

[86] 40 C.F.R. § 7.120(d); s*ee also* 65 Fed. Reg. 39,667, 39,670 (June 27, 2000).

the explanation given is merely a pretext for discrimination.[87] If OCR makes a preliminary determination of noncompliance and the subject fails to achieve voluntary compliance, OCR will issue a formal determination of Title VI noncompliance and the subject of the complaint is given another opportunity to propose a plan for complying with Title VI or demonstrate that the preliminary findings are incorrect.[88]

EPA can address a finding of discriminatory effect in several ways. For instance, compliance may be secured through voluntary, informal means. However, EPA is also authorized to institute proceedings to suspend, terminate, or refuse to provide future federal assistance to the offending state or local agency. 40 C.F.R. § 7.130. EPA may also decide that the matter raised in an administrative complaint is more appropriately handled by the Department of Justice through civil judicial enforcement. 40 C.F.R. § 7.130(a).

Petitioners have not filed an administrative complaint with EPA, despite the applicability of this process and the fact that EPA's regulations furnish an administrative cause of action for the very discriminatory *effects* of regulatory permitting that are alleged. Petitioners' criticisms concerning inefficiencies and time lags in OCR's resolution of administrative Title VI complaints, while not without some factual foundation, do not establish that such a process offers no reasonable prospect of success sufficient to overcome the exhaustion requirements.[89] Petitioners' arguments are also contradicted by the fact that on December 14, 2010, two Mossville-area organizations (RESTORE and the People's Advocate of Southwest Louisiana) filed with OCR a Title VI administrative complaint alleging violations and seeking investigation into LDEQ and the "methods that LDEQ has applied in Calcasieu Parish, Louisiana." Exhibit G at 1. Specifically, the complaint raises concerns about LDEQ's issuance of a RCRA corrective action permit for the PPG Industries facility in Lake Charles, Louisiana and resulting disproportionate impacts on the African-American community in the Lake Charles area. This facility is discussed repeatedly in the Petition, s*ee, e.g.*, Pet. at 36 (Table 1), 63-64, 70, and

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[87] *See* 40 C.F.R. § 7.120(g); 40 C.F.R. § 7.115(d).

[88] *See* 40 C.F.R. § 7.115(d)-(e).

[89] Even if OCR's operations are less than optimal, Petitioners are not excused from the requirement to exhaust domestic remedies. Moreover, the United States takes seriously and has responded to such concerns raised by Petitioners and others. Much has changed since the Second Amended Petition was filed in 2008. EPA Administrator Lisa Jackson has prioritized enhancing OCR's operations by dedicating significant new resources to OCR investigations of Title VI administrative complaints, including implementing a network of technical, policy and legal experts among and between the relevant EPA components. OCR is directed by new top management, and the Administrator has established a new position of Senior Counsel for External Civil Rights to expedite OCR's resolution of pending complaints. In fiscal year 2010 alone, OCR closed 29 complaints and 42 are pending currently. *See* U.S. Environmental Protection Agency, Office of Civil Rights, Quarterly Update of Title VI Administrative Complaints. Additionally, because LDEQ likely receives federal assistance from other federal agencies, Petitioners may not be limited to filing a Title VI complaint with EPA.

RESTORE's Title VI administrative complaint raises issues about this facility similar to those in the Petition. *See generally* Exhibit G.

Nor is it pertinent that an administrative complaint filed with EPA would be against a state agency and not against the United States. The Statute and Rules of Procedure of this Commission require Petitioners to pursue and exhaust every domestic remedy that would eliminate or ameliorate their alleged injuries, irrespective of the party against whom such a remedy is sought. Further, the State of Louisiana and its agencies have the primary responsibility for issuing, renewing and modifying the permits about which Petitioners are concerned. There is no question that the outcome of an administrative Title VI proceeding directed at these state agencies could affect their permitting practices. Petitioners offer no sufficient excuse for not filing a Title VI administrative complaint with OCR.

IV. <u>The Petition Lacks Merit</u>

The Commission's Report No. 43/10 ruled admissible only the Petition's claims alleging violations of Articles II and V of the American Declaration. As explained in Section III of these Observations, the United States believes that these claims should be ruled inadmissible, for failure to exhaust domestic remedies. Should the Commission nevertheless decide to reach the merits, this Section addresses those claims. It should be noted that this Section addresses the merits of Petitioners' claims under Articles I and XI only briefly. If, contrary to the strong urging of the United States in these Observations, the Commission grants the Petitioners' request for reconsideration and permits claims under Articles I and XI to proceed, the United States requests an opportunity to address such claims in greater detail prior to any decision on the merits.

Petitioners' allegations of violations of the American Declaration rest on mistaken characterizations of State commitments under that instrument. Throughout the Petitioners' submissions to the Commission, the commitments of the United States under the American Declaration are inaccurately described. They are conflated with obligations under the American Convention, to which the United States is not a party, and are misinterpreted, either by reference to cases that are inaccurately characterized or are inapplicable because they rely upon the American Convention or other inapposite international instruments.[90]

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[90] The Commission Statute explicitly provides that, for the purposes of the Commission, "human rights" in Member States not parties to the American Convention on Human Rights are understood to be only the rights set forth in the American Declaration. Commission Statute, Article 1(2)(b). While we appreciate that the Petitioners have removed from the Second Amended Petition inappropriate references to several international instruments to which the United States is not a State Party, we note that Petitioners' continued reference to and reliance upon decisions and opinions of the Inter-American Court and the European Court of Human Rights, and their underlying conventions, remains inapposite as the United States is not a party to those instruments nor subject to the jurisdiction of those bodies. Moreover, those instruments differ significantly from the American Declaration in their contents and contexts.

The foregoing sections of these Observations demonstrate that the United States affords its citizens extensive opportunities to participate in environmental and public health decision making, through its electoral systems, its legislative and regulatory processes, and its court systems. They describe the long-term, ongoing involvement of the Government in Mossville, demonstrating that the factual context is difficult and complex, that the United States continues to exert great efforts to investigate alleged contamination and negative health effects in the area, and that it has taken and is prepared to take remedial measures where appropriate. They also demonstrate the numerous remedies available to individuals and groups to defend and vindicate their interests in the areas of environmental protection, public health, and civil rights.

The Petitioners, however, invite the Commission to impose its authority over the proper functioning of these robust domestic processes. They ask the Commission not only to review specific siting and permitting decisions, but also to recommend that the United States "reform its existing environmental regulatory system" by adopting an approach to environmental and public health protection based on very different scientific and technical premises.[91]

That invitation is extremely broad and rests on the unsubstantiated assertion that the system of environmental regulation in the United States is so deficient that it violates Petitioners' rights. Yet, as demonstrated in Sections I through III above, the United States' system for the protection of the environment and public health is among the most sophisticated, thorough, and effective in the world, and Petitioners' arguments suggesting the contrary are not credible.

In this context, it is worth recalling the cautionary words of *Fadeyeva v. Russia*, a European Court of Human Rights case cited by both Petitioners and the Commission,[92] and discussed more fully in Section IV.B, below. *Fadeyeva* emphasized that "States have a wide margin of appreciation in the sphere of environmental protection," that "the national authorities . . . are in principle better placed than an international court to evaluate local needs and

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[91]Pet. at 94. Petitioners object to the regulation by the United States system of emissions of specific chemicals, asserting that "[t]hese laws erroneously presume that human health and the environment are protected by such inadequate requirements." *Id*. at 22. Petitioners believe that a much larger (but unspecified) list of chemicals should be regulated. *Id*. Moreover, they believe that the focus of regulation should shift from establishing limits on such chemicals, and that the Commission should direct the United States instead to "establish in all regulatory programs pollution limits that protect against multiple, cumulative, and synergistic health impacts of numerous toxic and hazardous substances released into the air, water, and land by one or more industrial facilities." *Id*. at 94, Request for Remedies ¶ 4.a.

[92] *Fadeyeva v. Russia* (June 9, 2005), analyzed in Report No. 43/10 at 12 & n.36. Although, as explained below, jurisprudence arising under the European Convention on Human Rights is not useful in interpreting the American Declaration substantively, *Fadeyeva* very clearly explains the reasons why, as a prudential matter, international tribunals defer to domestic authorities in the area of environmental and public-health regulation and protection.

conditions," and that it is not for such a court "to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere."[93]

In this case, Petitioners' arguments invite the Commission to intervene in domestic policy matters and substitute its policy judgment for that of national authorities with technical expertise in the relevant subject matter, legal competence to address the claims, and authority to impose appropriate remedies. This approach must be rejected because it is not supported by the provisions of the American Declaration on which Petitioners rely or by the facts in the record.

A. The Right to Equality Before the Law Under American Declaration Article II

Petitioners assert that the United States Government inadequately protects Mossville residents' rights to equal protection and freedom from racial discrimination, in violation of American Declaration Article II.[94] However, the Petition does not state facts that would tend to establish any such violation, and the Additional Observations provide no relevant additional information to substantiate this claim on the merits.

The United States' initial response pointed out that a claim under Article II requires a clear showing of intentional discrimination based on factors such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[95]

Petitioners have stated no facts that would establish current, intentional discrimination; at most they allege a correlation between patterns of minority settlement and environmental degradation. However, such a correlation does not demonstrate causation, much less discriminatory intent.

As noted in Section IV.D below, the siting of industrial facilities in the vicinity of Mossville began well before the conclusion of the American Declaration or the inception of modern environmental regulation, and occurred for a myriad of reasons. Further industrial development followed in the area. No showing has been made of any discriminatory intent in this development. Nor has any showing been made that such industrial development was the discriminatory *effect* of specific government policies. Finally, no discriminatory intent has been shown in what Petitioners allege has been the failure of the United States to reverse any harmful effects of this development. To the contrary, Sections I and II demonstrate that the United States has been deeply involved in a long-term effort to identify and mitigate, as necessary, any such effects.

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[93] *Id*. at ¶¶ 102 & 103.

[94] Pet. at 85-89.

[95] United States First Response at 6.

Petitioners do not attempt to demonstrate intentional discrimination and do not acknowledge any requirement to make such a showing. *Mary and Carrie Dann v. United States*,[96] the one Commission case relied on by Petitioners to support the view that no showing of intent is required, does not support that argument. That case involved a legal regime for adjudicating Native American property claims that was *de jure* different from the regime applicable to other citizens. The Commission concluded that, in the case of the Danns and their tribal collective, that special legal regime meted out treatment that was both different and inferior. Since the difference in treatment was dictated by law, it was by definition "intentional," and there was no need to decide whether discrimination could be established in the *absence* of a showing of intention.[97]

In this case, by contrast, Petitioners are subject to the same legal regime as all other United States citizens. Sections I-III describe the United States' system of environmental protection, in which interested individuals and groups play an extensive role in the formulation of standards and regulations, the issuance of permits, and administrative and judicial enforcement against both private polluters and the government. Petitioners have the same rights within this system as other United States citizens, and they make no argument to the contrary. They cannot make a claim of facial or *de jure* discrimination. Absent such a claim, Petitioners must allege and show intentional discrimination. They have not done so, and thus this claim should fail.

B. The Protection of Private and Family Life Under American Declaration Article V

Petitioners also assert that the United States Government inadequately protects Mossville residents' rights to privacy, in violation of American Declaration Article V.[98] Again, however, the Petition fails to state facts that would tend to establish any such violation, and the Additional Observations provide no relevant additional information to substantiate this claim on the merits.

In its Report, the Commission concluded that "the allegations concerning the rights to privacy cannot be regarded as manifestly out of order, . . . and call for an examination of the

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[96] Report No. 75/02, Case 11.140, at ¶¶ 96-97 (2002).

[97] The Commission also relies on the *Dann* case in its Report No. 43/10 on admissibility in this case. *See* Report No. 43/10 at 11-12 & n.35. In the same footnote, the Commission cites IACHR Report No. 51/01, Case No. 9903, *Ferrer-Mazorra v. United States* (April 4, 2001). However, like *Dann*, *Ferrer-Mazorra* did not deal with the requirement *vel non* of intentionality; to the contrary, like *Dann*, it involved a special regime for excludable aliens that was *de jure* different from the regime applicable to others. *Ferrer-Mazorra* at ¶¶ 238-239.

[98] Pet. § VIII, pp. 90-92.

merits."[99] The Commission recalled that in its *La Oroya (Peru)* decision,[100] "it did not consider that the allegations that 'excessive environmental contamination represents an intrusion into the personal and family life of individuals' could characterize a violation of the right to privacy" under Article 11 of the American Convention, but considered that the allegations in the present case differ sufficiently to call for examination on the merits.[101] The United States respectfully suggests that, for the purpose of finding whether there was a right-to-privacy violation, there is in fact no meaningful difference between the petitions in *La Oroya* and this case. If anything, the pollution and environmental degradation alleged in *La Oroya* were more severe, more pervasive, more immediately hazardous to life and health, and more intrusive in their effects on private and family life than those alleged in this case. The United States submits that the Commission would have been justified in ruling Petitioners' privacy claim inadmissible for the same reasons that applied in *La Oroya*. In any event, Petitioners' failure to provide any significant, relevant additional information in support of this claim mandates its rejection on the merits.

Neither the Petition nor the Additional Observations substantiate Petitioners' claim under Article V as a factual matter, nor do they explain how that claim can be brought within the ambit of Article V, which by its terms does not address the type of environmental injury alleged in this case. Petitioners cite no relevant case law under the American Declaration, but rely on two cases from the European Court of Human Rights, applying the European Convention on Human Rights.

The United States recognizes and embraces the growing international attention paid to environmental matters, including through multilateral conventions, bilateral agreements and other international processes. The United States believes that such other fora provide the proper setting for the development of international environmental law. However, while there are significant relationships between environmental protection and human rights, it would be an error to import environmental law into international human rights instruments, including by relying on treaties to which the United States is not a party, and which have different contexts and contents from that of the American Declaration.

Moreover, case law from that context, while not a proper source for interpreting the American Declaration, vividly illustrates the caution with which any human rights body must approach an invitation to substitute its judgment for that of expert domestic institutions in the areas of environmental protection and public health. *Fadeyeva v. Russia*, the primary European

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[99] Report No. 43/10, ¶ 43.

[100] *La Oroya (Peru), Admissibility*, Report No. 76/09 (August 5, 2009).

[101] Report No. 43/10 at 12 & n.37.

Court case cited by Petitioners and analyzed by the Commission,[102] underscores that any claim that environmental regulations and government actions applying them have violated privacy rights under international law must overcome a high threshold. Even if the relevant international instrument would permit such a claim, a tribunal considering it must accord substantial deference to government decisions in this area. *Fadeyeva* enumerates various reasons for such deference, including institutional differences in knowledge and expertise in an area of regulation that is highly technical and fact-specific, and respect for governments' policy choices, particularly in light of their need to balance competing policy interests.

Thus, in *Fadeyeva* the European Court, reviewing its prior jurisprudence, stated that "the Court has, as a rule, accepted that the States have a wide margin of appreciation in the sphere of environmental protection," and that "the national authorities . . . are in principle better placed than an international court to evaluate local needs and conditions."[103] The European Court in *Fadeyeva* went on to state that it "has also preferred to refrain from revising domestic environmental policies."[104] In its own discussion of *Fadeyeva*, this Commission further noted the European Court's caveat regarding the need "to strike a balance between the competing interests of the applicant's rights and the community as a whole."[105]

Fadeyeva quoted a previous holding that "it is certainly not for . . . the Court to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere. This is an area where the Contracting Parties are to be recognised as enjoying a wide margin of appreciation."[106] *Fadeyeva* concluded this discussion by emphasizing the highly circumscribed role of an international body in assessing governmental action in this area:

> "[T]he complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one. The Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8, *and only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities*."[107]

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[102] *Fadeyeva v. Russia* (June 9, 2005), analyzed in Report No. 43/10 at 12 & n. 36.

[103] *Id*. ¶¶ 102 & 103.

[104] *Id*. ¶ 103.

[105] Report No. 43/10 at 12 & n. 36.

[106] *Fadeyeva* at ¶ 104 (citation omitted).

[107] *Id*. at ¶ 105 (citations omitted, emphasis added).

Petitioners' claim under Article V of the American Declaration (indeed, all of Petitioners' claims) fails to meet this threshold. As is illustrated in the foregoing sections of these Observations, the United States has been, and continues to be, actively engaged in addressing the environmental and public health issues presented in the Mossville area. The United States' system of environmental regulation offers abundant opportunities for interested individuals and groups to participate in environmental decisions that affect them. While Petitioners have availed themselves – successfully – of some of these opportunities, they have not pursued the majority of the avenues open to them to address the concerns raised in this Petition.

The relevant decision-making processes in the United States can be fairly described, in the European Court's phrase, as "fair and such as to afford due respect to the interests safeguarded to the individual." Nor, given the information presented in Section II describing the long-term, extensive and ongoing government effort to identify, analyze and, where appropriate, remedy environmental and public health problems in Mossville, can it fairly be said that the United States is unresponsive to concerns in this complex area.

Thus, we respectfully submit that this Commission, as did the European Court, should accord the United States' environmental regulatory decisions a "wide margin of appreciation," and refrain from seeking to "substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere."

C. The Rights to Life and Health Under American Declaration Articles I and XI

Petitioners assert that the United States Government inadequately protects Mossville residents' rights to life and health, in violation of American Declaration Articles I and XI. [108] The Commission ruled these claims inadmissible for failure to exhaust domestic remedies. As Section III of these Observations demonstrates, the Commission's decision was correct, and the Commission should reject Petitioners' request to reconsider it.

In view of the Commission's decision to exclude Petitioners' claims under Articles I and XI, the United States addresses these claims only briefly below. However, should the Commission decide to reconsider and deem these claims admissible, the United States requests an opportunity to submit more detailed observations addressing them prior to any decision on the merits.

American Declaration Article I states that "[e]very human being has the right to life, liberty and the security of his person." It addresses State action directed against the individual. Unlike the corresponding provisions of the American Convention on Human Rights ("American Convention"), Article I includes no provision regarding protection of those rights against the

[108] Pet.at 80-85.

actions of private parties. Moreover, Article I does not address alleged environmental rights. Article I relates to such rights, if at all, only if another right under the American Declaration is violated to such a degree as to threaten human life. Thus, the United States submits that this claim can only stand if Petitioners can demonstrate a violation of the right to the preservation of health under Article XI.

However, the Petition overstates the reach of Article XI, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. As noted above, Article XI provides:

> Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, *to the extent permitted by public and community resources*. (Emphasis added.)

It is important to note that Article XI qualifies the right to the preservation of health through "sanitary and social measures" with the phrase, emphasized in the quotation above, "to the extent permitted by public and community resources." Article XI not only allows, but in fact requires, the balancing of the considerations enumerated therein, including scientific and technical resources and economic and social impacts.

The evaluation and balancing required by Article XI rests with the regulatory regime of the State and, for the reasons so cogently expressed in *Fadeyeva*, discussed above, must be accorded great deference. Sections I – III of these Observations demonstrate that the United States' system for the protection of the environment and public health is comprehensive and affords ample opportunity for participation by affected individuals and groups, and that this system has been, and continues to be, actively engaged in addressing the concerns raised by Petitioners.

This system is not perfect, but it is among the best in the world, and its processes and results are entitled to the "wide margin of appreciation" demanded by *Fadeyeva*. Such deference to the expertise of domestic institutions is particularly mandated here, where the process of environmental protection and remediation is ongoing and evolving, and where Petitioners have provided no additional information to cast serious doubt on the efficacy of that process.

D. Petitioners Have Not Shown the Factual Basis For A Violation Of Any Right

Even supposing that the various legal theories Petitioners have put forward are meritorious, Petitioners have not established the factual basis of a violation.

Petitioners' claims must be viewed in the context of the broader system of environmental protection and regulation. As is true in many nations, the United States did not begin to acquire a comprehensive system of environmental regulation until the 1960s and 1970s, and that system

developed over time. The evolving and incremental nature of that environmental regulation means that the United States (again like many countries) has a legal framework for analyzing contaminated areas, setting priorities between them, and addressing contaminated areas systematically as priorities and resources permit. Environmental regulation and remediation involve a careful balancing of scientific knowledge, technological capabilities, social and economic impacts, and resource availability that cannot be dealt with in absolutes.

As to the siting of existing facilities around Mossville, the same historical background of environmental regulation is again illustrative. As Petitioners themselves aver, industrial facilities in or near Mossville began to spring up in the 1930s and 1940s,[109] long before the American Declaration or any other pertinent international human rights instrument was promulgated. Industrial development in Mossville also predated by many years the domestic legislative and regulatory framework now in place to prevent or mitigate pollution. At the time these facilities were constructed, industrial facilities may have been seen more as beneficial sources of employment than as sources of pollution. And once facilities began to be located in Mossville, more may well have followed, more likely for economic reasons than for any overt or implicit policy reasons. [110]

Petitioners do not point to any specific evidence that invidious discrimination motivated the development of industry in or near Mossville. Over time, with the development of more rigorous environmental regulation and a better understanding of environmental harms, restrictions were placed on the operations of these facilities as to the amount of pollution they could emit. The question of what additional protections to afford communities that are near historical concentrations of industrial activity is a difficult one, and again one that is influenced by the evolution of technical knowledge, and that implicates a balancing of many factors.

Petitioners offer little hard or rigorously-tested evidence to support their allegations of harm, or their contentions that government efforts to address them are so inadequate as to constitute violations of rights protected under the American Declaration. For the most part, they instead offer anecdotal accounts, generalities about the nature of environmental regulation in the United States, and conclusory statements and assumptions about the situation in Mossville. One exception, the report entitled *"Industrial Sources of Dioxin Poisoning in Mossville, Louisiana: A Report based on the Government's Own Data,"* attached as Appendix D to Petitioners' Additional Observations, interprets some of the available information very differently than is

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[109] Pet. at 8, 33, 36, & 37.

[110] The phenomenon of such subsequent "path dependent" development – the location and concentration of certain types of facilities in a particular area because of the economic impulse provided by similar prior development – is much studied in modern economics. *See, e.g.*, Paul Krugman, "The Role of Geography in Development" (1998), *downloadable at* www.worldbank.org/html/rad/abcde/krugman.pdf; "Path Dependence," entry in EH.Net Encyclopedia of Economic and Business History, *at* http://eh.net/encyclopedia/article/puffert.path.dependence.

reflected in Section II of these Observations and has certain shortcomings that EPA has addressed.[111]

By contrast, the information provided in Section II of these Observations demonstrates that the facts concerning the nature and extent of pollution in the Mossville area, its impacts on public health, and appropriate remedial responses, are still genuinely in doubt and under active investigation. The United States and its agencies are undertaking a range of concrete actions relating to the situation in Mossville, including analysis of what contaminants exist in the area, their sources, their potential health effects, and possible remedial actions. The results will provide additional information on the nature of the potential harms to Mossville residents, and will help to delineate what steps are needed to address or prevent those harms.

Thus, it cannot be said that the United States has ignored or abandoned the Mossville community, or disregarded the concerns Petitioners identify. Instead, the United States is in the course of gathering and analyzing the facts to ascertain whether those concerns are well-founded and, if so, to determine how to address them. Petitioners have had, and will continue to have, access to information on the status of these government activities, as well as opportunities to be heard as study and decision making move forward.

In these circumstances, Petitioners have not presented an adequate factual basis for their claims. It would be both unjustified and premature for the Commission to insert itself into this process at Petitioners' invitation.

V. Conclusion

For the foregoing reasons, the United States respectfully requests that the Commission determine that all claims in this Petition are inadmissible. Should the Commission instead deem any claims admissible, the United States respectfully requests that the Commission deny those claims on the Merits, as unsupported by the facts and insufficient as a matter of law under the American Declaration.

Attachments:

Index of Exhibits

Glossary

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[111] *See* Letter from EPA Region 6 to MEAN, Wilma Subra and Edgar Mouton transmitting *EPA Response to "Industrial Sources of Dioxin Poisoning in Mossville, Louisiana: A Report based on the Government's Own Data"* (Nov. 13, 2009), Exhibit H.

Index of Exhibits to United States' Observations Dated December 17, 2010

Exhibit A: EPA, *Plan EJ 2014* (July 27, 2010)

Exhibit B: EPA, *EPA's Action Development Process: Interim Guidance on Considering Environmental Justice During the Development of an Action* (July 2010)

Exhibit C: EPA, Timeline of Government Actions

Exhibit D: EPA, *Summary of Actions* (Oct. 2010)

Exhibit E: Sierra Club and NRDC Administrative Petition for Rulemaking Concerning CAA Section 112 Emission Standards (Jan. 14, 2009)

Exhibit F: LEXIS Verdict and Settlement database entry for *Comeaux v. Condea Vista*

Exhibit G: Title VI Administrative Complaint Against LDEQ and Concerning the PPG Industries, Lake Charles, Louisiana Facility (Dec. 14, 2010)

Exhibit H: Letter from EPA Region 6 to MEAN, Wilma Subra and Edgar Mouton transmitting *EPA Response to "Industrial Sources of Dioxin Poisoning in Mossville, Louisiana: A Report based on the Government's Own Data"* (Nov. 13, 2009)

GLOSSARY

APA	Administrative Procedure Act
ATSDR	Agency for Toxic Substances and Disease Registry
CAA	Clean Air Act
CERCLA/Superfund	Comprehensive Environmental Response, Compensation and Liability Act
CWA	Clean Water Act
EJ	Environmental justice
EPA	United States Environmental Protection Agency
EQA	Louisiana Environmental Quality Act
LDEQ	Louisiana Department of Environmental Quality
LDHH	Louisiana Department of Health and Hospitals
MACT	Maximum achievable control technology
MEAN	Mossville Environmental Action Now
NAAQS	National Ambient Air Quality Standards
NCP	National Contingency Plan
NESHAPs	National Emissions Standards for Hazardous Air Pollutants
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
NPL	National Priorities List
OCR	EPA Office of Civil Rights
PA	Preliminary Assessment
PVC	Polyvinyl chloride and copolymer
RCRA	Resource Conservation and Recovery Act
RESTORE	Restore Explicit Symmetry to Our Ravaged Earth

SDWA	Safe Drinking Water Act
SEP	Supplemental environmental project
SI	Site Investigation
SIP	State Implementation Plan
TMDL	Total maximum daily load
TSD	Treatment, storage, and disposal
VOC	Volatile organic compound