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Eli Woods
Loyola University Chicago School of Law

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Environmental Racism in the Age of COVID-19

Eli Woods

As the COVID-19 pandemic has swept the world leaving millions infected, hundreds of thousands dead, and most economies in tatters, a question that has gone largely unanswered is whether toxic air pollution has been a culprit in helping spread the virus. What effects, if any, have high levels of toxic air pollution in communities of color had on the virus’ diffusion and lethality? Toxic air pollution, including particulate matter, ozone, and other harmful emissions, can cause serious underlying health conditions, such as cancer and respiratory problems, that worsen the effects of the virus. The Centers for Disease Control and Prevention (CDC) reported that COVID-19 cases in the African American community are 2.6 times higher than their white counterparts.\(^1\) Further, African American hospitalizations are 4.7 times higher while deaths are 2.1 times higher.\(^2\) A host of factors, including a history of discrimination, land-use planning, lack of access to healthcare, housing, and income inequality, help explain the disproportionate impact of COVID-19 on communities of color. These factors form the foundations of environmental racism, which refers to any policy, practice, or directive that differentially affects or disadvantages, intended or unintended, individuals, groups, or communities based on race or color.\(^3\) Ultimately, gross environmental health disparities caused by environmental racism can be best illustrated by the causal connection between high levels of toxic air pollution and higher numbers of cases, hospitalizations, and death from COVID-19.

Discussions of environmental justice and environmental racism began in the 1960s during the Civil Rights Movement by individuals, primarily people of color, who sought to address the inequality of environmental protection in their communities.\(^4\) While the environmental justice movement started out

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2. U.S. Dep’t of Health and Hum. Services, supra note 1.
as, and still very much remains, a grassroots movement, its message has now been adopted by the U.S. Environmental Protection Agency (EPA), which established the Office of Environmental Justice. The EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” By recognizing the “fair treatment and meaningful involvement of all people,” the EPA was acknowledging the gross disparities that existed in environmental protections that needed to be addressed. In 1994, President Clinton signed Executive Order (EO) 12898 to “make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” A Presidential Memorandum accompanied the Executive Order establishing that it be in accordance with Title VI of the Civil Rights Act of 1964. While President Clinton’s EO took an important step towards establishing an environmental justice policy, it is not enforceable in court. Title VI of the Civil Rights Act remains the centerpiece of any environmental justice claims under the law.

Title VI allows individuals to file administrative complaints with federal departments and agencies that provide financial assistance alleging discrimination based on race, color, or national origin by recipients of federal funds. The EPA has been bound by Title VI regulations since 1973, with the responsibility to ensure that its funds are not being used to subsidize discrimination. Through President Clinton’s EO, the EPA created the framework to address environmental racism and incorporate environmental justice into their mission. However, under Title VI, individuals directly suing recipients of federal funds in federal and state courts, or individuals filing administrative complaints with the EPA and other agencies, has produced only limited success.

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Further, nine of every ten complaints filed with the EPA between 1996 to mid-2013 saw the EPA’s Office of Civil Rights reject or dismiss them, according to a Center for Public Integrity investigation. Since it is difficult to find relief in the courts and with the EPA, environmental justice advocates must start thinking outside the box by filing administrative complaints with other federal agencies and state environmental protection agencies.

On January 30, 2020, the World Health Organization (WHO) declared the novel coronavirus outbreak a global public health emergency when the United States had only a few confirmed cases in Illinois, California, Arizona, and Washington state. At the same time, per the Washington Post, the United States intelligence agencies were warning the Trump Administration about the novel coronavirus in “more than a dozen classified briefings.” In response to the Ebola outbreak in 2014-15, President Obama established the Directorate of Global Health Security and Biodefense within the National Security Council (NSC) with its primary focus on pandemic preparedness. However, the Trump Administration disbanded the unit in 2018 with some team members moved to other units in the NSC. By failing to adequately prepare for and prevent the spread of COVID-19, over ten million Americans have contracted the virus, while hundreds of thousands and counting have died. Most notably,
no communities have been more acutely impacted by the virus than communities of color. Part I discusses the impact of gross environmental health disparities caused by toxic air pollution and racial discrimination, which are reciprocal factors that explain higher COVID-19 diffusion, hospitalizations, and lethality in communities of color. Part I also provides scientific studies linking greater COVID-19 diffusion and lethality to toxic air pollution. Part II examines commonly utilized legal routes by environmental justice advocates and why they often fail. Part III examines new and emerging legal routes for advocates to pursue on behalf of victims of environmental racism.

I. ENVIRONMENTAL RACISM AND THE IMPACT OF COVID-19

The Center for American Progress (CAP), a progressive think tank headquartered in Washington, D.C., released a report in September titled “Building a Just Climate Future for North Carolina.”16 The report found the following:

Like many other states, systemic and historic disparities in North Carolina, driven by discriminatory zoning, housing discrimination, the longstanding practice of concentrating sources of pollution in low-income communities and communities of color, among other unjust policies, have exacerbated the risks and impacts of more extreme weather, flooding, heat waves and other climate change impact in these communities.17

To put it simply, communities of color in North Carolina suffer from environmental racism. Environmental racism reinforces the stratification of (1) people by race, ethnicity, status and power; (2) place in central cities, suburbs, rural areas, unincorporated areas or Native American reservations; and (3) work, in that office workers, for example, are afforded greater protections than farm workers.18 Environmental decision-making and local land-use planning operate at the intersection of science, economics, politics, and special interests in a way that places communities of color at risk.19 Currently, there is no greater example of the adverse effects of environmental racism on communities of color than the COVID-19 pandemic.

As the CAP report emphasized, the COVID-19 pandemic highlights “the interconnection between systemic racism and injustice and environmental,

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17 Id. (quoting Cathleen Kelly, a senior fellow for energy and environment with the Center for American Progress, who helped write the report).
18 Bullard, supra note 3.
19 Bullard, supra note 3.
public health, and economic disparities.” According to the report, “[p]eople of color — especially Black, Native American, and Latinx people — are contracting and dying from COVID-19 at far higher rates than their white counterparts.” Further, public health researchers found that residents in polluted neighborhoods are more likely to experience the worst effects of COVID-19, and death rates from the disease have been highest in communities of color. This is especially true for Native American communities, who are often exposed to the highest levels of pollution. Further, the connection between air pollution and communities suffering the most severe impacts from COVID-19 are not isolated to North Carolina alone. Following the outbreak, scientists across the globe began to study contributing factors that may account for accelerated spread and lethality of the virus. In Europe, scientists focused on the regions of Central Spain and Northern Italy, which had the highest positivity rates and fatalities in Europe through the Spring.

Following the deadliest months of the pandemic in Europe, many scientists sought to investigate the correlation between the high level of COVID-19 lethality and atmospheric pollution. Scientists studied the relationship between coronavirus fatalities and exposure to various air pollutants, including ozone ($O_3$), nitrogen dioxide ($NO_2$), carbon monoxide (CO), and particle matter (PM). One study analyzed the relationship between air pollutants concentration ($PM_{2.5}$ and $PM_{10}$) and the number of deaths. Chronic exposure to air pollutants have been associated with lung ACE-2 over-expression, which is known to be the main receptor for SARS-CoV-2 (the name of the virus responsible for COVID-19). The study found that the highest number of COVID-19 cases were recorded in the most polluted regions with patients presenting with more severe forms of the disease requiring ICU admission. Moreover, in these regions, mortality was two-fold higher than the other regions.

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20 Allen, supra note 16 (quoting the CAP report).
21 Allen, supra note 16.
22 Allen, supra note 16.
23 Antonio Frontera et al., Severe air pollution links to higher mortality in COVID-19 patients: The "double-hit" hypothesis., 81 J. of Inf. 225 (2020).
24 Frontera et al., supra note 23.
25 Frontera et al., supra note 23.
26 Id.
A separate study examined the relationship between long-term exposure to NO2 and coronavirus fatalities. Results showed that out of the 4443 fatality cases, 3487 (78%) were in five regions located in Italy and central Spain. These regions showed the highest NO2 concentrations combined with downwards airflow, which prevented an efficient dispersion of air pollution. The results of the study indicated that long-term exposure to this pollutant may be one of the most important contributors to fatalities caused by the COVID-19 virus in these regions and maybe across the whole world.

Finally, a third study investigated the correlation between the degree of accelerated diffusion and lethality of COVID-19 and the surface air pollution in Milan metropolitan area, Lombardy region, Italy. The study found that high levels of urban air pollution, weather, and specific climate conditions have a significant impact on the increased rates of confirmed COVID-19 Total number, Daily New, and Total Deaths cases. Specifically, COVID-19 Daily New cases were found to be positively related with PM and Air Quality Index as dry air supports COVID-19 virus transmission, and outdoor airborne aerosols might be possible routes of COVID-19 diffusion. As evidenced by these studies, regions with high levels of air pollution have a positive correlation with high levels of COVID-19 diffusion and lethality.

In 2018, the EPA published a study in the American Journal of Public Health that found facilities emitting dangerous particulate air pollution, such as soot, disproportionately impacted low-income communities and communities of color. Inhaling particulate matter (PM) can have a devastating impact on human health, including causing severe asthma attacks, heart attacks, and premature death. The chronic conditions caused by long-term inhalation of

27 Yaron Ogen, Assessing nitrogen dioxide (NO2) levels as a contributing factor to coronavirus (COVID19) fatality, 726 Sci. Total Env’t 138605 (2020).
28 Ogen, supra note 27.
29 Id.
30 Ogen, supra note 27.
31 Maria A. Zoran et al., Assessing the relationship between surface levels of PM2.5 and PM10 particulate matter impact on COVID-19 in Milan, Italy, 738 Sci. of The Total Env’t 139825 (2020).
32 Id.
33 Zoran et al., supra note 31.
PM also creates the types of preexisting conditions that make COVID-19 far more lethal once contracted. Historic racism and economic inequality were cited as key factors in the siting and development of facilities emitting particulate pollution for disparate health impacts. The report’s goal was to evaluate the location of PM emitting facilities and the characteristics of surrounding communities, such as income level, race, and poverty rates most impacted by their pollution. After assessing PM emissions from facilities in a nationwide study along with the characteristics of the communities at the highest risk of health consequences due to exposure to it, the study found that non-whites had a 28 percent higher health burden and African Americans, specifically, had a 54 percent higher burden than the overall population. The glaring disparities in air quality are even more egregious when taken in conjunction with the CAP study, which provided evidence that residents in polluted neighborhoods are more likely to experience the worst effects of COVID-19, the CDC data, and the European studies showing causation between toxic air pollution and COVID-19.

 Crucially, the public health and scientific studies provide complainants with standing in the courts and with agencies. In order to have standing in court or with an agency, a complainant must show an “injury in fact,” which is “an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent.” Second, the plaintiff must show a “causal connection between the injury and the conduct complained of,” which means that the injury is “fairly traceable to the challenged action. . . and not the result of the independent action of some third party.” Third, it must be “likely” that a favorable decision will redress the harm. Here, the right to life and a healthy environment are concrete and particularized interests with the actual harm being COVID-19 and toxic air pollution. The studies provide evidence that toxic air pollution causes higher COVID-19 diffusion and lethality, and that communities of color reside in the most highly polluted regions of the country. Therefore, advocates now have a causal connection between the injury and conduct of polluters. Finally, a favorable decision preventing polluters from moving their facilities into communities of color, increasing their

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36 Willis, supra note 34.
37 Id.
38 Willis, supra note 34.
40 Id.
41 Id. at 561.
hazardous waste capacities, or operating with less stringent emissions standards would redress the harm.

Environmental justice advocates traditionally file complaints in federal and state courts, or file administrative complaints with the EPA, under Title VI of the Civil Rights Act, to attempt to stop environmental policies that have disparate impacts or discriminatory effects on communities of color. In the case of toxic air pollution and other environmental hazards causing higher COVID-19 diffusion and lethality in communities of color, advocates must utilize all the tools in their tool belts to achieve legal victories. As we will see, complaints often fail in the courts and get stuck in a bureaucratic nightmare with the EPA. Only after unpacking these may we have an awareness and understanding of the need to explore new legal routes.

II. TITLE VI CLAIMS IN THE COURTS AND EPA

Environmental justice advocates have traditionally utilized Title VI in two ways: (1) by directly suing recipients of federal funds in federal and state courts under Title VI and (2) by filing Title VI administrative complaints with the EPA and other agencies. The primary barriers preventing prosecution of Title VI cases in federal courts are two U.S. Supreme Court decisions in 1983 and 2001. In Guardians, the Court held that § 601 of Title VI required proof of intentional discrimination, which is an exceedingly high evidentiary bar that is difficult to demonstrate. In Sandoval, the Court held that agency § 602 regulations prohibiting disparate impact did not create a private right of action since Congress did not intend to create a private remedy to enforce regulations promulgated under § 602. Following the decision in Sandoval, there has been a movement away from bringing Title VI claims in courts, focusing instead on filing administrative complaints with federal agencies.

The EPA, under its Office of Civil Rights (OCR) division, has failed to act on the vast majority of Title VI complaints filed within the timeframes set forth in the agency’s Title VI regulations. An EPA report commissioned in

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43 Id.
44 Id.; See Guardians Ass’n v. Civil Service Commission, 463 U.S. 582 (1983).
46 Id.
47 Huang, supra note 42; See 40 C.F.R. Part 7.
March of 2011 evaluated OCR’s handling of Title VI complaints, which concluded that OCR’s Title VI track record was inadequate and unresponsive to environmental justice communities, and in some cases, damaging to EPA’s reputation both internally and externally. The report stated that only 6 percent of the 247 Title VI complaints received by OCR were accepted or dismissed within the agency’s twenty-day regulatory time limit. Furthermore, the report found that OCR’s backlog of Title VI complaints stretched back to 2001, and at the time of the report’s publication, there were numerous cases that had been awaiting action for up to four years, with two cases stuck in the queue for more than eight years. Half of the complaints took one year or more to be accepted or dismissed, with one case accepted after nine years and a second case accepted after ten years. The report found that “the prolonged history of backlog has reinforced a persistent internal perception that EPA intentionally avoids making decisions in its Title VI program amongst OCR staff that further confirms unawareness on overall priority and urgency in Title VI function.”

Since the report’s publication in 2011, the reputation of the EPA as inadequate, inattentive, and unresponsive to Title VI complaints has been further reinforced. In 2015, the Center for Public Integrity filed a Freedom of Information Act request seeking every Title VI complaint ever submitted to OCR along with every resolution of the complaints since 1996. The records, which included 265 Title VI cases from 1996 to mid-2013, revealed that when communities turned to OCR for help, their Title VI complaints were either rejected or dismissed more than nine of every ten times. In the majority of cases (162), OCR rejected claims without pursuing investigations, and in cases that it pursued investigations (only 52), it dismissed them more often than it proposed sanctions or remedies. Further, records showed that OCR failed to execute its authority to investigate claims even when it had reason to believe

50 Id.
51 Id. at 25.
52 Id. at 26.
54 Id., supra note 53.
discrimination could have been occurring.\textsuperscript{56} Complaints were often rejected for procedural reasons, including ninety-five cases where the targets did not receive agency funding, sixty-two cases that fell outside the 180-day time limit that the EPA has authority to waive, and fifty-two cases that had insufficient claims under Title VI.\textsuperscript{57}

Beyond the procedural issues with OCR, there are substantive issues that stem from an agency decision in 1998, commonly referred to as the \textit{Select Steel} rule. The Congressional Black Caucus Foundation summarizes the decision in the \textit{Select Steel} case, the \textit{Select Steel} rule promulgated from the case, and its implications for subsequent Title VI complaints filed with the EPA:

\textit{[T]he EPA has labored under an erroneous ruling that compliance with the health-based National Ambient Air Quality Standards (“NAAQS”) creates a rebuttable presumption that pollution impacts cannot be adverse from a public health standpoint, and therefore cannot violate Title VI prohibitions against disparate impact. This holding... stands in stark contrast to the civil rights rule of law applied throughout the rest of the Federal agencies, and by courts generally. All other agencies and courts enforce disparate impact claims under Title VI by identifying and addressing disparity. The EPA, in contrast, analyzes Title VI disparate impact claims by focusing on adversity. ‘Disparate impact’ goes to the issue of equality, while ‘adversity’ refers to physically measurable standards of pollution, without regard to the extent of the harm communities bear in relation to one another. The difference is that the EPA misunderstands that equality is the fundamental motivation that underlies Title VI and all civil rights law... In short, if the EPA finds no environmental adversity for each allegedly harmful pollutant, the EPA concludes there could be no civil rights disparity. Since the \textit{Select Steel} decision... the EPA’s anomalous approach to civil rights law has produced unwieldy delays and inefficiencies.\textsuperscript{58}}

As a result of the decision in \textit{Select Steel}, the EPA created a rule that makes environmental standards superior to civil rights law. Therefore, filing a Title VI complaint with the EPA is not only procedurally burdensome, but likely to be substantively ineffective. To avoid the likelihood of failure in the courts and with the EPA, environmental justice advocates may find success by filing ad-

\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} Dayna Bowen Matthew, \textit{How The New Administration Could Bring A New Day to The EPA’s Title VI Enforcement}, \textit{CONGRESSIONAL BLACK CAUCUS FOUNDATION, INC.}, 5-6, 7, January 23, 2017; See St. Francis Prayer Ctr. V. Michigan Department of Environmental Quality, (EPA File No. 5R-98-R5, 1998).
III. A NEW FRONTIER: THINKING OUTSIDE THE BOX

Environmental justice advocates need to find new ways to address civil rights violations resulting from environmental racism due to the relatively limited success achieved through traditional legal routes. As the COVID-19 pandemic rages on, disproportionately affecting communities of color due in large part to toxic air pollution, any legal battles should be conducted outside the sphere of the courts and the EPA. Through state environmental protection agencies and other federal agencies, such as the Department of Housing and Urban Development (HUD), advocates should consider filing administrative complaints that link toxic air pollution to COVID-19 to prevent cities and states from moving hazardous waste facilities into communities of color. Two examples from environmental justice groups in Illinois and Michigan show that filing administrative complaints outside federal and state courts and the EPA could be a blueprint for advocates to follow.

In June, the Illinois Environmental Protection Agency granted a permit to General Iron to move a polluting scrap-metal recycling plant from Chicago’s well-off, predominantly white North Side to a mostly Black and Latino, low-income neighborhood on the Southeast Side.\(^59\) Prior to the Illinois EPA granting the license, over three hundred comments were made to the agency during its notice and comment period with opponents to the project noting that General Iron’s Lincoln Park facility suffered an explosion in May.\(^60\) A construction permit was approved nonetheless with some special conditions, such as limits placed on emissions, hours of operation, and more monitoring and testing of emissions.\(^61\) However, the hearings for comments took place virtually due to the COVID-19 pandemic, so many residents with limited internet access did not have an opportunity to participate so only some residents articulated their concerns.\(^62\) In response to a process that left residents feeling disenfranchised

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\(^{60}\) Hope, supra note 59.

\(^{61}\) Id.

\(^{62}\) Id.
and discriminated against, three environmental justice groups filed a complaint on behalf of the residents with the U.S. Department of Housing and Urban Development (HUD). The complaint alleges that the city of Chicago violated the federal Fair Housing Act by facilitating the planned relocation of the facility from Lincoln Park to the Southeast Side, and that the city should be ordered to change the way it plans for industrial sites that pollute.

Since the city of Chicago receives various types of federal funds from HUD, the environmental justice groups, which include Southeast Environmental Task Force, Southeast Side Coalition to Ban Petcoke, People for Community Recovery, are asking HUD to find that the city does not meet the standards promulgated under the Fair Housing Act. In the complaint, the groups claim that the city’s own regulatory actions allege pollution and nuisance violations by General Iron in Lincoln Park where the facility was a source of noxious fumes, explosions, dust, and a substance called auto shredder fluff created by shredding junked cars. These toxic air pollutants would only further diffuse COVID-19 in communities of color, leading to greater transmission and contraction of the virus. Additionally, a new mapping analysis by the Natural Resources Defense Council (NRDC), conducted in close partnership with Chicago community organizations, underlines the high cumulative vulnerabilities to environmental pollution that these communities must endure in the city.

The mapping analysis used data compiled by the EPA and a methodology developed collectively by academic researchers, community groups, and state agencies. Mapped against the city’s industrial corridors, the NRDC’s cumulative impacts map took a combined look at environmental conditions together with sociodemographic characteristics that are associated with greater vulnera-

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64 Chase, supra note 63; Sebastian Malo, Environmental justice groups explore uncharted territory with new complaints, REUTERS LEGAL, October 9, 2020, 8:36 PM, https://www.reuters.com/article/usa-environment-lawsuit/environmental-justice-groups-explore-uncharted-territory-with-new-complaints-idUSL1N2H01UJ.

65 Id.

66 Id.


68 Id.
bility to environmental pollution. The analysis showed that zones filled with diesel trucks, dusty materials, noxious odors, and other environmental hazards were located immediately adjacent to parks and dense residential neighborhoods. Further, the map showed cumulative vulnerabilities in areas of the city with largely low-income residents and communities of color, including Little Village, Pilsen, McKinley/Brighton Park as well as the Southeast Side where General Iron wants to move its polluting scrap-metal recycling plant.

The cumulative impact map provides further evidence that the planned relocation of the General Iron facility to the Southeast Side would only exacerbate the existing high levels of environmental pollution. The HUD complaint should serve as an example to environmental justice advocates to explore nontraditional routes for solutions against companies that seek to emit toxic air pollution in communities of color causing greater COVID-19 diffusion and lethality. Nancy Loeb, who is a counsel for the plaintiffs, said the complainants were not aware of any other such environmental justice complaints in HUD’s history. Advocates across the country should take note of this new approach, win or lose. Similarly, in Michigan, the Great Lakes Environmental Law Center (GLELC) is using a nontraditional and new approach to prevent the planned increase of a hazardous waste treatment facility in a predominantly minority neighborhood.

In July, the GLELC filed an administrative complaint with the Michigan Department of Environment, Great Lakes and Energy (EGLE) on behalf of groups, including the Michigan Environmental Justice Coalition. In the complaint, GLELC alleges that EGLE violated Title VI by increasing health risks for nearby residents, predominantly people of color, by approving a ninefold increase of hazardous waste that the treatment facility U.S. Ecology North can store. The license alteration granted by EGLE would allow U.S Ecology North to expand storage capacity from 76,000 tons to 677,000 tons. According to Nicholas Leonard, executive director of the GLELC, their complaint is the first filed with EGLE to test out a new process that was put in

69 Geertsma, supra note 67.
70 Id.
71 Geertsma, supra note 67.
72 Malo, supra note 64.
73 Id.
74 Malo, supra note 64.
place in the aftermath of the Flint water crisis, which allows for Title VI complaints to be filed directly with the state.\textsuperscript{76} The complaint asks EGLE to modify "the state hazardous waste management plan to stop the disproportionate siting of commercial hazardous waste facilities in communities of color."\textsuperscript{77} In other words, GLELC is asking EGLE to do a fact-specific self-assessment to determine if the agency itself violated the law.\textsuperscript{78}

Andrew Bashi, an attorney with GLELC, says that while the EPA administers policy on a national level, "state agencies are delegated [the authority] to run permitting programs by the EPA" and "get funding from the EPA to do this permitting."\textsuperscript{79} Since the EGLE got this EPA funding, "they have to comply with Title VI," which "was the first time a Title VI complaint was filed directly through the state EPA."\textsuperscript{80} As administrative complaints are less formal, GLELC had an opportunity to take advantage of the flexibility and creativity therein as opposed to a traditional, more strict court complaint.\textsuperscript{81} In the complaint, they included a deep dive into the long history of discrimination and segregation, images and charts, and drew parallels between the situation in Detroit and the historical situation of fighting toxic waste dumps in the south.\textsuperscript{82} According to Bashi, "the parallels were very moving" with one colleague at Earthjustice telling him it was probably the most comprehensive complaint on the issue she had ever seen.\textsuperscript{83} Additionally, "people who read these complaints are in administrative roles," Bashi says, "they are not necessarily lawyers. People who manage the hazardous waste division. . . may be scientists and experts in hazardous waste, so [we] have an entire agency to move not just lawyers."\textsuperscript{84} Whilst GLELC had all the necessary legal framework, they wanted to develop a story that everyone at the agency could digest.\textsuperscript{85}

About seven weeks after filing the complaint, GLELC found themselves at the negotiating table.\textsuperscript{86} As Bashi explains, GLELC has "an opportunity, due

\textsuperscript{76} Malo, \textit{supra} note 64.
\textsuperscript{77} Wilson, \textit{supra} note 75.
\textsuperscript{78} Interview with Andre Bashi, Staff Attorney, Great Lakes Environmental Law Center (Oct. 29, 2020) [hereinafter "Bashi virtual interview"].
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} Bashi virtual interview \textit{supra} note 78.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} Malo, \textit{supra} note 64.
to state law, to do informal resolution even before the formal investigation by the state EPA.87 There have been three meetings to date between GLELC and EGLE with Bashi remaining hopeful that a resolution will be forthcoming, though he is unsure of what it may entail.88 Regardless, those at the agency responsible for granting permits, deciding what changes need to be made, and administering the assessments are going to know what is possible and what is not.89 As Bashi says, “the people who work at these agencies are conducting a system that is on its face neutral, but because of the history of racism and discrimination, the effects are disproportionately harming minorities.”90 Ultimately, GLELC’s goal is to help the agency’s administrators who espouse environmental justice achieve their goals.91

Rather than taking the more traditional route of filing an administrative complaint with the EPA, GLELC decided to bypass the bureaucratic nightmare of the agency and utilize this new process. As Bashi notes, “if you file an EPA complaint, it has a habit of taking forever to dispose of the case and resolve it, or they usually find it did not violate Title VI.” Rather than file with the EPA, Bashi goes on to say “we wanted to get it straight from [the state]. We knew the EPA was not going to work out.”92 Bashi believes they would fare no better in the courts, explaining that “CWA and CAA go through the federal government, even if the permitting program is in the state. Pro-business [federal] judges don’t believe that business should be regulated [and] federal judges find twisted and contorted ways to get the outcome they want.”93 By avoiding the EPA and the courts, GLELC was able to hold EGLE directly accountable for granting the license alteration to U.S Ecology North. As Leonard wrote:

EGLE has a legal obligation, pursuant to the EPA Title VI regulations, to ensure that its licensing decisions do not have a discriminatory effect. Instead of closely examining the proposed license to ensure that it would not have an unjustified adverse disparate impact on the surrounding community, EGLE continued its disappointing legacy of shirking its Title VI obligations to communities of color which perpetuates the environmental injustice of commer-

87 Bashi virtual interview supra note 78.
88 Bashi virtual interview supra note 78.
89 Id.
90 Id.
91 Id.
92 Id.
93 Id. (acronyms stand for Clean Water Act and Clean Air Act).

Environmental justice advocates should consider following GLELC’s model to hold toxic polluters accountable and prevent further damage to communities of color. “This is not a field that has the liberty of a million options that are really great,” Bashi says, “so when you see something that has not been done before, and as long as it is strategically done, it can be done in other places.”\footnote{Id.} Employing GLELC as a model, environmental justice advocates should take advantage of the flexibility and creativity inherent in administrative complaints. They should tailor their complaints for nonlawyer agency administrators who do not want to be seen as condoning, and in some cases encouraging polluters who facilitate the spread and lethality of COVID-19 in communities of color. “Almost all other states would have programs that fall under Title VI,” Bashi explains, “some may have stronger state laws or stronger Title VI options that would protect disadvantaged communities.”\footnote{Id.} However, Bashi cautions that the structure of each state’s environmental protection agency and the level of concern it has for a particular issue are important factors to consider before filing an administrative complaint.\footnote{Id.} Further, Bashi states that while there is more going on at the administrative level, advocates would need to research how Title VI gets applied in a particular state, and if a state’s agency does not care, then the laws and rules may not apply.\footnote{Id.} Therefore, advocates should proceed with a heightened awareness of these concerns, a particularized strategy in mind, and an understanding of the laws in each state prior to filing with a state agency.

\footnote{94 Steve Neavling, \textit{Michigan agency agrees to investigate environmental racism claims over hazardous waste plant in Detroit}, \textit{Detroit Metro Times}, August 12, 2020, 4:28 PM, https://www.metrotimes.com/news-hits/archives/2020/08/12/michigan-agency-agrees-to-investigate-environmental-racism-claims-over-hazardous-waste-plant-in-detroit.} \footnote{95 Id.} \footnote{96 Id.} \footnote{97 Id.} \footnote{98 Id.} \footnote{99 Id.}
CONCLUSION

The COVID-19 pandemic has shined a light on the gross environmental health disparities in communities of color caused by toxic air pollution and racial discrimination. Higher COVID-19 cases, hospitalizations, and deaths are causally linked to toxic air pollution promulgated through environmental racism placing communities of color at risk. As a result of environmental decision-making and local land-use planning, these communities have been placed directly in the crosshairs of the COVID-19 pandemic. In the pursuit of justice and accountability, environmental justice advocates should look beyond traditional, often futile legal routes in the courts and with the EPA. Advocates need to be strategic and think outside the box beginning with an eye towards non-traditional agencies and state EPAs. As the examples in Michigan and Illinois demonstrate, there are opportunities to use agencies, such as HUD, and state EPAs to file administrative complaints that provide more flexibility and creativity. Using public health and scientific studies, relevant and specific history of discrimination and segregation, charts, maps, and graphs, advocates can tailor their complaints for nonlawyer agency administrators with decision-making power. While the COVID-19 pandemic has exposed the devastating consequences of decades of failed environmental policy in communities of color, innovative approaches to environmental justice should give advocates hope for the future.