EARTHJUSTICE

Submitted via email

March 31, 2022

Lilian Dorka
Director
U.S. Environmental Protection Agency
Office of General Counsel
External Civil Rights Compliance Office
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Dorka.Lilian@epa.gov
Title_VI_Complaints@epa.gov

Anhthu Hoang
Acting Deputy Director
U.S. Environmental Protection Agency
Office of General Counsel
External Civil Rights Compliance Office
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Hoang.Anhthu@epa.gov

Daria Neal
Deputy Chief, Federal Coordination and Compliance Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Daria.Neal@usdoj.gov

Re: Civil Rights Complaint against the Florida Department of Environmental Protection and Environmental Injustices in Doral and Statewide from Incinerator Permitting

Dear Director Dorka, Acting Deputy Director Hoang, and Deputy Chief Neal:

Florida Rising respectfully submits this complaint against the Florida Department of Environmental Protection ("DEP") for violations of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and EPA's nondiscrimination regulations.

DEP has discriminated against Florida Rising's members, residents of Doral, persons with limited English proficiency ("LEP"), and members of the communities surrounding

Florida's 10 incinerators on the basis of race, national origin, sex, disability, and age. DEP's violations of civil rights laws and regulations stem from and include its failure to reasonably accommodate LEP persons in its programs and activities; its failure to reasonably accommodate persons based on age, disability, and limited English proficiency in virtual-only programs and activities; and its failure to consider environmental justice in its permitting actions, causing people to disproportionately bear the burdens of environmental harms from incinerators on the basis of their race, national origin, sex, and age.

This action stems from Florida Rising's opposition to a Clean Air Act Title V air permit renewal for the Miami-Dade County Resources Recovery Facility ("the Doral incinerator"), a polluting waste incinerator in Doral that emits noxious garbage odors into the surrounding area. Though located in Doral and owned by Miami-Dade County, this incinerator is regulated by DEP, the agency authorized to write and issue the air permit. After submitting public comments opposing the air permit renewal in December 2021, Florida Rising requested a public meeting with DEP for members of the public to be heard on this incinerator and the draft permit.

Though DEP agreed to a virtual-only public meeting, it became quickly apparent that DEP was treating the public meeting as a mere formality. In a predominantly Latinx community where 82% of the population is Spanish-speaking, DEP published notices regarding the draft air permit and the public meeting in English only, and the agency initially did not agree to provide Spanish-language interpretation at the public meeting.

After Florida Rising, through counsel, provided federal law and guidance on the need for a competent Spanish-language interpreter, DEP planned to have bilingual employee "do their best" to "get the gist" of public comments provided at the public meeting. After Florida Rising requested a *certified* Spanish-language interpreter at the public meeting, providing additional federal law and guidance in support thereof, DEP stated that civil rights nondiscrimination laws and guidance do not apply to its Title V program – an incorrect statement since DEP as an agency receives EPA and other federal funding.

DEP then stated, before any public meeting and additional input from members of the public on the draft air permit, that the agency is "going to issue the permit" and that the permit was "ready to go," accusing Florida Rising of trying to "bootstrap" its environmental justice arguments as to Title V to other DEP programs that more directly receive federal funding.

After the public meeting (scheduled for February 24, 2022) was postponed due to an error in the Teams link in DEP's notice, Florida Rising raised to DEP access issues that a virtual-only public meeting presents. Florida Rising requested that the rescheduled public meeting be a hybrid virtual and in-person meeting, utilizing a user-friendly platform like Zoom for the virtual component of the meeting. At this time, DEP has not agreed to these requests.

Florida Rising submitted written comments against renewal of the Doral incinerator's air permit because of the pollution and injustices incinerators cause: incinerators in Florida and throughout the United States are primarily in communities of color; they emit pollutants known to cause cancer, respiratory and reproductive health risks, increased risk of death, and other health impacts; and they are one of the most emission-intensive forms of electricity production,

exacerbating the climate crisis while poisoning communities. The elderly, children, and women are particularly vulnerable to air pollution harms from incinerators, due to the respiratory illnesses and reproductive health harms the pollution causes. Nevertheless, DEP does not account for environmental justice or other demographic factors like age or sex in its permitting actions.

Among other specific requests for relief, Florida Rising requests that EPA and DOJ bring DEP into compliance with civil rights laws and regulations, requiring it to develop LEP policies, provide accommodations for the public to meaningfully access its programs and activities, and consider environmental justice in its permitting actions.

I. PARTIES

A. Complainant

Florida Rising is a grassroots organization whose mission is to advance economic, racial, and climate justice across Florida, especially on behalf of communities of color, low-income communities, and communities disproportionately burdened by environmental harms.[1] In Doral and throughout the state, Florida Rising fights for healthy environments free from toxic pollution, climate resilience, and for a sustainable, just transition to clean energy that equitably centers the communities it serves.

In 2020, Florida Rising (then called New Florida Majority), alongside Earthjustice, submitted a letter to DEP opposing the expansion of a landfill near Doral that causes strong odors and respiratory health impacts. And in 2021, Florida Rising was a petitioner in a case before the Florida Public Service Commission, opposing a $2 billion rate increase that would be disproportionately felt by the utility's low-income customers.

Florida Rising is a leader in the climate justice movement, statewide and in South Florida in particular. Staff and members of the organization are active in the Miami Climate Alliance, helping to shape the region's urgently needed response to sea-level rise, natural disasters, and other climate change impacts. Florida Rising runs multifaceted campaigns to build the people-powered movement that is necessary to hold leaders and elected officials accountable to their constituents.

Florida Rising and its members have been following the Doral incinerator for years, aware of the strong community opposition to it. After DEP published a Notice of Intent to issue a Title V air operating permit last November for the incinerator, Florida Rising, through counsel at Earthjustice, submitted extensive comments to DEP regarding the draft permit and opposing its permit renewal. Separately, Florida Rising, alongside other advocacy groups and individuals in and around Doral, submitted a community sign-on letter to DEP opposing the air permit renewal.

[1] Florida Rising, https://floridarising.org/ (last visited March 30, 2022).

Florida Rising has members who reside in and near Doral who are impacted by the incinerator. Moreover, Florida Rising and its members are concerned about the climate change threats incinerator emissions present, especially in a state like Florida that is on the frontlines of the climate crisis. And as part of its organizational mission, Florida Rising and its members seek to combat the environmental injustices of incinerators, which are primarily in communities of color and particularly impact the health of older people, children, and women.

B. Recipient

DEP is the State of Florida's lead agency "for environmental management and stewardship, protecting…air, water, and land," in accordance with the law and rules adopted and promulgated by it.[2] As described in more detail below, DEP is a recipient of EPA funds.

DEP's Air Division "implements the federal Clean Air Act and related Florida statutes, monitors air quality, issues permits to the air pollution sources[,] and administers Florida's air pollution control programs."[3] In its permitting actions, DEP has a duty under state law to protect public health, safety, and welfare; prevent the creation of nuisances; and enhance the environment for the people of Florida.[4]

II. JURISDICTION

Title VI of the Civil Rights Act of 1964 ("Title VI") 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."[5] Likewise, for any agency that receives federal financial assistance, the Age Discrimination Act of 1975 ("the Age Discrimination Act") prohibits discrimination on the basis of age,[6] and Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination on the basis of disability.[7] EPA's nondiscrimination regulations also prohibit discrimination on these bases, as well as on the basis of sex.[8]

Acceptance of federal funds, here, EPA financial assistance, creates an obligation on the recipient to comply with the above civil rights laws and EPA's nondiscrimination regulations. As explained below, DEP receives federal assistance from EPA, making it subject to the requirements of Title VI, the Age Discrimination Act, Section 504, and EPA's nondiscrimination regulations. In addition, this complaint is timely and satisfies all other jurisdictional requirements.

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[2] Fla. Stat. § 403.061 (2021). DEP, About DEP, https://floridadep.gov/about-dep (last visited March 30, 2022).
[3] DEP, Air Topics, https://floridadep.gov/air-topics (last visited March 30, 2022).
[4] Fla. Stat. § 403.702 (2021).
[5] 42 U.S.C. § 2000d.
[6] 42 U.S.C. § 6101.
[7] 29 U.S.C. § 794.
[8] 40 CFR Part 7.

A. Program or Activity

DEP is an agency of the State of Florida that receives federal funds to assist its mission of executing a broad range of environmental regulation activities for the benefit of the people of Florida.[9] As a state agency, any DEP operation is considered a "program or activity" within the meaning of civil rights laws and EPA's regulations. Title VI, Section 504, and the Age Discrimination Act all define a "program or activity" as "all of the operations of… a department, agency, special purpose district, or other instrumentality of a State or of a local government[.]"[10] In 1987, Congress enacted an expansive definition of "program or activity" to make "clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance."[11] Accordingly, DEP is an agency of the State of Florida and must comply with Title VI whenever it receives federal financial assistance.

B. Federal Funding

DEP is a recipient of federal financial assistance as defined by EPA's nondiscrimination regulations. EPA's regulations define a "[r]ecipient" as "any State or its political subdivision, any instrumentality of a State or its political subdivision, [or] *any public or private agency*… to which Federal financial assistance is extended directly or through another recipient[.]"[12]

As explained above, DEP is an agency of the state of Florida, and as an agency, it receives federal funding from EPA.[13] For example, DEP received over $230 million in federal funds from EPA in Fiscal Year 2021. In 2021, EPA awarded DEP over $1.5 million in federal grants to support air quality environmental programs in Florida, administered through DEP's Air Division. Because DEP receives financial assistance from EPA, it is subject to Title VI, the Age Discrimination Act, Section 504, and EPA's nondiscrimination regulations.

C. Timeliness

This complaint is timely. EPA's External Civil Rights Compliance Office ("ECRCO") considers a civil rights complaint timely if it is filed within 180 calendar days of the alleged discriminatory acts[14] or if alleging a continuing policy or practice of discrimination, allege either a "series of related acts of which one occurred within the 180-day filing period or a systematic policy or practice that operated within the 180-day period."[15] The discriminatory acts and

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[9] *See* Fla. Stat. § 403.061 (2021).
[10] 42 U.S.C. § 2000d-4a; 42 U.S.C. § 6107; 29 U.S.C. § 794(b)(1)(A). *See also* 40 C.F.R. § 7.25.
[11] *Lopez v. City of Dallas, Tex.*, 2004 WL 2026804, at *9-10 (N.D. Tex. 2004) (citing S. Rep. 100-64); *Grimes v. Superior Home Health Care of Middle Tenn.*, 929 F. Supp. 1088, 1091-92 (M.D. Tenn. 1996) ("the [Civil Rights Restoration Act of 1987] was intended to ensure that the various civil rights statutes would apply to the entirety of any state or local institution that had a program or activity funded by the federal government.") (internal quotes omitted).
[12] 40 C.F.R. § 7.25 (emphasis added).
[13] Exhibit A, EPA grants awards to DEP from 2016 to 2021.
[14] 40 C.F.R. § 7.120(b)(2).
[15] EPA, Case Resolution Manual, 10 (2021), https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf ("ECRCO Manual").

policies alleged in this complaint all occurred within or were in operation within the past 180 days.

D. Other Jurisdictional and Prudential Concerns

This complaint satisfies all other jurisdictional and prudential considerations laid out in the applicable laws and regulations and EPA's Case Resolution Manual. This complaint is in writing and describes in sufficient detail the alleged discriminatory acts, policies, and practices in violation of civil rights laws and regulations.[16] It is filed with EPA by Florida Rising, whose mission is to work for environmental justice on behalf of disproportionately impacted communities, and is filed on behalf of Doral residents harmed by DEP's discriminatory practices and on behalf of specific classes of persons who have been discriminated against by FDEP.[17] This complaint contains unique civil rights allegations that have not been alleged in a pending or resolved complaint before the EPA or another federal, state, or local agency, or a state or federal court.[18]

III. FACTS

A. The Doral Incinerator

The Doral incinerator is a municipal waste incinerator owned by Miami-Dade County and operated by Covanta Energy. The incinerator is almost 40 years old, having begun operations in 1982.

Though labeled a "waste-to-energy" facility and a "renewable" source of energy, waste incineration is one of the most polluting forms of energy production. Incineration does not make waste disappear. Instead, it converts waste into air pollution and toxic ash that contaminate surrounding communities. Incinerators can emit more air pollutants than coal plants per unit of energy, up to 18 times more lead, 14 times more mercury, 6 times more smog-forming nitrogen oxides, 5 times more carbon monoxide, 4 times more cadmium and hydrogen chloride, and 2.5 times more greenhouse gases.[19]

Incinerators emit more greenhouse gases per unit of electricity than any other power source,[20] at a time when the climate crisis demands reductions in greenhouse gas emissions, especially in a state like Florida that is on the frontlines of the climate crisis.

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[16] *Id*. at 6, 11.
[17] *See* 40 C.F.R. § 7.120(a); ECRCO Manual, *supra* note 15, at 10 ("If a complaint alleges the maintenance of a discriminatory policy by a recipient, the complainant need not identify individuals who were discriminated against within the filing period[.]").
[18] *See* ECRCO Manual, *supra* note 15, at 13.
[19] Earthjustice et al., *New Jersey's Dirty Secret: The Injustice of Incinerators and Trash Energy in New Jersey's Frontline Communities*, 4 (2021), https://earthjustice.org/sites/default/files/files/nj-incinerator-report_earthjustice-2021-02.pdf ("The Injustice of Incinerators").
[20] Neil Tangri, *Waste Incinerators Undermine Clean Energy Goals, Global Alliance for Incinerator Alternatives*, 5 (2021), https://doi.org/10.31223/X5VK5X.

Pollution from incinerators can cause myriad, serious health impacts, such as respiratory problems; lung or skin cancer; non-Hodgkin's lymphoma in adults; nasal and eye irritation; an increase in the risk of miscarriages, stillbirth, and preterm birth; kidney disease; high blood pressure; and fatigue in children.[21] The Doral incinerator emits harmful chemicals that can cause these health impacts, including volatile organic compounds (VOCs), fine particulate matter (PM2.5), hydrogen fluoride, sulfuric acid mist, arsenic, beryllium, nitrogen oxides, sulfur dioxide (SO_2), mercury, cadmium, and dioxins/furan.[22]

If air pollution, the climate crisis, and health impacts were not enough, residents of the communities surrounding the Doral incinerator complain of strong and noxious garbage odors on a continuous basis. Residents reported, for example:[23]

- 72 straight hours of terrible garbage smell. This is the worst city in the USA to live.
- El olor a basura es Asqueroso. Por favor tengan consideración, esto es una Comunidad que merece respeto.
- There is a very intense odor that makes it difficult to be outside. It smells like acid garbage. Very intense but difficult to describe.
- Nauseabundo olor! No se puede respirar! Increíble la falta de consideración y respeto con nosotros residentes de Doral.

And many specifically identify the incinerator:

- Very strong bad odor coming from Covanta Facility forcing residents to stay indoors and impeding to spent outdoors activities. Frequent odor exposure is causing visitors and residents dizziness, nauseas and a lot of stress.
- Smell from Covanta plant is terrible in our neighborhood.
- Smell from Covanta Plant smells everywhere in our neighborhood and it's a Sunday during the day! Please help maintain this to a minimum.
- Odor from Covanta Energy recycling plant emitting odor causing eyes and throat to burn after only 5-10 minutes outside with children. Sunday 7:30pm 8/8/2021.
- It is a foul odor that makes it unbearable to be outside. The scent is strong and it has a rotten odor - which if you stay out long enough it lingers on your clothing. We

[21] Exhibit B, Earthjustice, "Re: Comments Submitted on Behalf of Florida Rising on Draft Title V Permit No. 0250348-013-AV, Proposed in Response to Application for Renewal of the Title V Permit for the Miami-Dade County Resources Recovery Facility," 8 (Dec. 20, 2021) ("Comment Letter")
[22] *Id*. at 11.
[23] Exhibit C, City of Doral's 311 Odor Complaint Log (Jan. 1, 2016 to Sept. 8, 2021) (redacted) at 105, 133-37, ("Odor Complaint Log")

never know when they will be burning the trash and have had guests over and cannot host outdoors.

Incinerators often lock municipalities into expensive, long-term contracts for up to 20 or 30 years. Despite the fact that the Doral incinerator operates at a tremendous loss for Miami-Dade County,[24] the County's operating contract with Covanta will automatically renew this year for up to 20 years, unless the County affirmatively votes by October 31, 2022 not to renew the contract.

Residents and the City of Doral alike are opposed to this incinerator being in their community.[25]

B. The Diversity of Florida and the Community Around the Doral Incinerator

Florida is a diverse state that includes many people who are foreign-born. Almost 30% of the state's population report speaking a language other than English at home, a rate that is higher than the national average of 21.5% of the population who speak a language other than English at home.[26] In Doral, that percentage is as high as 88.2% of residents.[27] Moreover, 20.8% of Florida's population is foreign-born (higher than the national average of 13.5%), with that percentage being 68.5% in Doral.[28]

Though possibly higher now, the latest estimates of Florida's LEP population, from 2015, show that 11.70% of Florida's population is LEP, which equates to 2,107,585 people.[29] The top two languages spoken by LEP people in Florida are Spanish and French (Haitian) Creole.[30]

Approximately 87,676 people live within a three miles radius of the Covanta Incinerator, of whom 93% are people of color and 36% are low-income.[31] The area around the facility contrasts starkly with the state as a whole, where only 46% of the population are people of

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[24] *See, e.g.*, Miami-Dade County, Dept. of Solid Waste Management, Comprehensive Annual Financial Report for 2020 at 65, https://www miamidade.gov/solidwaste/library/reports/comprehensive-annual-financial-report-2020.pdf (costing the County $56.3 million in total operating costs, yet generating only $8.2 million in revenue from electricity sales); Comprehensive Annual Financial Report for 2019 at 11, 14, https://www.miamidade.gov/solidwaste/library/reports/comprehensive-annual-financial-report-2019.pdf (costing the County $62.4 million in total operating costs, yet generating only $10.4 million in revenue from electricity sales); Comprehensive Annual financial Report for 2018 at 11, https://www.miamidade.gov/solidwaste/library/reports/comprehensive-annual-financial-report-2018.pdf (costing the County $60.3 million in total operating costs, yet generating only $10 million in revenue from electricity sales) at 11, 14.

[25] Samantha Gross, *Doral mayor to county: Don't extend lease at odoriferous Covanta recycling plant*, Miami Herald (Aug. 26, 2021), https://www.miamiherald.com/article253716598 html.

[26] U.S. Census Bureau, Florida, Language Spoken at Home, https://data.census.gov/cedsci/profile?g=0400000US12 (last visited March 30, 2022).

[27] U.S. Census Bureau, Doral city, Florida, https://data.census.gov/cedsci/profile?g=1600000US1217935 (last visited March 30, 2022).

[28] U.S. Census Bureau, *supra* notes 26 and 27.

[29] LEP.gov, 2015 Language Map App, Florida, https://www.lep.gov/maps/lma2015/Final (last visited March 30, 2022).

[30] U.S. Census, Detailed Languages Spoken at Home and Ability to Speak English https://www2.census.gov/library/data/tables/2008/demo/language-use/2009-2013-acs-lang-tables-state.xls

[31] Exhibit D at 3 (March 28, 2022)

color.[32] Also within three miles of the Covanta Incinerator are public housing and subsidized housing funded by the U.S. Department of Housing and Urban Development that consist of 12 public housing buildings and two subsidized housing buildings.[33]

The cities within a three-mile radius of the incinerator are Doral, Medley, Hialeah, and Sweetwater. All three of these cities are predominantly Latinx. According to U.S. Census Bureau statistics for each city, Doral is 82% Latinx, Medley is 95.45% Latinx, Hialeah is 94.03% Latinx, and Sweetwater is 93.71% Latinx.[34]

C. The Environmental Injustice of Incinerators

Though municipal solid waste incinerators may be owned by a city or county and operated by a private company, DEP regulates incinerators in Florida by issuing Title V Clean Air Act operating permits and oversees permitting and monitoring of incinerators even if delegated to a local air program.

1. Incinerators are overwhelmingly in communities of color

Almost 80% of all municipal solid waste incinerators in the United States are in Black, brown, and/or low-income communities.[35] In Florida, the percentage is not too far behind the high national average, in which 70% of the state's municipal incinerators are in communities of color and linguistically isolated communities.[36] And nationally, a staggering 67% to 83% of the worst-emitting incinerators (as to nitrogen oxides, sulfur dioxide, lead, mercury, particulate matter, and carbon monoxide) are in environmental justice communities.[37]

Up until recently, Florida had 11 municipal waste incinerators, the most of any state in the country.[38] With the shutdown of the Bay County Resources Recovery Facility in Panama

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[32] *Id*.
[33] Exhibit E, EPA, EJScreen image showing public and subsidized housing for a three-mile radius surrounding the Covanta Incinerator (Search performed on Dec. 9, 2021 at https://ejscreen.epa.gov/mapper).
[34] U.S. Census Bureau, Doral city, Florida, https://data.census.gov/cedsci/profile?g=1600000US1217935 (last visited March 30, 2022); U.S. Census Bureau, Medley town, Florida, https://data.census.gov/cedsci/profile?g=1600000US1243900 (last visited March 30, 2022); U.S. Census Bureau, Sweetwater city, Florida, https://data.census.gov/cedsci/profile?g=1600000US1270345 (last visited March 30, 2022).
[35] Ana Isabel Baptista & Adrienne Perovich, *U.S. Municipal Solid Waste Incinerators: An Industry in Decline*, TISHMAN ENV'T AND DESIGN CTR., 4 (2019), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/5d5c4bea0d59ad00012d220e/1566329840732/CR_GaiaReportFinal_05.21.pdf.
[36] *See* EJScreen Reports, *infra* notes 42 to 51.
[37] Baptista & Perovich, *supra* note 35, at App. E.
[38] *See* Tishman Env't and Design Ctr. & Global Alliance for Incinerator Alternatives (GAIA), *The Cost of Burning Trash: Human and Ecological Impacts of Incineration in Florida*, 1 (2020), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/5fc686311972c46e3c8167d1/1606846003793/The+Cost+of+Burning+Trash-+All+5+states.pdf.

City, Florida – due to its age and operation costs[39] – Florida now has 10 municipal incinerators, tied with New York for the most municipal incinerators of any state in the country.[40] Florida could reclaim its title in the very near future of having the most municipal waste incinerators, having just passed legislation subsidizing and supporting their operations and expansion.[41]

DEP's permitting of incinerators disparately impacts members of the public based on race (communities of color) and national origin (linguistic isolation), demonstrated by data from EPA's EJScreen database, below.

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[39] E.A. Crunden, *Citing age and costs, Florida county shutting down incinerator in 2021*, Waste Dive (Sept. 9, 2020), https://www.wastedive.com/news/florida-incinerator-bay-county-shutting-down-wte/584718/; *see also* Bay County Government, Bid Notice for demolition of Bay County Waste-to-Energy Facility (Jan. 3, 2022), https://www.baycountyfl.gov/bids.aspx?bidID=295 (last visited March 29, 2022).

[40] *See* Tishman Env't and Design Ctr. & Global Alliance for Incinerator Alternatives (GAIA), *The Cost of Burning Trash: Human and Ecological Impacts of Incineration in Florida*, 5 (2020), https://static1.squarespace.com/static/5d14dab43967cc000179f3d2/t/5fc686311972c46e3c8167d1/1606846003793/The+Cost+of+Burning+Trash-+All+5+states.pdf.

[41] Cole Rosengren, *Florida poised to solidify its status as the nation's waste-to-energy capital with supportive new legislation*, Waste Dive, (March 15, 2022), https://www.wastedive.com/news/florida-waste-combustion-power-purchase-expansion-desantis/620276/.

**** State Average for People of Color = 46%***
*****State Average for Linguistically Isolated People = 7%***
Red = % exceeds state average
Orange = % matches state average
Blue = high % relative to state average

Incinerator	**% People of Color* (within 3 mile radius)**	**% Linguistically Isolated** (within 3 mile radius)**
Lake County Resources Recovery Facility[42]	14%	3%
Pasco County Resources Recovery Facility[43]	19%	1%
Hillsborough County Resources Recovery Facility[44]	65%	8%
McKay Bay Refuse-to-Energy Facility[45]	67%	8%
Pinellas County Resource Recovery Facility[46]	31%	4%
Lee County Resource Recovery Facility[47]	49%	6%
Miami-Dade Resources Recovery Facility[48]	93%	28%
Wheelabrator South Broward, Inc.[49]	61%	14%
Palm Beach Renewable Energy Facility #1[50]	63%	7%
Palm Beach Renewable Energy Facility #2[51]	60%	6%

Data obtained by inputting the address of each incinerator into the EJScreen Database, https://ejscreen.epa.gov/mapper/, and running a Standard Report for a three-mile buffer around each incinerator.

[42] Exhibit F, EPA EJScreen Report for Lake County Resources Recovery Facility (March 28, 2022).
[43] Exhibit G, EPA EJScreen Report for Pasco County Resources Recovery Facility (March 28, 2022).
[44] Exhibit H, EPA EJScreen Report for Hillsborough County Resources Recovery Facility (March 28, 2022).
[45] Exhibit I, EPA EJScreen Report for McKay Bay Refuse-to-Energy Facility (March 28, 2022).
[46] Exhibit J, EPA EJScreen Report for Pinellas County Resources Recovery Facility (March 28, 2022).
[47] Exhibit K, EPA EJScreen Report for Lee County Resources Recovery Facility (March 28, 2022).
[48] Exhibit D, EPA EJScreen Report for Miami-Dade County Resources Recovery Facility (March 28, 2022).
[49] Exhibit L, EPA EJScreen Report for Wheelabrator South Broward, Inc. (March 28, 2022).
[50] Exhibit M, EPA EJScreen Report for Palm Beach County Renewable Energy Facility #1 (March 28, 2022).
[51] Exhibit N, EPA EJScreen Report for Palm Beach County Renewable Energy Facility #2 (March 28, 2022).

As the above statistics highlighted in blue demonstrate, 70% (7 out of 10) of Florida's incinerators are in locations whose percentages of people of color are higher than the state average percentage of people of color.

Additionally, while 40% (4 out of 10) of Florida's incinerators are in locations whose percentages of linguistically isolated people are higher than the state average percentage for linguistically isolated people, 70% (7 out of 10) incinerators are nonetheless in locations with high percentages of linguistically isolated people relative to the state average.

The Doral incinerator at issue is a stark outlier as to disparate impacts, with 93% of the surrounding community being people of color, compared with 46% statewide, and 28% being linguistically isolated, compared with 7% statewide.

Furthermore, we know that Black and Latinx people in the United States have been three times as likely to become infected from COVID-19 than white people.[52] Moreover, Black and Latinx people have been nearly twice as likely to die from the virus.[53] To date, Miami-Dade county has reported some of the highest coronavirus infection and death rates in the state.[54] The coronavirus is an ongoing part of daily life, with new variants continuing to arise, exacerbating the already inequitable health burdens people of color face. As major emitters of pollutants like fine particulate matter and NOx, waste incinerators make communities of color more susceptible to respiratory infections like COVID-19.[55]

As the above statistics demonstrate and given the health risks and known health harms air pollution from incinerators cause, DEP is discriminating against members of the public on the basis of race and national origin in its incinerator permitting actions.

2. ***People under age 18 and over age 65 are particularly vulnerable to air pollution health impacts*.**

DEP's permitting of incinerators disparately impacts members of the public statewide based on age – particularly children under age 5 – demonstrated by data from EPA's EJScreen database, below.

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[52] Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus,* N.Y. Times, (July 5, 2020), https://www nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data html.
[53] *Id.*
[54] *See, e.g.*, Exhibit O at 2-5, N.Y. Times, *Tracking Coronavirus in Florida: Latest Map and Case Count*, N.Y. Times (updated Dec. 15, 2021) https://www.nytimes.com/interactive/2021/us/florida-covid-cases.html; Exhibit P, Image of database documenting 683,842 total coronavirus cases and total 9,208 coronavirus deaths in Miami-Dade County as of Dec. 15, 2021—higher than any other county in Florida.
[55] The Injustice of Incinerators, *supra* note 19, at 10.

**** State Average for People over Age 64 = 20%***
*****State Average Children under Age 5 = 5%***
Red = % exceeds state average
Orange = % matches state average
Blue = high % relative to state average

Incinerator	**% People over Age 64* (within 3 mile radius)**	**% Children under Age 5** (within 3 mile radius)**
Lake County Resources Recovery Facility[56]	64%	3%
Pasco County Resources Recovery Facility[57]	18%	5%
Hillsborough County Resources Recovery Facility[58]	10%	7%
McKay Bay Refuse-to-Energy Facility[59]	13%	7%
Pinellas County Resource Recovery Facility[60]	18%	5%
Lee County Resource Recovery Facility[61]	15%	7%
Miami-Dade Resources Recovery Facility[62]	11%	6%
Wheelabrator South Broward, Inc.[63]	13%	7%
Palm Beach Renewable Energy Facility #1[64]	20%	5%
Palm Beach Renewable Energy Facility #2[65]	22%	5%

Data obtained by inputting the address of each incinerator into the EJScreen Database, https://ejscreen.epa.gov/mapper/, and running a Standard Report for a three-mile buffer around each incinerator.

As the above statistics demonstrate, 100% of Florida's incinerators are in locations with high percentages of children under age 5 relative to the state average of children under age 5.

[56] Exhibit F.
[57] Exhibit G.
[58] Exhibit H.
[59] Exhibit I.
[60] Exhibit J.
[61] Exhibit K.
[62] Exhibit D.
[63] Exhibit L.
[64] Exhibit M.
[65] Exhibit N.

And of all the incinerators in Florida, a staggering 90% of them are in locations where the percentage of children under age 5 *matches or exceeds* the average percentage of children statewide under age 5 – with 50% exceeding the state average and 40% matching the state average.

Moreover, 50% of Florida's incinerators are in locations with high percentages of people over age 64 relative to the state average for people over age 64. The Lake County Resources Recovery Facility is an outlier as to disproportionate impact based on age, with 64% of the surrounding community being over age 64, compared with 20% on average statewide.

Though data from EPA's EJScreen tool looks at people over age 64 and under age 5, EPA's nondiscrimination regulations do not contain specific age brackets for an act or policy to qualify as discrimination based on age.[66] Moreover, the Age Discrimination Act of 1975 also protects persons of all ages.

Looking at populations that are older and younger more broadly, Miami-Dade County has 549,679 people under the age of 18 and 452,607 over the age of 65—two age groups in which people are at a higher risk of air pollution-induced health effects.[67] Indeed, of all of the children in Miami-Dade County, 36,640 suffer from pediatric asthma.[68] To put these numbers in context, there are approximately 87,676 people living within three miles of the Covanta Incinerator in Miami-Dade County.[69] Therefore, there is considerable evidence that significant at-risk populations reside in the vicinity of the Doral incinerator.

Exposure to particle pollution can lead to reduced lung development and impaired lung function in children and a higher likelihood of developing asthma.[70] Children are particularly vulnerable to air pollution because the majority of lung development occurs after birth and is not fully completed until adulthood.[71] Generally, children spend more time outdoors and are thus more prone to inhale polluted air in comparison to adults.[72] The development of immunity in children is an ongoing process until adulthood, thus making children more susceptible to respiratory diseases from air pollution.[73] Maternal exposure to air pollution can also contribute

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[66] *See* 40 C.F.R. §§ 7.140-7.180

[67] American Lung Association, *State of the Air 2021*, 65 (2021) https://www.lung.org/getmedia/17c6cb6c-8a38-42a7-a3b0-6744011da370/sota-2021.pdf; *see also*, American Lung Association, "Health Effects of Particle Pollution, Who is Most at Risk from Particle Pollution?," https://www.lung.org/research/sota/health-risks (last visited Dec. 15, 2021).

[68] American Lung Association, *State of the Air 2021*, 65 (2021) https://www.lung.org/getmedia/17c6cb6c-8a38-42a7-a3b0-6744011da370/sota-2021.pdf.

[69] Exhibit D at 1.

[70] American Lung Association, *supra* note 68 at 23.

[71] *See, generally,* Heather L. Brumberg *et al*., Ambient Air Pollution: Health hazards to children. 147 PEDIATRICS 1 (2004), https://publications.aap.org/pediatrics/article/147/6/e2021051484/180283/Ambient-Air-Pollution-Health-Hazards-to-Children.

[72] World Health Organization, *Effects of Air Pollution on Children's Health and Development*, 8 (2005), https://apps.who.int/iris/bitstream/handle/10665/107652/E86575.pdf?sequence=1&isAllowed=y.

[73] Brumberg, *supra* note 71.

to adverse health outcomes in children, affecting their immune response, cardiometabolic health, and brain development.[74]

For people over the age of 65, their bodies' capacity to compensate for effects on environmental hazards is reduced, thus leaving this population at higher risk of suffering health harms from air pollution. Major contributors to health impacts include PM, and in particular, $PM_{2.5}$, air pollutants emitted by incinerators. Long-term exposure and accumulation (even at low levels) of these substances has been linked to premature death, hearth attacks, asthma, chronic bronchitis, and cardiac arrhythmias.[75]

As the above statistics demonstrate and given the health risks and known health harms air pollution from incinerators cause, particularly to older people and children, DEP is discriminating against members of the public on the basis of race and national origin in its incinerator permitting actions.

3. Incinerators harm women's health.

DEP's permitting of incinerators disparately impacts members of the public statewide based on gender, because pollution from incinerators disproportionately impacts women's reproductive health.

Studies examining the effects of waste incineration exposure found significant adverse effects on reproductive health and outcomes, including preterm delivery, congenital anomalies, infant deaths, and miscarriage.[76] Studies found a "significant association" between exposure to pollutants from incinerators and congenital anomalies such as heart and neural tube defects, facial clefts, and renal tract defects. And dioxins – harmful chemicals released by incinerators – were found to interfere with biological processes critical to embryonic and fetal development.[77]

Another study of women within approximately 2.5 miles of incinerators in a region in Italy found that "maternal exposure to incinerator emissions, even at very low levels, was associated with preterm delivery."[78]

D. DEP's Intent to Renew the Doral Incinerator Title V Air Permit

The Title V air operating permit for the Doral incinerator currently expires on April 4, 2022. On November 19, 2021, following an application by Covanta Energy for an air permit

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[74] Natalie Mr. Johnson, et al., *Air pollution and children's health—a review of adverse effects associated with prenatal exposure from fine to ultrafine particulate matter*, 26 ENV'T HEALTH AND PREVENTIVE MED 1 (2021), https://environhealthprevmed.biomedcentral.com/track/pdf/10.1186/s12199-021-00995-5.pdf.
[75] AirNow, Older Adults and Air Quality, https://www.airnow.gov/air-quality-and-health/older-adults/ (last visited Mach 30, 2022).
[76] Peter Tait et al., *The health impacts of waste incineration: a systematic review*, 44 AUSTRALIAN AND NEW ZEALAND J. OF PUB. HEALTH 40, 5 (2020), https://onlinelibrary.wiley.com/doi/epdf/10.1111/1753-6405.12939.
[77] *Id*.
[78] Silvia Candela et al., *Air Pollution from Incinerators and Reproductive Outcomes*, 24 EPIDEMIOLOGY, 863 (2013) https://pubmed.ncbi nlm nih.gov/24076993/.

renewal, DEP published a Notice of Intent to issue an air permit for the incinerator.[79] The draft permit could be viewed by following a link in the notice and entering the draft permit number, also listed in the notice.

The Notice of Intent was published in English only in the Miami Daily Business Review, a publication that caters to lawyers, legal professionals, and businesspeople in South Florida, so that they can have "the intelligence to run their firms and practices, win their cases, close business deals and connect with colleagues and clients in the South Florida market."[80]

The draft permit failed to take into account environmental justice laws and guidance or the disproportionate impacts its permitting action could have on the surrounding community. Indeed, there was no consideration whatsoever of any demographic or health considerations in the proposed permit, notwithstanding that Florida's express goals as to its solid waste management are to protect public health, safety, and welfare; prevent the creation of nuisances, and enhance the environment for the people of Florida.[81] Indeed, the draft permit failed to adequately address the most acute issue of which residents surrounding the incinerator complain: strong, noxious garbage odors that interfere with residents' health, wellbeing, and quality of life.[82]

Given the environmental justice, odor, and health implications of the Doral incinerator, among other legal and compliance issues, Earthjustice, on behalf of Florida Rising, submitted written comments on the draft permit, opposing its renewal.[83] Florida Rising separately spearheaded and submitted comments to DEP on the draft permit, alongside social and climate justice groups in Miami and residents opposed to the permit renewal.[84]

In both comment submissions, Earthjustice and Florida Rising requested a public meeting on the draft permit, contemplated in the comment process if there is significant public interest in the proposed permitting action.[85]

E. The February 24, 2022 Public Meeting

DEP agreed to provide a public meeting on February 24, 2022, for which notice was published in the Miami Daily Business Review and the Florida Administrative Register[86] – in English only – 30 days prior.[87]

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[79] *See* Exhibit Q.
[80] ALM Global, Daily Business Review, From the Editor, https://www.alm.com/brands/daily-business-review/ (last visited March 27, 2022) (ALM is a media company that owns the Daily Business Review; see also https://www.law.com/dailybusinessreview).
[81] Fla. Stat. § 403.702 (2021).
[82] *See* Exhibit R, Draft Permit Renewal; Exhibits B, C.
[83] *See* Exhibit B.
[84] See Exhibit S.
[85] *See* Exhibit T at 3.
[86] In its email communications with DEP (attached here as Exhibit V), Earthjustice initially thought DEP had not published notice of the public meeting in the Florida Administrative Register (FAR); upon further review, Earthjustice saw that notice had been published in FAR on this date.
[87] *See* Exhibit U, Public Meeting Notice.

DEP planned the public meeting to be virtual only, via Microsoft Teams, with the option for the public to also call in.

Prior to publication of the notice for the public meeting, Earthjustice notified DEP that there will be people speaking at the public meeting who only speak Spanish and asked if DEP will provide an interpreter.[88]

A summary of the communications that followed between Earthjustice and DEP demonstrate that:

- DEP, knowing there would LEP members of the public at the meeting, initially did *not* agree to provide a Spanish-language interpreter at the hearing.

- DEP only agreed to provide an interpreter after Earthjustice requested one more than once, citing federal law and guidance on language accommodation and outlining reasons why an interpreter was needed here.

- DEP's subsequent language interpretation plans did not provide for a competent Spanish-language interpreter; rather, a bilingual DEP employee, who had expressed concerns about the difficulty of language interpretation, would "do their best" to get the "gist" of comments provided in Spanish.

- DEP's Air Division director and deputy director incorrectly stated federal law and guidance on language accommodation and nondiscrimination under Title VI do not apply to DEP's Title V program since that DEP program does not rely on federal funding.

- DEP planned the now postponed February 24, 2022 public meeting to take place virtually over Microsoft Teams. Though Florida Rising subsequently requested a hybrid virtual/in-person public meeting using Zoom rather than Teams for the rescheduled public meeting, DEP has yet to respond to Florida Rising's requests.

In a January 27, 2022 telephone call between DEP and Earthjustice, Hastings Read, DEP Air Division's deputy director, and Dominique Burkhardt, counsel for Florida Rising, communicated about the February 24, 2022 public meeting. DEP informed Earthjustice that the public meeting would be two hours only, it would begin with a short presentation by DEP in English and Spanish regarding the draft permit, DEP would provide instructions in English and Spanish for attendees on how to unmute their mics or telephone, and then DEP would receive oral comments on the draft permit.

Regarding language interpretation, DEP advised its plan did not include providing a Spanish-language interpreter, despite being notified that there would be Spanish-speaking only people at the public meeting who intended to speak. Rather, Mr. Read stated that a recording of

[88] *See* Exhibit V (email thread between Earthjustice and DEP from January to March, 2022).

the hearing would be transcribed after-the-fact, and any oral comments received in Spanish would be translated into English.

In a February 3, 2022 email to DEP, Earthjustice cited statistics about the demographics of those who live near the incinerator and again requested a Spanish-language interpreter at the public meeting "to ensure meaningful participation of residents" who are Spanish-speaking only.

Earthjustice explained that an after-the-fact translation of comments from Spanish to English does not provide the same assurance to Spanish-speaking members of the public that their comments would be heard and considered by DEP in the same way comments by English-speaking members of the public would be, especially since the purpose of the public meeting is for the public to have their comments heard, understood, and received by DEP at a *designated* time and place.

Earthjustice further noted that at this public meeting, the public may ask questions,[89] which necessarily contemplates an interactive aspect to the hearing that could not be accomplished without a competent (here, certified) Spanish-language interpreter.

In that communication, Earthjustice cited Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," and related guidance for recipients of federal funding, "Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency,[90]" regarding ensuring that people who are not proficient in English can effectively participate in programs or activities like the public meeting here.

In a February 14, 2022 telephone call between Mr. Read and Ms. Burkhardt, DEP agreed to provide an interpreter at the public meeting, though DEP's plan did not involve providing a competent Spanish-language interpreter. DEP's plan was for a bilingual DEP employee to interpret oral comments by summarizing them after they have been provided in full, rather than point-by-point interpretation after every one or so sentences. Per Mr. Read, DEP would "do their best" to "get the gist" of comments made in Spanish.

During the February 14, 2022 call and later documented in a February 16, 2022 email to DEP, Mr. Read stated that the reason interpretation would be attempted after a comment was provided in full, rather than point-by-point interpretation, was because the DEP employee who would be interpreting raised concerns about the difficulty of language interpretation.[91]

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[89] Exhibit W (DEP's draft agenda for the public meeting on this draft air permit, with an agenda item being "Opportunity for Questions/Comments," published on DEP's events page: https://floridadep.gov/air/air/content/32293-postponed-draft-title-v-air-permit-renewal-miami-dade-resource-recovery).

[90] 65 Fed. Reg. 50123 (2000).

[91] Earthjustice recalls and believes DEP attempted to clarify afterwards that the bilingual employee's concerns had to do with the difficulty of language interpretation over a virtual platform. Whether the employee's concerns had to do with the difficulties of language interpretation broadly, or the difficulties of language interpretation over a virtual platform, such statements demonstrate that DEP fell short of ensuring that there would be a competent Spanish-language interpreter at the public meeting (which was virtual-only because DEP unilaterally planned it that way).

In a February 16, 2022 email to DEP, Earthjustice reiterated its concerns about Spanish-speaking members of the public being able to meaningfully participate in this public meeting, given DEP's language interpretation plans.

Earthjustice reiterated the application of federal LEP law and guidance and provided additional guidance for language interpretation from www.lep.gov. Earthjustice stated that a certified Spanish-language interpreter was needed based on the guidance provided and because of the large Spanish-speaking population near the incinerator, the "regionalisms" of the Spanish language, the technical subject of the public meeting, and the fact that the proceeding becomes part of the formal record in the air permitting process. Earthjustice further cited guidance that point-by-point interpretation is the best practice for language interpretation.

In a February 16, 2022 telephone call between Ms. Burkhardt, Mr. Read, and Jeff Koerner, DEP Air Division's director, DEP stated it would not provide a certified Spanish-language interpreter or point-by-point interpretation at the upcoming public meeting, stating that the Executive Order and federal guidance on language accommodation and nondiscrimination under Title VI did not apply to DEP's Title V program, since that particular DEP program does not rely on federal funding.

DEP stated, "we're going to issue this permit," the permit is "ready to go," and that Earthjustice was attempting to "bootstrap" its environmental justice arguments (presumably in the written comments on the permit as well as regarding language interpretation) to other departments within DEP that receive federal funding, such as DEP's air monitoring program.

In a February 17, 2022 email, Earthjustice notified DEP, as requested by the agency, that it expected 50 to 100 people to attend the public meeting, with an estimated 50 people who would speak, of which an estimated 30 people would require Spanish-language interpretation.

The next day, Earthjustice learned that the Teams link in DEP's published notice for the public meeting was non-functional, leading to an error page rather than a Teams meeting space. Earthjustice notified DEP of this immediately.

In a February 19, 2022 email, Earthjustice requested DEP cancel and re-notice the public meeting in this matter, to which DEP agreed, with the new hearing date and time still to be determined.

In that email, Earthjustice brought to DEP's attention feedback from members of the Doral community that Microsoft Teams is not user-friendly, because it first requires a person to register for a Microsoft account, unlike Zoom, which allows a person to simply click a link to enter a virtual meeting space. Earthjustice therefore requested that the rescheduled public meeting take place over Zoom rather than Teams.

In a telephone call two days later, Mr. Read advised Earthjustice that DEP does not use Zoom for public meetings, notwithstanding that DEP has held public meetings over Zoom in the past year, including this month.[92]

Because of the access issues a virtual-only public meeting via Teams presents, in a February 23, 2022 email, Earthjustice requested that the rescheduled public meeting be a hybrid virtual/in-person meeting. In the context of DEP's unwillingness to use Zoom, Earthjustice acknowledged its client Florida Rising would try its best to remove the access barriers that Teams presents.[93]

In a March 9, 2022 email, Earthjustice put in writing to DEP a record of its concerning statements and plans regarding the public meeting thus far and provided case law and regulations explaining how Title VI applies to the entirety of an agency's programs and activities if any part of the agency receives federal funding. Earthjustice also reiterated the need for a certified Spanish-language interpreter at the rescheduled public meeting, its request for a hybrid virtual/in-person meeting, and the use of Zoom rather than Teams.

Though DEP has a practice of holding virtual-only public meetings,[94] it has also held hybrid virtual/in-person public meetings in the past year.[95] There are also discrepancies between the public meeting at issue here and other public meetings: Earthjustice has not seen notice of other public meetings in the past year taking place over Teams; and DEP has provided

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[92] *See, e.g.*, DEP, Notice of Meeting / Workshop Hearing: Florida State Parks Fee Schedule Update (April 30, 2021 meeting date), https://floridadep.gov/parks/parks-director/content/29426-notice-meeting-workshop-hearing-florida-state-parks-fee-schedule (notice states "[t]o participate, place the following Internet web link in your browser: http://zoom.us/j/97516735433"); Rookery Bay Management Plan Public Comment Meeting (March 22, 2022 meeting date), https://floridadep.gov/rcp/nerr-rookery-bay/content/32781-rookery-bay-management-plan-public-comment-meeting (virtual meeting location is https://floridadep.gov/RBManagementPlan, which re-directs to Zoom when the link is copied and entered in browser: https://fiu.zoom.us/j/93703054724?pwd=dTRObVFGSkJWM3hGb0IrVHdnS0REUT09#success).

[93] Florida Rising held a workshop for members of the public regarding attending and submitting comments at the February 24, 2022 public meeting and was willing to take steps like these to try help its members and residents access the public meeting, notwithstanding the time and resources such efforts would require on Florida Rising's part, along with logistical issues working to carry this out in a short period of time leading up to the public meeting, for both English and Spanish-speaking community members.

[94] *See, e.g.*, Rookery Bay Management Plan meeting notice, *supra* note 92; DEP, Myakka River Management Council Public Meeting (Jan. 31, 2022 meeting date), https://floridadep.gov/parks/parks-office-park-planning/content/32242-myakka-river-management-council-public-meeting (noting "[t]his workshop will be conducted virtually via media technology that is free for the public to use"); Rainbow Springs State Park Virtual Public Meeting (Oct. 20, 2021 meeting date), https://floridadep.gov/parks/parks-office-park-planning/content/31124-rainbow-springs-state-park-virtual-public-meeting (noting the same regarding media technology free for public to use); https://floridadep.gov/Parks/Parks-Office-Park-Planning/content/28938-atlantic-ridge-preserve-state-park-virtual-public-meeting

[95] *See, e.g.*, DEP, Honeymoone and Caladesi Island State Parks Public Meetings (Oct. 18, 2021 meeting date), https://floridadep.gov/parks/parks-office-park-planning/content/30952-honeymoon-and-caladesi-island-state-parks-public; Rainbow Springs State Park Open House and Virtual Public Meetings (Dec. 14, 2021 meeting date), https://floridadep.gov/parks/parks-office-park-planning/content/31129-rainbow-springs-state-park-open-house-and-virtual.

accommodations in other virtual-only public meetings not present here, for instance, "media technology free for the public to use" to access DEP's public meetings.[96]

To date, DEP has not changed how it plans to provide language interpretation at the rescheduled public meeting, and it has not responded to Earthjustice's request for a hybrid virtual/in-person meeting utilizing Zoom rather than Teams.

DEP has also not re-noticed the public meeting, something it could do any day now, warranting swift action by EPA to correct the civil rights violations documented in this complaint.

DEP has discriminated against Florida Rising, its members, and members of the public impacted by the Doral incinerator by failing to publish the Notice of Intent to issue the air permit and notice of the public meeting in English, Spanish, and any other applicable language. Furthermore, as discussed in Section IX, *infra*, DEP's actions and statements regarding the February 24, 2022 public meeting warrant investigation by EPA into intentional discrimination by DEP. Lastly, the above facts make clear DEP has failed to have in place policies to accommodate LEP persons in its programs and activities.

F. DEP's Accessibility Policies

DEP's notice for the February 24, 2022 public meeting contained the following accommodation provision[97]:

> Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 48 hours before the workshop/meeting by contacting: Ms. Terri Long at 850-717-9023 or Terri.Long@FloridaDEP.gov. If you have a hearing or speech impairment, please contact the agency using the Florida Relay Service, 800-955-8771 (TDD) OR 800-955-8770 (Voice).

The Notice did not contain any provision for language accommodation.

Additionally, DEP's Accessibility Policy makes clear it does not have an LEP program or policy in place.[98] Rather, the policy pertains only to accommodation for persons with disabilities under the Americans with Disabilities Act ("ADA") and Section 508 of the Rehabilitation Act of 1973 ("Section 508").[99]

Though DEP has an accessibility coordinator and references the ADA in its Accessibility Policy, it is unclear if this policy accounts for those with disabilities in *virtual-only* meeting

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[96] *See* public notices, *supra* note 94.
[97] Exhibit U.
[98] *See* Exhibit X, DEP's Accessibility Policy, available at https://floridadep.gov/accessibility-information (last visited March 31, 2022).
[99] *Id*.

spaces, or if DEP takes into account whether a virtual-only public meeting could completely bar persons with disabilities from access.

There are numerous accessibility barriers that people with disabilities can experience on a web site or web application when trying to access a virtual meeting. For example, for people with auditory disabilities, there could be audio content without captions or transcripts, an inability to adjust text size and colors for captions, or text that is otherwise difficult to read.[100]

For people with physical disabilities, access barriers could manifest in the form of insufficient time to respond to or complete tasks (such as following instructions to unmute one's Teams microphone or providing verbal comment within a set, limited period of time); missing visual and non-visual orientation cues or other navigational aids; or inconsistent, unpredictable, and overly complicated navigation mechanisms.[101]

Many of these barriers to access that apply to people with disabilities could also apply to older people and to LEP persons, who may experience difficulties navigating technology or English-only interfaces.

Moreover, persons with disabilities, older people, and LEP persons are less likely to use computers and internet. According to a study the U.S. Census Bureau released in 2021, older people were the least likely of all age groups to have a desktop or laptop computer, a smartphone, tablet, or an internet subscription.[102] Likewise, people with limited English proficiency and households where at least one member has a disability are less likely to have these technological devices and an internet subscription.[103]

Even if someone does have technology and internet access, Teams – the virtual platform DEP planned for the public meeting on the Doral incinerator – could still present access barriers for persons based on disability, age, or limited English proficiency. To access Teams, one must first register for and create a Microsoft account, which requires following several different steps that include: 1) inputting one's email address or phone number, 2) creating a password, 2) inputting one's location and birthdate selecting from a dropdown menu, 3) going into one's email account or phone text messages to obtain a verification code from Microsoft, 4) entering the verification code, 5) solving a "puzzle" to verify one is not a robot, and 6) picking an image from six small windows of images with busy backgrounds.

There are several auditory and visual steps involved in properly participating in a virtual meeting space, including the public meeting DEP planned for the Doral incinerator. The public meeting involved a presentation by DEP, likely a visual presentation using PowerPoint in addition to being auditory, on the draft permit. Members of the public would also be required to

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[100] Web Accessibility Initiative, Diverse Abilities and Barriers, Examples of barriers for people with auditory disabilities, https://www.w3.org/WAI/people-use-web/abilities-barriers/#auditory (last visited March 28, 2022).
[101] *See* Web Accessibility Initiative, Diverse Abilities and Barriers, Examples of barriers for people with physical disabilities, https://www.w3.org/WAI/people-use-web/abilities-barriers/#auditory (last visited March 28, 2022).
[102] Michael Martin, American Community Survey Reports, Computer and Internet Use in the United States: 2018 (issued April 2021), at 5 https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-49.pdf.
[103] *Id*.

follow instructions to unmute their microphones (or telephones) in the virtual meeting space before speaking. In addition to DEP's planned meeting putting the onus on the public to access technology, participating in a virtual meeting also requires persons to be able to adjust audio and visual settings on their own personal device.

Another purpose of the public meeting is for the public to have access to their government officials – to see and hear them and to be seen and heard by them. For a member of the public to participate as meaningfully as possible in a Teams meeting with the option to call in, appearing via Teams would clearly be the better option; however, the steps involved in being able to meaningfully participate via Teams could present barriers to access based on disability, age, or limited English proficiency.

The second portion of DEP's Accessibility Policy references Section 508 of the Rehabilitation Act, which has to do with accessibility to electronic and information technology. Section 508 is binding only on federal agencies; it does not apply to recipients of federal financial assistance like DEP.[104] The State of Florida has applied principles of Section 508 only to "designing and creating any official State of Florida website."[105] Indeed, DEP's policy pursuant to Section 508 applies only to accessing information on DEP's website, not accessing a public meeting virtually.

Without a clear policy to accommodate people with disabilities in virtual-only program events and activities, DEP is discriminating against members of the public on the basis of disability. Because the same or similar barriers to accessing a virtual-only meeting could also apply to older persons or LEP persons, DEP's practice of conducting program events and activities in virtual-only spaces discriminates against members of the public on the basis of age and national origin.

IV. LEGAL BACKGROUND

Title VI, Section 504, the Age Discrimination Act, and EPA's nondiscrimination regulations prohibit recipients of EPA financial assistance from carrying out activities that intentionally discriminate against or have a disparate impact on protected groups on the basis of race, national origin, age, disability, and sex.

To establish a prima facie case of disparate impact, EPA must "(1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity; and (4) establish causation."[106] EPA's analysis focuses on the consequences of the policies or decisions instead of intent.[107] A discriminatory act or practice need not be affirmatively done; in some cases, it could

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[104] *See* 29 U.S.C. § 794d
[105] *See* Florida Department of Management Services, Accessibility Statement, https://www.dms myflorida.com/support/accessibility_statement (last visited March 28, 2022).
[106] EPA, External Civil Rights Compliance Office Compliance Toolkit, 12 (Jan. 18, 2017), https://www.epa.gov/sites/default/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf ("ECRCO Toolkit").
[107] *Id*. at 8. *See also* 40 C.F.R. §§ 7.35(b), 7.50, 7.145(b).

be established by the recipient's failure to take action or to adopt a policy.[108] For complaints involving a continuing discriminatory policy or practice, the complainant must show "either a series of related acts of which one occurred within the 180-day filing period or a systematic policy or practice that operated within the 180-day period."[109]

If the evidence establishes a prima facie case of adverse disparate impact, EPA determines "whether the recipient has articulated a 'substantial legitimate justification' for the challenged policy or practice."[110] If a recipient shows a "substantial legitimate justification," EPA must determine whether there are less discriminatory alternatives to the policy or practice.[111]

For the reasons stated below and throughout this complaint, DEP is in violation of the following civil rights laws and regulations because the agency's acts and policies cause disparate impacts to members of the public, including Florida Rising's members and communities it serves, on the basis of race, national origin, age, disability, and sex.

V. VIOLATION OF TITLE VI

Title VI prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin. 42 U.S.C. § 2000d. Furthermore, EPA's nondiscrimination regulations state that "[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin."[112]

Regarding limited English proficiency, Executive Order 13166 was signed into law in 2000 to "improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency."[113] In response, EPA promulgated "Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons."[114] EPA's guidance defines limited English proficient ("LEP") persons as "[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English."[115] EPA specifically identifies as "likely to include" LEP persons those "who live in communities in close proximity to a plant or facility…permitted by an EPA recipient."[116]

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[108] *Id*.
[109] ECRCO Manual, *supra* note 15, at 10 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 100, 107 (2002)).
[110] ECRCO Toolkit*, supra* note 106, at 13.
[111] *Id*.
[112] 40 C.F.R. § 7.30.
[113] Exec. Order No. 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121 (2000).
[114] EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. 35602-01 (June 25, 2004) ("EPA LEP Guidance").
[115] *Id*. at 35606.
[116] *Id*. at 35610.

EPA's guidance confirms that conduct having a disproportionate effect on LEP persons constitutes national origin discrimination.[117] It further confirms that written materials informing LEP persons of "rights or services [are] an important part of 'meaningful access[.]'"[118] EPA recognizes that "failure to ensure that LEP persons can effectively participate in or benefit from [f]ederally assisted programs and activities may violate Title VI…and Title VI regulations against national origin discrimination."[119]

EPA established four factors to determine the extent of a recipient's obligation to provide LEP persons with language services: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.[120]

As to the first factor, EPA's guidance is straightforward: "[t]he greater the number or proportion of… LEP persons, the more likely language services are needed."[121]

The second factor requires "enhanced language services" where a federal funding recipient frequently contacts a particular language group, but also notes that even recipients who serve LEP persons on an unpredictable or infrequent basis should have a plan to accommodate meaningful access, even if it is as "simple as being prepared to use…commercially available telephonic interpretation services."[122]

The third factor weighs the importance of the activity, information, service, or program; or the greater the possible consequences of the contact to LEP persons.[123] For example, the immediacy and risk of potential harm, such as "airborne toxic chemicals" indicate a greater obligation to provide language services.[124] Moreover, the decision by the federal, state, or local government "to make an activity, warning, or notice compulsory…can serve as strong evidence of the program's importance."[125]

The fourth and final factor considers the recipient's resources compared to the cost of language services, taking into account cost reduction measures provided by technology, sharing of language assistance materials or services among recipients, and reasonable business practices.[126]

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[117] *Id*. at 35605 (*citing Lau v. Nichols*, 414 U.S. 563 (1974)).
[118] *Id*. at 35610.
[119] *Id*. at 35604.
[120] *Id*. at 35606.
[121] *Id*.
[122] *Id*. at 35607.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] *Id*.

1. National origin discrimination against persons with limited English proficiency

DEP has discriminated on the basis of national origin against the predominantly Latinx community around the Doral incinerator, which includes Florida Rising members, as well as the linguistically isolated people around Florida's other incinerators.

DEP's discriminatory acts are:

- On November 19, 2021, publishing in English only the Notice of Intent to issue a Title V air permit for the Doral incinerator, failing to publish this notice in Spanish and any other applicable language to populations who would be impacted by the agency's proposed action;[127]

- On January 24, 2022, publishing in English only the Notice of the public meeting regarding the proposed air permit, failing to publish this notice in Spanish and any other applicable language to populations who would be impacted by the agency's proposed action;[128] and

- Failing to have in place a policy for LEP people to meaningfully access its programs and activities, effect in the past 180 days, evidenced by all the facts in Section III(E) and (F), *supra*.

Applying the four factors for LEP services in EPA's guidelines, there are significant proportions of LEP and foreign-born persons in Doral, as well as in Florida as a whole. As to the second factor, Spanish is the predominant language LEP and foreign-born persons speak in Florida, followed by Haitian-Creole. This warrants, at the very least, LEP services for Spanish- and Haitian Creole-speaking LEP persons. As to the third factor, all of DEP's programs and activities are significant; as Florida's chief environmental regulatory agency, it makes decisions that impact fundamental aspects of people's lives, including their health, safety, wellbeing, and the general environment around them. There is no question that DEP's programs and activities are important enough to warrant LEP services. DEP also has the resources to accommodate LEP persons, as an agency that receives significant federal funding.

By publishing the notices regarding the Doral incinerator in English only, DEP has excluded the people in and around Doral who are most impacted by the incinerator from critical information about a polluting facility, based on their national origin. These specific acts as to notice are part of a larger discriminatory policy of DEP failing to have an LEP program or policy.

The consequences are significant. Public notices provide people meaningful and exclusive opportunities to learn first-hand about DEP's proposed actions that affect their health,

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[127] *See* EPA LEP Guidance, *supra* note 114, at 35610(a) (evidence of compliance with EPA's guidance includes "providing written translations of vital documents to… each LEP language group that constitutes five percent or includes 1,000 members, whichever is less, of the population of persons…likely to be affected").
[128] *See* Section III(D), (E) *supra*.

quality of life, and the environment around them. Moreover, public notices such as the Notice of Intent to issue the Title V permit triggers statutory rights to public comment that are only for a set, short period of time. Public notices also provide firsthand information to the public about meetings and hearings, which are exclusive opportunities for members of the public to interact with and be heard by DEP decision-makers on matters affecting their health, quality of life, and the environment around them.

For instance, the public meeting on the Doral incinerator is planned to involve a presentation by DEP on the draft air permit and the opportunity to ask questions about it and provide comment. The public meeting becomes an official part of the record on the Title V permitting action, and DEP responds to public comments in its final permitting decision and is supposed to take public comment into account in how it writes the final permit. The entire record of the Title V permitting action – including participation and comment by members of the public – becomes part of a formal record that EPA considers when it reviews a final Title V permit or considers a petition to object to a final permit

By publishing the notices regarding the Covanta incinerator in English only, DEP has deprived LEP persons of their rights to information and public participation. It has also created a burden on Florida Rising to disseminate information about the agency's planned actions to LEP residents in Doral, utilizing Florida Rising's resources to carry out duties that belong to DEP.

Additionally, by not have an LEP policy in place and therefore having no protocol for providing competent language interpretation, DEP deprives members of the public from meaningfully participating in its programs and activities and to exercise their rights to receive information and provide input in important agency decision-making processes at a designated time and place. These harms to LEP persons, as outlined in Section III(F), *supra*, also manifest in potentially limiting or barring access to the public meeting space to begin with, if the public meeting is virtual only.

LEP members of the Doral community and all LEP persons in Florida are harmed by DEP's discriminatory acts and policies, adversely affecting their procedural rights to information and to participate publicly in DEP's decision-making processes.

DEP's discriminatory acts and lack of an LEP policy disproportionately excludes and harms LEP persons in the aforementioned ways that do not apply to English speakers.

These harms to LEP persons are directly caused by DEP's discriminatory acts and lack of an LEP policy. If DEP published notices regarding the Doral incinerator in relevant languages other than English, and if it had an LEP policy in place to allow for meaningful access by LEP people to its programs or activities, these harms would not exist.

2. Race and national origin discrimination from DEP's permitting of incinerators

DEP has discriminated on the basis of race and national origin against the predominantly Latinx community around the Doral incinerator, which includes Florida Rising members, as well as the communities around Florida's other incinerators made up of people of color and

linguistically isolated people.[129] DEP has a continuing policy and practice of permitting these polluting incinerators without consideration of harms to these protected classes of people.[130] DEP's intent to renew an air operating permit for the Doral incinerator, noticed on November 19, 2021, is evidence of this ongoing discriminatory policy. Moreover, because a Title V air operating permit issued by DEP is required for these incinerators to operate, and there are 10 incinerators in Florida currently in operation, DEP's systematic discriminatory policy was in effect during the past 180 days.

DEP's failure to consider environmental justice factors, and specifically these protected classes of people, in its permitting actions harms Florida Rising's members, the communities in and around Doral, and the communities around Florida's other nine incinerators. The people in these communities are disproportionately exposed to toxic pollution and noxious odors from municipal incinerators. The strong, noxious garbage odors disrupt the quality of life for Doral residents, documented in detail over the past several years in the City's odor complaint logs.

Furthermore, pollution from incinerators is known to cause respiratory problems; cancer; skin, nasal, and eye irritation; and increased risk of reproductive harms, among other serious health impacts. Documented in the odor complaint logs, Doral residents have specifically complained of burning eyes and throat, dizziness, headaches, nausea, and breathing problems. Moreover, people of color have been disproportionately impacted by COVID-19, and pollution from incinerators increases susceptibility to infection.[131]

As demonstrated in Section III, *supra*, people in Doral and throughout Florida near incinerators are disproportionately impacted by these harms based on their race and national.

DEP's permitting practices cause these harms. In order for incinerators in Florida to operate, they require permits and authorizations from DEP. In its permitting actions, DEP has a duty to protect the health, safety, and welfare of the people of Florida, including preventing nuisances such as the strong garbage odors that interfere with the lives and wellbeing of Doral residents. By permitting incinerators without considering disproportionate environmental impacts on people of color, and by failing to adequately address odors from in its incinerator permitting, DEP is causing these harmful, disproportionate impacts on the basis of race and national origin.

VI. VIOLATION OF EPA REGULATIONS AGAINST SEX DISCRIMINATION

EPA's nondiscrimination regulations prohibit recipients from enacting policies or practices that discriminate on the basis of sex.[132]

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[129] *See, generally*, Section III, *supra*.
[130] *See* Section III(C), *supra*.
[131] *See* Section (III)(A), (C), *supra*.
[132] 40 C.F.R. § 7.30.

1. Sex discrimination based on DEP's permitting of incinerators statewide

DEP has discriminated on the basis of sex against women around the Doral incinerator, which includes Florida Rising members, as well as women in the communities around Florida's other incinerators. DEP has a continuing policy and practice of permitting these polluting incinerators without consideration of the particular vulnerabilities of women to pollutants emitted from incinerators.[133] DEP's intent to renew an air operating permit for the Doral incinerator, noticed on November 19, 2021, is evidence of this ongoing discriminatory policy. Moreover, because a Title V air operating permit issued by DEP is required for these incinerators to operate, and there are 10 incinerators in Florida currently in operation, DEP's systematic discriminatory policy was in effect during the past 180 days.

Women are particularly vulnerable to the adverse health effects from air pollution, and in particular, air pollution from incinerators. Pollution from incinerators are proven to increase reproductive health risks, including preterm delivery, congenital anomalies, infant deaths, and miscarriage.[134]

Because these harms go to reproductive health, they disproportionately impact women in ways that do not impact men.

DEP's permitting practices cause these harms. In order for incinerators in Florida to operate, they require permits and authorizations from DEP. In its permitting actions, DEP has a duty to protect the health, safety, and welfare of the people of Florida, including preventing nuisances such as the strong garbage odors that interfere with the lives and wellbeing of Doral residents. By permitting incinerators without considering and addressing particular risks to women's health, DEP is causing these harmful, disproportionate impacts on the basis of sex.

VII. VIOLATION OF SECTION 504 OF THE REHABILITATION ACT

Section 504 prohibits discrimination against people with disabilities in programs that receive federal financial assistance.[135] EPA's nondiscrimination regulations state that "[n]o person in the United States may, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance."[136]

Section 504 requires that people with disabilities be provided meaningful access to programs, which requires reasonable accommodations.[137] Under some circumstances, the "refusal to modify an existing program might become unreasonable and discriminatory."[138]

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[133] *See* Section III(C), (D), *supra*.
[134] *See* Section (III)(A),(C), *supra*.
[135] 29 U.S.C § 701 (c)(2).
[136] 40 C.F.R. § 7.140.
[137] *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).
[138] *Alexander v. Choate*, 469 U.S. 287, 299-302, (1985).

1. Discrimination on the basis of disability

DEP has discriminated on the basis of disability against people around the Doral incinerator and Florida's other incinerators statewide. DEP's Accessibility Policy fails to adequately accommodate people with disabilities in the agency's programs and activities, such as in its virtual-only public meetings. DEP's publication of notice on January 24, 2022 of a Teams-only public meeting on the Doral incinerator – and not agreeing at this time to hybrid virtual/in-person meeting utilizing a more accessible platform like Zoom – is evidence of this ongoing discriminatory policy.[139]

DEP has a practice of regularly using virtual-only venues for its public meetings. Nevertheless, DEP's inconsistent practices with regard to when and how it uses a virtual-only platform raise additional grounds to find discriminatory impact. For instance, over the past year, many of DEP's public meetings have been virtual only, while others have been hybrid. Some of the virtual meetings have provided technological accommodations, while others have not. And some of the virtual meetings have used a user-friendly platform like Zoom, while others have not. DEP does not have any policy or criteria available to the public as to how and why it makes these decisions affecting access.[140]

As previously discussed, people who are disabled are less likely than people who are not disabled to have access to technological devices and internet. Additionally, Teams requires a person to first register for a Microsoft account (a process involving several different steps), unlike Zoom, which allows a person to simply click a link to enter a meeting space. Furthermore, the planned public meeting for February 22, 2022, involved a presentation by DEP, likely a visual presentation using PowerPoint, on the draft permit. Members of the public would also be required to follow instructions to unmute their microphones (or telephones) in the virtual meeting space before speaking. Another purpose of the public meeting is for the public to have access to their government officials – to see and hear them and to be seen and heard by them – something that a Teams and call-in only option could limit or bar based on a person's disability.[141]

For a person with a disability – whether it is physical, visual, auditory, or otherwise – a virtual-only public meeting, and especially one that that first requires registration for an account through a separate application to access it, could limit or completely bar that person from meaningfully accessing DEP's programs and activities.

Such a limitation means a person with a disability could be precluded from meaningfully participating in agency decision making-processes, accessing information, and otherwise having the opportunity to hear from and be heard by their government officials on account of their disability – a harm not faced by those without a disability.

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[139] *See* Section III(E), (F), *supra*.
[140] *See* Section III(E), *supra*.
[141] *See* Section III(E), (F), *supra*.

DEP determines how to conduct its public meetings, and as the facts in this complaint demonstrate, may disregard specific accommodation requests by members of the public. DEP's incomplete and inconsistent Accessibility Policy and practices, which include holding virtual-only public meetings and events, are therefore the cause of these disparate impacts on people with disabilities.

VIII. VIOLATION OF THE AGE DISCRIMINATION ACT

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.[142] EPA's nondiscrimination regulations state that "[n]o qualified handicapped person shall solely on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance."[143]

1. Discrimination on the basis of age procedurally

DEP has discriminated on the basis of age against people around the Doral incinerator and Florida's other incinerators statewide. DEP's Accessibility Policy fails to adequately accommodate people with disabilities in the agency's programs and activities, such as in its virtual-only public meetings. DEP's publication of notice on January 24, 2022 of a Teams-only public meeting on the Doral incinerator – and not agreeing at this time to hybrid virtual/in-person meeting utilizing a more accessible platform like Zoom – is evidence of this ongoing discriminatory policy.[144] DEP's inconsistent accessibility practices with regard to virtual meetings, outlined in Section VII, *supra*, further discriminates against people in Florida on the basis of age.

As previously discussed, people who over age 65 are less likely than people in other age groups to have access to technological devices and internet. [145] Additionally, Teams requires a person to first register for a Microsoft account, unlike Zoom, which allows a person to simply click a link to enter a meeting space. For persons who are older and not technologically proficient or do not have access to technology or internet, they might be foreclosed from meaningfully accessing a DEP program or activity like the public meeting on the Doral incinerator.

Though DEP allowed for a call-in number to access the planned February 24, 2022 public meeting, telephonic appearance is not an adequate alternative when one of the purposes of a public meeting is to see and hear ones public officials and be seen and heard by them. Thus,

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[142] 42 U.S.C. §§ 6101-6107.
[143] 40 C.F.R. § 7.45.
[144] *See* Section III(E), *supra*.
[145] *See* Section III(F), *supra*.

DEP's public meetings should at a minimum allow for hybrid virtual/in-person attendance, something that other agencies in Florida have made a habit of doing.[146]

For a persons over a certain age, a virtual-only public meeting, and especially one that first requires registration for an account through a separate process involving many steps, could limit or completely bar that person from meaningfully accessing DEP's programs and activities.

Such a limitation or bar means persons of a certain age could be precluded from meaningfully participating in agency decision making-processes, accessing information, and otherwise having the opportunity to hear from and be heard by their government officials on account of their disability– a harm not faced by persons in other age groups known to have better access to and familiarity with technological devices and the internet.

DEP determines how to conduct its public meetings, and as the facts in this complaint demonstrate, may disregard specific accommodation requests by members of the public. DEP's incomplete and inconsistent Accessibility Policy and practices, which include holding virtual-only public meetings and events, are therefore the cause of these disparate impacts on people on the basis of age.

2. Age discrimination based on DEP's permitting of incinerators statewide

DEP has discriminated on the basis of age against older people and children – especially children under age 5 – in communities around the Doral incinerator, which includes Florida Rising members, as well as in communities around Florida's other incinerators statewide. DEP has a continuing policy and practice of permitting these polluting incinerators without consideration of the particular vulnerabilities of older people and children to pollutants emitted from incinerators.[147] DEP's intent to renew an air operating permit for the Doral incinerator, noticed on November 19, 2021, is evidence of this ongoing discriminatory policy. Moreover, because a Title V air operating permit issued by DEP is required for these incinerators to operate, and there are 10 incinerators in Florida currently in operation, DEP's systematic discriminatory policy was in effect during the past 180 days.

DEP's failure to consider environmental justice factors, and specifically these protected classes of people, in its permitting actions harms Florida Rising's members, the communities in and around Doral, and the communities around Florida's other nine incinerators. Older people and children in these communities are disproportionately exposed to toxic pollution and noxious odors from municipal incinerators, which cause adverse health impacts such as asthma, reduced lung function, and other respiratory and health impacts.[148] Both older and younger people are more vulnerable to the adverse health effects from air pollution that incinerators emit, and as

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[146] *See, e.g.*, Florida Dept. of Transportation, Public Meeting Notices, http://fdotwp1.dot.state.fl.us/publicsyndication/PublicMeetings.aspx/publicmeetings_district4 (last visited March 30, 2022) (showing virtual and in-person public meetings, with the in-person components being located at public facilities like a local library or community center).
[147] *See* Section III(C), (D), *supra*.
[148] *See* Section III(C), supra.

demonstrated in this complaint, Florida's incinerators disproportionately impact children under age 5.[149]

As demonstrated in Section III, *supra*, people in Doral and throughout Florida near incinerators are disproportionately impacted by these harms on the basis of age.

DEP's permitting practices cause these harms. In order for incinerators in Florida to operate, they require permits and authorizations from DEP. In its permitting actions, DEP has a duty to protect the health, safety, and welfare of the people of Florida, including preventing nuisances such as the strong garbage odors that interfere with the lives and wellbeing of Doral residents. By permitting incinerators without considering and addressing the vulnerabilities of older people and children, DEP is causing these harmful, disproportionate impacts based on age.

IX. INVESTIGATION INTO INTENTIONAL DISCRIMINATION IS WARRANTED

To show intentional discrimination, or disparate treatment, a complainant must show that the recipient treated individuals differently because of their race, color, national origin, or other protected status. A complainant is not required to show evidence of bad-faith, ill-will, or evil motive on the recipient's part. Because direct proof of discriminatory motive is often unavailable, EPA can also consider direct and circumstantial evidence of discriminatory intent, including statements by decision-makers, the historical background of the events at issue, the foreseeability of the consequences of an action, a history of discriminatory or segregated conduct, or a substantial disparate impact on a protected group.[150]

Though the focus of Florida Rising's claims are on disparate impact, Florida Rising requests that EPA assess and investigate whether the facts in this complaint give rise to intentional discrimination on DEP's part, considering as a whole the agency's historic lack of an LEP policy in a diverse state like Florida; the agency's unwillingness to provide a competent Spanish-language interpreter at public meeting on the Doral incinerator; the agency's plans for a virtual-only public meeting via Teams on the Doral incinerator, despite having hybrid public meetings in other instances and providing other forms of accommodation in other meetings; the agency's statement that non-discrimination law and guidance do not apply to its Title V program; the agency's derogatory statement that Florida Rising was trying to "bootstrap" its environmental justice claims against the Title V program to other DEP programs; and DEP historically failing to consider environmental justice in its permitting actions.

X. LESS DISCRIMINATORY ALTERNATIVES

The following less discriminatory alternatives available to DEP include but are not limited to:

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[149] *See* Section (III)(A), (C), *supra*.
[150] ECRCO Toolkit, *supra* note 106, at 7-10.

1. Developing an LEP program with policies and protocols in place to ensure meaningful access to DEP's programs and activities by LEP persons;

2. Revising Florida's Administrative Code to require all notices that require publication to be published in English as well as in other relevant languages;

3. Publishing notices in newspapers of general circulation that are widely read by impacted communities, including in publications with a high readership by LEP persons who would be affected by an agency action, with publication being in both print and online form;

4. Require posting of public meeting or hearing notices at proposed meeting sites in English as well as in other applicable languages;

5. Require posting of public meeting or hearing notices at public locations throughout the community that will be affected by a proposed agency action, such as near schools, in public libraries, places of worship, public transportation spaces, etc.;

6. Revise Florida's Administrative Code to require competent language interpretation services at public meetings, establish criteria for when a certified language interpreter will be required (in keeping with federal law and guidance), and include in public notices whether language interpretation will be made available;

7. Require public meetings and hearings take place both in-person and virtually, with the in-person component taking place in the impacted community and the virtual component utilizing Zoom or comparable user-friendly platform;

8. Expand its Accessibility Policy to ensure adequate accommodations by people based on age, disability, and LEP status at the virtual component of public meetings or meetings;

9. Allow elderly and disabled persons to comment first during public meetings and hearings, followed by children under the age of 18 and families with children;

10. Expressly take into account civil rights requirements and guidance in all agency operations, including programs and activities and permitting actions;

11. Expressly take into account environmental justice laws and guidance in all permitting actions, through applicable federal laws governing an agency action and/or through Section 403.702, Florida Statutes;

12. Create a Public Involvement Plan for permitting actions in environmental justice communities, that includes building relationships with environmental justice communities and breaking down barriers to their access to information and public participation;

13. Host workshops to educate members of environmental justice communities on key environmental processes and how to effectively engage;

14. Make DEP's Oculus and Nexus public information systems easier to use and available in other languages;

15. Translate technical documents into lay language (in English, Spanish, and any other applicable language).

XI. RELIEF REQUESTED

Florida Rising requests that EPA promptly and comprehensively accept this complaint; investigate all allegations in the complaint, including whether DEP violated Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and EPA's implementing nondiscrimination regulations; and take all actions necessary to ensure DEP comply with the law. Florida Rising also requests that the Civil Rights Division of the Department of Justice play an active role in coordinating this federal investigation and any enforcement actions, consistent with the mission of the Federal Coordination and Compliance Section.

Florida Rising requests that DEP be brought into full compliance and ask EPA to provide the following relief and any other relief deemed necessary:

1. Require DEP, when it re-notices the public meeting on the Doral incinerator, to publish notice in a newspaper of general circulation widely read by the local community, in English, Spanish, and any other applicable language.

2. Require DEP to conduct a hybrid virtual/in-person public meeting on the Doral incinerator, in which the in-person component takes place locally in Doral and the virtual component utilizes Zoom or a comparable user-friendly platform.

3. Require DEP to provide a certified Spanish-language interpreter at the public meeting on the Doral incinerator and be prepared to accommodate as needed members of the public based on their age or disability.

4. Require DEP to develop an LEP program with policies and protocols in place to ensure meaningful access to DEP's programs and activities by LEP persons.

5. Revise Florida's Administrative Code to ensure required public notices are published in English as well as in other applicable languages, in keeping with EPA's LEP guidance.

6. Revise Florida's Administrative Code to require competent language interpretation services at public meetings and hearings; establish criteria for when a certified language interpreter will be required, in keeping with federal law and guidance; and include in public notices whether language interpretation will be made available.

7. Require DEP to update its Accessibility Policy to account for accommodations on the basis of disability, age, and limited English proficiency during the virtual components of its public meetings or hearings.

8. Require DEP to comply with civil rights law and guidance and environmental law and guidance in all of its permitting actions.

9. Require DEP to expressly take into account environmental justice and relevant demographic and social factors in its permitting actions, conducting a full and fair analysis of whether a permitting action would disproportionately harm communities on the basis of race, color, national origin, age, disability, sex, or other protected classes; and identify alternatives that would avoid, minimize, or mitigate those harms, including not taking a permitting action.

10. Require that any decision to renew a permit is conditioned on ameliorating adverse impacts to environmental justice communities, with specific benchmarks for monitoring and compliance, in a manner that does not shift financial or other costs onto taxpayers and impacted community members.

If DEP does not come into compliance voluntarily, Florida Rising requests that EPA suspend or terminate financial assistance to DEP, at least in regard to any discretionary funding requested by the agency or funding used in a manner that does not directly protect the public. *See* 40 C.F.R. § 7.130.

Florida Rising also requests that it be involved in the investigation and resolution of this complaint. We look forward to working with EPA's ECRCO and DOJ to prevent further harm to the people of Doral and Florida as a whole.

Sincerely,

/s/ Dominique Burkhardt
Senior Attorney, Earthjustice
4500 Biscayne Blvd., Ste. 201
Miami, FL 33137
dburkhardt@earthjustice.org
(305) 440-5432

/s/ Nestor Perez
Associate Attorney, Earthjustice
4500 Biscayne Blvd., Ste. 201
Miami, FL 33137
nperez@earthjustice.org
(305) 440-5432

/s/ Bradley Marshall
Senior Attorney, Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
bmarshall@earthjustice.org
(850) 681-0031

CC:

Kurt Temple
Senior Advisor, EPA
External Civil Rights Compliance Office
Temple.Kurt@epa.gov

Monique Hudson
Associate Regional Counsel,
EPA Region 4
Hudson.Monique@Epa.gov

Brian Holtclaw
Section Chief, Environmental Justice and Children's Health Section
EPA Region 4
Holtzclaw.Brian@epa.gov

Lynorae Benjamin
Acting Chief, Air Planning and Implementation Branch
EPA Region 4
benjamin.Lynorae@epa.gov

Ana Oquendo
Florida Title V Permit Program, Air and Radiation Division
EPA Region 4
Oquendo.Ana@epa.gov

Yolanda Adams
Air, Pesticides, and Toxics Management Division
EPA Region 4
Adams.Yolanda@epa.gov