Christopher Winter, OSB # 984355
Crag Law Center
chris@crag.org
(503) 525-2725
917 SW Oak Street, Suite 417
Portland, OR 97205
Fax: (503) 296-5454

Attorney for Complainant

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEYOND TOXICS, Complainant, vs. **LANE REGIONAL AIR PROTECTION AGENCY**, Respondent.	COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. Section 2000d, 40 C.F.R. Part 7, and 59 C.F.R. 7629. *In Re: the February 11, 2014 modification of Seneca Sustainable Energy's Permit No. 206470.*

I. INTRODUCTION

This is a complaint by Beyond Toxics under Title VI of the Civil Rights Act of 1964 and the U.S. Environmental Protection Agency's implementing regulations, alleging discrimination by Lane Regional Air Protection Agency in its February 11, 2014 modification of Standard Air Contaminant Discharge Permit number 206470. The permit allows Seneca Sustainable Energy ("SSE") to emit fine particulate matter ("$PM_{2.5}$"), a pollutant that is harmful to human health. Lane Regional Air Protection Agency ("LRAPA") is responsible for permitting emissions of $PM_{2.5}$ and other pollutants in Lane County, Oregon. LRAPA, a recipient of financial assistance from the United States Environmental Protection Agency ("EPA"), approved the issuance and subsequent

modification of SSE's permit for the emission of $PM_{2.5}$ without analyzing the potential for disproportionate environmental and human health effects on nearby environmental justice communities. LRAPA was required by Title VI and EPA's implementing regulations to consider these disproportionate effects. To comply with Title IV, LRAPA should have conducted air quality modeling and a disproportionate impacts analysis with respect to the emissions but did not do so in this case.

LRAPA's action has an adverse impact that is discriminatory on the bases of race, color, or national origin, and on the basis of economic status. Under the permit approved by LRAPA, residents living near and within the West Eugene Industrial Corridor will be exposed to $PM_{2.5}$ in amounts that are likely to threaten human health. $PM_{2.5}$ emissions are linked to numerous health concerns including early death, cardiovascular and respiratory diseases, and cancer. West Eugene Industrial Corridor residents are disproportionately Latino and low-income compared to other areas of Eugene.[1] Therefore, LRAPA's decision to approve the permit modification disparately impacts minority and low-income communities in violation of Title VI.

II. THE COMPLAINANT

Complainant Beyond Toxics is an Oregon non-profit membership organization that works for environmental justice for vulnerable communities. Founded in 2001, its constituents include urban minority and low-income communities, such as those in the West Eugene Industrial Corridor. Beyond Toxics works for just solutions that involve

---

[1] *See* Livability Lane, *Equity and Opportunity Assessment: Social and Demographic Characteristics, Latino Population*. http://www.livabilitylane.org/files/FULL%20MAPS/SocialDemographics/EOA_SocialDemMaps_6dec13%201.pdf (last visited July 17, 2014); *see also*, Livability Lane, *Equity and Opportunity Assessment, Income and Poverty*. http://www.livabilitylane.org/files/FULL%20MAPS/Income_Poverty/OEA_Income_poverty_Ma ps_6dec13%202.pdf (last visited July 17, 2014).

and empower impacted communities. Beyond Toxics documents environmental injustices and uses community-based research to empower communities receiving disproportionate exposures to toxics pollutants. The group has been a community organizer in West Eugene since 2004. In 2010, Beyond Toxics received an U.S. Environmental Protection Agency environmental justice grant to gather environmental health data in the West Eugene Industrial Corridor. A second environmental justice grant was awarded in 2011. The environmental justice project resulted in a number of accomplishments that increased civic participation and gathered important environmental health data. In 2012, Beyond Toxics organized the first Environmental Justice Bus Tour project, which brought elected officials into industrial communities to meet low-income and Latino families fighting for an equal right to clean air and struggling to reduce high asthma rates amongst Latino school children. The environmental justice project also canvassed over 400 West Eugene families to gather data for the Beyond Toxics report, "Environmental Justice in West Eugene: Families, Health and Air Pollution."[2] The report provides evidence of significant health disparities between children in the Eugene 4-J School District and the West Eugene Bethel School District, and discusses correlations between schools with higher asthma rates and proximity to industrial pollution point sources. Beyond Toxics also documented minority populations and proximity to brownfield and industrial areas in the report "Brownfield Redevelopment and Community Involvement: A Case Study in the

[2] Beyond Toxics and Centro Latino Americano, "Environmental Justice in West Eugene: Families Health and Air Pollution, 2011-2012" http://www.beyondtoxics.org/wp-content/uploads/2013/07/EnvJusticeWestEugene-FamiliesHealthAirPollution_FULLreport_FINALwebres.pdf

City of Eugene, Oregon."[3] These reports provide detailed data about environmental justice and recommendations to state and local agencies to improve environmental and public health for the residents in West Eugene. Beyond Toxics is a partner with the City of Eugene and the Brownfield Coalition to assess potential brownfield sites, a project funded by the U.S. EPA. In 2013-2014, the organization is partnering with local civic groups, Bethel neighborhood association and the U.S. EPA to test soils in West Eugene for heavy metals, a project developed in response to residents' request to determine if soils are safe for gardening. This project benefits vulnerable residents by providing soil analysis paired with bilingual gardening workshops and education about nutrition, environmental health and local food security.

III. TIMELINESS OF COMPLAINT

This compliant is timely filed because LRAPA's most recent discriminatory action occurred on February 11, 2014, when it approved the modification of SSE's Standard Air Contaminant Discharge Permit. This filing is within the 180-day filing period for a Title VI complaint as required under 40 C.F.R. § 7.120(b)(2) and 24 C.F.R. § 1.7(b).

IV. FINANCIAL ASSISTANCE

LRAPA must comply with EPA's Title VI implementing regulations because LRAPA regularly receives federal funding. LRAPA received a federal grant of $284,088 in the year 2012-2013, and expects to receive $278,458 in 2013-2014.[4]

---

[3] Groth, Kelly for Beyond Toxics and Centro Latino Americano, June, 2013. Brownfield Redevelopment and Community Involvement: A Case Study in the City of Eugene, Oregon (A Environmental Justice White Paper).

[4] Exhibit A, LRAPA, *Annual Budget 2014-2015* 17, http://www.lrapa.org/downloads/s/ADOPTED_BUDGET_POST_WEB.pdf (last visited July 10, 2014).

V. FACTS

A. The Community

Approximately 30,000 people live in the West Eugene Industrial Corridor, which is comprised of three neighborhoods: Bethel-Danebo, Trainsong, and parts of River Road.[5] This area has a disproportionately high percentage of minority residents and a disproportionately high poverty rate compared to minority and poverty rates in Eugene's overall population.[6]

In Eugene as a whole, 7.8 percent of the population is of Hispanic or Latino ethnicity.[7] In the West Eugene Industrial Corridor, this percentage rises to between 11 and 37 percent.[8] The Eugene-Springfield 2010 Consolidated Plan identifies "Areas of Racial and Ethnic Concentration" based on data from the 2000 Census.[9] These concentrations exist along the West Eugene Industrial Corridor.[10] This area has an overall Latino / racial minority population in the 50 to 73.5 percent range.[11] Furthermore, the current number and proportion of Latinos in West Eugene may be higher than these

---

[5] *See* Exhibit B: *Map of Eugene/Springfield.*

[6] *See* City of Eugene et. al., *2005 Eugene-Springfield Housing, Homeless, and Community Development Five-Year Strategic Plan* ("2005 Consolidated Plan") at 27, 32 http://www.ci.springfield.or.us/dsd/housing/img/ConPlan2005-2.pdf (last visited July 10, 2014).

[7] U.S. Census Bureau, *Eugene City Census Designated Place, Oregon* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_QTP3 (last visited July 18, 2014).

[8] Livability Lane, *Equity and Opportunity Assessment: Social and Demographic Characteristics, Latino Population*. http://www.livabilitylane.org/files/FULL%20MAPS/SocialDemographics/EOA_SocialDemMaps_6dec13%201.pdf (last visited July 17, 2014).

[9] City of Eugene et. al., *Adopted Eugene-Springfield Consolidated Plan 2010* 28-9, http://www.ci.springfield.or.us/dsd/housing/img/ConPlan2005-2.pdf (last visited July 10, 2014).

[10] *Id.* at 29.

[11] Cities of Eugene and Springrield, *Eugene-Springfield One-Year Action Plan 2013-14: An Action Plan for Housing and Community Development.* Appendix G at 169 (October 2012). http://www.ci.springfield.or.us/dpw/HousingBlockGrants/SupportFiles/2013_OYAP_Complete.pdf (last visited July 17, 2014).

figures indicate due to underreporting of undocumented residents.

West Eugene is economically depressed, and a disproportionately high number of its residents live in poverty. The average poverty rate in Eugene is 23.1 percent.[12] In areas of the West Eugene Industrial Corridor, the rate rises between 40-68% below the poverty line.[13] Overall, residents of the West Eugene Industrial Corridor are disproportionately economically vulnerable.[14]

Residents of the West Eugene Industrial Corridor are also disproportionately affected by industrial pollution: they are exposed to 99% of all the air pollution in Eugene.[15] The majority of the industrial uses are located in west Eugene or the Highway 99 corridor. In 2013, of the thirty-one facilities reporting to the City's Toxics Right-to-Know Program, all but one facility is located in the West Eugene area. In 2013, 705,168 pounds of chemicals released through the environment (air, water, on-site disposal) in West Eugene, which accounts for over 99% of the City's entire air toxic emissions captured by the Toxics Right-to-Know Program. A total of 486,292 pounds of chemicals (69% of environmentally-released chemicals) were released into the air.[16]

---

[12] United States Census, Quickfacts on Eugene, Oregon, http://quickfacts.census.gov/qfd/states/41/4123850.html (last visited July 30, 2014).

[13] Livability Lane, *Equity and Opportunity Assessment, Income and Poverty*, http://www.livabilitylane.org/files/FULL%20MAPS/Income_Poverty/OEA_Income_poverty_Maps_6dec13%202.pdf (last visited July 17, 2014). (Showing that parts of Trainsong fall into a census tract that is in the high range with 40-68% of the population below the poverty line.)

[14] Livability Lane, *Equity and Opportunity Assessment: Income and Poverty: Economic Vulnerability* composite map. http://www.livabilitylane.org/files/FULL%20MAPS/Composites/EOA_Composites_2_14_2IncomePoverty.pdf (last visited July 17, 2014).

[15] Beyond Toxics and Centro Latino Americano, *Environmental Justice in West Eugene: Families, Health and Air Pollution* 18 (2011-12), http://www.beyondtoxics.org/wp-content/uploads/2013/07/EnvJusticeWestEugeneFamiliesHealthAirPollution_FULLreport_FINALwebres.pdf (last visited July 18, 2014).

[16] City of Eugene, 6/30/ 2014. Environmental Justice Issue Briefing: Urban Growth Boundary Expansion Analysis: Clear Lake Road Area-Draft. p. 3

This disproportionate exposure to pollution is reflected in the high rate of illness among West Eugene communities. In the Bethel school district in Northwest Eugene, for example, the rate of asthma prevalence is 14.3%. By comparison, the average rate of asthma prevalence in the 4J school district, which includes most of Eugene, is 8.1%.[17]

West Eugene residents have for many years expressed their concern over the health effects of the pollutants in their neighborhoods. A 2010 report on air quality in the Trainsong neighborhood, prepared by the Oregon Department of Human Services' Environmental Health Assessment Program, reported that residents complained of high rates of ailments including asthma; difficulty breathing; eye, nose, and throat irritation; allergies; sinus infections; nausea; headaches; dizziness; anemia; immune system impairment; brain cancer; and acute myeloid leukemia.[18] Residents have raised concerns over contaminants including creosote; pentachlorophenol, polycyclic aromatic hydrocarbons, and dioxins; hazardous air pollutants including benzene, toluene, PCE, TCE, and formaldehyde; diesel particulate; metals including arsenic, lead, chromium, and manganese; and herbicides and pesticides; as well as particulate matter.[19]

B. The Regulatory History and Health Effects of Fine Particulate Matter ("$PM_{2.5}$")

The Clean Air Act ("CAA") requires EPA to establish national air quality standards to protect public health and welfare.[20] The CAA established the National

---

[17] *Id.* at 30.

[18] Oregon Dept. of Human Services, *Health Consultation: Trainsong Indoor Air Assessment* (2010), http://www.atsdr.cdc.gov/HAC/pha/UnionPacificRailroadCompany0121201 0/UnionPacificRailroadCoFinalHC01-21-2010.pdf (last visited July 10, 2014).

[19] *Id.* at 9.

[20] *Id.* at 3088; *see also Whitman v. Am. Trucking Associations*, 531 U.S. 457, 473 (2001).

Ambient Air Quality Standards ("NAAQS") for pollutants considered harmful to human health and the environment.[21] EPA has recognized $PM_{2.5}$ as a uniquely harmful category of pollutant since 1997, when it determined that PM_{10} (coarse particulate matter) standards alone were inadequate to protect public health and established annual and 24-hour NAAQS for $PM_{2.5}$.[22] EPA cited data showing that $PM_{2.5}$ poses unique health risks and is more dangerous to human health than PM_{10}.[23] EPA noted that significant adverse health effects occurred even in areas where the existing PM_{10} standards were met, and stated that public health concerns required the addition of the fine particulate matter standard.[24]

Exposure to $PM_{2.5}$ affects human heart and lung function. $PM_{2.5}$ is composed of particles less than 2.5 micrometers in diameter, making it the most dangerous type of particulate matter because these particles travel easily into the lungs and can also enter the bloodstream.[25] Both long- and short-term exposure to $PM_{2.5}$ can result in numerous negative health effects, including premature death.[26]

$PM_{2.5}$ exposure harms the cardiovascular system. Long-term exposure has been

---

[21] 42 U.S.C.A. § 7409.

[22] National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997) ("1997 Final Rule").

[23] National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,648-9 (December 13, 1996).

[24] 1997 Final Rule at 38,657.

[25] United States Environmental Protection Agency, *Particulate Matter: Health* (2014), http://www.epa.gov/airquality/particulatematter/health.html (last visited July 10, 2014).

[26] National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3103 (Jan. 15, 2013) (codified at 40 C.F.R. Parts 50, 51, 52, 53 and 58) ("2013 Final Rule").

linked to health effects including heart attacks, congestive heart failure, stroke, and cardiovascular-related mortality. Short-term exposure is similarly associated with effects "ranging from subtle changes in indicators of cardiovascular health to serious clinical events, such as increased hospitalizations and emergency department visits due to cardiovascular disease and cardiovascular mortality."[27]

$PM_{2.5}$ exposure likely also harms the respiratory system. Long-term exposure is linked to increased asthma development and respiratory symptoms including death. Even short-term $PM_{2.5}$ exposure is associated with increased emergency room visits and hospital admissions for chronic obstructive pulmonary disease and respiratory infections.[28]

In addition, the scientific data suggests a causal relationship between long-term $PM_{2.5}$ exposure and developmental and reproductive effects. This exposure is associated with low birth weight and infant mortality, particularly as a result of respiratory problems.[29] Studies have also shown a positive association between $PM_{2.5}$ exposure and carcinogenic, mutagenic, and genotoxic effects; for example, $PM_{2.5}$ exposure is linked to lung cancer mortality.[30]

Certain groups are particularly at risk for experiencing adverse health effects as a result of $PM_{2.5}$ exposure. In addition to populations traditionally identified as vulnerable, such as children and older adults, current data supports the identification of additional at-

---

[27] 2013 Final Rule; 78 Fed. Reg. at 3103.

[28] *Id.*

[29] *Id.* at 3104.

[30] *Id.*

risk groups, including people with lower socioeconomic status.[31] This compounding factor is particularly relevant for environmental justice communities.[32] When entire communities are affected by $PM_{2.5}$ emissions, the public health costs can be significant.[33]

Today, the EPA states that "[i]nhalable particles, particularly fine particles, have the greatest demonstrated impact on human health."[34] In addition to EPA's annual and 24-hour primary standards, set to protect public health, EPA also regulates $PM_{2.5}$ through annual and 24-hour secondary standards, which are calibrated to protect public welfare (including protection against decreased visibility and damage to property or vegetation).[35] These standards are complemented by EPA's regulation of coarse particulate matter, which is between 2.5 and 10 micrometers in diameter. The agency sets an allowable maximum level of $PM_{2.5}$, measured in micrograms per cubic meter of air ($\mu g/m^3$).[36]

Since its initial regulation in 1997, EPA has continued to study the effects of $PM_{2.5}$ and revise its regulations periodically. In 2006, the agency decreased the primary 24-hour $PM_{2.5}$ standard from 65 to 35 $\mu g/m^3$ and revised the Air Quality Index to reflect this change, directing states to revise their implementation plans accordingly.[37] States are

---

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] United States Environmental Protection Agency, *Particulate Matter (PM) Research* (2013), http://www.epa.gov/airscience/air-particulatematter.htm (last visited July 10, 2014).

[35] United State Environmental Protection Agency, National Ambient Air Quality Standards (2012), http://www.epa.gov/air/criteria.html (last visited July 10, 2014).

[36] 2013 Final Rule at 3088.

[37] *Id.*

required to submit appropriate revisions of their State Implementation Plans within three years of NAAQS revisions.[38]

Following the 2006 promulgation, litigants challenged EPA's explanation of why its standards provided adequate health protection from $PM_{2.5}$, including protection for vulnerable subpopulations such as children.[39] The court remanded the primary annual $PM_{2.5}$ standard to EPA for reconsideration. As a result, EPA initiated a comprehensive review of the science on fine particulate matter.

EPA prepared multiple drafts of Integrated Science Assessments, Risk and Exposure Assessments, and Policy Assessments, which were peer reviewed by the independent Clean Air Scientific Advisory Committee.[40] In 2013, EPA promulgated a rule strengthening the regulation of $PM_{2.5}$, lowering the primary annual standard for $PM_{2.5}$ emissions from 15.0 to 12.0 $\mu g/m^3$.[41] EPA retained the 24-hour $PM_{2.5}$ standard established in 2006 (35 $\mu g/m^3$).[42]

C. Permitting History

The Lane Regional Air Protection Agency is responsible for issuing permits for, among other pollutants, $PM_{2.5}$ emissions. LRAPA's mission is "[T]o protect public health, community well-being, and the environment as a leader and advocate for the

---

[38] Environmental Protection Agency, *State Implementation Plan Development Process* http://www.epa.gov/airquality/urbanair/sipstatus/process.html (last visited July 18, 2014).

[39] *Id.*; *see also Am. Farm Bureau Fed'n v. E.P.A.*, 559 F.3d 512 (D.C. Cir. 2009).

[40] 2013 Final Rule at 3088.

[41] *Id.*; *see also* United States Environmental Protection Agency, *Revised Air Quality Standards for Particle Pollution and Updates to the Air Quality Index* (2013), http://www.epa.gov/airquality/particlepollution/2012/decfsstandards.pdf (last visited July 10, 2014).

[42] 2013 Final Rule at 3088.

improvement and maintenance of air quality in Lane County."[43]

In October 2009, LRAPA issued a permit for Seneca Sustainable Energy's cogeneration power plant ("the facility"), which would house a wood-fired boiler and steam turbine power plant and emit fine particulate matter and other hazardous pollutants. In reviewing the original pre-construction permit, LRAPA did not conduct an analysis to determine whether the facility would have a disproportionate impact on communities in the nearby Industrial Corridor area, as required by Title VI of the Civil Rights Act and EPA's implementing regulations.[44] The original permit allowed SSE to emit a total of 14 tons of PM/PM_{10} per year.[45] As discussed below, LRAPA did not separately regulate $PM_{2.5}$ at the time it issued the original permit for SSE. Beyond Toxics participated extensively in this original permitting process.

On May 3, 2013, SSE submitted a Permit Modification Application. This application stated that the power plant would produce 16.6 tons of $PM_{2.5}$ per year and 16.6 tons of PM_{10} per year.[46] LRAPA provided public notice of the completed application on June 10, 2013, and the public comment period extended to November 22, 2013. A public hearing was held on October 16, 2013.[47] Beyond Toxics submitted comments on

---

[43] LRAPA, *About LRAPA* (2014), http://www.lrapa.org/about_LRAPA/index.php (last visited July 10, 2014).

[44] Exhibit C: LRAPA, Standard Air Contaminant Discharge Permit Review Report for Permit No. 206470 at Attachment A: Responses to Comments Received 7 (2014), http://www.lrapa.org/downloads/permits/SSE_206470_Adden_No._1_and_Review_Report_ with_Attach_A_and_B.pdf (last visited July 10, 2014) ("2014 Review Report").

[45] Exhibit D: LRAPA, Modified Standard Air Contaminant Discharge Permit No. 206470 6 (2014), http://www.lrapa.org/downloads/permits/SSE_206470_Adden_No._1_and_Permit.pdf.

[46] Exhibit E: Seneca Sustainable Energy, Request for Revisions to Standard Air Contaminant Discharge Permit No. 206470 (2013).

[47] 2014 Review Report at 19.

the environmental justice and public health concerns raised by the proposed modification, requesting that LRAPA conduct a disproportionate impacts analysis under Title VI.[48] In February, 2014, LRAPA approved a modification of the permit that allows SSE to emit 16 tons of $PM_{2.5}$ per year, an increase of at least 2 tons per year.[49] LRAPA again did not conduct a disproportionate impacts analysis when reviewing SSE's application for the permit modification.

VI. ARGUMENT

Recipients of federal funding are prohibited from taking actions that have a discriminatory impact on minority populations. Title VI of the Civil Rights Act of 1964 states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving any Federal financial assistance.[50]

EPA's implementing regulations further prohibit recipients of EPA funding from discriminating. Specifically, EPA's Title VI regulations provide that an EPA funding recipient

> ...shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.[51]

---

[48] *See* Exhibit F: Beyond Toxics, Comments on Application for Modification of Air Contaminant Discharge Permit for Seneca Sustainable Energy, LLC (November 22, 2013).

[49] *Id.*

[50] 42 U.S.C. Section 2000d.

[51] 40 C.F.R. §7.35(b).

In addition to these protections, Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations," provides:

> To the greatest extent practicable and permitted by law, … each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States….[52]

LRAPA's decision to approve SSE's permit modification violates the Agency's statutory and regulatory duty to administer all programs and activities in a nondiscriminatory manner. Furthermore, LRAPA failed to satisfy E.O. 12898's requirement that federal agencies identify disproportionate affects because it failed to even conduct an analysis of the effects of the $PM_{2.5}$ emissions.

A. LRAPA unlawfully approved SSE's permit application without addressing the disproportionate impact of $PM_{2.5}$ emissions on Latino and low-income communities.

Despite the well-known and unique health threats posed by emission of $PM_{2.5}$, LRAPA approved the permit modification, and the addition of two tons of $PM_{2.5}$ per year into the West Eugene community, without conducting any analysis of health effects from exposure to $PM_{2.5}$ or any disproportionate impacts analysis. LRAPA failed to conduct any modeling of air quality impacts relative to $PM_{2.5}$, nor did LRAPA require the permittee to conduct any such modeling. Instead, LRAPA assumed that the project would not have a disproportionate impact on environmental justice communities based on its arbitrary conclusion that "…there would be no significant adverse impacts to any community, regardless of demographic makeup," a statement that was issued by the

---

[52] Exec. Order No. 12898, 59 C.F.R. 7629 (1994).

agency after Beyond Toxics had raised this issue during the public comment period.[53] The draft permit documents published by LRAPA did not raise or identify the issue of disproportionate impacts at all.

Instead of conducting a disproportionate impacts analysis for $PM_{2.5}$, LRAPA asserts it only had an obligation to regulate for PM_{10} and therefore can ignore the unique health threats posed by $PM_{2.5}$. The Agency does not contest that it failed to model and analyze the impact of $PM_{2.5}$ emissions on Industrial Corridor neighborhoods. LRAPA asserts that the facility was originally permitted in 2009, "prior to adoption of the $PM_{2.5}$ as a regulated pollutant in LRAPA's rules and regulations."[54] On that basis, even though the permit modification was authorized in 2014, LRAPA states that due to its own policy regarding particulate matter, it had no obligation to consider the unique threats from $PM_{2.5}$. LRAPA argues that it did not have to conduct a disproportionate impacts analysis because it complied with its own existing policy regarding particulate matter.[55]

LRAPA's attempt to rely on compliance with an outdated NAAQS for PM_{10} is flatly inconsistent with the Office of Civil Rights ("OCR's") recently issued draft guidance document, OCR's preliminary findings from a recent Title VI case, and persuasive authority from the Environmental Appeals Board. Furthermore, LRAPA cannot avoid its responsibility to conduct a disproportionate impacts analysis by arguing that it purchased offsets as emissions reductions credits.

//

//

---

[53] 2014 Review Report at Attachment A: Responses to Comments Received 2.

[54] *Id.*
[55] *Id.*

1. LRAPA's decision is inconsistent with OCR's guidance document "Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds".

Prior to 2013, OCR's draft guidance documents reflected a rebuttable presumption that compliance with the NAAQS indicated that the adverse effects required for a Title VI complaint were not present. In a draft guidance document issued in 2013, OCR explicitly eliminated this presumption, stating that EPA "will no longer presume an absence of adversity if a NAAQS (or another health-based threshold) is satisfied."[56] Instead, compliance with such standards is now evaluated along with other relevant factors. EPA explained "presuming compliance with civil rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health."[57]

Therefore, even if LRAPA had relied on its compliance with the current NAAQS, this fact alone would not be sufficient to ensure compliance with Title VI requirements under OCR's draft policy, because low income communities are considered to be at particularly high risk for exhibiting health impacts from exposure to $PM_{2.5}$ and because West Eugene communities are already struggling with the cumulative effects of multiple sources of pollution. Here, however, the facts are even more egregious, as LRAPA has assumed the absence of adverse health effects based on standards that are many years out of date without performing any analysis of impacts attributable to exposure to $PM_{2.5}$. There is simply no factual basis in the record for this permit modification for LRAPA's

---

[56] Environmental Protection Agency, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental and Health-Based Thresholds* 4, January 24, 2013, http://www.epa.gov/ocr/docs/pdf/t6 .adversity_paper1.24.13.pdf (last visited July 18, 2014).

[57] *Id.*

assumption that the emissions of an additional 2 tons per year of fine particulate matter in a residential community in West Eugene will not result in disproportionate effects.

2. LRAPA's decision is inconsistent with OCR's preliminary findings with regard to a similar environmental justice complaint.

In its preliminary findings pursuant to an environmental justice complaint concerning the disparate impacts of the pesticide methyl bromide, OCR explained that "compliance with federal and/or state environmental regulations, does not, by itself, ensure compliance with Title VI."[58] The complainants in *Angelita C. et. al. v. California Department of Pesticide Regulation* alleged that the Department's renewal of the registration for methyl bromide imposed a disproprotionate impact on Latino schoolchildren who attended schools that were within 1.5 miles of where methyl bromide was applied.[59] After noting that compliance with state law is not determinative, OCR then conducted its own independent analysis through preparation of a methyl bromide exposure model, reaching a preliminary finding of a *prima facie* violation of Title VI. OCR's analysis did not rely upon whether or to what extent CDPR complied with state regulations.

Similarly, LRAPA is subject to Title VI and its implementing regulations, and supposed compliance with its own out of date regulations on fine particulate matter does not equate with compliance with Title VI. LRAPA was required to make an independent assessment of and conclusion regarding disproportionate impacts, and complainants here request that OCR conduct that analysis where LRAPA has failed to do so in resolving

---

[58] United States Environmental Protection Agency, Re: Title VI Complaint 16R-99-R9 (prelim) (2011), http://www.epa.gov/ocr/TitleVIcases/title6-c42211-preliminary-finding.pdf (last visited July 10, 2014).

[59] *Angelita C. et. al. v. California Dept. of Pesticide Regulation*, 5.

this complaint.

3. LRAPA's decision is inconsistent with the Environmental Appeals Board's decision in *In Re Shell Gulf of Mexico, Inc.*

The Environmental Appeals Board has determined that when the EPA Administrator has proposed a more stringent standard, compliance with the previous standard is not sufficient to demonstrate that a population will not experience disproportionate effects from the permitted activity.[60]

In *In Re Shell Gulf of Mexico, Inc.*, the permitting agency maintained that it did not have to conduct an environmental justice analysis because the permitted activity did not exceed the pollutant levels allowed by the existing NAAQS, even though the Administrator had proposed, but not finalized, a stricter standard.[61] The EPA Environmental Appeals Board found that technical compliance was inadequate for compliance with Executive Order 12898, and ordered the agency to complete an environmental justice analysis.[62]

As the Board noted in *Shell*, EPA sets the NAAQS using scientific expertise to ensure that the primary standard protects public health within an adequate margin of safety.[63] The 2006 $PM_{2.5}$ NAAQS revision was based on rigorous scientific study, and the Administrator determined that the previous, 65 $\mu g/m^3$ 24-hour primary standard was inadequate to protect human health.[64]

---

[60] *See In re Shell Gulf of Mexico Inc.*, No. 1550, 2010 WL 9564110 (Environmental Appeals Board 2010).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] 2006 Final Rule.

The *Shell* decision pointed out that information concerning the health risks of the pollutant was made available to the public prior to the permit's issuance. Here as well, EPA published the information on health effects of $PM_{2.5}$ that prompted the new standard in 2006, more than 7 years before the permit modification at issue here.[65] LRAPA issued SSE's original permit in 2009, and approved its permit modification in 2014. LRAPA was well aware of the unique health risks posed by $PM_{2.5}$ and yet made no effort to address squarely those risks in approving the modification of SSE's permit.

In *Shell*, the Board stated that the agency's environmental justice analysis was insufficient because the permitting agency relied on its compliance with the earlier standard. Here, LRAPA claims, on the same basis, that it is not required to conduct an environmental justice analysis because it complied with the applicable (and outdated) standards that it asserts applied at the time the original permit was issued in 2009. Just as in the *Shell* case, technical compliance with an outdated standard does not excuse the permitting authority from conducting a reasoned disproportionate impacts analysis.

4. LRAPA is required to conduct a disproportionate impacts analysis despite SSE's purchase of PM_{10} offsets.

LRAPA argues that air quality modeling and impacts analysis are unnecessary because SSE purchased offsets as emissions reductions credits.[66] LRAPA states that SSE purchased offsets at a ratio of two offsets per each unit of emissions.[67] However, the

---

[65] *Id.*

[66] 2014 Review Report at Attachment A: Responses to Comments Received 5 (2014), http://www.lrapa.org/downloads/permits/SSE_206470_Adden_No._1_and_Review_Report_with_Attach_A_and_B.pdf (last visited July 10, 2014).

[67] *Id.* at 6.

purchase of offsets, without more, is not a substitute for air quality modeling and a disparate impacts analysis. Furthermore, the facility from which the offsets were purchased by SSE is located in Springfield, Oregon, approximately thirteen miles from the impacted communities.[68] The community in which the offset facility is located is predominantly white, with the proportion of Latino residents at 8.8 percent, much lower than in the West Eugene Industrial Corridor communities.[69] LRAPA is affirmatively and knowingly approving a shift in pollution from a predominantly white neighborhood to a heavily Latino community. The offsets relied upon by LRAPA here increase the severity of the disproportionate impacts – they do not eliminate those impacts. Finally, the offsets are for PM_{10} rather than $PM_{2.5}$, and therefore do not mitigate the unique health impacts of $PM_{2.5}$.[70]

B. The $PM_{2.5}$ emission increase will have adverse effects that will disproportionately impact Latino and low-income populations.

$PM_{2.5}$ is the most dangerous form of particulate matter because its small size allows it to pass easily into the bloodstream and the lungs.[71] Scientific studies of $PM_{2.5}$ exposure show that it is associated with numerous negative health effects, including mild and severe cardiovascular and respiratory symptoms and early death.[72] Even short-term exposure to $PM_{2.5}$ can cause problems such as chronic obstructive pulmonary disorder,

---

[68] *See* Exhibit B, *Map of Eugene/Springfield.*

[69] US Census Bureau, *Zip Code Tabulation Area 97478* http://factfinder2.census.gov/faces/tables ervices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1.

[70] Max Hueftle, LRAPA Permit Section Manager (ACDP/Title V), Statement at Seneca Sustainable Energy Public Hearing (Oct., 13, 2013).

[71] United States Environmental Protection Agency, *Particulate Matter: Health* (2014), http://www.epa.gov/airquality/particulatematter/health.html (last visited July 10, 2014).

[72] 2013 Final Rule at 3104.

respiratory infections, and cardiovascular disease.[73] Long-term exposure, which would be imposed on residents by SSE's facility, causes asthma, heart attacks and congestive heart failure, and stroke.[74] $PM_{2.5}$ exposure can cause early death as a result of harm to either the respiratory or cardiovascular systems.[75] $PM_{2.5}$ exposure is associated with early death as a result of harm to both the respiratory and cardiovascular systems. Studies have also linked $PM_{2.5}$ exposure to cancer and birth defects.[76] Vulnerable populations such as children and older adults are particularly at risk for these effects.[77] In establishing the $PM_{2.5}$ standard, EPA noted that there was no evidence of a threshold below which $PM_{2.5}$ exposure does not produce adverse health effects.[78] EPA adopted a regulatory framework reflective of this fact.[79]

Existing data demonstrates that air quality in the vicinity of the SSE facility is already worse than the air quality standard many days out of the year. The 2013 mean 24-hour $PM_{2.5}$ level in the region of the SSE facility was 8.3 $\mu g/m^3$.[80] The highest 24-hour level in 2013 was 54.6 $\mu g/m^3$, and the annual 98% percentile level was 40.2 μ

---

[73] *Id.* at 3103.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 3104.

[77] *Id.*

[78] National Ambient Air Quality Standards for Particulate Matter: Proposed Decision. 61 Fed. Reg. 65,638, 65,648-9 (December 13, 1996).

[79] 1997 Final Rule at 38670.

[80] LRAPA, *2013 Annual Report* 12, http://www.lrapa.org/downloads/annual_reports/'13_Annual_Report_web.pdf (last visited July 17, 2014); *see also* Oregon Department of Environmental Quality, *2013 Oregon Air Quality Data Sumaries* (July 2014) at 45 (Table 6).

g/m^3.[81] Because $PM_{2.5}$ is a "non-threshold"[82] pollutant, any increase the amount of $PM_{2.5}$ will increase the risk of adverse health effects. Here, the increase in $PM_{2.5}$ emissions by SSE means that some members of the West Eugene Industrial Corridor will experience adverse effects, particularly in light of the cumulative threats from other pollution in this community.

SSE's facility is located near the homes and schools of West Eugene Industrial Corridor residents. The nearest home is 1,500 feet away, and there are four elementary schools within three miles of the facility.[83] Because of this proximity the $PM_{2.5}$ emissions from SSE's facility will primarily impact these nearby communities, because they are in closest proximity to the facility. Residents of these neighborhoods are disproportionately Latino and low-income, so the effects of $PM_{2.5}$ emission will have a disproportionate impact on communities that are protected by Title VI.

Furthermore, the available data suggests that people with lower socioeconomic status might be particularly at risk of experiencing adverse health effects related to $PM_{2.5}$ exposure.[84] This compounding factor is particularly relevant for environmental justice communities, where families typically lack economic resources and access to health care.

C. LRAPA lacks a grievance procedure as required by law.

EPA's Title VI implementing regulations state that each recipient of EPA funding shall "adopt grievance procedures that assure the prompt and fair resolution of complaints

---

[81] *Id.*

[82] *Id.* at 38688.

[83] *See* Exhibit B: *Map of Eugene/Springfield* (showing that Clear Lake Elementary School, Irving Elementary School, Howard Elementary, and Fairfield Elementary School are within three miles of the facility).

[84] *Id.*

which allege violation of this part."[85] LRAPA has adopted no such procedures and is therefore in violation of this regulation.

VII. REMEDIES

The resolution process as well as the outcome must treat impacted communities fairly. For justice to be done, impacted communities must have substantial involvement in the resolution process. EPA regulations authorize EPA to use any means authorized by law to obtain compliance with Title VI, including the termination of EPA funding.[86] The regulations also require any recipient of federal assistance that has previously discriminated to take affirmative action to remedy that discrimination.[87]

While the termination of federal funding is the ultimate remedy, we are aware that OCR attempts to identify other means of addressing possible violations of Title VI. In this instance, EPA should first ensure independent analysis of the disproportionate effects of the $PM_{2.5}$ emissions approved by LRAPA, ideally providing the Complainant and communities with the resources to review and assess the air quality modeling to be performed by OCR.

Once that modeling is completed with the input of the impacted communities and preliminary findings are issued, we would recommend that OCR consider requiring, at a minimum, the following steps in order to resolve this Title VI Complaint:

(1) Require that LRAPA revoke approval of the SSE permit modification;

(2) Require that LRAPA in any future consideration of a permit modification for

---

[85] 40 C.F.R. § 7.90(a).

[86] 40 C.F.R. § 7.130(a).

[87] 40 C.F.R. § 7.35(a)(7).

SSE conduct a robust analysis of disproportionate impacts to West Eugene Communities, including cumulative impacts from other nearby permitted facilities regulated by LRAPA under the CAA and allow public comment on that disproportionate impacts analysis; and

(3) Require that LRAPA notify OCR of any proposed modifications to the SEE permit and allow OCR an opportunity to review and provide comments the disproportionate impacts analysis.

We are aware that EPA's regulations impose mandatory timelines for the issuance of preliminary findings.[88] We request that EPA complete its preliminary investigation within this time frame before engaging in discussions with LRAPA on informal resolution of this complaint.

EPA's regulations also authorize EPA to conduct a periodic compliance review of recipients' programs and activities.[89] In light of the serious Title VI violations described in this complaint, Beyond Toxics requests that EPA initiate a broader review of LRAPA's programs and activities to ensure compliance with Title VI of the Civil Rights Act. While we recognize that the revocation of EPA funding is an unusual remedy, in this case we believe that a broader compliance review of LRAPA's programs and activities may very well identify many other instances of civil rights violations, not the least of which is the original issuance of the SSE permit and other recent air quality permitting decisions. We believe that if OCR engages in this periodic compliance review that it may identify a pattern and practice of LRAPA ignoring its obligations under Title VI of the Civil Rights Act, and we strongly recommend that OCR consider exercising its

[88] 40 C.F.R. § 7.115(c)(1).

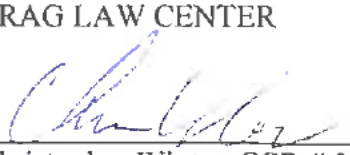
[89] 40 C.F.R. § 7.115(a).

discretion to revoke funding from LRAPA to ensure that West Eugene Communities are protected from discrimination moving forward and to ensure the LRAPA complies with federal civil rights law.

DATE: August 5, 2014

Respectfully submitted,

CRAG LAW CENTER



Christopher Winter, OSB # 984355
Crag Law Center
chris@crag.org
(503) 525-2725
917 SW Oak Street, Suite 417
Portland, OR 97205
Fax: (503) 296-5454