



ENVIRONMENTAL LAW *and* POLICY CLINIC

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Re: Supplementary Information Supporting Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, EPA Complaint No. 04RDA-22-R4, regarding the North Carolina Department of Environmental Quality's Issuance of Air Permit No. 10693R00

Dear Administrator Regan and Assistant Administrator Engelman-Lado:

On behalf of the Anderson Community Group ("ACG" or "Complainant"), the Duke Environmental Law & Policy Clinic submits this Supplement to the Complaint filed by ACG on March 17, 2022 and April 11, 2022,¹ against the North Carolina Department of Environmental

¹ Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, regarding the North Carolina Department of Environmental Quality's Issuance of Permit Number. 10693R00 (ENV'T PROT. AGENCY Mar. 17, 2022) (EPA Complaint No. 04RDA-22-R4) (Exhibit A); Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, regarding the North Carolina Department of Environmental Quality's Issuance of Permit Number. 10693R00 (ENV'T PROT. AGENCY Apr. 11, 2022) (EPA Complaint No. 04RDA-22-R4) (Exhibit B). The EPA internal tracking number for both complaints is EPA Complaint No. 04RDA-22-R4.

Quality (“DEQ”) for its issuance of a permit (“Permit”) authorizing Carolina Sunrock LLC – Burlington North’s (“Carolina Sunrock”) construction and operation of the proposed Burlington North asphalt plant (“Asphalt Plant”), which would be a new source of significant air pollution.² The Permit specifies Caswell County, North Carolina as the location where the Asphalt Plant will be built. However, the Anderson Community, and the neighboring properties, will feel the brunt of the air pollution from the Asphalt Plant since it has a low stack height.³ A disproportionate share of the residents who live around the Asphalt Plant in the Anderson Community are disabled and/or Black, Indigenous and People of Color (BIPOC).⁴ DEQ’s process in approving the Permit did not adequately account for the disparate impacts that the Asphalt Plant will generate. Additionally, DEQ’s permitting process itself exacerbated these disparate impacts against disabled and BIPOC members of the Anderson Community.

ACG requests that OEJECR enforce Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964 and EPA’s implementing regulations and respond to this Supplement to the Complaint with the full force of the law to protect the residents of the Anderson Community, who would suffer the brunt of the environmental and health impacts if the Burlington North Asphalt Plant is built and operated under the permit issued by DEQ.

I. COMPLAINANTS AND THE DEQ PERMITTING PROCESS

ACG was founded by residents in the Anderson Community, North Carolina in 2020 to advocate against the construction and operation of the Asphalt Plant. When residents of Anderson were notified of the proposed Asphalt Plant in 2019, they understood the detrimental health effects that the Asphalt Plant would have on the already marginalized individuals that make up their community. Work done by ACG showed that the Anderson Community has a much higher proportion of disabled and minority residents than Caswell County or the larger census tracts in which they were located. DEQ used whole census tract data, rather than local information in the immediate vicinity of the plant, thus masking the extent of the disparate impacts to immediate neighborhood of the Asphalt Plant. Researchers from UNC’s Gillings School of Global Public Health investigated the concerns of ACG and validated them. ACG provided reports to DEQ showing that the proportions of minority and disabled residents were much higher than those proportions DEQ filed in its reports.⁵ ACG members, (b)(6) Privacy mobilized around the Asphalt Plant’s permitting hearings in 2020 and 2021, to express concerns on the detrimental effects the Asphalt Plant would have on Anderson residents. After the 2021 Permit was approved, ACG filed a Title VI Complaint with the EPA on March 17, 2022

² DEQ, Carolina Sunrock Air Permit No. 10693R00 (October 19, 2021), <https://deq.nc.gov/air-quality/final-signed-permit-carolina-sunrock-burlington-north/download?attachment>.

³ See Lindsay Savelli, Amy Kryston, Courtney Woods, *Report on Anderson Environmental Quality and Health*, UNIV. OF N.C. AT CHAPEL HILL, GILLINGS SCH. OF GLOB. PUB. HEALTH (Aug. 2021) (hereinafter “UNC Study”) (Exhibit C).

⁴ See DEQ, Draft Environmental Justice Report – Carolina Sunrock – Burlington North Facility, 10 (Aug. 9, 2021), <https://deq.nc.gov/media/20760/download> (hereinafter “DEQ EJ Report”) (noting that the 1-mile radius around the project contains a Black population of more than 10 percent higher than the percentage of the Black population of North Carolina as a whole); Courtney Woods, *Anderson Health Survey Flyer*, UNIV. N.C. CHAPEL HILL, GILLINGS SCH. OF GLOB. PUB. HEALTH (Aug. 2021) (Exhibit D) (noting that 77 percent of residents reported a formally diagnosed chronic illness); Rev. Bryon Shoffner, *The Shoffner EJ Report – Burlington North Facility* (May 26, 2020) (hereinafter “Shoffner Report”) (Exhibit E).

⁵ See *id.*; see also Shoffner Report, Exhibit E.

and April 11, 2022, alleging that DEQ's actions in the permitting process had a disparate impact on the disabled and minority communities of Anderson.⁶

II. JURISDICTION

EPA has jurisdiction over a complaint under Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964 if the complaint meets four requirements: (1) the complaint is in writing; (2) the complaint alleges discriminatory acts that, if true, violate EPA's Title VI regulations; (3) the complaint identifies a recipient of EPA funding that committed the alleged discriminatory act; and (4) the complaint is filed within 180 days of the alleged discriminatory act.⁷

ACG's Complaint was timely filed and identified violations by DEQ, a state government agency that receives EPA funding and is thus bound by Title VI and Section 504.⁸ The Complaint was filed on March 17, 2022 and April 11, 2022, which was within 180 days of the discriminatory permitting decision on October 19, 2021.⁹ At the time the Permit was issued, DEQ was a recipient of EPA assistance.¹⁰ According to USASpending.gov, "the official source of spending data for the U.S. Government,"¹¹ EPA awarded DEQ \$150,180,000 in fiscal year 2020, \$116,060,000 in fiscal year 2021 and \$169,200,000 in fiscal year 2022.¹² DEQ is required to comply with Section 504 and Title VI and EPA's Section 504 and Title VI implementing regulations, but failed to do so, resulting in disproportionate adverse impacts to individuals protected under Section 504 and Title VI. This Supplement provides additional background and supporting argument.

III. FACTUAL BACKGROUND

1. Pollution from the Asphalt Plant will disproportionately affect people with disabilities in the Anderson Community, which has a disproportionate share of these disabling chronic diseases and DEQ's permitting and environmental justice processes ignored these disproportionate impacts.

⁶ See ACG Complaint dated March 17, 2022 (Exhibit A); ACG Complaint dated April 11, 2022 (Exhibit B).

⁷ 40 C.F.R. § 7.120.

⁸ 42 U.S.C. § 2000d (2018); 40 C.F.R. § 7.25; 40 C.F.R. § 7.35(b); see also *Title VI Compliance*, N.C. DEP'T ENV'T QUALITY, <https://deq.nc.gov/permits-rules/title-vi-compliance> (last visited Oct. 23, 2022) ("As a recipient of federal funding, DEQ is required to comply with the rules, laws and regulations of Title VI.")

⁹ This date of this Supplement falls after 180 days since October 19, 2021, but serves as a supplement to the initial Complaint, not a new complaint itself.

¹⁰ 40 C.F.R. § 7.25. Under EPA's Section 504 and Title VI and regulations, a "[r]ecipient" is "any State or its political subdivision, any instrumentality of a State or its political subdivision, [and] any public or private agency... to which Federal financial assistance is extended directly or through another recipient . . ." "EPA assistance" is "any grant or cooperative agreement, loan, contract . . . , or any other arrangement by which EPA provides or otherwise makes available assistance in the form of funds."

¹¹ USA Spending, *About*, usaspending.gov/about (last visited Oct. 23, 2022).

¹² USA Spending, *Recipient Profile, North Carolina Department of Environmental Quality*, <https://www.usaspending.gov/recipient/4c5c9d1f-be52-87a1-3c49-b89303b6df52-C/all> (last visited Oct. 23, 2022) (noting that the fiscal years cited above reflect the time period during which DEQ considered and approved the Permit).

DEQ's decision to approve the Permit disproportionately affects people with disabilities (1) by failing to measure and account for pre-existing disabilities present in residents around the location of the Asphalt Plant and (2) by failing to account for the compound effects that increasing the level of pollutants in ambient air can have on individuals with pre-existing disabilities.

Anderson Community residents have a much higher rate of chronic disease than residents generally at both the county and state level. Most notably, the prevalence of asthma in the Anderson Community is 25.9%, where it is only 13% in Caswell County and only 8.3% in the state of North Carolina.¹³ Lung disease is 24.4% in the Anderson Community, while only having a 6.1% prevalence in Caswell County and a 5.6% prevalence in the state of North Carolina. Further, high blood pressure has a 60.4% prevalence in the Anderson Community, with only a 47.3% and 35% prevalence in Caswell County and the state of North Carolina, respectively. In addition to having higher chronic disease rates than the state average, the UNC Study found that Caswell County has more than 10 deaths per 100,000 residents more than the state average for lung disease, cancer, diabetes and heart disease.¹⁴ Overall, the UNC Study data, which shows that Anderson has a much higher rate of chronic disease than those of the county and state, conform to the results of the Anderson Health Survey, which note that 77% of residents report a formally diagnosed chronic illness and 48% of residents report having three or more formally diagnosed chronic illnesses.¹⁵ Further, the percentages and severity of the diseases above are likely to be undercounted as the UNC Study was performed in August 2021, before the full scope of the adverse human health effects of the COVID-19 pandemic could be evaluated.

The above chronic diseases can also be defined as “disabilities.” The Rehabilitation Act defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”¹⁶ “Major life activities include caring for one’s self . . . breathing, working, performing manual tasks and learning.”¹⁷ The above ailments are clearly disabilities in this context. Symptoms of asthma, such as trouble breathing and chest pain, can be “major problem[s] that interfer[e] with daily activities and may lead to a life threatening asthma attack.”¹⁸ Similar symptoms exist for lung disease and cancer.¹⁹ These diseases are even more likely to be disabling for the Anderson Community residents in particular. The stimuli for these diseases in Anderson may be gasses or dust in the ambient environment, which would be exacerbated by new air pollution sources and fugitive dust emissions creating particulate matter pollution.²⁰ These diseases are even more likely to be

¹³ UNC Study (Exhibit C), at Table 2.

¹⁴ *Id.* at Table 3.

¹⁵ *Anderson Health Survey Flyer* (Exhibit D).

¹⁶ 42 U.S.C. § 12102(1)(A).

¹⁷ Off. Of C.R., Know the Rights that Protect Individuals with Disabilities from Discrimination, <https://www.hhs.gov/sites/default/files/knownyourrights504adafactsheet.pdf>.

¹⁸ *Asthma*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/asthma/symptoms-causes/syc-20369653> (last visited Oct. 23, 2022).

¹⁹ *Chronic Obstructive Pulmonary Disease (COPD)*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/copd/symptoms-causes/syc-20353679> (last visited Oct. 23, 2022).

²⁰ *See id.* (noting that COPD is “typically caused by long-term exposure to irritating gases or particulate matter”); *see* MAYO CLINIC, *supra* note 19 (noting that asthma can be triggered by “irritants such as chemical fumes, gases or

disabling due to the scarcity of medical resources available to the Anderson Community residents. The UNC Study noted, “[t]here are only 3.8 physicians per 10,000 residents, compared to the state average of 23.5.”²¹ Without treatments, these illnesses progress to interfere with a person’s daily activities.

The DEQ EJ Report did not take the above evidence into account at all. Therefore, the Report did not fully account for the level of disability in the Asphalt Plant’s surrounding area. While the DEQ EJ Report did survey for disability, it only reported disability rates for Caswell County and Census Tract 9306, not the Anderson Community – the relevant area closest to and most acutely impacted by the Asphalt Plant. Indeed, the percentage of disabled residents in DEQ’s EJ Report is significantly undercounting individuals as documented by the UNC Study. By looking at the census tract level rather than the local community, DEQ’s analysis diluted the impact on the residents closest to the pollution and most sensitive to its effects.

Even in the areas which DEQ did survey, DEQ found that disability rates were already 10% higher than those in North Carolina as a whole.²² Section 504 of the Rehabilitation Act does not limit federal aid recipients to a threshold location measurement in assessing disparate impact for civil rights compliance purposes. Therefore, measuring the rate of disability at the census tract level is simply not a thorough enough analysis to demonstrate compliance with the EPA’s civil rights regulations. DEQ could have measured the level of disability at the township level (i.e. Anderson Community) to accurately assess the level of disability in the Asphalt Plant vicinity.

The UNC Report clearly shows that Anderson has an above average number of residents with disabilities, with asthma and other lung diseases prominent among them. Building and operating a new source of air pollution in Anderson will disproportionately affect people with disabilities. This disparate impact will be exacerbated by the addition of the Asphalt Plant. As noted in the EPA’s *Hot Mix Asphalt Emissions Assessment Report*, “asphalt plants produce known carcinogens and toxic pollutants, such as particulate matter less than 10 micrometers (PM₁₀), volatile organic compounds (VOC), carbon monoxide, sulfur oxides, nitrogen oxides, polycyclic aromatic hydrocarbons (PAH), phenol, and volatile and metal hazardous air pollutants.”²³ Further, those continuously exposed to PM₁₀ generated by asphalt plants have been shown to have shorter telomere lengths, which is associated with increased risk of cancer, age-related diseases, and reduced life-expectancy.²⁴ Children exposed to traffic-related pollution such as that which the Asphalt Plant would create, “were more likely to develop asthma and wheezing, and reported more frequent use of asthma medications.”²⁵ Further, living near polluting industries can increase asthma attacks by 108%,

dust”). *See also* UNC Study (Exhibit C), at 7 (noting “asthma may be triggered and other lung disease may be exacerbated by regular exposure to air pollution.”).

²¹ UNC Study (Exhibit C), at 10.

²² DEQ EJ Report at 14.

²³ UNC Study (Exhibit C), at 9.

²⁴ *Id.*

²⁵ *Id.*

and children who live near asphalt plants have approximately a 25% greater chance of asthma attacks than children who do not.²⁶

Anderson residents already suffer from increased rates of asthma, so adding another source of pollution that causes more disease will only exacerbate their disabilities. Disabled residents of Anderson are not only disproportionately affected by the Asphalt Plant because they have a higher rate of pre-existing disabilities, but also due to the *compound* health effects that increased pollution will have on those pre-existing disabilities. As one study notes, “[t]he idea that outdoor air pollution can cause exacerbations of pre-existing asthma is supported by an evidence base that has been accumulating for several decades...”²⁷ Further, “exposure to PM has been associated with asthma exacerbation, including hospital admissions and emergency department visits...”²⁸ In a study where children both with and without pre-existing asthma were exposed to air pollution, “children with recurrent wheezing or asthma reported significantly more days of” fever, cough, asthma attacks, pneumonia and hospitalizations.²⁹ Air pollution can also induce the exacerbation of COPD, already a disproportionate risk for the Anderson Community.³⁰

DEQ failed to take into account that the Asphalt Plant’s operation would *add* to the level of disability in the Asphalt Plant’s surrounding area by exacerbating the disabilities of nearby residents. While the Permit does set emission thresholds for the Asphalt Plant which comply with existing federal and state emissions standards, these thresholds do not account for the fact that these air pollutants will have a much greater adverse impact on a community in which 1/4 of individuals are asthmatic and/or suffering from lung disease. The Permit set its regulation of pollutants based on standards based on statewide assumptions on the level of disability, which is not an accurate assumption as applied to the Anderson Community. DEQ’s own EJ Report acknowledges that Anderson is much more vulnerable to additional pollutants being added to the environment. While a certain level of air pollution might be manageable for a community with average respiratory disability rates,³¹ the same cannot be true for a community with abnormally high rates of respiratory disabilities like Anderson.

2. DEQ’s permitting and environmental justice processes ignored the history of racial injustice in Caswell County including its strong connection with the Ku Klux Klan.

Additionally, Caswell County, in which Anderson is located, has a history of discrimination and intimidation towards African Americans. After the Reconstruction Amendments, which allowed African Americans to vote, the Ku Klux Klan committed

²⁶ Nilsa I. Loyo-Berrios et al., Air Pollution Sources and Childhood Asthma Attacks in Cataño, Puerto Rico, 165 AM. J. OF EPIDEMIOLOGY 927, 930 (2007).

²⁷ Michael Guarnieri & John R. Balmes, Outdoor Air Pollution and Asthma, 383 THE LANCET 1581, 1581 (2014).

²⁸ Lina Madaniyazi & Seposo Xerxes, Outdoor Air Pollution and the onset and Exacerbation of Asthma, 7 CHRONIC DISEASES & TRANSLATIONAL MED. 100, 102 (2021).

²⁹ Susanna Esposito et al., Impact of Air Pollution on Respiratory Diseases in Children with Recurrent Wheezing or Asthma, 14 BMC PULMONARY MED. 1, 3 (2014).

³⁰ Xu-Qin Jiang, Xiao-Dong Mei & Di Feng, *Air Pollution and Chronic Airway Diseases: What Should People Know and Do?*, 8 J. THORACIC DISEASE E31, E33 (2016).

³¹ DEQ, Hearing Officer’s Report and Recommendations 5–6 (Sept. 20, 2021), <https://deq.nc.gov/media/24807/download?attachment> (hereinafter “Hearing Officer’s Report”) (Exhibit F).

violent crimes against the newly franchised and their political representatives. In 1870, John Walter Stephens, a Republican state senator who advocated for African American rights, was assassinated in the Caswell County Courthouse.³² This, among other incidents of racial violence, caused the governor of North Carolina to declare a police operation against the Ku Klux Klan in Caswell and neighboring counties.³³ While this operation was successful, when Democrats won back control of the state assembly in 1871, they impeached the governor and passed amnesty laws for members of the Klan involved in racial violence.³⁴ No one was ever convicted of the murder of Senator Stephens.³⁵

The Klan is still present in Caswell County today. One of the largest and most active Klan groups, the Loyal White Knights, is located in Caswell County.³⁶ The Loyal White Knights have continuously distributed racist flyers and other propaganda across the mid-Atlantic region and are responsible for 55% of the Klan's reported propaganda distributions over the last five years.³⁷ Additionally, the Loyal White Knights hosted a rally in Charlottesville, Virginia in July, 2017 with about fifty Klansmen in attendance, occurring just one month before the "Unite the Right" rally.³⁸ The Loyal White Knights also were still hosting political rallies and distributing hate literature as recently as 2018.³⁹ A confederate monument erected by the Caswell County Chapter of the United Daughters of the Confederacy in 1921 still stands in front of the Caswell County Courthouse.⁴⁰ None of this history or context was mentioned in the EJ Report for the project.

Historically, Caswell County has not provided land use control protections for the Anderson Community. In turn, this lack of protection caused it to be a target for locally unwanted land uses—a sacrifice zone. And this community surrounding the proposed Asphalt Plant is a BIPOC community. The DEQ EJ Report notes that in the one-mile radius from the Asphalt Plant, African American residents comprise 29% of the population, which is more than 10% higher than the African American population for the state of North Carolina.⁴¹ This proportion may be even higher – ACG conducted a demographic survey of the members of the Anderson Community and estimated that the proportion of African Americans within a one-mile radius of the Asphalt Plant is 61.2%.⁴² These residents already host a private park site which houses a large number of predatory animals. The Animal Park at the Conservators Center is located on Hughes Mill Road, near the Asphalt Plant and the Anderson

³² Primary Source, *The Murder of "Chicken" Stephens*, NCPEDIA (2009), <https://www.ncpedia.org/printpdf/13857>.

³³ *Lynching of Wyatt Outlaw and the Kirk-Holden War*, N.C. DEP'T NAT. & CULTURAL RES. (Feb. 26, 2016), <https://www.ncdcr.gov/blog/2015/02/26/lynching-of-wyatt-outlaw-and-the-kirk-holden-war>.

³⁴ NCPEDIA, *supra* note 36.

³⁵ *Id.*

³⁶ *Loyal White Knights of the Ku Klux Klan*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/loyal-white-knights-of-the-ku-klux-klan> (last visited Nov. 23, 2022).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Lisa Provence, *'Proud' to be a Racist: A Grand Dragon Goes on the Record*, C-VILLE (Jun. 21, 2017), <https://www.c-ville.com/proud-racist-grand-dragon-goes-record/>.

⁴⁰ Caswell County Confederate Monument, Yanceyville, DOCSOUTH, <https://docsouth.unc.edu/commland/monument/170> (last accessed Dec. 5, 2022).

⁴¹ DEQ EJ Report at 10.

⁴² Hearing Officer's Report, Exhibit E at Table 3.

Community.⁴³ Residents have expressed concern for their safety and for the sleep disturbances caused by the increasing number of big cats held there and based on recent mauling of a conservation intern.⁴⁴ In addition, large confinement poultry buildings have been placed in this community, very near the Asphalt Plant site.

3. The Asphalt Plant will increase air pollution in the Anderson Community.

The World Health Organization estimates that 1 in 9 deaths globally are attributable to the adverse effects of poor air quality.⁴⁵ Asphalt plants contribute to localized pollution through production, known as smokestack emissions, as well as through storage and transportation, known as fugitive emissions.⁴⁶ Asphalt plants emit known carcinogens and air pollutants including: particulate matter (TSP, PM₁₀, and PM_{2.5}), Sulfur dioxide (SO₂), Nitrogen oxide (NO_x), Carbon monoxide (CO), Methane (CH₄), hazardous air pollutants (HAPs), and toxic air pollutants (TAPs), which include Polycyclic Aromatic Hydrocarbons (PAH), volatile organic compounds (VOC), metals, and hydrogen sulfide (H₂S).⁴⁷ All of these pollutants pose a significant threat to an already immunocompromised community.⁴⁸

As the UNC Study notes, 77% of residents in the Anderson Community reported a chronic illness, with 48% having three or more formally diagnosed illnesses. Anderson residents have twice the prevalence of asthma than that of Caswell County, and more than triple that of North Carolina.⁴⁹ EPA identified the areas surrounding the Asphalt Plant as medically underserved.⁵⁰ Children and older adults are most susceptible to the health risks associated with air pollution.⁵¹ A study conducted by the Blue Ridge Environmental Defense League (BREDL)

⁴³ *Directions*, ANIMAL PARK CONSERVATORS CTR., <https://animalparknc.org/visit/directions/> (last visited Nov. 27, 2022).

⁴⁴ An intern working at the Conservators Center was mauled to death by a lion during a cleaning of its enclosure, causing concern for neighbors. Joel Brown, “*It’s Happened Before: Neighbor Recalls Lion Escaping from Conservators Center Years Ago*,” ABC 11 (Jan. 1, 2019), <https://abc11.com/deadly-lion-attack-black-killed/4997544/>.

⁴⁵ Aman Gebremariam Gebreselassie, *Community Exposure to Particulate Matter and Its Impact for Students and Residents Near a Construction Asphalt Plant: A Case Study* (Dec. 2019) (M.A. Thesis, University of Nevada, Las Vegas) (Digital Scholarship@UNLV) at 1–7.

⁴⁶ *Asphalt Plants*, CTR. HEALTH, ENV’T & JUST. 1 (Aug. 2016), <https://chej.org/wp-content/uploads/Asphalt-Plants-PUB-131.pdf>.

⁴⁷ *Asphalt Plants Contaminants of Concern: An Overview of 7 Toxic Substances Released from Asphalt Processing Facilities and their Known Effects on Human Health.*, BLUE RIDGE ENV’T DEF. LEAGUE., <https://sustainablemadison.org/files/factsheet.pdf> (last visited Nov. 30, 2022); Tianyang Liu, *Air Pollution Control for a Hot Mix Asphalt Plant*, 3 ACAD. J. ARCHITECTURE AND GEOTECHNICAL ENG’G 52, 52–66 (2021); Nigel Gibson et al., *Air Quality Assessment of Benzo(a)pyrene from Asphalt Plant Operation*, J. OF ENV’T MONITORING, 233, 233–240 (2012); ENV’T PROT. AGENCY, EPA-454/R-00-019, HOT MIX ASPHALT PLANTS EMISSION ASSESSMENT REPORT (2000); K. Sorgi, *Monitoring of Environmental Exposure to Polycyclic Aromatic Hydrocarbons: A Review*, 5 ENV’T CHEMISTRY LETTERS 169, 169–195 (2007).

⁴⁸ UNC Study (Exhibit C), at 3, 6.

⁴⁹ *Id.*

⁵⁰ EJScreen: Environmental Justice Screening and Mapping Tool, ENV’T PROT. AGENCY (last visited Nov. 13, 2022).

⁵¹ Aman Gebremariam Gebreselassie, *Community Exposure to Particulate Matter and Its Impact for Students and Residents Near a Construction Asphalt Plant: A Case Study* (Dec. 2019) (M.A. Thesis, University of Nevada, Las Vegas) (Digital Scholarship@UNLV) at 1–7.

reported that residents living within one mile of an asphalt plant had significantly elevated cancer rates, especially brain cancer and lung cancer.⁵² Asphalt plant exposure also has been correlated with shorter telomere length, which is linked to an increase in cancer rates, age related illnesses, and reduced life expectancy.⁵³

Of the pollutants emitted by asphalt plants, particulate matter (PM) represents a significant threat to members of the Anderson Community. EPA regulates PM in two forms, PM₁₀ and PM_{2.5}, with numbers corresponding to the diameter in micrometers of the particles released through smokestack emissions and fugitive emissions.⁵⁴ When these particles travel through the lungs and bloodstream, they are known to cause various cardiovascular issues, especially to those with heart and lung issues.⁵⁵ Although PM_{2.5} has the strongest correlation with disease and mortality, exposure to PM in any form reduces life expectancy by approximately 9 months on average.⁵⁶ Adults and children with heart and lung complications are more negatively affected by PM exposure;⁵⁷ and exposure to PM has been found to increase students' absences from school, lost income for working individuals due to work absence, and hospital admissions, emergency room, and doctor visits, placing a greater financial burden on the communities and individuals situated near asphalt plants.⁵⁸ An increase in 10-ug/m³ in PM_{2.5} is associated with 4%, 5%, and 8% increased risk of all-cause, cardiopulmonary, and lung cancer mortality respectively.⁵⁹ Similarly, a decrease of 10-ug/m³ is associated with an increase in life expectancy of 0.35 years on average.⁶⁰ According to Division of Air Quality (DAQ) models for the Asphalt Plant, TSP, PM₁₀, and PM_{2.5} levels have not exceeded the National Ambient Air Quality Standards (NAAQS), yet we note discrepancies of data reported by DAQ in the model analysis in the March 23, 2021 Memo, resulting in disparate impacts to the community by withholding calculation information.⁶¹ Researchers commonly denote that TSP's include PM₁₀

⁵² *Salisbury Health Survey*, BLUE RIDGE ENV'T DEF. LEAGUE., https://www.bredl.org/pdf2/health_survey_overview_100710_CHE.pdf (last visited Nov. 30, 2022).

⁵³ Avinash S. Gaikwad, *Evaluation of Telomere Length and Genotoxicity Among Asphalt Associated Workers*, MUTATION RSCH./GENETIC TOXICOLOGY AND ENV'T MUTAGENESIS (Oct. 2020); Masood A. Shamma, *Telomeres, Cancer, and Aging*, 14 CURRENT OP. CLINICAL NUTRITION AND METABOLIC CARE 28, 28–34 (Jan. 2011).

⁵⁴ EPA, Particulate Matter (PM) Basics, <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics> (last visited Nov. 30, 2021).

⁵⁵ Ken Donaldson et al., *Role of Inflammation in Cardiopulmonary Health Effects of PM*, 207 TOXICOLOGY AND APPLIED PHARMACOLOGY, S483, S483–S488 (2005).

⁵⁶ *Commission Working Paper, Annex to: The Communication on Thematic Strategy on Air Pollution and The Directive on "Ambient Air Quality and Cleaner Air for Europe"*, SEC (2005) 1133 (Sept. 21, 2005), <https://op.europa.eu/en/publication-detail/-/publication/6d43a0e3-462e-4b6f-a81b-01bdf0c21253>.

⁵⁷ Aman Gebremariam Gebreselassie, *Community Exposure to Particulate Matter and Its Impact for Students and Residents Near a Construction Asphalt Plant: A Case Study* (Dec. 2019) (M.A. Thesis, University of Nevada, Las Vegas) (Digital Scholarship@UNLV) at 1–7.

⁵⁸ Jaana I. Halonen et al., *Particulate Air Pollution and Acute Cardiorespiratory Hospital Admissions and Mortality Among the Elderly*, 20 EPIDEMIOLOGY 143, 143–153 (Jan. 2009); Piers MacNaughton, *Impact of Particulate Matter Exposure and Surrounding "Greenness" on Chronic Absenteeism in Massachusetts Public Schools*, 14 INT'L J. ENV'TL RSCH. & PUB. HEALTH 207 (2017).

⁵⁹ C. Arden Pope et al., *Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution*, 287 J. AM. MED. ASS'N 1132, 1132–1141 (2002).

⁶⁰ Andrew W. Correia, *Effect of Air Pollution Control on Life Expectancy in the United States: An Analysis of 545 U.S. Counties for the Period from 2000 to 2007*, 24 EPIDEMIOLOGY 23, 23–31 (2013).

⁶¹ N.C. DIV. AIR QUALITY, *Sitewide NAAQS Dispersion Modeling Analysis for Carolina Sunrock, LLC – Burlington*, <https://deq.nc.gov/media/20751/download> (Mar. 23, 2021).

and PM_{2.5},⁶² yet, in this case, if the sum of PM₁₀ and PM_{2.5} are included in the TSP calculation it would exceed the NAAQS by 35-ug/m³.⁶³ No explanation or justification is given for the exclusion of PM₁₀ and PM_{2.5} in the total TSP calculation.⁶⁴

Asphalt Plant production processes will increase hazardous air pollutants and toxic air pollutants threatening the health and well-being of the Anderson Community. The Clean Air Act identifies Hazardous Air Pollutants (HAPs) which are "known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects."⁶⁵ There are three classes of HAPs: 1) polycyclic aromatic hydrocarbons (PAHs), 2) volatile organic HAPs, and 3) metal HAPs all of which are released by asphalt plants.⁶⁶ EPA claims that sufficient concentration and duration exposure leads to an increased chance of cancer and sustaining "damage to the immune system, as well as neurological, reproductive (e.g., reduced fertility), developmental, respiratory and other health problems."⁶⁷ In addition to HAPs, North Carolina regulates 91 toxic air pollutants (TAPs) released by stationary sources through the North Carolina Air Toxics program. Seventy-eight of these pollutants are also considered HAPs. Asphalt plants emit 28 TAPs,⁶⁸ 14 of which are not considered HAPs.⁶⁹ While these pollutants do not exceed NAAQS in DAQ's models, the models fail to consider the existing health conditions of the community, and thus should lead to inconclusive results regarding whether the emissions are low enough to mitigate adverse health outcomes.⁷⁰

The Permit issued by DEQ disparately impacts all residents of the Anderson Community—those with disabilities and those without—by increasing the risks of air pollution. Increased exposure to PM emissions, which are associated with higher cancer rates, greater health complications, and shorter life-expectancy will increase due to the increased truck traffic and related loading and unloading activities at the Asphalt Plant site. DEQ's Permit, which authorizes the operation of the Asphalt Plant, will add more particulate matter to the air that Anderson Community residents breathe – adding to the existing environmental disturbances that Anderson Community residents face. The polluted air will increase the rate of and exacerbate the current chronic illness and disabilities that Anderson Community residents already face.

⁶² EPA, Timeline of Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS), <https://www.epa.gov/pm-pollution/timeline-particulate-matter-pm-national-ambient-air-quality-standards-naaqs> (last visited Nov. 30, 2021).

⁶³ N.C. DIV. AIR QUALITY, Sitewide NAAQS Dispersion Modeling Analysis for Carolina Sunrock, LLC – Burlington, <https://deq.nc.gov/media/20751/download> (Mar. 23, 2021).

⁶⁴ *Id.*

⁶⁵ 42 U.S.C. § 7412(b).

⁶⁶ Hearing Officer's Report (Exhibit F).

⁶⁷ EPA, Health and Environmental Effects of Hazardous Air Pollutants, <https://www.epa.gov/haps/health-and-environmental-effects-hazardous-air-pollutants> (last visited Nov. 30, 2022).

⁶⁸ DEQ, *Asphalt Plants*, <https://deq.nc.gov/about/divisions/air-quality/air-quality-permits/asphalt-plants> (last visited Nov. 30, 2021).

⁶⁹ DEQ, Hazardous Air Pollutants and Toxic Air Pollutants (HAPs & TAPs), <https://deq.nc.gov/about/divisions/air-quality/air-quality-planning/air-quality-rules-regulations/hazardous-air-pollutants-and-toxic-air-pollutants-haps-taps> (last visited Nov. 30, 2021).

⁷⁰ N.C. DIV. AIR QUALITY, Sitewide NAAQS Dispersion Modeling Analysis for Carolina Sunrock, LLC – Burlington, <https://deq.nc.gov/media/20751/download> (Mar. 23, 2021).

Many people, including Anderson Community members, submitted public comments to DEQ specifically detailing the chronic diseases and other health concerns that their families face from new sources of air pollution, citing to dust and/or particulate matter specifically. These comments reflected residents' understanding that the Asphalt Plant would lower air quality in the area and thereby increase disease. The comments then noted that these negative impacts would be disproportionately shouldered by people of color who are already suffering from legacies of systemic and environmental racism. These health and environmental justice concerns were frequently and directly expressed by residents to DEQ during the public hearing process.

In response, DEQ Hearing Officers trotted out form language in the Hearing Officer's Reports for both projects to assert that their standards are set with adequate margins of safety to protect all communities from harm, and pointing folks to various websites for information about standards setting. No specific response was crafted, just a rote set of responses to public comments summarized and grouped together by DEQ employees. It is especially irksome that DEQ's excuse for not doing more to protect communities is to hide behind their rules. In 2019, on their own initiative, DEQ made the control of fugitive dust emissions subject to a bizarre and circular logic. In its 2019 rules re-adoption package, DEQ changed the definition of the term Substantive Complaints.⁷¹ The definition was changed to read: "Substantive complaints" means complaints that are verified by the Division with physical ~~evidence~~. ~~evidence of excess fugitive dust emissions~~." (Strikethrough and bold from original changed text) By the simple change of a few lines, DEQ took citizen's complaints about fugitive dust right out of the picture. If DEQ personnel do not do not verify physical evidence of "excess fugitive dust emissions," there is no substantiated complaint. Other changes to this rule, were of like effect-putting it all up to DEQ's enforcement discretion as to whether residents will be protected from fugitive dust or not. Given that DEQ itself made its own fugitive dust rule more difficult to enforce by residents in the last rulemaking cycle while ignoring federal civil rights law, it appears that DEQ's primary goal was to subvert complaints by defining them away. And the use of the language allows them to say to anyone, there were no substantive complaints about the facility to EPA, to the legislature or to other neighbors. This rule change became effective on the first of September of 2019, greatly benefitting quarries, mining, pellet mills, landfill operators, and asphalt plants.⁷² DEQ chose to change its rules in ways that harmed the neighbors of all these types of fugitive dust sources, exacerbating the environmental injustices faced by many neighbors of these types of facilities.

4. The Asphalt Plant will increase economic loss in the Anderson Community.

In addition to ignoring increased threats to an at-risk community's health, DEQ failed to account for the disparate economic impact on a community consisting of 75% African American residents,⁷³ and at least 21.3% of residents living below the federal poverty line.⁷⁴ A study conducted by BREDL found a 56% loss in property value due to the presence of a nearby asphalt plant.⁷⁵ The frequency and cost of doctors' visits will rise as the health of the community

⁷¹ See "Excerpt of 2019 Rulemaking by DEQ Regarding Fugitive Dust Emissions (Exhibit G).

⁷² See 15A NCAC 2D .0540 (Eff. Sept. 1, 2019)

⁷³ Shoffner Report (Exhibit E).

⁷⁴ UNC Study (Exhibit C).

⁷⁵ *Asphalt Plants*, CTR. HEALTH, ENV'T & JUST. 1 (Aug. 2016), <https://chej.org/wp-content/uploads/Asphalt-Plants-PUB-131.pdf>.

diminishes, and the cost for these hospital admissions, emergency room and doctor visits must be included in the added economic costs to the community.⁷⁶ Additional travel costs must also be included in the economic costs due to the dearth of physicians,⁷⁷ with the nearest hospital being located more than 20 miles away. The economic losses resulting from the Asphalt Plant will fall disproportionately on the Anderson Community.

5. Carolina Sunrock's Litigation Tactics Against Opponents of the Asphalt Plant and Quarry Projects Exacerbated Procedural Injustice.

In February 2021, various residents of Caswell County and Alamance County residents challenged Caswell County's issuance of a watershed protection and Special Non-Residential Intensity Allocation (SNIA) permit to Carolina Sunrock, other permits that are required to operate the Asphalt Plant, "on the grounds that Caswell County's moratorium prohibited the issuance of those permits."⁷⁸ On April 22, 2021, Carolina Sunrock sued these 55 community members. The lawsuit's stated basis was that "Sunrock has a common law vested right that precludes the enforcement of the moratorium" and that these various community members' requests for the Watershed Board to review the moratorium constituted an "actual and genuine controversy" as to whether the moratorium applied.⁷⁹ In October and November 2021, Sunrock added ACG members (b)(6) Privacy Branch of the NAACP (NAACP) to the lawsuit, Sunrock stated that, while (b)(6) Privacy had not challenged the permits on the basis of the moratorium, they intended to do so. These three defendants were represented by the Southern Coalition for Social Justice (SCSJ), who defended (b)(6) Privacy and the NAACP against the lawsuit filed by Carolina Sunrock.⁸⁰

On March 18, 2022, Judge Edwin G. Wilson dismissed Carolina Sunrock's suit against (b)(6) Privacy and the NAACP because Carolina Sunrock lacked standing against those defendants.⁸¹ Judge Wilson noted that if the Watershed Board were to make a ruling adverse to Carolina Sunrock, Carolina Sunrock's grievance will be against the Watershed Board, (b)(6) Privacy the NAACP.⁸² Judge Wilson concluded by noting that individuals have a right, protected by the U.S. and North Carolina constitutions, "to petition their elected official[s] for redress of grievances," and that if the Court were to rule against the community members here in granting Sunrock's motion, "it would only serve to dissuade petition activity, which is constitutionally protected."⁸³ Some community members have

⁷⁶ Aman Gebremariam Gebreselassie, Community Exposure to Particulate Matter and Its Impact for Students and Residents Near a Construction Asphalt Plant: A Case Study (Dec. 2019) (M.A. Thesis, University of Nevada, Las Vegas) (Digital Scholarship@UNLV) at 1-7.

⁷⁷ UNC Study (Exhibit C).

⁷⁸ Complaint at 3, (b)(6) Privacy

⁷⁹ *Id.* at 32.

⁸⁰ Brief for NAACP Defendants at (b)(6) Privacy

⁸¹ Order Granting NAACP Defendants' Motion to Dismiss (b)(6) Privacy

⁸² *Id.* at 6.

⁸³ *Id.* at 8.

expressed concern that this was a SLAPP suit, motivated to dissuade them from fighting the proposed Asphalt Plant and related Quarry.⁸⁴

Whatever the motivations behind the suit, the impact was to dissuade Anderson Community members from speaking out regarding their concerns at the public hearing. As (b)(6) Privacy explained in his affidavit, during the Permit hearing in Fall 2021, many community members did not wish to speak themselves due to fear of potential retaliation.⁸⁵ This lawsuit had the effect of chilling speech from an environmental justice community, whatever may have been its proponent's intentions.

In August of 2022, Carolina Sunrock voluntarily dismissed its lawsuit against the other 55 defendants, but did so without prejudice. Had they dismissed the lawsuit with prejudice, the defendants could have experienced freedom to speak without fear of being dragged into depositions, discovery requests, subpoenas, litigation holds and all the other aspects of the lawsuit. But Carolina Sunrock chose to leave the door open by filing a dismissal without prejudice. Under the NC Rules of Civil Procedure, this lawsuit still hangs over the heads of the remaining defendants until August of 2023.

6. DEQ's Permitting Process had Disparate Adverse Impacts on Anderson Community Residents' Ability to Meaningfully Participate in the Permitting Processes

In July 2020, DEQ officials visited the Anderson Community, coordinated by ACG, to see the site of the proposed Asphalt Plant and talk with the affected community.⁸⁶ After the visit, while ACG frequently initiated contact with DEQ. But in those communications DEQ never said how they would use the information gathered on the visit in its evaluation of whether to approve or deny the Permit.⁸⁷ Further, a DEQ official told ACG that "DEQ is not in the business of denying permits."⁸⁸ DEQ's communications suggest that DEQ was not affording an equal consideration to Anderson Community residents compared to the proposed polluter, the permittee. The Hearing Officer's Report clearly provides evidence that communications between the permittee and DEQ impacted its decision, through subsequent information requests, but no evidence in the record shows that DEQ took any of the information from its visit with community members into consideration. It appears that DEQ's efforts were only to placate residents by accepting their hospitality while ignoring the information they provided.

On September 20, 2021, DEQ held a virtual hearing for the permit of the Burlington North Asphalt Plant with 37 people in attendance, according to the Hearing Officer's Report.⁸⁹ The hearing officer limited the testimonies of community members to two minutes.⁹⁰ The

⁸⁴ Lisa Sorg, *Caswell County Judge Dismisses Mining Company Lawsuit Against Residents, Citing Free Speech*, THE PULSE (Mar. 22, 2022), <https://pulse.ncpolicywatch.org/2022/03/22/caswell-county-judge-dismisses-mining-company-lawsuit-against-residents-citing-free-speech/#sthash.8e6v5Bhj.dpbs>.

⁸⁵ (b)(6) Privacy

⁸⁶ (b)(6) Privacy (Exhibit H), at 4.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 6.

⁸⁹ Hearing Officer's Report (Exhibit F), at 5.

⁹⁰ DEQ, *Burlington North Hearing Transcript* (Exhibit I), at 17. See also ACG, *Burlington North Hearing Transcript* (Exhibit J), at 4.

following day, DEQ held a hearing for the Prospect Hill asphalt plant, which is located within a predominantly white community. Seventy people were in attendance—almost double the amount of attendees for the Burlington North hearing—yet speakers were allotted three minutes each for their statements.⁹¹

ACG pointed out this disparity in its March 17, 2022 complaint, quoting (b)(6) Privacy, to say “that DAQ treated these two public hearings differently for oral comments. Last night's Burlington North facility hearing was restricted to two minutes. Tonight, you're allowed three minutes. The Burlington North facility will significantly impact an environmental justice community. Thus, I must question DAQ's compliance with the Title VI Civil Rights.”⁹²

Telling Anderson Community members they only had two minutes to testify when Prospect Hill neighbors got three clearly communicated that NC DEQ treated the Anderson Community poorly in comparison to the Prospect Hill Community. Also, the official transcript of the Burlington North Hearing provided to our client by DEQ does not include the complete testimony of one of the ACG founding members, (b)(6) Privacy⁹³ The testimony of (b)(6) Privacy was also not fully included, even though she shared important information about the installation of and subsequent data ascertained from an air monitor within a one-mile radius of the proposed asphalt plant.⁹⁴

Complete and transparent access to important permitting documents is essential to meaningful participation. Much information passed between the applicant and DEQ were only available upon inspection at the Winston Salem Regional Office, during the time of COVID-19 lockdown. Some permitting information was loaded onto the DEQ website portal, but not all. Crucial permitting documents loaded on the DEQ website, including permit application files and hearing officer's reports, were PDF image files, not OCR readable files. This made them especially large and unwieldy for any community members.⁹⁵ Providing copies through use of poorly scanned and overly large image files to convey important information is the type of tactic that one expects in abusive discovery practice by private parties, not a public agency charged with transparency. Downloading and working with these files is a chore with high speed access and a strong computer, but it is nearly pointless to attempt for those living in an area with poor internet service like the Anderson Community

In addition, the documents used in the permitting decision were not made accessible to people with visual disabilities, impairing their ability to meaningfully participate. For example, (b)(6) Privacy was not able to access the permit decision documents because of her visual impairment. Although (b)(6) Privacy made DEQ well aware of her needs as a visually-impaired community member and how those needs are legally protected under Section 504, DEQ has not provided materials on DEQ's website in a format that is accessible for visually-impaired

⁹¹ Prospect Hill Hearing Officer's Report (Exhibit K), at 5.

⁹² Complaint filed March 17, 2022 (Exhibit A) at 3.

⁹³ DEQ, *Burlington North Hearing Transcript* (Exhibit I), (b)(6) Privacy a woman of color and legally blind.

⁹⁴ *Id.* at 21, 29.

⁹⁵ See e.g. <https://deq.nc.gov/media/24848/download?attachment> (16.7 MB pdf image file)

community members.⁹⁶ Rather, they used form language to deflect criticism at every turn in the Hearing Officers' Reports, a litany of excuses unresponsive to the real concerns voiced.

Other Anderson residents also had difficulty accessing important information about the proposed permit. When one concerned community member emailed DEQ to ask if about copies of updated modeling documents, DEQ provided that community member a web link that expired after seven days. The fact that these documents were only provided to this community member individually and not to the general public via the DEQ website is concerning. This process prioritizes those community members who have the time, resources, and knowledge to continually reach out to DEQ on these issues for weeks.

IV. PERMITTING ACTIONS BY DEQ VIOLATED FEDERAL LAW AND EXACERBATED ENVIRONMENTAL INJUSTICE

Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funds from discriminating against individuals on the basis of disability, and provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”⁹⁷ Violations of Section 504 include, “[f]ailing to make reasonable modifications to avoid disability discrimination.”⁹⁸ Section 504 defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”⁹⁹ “Major life activities include caring for one’s self . . . breathing, working, performing manual tasks and learning.”¹⁰⁰ Disabilities include, “diabetes, heart disease [and] high blood pressure,” and other “hidden disabilities” which may not be outwardly visible.¹⁰¹

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin, and provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁰² Title VI applies to programs and activities receiving federal financial assistance.¹⁰³ In 1973, EPA adopted nondiscrimination regulations implementing the purposes of Title VI. EPA regulations require state permitting agencies to minimize the “environmental impacts to local

⁹⁶ See (b)(6) Privacy Affidavit at 16 (EPA Complaint No. 04RDA-22-R4) (Exhibit L).

⁹⁷ 29 U.S.C. § 794(a).

⁹⁸ U.S. Dep’t of Just., What Can DOJ Do? (Sept. 7, 2022), <https://www.justice.gov/crt/what-can-doj-do>.

⁹⁹ 42 U.S.C. § 12102(1)(A).

¹⁰⁰ Off. Of C.R., Know the Rights that Protect Individuals with Disabilities from Discrimination, <https://www.hhs.gov/sites/default/files/knownyourrights504adafactsheet.pdf>.

¹⁰¹ U.S. Dep’t of Educ., The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973, <https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html> (last visited Nov. 27, 2022).

¹⁰² 42 U.S.C. § 2000d.

¹⁰³ C.R. Div. U.S. Dep’t of Just., Title VI Legal Manual 22, <https://www.justice.gov/crt/book/file/1364106/download> (last visited Nov. 27, 2022).

communities and ensur[e] that their practices and policies are implemented in a nondiscriminatory manner.”¹⁰⁴

In sum, federal civil rights laws and EPA regulations prohibit a recipient of federal funds from using criteria or methods of administering a program or activity which have the effect of subjecting individuals to discrimination.¹⁰⁵ Additionally, “Title VI imposes on states an affirmative obligation to include consideration of Title VI criteria in permitting decisions.”¹⁰⁶ Therefore, DEQ—as a recipient of federal funds—is required to administer its permitting regime in a manner that does not have the effect of subjecting individuals to discrimination. As EPA Title VI and Section 504 regulations provide, DEQ “shall not choose a site or location of a facility that has the purpose or effect of . . . subjecting [individuals] to discrimination . . . on the grounds of race.”¹⁰⁷ As noted in the above, the Asphalt Plant will disproportionately affect residents who are disproportionately people of color and/or disabled.

While DEQ drafted an environmental justice report as part of the permitting process, the Report simply evaluated the demographics and socioeconomics of the project area without any of the historical context of racism in Caswell County or any exploration of the immediate vicinity of the Anderson Community, as opposed to the much larger census tract in which it is located. DEQ did nothing to reduce the disproportionate adverse impacts of the Permit on the African American and disabled communities as Title VI and Section 504 require. The report itself is devoid of any actual analysis of these impacts, much less any recommendations for reducing or mitigating them.¹⁰⁸

If DEQ could justify these environmental harms, it would need to “offer evidence that its policy or decision in question is demonstrably related to a significant, legitimate goal related to its mission.”¹⁰⁹ But to date, DEQ has not put forward any justification for failing to consider disproportionate adverse impacts to communities of color, in the environmental justice report, Hearing Officer’s Report, or elsewhere.

When considering whether a disparate impact on a particular community is justified, EPA guidance instructs DEQ to consider whether any purported benefits would be “delivered directly to the affect population,” keeping in mind “the views of the affected community” about whether the benefits justify the disparate impacts.”¹¹⁰ The Anderson Community made its voice very clear, as the comments given indicate: it did not think the Permit benefited it, and thought it would actually harm residents – socially, economically and environmentally.¹¹¹

¹⁰⁴ Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance), 71 Fed. Reg. 14207, 14214 (Mar. 21, 2006).

¹⁰⁵ 42 U.S.C. § 2000d (2018); 40 C.F.R. § 7.35(b).

¹⁰⁶ *S. Camden Citizens in Action v. New Jersey Dept. of Env’t Prot.*, 145 F.Supp. 2d 446, 476 (D.N.J. 2001).

¹⁰⁷ 40 C.F.R. § 7.35(c).

¹⁰⁸ See generally DEQ EJ Report.

¹⁰⁹ ENV’T PROT. AGENCY – EXTERNAL C.R. COMPLIANCE OFF., COMPLIANCE TOOLKIT 15 (Jan. 18, 2017), https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

¹¹⁰ *Id.*

¹¹¹ See Hearing Officer’s Report (Exhibit F).

DEQ is fully capable of ensuring that its permitting program fulfils its primary purpose while also avoiding discriminatory effects. Its decision to forgo the analysis here, despite comments and evidence suggesting that the decision to issue the Permits would cause disproportionate adverse impacts to minority and disabled communities, violates Title VI and Section 504's requirements to administer programs in non-discriminatory manners.

DEQ has the authority to permit the Asphalt Plant in a way that protects the nearby community and the environment. In the Permit, DEQ could have included more timely monitoring procedures to ensure that the Asphalt Plant is being operated within federal and state environmental standards. As noted in the Hearing Officer's Report, DEQ has the authority to require:

- Monthly visual inspections of the fabric filters in the baghouses. The Permit only requires annual internal inspections.¹¹²
- Weekly inspections to ensure that water is flowing to discharge spray nozzles in wet suppression systems. The Permit only requires monthly inspections.¹¹³
- Require auditing of Carolina Sunrock's sales receipts, contracts, invoices and fuel and cement purchases to confirm asphalt and concrete production and emissions. The Permit currently leaves this to the discretion of DEQ.¹¹⁴

DEQ acknowledged these potential modifications to the Permit in the Hearing Officer's Report but did not include them in the Permit. In addition, it appears that DEQ is not aware of EPA initiatives to improve Title VI compliance by state agencies, including training for personnel and interim guidance for permit writers.¹¹⁵ The reports of the Hearing Officers clearly show they do not think the federal civil rights laws govern their permitting decisions. Per the logic in the Hearing Officer's Report, Title VI and Section 504 would have to be restated in the regulations of the Division of Air Quality to have any impact on their permitting decisions whatsoever. Per the terms of the Hearing Officer's Report, DEQ's responsibility for environmental justice is limited to improving outreach recommendations and holding cursory public hearings.

V. RELIEF REQUESTED

As detailed above, DEQ issued a permit for the Asphalt Plant that fails to protect the health of Anderson residents. Anderson residents already suffer from adverse health outcomes due to the various animal projects in the community. Despite the evidence that asphalt plants worsen health outcomes for already exposed communities, DEQ issued the Permit without addressing these harms. This is unacceptable and a violation of federal law. Complainants request that OEJECR investigate the allegations of ACG that DEQ violated Section 504 and Title

¹¹² *Id.* at 17.

¹¹³ *Id.* at 18.

¹¹⁴ *Id.*

¹¹⁵ See e.g. EPA Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions (FAQs) available at: <https://www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf> (last accessed December 20, 2022)

VI and the corresponding EPA regulations in issuing the Permit with inadequate protections for the air quality and the health of people living nearby, a disproportionate share of whom are disabled and African American.

VI. CONCLUSION

For all the reasons outlined above, Complainants request that EPA accept this Supplement to the Complaint for investigation, and upon a finding of disparate impact, bring DEQ into compliance with Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations. Thank you for your consideration of this matter. And thank you for your service to the people of this nation and the places which we love. As you have any questions and wish to discuss the matter further, please contact me at longest@law.duke.edu or 919-613-7207.

Sincerely,

/s/ Ryke Longest
Ryke Longest, *Co-Director*
DUKE ENVIRONMENTAL
LAW AND POLICY CLINIC

ENCL: APPENDICES

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