UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

INFORMAL RESOLUTION AGREEMENT
between the
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
and the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
EPA COMPLAINT NO. 03R-19-R3

I. PURPOSE AND JURISDICTION

A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI) and other federal nondiscrimination laws, and United States Environmental Protection Agency's (EPA) implementing regulation at 40 C.F.R. Parts 5 and 7 prohibit discrimination on the basis of race, color, national origin, disability, sex, age, and retaliation in the programs, services and activities of applicants for or recipients of federal financial assistance.[1]

B. The West Virginia Department of Environmental Protection (WVDEP) receives federal financial assistance from the EPA and, therefore, must ensure non-discrimination in programs and activities pursuant to the provisions of Title VI, the other federal non-discrimination laws and the EPA's implementing regulation.

C. On October 17, 2019, the EPA's External Civil Rights Compliance Office (ECRCO) accepted for investigation complaint No. 03R-19-R3 brought under Title VI and the EPA's regulations at 40 C.F.R. Part 7 that alleged discrimination based on race.

D. In response to the complaint, the EPA accepted for investigation the following issues:

1. Whether the WVDEP discriminated against African American descendants of those buried at the Boyd Carter Memorial Cemetery on the basis of race in violation of Title VI of the Civil Rights Act of 1964 and the EPA's non-discrimination regulation found at 40 C.F.R. Part 7,

   a. During its public involvement process relating to Mountaineer Gas' application for Registration No. WVR311281 under WV General Permit No. WV0116815, Stormwater Associated with Oil and Gas

[1] Title VI of the Civil Rights Act of 1964, 42 United States Code §§ 2000d to 2000d-7 (Title VI); Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 et seq.; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 et seq.; Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 § 13, 86 Stat. 903 (codified as amended at 33 U.S.C. § 1251 (1972)); 40 C.F.R. Parts 5 and 7.

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Related Construction Activities, including by limiting their participation and providing allegedly misleading information; and

b. In its process for approving and approval of Mountaineer Gas' registration under the Stormwater Construction General Permit, which allegedly resulted in the disturbance of graves on the Cemetery grounds; and

2. Whether the WVDEP has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general non-discrimination obligations, including specific policies and procedures to ensure meaningful access to the WVDEP's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether the WVDEP has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and the EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.

E. During the course of the EPA's investigation into EPA Complaint No. 03R-19-R3, on January 28, 2020, the WVDEP agreed to engage in the voluntary Informal Resolution Agreement (Agreement) process in order to resolve the complaint. This Agreement does not constitute an admission by the WVDEP of a violation of, or a finding of compliance or noncompliance by the EPA with, Title VI or 40 C.F.R. Parts 5 and 7.

F. This Agreement is entered into by the WVDEP and the EPA.

G. This Agreement is entered into pursuant to the authority granted to the EPA under the federal non-discrimination laws, including Title VI of the Civil Rights Act of 1964, and the EPA's implementing regulation found at 40 C.F.R. Parts 5 and 7, and resolves complaint number 03R-19-R3.

H. The WVDEP is committed to carrying out its responsibilities in a nondiscriminatory manner, in accordance with the requirements of Title VI and other federal non-discrimination laws enforced by the EPA regulation at 40 C.F.R. Parts 5 and 7. The activities detailed in Section II of this Agreement, which the WVDEP has voluntarily agreed to undertake and implement, are in furtherance of this ongoing commitment.

II. SPECIFIC WVDEP COMMITMENTS

The WVDEP agrees to the following commitments:

A. <u>Notice of Non-Discrimination under the Federal Non-Discrimination Laws</u>

1. The WVDEP will post a notice of non-Discrimination (Notice) on the WVDEP's website homepage, in all WVDEP's offices and facilities, and in its general publications that are distributed to the public (*e.g.,* public outreach

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materials, such as brochures, notices, fact sheets or other information on rights and services; applications or forms to participate in or access WVDEP programs, processes or activities). The WVDEP will ensure that its Notice is accessible to individuals with limited-English proficiency (LEP) and individuals with disabilities, including ensuring that the Notice posted on the WVDEP's Website Homepage is accessible to persons who are blind or have low vision.

The Notice will contain, at a minimum, the following recommended text:

a. The WVDEP does not discriminate on the basis of race, color, national origin, disability, age, or sex in administration of its programs or activities, and the WVDEP does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.

b. [Insert name and title of non-discrimination coordinator] is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Parts 5 and 7 (Non-Discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title IX of the Education Amendments of 1972; and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination laws).

c. If you have any questions about this notice or any of the WVDEP's non-discrimination programs, policies or procedures, you may contact:

   (Name)
   (Position)
   (Organization/Department)
   West Virginia Department of Environmental Protection
   601 57th Street SE
   Charleston, West Virginia 25304
   (Phone Number)
   (Email)

   If you believe that you have been discriminated against with respect to a [Recipient Name] program or activity, you may contact the [insert title of non-discrimination coordinator] identified above or visit our website at [insert Recipient website address] to learn how and where to file a complaint of discrimination.

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2. Within 30 days after the effective date of this Agreement, the WVDEP will submit to the EPA for review a draft copy of its Notice of Non-Discrimination that is consistent with 40 C.F.R. Parts 5 and 7. ECRCO will review the draft Notice of Non-Discrimination and provide any comments within 30 days. Within 30 days of receiving ECRCO's comments, WVDEP will prominently publish in print and on its website the final Notice of Non-Discrimination.

3. If the identity of the Non-Discrimination Coordinator changes, then the WVDEP will promptly update materials as appropriate.

B. Grievance Procedures to Process Discrimination Complaints filed under the Federal Non-Discrimination Laws

1. The WVDEP will post Grievance Procedures to promptly and fairly process and resolve discrimination complaints filed under federal non-discrimination statutes and the EPA's implementing regulations at 40 C.F.R. Parts 5 and 7 on the WVDEP's website homepage, in all WVDEP's offices and facilities, and in its general publications as appropriate that are distributed to the public. The WVDEP will ensure that its Grievance Procedures are accessible to individuals with LEP and individuals with disabilities, including ensuring that the Notice as posted on its Website Homepage is accessible to individuals who are blind or have low vision.

2. The Grievance Procedures will:
   a. Clearly identify the Non-Discrimination Coordinator, including name and contact information;
   b. Explain the role of the Non-Discrimination Coordinator relative to the coordination and oversight of the Grievance Procedures;
   c. State who may file a complaint under the Grievance Procedures and describe the appropriate bases for filing a complaint;
   d. Describe which processes are available, and the options for complainants in pursuing either;
   e. State that the preponderance of the evidence standard will be applied during the analysis of the complaint;
   f. Contain assurances that intimidation and retaliation are prohibited and that claims of intimidation and retaliation will be handled promptly and fairly pursuant to your Grievance Procedures in the same manner as other claims of discrimination;

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g. Assure the prompt and fair resolution of complaints which allege violation of federal non-discrimination laws;

h. State that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process.

i. Be reviewed on an annual basis (for both in-print and online materials), and revised as necessary, to ensure prompt and fair resolution of discrimination complaints.

3. Within 120 days after the effective date of this Agreement, the WVDEP will submit to the EPA for review a draft copy of its Grievance Procedures. ECRCO will review the draft Grievance Procedures and provide any comments within 30 days. Within 30 days of receiving ECRCO's comments, WVDEP will prominently publish in print and on its website the final Grievance Procedures.

4. The WVDEP will review and revise as necessary the Grievance Procedures on an annual basis to ensure prompt and fair resolution of discrimination complaints.

C. Designation of Non-Discrimination Coordinator

1. The WVDEP will designate at least one Non-Discrimination Coordinator to ensure compliance with the federal non-discrimination laws, who will:

a. Provide information to individuals internally and externally that the WVDEP does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of the WVDEP's programs or activities, and that the WVDEP does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights;

b. Provide notice of the WVDEP's grievance processes and the ability to file a discrimination complaint;

c. Establish a mechanism (e.g., an investigation manual) for implementation of the WVDEP's Grievance Procedures to ensure that all discrimination complaints filed with the WVDEP under federal non-discrimination laws and the EPA implementing regulations 40 C.F.R. Parts 5 and 7 are processed promptly and fairly. One element of any policy and procedure or mechanism must include providing

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meaningful access for individuals with limited English proficiency and individuals with disabilities to the WVDEP's programs and activities;

d. Track all complaints filed with the WVDEP under federal non-discrimination laws, in order to identify any patterns or systemic problems;

e. Conduct semiannual reviews/analysis of all complaints filed with the WVDEP under the federal non-discrimination laws identified within this Agreement, and/or any other discrimination complaints independently investigated by the WVDEP covering these laws, to identify and address any patterns, systematic problems or any trends identified;

f. Ensure that appropriate training is provided for WVDEP staff in the processes available to resolve complaints filed with the WVDEP under federal non-discrimination laws;

g. Ensure that appropriate training is provided for WVDEP staff on the WVDEP's non-discrimination policies and procedures, as well as the nature of the WVDEP's obligation to comply with federal non-discrimination laws;

h. Ensure that complainants are updated on the progress of their complaints filed with the WVDEP under federal non-discrimination laws and are promptly informed as to any determinations the WVDEP has made;

i. Undertake periodic evaluations of the efficacy of the WVDEP's efforts to provide services, aids, benefits, and participation in any of the WVDEP's programs or activities without regard to race, color, national origin, disability, age, sex or prior exercise of rights or opposition to actions protected under federal non-discrimination laws.

2. The Non-Discrimination Coordinator will not have other responsibilities that create a conflict of interest (*e.g.,* serving as the WVDEP's Non-Discrimination Coordinator as well as its legal advisor or representative on civil rights issues).

3. Within 90 days after the effective date of this Agreement, the WVDEP will identify at least one individual who will serve as Non-Discrimination Coordinator(s) consistent with the regulatory requirements of 40 C.F.R. §5.135, §7.85(g), and §7.95(a).

4. Within 90 days of appointment of a Non-Discrimination Coordinator, the WVDEP will forward to ECRCO proof that the responsibilities have been

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included in the incumbent's statement of duties and that the incumbent has accepted the duties.

D. Public Participation

1. The WVDEP understands that meaningful public participation consists of informing, consulting, and working with potentially affected communities at various stages of the environmental decision-making process to address their questions and concerns. Therefore, the WVDEP will:

   a. Ensure that its public involvement process is available to all persons regardless of race, color, national origin, disability, age, sex, or prior exercise of rights or opposition to actions protected by 40 C.F.R. Parts 5 and 7 and the federal non-discrimination laws;

   b. Ensure that the factors used to determine the appropriate time, place, location, duration, and security at public meetings are developed and applied in a non-discriminatory manner;

   c. Develop, publicize, and implement written public participation procedures (consistent with the federal civil rights laws and the EPA's Public Participation Guidance found at 71 F.R. 14207, 14210-11 (March 21, 2006))[2], that include implementation of the following steps for effective public participation that is accessible to all persons regardless of race, color, national origin (including LEP), disability, age, and sex each time the WVDEP engages in a public participation or public involvement process:

      i. Develop a description of the relevant/affected community (including demographics, history, and background, for example/such as, percentage of the service area that is minority, has less than a high school education, has members of households who speak a language other than English and/or speak English less than very well, has a history of filing complaints, has an inability to access traditional communication channels, internet, etc.);

      ii. Provide a contact list for relevant staff members on the WVDEP's website, including phone numbers and email addresses, to allow the public to communicate via phone or internet;

[2] https://www.govinfo.gov/content/pkg/FR-2006-03-21/pdf/06-2691.pdf

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iii. Develop a list of past and present community civil rights concerns (including any complaints filed under the federal non-discrimination laws), and actions undertaken in response to such concerns;

iv. Develop and implement a detailed plan of action (including outreach activities) the WVDEP will take to address concerns raised by the public;

v. Develop and implement a contingency plan for unexpected events that impact public meetings or other public participation avenues;

vi. Identify location(s) where public meetings will be held (considering the availability and schedules of public transportation), and will ensure that public meetings are held in locations that allow for meaningful participation/involvement by individuals with LEP and individuals with disabilities;

vii. Develop and maintain a list of contact names for obtaining reasonable accommodations at no cost for individuals with disabilities and language assistance services for limited-English proficient persons, including translation of documents and/or interpreters for meetings;

viii. Develop and maintain a list of appropriate local media contacts (based on the cultural and linguistic needs of the community).

d. The WVDEP will, during times of national, state, or local emergency, ensure that any public meetings occurring virtually are held in such a manner as to ensure the meaningful participation/involvement of individuals with limited English proficiency and individuals with disabilities. The WVDEP may seek technical assistance from EPA in ensuring that this occurs.

e. The WVDEP will ensure that a Public Involvement/Participation plan (plan) is developed and prominently highlighted on the WVDEP website for the benefit of interested residents, which will explain how interested residents can participate in the permitting process under various environmental laws. This plan should also be posted in other publicly accessible locations such as local public libraries, and WVDEP will ensure that it incorporates the following elements:

i. How the WVDEP will meaningfully engage the public prior to

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and during significant WVDEP activities (*e.g.,* how the public can request a public hearing and criteria on how public hearings are determined);

ii. How the WVDEP will effectively communicate and engage with the public regarding its programs, activities, and services (*e.g.,* public notice procedures for submitting public comment during permit registrations); and

iii. What methods the WVDEP will implement to ensure the public can access publicly available information and documents regarding WVDEP programs, activities, and services. This should include:

a. How the WVDEP will improve its existing methods and tracking systems to allow the public to easily and efficiently access the WVDEP's publicly available electronic and hardcopy documents and information (e.g. ApplicationXtender, the Electronic Submission System ("ESS"), and other relevant electronic systems); and

b. Providing clear instructions for public users on how and where to access WVDEP's electronic and hardcopy documents and information.

2. The Non-Discrimination Coordinator(s) will ensure that appropriate WVDEP staff receive training in best practices related to public involvement in environmental permitting processes and other processes undertaken by WVDEP that include public engagement.

3. WVDEP will provide a mechanism for residents to access relevant hard copy information in a centralized public location near to a proposed activity in question in addition to providing the public with access to internet and digitally provided information relating to that activity;

4. Within 120 days of the effective date of this Agreement, the WVDEP will submit to EPA for review a draft copy of its Public Participation Plan(s). ECRCO will review the draft Public Participation Plan(s) and provide any comments within 30 days. Within 30 days of receiving ECRCO's comments, WVDEP will prominently publish in print and on its website the final Public Participation Plan(s).

E. <u>WVDEP Plan to Ensure Meaningful Access to Programs and Activities for Persons with Limited English Proficiency (LEP)</u>

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1. The WVDEP will conduct an appropriate analysis as described in EPA's LEP Guidance found at 69 F.R. 35602 (June 25, 2004)[3] and http://www.lep.gov, to identify the appropriate language groups and determine what language services or mix of language services the WVDEP needs to provide (e.g., interpreters and translators), to ensure that limited-English proficient individuals can meaningfully participate in the WVDEP's programs and activities.

2. The WVDEP will develop, publicize, and implement written procedures (a Language Access Plan) to ensure meaningful access to all WVDEP services, programs and activities for individuals with LEP, at no cost to those individuals.

3. Within 120 days of the effective date of this Agreement, the WVDEP will submit to EPA for review a draft copy of its written Language Access Plan. ECRCO will review the draft Language Access Plan and provide any comments within 30 days. Within 30 days of receiving ECRCO's comments, WVDEP will prominently publish in print and on its website the final Language Access Plan.

F. WVDEP Plan to Ensure Meaningful Access to Programs and Activities for Persons with Disabilities

1. The WVDEP will develop, publicize and implement a Disability Access Plan to ensure meaningful access to all WVDEP programs, services and activities for individuals with disabilities.[4]

2. The WVDEP will provide, at no cost, auxiliary aids and services to individuals with disabilities, (including, but not limited to, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals, as necessary), to ensure effective communication and an equal opportunity to participate fully in benefits, activities, programs, and services provided by the WVDEP in a timely manner in such a way as to protect the privacy and independence of the individual.

3. The WVDEP will ensure that its facilities and other facilities utilized by the WVDEP (*e.g.* if the WVDEP holds a public hearing at a school or recreational center) are physically accessible to, individuals with disabilities.

4. Within 120 days of the effective date of this Agreement, the WVDEP will submit to ECRCO for review a draft copy of its Disability Access Plan. ECRCO will review the draft Disability Access Plan and provide any

[3] https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf
[4] *See* Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf

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comments within 30 days. Within 30 days of receiving ECRCO's comments, WVDEP will prominently publish in print and on its website the final Disability Access Plan.

G. Training

1. Within 180 days of the effective date of this Agreement, the WVDEP will ensure that all its staff has been appropriately trained on federal non-discrimination obligations and all plans, policies and procedures created and implemented as part of this Agreement. WVDEP may request assistance from EPA for any of the training required in this Agreement.

2. Within 120 days of the effective date of this Agreement, the WVDEP will forward to EPA for review a draft plan of ensuring that such training is a routine part of the on-boarding process for new employees and is given regularly as refresher training to all employees. ECRCO will review the draft training plan and provide any comments within 30 days. Within 30 days of receiving ECRCO's comments, WVDEP will forward a final copy of the training plan to ECRCO and implement the above plan.

III. GENERAL CONSIDERATIONS

A. In consideration of the WVDEP's implementation of commitments and actions described in Section II of this Agreement, ECRCO will end its investigation of Complaint No. 03R-19-R3 and not issue a decision containing findings on the merits of the complaint.

B. ECRCO will monitor the implementation of the commitments in Section II of this Agreement, as appropriate, to ensure they are fully implemented. Once the terms of this Agreement are satisfied, ECRCO will issue a letter documenting completion of the commitments, closure of its monitoring actions and closure of Complaint No. 03R-19-R3 as of the date of that letter.

C. If not otherwise specified herein, ECRCO will review and provide feedback about any documentation submitted by the WVDEP demonstrating completion of each commitment and will provide an assessment, to include verbal and/or written feedback, as to whether the documentation satisfies the commitment within 30 days of receipt of each such submission.

D. EPA will, upon request, provide technical assistance to the WVDEP regarding any of the civil rights obligations previously referenced.

IV. COMPUTATION OF TIME AND NOTICE

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A. As used in this Agreement, "day" will mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period will run until the close of business of the next working day.

B. Service of any documents required by this Agreement may be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. Electronic service is acceptable as outlined below. Documents forwarded by email for review are to be sent in native format for draft documents and PDF format for documents intended to be final.

C. Electronic documents submitted by the WVDEP to the EPA via email will be sent to the following email address: Dorka.Lilian@epa.gov., as well as a copy to the Case Manager, Jonathan Stein, at Stein.Jonathan@epa.gov. Documents mailed by the WVDEP to EPA will be sent to the Director, U.S. EPA External Civil Rights Compliance Office, Office of General Counsel (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460.

D. Documents submitted by the EPA to WVDEP will be sent to Jason Wandling, General Counsel at Jason.E.Wandling@wv.gov or at West Virginia Department of Environmental Protection, 601 57th St., Charleston, WV 25304.

V. EFFECT OF THE AGREEMENT

A. The WVDEP understands that, if necessary, ECRCO may visit the WVDEP, interview staff, and request such additional reports or data as are necessary for ECRCO to determine whether the WVDEP has fulfilled the terms of this Agreement.

B. The WVDEP understands that the EPA will not close its monitoring of this Agreement until ECRCO determines that the WVDEP has fully implemented this Agreement and that a failure to satisfy any term in this agreement may result in the EPA re-opening an investigation.

C. If either Party desires to modify any portion of this Agreement because of changed conditions making performance impractical or impossible, or due to material change to the WVDEP's program or authorities, or for other good cause, the Party seeking a modification will promptly notify the other in writing, setting forth the facts and circumstances justifying the proposed modification. Any modification(s) to this Agreement will take effect only upon written agreement by the Secretary of the WVDEP and the Director of ECRCO.

D. This Agreement constitutes the entire Agreement between the WVDEP and the EPA regarding the matters addressed herein, and no other statement, promise, or agreement, made by any other person will be construed to change any commitment or

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term of this Agreement, except as specifically agreed to by the WVDEP and the EPA in accordance with the provisions of Section V(C) above.

E. This Agreement does not affect the WVDEP's continuing responsibility to comply with Title VI or other federal nondiscrimination laws and the EPA's regulations at 40 C.F.R. Parts 5 and 7, nor does it affect the EPA's investigation of any other Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement.

F. The effective date of this Agreement is the date by which both Parties have signed the Agreement. This Agreement may be signed in counterparts. The Secretary, in their capacity as an official of the WVDEP, has the authority to enter into this Agreement for purposes of carrying out the activities listed in these paragraphs. The Director of ECRCO has the authority to enter into this Agreement.

On behalf of the West Virginia Department of Environmental Protection,

_____ _____

Austin Caperton (Date)
Secretary
West Virginia Department of Environmental Protection

On behalf of the U.S. Environmental Protection Agency,

_____ 10/7/2020_____

Lilian S. Dorka, Director (Date)
External Civil Rights Compliance Office
Office of General Counsel