

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

(b)(6) Privacy, (b)(7)(C) Enf. Privacy)
and)
CONSERVATION LAW FOUNDATION, INC.,)
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Complainants,)
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v.)
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)
MASSACHUSETTS EXECUTIVE OFFICE)
OF ENERGY AND ENVIRONMENTAL)
AFFAIRS,)
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Respondent.)
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_____)

**COMPLAINT UNDER TITLE VI
OF THE CIVIL RIGHTS ACT
OF 1964**

I. INTRODUCTION

On August 29, 2022, the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (“EEA”) issued a Massachusetts Environmental Protection Act (“MEPA”) Certificate (“MEPA Certificate”)¹ determining that Parallel Products of New England (d/b/a (b)(6) Privacy, (b)(7)(C) Enf. Privacy) LLC (“Project Proponent”) fully complied with state law and its accompanying implementing regulations when it sought to expand its existing waste management facility on 71 acres in New Bedford, Massachusetts that would accept and process 1,500 tons per day of municipal solid waste and construction and demolition debris and transport most of that waste for disposal at other sites (“Project”). The MEPA Certificate came despite years of community members and their allies calling attention to the failure of the Proponent to engage the public, specifically its failure to engage New Bedford’s limited English proficient (“LEP”) speakers. Over the past three years, EEA Secretary and the MEPA Office allowed the Proponent to go months without conducting any community outreach, providing little to no interpretation services, and effectively withholding information from LEP speakers by failing to provide copies of key documents translated into the community members’ languages. Therefore, (b)(6) Privacy, (b)(7)(C) Enf. Privacy and Conservation Law Foundation (“CLF”) file the within complaint, seeking to hold EEA and the MEPA Office accountable to its duties and obligations under Title VI of the Civil Rights Act to uphold language justice by prohibiting any recipient of federal funds from engaging in discrimination on the basis of national origin.

¹ Massachusetts Executive Office of Energy and Environmental Affairs, EEA-15990, Certificate of the Secretary of Energy and Environmental Affairs on the Notice of Project Change and Supplemental Final Environmental Impact Report (Aug. 29, 2022). *See* Attachment A, MEPA Certificate and public comments.

The City of New Bedford is a racially, ethnically, and linguistically diverse community that has contributed to Massachusetts history since the 1700s. Once home to Frederick Douglass, its whaling industry created jobs and a home to those making passage along the underground railroad, contributing to the diverse community it is today.² Now, New Bedford is home to almost 100,000 residents, including state-designated environmental justice (“EJ”) populations.³ For all New Bedford has contributed to Massachusetts history, culture, and community, there can be no doubt that EEA and the MEPA Office were legally obligated to ensure a better and more inclusive environmental review process complete with multilingual materials; yet these entities failed to meet this obligation before issuing the MEPA Certificate to the Project Proponent.

Communities of color, low-income, LEP, and immigrant communities have disproportionately borne the environmental impacts of industrial advancement for too long. For communities like New Bedford, where a substantial number of LEP speakers live amidst state-designated environmental justice populations, these harms are exacerbated by the lack of meaningful access to public processes. Waste management facilities contribute multiple environmental burdens to host communities such as: heavy-duty vehicle traffic, noise, odor, pollution, and contamination.⁴ Before such facilities are permitted and constructed, it is vital that

² *The Underground Railroad*, NATIONAL PARK SERVICE (July 14, 2021), <https://www.nps.gov/nebe/learn/historyculture/undergroundrailroad.htm> (last visited Feb. 17, 2023).

³ Massachusetts law defines environmental justice populations as a neighborhood that meets one or more of the following criteria: (i) the annual median household income is not more than 65% of the statewide annual median household income; (ii) people of color or Indigenous People comprise 40% or more of the population; (iii) 25% or more of households lack English language proficiency; or (iv) people of color or Indigenous People comprise 25% or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150% of the statewide annual median household income. *See An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy*, St. 2021, c. 8, § 56.

⁴ Celine Yang, *Q&A: Addressing the Environmental Justice Implications of Waste*, ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, (May 14, 2021), <https://www.eesi.org/articles/view/qa-addressing-the-environmental-justice-implications-of-waste> (last visited Feb. 17, 2023).

the people most impacted receive an opportunity to influence decisions about what is happening in their community, and it is EEA's and the MEPA Office's obligation to safeguard that opportunity.

Civil Rights Act objectives include, among other things, promoting the full and fair participation of all affected populations in decision-making by state agencies receiving federal assistance and ensuring meaningful access to federally-funded programs and activities by LEP speakers. The mandate to include LEP speakers in public processes was emphasized as recently as February 16, 2023 when President Biden issued an *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, wherein he proclaimed that “[a]gencies shall comprehensively use their respective civil rights authorities and offices to prevent and address discrimination and advance equity for all, including to increase the effects of civil rights enforcement and to increase public awareness of civil rights principles, ...[to] improve language access services to ensure that all communities can engage with agencies’ respective civil rights offices, including by fully implementing Executive Order 13166 of August 11, 2000 (Improving Access to Services for Persons with Limited English Proficiency).”⁵ As a recipient of federal financial assistance, EEA and the MEPA Office are bound by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, to ensure that no residents are unlawfully excluded from their public decision-making processes. This mandate requires the meaningful participation of LEP speakers. The mandates of Title VI

⁵ *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, EO No. 14091 at section 8(e), available at [Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government - The White House](#).

are also reflected in EEA’s own Environmental Justice policy (“EEA EJ Policy”),⁶ in which EEA emphasizes that “communities must have a strong voice in environmental decision-making regardless of race, color, national origin, income, or **English language proficiency** [and] that such voices [must have the opportunity to] influence environmental decision-making....”⁷ Additionally, a 2021 Massachusetts law, An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy (“Roadmap Law”),⁸ and a 2014 Massachusetts Executive Order, Executive Order on Environmental Justice (“E.O. 552”)⁹ further commit EEA and the MEPA Office to ensuring a just and inclusive public decision-making process.

Here, the Project Proponent has sought permission to expand a waste management facility subject to MEPA review in New Bedford. The Project Proponent obtained the MEPA Certificate for their Notice of Project Change (“NPC”) and Supplemental Final Environmental Impact Report (“SFEIR”) on August 29, 2022¹⁰ after initially filing the Project environmental review materials in 2019. The MEPA Certificate marked the completion of the MEPA review process. For the entire three-year period from filing to certification, the Project Proponent failed to engage the New Bedford community, particularly New Bedford’s LEP speakers. First, the Project Proponent failed to provide adequate community outreach, adequate notice, and accessible registration processes for public meetings. Then, for the handful of public meetings

⁶ Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs (June 24, 2021), available at: [download \(mass.gov\)](#).

⁷ *Id.* at 2 (emphasis added).

⁸ An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, St. 2021, c. 8.

⁹ Massachusetts Executive Order 552, Executive Order on Environmental Justice (Nov. 20, 2014).

¹⁰ MEPA Certificate at 1.

that were held, the Project Proponent provided little to no interpretation services for residents who required them. Additionally, the Project Proponent failed to make translated copies of factual and important documents available to LEP speakers in their own languages. Finally, barriers that English-speaking community members faced in submitting public comment were exacerbated for LEP speakers. When [REDACTED] and CLF raised these concerns, the Project Proponent only provided excuses.

Despite the MEPA Office's obligations under Title VI and parallel state and regulatory mandates, the EEA Secretary issued a MEPA certificate knowing about the Project Proponent's failure to provide adequate community engagement and meaningful language access. Notably, even with the above-mentioned language access deficits that dampened community involvement, the MEPA Office received hundreds of comments about the Project, demonstrating community interest in the Project and warranting more comprehensive steps to safeguard language access.¹¹ The EEA Secretary and MEPA Office's certification of Project Proponent's NPC and SFEIR is a failure of their duties under Title VI to: (1) not discriminate based on national origin or English-language proficiency; and (2) provide adequate access for LEP speakers of the impacted community. It is also a violation of EPA's Title VI implementing regulations, 40 C.F.R. Part 7, *Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency* ("EPA Regulations"), and EPA's guidance to recipients of federal funds, *Guidance to Environmental Protection Agency Financial Assistance Recipients*

¹¹ *Id.* (noting that the EEA Secretary "received over 300 comment letters from elected officials, the New Bedford City Council, legislators, community and environmental organizations, and residents on this NPC/SFEIR filing ... [expressing] concerns about the project because of its noise, air quality, odor and traffic impacts and its proximity to residences and schools.").

Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Persons, Docket No. FRL-7776-6 (June 25, 2004) (“EPA LEP Guidance”).

Complainants now request the United States Environmental Protection Agency’s (“EPA”) External Civil Rights Compliance Office (“ECRCO”) promptly and thoroughly investigate the allegations set forth in this complaint and take all actions necessary to ensure that the Respondent complies fully with the law, including: (1) suspending Project Proponent’s ongoing Massachusetts permitting process until the conclusion of ECRCO review;¹² (2) requiring the EEA Secretary and MEPA Office to re-open the MEPA review process to allow additional public comment opportunities following written translation of project materials into languages spoken by LEP speakers affected by the Project and at least two in-person public meetings with language interpretation services, as well as a fully accessible registration process for public meetings; (3) suspending any further federal funding disbursements to EEA until the MEPA Office consistently requires environmental justice and language access compliance for all project proponents; and (4) any other remedy that the EPA deems appropriate.

II. PARTIES

a. Complainants

i. Conservation Law Foundation

Conservation Law Foundation is a nonprofit, member-supported organization dedicated to protecting New England’s environment. CLF protects New England’s environment for the benefit of all people and uses the law, science, and the market to create solutions that preserve

¹² See, e.g., TITLE VI LEGAL MANUAL, Civil Rights Division U.S. Department of Justice at 117 (stating that a remedy can include measures associated with a permitting action such as “modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impact” referencing EPA Investigations Guidance, 65 Fed. Reg. at 39,683.), available at [DOJ Title VI Legal Manual \(epa.gov\)](https://www.epa.gov/epa-title-vi-legal-manual).

our natural resources, build healthy communities, and sustain a vibrant economy. CLF’s mission includes working to end the unfair environmental burdens imposed on low-income communities and communities of color, and safeguarding the health and quality of life of all New England communities. CLF has 3,331 members in Massachusetts, including residents who reside in New Bedford. CLF’s zero waste project, operating within its environmental justice program, protects New England communities from the dangers posed by unsustainable ways of managing our waste. CLF became involved with this Project and [REDACTED] in 2019 when the Project Proponent initially sought to build a sewage sludge drying facility at the site located at 100 Duchaine Boulevard in New Bedford, Massachusetts. CLF’s Massachusetts members include residents with a deep interest in protecting our natural resources and in reducing the need for landfills, incinerators, and trash transfer stations, as well as promoting zero waste programs in the Commonwealth.

ii. [REDACTED]

[REDACTED] is an organization of concerned residents who formed initially in opposition to expanding gas infrastructure in Massachusetts and is now primarily focused on challenging the Project Proponent’s facility. [REDACTED] is a registered non-profit and has a subcommittee of New Bedford residents concerned specifically with the Project: [REDACTED]. Together, [REDACTED] have approximately 1,100 Facebook members, the majority of whom reside in New Bedford and are directly impacted by the Project.

b. Respondent - EEA and its MEPA Office

EEA is the primary agency of the Commonwealth of Massachusetts for environmental planning, charged with, “analyz[ing] and mak[ing] recommendations, in cooperation with other

state and regional agencies, concerning the development of energy policies and programs in the commonwealth.” M.G.L. c. 21A, § 2(17). EEA is a large agency containing many offices. The EEA office at issue here is the MEPA Office, charged with overseeing a review process that “provides meaningful opportunities for public review of potential environmental impacts,”¹³ for various projects like the one at issue in this complaint. The MEPA Office issues certificates determining whether a project adequately and properly complies with M.G.L. c. 30, §§ 61-62I and its implementing regulations, 301 CMR 11.00 et seq.

III. JURISDICTION

Under Title VI of the Civil Rights Act, acceptance of federal funds, including assistance from the EPA, for a program or activity, obligates the recipient to comply with the Title: “[n]o person in the United States shall, on ground race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. EEA is a “program or activity” which receives federal EPA assistance, making it subject to Title VI and EPA’s implementing regulations.

Under EPA regulations, a complaint may be filed by a person “who believes that he or she or a specific class of persons has been discriminated against” in violation of EPA regulations and Title VI. 40 C.F.R. § 7.120(a). Additionally, the complaint must be in writing, alleging the discriminatory acts that occurred, and be filed within 180 calendar days of the alleged

¹³ MASSACHUSETTS ENVIRONMENTAL POLICY ACT OFFICE, [Massachusetts Environmental Policy Act Office | Mass.gov](https://www.mass.gov/info-details/massachusetts-environmental-policy-act-office) (last visited Feb. 17, 2023).

discriminatory acts. 40 C.F.R. § 7.120(b). As explained below, this complaint satisfies all jurisdictional requirements outlined in 40 C.F.R. § 7.120.

a. Federal Financial Assistance

Under the EPA’s Title VI regulations, EEA is a “recipient” of federal financial assistance. A “[r]ecipient” is “any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient.” 40 C.F.R. § 7.25. In Fiscal Year 2022 alone, EEA received \$4,427,000 in federal funds.¹⁴ Because EEA receives federal financial assistance from EPA, it is subject to Title VI and EPA’s Title VI implementing regulations. 40 C.F.R § 7.25.

b. Program or Activity

A “program or activity” includes “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government; or [t]he entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.” 40 C.F.R. § 7.25.

Significantly, the entire entity does not need to receive federal funds for it to be governed by these regulations; indeed, “if any part of a listed entity receives federal funds, the entire entity is

¹⁴ *Capital Investment Plan*, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (2022), <https://budget.digital.mass.gov/capital/fy22/beneficiary-agency/energy-and-environmental-affairs/co-of-energy-and-environmental-affairs> (last visited Feb. 17, 2023).

covered by Title VI.” *Ass'n of Mexican-Am. Educators v. Cal.* 195 F.3d 465, 475 (9th Cir. 1999), rev'd in part on other grounds, 231 F.3d 572 (9th Cir. 2000) (citing *Grimes v. Superior Home Health Care*, 929 F. Supp. 1088, 1092 (M.D. Tenn. 1996)).

EEA is an agency of the Commonwealth of Massachusetts. The Massachusetts General Court has conferred general jurisdiction onto EEA to execute a broad range of environmental regulations for the benefit of all residents of Massachusetts. M.G.L. c. 21A, § 2. EEA contains, a “Massachusetts Environmental Policy Act Office,”¹⁵ the office relevant to this complaint. The agency is also vested with plenary powers that it may exercise as necessary and convenient to perform acts within its jurisdiction, such as notice requirements for matters within its jurisdiction. EEA’s operations and status as a state agency meet the definition of a “program or activity” under Title VI, and, therefore, it must comply with Title VI in implementing all its regulatory activities.

c. Timeliness

For a complaint to be timely, it must be filed “within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause.” 40 C.F.R. § 7.120(b)(2). The MEPA Certificate approving Project Proponent’s NPC and SFEIR was issued August 29, 2022, making the filing of this complaint fall within the 180-day limit.

d. Other Jurisdictional and Prudential Concerns

¹⁵ MASSACHUSETTS OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS, <https://www.mass.gov/orgs/executive-office-of-energy-and-environmental-affairs> (last visited Feb. 17, 2023).

This complaint satisfies all other jurisdictional criteria under Title VI and EPA's implementing regulations. Specifically, this written complaint describes the alleged discriminatory acts, identifies the challenged practice, and is filed with EPA by CLF and [REDACTED] who assert and allege that EEA and the MEPA Office's actions with respect to New Bedford's LEP speakers amounts to discrimination on the basis of national origin, violating Title VI and associated EPA regulations. 40 C.F.R. §7.120(a), (b).

IV. FACTUAL BACKGROUND

a. New Bedford is a Community with a Substantial LEP Population.

New Bedford is the sixth largest city in Massachusetts, located on the Acushnet River on Massachusetts' south coast. With a population of just under 100,000, New Bedford boasts a large multi-ethnic population, where 33% of residents do not speak English very well.¹⁶ As of 2020, 20% of New Bedford's population were foreign-born and 40.9% identify as something other than Non-Hispanic White.¹⁷ The largest non-White ethnic groups in New Bedford are Hispanic or Latino at 14% and Black or African American at 6.21%.¹⁸ White non-Hispanic people make up 59.1% of New Bedford's population. Comparatively, Massachusetts has a 12.8% Hispanic or Latino population, 9.3% Black or African American population, and 70.1% White non-Hispanic or Latino population, reflecting the fact that New Bedford has a higher proportion of non-White ethnic groups than is reflected in the overall Massachusetts population, including a higher

¹⁶ Languages Spoken in Massachusetts Mapping Tool, New Bedford, [Languages spoken in Massachusetts \(arcgis.com\)](#) (data can be accessed by clicking on New Bedford, census tract 6515, and then using the right arrow to navigate to screen 6/8 (02740), which indicates that 33.4% of households speak a language other than English); see also *Demographics*, NEW BEDFORD, [New Bedford, MA | Data USA](#).

¹⁷ *Demographics*, NEW BEDFORD, [New Bedford, MA | Data USA](#).

¹⁸ *Id.*

percentage of Hispanic residents.¹⁹ According to the EPA’s Environmental Justice Screen, of the 38% of residents that speak a language other than English at home, 15% of New Bedford residents speaks English “less than very well.”²⁰ Project Proponent is located at the New Bedford Business Park, an area designated by Massachusetts law and mapping tool as an environmental justice population, and where 10% of the population is language isolated.²¹ The fact that New Bedford has both large LEP and people of color populations invariably is related to its many poverty and environmental justice issues. The median per capita income for 2017-2021 was \$27,583, meaning 18.7% of New Bedford lives in poverty,²² 8.3% above the state average of people living in poverty.²³ In a state where almost half the adult population has a bachelor’s degree,²⁴ New Bedford falls severely behind with only 17% of the population holding a bachelor’s degree or higher.²⁵

New Bedford’s environment and community bear the impact of industry today. As a large port city, New Bedford’s fishing industry generates more than \$1 billion in economic activity. Fishing in the New Bedford Harbor itself, however, is banned because of polychlorinated

¹⁹ QuickFacts Massachusetts, UNITED STATES CENSUS BUREAU (2021), [U.S. Census Bureau QuickFacts: Massachusetts](#).

²⁰ EJScreen: Environmental Justice Screening and Mapping Tool, [EJScreen: Environmental Justice Screening and Mapping Tool | US EPA](#) (last visited Feb. 17, 2023).

²¹ Languages Spoken in Massachusetts Mapping Tool, New Bedford, [Languages spoken in Massachusetts \(arcgis.com\)](#).

²² QuickFacts New Bedford City, Massachusetts, UNITED STATES CENSUS BUREAU (2021), [U.S. Census Bureau QuickFacts: New Bedford city, Massachusetts](#).

²³ QuickFacts Massachusetts, UNITED STATES CENSUS BUREAU, (2021), [U.S. Census Bureau QuickFacts: Massachusetts](#).

²⁴ *Id.* (45.2% of the population age 25+ has a Bachelor’s degree or higher, 2017-21).

²⁵ QuickFacts New Bedford City, Massachusetts, UNITED STATES CENSUS BUREAU (2021), [U.S. Census Bureau QuickFacts: New Bedford city, Massachusetts](#).

biphenyl contamination from industrial waste.²⁶ In fact, the Harbor is so contaminated, it has become the largest EPA Superfund Site in the country.²⁷ Despite this, locals have been documented fishing for both recreation and sustenance in the contaminated area.²⁸ EPA research into this pattern has revealed a potential explanation: fishing advisories, which are printed in English, Spanish, and Portuguese, are not accessible to new immigrants to New Bedford from Guatemala, who speak K'iché, a non-written Mayan language.²⁹ New Bedford also suffers from a multitude of health and environmental concerns, like statistically significantly higher blood lead levels³⁰ and combined sewer overflow.³¹

To be considered an environmental justice population in Massachusetts, the neighborhood must meet one of the following criteria:³²

1. The annual median household income is 65% or less of the statewide annual median household income;
2. People of color or Indigenous Peoples make up 40% or more of the population;
3. 25% or more of the households identify as speaking English less than “very well;”

²⁶ *Persistent Contamination with PCBs in New Bedford Harbor, Massachusetts, The US*, ENVIRONMENTAL JUSTICE ATLAS (Nov. 3, 2021), <https://ejatlas.org/conflict/pcbs-in-new-bedford-harbor-massachusetts#:~:text=New%20Bedford%20is%20made%20up,environmental%20justice%20communities%20%5B2%5D>.

²⁷ *Id.*

²⁸ Conservation Law Foundation, NEW BEDFORD, MASSACHUSETTS ENVIRONMENTAL JUSTICE IN THE TWENTY-FIRST CENTURY at 16 (August 2016), available at [Microsoft Word - FINAL New Bedford EJ Assessment.docx \(clf.org\)](#).

²⁹ *Id.* For additional evidence of failure to recognize K'iche language, see Colin Hogan, *DOJ settlement: New Bedford Schools must increase focus on K'iché language and culture*, NEW BEDFORD LIGHT (Sept. 19, 2022), [DOJ settlement: New Bedford schools must increase focus on K'iché language and culture - The New Bedford Light](#).

³⁰ Massachusetts Department of Public Health Environmental Justice Tool, [EJ screening custom mapping \(mass.gov\)](#) (to access data, select “New Bedford”).

³¹ ArcGIS CSO Reporting Map, [ArcGIS - CSO Reporting Map](#) (last visited Feb. 21, 2023).

³² An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, St. 2021, c. 8, § 56; see also Environmental Justice Populations in Massachusetts, EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (2022), <https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts#:~:text=In%20Massachusetts%2C%20an%20environmental%20justice,or%20more%20of%20the%20population>.

4. People of color or Indigenous Peoples make up 25% or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150% of the statewide annual median household income.

New Bedford meets **all** criteria.³³ Over 78% of New Bedford residents meet criteria for an environmental justice population.³⁴ Because New Bedford residents are already burdened by environmental and health concerns, it is especially critical for New Bedford's LEP speakers to be included in decisions like the expansion of a waste management facility, a decision that has the potential to worsen environmental and health conditions in their community.

b. Project Proponent Is Subject to the MEPA Approval Process and Accompanying State Law.

Before detailing how MEPA's certificate approving Project Proponent's NPC and SFEIR was a violation of its duties under Title IV, Complainants will first set forth the timeline and provide details of Project Proponent's waste management facility construction. In 2019, the Project Proponent initially filed an Extended Environmental Notification Form with the MEPA Office.³⁵ The Project is part of a 71-acre waste management facility that currently recycles and processes glass, and seeks to additionally handle solid waste, including both municipal solid waste ("MSW") and construction and demolition waste ("C&D").³⁶ The Project is split into two phases, where Phase 1 includes the construction of:

³³ Environmental Justice Populations in Massachusetts, EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (2022), <https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts>; *see also* List of Massachusetts Cities & Towns with Environmental Justice Populations (updated Nov. 2022), available at [EJ 2020 updated municipal statistics Nov2022.xlsx \(s3.us-east-1.amazonaws.com\)](https://www.mass.gov/doc/2020-updated-municipal-statistics-nov2022.xlsx).

³⁴ MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS, 2020 ENVIRONMENTAL JUSTICE POPULATIONS (NOV. 2022) (available at: <https://www.mass.gov/doc/massachusetts-cities-towns-with-environmental-justice-populations/download>).

³⁵ MEPA Certificate at 1.

³⁶ *Id.* at 2.

[A] 27,5000 foot (sf) building for glass recycling/processing (“Glass Processing Building”), a 23,320-sf bunker building (“Glass Processing Bunker Building”) attached to the north side of the Glass Processing Building, a 21,973-sf side bunker building (“Glass Processing Side Bunker Building”) southeast of the Glass Processing Building, a railroad (“RR”) sidetrack from the main RR line to the glass processing facility, and installation of an approximately 1.9-megawatt (“MW”) solar photovoltaic (“PV”) array mounted on rooftops and canopies.³⁷

A majority of Phase 1 was completed after the Project Proponent obtained a Phase 1 waiver.³⁸

Currently, Project Proponent operates the glass recycling and processing portion of Phase 1, and construction is almost complete on all other Phase 1 components.³⁹ Phase 2 is construction of the MSW and C&D transfer station, which will include a 65,317 sf MSW and C&D tipping and processing building, extension of the railroad sidetrack, and construction of additional roof- and canopy-mounted solar arrays.⁴⁰ The facility will have trucks traveling to and from the site for thirteen hours straight every weekday and for nine hours on Saturdays;⁴¹ certain waste, like processed MSW, will be baled and shrink-wrapped for transport via rail.⁴²

This large undertaking will impact the surrounding environmental justice populations. Residents will be subjected to 418 daily truck trips, air pollutants, odor, and noise.⁴³ The facility will use 19,650 gallons of water per day and generate 113,750 gallons of wastewater at the same

³⁷ *Id.* at 2-3.

³⁸ *Id.* at 3.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 4.

time.⁴⁴ The facility itself is located in an environmentally sensitive area, bordering both vegetated wetlands and land under water to the north and west, and the Acushnet Cedar Swamp State Reservation to the west.⁴⁵ By reviewing a map of New Bedford, it becomes immediately apparent that on weekdays, when 418 trucks will be traveling daily on Route 140 along with the additional traffic added by 90% of the Project Proponent’s employees, such traffic will impede and interfere with the comings and goings of school children, teachers, and staff of an elementary school located not more than 1,000 feet from the exit ramp.⁴⁶ Further, Route 140 runs through environmental justice populations to the north and south of the Project site.⁴⁷

To construct the Project, the Project Proponent is subject to MEPA review and must prepare and submit an Environmental Impact Report (“EIR”).⁴⁸ MEPA jurisdiction regarding this Project is “broad” because the Project Proponent is seeking financial assistance.⁴⁹ Project Proponent is subject to the EEA EJ Policy due to its location within an EJ population and because it exceeds EIR thresholds for sewage and solid waste.⁵⁰ Since initiating the MEPA review process in 2019, the Project Proponent over the past three years has: (1) filed an Extended Environmental Notification Form (“EENF”) in February 2019 and a two-part supplemental

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 301 CMR 11.03(5)(a)(6), 11.03(9)(a).

⁴⁹ 301 CMR 11.01(2)(a)(2) (“MEPA jurisdiction is broad when a Project is undertaken by an Agency or seeks the provision of Financial Assistance”). *See also* Background Document on Proposed Regulations by Massachusetts Environmental Policy Act (MEPA) Office (Sept. 2021) at 2, available at [download \(mass.gov\)](https://www.mass.gov/info-details/download-mass-gov).

⁵⁰ MEPA Certificate at 5.

submittal to the EENF in March 2019;⁵¹ (2) received a Phase 1 Waiver from EEA in May 2019;⁵² (3) filed a two-part Draft Environmental Impact Report (“DEIR”) in November 2019;⁵³ (4) obtained MEPA approval for the DEIR in January 2020;⁵⁴ (5) submitted a Final Environmental Impact Report in January 2021;⁵⁵ (6) submitted a combined SFEIR and NPC in July 2022;⁵⁶ and finally, (7) received the MEPA Certificate for both its NPC and SFEIR on August 29, 2022.⁵⁷

EEA has acknowledged the widespread community opposition to the Project. In fact, in the Certificate, the EEA Secretary states: “I received over 300 comment letters from elected officials, the New Bedford City Council, legislators, community and environmental organizations, and residents on this NPC/SFEIR filing. Most commenters expressed concerns about the project because of its noise, air quality, odor and traffic impacts and its proximity to

⁵¹ GREEN SEAL ENVIRONMENTAL INC., EXPANDED ENVIRONMENTAL NOTIFICATION FORM (2019), available at: [MEPA-EENF-Complete-Report-Final.pdf \(parallelproductssustainability.com\)](#); GREEN SEAL ENVIRONMENTAL INC., EXPANDED ENVIRONMENTAL NOTIFICATION FORM, SUPPLEMENTAL SUBMITTAL (2019), available at: [PPNE-Supplemental-Submittal-1.pdf \(parallelproductssustainability.com\)](#); GREEN SEAL ENVIRONMENTAL INC., EXPANDED ENVIRONMENTAL NOTIFICATION FORM, SUPPLEMENTAL SUBMITTAL NO. 2 (2019), available at: [PPNE-Supplemental-Submittal-2.pdf \(parallelproductssustainability.com\)](#).

⁵² MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS, FINAL RECORD OF DECISION (2019), available at: [MEPA-Phase-One-Approval.pdf \(parallelproductssustainability.com\)](#).

⁵³ GREEN SEAL ENVIRONMENTAL INC., DRAFT ENVIRONMENTAL IMPACT REPORT (2019), available at: [Complete-PDF-pg-1.pdf \(parallelproductssustainability.com\)](#) and [Complete-PDF-pg-2.pdf \(parallelproductssustainability.com\)](#).

⁵⁴ MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS, CERTIFICATE OF SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS ON THE DRAFT ENVIRONMENTAL IMPACT REPORT (2020), available at: [15990-DEIR-Parallel-Products-of-New-England.pdf \(parallelproductssustainability.com\)](#).

⁵⁵ GREEN SEAL ENVIRONMENTAL, INC., FINAL ENVIRONMENTAL IMPACT REPORT (2021), available at: [feir.pdf \(parallelproductssustainability.com\)](#).

⁵⁶ GREEN SEAL ENVIRONMENTAL, INC., NOTICE OF PROJECT CHANGE AND SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT (2022), available at: [sfeir.pdf \(parallelproductssustainability.com\)](#).

⁵⁷ MEPA Certificate at 1-2.

residence and schools. Most commenters opposed to the project have highlighted the environmental burden placed on EJ populations and residents in nearby sections of New Bedford....”⁵⁸

For the entirety of this Project, Project Proponent has been and remains subject to the Roadmap Law, which requires “additional measures to improve public participation by the environmental justice population,” when a proposed project “affects” such a population.⁵⁹ Such additional measures include “(i) making public notices, environmental notification forms, environmental impact reports and other key documents related to the Secretary’s review and decisions of a project review available in English and **any other language spoken by a significant number of the affected environmental justice population**, (ii) providing **translation services at public meetings** for a significant portion of an affected environmental justice population that lacks English proficiency”⁶⁰ The Secretary and MEPA Office have failed to meet their obligations under Title VI and the Roadmap Law.

When the Secretary and MEPA Office approved the Project Proponent’s NPC and SFEIR on August 29, 2022, they concluded that the Project Proponent “adequately and properly complie[d]” with the Massachusetts Environmental Policy Act and its implementing regulations.⁶¹ Having received the MEPA Office’s approval, the Project Proponent will go on to other state permitting procedures.

⁵⁸ *Id.* at 1-2.

⁵⁹ An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, St. 2021, c. 8.

⁶⁰ *Id.* (emphasis added).

⁶¹ MEPA Certificate at 1.

c. Multiple Barriers Existed that Prevented New Bedford’s LEP Speakers from Being Involved in the MEPA Review Process.

Throughout the entirety of MEPA review process, the Project Proponent consistently failed to engage New Bedford’s LEP speakers about the Project and its impact on their community. The public process leading up to the NPC/SFEIR approval lacked community participation in multiple ways. First, the Project Proponent failed to provide adequate outreach to the community, and notice and accessible registration processes for public meetings. Then, for the handful of public meetings that were held, the Project Proponent provided little to no interpretation services for residents who required them. Additionally, the Project Proponent failed to make translated copies of factual and important documents available to LEP speakers in their own languages. Finally, the Project Proponent failed to provide the community with adequate time to comment on its NPC/SFEIR, a highly technical document that even to English speakers would be challenging to read and respond to quickly. Each of these obstacles is discussed in more detail below.

- i. Barriers to LEP speakers were created by inadequate outreach having been conducted, and insufficient notice of and poor access to the few public meetings that occurred.*

The Project Proponent failed to conduct sufficient community outreach throughout the MEPA review process. While their door-to-door outreach program purportedly reached 1,390 homes, such outreach occurred three years ago.⁶² The Project Proponent has not provided door-

⁶² Notably, although a Parallel Projects employee identified herself as responsible for community outreach at the last of several meetings held in 2021 (June 18, 2021), that person was not in attendance at any of the meetings held in 2022, so there is no evidence that anyone was responsible for outreach during 2022, when the Project Proponent submitted its NPC/SFEIR.

to-door outreach since 2019, during which time new people may have moved into or within the community. So limited is the Project Proponent’s outreach that it describes its sponsorship of the 2019 New Bedford Chowderfest as one of its outreach events. Comments from the public demonstrate that the only reason many community members had any notice of Parallel Projects’ plans was because community-based organizations, such as (b)(6) Privacy, (b)(7)(C) worked hard to keep community members informed. Instead of reaching out to the community that would be impacted by its Project, the Project Proponent delivered notice of meetings **only** to state and city officials, and to only those community members and community-based organizations that had previously submitted comments regarding prior project filings or attended prior virtual meetings. Because few community members and community-based organizations comprised this group, much of the community was never provided notice of the meetings. The deficiency of community outreach is perfectly illustrated by one of the 300 comments provided to MEPA: “the **only** reason I am aware of the project, its development, and the MEPA process is due to the outreach efforts made by the members of the (b)(6) Privacy, (b)(7)(C) Enf. Privacy.”⁶³

Prior to the global COVID-19 pandemic, which first impacted Massachusetts in March 2020, community members report little to no contact with the Project Proponent. In fact, the Project Proponent held only four meetings in 2019, three of which occurred in June 2019 and at which the Project Proponent restricted attendance to 20 people. For over a year, from June 2021 to July 2022, the Project Proponent failed to conduct any public meetings at all. Finally, the Project Proponent held two virtual meetings on August 3, 2022, and August 18, 2022.⁶⁴

⁶³ See Attachment A at 39 (emphasis added).

⁶⁴ Parallel Projects’ website indicates that it held a virtual public meeting on June 3, 2022, but that meeting actually occurred on August 3, 2022, which is evidenced by information on the first slide on the video recording of the

Frustratingly, these meetings, which were about the changes to Final Environmental Impact Report that had been submitted sixteen months earlier in January 2021, were held **after** the SFEIR, describing those changes, had been submitted to EEA in July 2022. The public comment period deadline to the MEPA Office on the SFEIR was August 22, 2022, just four days after the August 18, 2022 meeting.⁶⁵ This resulted in the SFEIR submission being without meaningful community involvement (see *subsection iv* below for more discussion on this point). Additional barriers to participating in the August 2022 public meetings were created by the Project Proponent requiring prospective attendees to register for these meetings on their website in advance.

The MEPA Office acknowledges in its Certificate that the Project Proponent failed to engage with the community: “I do recognize that the [Project] Proponent, by its own admission, did not engage the public on the changed components of the project prior to filing, which is inconsistent with the spirit of the EEA EJ Policy.”⁶⁶ Yet, in the face of this admission, the EEA Secretary and MEPA Office still certified the Project Proponent’s NPC/SFEIR, which concluded the MEPA review process.

meeting. The website also indicates that it held a virtual public meeting on August 18, 2022, but that recording is identical to the one labeled June 3, 2022. There is not a recording of the August 18, 2022 on Parallel Products’ website. See [Meetings – Parallel Products Sustainability](#).

⁶⁵ Subsequent to the August 2022 public meetings, the Project Proponent held two additional virtual meetings (September 21, 2022 and December 15, 2022) and one in-person meeting (January 11, 2023), which are not relevant to the within complaint as such complaint deals with the MEPA Certificate that was issued on August 29, 2022.

⁶⁶ See MEPA Certificate at 2. Interestingly, the EEA Secretary suggests that because the Project Proponent removed a third portion of the Project, a biosolid waste component, its defects in outreach and community involvement were thereby cured. Removal of the biosolid component does not cure such defects, because the Project Proponent continues to advance other portions of the Project without having meaningfully engaged community members, including LEP speakers, in the process leading up to the MEPA Certificate.

- ii. Barriers to LEP speakers were created by the existence of little or no interpretation services, which were not truly accessible to LEP speakers even when offered.

When registering for some public meetings, participants were prompted to indicate if they needed interpretation services; however, they were prompted to do so in **English only** and they were not able to indicate **what** language they required interpretation services in. Even after registering for the August 3, 2022 meeting and requesting language interpretation services, one person received an **English language** email with instructions on how to access interpretation services.⁶⁷ For LEP speakers, then, even requesting interpretation services for public meetings was not truly accessible.⁶⁸

Further issues around communication and access developed during the August 3, 2022 meeting. Attendees were permitted to enter questions into the virtual chat, but were not able to view any other entries in the chat, meaning they could not see if their questions were echoed by other community members or if clarification/answers were provided in the chat. Additionally, attendees who planned to ask a question live discovered that they were unable to unmute themselves on the virtual platform. This resulted in questions going unanswered by the Project Proponent. During the meeting itself, the lack of interpretation services was brought to the Project Proponent's attention. Their response was that the submissions requesting interpretation

⁶⁷ The email stated in English, "our registration records show you recently requested interpretation services for this event... Please clarify what sort of services you will need," indicating a total lack of awareness that a person requesting interpretation services may have trouble making the request for same in English.

⁶⁸ Even now, having obtained a MEPA Certificate and entering the site suitability application process with Massachusetts' Department of Environmental Protection, the Project Proponent continues to fail to make its public meeting registration process accessible to LEP speakers. *See* Attachment B (screenshot of recent registration form accessed February 17, 2023 for March 1, 2023 public meeting in English with instructions for requesting interpretation services in English only).

services had been provided too late to accommodate. As an alternative to live interpretation, the Project Proponent proposed that community members take additional time to meet with them individually at their facility, one on one. The Project Proponent recorded the meeting and posted it on its website, erroneously dated June 3, 2022.

A second virtual meeting was held on August 18, 2022. The Project Proponent provided live interpretation in Spanish at this meeting, though a recording of this meeting is not available on the Project Proponent's website in English or Spanish.⁶⁹ In fact, of the eight recordings of public meetings posted on Parallel Products' website, one is labeled "private video"; one is misdated (June 3, 2022); two (those labeled June 3, 2022 and August 18, 2022) are identical recordings of the same meeting (the meeting that occurred on August 3, 2022), and none of the recordings is available in any language besides English.⁷⁰ Notably, only one of these meetings occurred during the public comment period for the NPC/SFEIR.⁷¹

iii. Barriers to LEP speakers were created by the lack of materials translated into other languages.

Any LEP speakers seeking information from the Project Proponent about the Project would have experienced challenges finding multilingual or translated materials. The Parallel Products website has an entire webpage dedicated to the New Bedford Facility expansion where

⁶⁹ A recording labeled August 18, 2022 is available on the Project Proponent's website, but that recording is identical to the recording labeled June 3, 2022, which is, in fact, a recording of the August 3, 2022 public meeting.

⁷⁰ See Parallel Products "Community Meeting Recordings" available at [Meetings – Parallel Products Sustainability](#) (last visited Feb. 17, 2023).

⁷¹ Only the August 18, 2022 meeting occurred during the public comment period for the NPC/SFEIR, but as discussed earlier, there is no recording of this meeting on Parallel Projects' website (the recording labeled August 18, 2022 is a duplicate of the recording labeled June 3, 2022, which is actually a recording of the meeting that occurred on August 3, 2022).

links to twenty-five documents are available. Of those documents, only one – the air quality fact sheet – has been translated into a language other than English; this document was translated in Spanish and Portuguese, which, upon review by CLF, appeared to have been translated by a translator without sufficient understanding of the content to communicate language nuances accurately.⁷² Documents that contain a wealth of relevant information about the Project – such as the Traffic Impact Study Summary, January 2020 Informational Meeting PowerPoint, Site Rendering, EENF Certificate, and others – are not translated into any other languages, making them inaccessible to anyone who does not read English. So too was other important information, such as the Project Proponent’s NPC/SFEIR submittal and the announcement that the Project Proponent signed a host agreement with the City of New Bedford, leaving LEP speakers with no access to this process for which public involvement is essential.

Notably, (b)(6) Privacy, (b)(7) members recall that fact sheets distributed by the Project Proponent sometimes contained instructions on how to request translation services by email. However, expecting LEP speakers to access translated copies of documents by first reading and following English-language instructions is nonsensical and demonstrates how poorly the Project Proponent cared to make its materials accessible to LEP speakers.

iv. Heightened barriers to LEP speakers were created by the short comment period permitted for the NPC/SFEIR.

⁷² See Parallel Products, “New Bedford Facility” available at [Parallel Products Sustainability](#) (last visited Feb. 17, 2023). The fact sheets contain phrases and language that are a literal translation of the text lacking accuracy and precision. For example, in the Spanish fact sheet, the phrase “How could the project impact me?” is translated as “¿Cómo podría impactar el proyecto en mí?” which if it had been translated accurately would have read, “¿Cómo podría impactarme el proyecto?” The phrase used in the fact sheet reads incoherently instead of fluently. Another example of language that fails to accurately convey the intended meaning is found in the phrase, “emisiones presenciales,” which is meant to communicate “on-site emissions,” but actually reads as “in person” or “face-to-face” emissions. Relying on computer-generated translation or translators who lack understanding of the English content instead of utilizing trained translators leads to documents that are not immediately accessible or clear to understand.

Approval of the NPC/SFEIR completes the MEPA review process for this Project, triggering the next step, which includes Massachusetts Department of Environmental Protection's ("DEP") review for permitting. Therefore, the public comment opportunity on the MEPA documents was the last chance for the community to participate in the MEPA process and the only time that an agency looks at the Project operations in their entirety, not limited to only one component of the Project, such as air emissions. Massachusetts law anticipates that the NPC and SFEIR will be submitted as two separate documents with two separate comment periods lasting for 20 days and 37 days, respectively.⁷³ Here, the MEPA Office allowed the Project Proponent to incorporate the NPC into the SFEIR, resulting in only one comment period for the public, instead of the typical two. This circumvention resulted in a comment period for the combined NPC/SFEIR of 37 days for a 997-page document. Many commenters requested an extension of time to comment.⁷⁴

Despite these requests for more time to comment, the MEPA Office refused to extend the comment period for any length of time, stating the only way to extend the comment period would be for the Project Proponent to withdraw and resubmit the NPC/SFEIR to restart the clock.⁷⁵ Predictably, the Project Proponent did not select this course of action. MEPA regulations detail the responsibilities of the MEPA Office.⁷⁶ Among other things, the MEPA Office is

⁷³ Background Document on Proposed Regulations by Massachusetts Environmental Policy Act (MEPA) Office (Sept. 2021) at 2 ("An ENF filing undergoes 30-day review period [with 20 days for public comment], while each EIR is subject to a 37-day review period [with 30 days for public comment]). *See* M.G.L. c. 30, §§ 62A-62C").

⁷⁴ Joint comment letter of CLF, (b)(6) Privacy, (b)(7)(C) Enf. Privacy to Secretary Card, EEA at page 4 (Aug. 22, 2022).

⁷⁵ MEPA Certificate at 6-7.

⁷⁶ 301 CMR 11.01(5)(b).

responsible for: “ensuring adequate prior public notice of site visits, public consultation sessions, and comment periods, and meaningful opportunities for public review of review documents”⁷⁷

The MEPA regulations further allow the Secretary to extend the public comment period for up to 30 days “on account of the Proponent’s failure to meet circulation or Public Notice requirements, with the consent of the Proponent for a draft EIR or as part of a Special Review Procedure.”⁷⁸

Instead of using available time to engage the public, however, the Project Proponent was in negotiations with the City of New Bedford’s elected officials to reach an agreement that would result in the Project Proponent paying a fee to the city, engaging in discussions that were not transparent and inclusive, thereby shutting the community out of the process.⁷⁹

V. LEGAL ANALYSIS

a. The MEPA Certificate Sanctions Intentional Discrimination on the Basis of National Origin, Prohibited by Title VI of the Civil Rights Act.

The Project Proponent’s failure to provide language services to LEP speakers is intentional discrimination on the basis of national origin. By issuing the MEPA Certificate, then, EEA and the MEPA Office have engaged in intentional discrimination on the basis of national origin, which, as a recipient of federal funds, they are prohibited from doing.

i. Language-based discrimination can be a form of national origin discrimination.

⁷⁷ *Id.*

⁷⁸ 301 CMR 11.08(4).

⁷⁹ MEPA Certificate at 6 (stating that the Project Proponent did not engage the public with regard to its changed Project, because it was “still in negotiations with the City about these changes”); *see also* PARALLEL PRODUCTS DROPS BIOSOLIDS PROJECT IN AGREEMENT WITH CITY, City of New Bedford (July 15, 2022), available at [Parallel Products Drops Biosolids Project in Agreement with City - City of New Bedford Official Website \(newbedford-ma.gov\)](https://www.newbedford-ma.gov/parallel-products-drops-biosolids-project-in-agreement-with-city).

Courts have long articulated that language-based discrimination can be a form of national origin discrimination, which is prohibited under Title VI of the Civil Rights Act of 1964. In *Lau v. Nichols*, the Supreme Court held that the San Francisco Unified School District had violated state regulations promulgated under Section 602 of Title VI by California’s Department of Health, Education, and Welfare, which required school districts to “take affirmative steps to rectify the language deficiency” of “national origin-minority group children,” when the district failed to provide English-language instruction to Chinese-speaking students.⁸⁰ While “little case law”⁸¹ has attempted to test the parameters of the Supreme Court’s 2001 *Alexander v. Sandoval* decision,⁸² which refined the scope of *Lau*, there can be no doubt that language-based discrimination remains a form of national origin discrimination proscribed by Title VI of the Civil Rights Act. *See e.g., T.R. v. Sch. Dist. of Philadelphia*, 223 F. Supp. 3d 321, 335 (E.D. Pa. 2016) (the “Supreme Court’s pronouncement in *Lau* instructs that language based discrimination can constitute an actionable form of national origin discrimination”); *New York by Schneiderman v. Utica City Sch. Dist.*, 177 F. Supp. 3d 739, 752 (N.D.N.Y. 2016) (concluding that an allegation that senior school district officials “directed their subordinates to divert LEP

⁸⁰ *Lau v. Nichols*, 414 U.S. 563, 568, 94 S. Ct. 786, 789, 39 L. Ed. 2d 1 (1974) (internal quotations omitted) (abrogated on other grounds by *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), holding that Section 601 of Title VI prohibits only intentional, not disparate impact, discrimination). *See also United States v. Maricopa Cnty., Ariz.*, 915 F. Supp. 2d 1073, 1079–80 (D. Ariz. 2012) (noting that “longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI”).

⁸¹ *Almendares v. Palmer*, 284 F. Supp. 2d 799, 805 (N.D. Ohio 2003) (stating that “even if there is little case law after *Sandoval*, [the defendants’ argument that the] plaintiffs can only allege a claim of intentional discrimination by demonstrating they were ‘treated differently than similarly-situated individuals’ is not an accurate statement of the law”).

⁸² *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (holding that Section 601 of Title VI prohibits only intentional, not disparate impact, discrimination).

immigrant students aged 17–20 ... into alternative, unequal educational settings” was sufficient to state a Title VI claim); *United States v. Maricopa Cnty., Ariz.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (“longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI”).

ii. Failing to provide language services to LEP speakers can be a form of discrimination on the basis of national origin.

Federal courts have also recognized that failing to provide language services to LEP speakers can be a form of intentional discrimination on the basis of national origin. In *Reyes v. Clarke*, for example, the court denied a defendant’s motion to dismiss, noting that “courts have accepted at the pleading stage that the failure to provide services in any language other than English may support an inference for intentional discrimination on the basis of national origin.”⁸³ See also *H.P. v. Bd. of Educ. of City of Chicago*,⁸⁴ where the court observed that “all Plaintiffs must allege to suggest intentional discrimination” and avoid dismissal on defendant’s motion to dismiss is allege that “she was treated differently than other students because of her race or national origin, and has provide[] specific examples of the ways in which she was treated differently.”

The federal government has also recognized the importance of providing language services to LEP speakers as an essential mechanism for Title VI compliance. In an effort to improve accessibility of services to LEP persons, President Clinton ordered Federal agencies to

⁸³ *Reyes v. Clarke*, No. 3:18CV611, 2019 WL 4044316, at *24 (E.D. Va. Aug. 27, 2019).

⁸⁴ *H.P. v. Bd. of Educ. of City of Chicago*, 385 F. Supp. 3d 623, 638 (N.D. Ill. 2019) (citing *Marcial v. Rush Univ. med. Ctr.*, No-16-cv-1609, 2017 WL 2180503, at *4 (N.D. Ill. May 18, 2017).

“ensure that recipients of Federal financial assistance ... provide meaningful access to their LEP applicants and beneficiaries ... [and] ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus *do not discriminate on the basis of national origin in violation of title VI ...*” Access to Persons with Limited English Proficiency, 2000. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (2000) (emphasis added).⁸⁵ The EPA’s 2004 LEP Guidance also emphasizes that “[i]n certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964 ... against national origin discrimination.”⁸⁶

Disparate impact discrimination on the basis of national origin also remains unlawful under Title VI with respect to actions by recipients of federal financial assistance from the EPA. *See Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency*, 40 C.F.R. Part 7 (making clear that actions having “the effect of” discrimination are prohibited alongside actions that are intentionally discriminatory); *see also Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient*

⁸⁵ Significantly, the EPA has stated that Executive Order 13166’s prohibition against disparate impact discrimination is not undone by the U.S. Supreme Court’s decision in *Alexander v. Sandoval*. *See Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, Docket No. FRL-7776-6, 69 Fed. Reg. 35,602, 35,605 (June 25, 2004) (concurring with the Department of Justice’s position that *Alexander v. Sandoval* does not “impliedly strik[e] down the disparate impact prohibition in the regulations promulgated under Title VI that form part of the basis for Executive Order 13166”).

⁸⁶ *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, Docket No. FRL-7776-6, 69 Fed. Reg. 35,602, 35,604 (June 25, 2004); *see also EPA Order - Compliance with Executive Order 13166: Improving Access to Services for Persons with limited English Proficiency* (Feb. 10, 2017) (which, by providing internal management guidance of EPA’s language access program, demonstrates the very high level of commitment the EPA has to ensuring language services for LEP people).

Persons, Docket No. FRL-7776-6, 69 Fed. Reg. 35,602, 35, 605 (June 25, 2004) (maintaining that *Alexander v. Sandoval* does not upset the prohibition against disparate impact discrimination by Title VI). Therefore, an allegation that language services were not provided to LEP speakers in a setting where English language services were provided to English speakers supports a claim of discrimination on the basis of national origin.

iii. The Project Proponent's failure to provide language services to LEP speakers is evidence of discrimination on the basis of national origin.

The Project Proponent discriminated against LEP speakers on the basis of national origin when it failed to provide interpretation and translation services during the MEPA review process. The Project Proponent knew about New Bedford's substantial LEP population; the Project Proponent also knew that such population requires written translation of materials and verbal interpretation services at public meetings. Yet, the Project Proponent consistently failed over the course of three years to provide these materials and services. Adding insult to injury, the MEPA Office was aware of and ignored the Project Proponent's failures. By issuing a Certificate, then, the MEPA Office has sanctioned the Project Proponent's actions that discriminated against LEP speakers on the basis of national origin in contravention of Title VI of the Civil Rights Act of 1964.

b. The MEPA Certificate was Issued in Violation of the EPA's Regulations and Guidance Proscribing Discrimination on the Basis of National Origin and Requiring the Reduction of Language Barriers.

The EPA's implementing regulations and guidance, in line with Title VI, both proscribe language-based discrimination. In these materials, the EPA has enumerated prohibited actions

and factors that can be used to determine whether a recipient of federal funds has violated Title VI. A full assessment of the activities that occurred over the course of the MEPA review process leads to the inevitable conclusion that EEA and the MEPA Office failed to comply with the EPA's regulations and guidance when it sanctioned the Project Proponent's failure to even minimally reduce language barriers for LEP speakers.

i. The EPA's Title VI implementing regulations proscribe recipients of federal funds from intentional and disparate impact discrimination on the basis of national origin.

The EPA has codified its Title VI implementing regulations under 40 C.F.R. Part 7, *Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency* ("EPA Regulations" or "Part 7").⁸⁷ The EPA Regulations apply to EEA and the MEPA Office. *See* 40 C.F.R. § 7.15, Applicability (stating that Part 7 "applies to all applicants for, and recipients of, EPA assistance in the operation or activities receiving such assistance"). Furthermore, Part 7 provides that recipients of EPA assistance are prohibited from discriminating on the basis of national origin, either with intention or by disparate impact. *See* 40 C.F.R. § 7.35(b) (stating that "[a] recipient shall not use criteria or methods of administering its program or activity which **have the effect of** subjecting individuals

⁸⁷ *See also Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, Docket No. FRL-7776-6, 69 Fed. Reg. 35,602, 35,605 (June 25, 2004) (describing the authority of the EPA Regulations as originating in Section 602 of Title VI, which "authorizes and directs Federal agencies that are empowered to extend Federal financial assistance to any program or activity 'to effectuate the provisions of [section 601] ... by issuing rules, regulations, or order of general applicability'"). So committed is the EPA to providing meaningful access to LEP individuals that in 2017 it provided administrative updates to its order, *Compliance with Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency* (Feb. 10, 2017), which provides internal management guidance of EPA's language access program with an emphasis on "providing LEP individuals with meaningful access to EPA's programs and activities," though the order is not intended to be utilized in administrative and judicial proceedings.

to discrimination because of their ... national origin, ... or **have the effect of** defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular ... national origin ...”) (emphasis added). With the language emphasized above (“have the effect of”), Part 7 signals that intentional *and* disparate impact discrimination are prohibited under the regulations.

Significantly, under the EPA Regulations, a recipient is prohibited from engaging in, *inter alia*, the following discriminatory actions:

- Providing any person service, air or other benefit that is different, or is provided differently from that provided to others under the program or activity;
- Subjecting a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program or activity;
- Denying a person or any group of persons the opportunity to participate as members of any planning or advisory body which is integral part of the program or activity.⁸⁸

These prohibitions will be discussed in more detail in section (b)(iii) of the Legal Analysis.

ii. The EPA Guidance requires recipients of federal funds to reduce language barriers.

In addition to promulgating the regulations under Part 7, the EPA has published the EPA Guidance, first discussed in section (a)(ii) of the Legal Analysis. Noting that “[t]he Federal Government is committed to improving the accessibility of programs and activities to eligible LEP persons,” the EPA Guidance instructs recipients of federal financial assistance to reduce language barriers that would preclude meaningful access by LEP persons to such programs and

⁸⁸ 40 C.F.R. § 7.35(a)(2), (4), and (5).

activities, and that failure to do so can “violate the prohibition under Title VI of the Civil Rights Act of 1964 ... and Title VI regulations against national origin discrimination.”⁸⁹

Under the EPA Guidance, there are four flexible and fact-dependent factors to determine if a recipient has met their obligation to provide LEP services:

1. the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
2. the frequency with which LEP individuals come into contact with the program;
3. the nature and importance of the program, activity, or service provided by the program to people’s lives, and
4. the resources available to the grantee/recipient and costs.⁹⁰

These factors will also be discussed in more detail in section (b)(iii) of the Legal Analysis.

Significantly, the EPA Guidance also addresses the importance of translating “vital written materials”;⁹¹ and emphasizes the importance of quality and accuracy, noting that “regardless of the type of language services provided, quality and accuracy of those services can be critical in order to avoid serious consequences to the LEP person and to the recipient.”⁹² Merely providing some form of language services, then, does not necessarily amount to compliance with EPA Guidance if the quality of such services is poor and the documents that are translated do not include the “vital” ones.

iii. The MEPA Certificate sanctions the Project Proponent’s failure to provide adequate language services to LEP speakers in violation of EPA regulations and guidance.

⁸⁹ EPA Guidance at 602.

⁹⁰ *Id.* at Part V, *How Does a Recipient Determine the Extent of Its Obligation to Provide LEP Services?*

⁹¹ *Id.* at Part VI, *Selecting Language Assistance Services.*

⁹² *Id.*

As discussed in Section V(b)(i) of this complaint, *supra*, under the EPA Regulations, a recipient is prohibited from engaging in certain discriminatory actions. With respect to the first action identified earlier – providing any person services differently from those provided to another under the program or activity – there can be no doubt that English-speaking members of the New Bedford community had much greater access to the Project than did their LEP counterparts. The Project Proponent conducted outreach and notice of public meetings, albeit at insufficient levels, in English, thereby providing different services for New Bedford community members depending on whether they were English-speaking or not.⁹³ Furthermore, until August 18, 2022, the last of the public meetings held before the issuance of the MEPA Certificate, no interpretation services were provided at any of the public meetings.⁹⁴ Finally, all the documents on the Project Proponent’s website, with the exception of the air quality fact sheet, were available in English only, thereby treating residents who read English differently than those who read other languages.⁹⁵

With respect to the second action prohibited by the EPA Regulations – subjecting a person to segregation or separate treatment – the Project Proponent, when challenged on not providing interpretation services during a virtual public meeting on August 3, 2022, offered to remedy that defect by inviting LEP speakers to make special arrangements to come to the facility at a later time to obtain information about the Project that was available to English-speaking

⁹³ See Section IV(c)(i) of this complaint - *Barriers presented by inadequate outreach, and insufficient notice of and poor access to the few public meetings that occurred.*

⁹⁴ See Section IV(c)(ii) of this complaint - *Barriers presented due to little or no interpretation services that, when offered, were not truly accessible to LEP speakers* (a Spanish interpreter was provided at the August 18, 2022 public meeting, though Spanish is not the only language spoken by a significant number of members of New Bedford’s LEP community).

⁹⁵ See Section IV(c)(iii) of this complaint - *Barriers presented by lack of materials translated into other languages.*

community members at the public meeting. This proposal was in every way a mechanism of segregation, since it would separate community members based on the language they speak. Furthermore, by instructing LEP speakers to come to the facility, the Project Proponent deprived them of the accountability and safety that exists in a public forum, and unlawfully shifted the onus from the Project Proponent, where it belongs, to LEP speakers. Finally, the invitation was only an empty offer if no one at the facility was competent to interpret for residents who might have accepted it.⁹⁶

With respect to the last action proscribed by the EPA Regulations – denying a person the opportunity to participate as members of any planning that is integral to the program or activity – when it failed to provide interpretation and translation services over the course of the MEPA review process, the Project Proponent denied New Bedford’s LEP speakers the “opportunity to participate.”⁹⁷ This fact is not even disputed in the MEPA Certificate. By issuing the Certificate, then, the Respondent has failed to comply with the EPA Regulations that prohibit a recipient from engaging in such proscribed discriminatory actions. Because the EPA Regulations explicitly prohibit a recipient from using criteria or methods which **have the effect of** subjecting individuals to discrimination because of their national origin, there can be no doubt that EEA has violated such regulations by issuing the MEPA Certificate.

Turning now to the EPA LEP Guidance, whether a recipient has met their obligation to provide LEP services can be determined by looking at the four factors enumerated in the previous subsection. In the instant case, the Project Proponent’s activities, sanctioned by EEA

⁹⁶ See, e.g., *EPA Guidance at Part VI, Selecting Language Assistance Services* (observing that “regardless of the type of language services provided, *quality and accuracy* of those services can be critical in order to avoid serious consequences to the LEP person and to the recipient”) (emphasis added).

⁹⁷ 40 C.F.R. § 7.35(a)(5).

and the MEPA Office, fail to measure up on all fronts. The first two factors focus on the community being affected; specifically, the number or proportion of LEP individuals likely to be encountered and the frequency with which such individuals encounter the program. The larger the proportion and the higher the frequency, then, the more likely language services are required. There is no questioning the fact that New Bedford has a sizeable LEP community, which is known to EEA. In fact, EEA has a database of communities in Massachusetts considered EJ populations⁹⁸ and New Bedford is one of the municipalities on the list of “Massachusetts Cities & Towns with Environmental Justice Populations” due to its population’s English isolation, among other factors.⁹⁹ Therefore, by permitting the MEPA review process to exclude a large number of LEP speakers – members of New Bedford’s environmental justice population – EEA has failed to meet its obligations under the EPA Guidance.

The third factor under the EPA’s LEP Guidance relates to the nature and importance of the program; specifically, how the program will impact the lives of the LEP community. The greater the impact, the stronger the case for providing holistic language services. As discussed earlier, the construction and operation of a waste management facility of this size will significantly impact the lives of New Bedford’s community members. The MEPA process is the venue for concerned residents to learn about what is happening in and to their community, as well as the venue for them to voice their concerns and/or opposition to the Project. As noted earlier, hundreds of residents participated in the MEPA review process, showing their concern;

⁹⁸ *Environmental Justice Populations in Massachusetts*, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (2022), <https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts>.

⁹⁹ 2020 ENVIRONMENTAL JUSTICE POPULATIONS, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (Nov. 2022), available at: <https://www.mass.gov/doc/massachusetts-cities-towns-with-environmental-justice-populations/download>.

yet many residents of New Bedford (those who are LEP speakers) were excluded. Measured against the third factor, EEA has failed to meet its obligation under EPA Guidance by leaving New Bedford's LEP community out of the Project Proponent's plan to erect a community-changing facility.

The fourth and final factor of the EPA's LEP Guidance deals with the resources available to the recipient and cost. This factor is a balancing factor, demonstrating the EPA's recognition that smaller entities may not have resources to provide extensive interpretation and translation services. EEA is a statewide entity that in the 2023 Fiscal Year Budget has a total unrestricted budget over \$127 million.¹⁰⁰ Because EEA is not a small entity, it certainly has the necessary resources to require a process that is fully accessible to LEP speakers. Further, the issue here is not even whether the language services provided were adequate, but whether language services were provided **at all** during most of the MEPA review process.

An analysis of the instant case against all four factors leads to the inevitable result that EEA and the MEPA Office had the capacity to ensure that language services were accessible to LEP speakers. The MEPA Certificate, then, is a blatant dereliction of duty by EEA to New Bedford's residents who do not speak English proficiently, and, as such, a violation of EEA's obligation, as a federally funded entity, to abstain from discrimination on the basis of national origin. The impact of the Project on the New Bedford LEP community has been clearly apparent and clearly known throughout the entire MEPA review process; this is evinced by the repeated calls for community meetings and the hundreds of public comments submitted on various MEPA filings. In fact, Complainants CLF and [REDACTED] along with two other organizations, [REDACTED] and

¹⁰⁰ FY 2023 Final Budget, 2022 Mass. Acts 126.

(b)(6) Privacy, (b)(7)(C) Enf. Privacy sent joint comments to the Secretary of EEA and director of the MEPA Office detailing the four groups' concerns regarding the Project's impact on New Bedford's community and living environment, including its LEP population.¹⁰¹ Yet in a city of almost 100,000 people, the Project Proponent expressly limited attendance to only **twenty** people to the four meetings it held in 2019. With Phase 1 of the Project involving the construction of two 20,000+ sf buildings, a railway, and a solar array, that the Project Proponent limited the number of people who could participate in public meetings on such an immense project to sixty people out of 100,000 residents is an alarming fact.

The NPC/SFEIR, the very document that the community was called to comment on for the conclusion of the MEPA review process, is almost a thousand pages and available in English only. Further, even for those residents who had English reading ability, the community was only given two weeks to digest and comment on this extensive document and was afforded only one public meeting on August 18, 2022 with the Project Proponent at which to ask questions. A document of this length and technical density would be difficult for even an English speaker with a high level of education to digest in that timeframe; that the MEPA Office gave LEP speakers this timeframe to read a long, technical document in English is an exercise of gross disregard of their duty to uphold Title VI's prohibition against national origin discrimination.

The EPA LEP Guidance also instructs recipients to provide translation services for "vital documents." In the instant case, at a minimum, documents such as notices advising LEP speakers of free language assistance, and notices of environmental hazards must be considered "vital" to the MEPA review process. Other important documents, such as the Traffic Impact Study and even a summary of the NPC/SFEIR and instructions on how to comment on same, are also

¹⁰¹ See Attachment C, Letter to EEA Secretary from CLF, (b)(6) Privacy, (b)(7)(C) Enf. Privacy (August 22, 2022).

“vital” to participate in the MEPA process. These documents and others are incredibly important to LEP speakers precisely because they describe how the Project would impact their community, environment, and health; they contain the key information that New Bedford’s LEP community needed to be informed and to meaningfully participate in the public comment period; yet none of these documents were translated into the languages spoken by community residents. Instead, the only items translated into other languages available on Parallel Products’ website are Spanish and Portuguese language versions of the air quality fact sheet, which, upon review by a CLF staff person fluent in both languages, seem confusing and to have been produced by a computer or translator who lacks understanding of the English content rather than by a trained translator.¹⁰² EEA and the MEPA Office should not have issued a MEPA Certificate finding that the Project Proponent’s NPC/SFEIR adequately and properly complied with MEPA or other laws without the Project Proponent first demonstrating that it included New Bedford’s LEP speakers, members of an environmental justice population, in the process as it is required to by law.

In the MEPA Certificate, the EEA Secretary acknowledges that the Project Proponent did not do enough to engage the public and that its actions were “inconsistent with the spirit of the EEA EJ Policy.”¹⁰³ The Secretary, however, seemed unconcerned about this because the Project Proponent simply “anticipates”¹⁰⁴ that MassDEP will require additional outreach to the New Bedford community.¹⁰⁵ EEA and the MEPA Office, however, cannot pass on their obligations and duties under Title VI to the next reviewing agency. MassDEP public engagement

¹⁰² See footnote 72.

¹⁰³ MEPA Certificate at 2.

¹⁰⁴ *Id.* at 6.

¹⁰⁵ *Id.*

requirements that will apply once the Project Proponent files an application for site suitability approval do not mitigate EEA's and the MEPA Office's failure to ensure adequate outreach and inclusion of LEP speakers by the Project Proponent during its review process.

VI. RELIEF REQUESTED

It is evident from the MEPA Certificate that the Secretary, EEA, and MEPA Office knew of the Project Proponent's failure to meaningfully engage New Bedford's LEP residents during the MEPA review process. EEA and the MEPA Office's approval of the Project Proponent's NPC/SFEIR is a breach of their duties under Title VI to safeguard LEP speakers' access to federally funded programs. Complainants respectfully request that the EPA's External Civil Rights Compliance Office:

1. Suspend the Project Proponent's ongoing permitting process with the Massachusetts Department of Environmental Protection until the conclusion of ECRCO review;
2. Require EEA to re-open the MEPA review process to allow additional public comment opportunities following written translation of project materials into languages spoken by LEP speakers affected by the Project and at least two in-person public meetings with language interpretation services, as well as a fully accessible registration process for public meetings;
3. Suspend any further federal funding disbursements to EEA until the MEPA Office consistently requires environmental justice and language access compliance for all project proponents; and
4. Issue any other remedy that the EPA deems appropriate.

Federal funding from the EPA is supporting EEA in its failure to require language access to residents of New Bedford, thus discriminating on the basis of national origin. Therefore, such funding should be suspended until the EPA is confident that their funds are being used lawfully. On June 1, 2020, CLF and an environmental justice non-profit organization, (b)(6) Privacy, (b)(7)(C) Ent. Privacy filed a similar claim against EEA, among other agencies, regarding insufficient language access

regarding the siting of an electrical substation and transmission lines in East Boston, which remains open at the time of this filing. At this point in time, an individualized remedy to this solution is not proportionate to the harm. EEA is once again failing to ensure LEP residents are meaningfully engaged in situations where it oversees and engages in community-altering decisions. To prevent this continued pattern of harm, a systematic remedy is required; that remedy is suspension of EPA funds to EEA.

VII. CONCLUSION

For these reasons, Complainants respectfully request that ECRCO accept this complaint, promptly and thoroughly investigate the allegations set forth in this complaint, and take all actions necessary to ensure that Respondents are brought into full compliance with the applicable law.

Respectfully submitted,

(b)(6) Privacy, (b)(7)(C) Enf. Privacy and Conservation Law Foundation, Inc.

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