



MISSISSIPPI STATE DEPARTMENT OF HEALTH

January 13, 2023

Anthu Hoang  
Acting Director, Office of Environmental Justice & External Civil Rights  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460  
Hoang.anthu@epa.gov

Re: MSDH's Response to EPA Complaint No: 06R-22-R4

Dear Ms. Hoang:

The recipient, Mississippi State Department of Health ("MSDH"), submits this response to NAACP's complaint filed with the United States Environmental Protection Agency ("EPA") Office of Environment Justice and External Civil Rights and Office of External Civil Rights Compliance ("OECRC") on September 27, 2022.<sup>1</sup> NAACP alleges that MSDH violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 ("Title VI"), through its administration of EPA funding. For consideration are the following two issues:

1. Whether MSDH, including the Local Governments and Rural Water Systems Improvements Boards, discriminated against the majority Black population of Jackson, Mississippi, on the basis of race and color, by intent or effect, in its funding of water infrastructure and treatment programs and activities in violation of Title VI and EPA's implementing regulation at 40 C.F.R. Part 7.
2. Whether MSDH 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 nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to MSDH's services, programs, and activities, for individuals with limited English proficiency and individuals with disabilities, and whether MSDH has public participation policies and processes that are consistent with Title VI and the other federal civil laws, and EPA's implementation regulation at 40 C.F.R. Parts 5 and 7.5.

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<sup>1</sup> EPA issued its Final Acceptance on October 20, 2022. The deadline for MSDH's response was extended to January 19, 2023.

## **MSDH'S POSITION SUMMARY**

Mississippi State Department of Health (MSDH) is a public health agency with a mission to protect and advance the health, well-being, and safety of Mississippians. Public health protection takes on many forms from ensuring the safety of food and water to setting standards for health and care facilities.<sup>2</sup> MSDH consists of more than 2,300 employees, including physicians, nurses, engineers, environmentalists, clerks, medical aides, social workers, nutritionists, disease intervention specialists, laboratory technologists, pharmacists, and others who deliver public health services throughout the state. MSDH has policies and procedures to ensure that all individuals are treated fairly without regard to political affiliation, race, national origin, sex, religious creed, age, or disability.

Now, turning to the first issue. Complainant NAACP failed to show how MSDH racially discriminated against the City of Jackson based on MSDH's administration of EPA funds— either intentionally or by way of disparate treatment. Contrary to the allegations, MSDH has never denied funding to the City of Jackson when requested through the Drinking Water Systems Improvements Revolving Loan Fund. Requests for loan funding are made by systems like the City of Jackson when they are seeking funding to meet their infrastructure needs. In short, the public water system must initiate the process of pursuing funding. Moreover, other water supply systems comprised of majority African Americans have received funding throughout the life of the program. MSDH's process for loan funding is uniform and applied the same to each water system, regardless of race. Therefore, MSDH did not discriminate against the City of Jackson.

As to the second issue, MSDH has policies and procedures in place to comply with the nondiscrimination obligations under Title VI, including meaningful public participation policies and procedures, and MSDH provides meaningful access for individuals with limited English proficiency and individuals with disabilities. Thus, MSDH has the requisite procedural safeguards in place to ensure it complies with Title VI and EPA's Title VI regulation.

## **FACTUAL BACKGROUND**

### **Overview of MSDH's Water Funding Programs**

#### **a. Public Water Supply Program**

MSDH was established in 1982.<sup>3</sup> Its mission is to advance the health, well-being and safety of all Mississippians. MSDH accomplishes this by establishing standards, recommendations, and regulations in areas affecting public health. Safe drinking water consumption is regulated by both federal and state law. MSDH's Bureau of Public Water Supply Program ("BPWS") was created to ensure that Mississippians are consuming water that is meeting the appropriate standards set forth in the Safe Drinking Water Act.<sup>4</sup>

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<sup>2</sup> <https://www.msdh.ms.gov/page/19,0,378.html>

<sup>3</sup> *Id.*

<sup>4</sup> [www.msdh.ms.gov](http://www.msdh.ms.gov)

BPWS is implemented through five program areas: (1) microbiological, chemical, and radiological monitoring of drinking water quality; (2) negotiation with consulting engineers on the final design of engineering plans and specifications for all new or substantially modified public water supplies; (3) annual surveys of each community public water supply to identify and eliminate operational and maintenance problems that may potentially affect drinking water quality; (4) enforcement to ensure that all public water supplies follow SDWA standards; and (5) licensure of water system operators and back flow assembly testers and training of water supply officials.<sup>5</sup>

To assist MSDH with maintaining the standards mandated by SDWA and to ensure that all water supply systems are able to maintain or achieve compliance status, MSDH receives federal funding from the EPA. At issue is with respect to the NAACP's complaint is the EPA funding MSDH receives to operate the State's Drinking Water System Improvements Revolving Loan Fund ("DWSIRLF") Program.

### **b. Drinking Water Systems Improvement Revolving Loan Fund**

The DWSIRLF Program is a construction loan program created in 1997.<sup>6</sup> The program's purpose is to provide low interest loan funding to water systems to assist in the expansion or repair of existing water systems based on federal guidance and state regulations.<sup>7</sup> Pursuant to state statute, the Local Governments and Rural Water Systems Improvements Board ("Board") was created to oversee the administration of the DWSIRLF program.<sup>8</sup> MSDH, as the state's primacy agency for the SDWA, is tasked with supplying the staff and facilities necessary to administer the program.<sup>9</sup>

MSDH's DWSIRLF Program is a voluntary financial infrastructure loan program. Hence, MSDH does not seek out water systems to provide funding to them. Funding is readily available for any eligible water system to access, but it is completely up to the water system to seek assistance from MSDH. The process to apply for funding is the same for all eligible water systems throughout the state of Mississippi.

Despite the program's long-standing existence, the City of Jackson has only applied for DWSIRLF funding three times in the program's twenty-five years plus existence; the first loan application was submitted in 2016. The second and third loan applications were submitted in 2019 and 2021 respectively.

### **a. Drinking Water Systems Emergency Loan Fund**

Section 41-3-16, Mississippi Code of 1972, as amended, created the Drinking Water Systems Emergency Loan Fund Program (DWSELF).<sup>10</sup> This program provides loans to

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<sup>5</sup> *Id.*

<sup>6</sup> Miss. Code Ann. § 41-3-16.

<sup>7</sup> Miss. Code Ann. § 41-26-3 defines water system as "a system for providing to the public piped water for human consumption through pipes or other constructed conveyances if the system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals."

<sup>8</sup> Miss. Code Ann. § 41-3-16(3)(a)-(h) provides a list of duties for the Board.

<sup>9</sup> Attachment 1 - DWSIRLF's Regulation.

<sup>10</sup> Miss. Code Ann § 41-3-16.

counties, municipalities, districts, or other (tax exempt) water organizations for emergency construction, repair, or replacement of drinking water facilities. This entirely state-funded loan program provides a ready funding source for such emergency projects without the federal crosscutter requirements required in (DWSIRLF) Program, thereby saving valuable time and expense. This Program eliminates the need to address emergency loans in the DWSIRLF. The basic provisions of this program are: 1) a current interest rate of 2.0%; 2) a maximum single loan amount as determined by the Board; 3) a maximum repayment period of five (5) years; and 4) the project must meet the definition of an emergency as established in the program regulations. It is also important to note that loan recipients do not pay interest during the original construction period (capitalized interest) up to a year, and that loan repayments do not begin until after project completion.<sup>11</sup>

The City of Jackson applied for emergency funding in 2016 and was awarded funding.

## **b. MSDH's Intended Use Plans**

As required by the Safe Drinking Water Act Amendments of 1996 ("SDWA"), MSDH prepares an annual Intended Use Plan (IUP). The IUP outlines how the State of Mississippi will use the funding received from the EPA Capitalization grant which is received annually. Specifically, the IUP shows in detail the goals (basic, long-term, and short-term), the structure, the associated funding sources, and the financial status of the Program; the role of the set-aside activities within the state; and most importantly, the distribution of funds towards public water system improvements projects and the criteria used to determine their ranking within the priority system in accordance with the federal law.<sup>12</sup>

### *1. Funding Limits*

Each IUP discusses the funding guidelines and restrictions. Under state law, the Board has the discretion to set the maximum amount for DWSIRLF loans, which is a statewide program.<sup>13</sup> In order to ensure that assistance is dispersed to as many water supply systems in need of water infrastructure improvements, the Board has set a maximum loan amount of \$5,000,000.00 per borrower.<sup>14</sup> However, the Board allows, on a case-by-case basis, the maximum loan limit to be exceeded by a vote of the Board. Principle loan forgiveness is also provided for water supply systems designated as a disadvantaged community. The maximum principal loan forgiveness is set at \$500,000.00.

Despite NAACP's criticism of the Board's \$5,000,000.00 cap on borrowers, the City of Jackson has repeatedly requested funds that exceeded the \$5,000,000.00 maximum cap. Each request resulted in an approval with funds being awarded when the City requested it in 2016, 2019, and 2021.

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<sup>11</sup> *Id.*

<sup>12</sup> Attachment 2 - Intended Use Plans for years 2016, 2019, and 2021. (Collective)

<sup>13</sup> Miss. Code. § 41-3-16.

<sup>14</sup> *Id.*

## 2. Priority and Ranking System

Priority ranking are given to water systems that involve the following: (1) address the most serious risk to human health, (2) are necessary to ensure compliance with the SDWA requirements, and (3) assist systems most in need, on a per household basis.<sup>15</sup>

The criteria for ranking projects within each category is intended to give priority to projects that:

- (1) benefit the most people per dollar expended;
- (2) assist systems most in need on a per household affordability basis as required by the SDWA;
- (3) use consolidation with other systems to correct existing deficiencies and improve management;
- (4) take into consideration the system's current capacity;
- (5) encourage participation in short-term and long-term technical assistance programs; and
- (6) encourage an Asset Management Plan participation in the Drinking Water Needs Survey.

Based on the funding criteria established in MSDH's IUPs, the City of Jackson received priority ranking status and received funding in the amounts that they requested to assist the city in its water infrastructure efforts.<sup>16</sup>

### **c. MSDH's Funding Provided to the City of Jackson**

Since 1997, MSDH has provided loans to eligible water systems in need. Again, DWSIRLF is a voluntary loan funding program. It is solely up to the individual water systems, not MSDH, to seek funding assistance. In its 25 years existence, MSDH has never denied funding to any eligible water system. This includes any requests for funding through the DWSIRLF program by the City of Jackson. The City of Jackson has only applied for DWSIRLF funding three times within a twenty-five-year period. Each time the City of Jackson has applied for funding, it has been awarded the amount of funding requested..

On August 1, 2016, the City of Jackson was awarded an emergency loan in the award amount of \$466,913.00. Loan repayment started via tax diversion of \$ 8,891.43 monthly beginning in August 2018. <sup>17</sup>

On September 30, 2016, the City of Jackson received its first improvements loan in the amount of \$10,861,920.00. The final loan principal amount was \$6,986,416.00. Loan repayment started via tax diversion of \$ 35,915.79 monthly in April 2021. With the final principal amount of \$6,986,416.00, the city opted to not utilize their full award

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<sup>15</sup> Attachment 2 - Intended Use Plans for years 2016, 2019, and 2021. (Collective).

<sup>16</sup> *Id.*

<sup>17</sup> Attachment 3 - Loan Agreements executed by the City of Jackson for years 2016, 2019, and 2021.

amount. The remaining unused funding of \$3,875,504.00 could have been utilized for additional system improvements at that time.<sup>18</sup>

On September 30, 2019, the City of Jackson was received another improvement loan in the amount of \$12,903.093.00. Currently, \$8,964.394.00 has been disbursed. This loan is still currently open.<sup>19</sup>

On September 30, 2021, the City of Jackson received the amount of \$ 27,953,300.00. This loan is still currently open.<sup>20</sup>

Therefore, the allegation that the City of Jackson has not been properly funded by the program administered by the MSDH is untrue and without evidence. To the contrary, the above loan agreements show that the City of Jackson has been awarded and continues to be awarded loan amounts that far exceed the maximum loan limits established by the Board.

#### **d. EPA Oversight of MSDH’s DWSIRLF Program**

To further ensure that MSDH’s DWSIRLF Program complies with federal guidelines, EPA conducts an annual review of the state’s program. If there are issues of concerns, an EPA investigator has an obligation to inform the agency so that it may take corrective action to resolve the matter. On July 28, 2022, EPA conducted its annual review of the DWSIRLF program and determined the following:

“The Mississippi DWSRF has been administered in accordance with Section 1452 of the Safe Drinking Water Act (SDWA) as amended. The program is following all terms, schedules, provisions, assurances of the IUP, the operating agreement between MSDH and the EPA, and the conditions of the capitalization grant agreement.”<sup>21</sup>

NAACP’s Complaint ultimately alleges discrimination due to the MSDH’s administration of federal funding resources; however, EPA has routinely reviewed the state’s program, including its IUPs and the state’s funding criteria, and have determined that the program follows federal law. Moreover, an annual report as recent as July 28, 2022, shows the EPA did *not* determine that MSDH’s program or funding criteria was discriminatory as to the City of Jackson or to other African American population.<sup>22</sup>

### **ARGUMENT**

- I. The Complaint’s discrimination claim should be dismissed because the complaint is untimely; or in the alternative, limited to loans for which the City of Jackson applied for DWSIRLF funding within 180 days of the filing of the Complaint on September 27, 2022.**

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Attachment 4 - June 2022 EPA Program Evaluation Report.

<sup>22</sup> *Id.*

According to the EPA’s regulations, a complaint must be filed within 180 days of the alleged discriminatory action.<sup>23</sup> Here, the complaint makes the general claim that the state of Mississippi discriminated against the City of Jackson based on its administration of federal funds. It further suggests that underfunding has occurred for over a decade.<sup>24</sup> However, these claims are so general that it is difficult to pinpoint when the alleged discriminatory action took place by MSDH. Notably, the NAACP admits that the only DWSIRLF funding the City of Jackson applied for to improve its drinking water infrastructure was in the years 2016, 2019, and 2021. Again, each of these three loan requests were approved. Hence, it is difficult to determine how and when the City of Jackson has been racially discriminated against by MSDH. Furthermore, even though the Board implemented a funding limit of \$5,000,000.00, the City of Jackson has requested and received DWSIRLF funding that exceeded the maximum.

Based on the most recent DWSIRLF loan agreement executed by the City of Jackson to apply the 180-day filing period, the Complaint should have been filed by March 30, 2022. Instead, the complaint was filed on September 27, 2022. Thus, NAACP’s racial discrimination complaint is time-barred. In the alternative, EPA’s investigation must be limited to any specifically identified acts of discrimination within the 180-day time period before the filing of the Complaint.

**II. MSDH, including the Board, did not discriminate against the majority Black population of Jackson, Mississippi, on the basis of race and color, by intent or effect, in its funding of water infrastructure and treatment programs and activities in violation of Title VI and EPA’s implementing regulation at 40. C.F.R. Part 7.**

**a. Disparate treatment**

Federal civil rights laws and EPA’s implementing regulation prohibits recipients of federal funding, such as MSDH, from intentionally discriminating in their programs and activities based on race, color, or national origin, disability, sex, or age.<sup>25</sup> This is referred to as “disparate treatment.”<sup>26</sup> The regulation at 40 C.F.R. Section 7.35 (a), states that “a recipient shall not on the basis of race, color, or national origin provide a person any service, aid, or other benefit that is different, or is provided differently from the provided to others under the program or activity.”

Intentional discrimination requires a showing that a “challenged action was motivated by an intent to discriminate.”<sup>27</sup> Evidence of “bad faith”, ill will, or any evil motive on the part of the recipient is not necessary. However, evidence in a disparate treatment case must generally show that the recipient acted, at least in part, because of

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<sup>23</sup> 40 C.F.R. Part 7.

<sup>24</sup> See *Complaint*, page 13, paragraph 37.

<sup>25</sup> 40 C.F.R. § 7. 30 et seq; 42 U.S.C. §§ 2000d to 2000d-7.

<sup>26</sup> See *Ricci v. DeStefano*, 557, 577 (2009) (“Title VII prohibits intentional discrimination known as ‘disparate treatment’).

<sup>27</sup> *Elston v. Talladega Cty. Bd. Of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1984).

the complainant's protected status.<sup>28</sup> The totality of the relevant facts" determine whether intentional discrimination has occurred.<sup>29</sup> Intentional discrimination under Title VI may be proven by either direct or indirect evidence.<sup>30</sup> A policy or decision that is discriminatory on its face is direct evidence of intentional discrimination<sup>31</sup>.

Here, there is simply no evidence that MSDH, including the Board, discriminated against the City of Jackson based on race. The application process for all loans is the same for every applicant, regardless of race. In fact, MSDH's application process mirrors other DWSIRLF programs throughout the country. MSDH has and continues to create its annual IUPs that details its funding processes and procedures. The previous and the current IUPs do not and have never focused on race demographics. The focus has always been on providing financial assistance to applicants with water systems infrastructure needs throughout the state of Mississippi. The City of Jackson has never been denied a loan nor has any other applicant. In fact, the City of Jackson continues to receive funds in excess of the Board's maximum funding limits so that the city can operate and maintain its water facilities.

Moreover, the Complaint erroneously places blame on MSDH. For example, the complaint states "*MSDH both received funds from EPA to provide safe drinking water and wastewater, and were aware of Jackson's severe needs, but distributed to the city only a small portion fraction and disproportionate low amount.*"<sup>32</sup> Again this statement is incorrect as the City of Jackson has always been able to petition the Board and ask for funding, as can any other applicant. This has been the case since the program's inception. The complaint further asserts, "*MSDH have engaged in a long-standing pattern and practice of systematically depriving Jackson the funds that it needs to operate and maintain its water facilities in a safe and reliable... State agencies awarded federal funds from DWSRF just (3) three times in the (25) twenty-five years that the program has been in existence.*"<sup>33</sup> Additionally, funding for wastewater infrastructure is provided through the Mississippi Department of Environmental Quality, a separate and distinct agency. Federal Clean Water State Revolving Loan Fund dollars are provided to that agency from the EPA in much the same way as MSDH.

The reason that the City of Jackson has received funding from MSDH three (3) times since the program's existence is because that is how many requests for funding have been made by the City of Jackson. As previously mentioned, the program is a voluntary statewide program. This means that is up solely up to the City of Jackson to seek DWSIRLF. The City of Jackson was aware of its drinking water issues, however, the City of Jackson failed to request funding from MSDH until 2016, (15) fifteen years after the program's existence. Therefore, it is completely impossible for *MSDH to engage in a long-standing practice of systematically depriving the City of Jackson with funds* when, in fact, the City of Jackson did not ask for funding until recently and was approved. Further as the loan agreements shows, MSDH has never "*deprived*" the City of Jackson

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<sup>28</sup> *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

<sup>29</sup> *See Washington v. Davis*, 426 U.S.229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts.").

<sup>30</sup> *Sagr v. Univ. of Cincinnati*, No. 1:18-cv-542, 2019 U.S.District. LEXIS 26467, at \*39 (S.D.Ohio Feb.20, 2019).

<sup>31</sup> EPA Toolkit, p.3.

<sup>32</sup> *See Complaint*, Page 4, Paragraph 1.

<sup>33</sup> *Id.*



of funding. Other water organizations comprised of majority African American have applied for and received funding throughout the program's (25) twenty-five-year existence using the same requirement and funding model that is afforded to the City of Jackson.

Therefore, MSDH does not bear the responsibility for the City of Jackson's long-standing water issues. MSDH is only responsible for equitable distribution of funds to any water system in need, regardless of race, color, national origin, sex, or religion. MSDH has done this. MSDH has met its obligations in this regard to the City of Jackson and all other water systems that have requested funding.

**b. MSDH did not operate its DWSIRILF Program in a manner that disparately impacted the City of Jackson.**

**i. Facially neutral policy or practice**

EPA must “accurately and completely define the policy or practice at issue.”<sup>34</sup> This is a fact-specific inquiry, and in some instances, EPA may need to “burden its inquiry beyond the specific complaint allegations” to define the policy or practice.<sup>35</sup> The policy or practice could be overt. For example, a policy or practice of issuing wastewater permits to applicants who have complied with the environmental laws and regulations is a facially neutral policy. Sometimes the challenged policy or practice could be the absence of a policy or practice.<sup>36</sup> For example, if a recipient does not have a policy of providing language assistance to individuals with limited English proficiency, such individuals will potentially not have equal access to agency programs.<sup>37</sup>

Here, MSDH's policies and practices did not and do not disparately impact the City of Jackson. The policies at issue are the policies established to properly operate the DWSIRILF Program. Of significance, these policies were created pursuant to federal and state guidelines. MSDH operates its program the same statewide. All applicants are held to the same standard, regardless of race or color. Moreover, the City of Jackson's water issues occurred long before 2016— the year the City of Jackson first applied for a DWSIRILF loan. Hence the long-standing issues involving the City of Jackson's water system are not a result of MSDH's policies or lack thereof. Instead, MSDH has helped by providing loans to assist the City of Jackson any time a request has been made to the agency.

**ii. Adversity of harm**

“Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm.”<sup>38</sup> To determine whether there has been an adverse and disproportionate impact, EPA considers environmental harms and adverse health effects on race, color, or national origin. EPA

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<sup>34</sup> DOJ Manual, Section VII.C.1.a, p.9.

<sup>35</sup> *Id.*

<sup>36</sup> DOJ Manual, Section VII. C.1.a, p. 12.

<sup>37</sup> *Id.*

<sup>38</sup> EPA Toolkit, p. 18 (n.41).

also considers non health harms including economic harms, nuisance odors, traffic congestion, noise, and vermin.<sup>39</sup>

In this matter, there is simply no adversity nor harm that has occurred to the majority of African American residents of the City of Jackson resulting from MSDH's action or inaction as it relates to its administration of funds through the DWSIRLF Program. Again, the City of Jackson has never been denied a loan nor has any other applicant. In fact, the City of Jackson continues to receive funds in excess of the Board's maximum funding limits so that the city can operate and maintain its water facilities. Furthermore, MSDH has always been available to provide funding to the City of Jackson earlier than year 2016; however, the City of Jackson failed to seek assistance from MSDH prior to year 2016. Thus, there is no evidence to suggest that MSDH discriminated against the majority population of the City of Jackson through its administration of EPA funding.

### iii. Disparity

Disparity occurs when “a disproportionate share of the adversity or harm is borne by individuals based on their race, color, national origin, age, disability, or sex.”<sup>40</sup> Disparity may be determined by comparing the proportion of the members of the protected class who are adversely affected to the proportion of those not in the protected class who are adversely affected.<sup>41</sup> Once the investigation agency identifies the protected class, it must evaluate whether there is available statistical evidence necessary to evaluate a disparity claim.<sup>42</sup> EPA will “evaluate population or demographic information of the impacted community as compared to an appropriate comparison population that is similarly situated.”<sup>43</sup> Disparity can also be obvious.<sup>44</sup> For example, if a recipient's policy or practice would effectively exclude people with limited English proficiency, disparity is evident without the need for statistics.<sup>45</sup>

“The disparate impact rule only prohibits causing disparate impacts, not the mere existence of disparate impacts or conditions, neither Title VI nor the disparate impact rule necessarily requires a racially balanced result or condition.”<sup>46</sup> Courts decline to find disparate impact discrimination where any policy or action taken with respect to a certain group will necessarily affect more protected individuals than those who are not protected, when allegations of discrimination involve nothing more than statistical disparity.<sup>47</sup> Proving disparate impact under Title VI requires “a reliable indicator of disparate impact” and “an appropriate statistical measure” that takes into account all relevant bases of comparison.”<sup>48</sup>

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<sup>39</sup> EPA Toolkit FAQs, p.4.

<sup>40</sup> EPA Toolkit, p. 18 (n. 42).

<sup>41</sup> *Id.* at n. 42 (citing *Tsombanidis v. W. Haven Fire Dep't*, 352 F. 3d 565, 576-77 (2d Cir. 2003)).

<sup>42</sup> DOJ Manual, Section VII. C.1.c, p. 17.

<sup>43</sup> EPA Toolkit, p. 15.

<sup>44</sup> DOJ Manual, Section VII. C.1.c, p. 19.

<sup>45</sup> *Id.*

<sup>46</sup> *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty's. Project, Inc.*, 576 U.S. 519, 542 (citing *United States v. Lowndes County Bd. Of Educ.*, 878 F.2d 1301, 1305 (11 th Cir. 1989)).

<sup>47</sup> *See, e.g., Ewards v. Johnson Cty. Health Dep't*, 855 F.2d 1215, 1223-24 (4 th Cir. 1989).

<sup>48</sup> *S. Bronx Coal.forCleanAir v. Conroy*, 20 F. Supp. 2d 565, 573 (S.D.N.Y. 1998) (citing *New York UrbanLeague, Inc. v. State of New York*, 71 F.3d 1031, 1038 (2d Cir. 1995)).

The disparity element cannot be proven in this instance because the majority population of the City of Jackson suffered no harm or adversity on the part of MSDH in any capacity. Moreover, other water supply systems comprised of majority African Americans have also received funding throughout the life of the program. MSDH's process required to receive funding is uniform and applied the same to each water system throughout the state of Mississippi, regardless of race. To add, MSDH's application process mirrors other DWSIRLF programs throughout the country.

#### **iv. Causation**

There must be a causal connection between the recipient's facially neutral policy and a disproportionate and adverse impact on the protected class.<sup>49</sup> "When EPA investigates complaints alleging adverse impacts from facilities permitted by recipients, it may consider "scientific proof of a direct link, prediction of potential significant exposure and risk resulting from stressors created by permitted activities or other sources, and other complex methodologies."<sup>50</sup> There must be "robust causalities requirement" in ensuring entities are not 'held liable for racial disparities they did not create'"<sup>51</sup>

MSDH's DWSIRLF Program is a voluntary financial infrastructure loan program. Hence, MSDH cannot seek out water systems to provide funding to them. Funding is readily available for any eligible water system to access, but it is completely up to the water system to seek assistance from MSDH. In this instance, the City of Jackson's failure to timely seek assistance from MSDH is what contributed to the ongoing water issues and the adverse impact to the majority of its resident, not MSDH's policies or practices.

#### **v. Is there a substantial legitimate justification for the policy or practice?**

If EPA determines that there is a prima facie case of adverse disparate impact, which MSDH asserts does not exist, EPA must then consider whether the recipient has stated a "substantial legitimate justification" for the challenged policy or practice.<sup>52</sup> Further, EPA must consider whether the recipient can show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the recipient institutional mission."<sup>53</sup>

MSDH did not discriminate against the majority Black population of the City of Jackson via its policies and procedures relating to the DWSIRLF Program. Although it is still unclear as to what specific policy or practice is being challenged here, all of MSDH's policies are applied fairly and pursuant to its program's objectives. DWSIRLF's purpose is to provide low interest loan funding to water systems to assist in the expansion or repair of existing water systems based on federal guidance and state regulations. The funding MSDH receives is for the betterment of all water systems in Mississippi. Therefore, the

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<sup>49</sup> EPA Toolkit, p. 19 (n.43) (citing *N.Y.C. Envtl. Justice All. V. Giuliani* 214 F. 3d 65, 69 (2d Cir. 2000)).

<sup>50</sup> DOJ Manual, Section VII.C.1.d, p. 28 (citing EPA investigations Guidance, 65 Fed. Reg. at 39, 679).

<sup>51</sup> *Id.* (citing *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015)).

<sup>52</sup> EPA Toolkit, p. 9.

<sup>53</sup> *Id.* (citing *Elston v. Talladega County Bd. of Educ.*, 997 F. 3d 1394, 1413 (11 th Cir. 1993)).

application process is the same for all applicants. If policies and procedures are not applied uniformly, the effect could leave some water systems without any funds. In order to ensure that assistance is dispersed to as many water supply systems in need of water infrastructure improvements, the Board has set a maximum loan amount of \$5,000,000.00 per borrower. Despite this loan cap, applicants are still able to petition the Board for loan amounts in excess of \$5,000,000.00, which is what the City of Jackson did.

#### **vi. Are there less discriminatory alternative or mitigation**

If the recipient demonstrates a substantial legitimate justification for the challenged policy or practice, EPA must determine whether there are any equally effective, less discriminatory alternatives.<sup>54</sup> For example, if a recipient considers issuing an environmental permit in a minority community that could adversely and disproportionately affect the community, the recipient must consider whether it can prevent such adverse and disproportionate effects by requiring the facility to operate in a manner that would eliminate or mitigate its disproportionate impact, or by not renewing the permit.<sup>55</sup> If there are no available mitigation measures, whether within or outside the permitting program, denial of the permit may be the only way to avoid a Title VI violation.<sup>56</sup>

Contrary to NACCP's allegations, the City of Jackson has never been deprived of requested funding by MSDH. The only DWSIRLF funding the City of Jackson applied for to improve its drinking water infrastructure was in the years 2016, 2019, and 2021. Again, each of these three loan requests were approved. There are simply no other alternative measures that can be done as MSDH has operated its program uniformly and fairly across the board.

### **III. MSDH 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 nondiscrimination obligation.**

In accordance with Title VI, MSDH maintains policies and procedures such that all employees and individuals are treated fairly without regard to political affiliation, race, national origin, sex, religious creed, age, disability, or limited English proficiency.<sup>57</sup> MSDH is constantly changing its policy to ensure it meets the standards set out in Title VI.

For example, health equity policy and procedures has been implemented throughout the agency.<sup>58</sup> This policy is intended to promote health equity in all policies, practices, and processes within MSDH. Moreover, MSDH employees are provided health equity training so employees are able to explain, describe, and apply core principles of health

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<sup>54</sup> EPA Toolkit, p. 9.

<sup>55</sup> *Id.* at p. 15

<sup>56</sup> EPA FAQs, p. 15 (FAQ 14).

<sup>57</sup> Attachment 5 - MDHS's Equal Opportunity Policy

<sup>58</sup> Attachment 6 – MDHS's Health Equity Policy and Procedures

equity. MSDH has also developed a communication policy that strictly prohibits its employees from discriminating against individuals via social media platforms.<sup>59</sup>

Recently, MSDH’s employees attended a training held on August 1, 2022; August 2, 2022; and August 5, 2022. This training provided instructions on how employees can reach interpreters. The training was uploaded to the MSDH’s Health Stream on August 23, 2022. Each staff member that attended the training was provided with a certificate. The training was conducted by Cesco staff Gabriela Siebach and Camila Prado-Irwin. MSDH employee, and Director of the Language Access Program, Selma Alford moderated the training.<sup>60</sup>

Limited English proficiency (LEP) notices are now provided every place where the community is served.<sup>61</sup> This includes all county health departments, Women and Children (“WIC”) offices and dental offices. On MSDH’s website, individuals can find the process for filing a grievance or complaint and review MSDH’s nondiscrimination notice.<sup>62</sup> LEP individuals can access information about availability of no-cost, qualified language interpreters by going to MSDH’s website or by contacting the Office of Preventative Health and Health Equity. While MSDH does not have an official Plan published at this time, a proposed plan is currently being reviewed for publication this month.<sup>63</sup>

MSDH has staff members who are bilingual and multilingual. Additionally, MSDH also has a language access department which has contracted with the providers to provide interpretation services in more than 200 languages. These services are available throughout all MSDH Offices statewide. LEP or individuals with American Sign Language needs can access these services in person, by telephone, online or through video service delivery.<sup>64</sup>

#### **IV. OBJECTIONS TO THE INVESTIGATION AND FUTURE FINDINGS**

MSDH is gravely concerned with EPA’s failure to provide adequate and meaningful standards in which MSDH can adhere to and defend against as it relates to Title VI compliance. MSDH expressly reserves all rights to whether the scope and procedures employed in connection with this investigation (and any future findings) exceed EPA’s statutory authority under Title VI. EPA’s External Civil Rights Compliance Office published Chapter 1 of its Toolkit in 2017 (“Toolkit”). However, this Toolkit fails to provide recipients with proper guidance as to what is required and what measures recipients must implement to comply with Title VI.<sup>65</sup> Hence, threatening to withdraw federal funds from MSDH for its failure to meet standards— that have not been fully articulated or established— goes against this nation’s system of federalism.

Moreover, the EPA is well aware that the City of Jackson’s longstanding water system infrastructure issues are not caused by any discrimination from MSDH. On

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<sup>59</sup> Attachment 7 - MSDH’s Communication Policy on Social Media

<sup>60</sup> Attachment 8- Title VI Training

<sup>61</sup> Attachment 9 - MSDH’s LEP Notices

<sup>62</sup> Attachment 10 - MSDH’s External Complaint Process and Nondiscrimination Notice

<sup>63</sup> Attachment 11 - Language Access Plan Draft

<sup>64</sup> Attachment 12 - Cesco Agreements and Uniform Technical Translation. (Collective).

<sup>65</sup> The Toolkit focuses on legal standards for disparate treatment and disparate impact claims only.

February 28, 2020, MSDH sent a letter to EPA expressing its concerns with the City of Jackson's failure to comply with the Safe Drinking Water Act ("SDWA").<sup>66</sup> The EPA, after conducting its own investigation, cited the City of Jackson for multiple violations.<sup>67</sup> The City of Jackson's failure to properly maintain its water systems was further evidenced through the written Administrative Compliance Order of Consent.<sup>68</sup> The Consent Order showed the City of Jackson water systems could not perform membrane integrity testing; their turbidity exceeded recommended levels, equipment was not properly being maintained, and the City of Jackson failed to develop a Comprehensive Equipment Repair Plan approved by the EPA.<sup>69</sup> Furthermore, the EPA found additional violations beyond what was identified in the Emergency Order.

Therefore, for the reasons provided above, MSDH respectfully requests that EPA return preliminary findings that MSDH, including the Board, did not violate Title VI in its administration of EPA funding to the City of Jackson and that MSDH has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7.

Should you have any further questions or concerns, please contact me directly at [Demetrica.olabintan@ago.ms.gov](mailto:Demetrica.olabintan@ago.ms.gov).

Sincerely,

*Demetrica Olabintan*

Demetrica Olabintan  
Special Assistant Attorney General

Cc: Monique Wright-Hudson, EPA  
Jim Craig, MSDH Senior Deputy  
Christin Williams, MSDH Attorney  
Lateysha Martin, Special Assistant Attorney General

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<sup>66</sup> Attachment 13- MSDH's Letter to EPA (February 2020)

<sup>67</sup> Attachment 14- EPA City of Jackson Emergency Administrative Order 1431 03272020

<sup>68</sup> Attachment 15- Administrative Compliance Order of Consent

<sup>69</sup> *Id.*

Attachments:

- Attachment 1 - DWSIRLF's Regulation
- Attachment 2 a - MSDH's Intended Use Plan (2016)
- Attachment 2 b - MSDH's Intended Use Plan (2019)
- Attachment 2 c - MSDH's Intended Use Plan (2021)
- Attachment 3 a-1 - Loan Agreement executed by the City of Jackson Initial (2016)
- Attachment 3 a-2 - Loan Agreement executed by the City of Jackson Final (2016)
- Attachment 3 b - Loan Agreement executed by the City of Jackson (2019)
- Attachment 3 c - Loan Agreement executed by the City of Jackson (2021)
- Attachment 3 d - Emergency Loan Agreement (2016)
- Attachment 4 - June 2022 EPA Program Evaluation Report
- Attachment 5 - MSDH's Equal Opportunity Policy
- Attachment 6 - MSDH's Health Equity Policy and Procedures
- Attachment 7 - MSDH's Communication Policy
- Attachment 8 - Title VI Training
- Attachment 9 - MSDH's LEP Notices
- Attachment 10 - MSDH's External Complaint Process and  
Nondiscrimination Notice
- Attachment 11 - Language Access Plan Draft
- Attachment 12 a - Cesco Agreement 1
- Attachment 12 b - Cesco Agreement 2
- Attachment 12 c - Cesco Agreement 3
- Attachment 12 d - Cesco Agreement 4
- Attachment 12 e - Universe Technical Translation 1
- Attachment 12 f - Universe Technical Translation 2
- Attachment 12 e - Universe Technical Translation 3
- Attachment 13 - MSDH's Letter to EPA (2020)
- Attachment 14 - EPA City of Jackson Emergency Administrative Order  
1431 03272020
- Attachment 15 - Administrative Compliance Order of Consent (July 2021)