

December 4, 2021

Debra Shore
Region 5 Administrator
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604

Re: U.S. EPA's Authority Regarding the General III, LLC (d/b/a Southside Recycling) Permit

Submitted via e-mail to: shore.debra@epa.gov

Dear Administrator Shore:

We write today to thank you for coming to Southeast Chicago for an initial meeting with the Southeast Environmental Task Force (SETF), the Southeast Side Coalition to Ban Petcoke (SSCBP) and other members of the Chicago Environmental Justice Network on November 19, 2021, regarding the range of environmental injustices plaguing the area and other Southside communities.

As iterated in our discussion, we are urging U.S. EPA to utilize its federal enforcement authority in relation to the permit application of General III, LLC (d/b/a Southside Recycling) (hereinafter RMG/GIII) for a large industrial recycling operation proposed for 11600 S. Burley Avenue. SETF and its members are deeply concerned by the threat posed to the health and well-being of Southeast Side residents by the proposed relocation of the General Iron recycling operation from the Lincoln Park neighborhood to the Southeast Side.

This letter focuses on the legal authorities of U.S. EPA to ensure that recipients of federal funds like the City of Chicago do not take actions that discriminate against or disparately burden communities of color and protected classes. In the face of the very real risks to the health and well-being of the Southeast Side residents; the deeply troubling history of this particular operation and its proposed relocation; and the widening of disparities that granting a permit would produce, it is imperative that U.S. EPA exercise its authority to protect the community to its full and necessary extent.

I. U.S. EPA Should Act Now to Ensure the City of Chicago Complies With Its Title VI Obligations.

A. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 (Title VI) is a federal law that prohibits any federally funded program or activity from discriminating on the basis of race, color, or national origin, and

provides a statutory basis for relief for victims.¹ Section 602 of Title VI requires agencies distributing federal funds to issue regulations implementing the prohibition of discrimination.² It also requires these agencies to create mechanisms for processing complaints of discrimination based on race, color, and national origin.

Agency regulations implementing Title VI, as well as agency authority under other laws, are subject to the environmental justice goals of Presidential Executive Order 12898, which requires each Federal agency 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.”³ Federal agencies may implement policies that affect their funding activity to accomplish the goals of Executive Order 12898.⁴ Title VI itself and the Executive Order thus require agencies to use their Title VI authority, as well as their authority under various laws such as the Clean Air Act, National Environmental Policy Act, and the Fair Housing Act to prevent discrimination. As discussed in further detail in Section D below, U.S. EPA Title VI enforcement and compliance authority *includes* the authority to ensure that the activities they fund that affect human health and the environment do not discriminate based on race, color, or national origin.⁵

B. Title VI Implementation in the Environmental Context

U.S. EPA implements Title VI through its regulations contained at 40 CFR Part 7, “Nondiscrimination in Programs or Activities Receiving Federal Assistance from EPA.”⁶ Every U.S. EPA grant recipient, including each local government or department receiving financial assistance from U.S. EPA, is subject to the terms of 40 CFR Part 7.⁷ As a recipient of U.S. EPA financial assistance, the City of Chicago and by extension the Chicago Department of Public Health (CDPH) submitted assurance that it would comply with U.S. EPA’s Title VI implementing regulations along with its funding applications.⁸ Accepting U.S. EPA funds also

¹ 42 U.S.C. § 2000d et seq.

² 42 U.S.C. § 2000d-1.

³ Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.

⁴ U.S. EPA, *Title VI and Executive Order 12898 Comparison* (April 3, 2014), <https://www.epa.gov/sites/production/files/2015-02/documents/title-vi-ej-comparison.pdf>.

⁵ *Id.* (emphasis in original).

⁶ 40 C.F.R. § 7.35.

⁷ U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, https://19january2017snapshot.epa.gov/sites/production/files/2013-09/documents/frn_t6_pub06272000.pdf.

⁸ See <https://www.usaspending.gov/> (According to USAspending.gov, the City of Chicago has two current grants from U.S. EPA (Award ID # 00E02853 dated 10/1/20-9/30/22 related to the Diesel Emission Reduction Act and Award ID # 00E02870 dated 10/1/20-9/30/23 related to Brownfields); See also U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, https://19january2017snapshot.epa.gov/sites/production/files/2013-09/documents/frn_t6_pub06272000.pdf. (“Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded.”); Illinois EPA receives funds from the U.S. EPA for, *inter alia*, its air and waste functions and

served as the City of Chicago's acceptance of the obligation to comply with the agency's Title VI implementing regulations.⁹ Further, indirect receipt of federal funds through another agency is considered receipt of federal funds.¹⁰

Under U.S. EPA's Title VI implementing regulations, the City of Chicago is prohibited from using "*criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin.*"¹¹ Central to U.S. EPA's Title VI implementing regulations is the *consequence* of agency policies and decisions, not their *intent*. As such, they include prohibitions against both intentional and unintentional discrimination by the City of Chicago and other U.S. EPA funded agencies.¹²

Unintentional discrimination includes those actions that have a disproportionate adverse effect on individuals of a certain race, color, or national origin. Even where not formalized in writing, a neutral policy or decision understood as a standard operating procedure, a failure to act, or a failure to proactively adopt an important policy can also constitute a violation of Title VI.¹³ Recipients of federal financial assistance are prohibited from utilizing criteria or methods of administration that have the effect, even if unintentional, of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program's objectives.¹⁴

enforcement. Illinois EPA has several Memorandum of Understanding (MOUs) with the City of Chicago; with this letter we are providing the most recent drafts of two such MOUs in our possession, Intergovernmental Agency Agreement Agency Procurement No. FA-19202 dated 10/1/18-9/20/20 and Intergovernmental Delegation Agreement # #R2- 1A1 7; DLC#IOS-93 dated 7/1/16-6/30/21. Moreover, the air agreement includes that CDPH will provide environmental justice services and work with Illinois EPA to facilitate administration of its environmental justice program.

⁹ U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, https://19january2017snapshot.epa.gov/sites/production/files/2013-09/documents/frn_t6_pub06272000.pdf.

¹⁰ See Department of Justice, *Title VI Legal Manual*, https://www.epa.gov/sites/default/files/2021-01/documents/titlevi_legal_manual_rev_ed_1.pdf ("An entity may receive grant money directly from an agency or indirectly through another entity. In either case, the direct recipient as well as the secondary or subrecipient are considered to have received federal funds."). In addition, CDPH and Illinois EPA have two intergovernmental agreements pertaining to environmental matters. We are providing the most recent copies of these agreements in our possession. The first agreement provides that CDPH will provide Illinois EPA with air-related environmental justice services as well as a list of compliance and enforcement services, and in return Illinois EPA will provide CDPH with up to \$409,660 per year of the two-year agreement. The second is a waste management delegation agreement, under which Illinois EPA provided CDPH with \$142,302 dollars.

¹¹ 40 C.F.R. § 7.35 (emphasis added).

¹² *Id.*

¹³ See, e.g., *United States v. Maricopa Cty., Ariz.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

¹⁴ 40 C.F.R. § 7.35.

While neutral on their face, environmental laws, policies, public participation practices, and decisions can still produce unintentional discriminatory effects that violate Title VI.¹⁵ For this reason, the City of Chicago’s “Title VI obligation is layered upon its separate, but related obligations under the Federal or state environmental laws governing its environmental permitting program.”¹⁶ Therefore, the mere fact that the City of Chicago, including CDPH, can demonstrate its actions comply with relevant federal and state environmental laws “does not constitute per se compliance with Title VI.”¹⁷ Similarly, the “question of whether or not individual facility operators are in violation of [environmental laws] is distinct from whether the permitting agencies’ decision to grant permits to the operators had a discriminatory impact on the affected communities.”¹⁸

C. Permitting Decisions Under Title VI

Per 40 CFR 7.35(b), the City of Chicago and other recipients of U.S. EPA funding are responsible for ensuring that the activities authorized by their environmental permitting decisions do not have discriminatory effects, regardless of whether the agency selects the site or location of permitted sources. The fact that the recipient, the City of Chicago, does not select the site in a permit application does not relieve the City of the responsibility of ensuring that its actions in issuing permits for such facilities do not have a discriminatory effect. By extension, the fact that CDPH did not have a direct or substantial role in approving the site of the proposed operation does not relieve CDPH from its obligation to ensure that its permitting decisions do not have a discriminatory effect.

D. Compliance Reviews under Title VI

U.S. EPA has the authority and responsibility to investigate whether entities that receive federal funds are in compliance with Title VI.¹⁹ U.S. EPA regulations provide that the External Civil Rights Compliance Office:

[m]ay periodically conduct compliance reviews of any recipient’s programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.²⁰

¹⁵ U.S. EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, https://19january2017snapshot.epa.gov/sites/production/files/2013-09/documents/frn_t6_pub06272000.pdf.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Californians v. United States EPA*, No. C 15-3292 SBA, 2018 U.S. Dist. LEXIS 56105, *35 (N.D. Cal. Mar. 30, 2018)

¹⁹ 40 CFR 7.115(a).

²⁰ *Id.*

If U.S. EPA has “reason to believe that discrimination may be occurring in such program or activities,” the agency may collect data and information from the City of Chicago and conduct on-site reviews to ensure compliance.²¹

As the Department of Justice’s Title VI Legal Manual explains, federal agencies have “broad discretion” in determining which recipients and subrecipients to target for compliance reviews.²² The standards outlined above must be read in light of this broad discretion to ensure that agencies can hold recipients accountable for noncompliance with federal law.

Ultimately, U.S. EPA may withhold funding from recipients found to have discriminated on the basis of race, color, or national origin.²³ U.S. EPA may also use “any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.”²⁴

II. U.S. EPA Must Use Its Federal Enforcement Authority to Protect the Southeast Side Environmental Justice Community.

U.S. EPA, by letter to Mayor Lightfoot from Administrator Regan, has already recognized that “the current conditions facing Chicago’s southeast side epitomize the problem of environmental injustice, resulting from more than a half century of prior actions.”²⁵ U.S. EPA also noted that the “neighborhood currently ranks at the highest levels for many pollution indicators used by U.S. EPA’s EJSCREEN tool, including fine particulate matter, air toxics cancer risk, respiratory hazard, traffic proximity, lead paint, Superfund site proximity, hazardous waste proximity, and wastewater discharges.”²⁶ Furthermore, U.S. EPA cautioned that “the siting of this facility in Chicago’s southeast side has raised significant civil rights concerns.”²⁷

While CDPH is purporting to comply with Administrator Regan’s request for an environmental justice analysis by initiating a Health Impact Assessment (HIA), both the process and the substance of the HIA implementation by CDPH and the input given to that implementation by Region 5 raise serious concerns about the CDPH/the City’s Title VI compliance and U.S. EPA’s Title VI oversight. As outlined in detail in the attached comment letter to CDPH, both the Region 5 Air Study and numerous other aspects of the HIA as presented to the community during a virtual meeting on November 4, 2021 cannot serve as the basis for granting a permit and are otherwise woefully inadequate to satisfy either the most basic requirements for an HIA or the obligations of U.S. EPA and the City of Chicago under Title VI.

²¹ *Id.*

²² Department of Justice, *Title VI Legal Manual*, https://www.epa.gov/sites/default/files/2021-01/documents/titlevi_legal_manual_rev_ed_1.pdf.

²³ 40 C.F.R. § 7.130.

²⁴ *Id.*

²⁵ U.S. EPA, Letter to Lori Lightfoot from U.S. EPA Administrator Michael Regan (May 7, 2021).

²⁶ *Id.*

²⁷ *Id.*

U.S. EPA’s strategic plan emphasized the need to “strengthen enforcement of and compliance with civil rights laws to address the legacy of pollution in overburdened communities.”²⁸ In line with the agency’s strategic plan, we urge U.S. EPA to utilize its full federal oversight and enforcement authority pursuant to Title VI to ensure that residents of the Southeast Side environmental justice community are protected. We would welcome further dialogue with you and your staff should any questions arise.

Sincerely,

Ex. (6), 7(C)

On behalf of SETF and SSCBP

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²⁸ U.S. EPA, FY 2022-2026 EPA Strategic Plan Draft (October 1, 2021), <https://www.epa.gov/system/files/documents/2021-10/fy-2022-2026-epa-draft-strategic-plan.pdf>.