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**VIA E-mail to [Regan.Michael@epa.gov](mailto:Regan.Michael@epa.gov); [Dorka.Lilian@epa.gov](mailto:Dorka.Lilian@epa.gov);**  
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**Re: Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,  
regarding the Tennessee Department of Environment and Conservation**

Dear Administrator Regan and Director Dorka:

On behalf of Memphis Community Against Pollution, Inc. (“MCAP”),<sup>1</sup> the Southern Environmental Law Center submits this complaint against the Tennessee Department of Environment and Conservation (“TDEC”) for its issuance of the Aquatic Resource Alteration Permit and Section 401 Certification for the Byhalia Connection Pipeline (combined, “Byhalia Pipeline Permit”),<sup>2</sup> which will result in unjustified disparate adverse impacts on the basis of race against African Americans in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, as well as the Title VI implementing regulations of the United States Environmental Protection Agency (“EPA”), 40 C.F.R. Part 7.

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<sup>1</sup> Memphis Community Against Pollution, Inc. (“MCAP”) is a Tennessee not-for-profit corporation founded in October 2020 and incorporated in March 2021. MCAP continues to organize and advocate as Memphis Community Against the Pipeline, the name used at founding. MCAP supporters include local community members who oppose the Byhalia Connection Pipeline. MCAP opposes the proposed Byhalia Pipeline because the risks to drinking water, damage to surface water resources, and infringement of property rights cause disproportionate harms to Black residents and landowners.

<sup>2</sup> NRS20.089 (Nov. 17, 2020),

[http://tdec.tn.gov:8080/pls/enf\\_reports/f?p=9034:34051:::NO:34051:P34051\\_PERMIT\\_NUMBER:NRS20.089](http://tdec.tn.gov:8080/pls/enf_reports/f?p=9034:34051:::NO:34051:P34051_PERMIT_NUMBER:NRS20.089) (“Byhalia Pipeline Permit”) (Attachment A).

The Byhalia Connection Pipeline is a proposed 49-mile high-pressure crude oil pipeline that would run directly through the municipal wellfield that supplies drinking water for historic Black neighborhoods in Memphis, Tennessee. The developer of this proposed pipeline, Byhalia Pipeline LLC, chose a route through communities that are 97% Black, low-income, and already burdened by dozens of industrial facilities and major pollution sources. Byhalia Pipeline LLC had other options, as demonstrated in an addendum to its permit application. However, the company did not bother to analyze whether any of those routes might cause fewer disproportionately adverse impacts, and TDEC did not require that analysis, despite public comments raising concerns about the environmental justice implications of the proposed pipeline route. Byhalia Pipeline LLC also has options in addition to those disclosed in its addendum to its permit application including, as discussed below, an existing pipeline which could serve the same proposed purpose as the Byhalia Pipeline.

Relying on Byhalia's inadequate application, TDEC issued a permit that will disparately impact Black communities in southwest Memphis, without any justification or explanation for those disparate impacts. By doing so, it has violated Title VI of the Civil Rights Act of 1964, which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>3</sup> TDEC is further violating Title VI by adopting a policy of not considering disproportionate impacts and environmental justice in its permitting decisions, as the agency explains in the Notice of Determination for the Byhalia Pipeline Permit.<sup>4</sup>

To remedy these violations, EPA must require TDEC to revoke the Byhalia Pipeline Permit in order to fully consider the disproportionate adverse impacts that result from the current pipeline route, and whether those impacts are justified. With EPA's guidance, TDEC must also develop a permit approval process that appropriately considers the potential for disproportionate impacts, as required by Title VI.

## **I. Jurisdiction**

Jurisdiction for an EPA Title VI complaint requires four elements: (1) the complaint must be in writing; (2) it must allege discriminatory acts that, if true, violate EPA's Title VI regulations; (3) it must identify a recipient of EPA funding that committed the alleged discriminatory act; and (4) it must be filed within 180 days of the alleged discriminatory act.<sup>5</sup> This complaint is clearly in writing, alleges below discriminatory acts that violate Title VI, and

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<sup>3</sup> 42 U.S.C. § 2000d.

<sup>4</sup> See TDEC, *Notice of Determination for NRS20.089* (Nov. 9, 2020), 8-9 ("Notice of Determination") (Attachment B).

<sup>5</sup> 40 C.F.R. § 7.120; see also EPA External Civil Rights Compliance Office, *Case Resolution Manual* (January 2017), 7-11, [https://www.epa.gov/sites/production/files/2017-01/documents/final\\_epa\\_ogc\\_ecrco\\_crm\\_january\\_11\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf).

was filed within 180 days of those acts.<sup>6</sup> The third element is met by noting that TDEC committed the alleged discriminatory acts, and it is a recipient of EPA funding.

TDEC is an state government agency that must comply with Title VI requirements.<sup>7</sup> At the time of the Byhalia Pipeline Permit approval, TDEC was a recipient of EPA assistance.<sup>8</sup> According to USASpending.gov, “the official source for spending data for the U.S. Government”<sup>9</sup>, EPA awarded TDEC \$56.38 million in funds in fiscal year 2020.<sup>10</sup> This figure includes \$23.09 million in capitalization grants for Clean Water State Revolving Funds and \$19.13 million in capitalization grants for Drinking Water State Revolving Funds.<sup>11</sup> It also includes \$9.6 million in Performance Partnership Grants.<sup>12</sup> The Performance Partnership Grant in effect in November 2020 was specifically “for the operation of [TDEC’s] continuing environmental programs in their efforts to improve air, surface, and ground water quality, and ensure safe public drinking water supplies.”<sup>13</sup>

Under Title VI, if any part of a public institutions, such as a state environmental agency, receives federal funds, the whole entity is covered by Title VI.<sup>14</sup> TDEC is required to comply with Title VI and EPA’s Title VI implementing regulations in the operation and enforcement of its Aquatic Resource Alteration Permit (“ARAP”) and Section 401 Certification program, and this complaint alleges that it failed to do so, resulting in disproportionate adverse impacts to

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<sup>6</sup> 40 C.F.R. § 7.120(b)(2). The Byhalia Pipeline Permit was issued on November 17, 2020, so this complaint is timely filed. EPA also retains authority to waive the time limit for good cause. *Id.*

<sup>7</sup> Tenn. Code Ann. § 4-21-904.

<sup>8</sup> Under EPA’s Title VI regulations, a “[r]ecipient” is “any State or its political subdivision, any instrumentality of a State or its political subdivision, [and] any public or private agency... to which Federal financial assistance is extended directly or through another recipient . . .” 40 C.F.R. § 7.25. “EPA assistance” is “any grant or corporative agreement, loan, contract . . . , or any other arrangement by which EPA provides or otherwise makes available assistance in the form of funds. . .” *Id.*

<sup>9</sup> USA Spending, *About*, <https://www.usaspending.gov/about> (accessed May 16, 2021).

<sup>10</sup> USA Spending, *ENVIRONMENT AND CONSERVATION, TENNESSEE DEPARTMENT OF | Federal Award Recipient Profile*, <https://www.usaspending.gov/recipient/42d3aa10-7619-e5e2-769a-19a265670ece-C/2020> (accessed May 16, 2021).

<sup>11</sup> *Id.* The Clean Water State Revolving Fund capitalization grants provide federal financial assistance for the purpose of developing and financing various water quality improvement and protection projects. USA Spending, *GRANT to ENVIRONMENT AND CONSERVATION, TENNESSEE DEPARTMENT OF*, [https://www.usaspending.gov/award/ASST\\_NON\\_47000120\\_6800](https://www.usaspending.gov/award/ASST_NON_47000120_6800) (accessed May 16, 2021). The Safe Drinking Water Revolving Fund capitalization grants provide federal financial assistance for the purpose of developing and financing “drinking water improvement projects and activities to protect human health.” USA Spending, *GRANT to ENVIRONMENT AND CONSERVATION, TENNESSEE DEPARTMENT OF*, [https://www.usaspending.gov/award/ASST\\_NON\\_98427220\\_6800](https://www.usaspending.gov/award/ASST_NON_98427220_6800) (accessed May 16, 2021).

<sup>12</sup> USA Spending, *GRANT to ENVIRONMENT AND CONSERVATION, TENNESSEE DEPARTMENT OF*, [https://www.usaspending.gov/award/ASST\\_NON\\_00D39119\\_6800](https://www.usaspending.gov/award/ASST_NON_00D39119_6800) (accessed May 16, 2021).

<sup>13</sup> *Id.*

<sup>14</sup> See EPA, *U.S. EPA’s External Civil Rights Compliance Toolkit, Chapter 1* (Jan. 18, 2017), 2, [https://www.epa.gov/sites/production/files/2020-02/documents/toolkit\\_ecrco\\_chapter\\_1-letter-faqs\\_2017.01.18.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf) (“Civil Rights Compliance Toolkit”).

groups protected under Title VI. In the event that TDEC does not take the actions requested in this complaint to achieve full compliance with Title VI, EPA should revoke federal funding used by TDEC for the ARAP and Section 401 Certification program.

## II. Background

### A. *The Southwest Memphis Community*

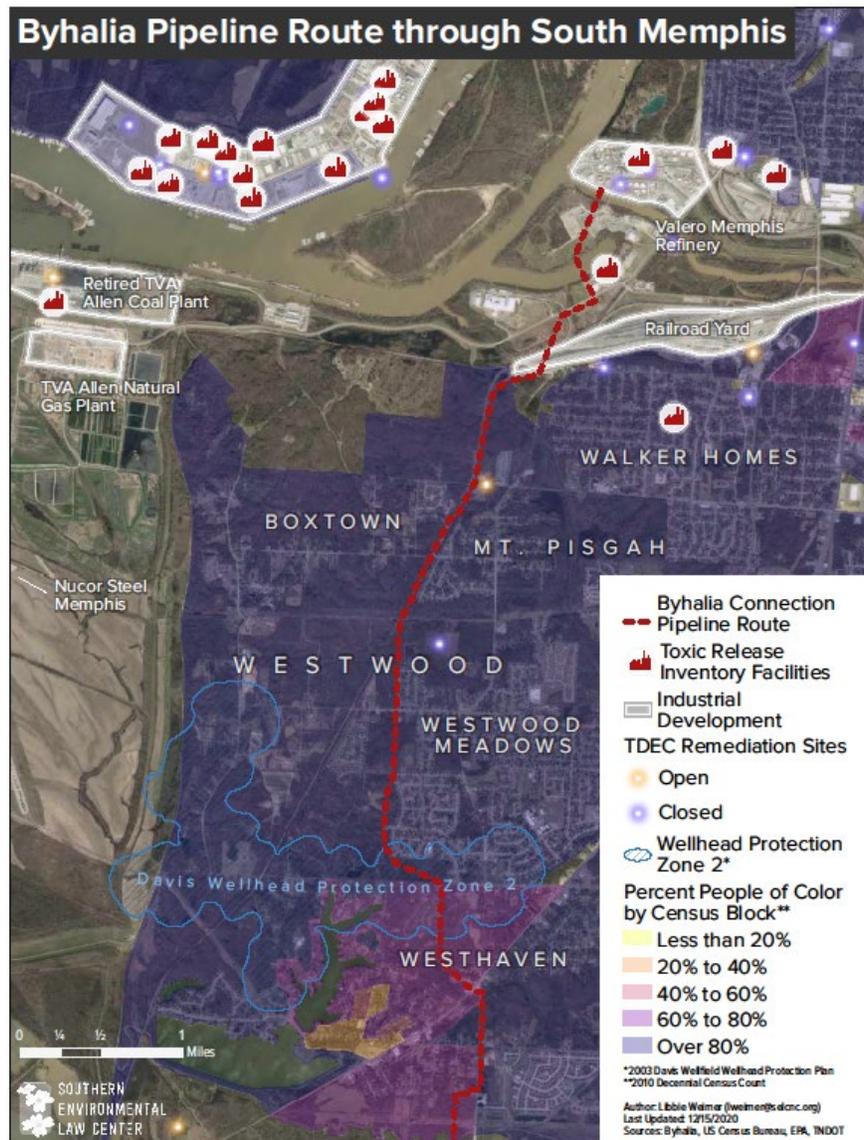
A crude oil spill or leak from the Byhalia Pipeline along the route approved by TDEC could contaminate the drinking water source of southwest Memphis, a predominately Black community long overburdened by industrial pollution. The proposed route cuts through the heart of Boxtown, a freedmen's community established by formerly enslaved people following the Emancipation Proclamation of 1863.<sup>15</sup> Residents in the neighborhood's zip code, 38109, are 97% Black,<sup>16</sup> and nearly half of the households have an income below \$25,000 a year.<sup>17</sup> As shown on the map below, southwest Memphis is already home to numerous industrial facilities, including an oil refinery, a steel mill, a recently retired coal-fired power plant with leaking, unlined coal ash pits, and a new natural gas plant.

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<sup>15</sup> Aubrey Ford, Phoebe Weinman and Walker Weinman, *Boxtown: The Land of Broken Promises*, Storyboard Memphis (Sept. 16, 2019), <https://storyboardmemphis.org/neighborhood-board/boxtown/>.

<sup>16</sup> United States Census Bureau, *RACE (TOTAL RACES TALLIED), ZCTA5 38109, Tennessee*, <https://data.census.gov/cedsci/table?q=38109%20race&tid=DECENNIALSF12010.P6> (accessed May 16, 2021).

<sup>17</sup> United States Census Bureau, *INCOME IN THE PAST 12 MONTHS (IN 2018 INFLATION-ADJUSTED DOLLARS), ZCTA5 38109, Tennessee*, [https://data.census.gov/cedsci/table?g=8600000US38109&tid=ACSST5Y2018.S1901&hidePreview=false&vintage=2018&layer=zcta5&cid=DP05\\_0001E](https://data.census.gov/cedsci/table?g=8600000US38109&tid=ACSST5Y2018.S1901&hidePreview=false&vintage=2018&layer=zcta5&cid=DP05_0001E) (accessed May 16, 2021).



These industrial facilities have burdened the predominantly Black communities of southwest Memphis with what may be some of the nation’s worst air quality, and with increasing threats to their drinking water and surface waters. For example, the Tennessee Valley Authority’s Allen Coal Plant spewed pollutants into the air in southwest Memphis for decades. Although that coal plant retired in 2018, it remains a pollution problem due to high levels of arsenic and other coal ash contaminants leaching into groundwater and surface waters such as the Horn Lake Cutoff and McKellar Lake.<sup>18</sup> The Tennessee Valley Authority now operates a natural

<sup>18</sup> John Carmichael et al., *Preliminary evaluation of the hydrogeology and groundwater quality of the Mississippi River Valley Alluvial Aquifer and Memphis Aquifer at the Tennessee Valley Authority*

gas plant next door to the coal plant. The gas plant contributes to the area's air pollution and also consumes an enormous amount of southwest Memphis's clean drinking water to operate.<sup>19</sup> For decades the Valero Memphis Refinery has been emitting toxic fumes, as well as being the center of convergence for several existing hazardous liquids pipelines.<sup>20</sup> As recently as February 2021, the Valero Refinery polluted Nonconnah Creek with oil and the air with toxic hydrogen sulfide during a flare event.<sup>21</sup> The site of the Valero Memphis Refinery is also a long-standing source of groundwater contamination, including benzene, that has been in remediation for decades.<sup>22</sup> Driven by toxic pollutants like benzene and formaldehyde, the cumulative cancer risk in southwest Memphis is four times higher than the national average.<sup>23</sup>

### B. The Proposed Byhalia Connection Pipeline

Byhalia Pipeline LLC proposes to run a 49-mile high-pressure crude oil pipeline through these already overburdened communities in order to connect the existing Valero Memphis Refinery with the Valero Collierville Terminal in Marshall County, Mississippi.<sup>24</sup> Rather than lead Byhalia to look elsewhere, the environmental injustice in southwest Memphis is precisely *why* Byhalia chose this route. Instead of taking the shortest route due east, the proposed route heads due south, through communities of color, before turning east and traversing parts of Northern Mississippi, and eventually back north. Explaining the circuitous route to landowners, a

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*Allen Power Plants, Memphis, Shelby County, Tennessee*, United States Geological Survey Open-File Report 2018-1097, <https://pubs.er.usgs.gov/publication/ofr20181097>; MLGW Interdepartmental Memorandum (May 5, 2021), 15, 20 (Attachment C).

<sup>19</sup> Tom Charlier, *TVA absorbing higher costs to cool new Memphis power plant*, Memphis Commercial Appeal (July 6, 2018), <https://www.commercialappeal.com/story/news/2018/07/06/tva-mlgw-cooling-water/759124002/>.

<sup>20</sup> Sarah Macaraeg, *Byhalia pipeline: Toxic refinery pollution, monitoring blind spot in southwest Memphis*, Memphis Commercial Appeal (Mar. 16, 2021), <https://www.commercialappeal.com/in-depth/news/2021/03/17/takeaways-toxic-refinery-pollution-southwest-memphis/4718350001/>; PHMSA National Pipeline Mapping System, *NPMS Public Viewer*, <https://pvnpm.phmsa.dot.gov/PublicViewer/> (choose Tennessee, then Shelby County, to view pipeline map in area) (accessed May 16, 2021).

<sup>21</sup> Carrington J. Tatum, *Valero cleans up oil after Memphis refinery flare; excess toxic gas release*, MLK50 (Feb. 24, 2021), <https://mlk50.com/2021/02/24/valero-cleans-up-oil-after-memphis-refinery-flare-excess-toxic-gas-release/>.

<sup>22</sup> EarthCon Consultants, Inc., *Valero Refining Company-Tennessee, LLC Semi-Annual Site Status Monitoring Report* (May 21, 2019), [https://static1.squarespace.com/static/5b7b3e99d274cb770c84b404/t/5ed184032c0f245a2e211f48/1590789165192/Valero\\_OCTOBER+2018+%E2%80%93MARCH+2019\\_small.pdf](https://static1.squarespace.com/static/5b7b3e99d274cb770c84b404/t/5ed184032c0f245a2e211f48/1590789165192/Valero_OCTOBER+2018+%E2%80%93MARCH+2019_small.pdf).

<sup>23</sup> Chunrong Jia and Jeffrey Foran, *Air Toxics Concentrations, Source Identification, and Health Risks: An Air Pollution Hot Spot in Southwest Memphis, TN*, 81 Atmospheric Env't 112–116 (Dec. 2013), <https://www.sciencedirect.com/science/article/abs/pii/S1352231013006948?via%3Dihub#>.

<sup>24</sup> Byhalia Pipeline LLC, *Byhalia Connection*, <https://byhaliacconnection.com/about-project/> (accessed May 16, 2021). The purpose of the pipeline is to facilitate movement of crude oil from Cushing, Oklahoma to St. James, Louisiana by connecting two existing crude oil pipelines: the Diamond Pipeline, beginning in Cushing, Oklahoma and currently terminating at the Valero Memphis Refinery, and the Capline Pipeline, which is being reversed to run from Patoka, Illinois to St. James, Louisiana. See Plains All American Pipeline, L.P. Annual Report (Form 10-K), 19 (Mar. 1, 2021) (Attachment D).

land agent disclosed that Byhalia saw southwest Memphis—poor, Black, already polluted—as the “point of least resistance.”<sup>25</sup>

Byhalia Pipeline LLC is a joint venture between Plains All American, L.P. (a Texas-based multibillion-dollar fossil fuel transportation conglomerate) and a subsidiary of Valero Energy Partners (a Texas-based multibillion-dollar energy conglomerate).<sup>26</sup> As the people of southwest Memphis know too well, private industries making decisions based on their bottom line often leads to the toxic concentration of pollutants in low-income communities and communities of color. It is the government agencies that regulate those industries, like TDEC, that must ensure that these communities do not face further disproportionate impacts and environmental injustice.

### C. *The ARAP and Section 401 Certification Process*

Because the proposed pipeline would cross wetlands and streams in Tennessee, on April 20, 2020, Byhalia Pipeline LLC applied for an ARAP and Section 401 Certification for the project. On April 24, 2020, the Department notified Byhalia Pipeline LLC that its application was deficient, for, among other reasons, failure to submit a detailed alternatives analysis.<sup>27</sup> On June 19, 2020, Byhalia Pipeline LLC submitted an alternatives analysis describing five alternatives, including a no action alternative, and identifying its preferred route—a route that turns abruptly south to snake through predominantly Black neighborhoods in southwest Memphis—as the least environmentally damaging alternative.<sup>28</sup> Byhalia Pipeline LLC’s alternatives analysis did not identify environmental justice or disproportionate impacts as one of its “route criteria.” The pipeline company’s social and economic justification, which it also misleadingly styled as an “environmental justice” analysis, had no demographic analysis and suggested only that “[t]he project would have significant economic benefits to the local economies.”<sup>29</sup>

TDEC’s ARAP and Section 401 Certification regulations require the agency to invite and consider public comments on the application for an individual permit.<sup>30</sup> From July 21 through

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<sup>25</sup> Michaela A. Watts and Laura Testino, *Memphis Question Plains All American About Route for Proposed Byhalia Connection Pipeline*, Commercial Appeal (Feb. 15, 2020), <https://www.commercialappeal.com/story/news/2020/02/15/memphians-question-plains-all-american-byhalia-connection-pipeline/4761549002/>.

<sup>26</sup> Byhalia Pipeline LLC, *About Us*, <https://byhaliaconnection.com/partner/> (accessed May 16, 2021).

<sup>27</sup> Letter from Mike Lee, TDEC, to William Gore, Byhalia Pipeline LLC, re: Letter of Deficiency- §401 Water Quality Certification; State of Tennessee Application NRS 20.089- Byhalia Pipeline Connection; Shelby County, TN (April 24, 2020) (Attachment E) (“Detailed information is required under Section 10. Detailed Alternative Analysis, especially in regards to any other sites that were evaluated, avoidance and minimization. The social and economic justification should include information on jobs created, revenue generated, and taxes collected”).

<sup>28</sup> Alternatives Analysis, Byhalia Connection Pipeline, TDEC ARAP NRS20.089 (June 19, 2020) (Attachment F).

<sup>29</sup> *Id.*

<sup>30</sup> Tenn. Comp. R. & Regs. 0400-40-07-.04(4)(b) and (e).

September 11, TDEC received numerous public comments. Many comments from the public expressed concerns that the pipeline would present an unacceptable threat to the Memphis Sand Aquifer, the city's sole drinking water source, a few of which are excerpted below:

- “This pipeline not only poses a risk to the pristine drinking water supply provided by the Memphis aquifer, but it will also cross multiple streams, posing a risk to our wetlands and waterways, which has a literal trickledown effect into our agriculture, industry, economy, and community. Once contaminated, the aquifer cannot be recovered.”<sup>31</sup>
- “Public data [] shows that about a quarter of the proposed Byhalia Connection route traverses the unconfined area of the Memphis/Sparta aquifer in DeSoto and Marshall Counties. The unconfined area... is highly vulnerable to a pipeline leak or rupture which could result in a crude oil spill directly contaminating the source of the region's drinking water. Of course, the entire proposed route should be considered sensitive because even where a confining clay layer isolates the Memphis/Sparta aquifer, a shallow alluvial aquifer is present, and gaps or breaches in the confining clay layer can provide a pathway for surface water and pollution to reach the deeper Memphis/Sparta aquifer. Even if crude oil contamination only impacted the shallow aquifer, it would be harmful to locals who rely on the shallow aquifer for industrial, agricultural and domestic wells.”<sup>32</sup>
- “Byhalia Pipeline's application assumes that the aquifer is protected by the protective clay layer all along its route—until it enters the aquifer's recharge area. This application ignores the fact that the protective clay layer has holes and gaps. ... The Applicant has failed to examine whether its proposed route transits areas where there is a gap, hole, or thin point in the clay protective layer. This pipeline may be up to industry standards, but its contents, its pressure (1500 psi), and the ground over which it travels are all risky. An oil spill of any sort will contribute to significant ground, groundwater, upper aquifer, and if we are not careful, unthinkable Memphis Sand Aquifer pollution. Hydraulic connectivity, clay layer gaps, and stream-scoured holes all connect the upper to the lower aquifer. *These connections are well-documented in parts of south Memphis [] though they have not been examined or studied along the proposed route.*”<sup>33</sup>

Many other public comments specifically addressed how the pipeline would unjustly burden the Black community of southwest Memphis through increasing the pollution and health risks in an already over-burdened community, as well as the negative impacts of the pipeline on Black wealth and Black homeownership. A few examples demonstrate the depth of concern about these environmental justice issues:

- “I am writing you today as a concerned Memphis citizen, opposing the Byhalia Pipeline Project, and its intended construction through the heart of the Boxtown neighborhood. This community already deals with lower than average health outcomes due to surrounding chemical plants and factories. The last thing Memphis needs is another noxious construction project with few-to-no environmental impact projections. For

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<sup>31</sup> Comment from Emily Graves (Sept. 11, 2020) (Attachment G).

<sup>32</sup> Comment from Deborah Carrington (Sept. 11, 2020) (Attachment H).

<sup>33</sup> Comment from Protect Our Aquifer (Sept. 11, 2020) (Attachment I) (emphasis original).

heaven's sake! At the very least take the time to finalize a legitimate environmental impact study before potentially devastating a unique community where many homeowners still live in houses built by their ancestors. Have some respect."<sup>34</sup>

- “In a city with a history of segregation and treating people of color as second-class citizens, the residents of Boxtown have somehow defied the odds and have a rate of homeownership well beyond the national average for Black people. Despite rampant poverty and meager incomes, residents have done this through generations, many of their homes being in the family since they were first built in the 19th century. Boxtown residents already have enough to deal with due to the industrial complex they are surrounded by, but to gut their neighborhood with an explosive substance constantly running mere feet below them is, to me, unconscionable. ... I know they claim that the pipeline will bring jobs to the area, but they are likely to be specialized and temporary, and therefore offer almost zero benefit to the residents who are going to be affected. There is only risk and almost no reward to these residents who have worked so hard to get where they are. The only people who will benefit from this project are the rich oil tycoons who will further line their pockets, possibly at the expense of the environment, the aquifer, and the livelihood of hard-working, disadvantaged residents.”<sup>35</sup>
- “As a resident of Memphis and Shelby County, I feel strongly that the proposed pipeline poses significant environmental risk and causes great concern for our local water source, property values, and especially the health of my family, friends, and neighbors in Shelby County. Byhalia Pipeline, LLC... has proposed to run the crude oil pipeline through a stable African American community with generations of land ownership, and without any meaningful involvement of local community leaders in the process.”<sup>36</sup>
- “As a citizen of Memphis, I implore you to act in opposition to allowing the Byhalia Oil Pipeline project to proceed. T.O. Fuller State Park is not only a historical and cultural site for Black and Indigenous Tennesseans, but the communities that surround it are valued by the generations of families that worked to secure home ownership in a country that has historically implemented policies that made this all but impossible. ... Now, with the proposed pipeline, an area that has already suffered so much industrial contamination will be further endangered by the potential threat of a pipeline breach. ... The Boxtown community just South of the park has voiced its opposition to this project, and I stand in solidarity with its residents.”<sup>37</sup>
- “Boxtown is 99% Black, according to U.S. Census data, and it has experienced decades of environmental racism. In a five-mile radius around Smith's church in Boxtown, near where Fields Road trails to an end at Boxtown Road, are at least 32 industrial facilities. To the west sit iron and steel mills; to the east, a pesticide manufacturer. A few miles north, between McKellar Lake and Nonconnah Creek, a Valero oil refinery pumps 195,000 barrels of oil per day. According to a 2013 study, the cumulative cancer risk from toxic air in southwest Memphis, which includes Boxtown, is four times higher than

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<sup>34</sup> Comment from Caitlin Hassinger (Sept. 11, 2020) (Attachment J).

<sup>35</sup> Comment from Brian Martinelli (Sept. 11, 2020) (Attachment K).

<sup>36</sup> Comment from John Paul Shaffer (Sept. 11, 2020) (Attachment L).

<sup>37</sup> Comment from Uele Siebert (Sept. 11, 2020) (Attachment M).

the national average, and driven by industrial and transportation-related pollutants like benzene and formaldehyde.”<sup>38</sup>

- “This project would be disastrous for the residents of 38109 as a whole. It is known that a project of this magnitude would decrease home values, potentially would cause residents to sale/move and would cause pollution to this predominantly black area. Boxtown is 99% black and has over 60% of home ownership, some of the highest rates in the states. These individuals are also the marginalized unfortunately. ... Many homes in Boxtown have generational families living in them. This project would destroy black wealth while lining the pockets of developers.”<sup>39</sup>

Notwithstanding the concerns it heard from the affected communities and others, TDEC issued the ARAP and Section 401 Certification on November 17, 2020. In the Notice of Determination for the permit, TDEC expressly found that “the permittee’s preferred alternative, with conditions, represents the practicable alternative that would achieve the project objective and have the least adverse impact on resource values.”<sup>40</sup> TDEC’s primary answer to the many comments regarding threats to the Memphis Sand Aquifer was that its permitting program “do[es] not regulate discharges to groundwater (only surface waters) or the operation of the pipeline,” and TDEC therefore had no reason to evaluate or consider those impacts.<sup>41</sup>

Responding to the numerous comments about disproportionate impacts and environmental injustice, TDEC’s only response was that it has no “specific language within rule or statute that requires and/or provides TDEC the explicit authority to consider environmental justice within its environmental regulatory program actions,” and, therefore, TDEC cannot conduct an inquiry to evaluate claims of environmental injustice or disparate impact.<sup>42</sup> Instead, TDEC asserted that its job was done simply by conducting a public hearing and taking public comment on the project.<sup>43</sup> TDEC also decided it had no ability to consider negative effects on home values or the questionable economic benefits of the project, and no need to include the social and economic justification for the project in the permit.<sup>44</sup> This was an unexplained departure from TDEC’s earlier position, in which it had required Byhalia Pipeline LLC to submit a social and economic justification, and had included that justification in the draft permit posted on November 3, 2020.<sup>45</sup>

### III. Legal Violation

The prohibition on discrimination in Title VI is mirrored in EPA’s Title VI implementing regulations, which state that “[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA

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<sup>38</sup> Comment from Prudence Katze (Sept. 11, 2020) (Attachment N).

<sup>39</sup> Comment from Johnnie Robinson (Sept. 11, 2020) (Attachment O).

<sup>40</sup> Notice of Determination, 3.

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 7-8, 10.

<sup>45</sup> Draft Byhalia Pipeline Permit (Nov. 3, 2020), 21 (“November 3 Draft Permit”) (Attachment P).

assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act.”<sup>46</sup> As EPA guidance notes, “EPA and other federal agencies are authorized to enact regulations to achieve the law’s objectives in prohibiting discrimination,” including through regulations preventing federal funding recipient actions that cause racially disparate impacts.<sup>47</sup>

These impacts are often health and environmental harms, but can also include non-health harms, “including, among other things, economic (e.g., depressed property values), nuisance odors, traffic congestion, noise and vermin.”<sup>48</sup> State permitting agencies are “responsible for minimizing the environmental impacts to local communities and ensuring that their practices and policies are implemented in a nondiscriminatory manner.”<sup>49</sup> EPA’s regulations make this clear through the specific prohibition at 40 C.F.R. § 7.35(b)-(c):

A 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, [or] national origin, . . . or have the effect of defeating or substantially impairing accomplishment of this subpart.

Even “policies, criteria or methods of administering programs that are neutral on their face but have the effect of discriminating” can result in a Title VI violation if the recipient cannot articulate a “‘substantial legitimate justification’ for the challenged policy or practice.”<sup>50</sup> Even when there is a substantial legitimate justification, employing a neutral policy that leads to disparate impacts may still constitute a violation of Title VI if there are less discriminatory alternatives that would achieve the same purpose.<sup>51</sup>

In issuing the Byhalia Pipeline Permit without consideration of the potential for disproportionate adverse impacts based on the route, or the potential for the contamination of drinking water in already-overburdened Black communities, TDEC used a method of administering its program that the agency may characterize as neutral on its face, but that has the effect of subjecting individuals to discrimination because of their race. To date, TDEC has not put forward any substantial legitimate justification for avoiding that consideration, and has not explained why the primary purpose of its permitting program—the protection of water quality and water resources—cannot be achieved equally well in a less discriminatory manner. This constitutes a violation of Title VI.

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<sup>46</sup> 40 C.F.R. § 7.30.

<sup>47</sup> *See* Civil Rights Compliance Toolkit, 8.

<sup>48</sup> *Id.* at Chapter 1 FAQs, 4.

<sup>49</sup> EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance), 71 Fed. Reg. 14207, 14214 (March. 21, 2006).

<sup>50</sup> Civil Rights Compliance Toolkit, 2, 9.

<sup>51</sup> *Id.* at 10.

*A. The Byhalia Pipeline Permit issued by TDEC has clear adverse impacts, including risking the contamination of the drinking water source for southwest Memphis.*

In issuing the Byhalia Pipeline Permit, TDEC approved a project which would have immediate adverse effects on members of the community in proximity to the pipeline. In the construction of the pipeline, Byhalia Pipeline LLC would need to clear land, excavate, stage construction, install pipe and other structures, re-level, and restore vegetation.<sup>52</sup> These activities can be noisy, increase traffic, limit use of private and public property, cause local air pollution through dust and heavy equipment emissions, cause water pollution through increased stormwater runoff, and harm valuable wetlands, which can help protect against floods. When the rights-of-way are revegetated, they often end up hosting weeds and invasive plant species, further degrading property values and homeowners' enjoyment of their property.<sup>53</sup>

Even after construction is complete, pipelines continue to have adverse effects. Constructing a pipeline requires obtaining easements, and these easements can inhibit future development due to concerns about hitting the pipeline or maintaining the right-of-way above it.<sup>54</sup> Between these constraints, concerns about the risks of leaks and oil spills, and uncertainty about whether abandoned pipes will remain in the ground indefinitely, property values often fall around pipelines.<sup>55</sup>

A decline in property values would be particularly harmful for many southwest Memphians. Southwest Memphis has an unusually high homeownership rate compared to demographically similar communities, despite having a relatively low median income, and for many their home is their sole source of wealth.<sup>56</sup> The damage would also be more than economic; many families live on property that has been passed down over generations, including some with homesteads first created by newly emancipated Black Americans in the aftermath of the Civil War, and hope to pass the land to the next generation.<sup>57</sup> TDEC received many public comments on this issue during its consideration of the permit, as noted in the section above, and so was well aware of the concern community members had about these impacts. These are all

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<sup>52</sup> See generally Byhalia Pipeline Permit.

<sup>53</sup> U.S. Fish and Wildlife Service, *Oil and Gas Pipelines*, <https://www.fws.gov/ecological-services/energy-development/pipelines.html> (accessed May 16, 2021).

<sup>54</sup> Pipeline Safety Trust, *Pipeline Info for Landowners*, <https://pstrust.org/about-pipelines/pipelines-for-landowners/> (accessed May 16, 2021).

<sup>55</sup> Daniel Walmer, *Pipelines could affect property values*, Lebanon Daily News (Jan. 2, 2016), <https://www.ldnews.com/story/news/local/2016/01/02/pipelines-could-affect-property-values/77984160/> (regarding natural gas pipelines); Conversations for Responsible Economic Development, *How do pipeline spills impact property values? Assessing the real estate risk of an oil spill in southern British Columbia*, <http://credbc.ca/wp-content/uploads/2013/12/Pipeline-spills-property-values.pdf>.

<sup>56</sup> Leanna First-Arai, *Pipeline through the heart: A Black neighborhood's uphill battle against oil developers*, MLK50 (Sept. 10, 2020), <https://mlk50.com/2020/09/10/this-black-neighborhood-is-trying-to-stop-an-oil-pipeline-theyre-running-out-of-time/>.

<sup>57</sup> *Id.*

harms that fall within the scope of Title VI concern and EPA investigation, when, as here, they are sufficiently harmful and unjustified.<sup>58</sup>

Crude oil pipelines also commonly leak, and therefore have the potential to contaminate the surrounding soil and groundwater. In a city like Memphis, which relies solely on groundwater for drinking water, this could create the conditions for a disaster. As TDEC knows, and was reminded of in many public comments, the Byhalia Pipeline route goes over the Memphis Sand Aquifer, the city's sole drinking water source. Portions of the route go over the unconfined area of the aquifer, or the "recharge zone", which is particularly vulnerable to contamination, but the entire route poses serious risks because any spills or leaks would still easily travel to the shallow, alluvial aquifer above the Memphis Sand Aquifer, which locals rely on for industrial and agricultural wells.<sup>59</sup> Additionally, southwest Memphis is an area with known and suspected breaches in the protective clay layer between the two aquifers, and so there are pathways for pollution to travel from the shallow aquifer to the Memphis Sand Aquifer much more quickly than it would through the clay layer itself.<sup>60</sup>

When pipelines leak, they release carcinogenic chemicals such as benzene and other hazardous pollutants.<sup>61</sup> And, unfortunately, pipeline leaks are common: since 2010, more than 1,650 leaks have spilled more than 11.5 million gallons of oil.<sup>62</sup> Worryingly, data from the Pipeline and Hazardous Materials Safety Administration show that there have been over 4,000 oil and fuel pipeline spills since 2010, but only 7% were detected by leak detection systems.<sup>63</sup> TDEC erroneously concluded there was "no reason to believe there is any possibility of affecting the deep regional aquifer,"<sup>64</sup> but it had more than enough information at the time of issuing the permit to suspect that leaks along the pipeline route could contaminate the drinking water supply.

*B. The adverse impacts facilitated by TDEC's grant of the Byhalia Pipeline Permit are disproportionately borne by a group protected by Title VI.*

As noted in the section above, the Byhalia Pipeline route traverses southwest Memphis, including the Boxtown community, which is predominantly Black and low-income. Southwest Memphis is also already burdened by numerous current polluting industries and legacy polluting sites; not coincidentally, the cumulative cancer risk in southwest Memphis is four times higher than the national average.<sup>65</sup> Although TDEC requested, and Byhalia Pipeline LLC provided, an

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<sup>58</sup> Civil Rights Compliance Toolkit, 21.

<sup>59</sup> Comment from Deborah Carrington (Sept. 11, 2020) (Attachment H).

<sup>60</sup> Douglas Cosler, *Evaluation of the Risk of Contamination of the Memphis Sand Aquifer by the Proposed Byhalia Connection Pipeline* (February 1, 2021), 16 ("Cosler Report") (Attachment Q).

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> Mike Soraghan, *Giant N.C. spill shows gaps in pipeline safety*, E&E News (Feb. 25, 2021), <https://www.eenews.net/stories/1063725961>.

<sup>64</sup> Notice of Determination, 6.

<sup>65</sup> Chunrong Jia and Jeffrey Foran, *Air Toxics Concentrations, Source Identification, and Health Risks: An Air Pollution Hot Spot in Southwest Memphis, TN*, 81 Atmospheric Env't 112–116 (Dec. 2013), <https://www.sciencedirect.com/science/article/abs/pii/S1352231013006948?via%3Dihub#>.

analysis of several alternatives to the southwest Memphis route, neither TDEC nor Byhalia engaged in any kind of demographic comparison between the routes or examined the existing pollution and polluting infrastructure burdens borne by the respective communities.

*C. TDEC has not articulated a “substantial legitimate justification” for its decision to issue the Byhalia Pipeline Permit without any consideration of disproportionate adverse impacts on minority communities or potential effects on drinking water.*

Many people, including community members in southwest Memphis, submitted comments to TDEC during the public comment period for the Byhalia Pipeline Permit. As noted above, two related issues predominated: concern about the pipeline’s risk to drinking water, and concern that those risks, as well as other negative impacts, would be disproportionately shouldered by low-income, predominately Black communities already suffering under a legacy of industrial pollution facilitated by systemic racism in Memphis and Tennessee.<sup>66</sup>

In response to these comments on environmental justice, TDEC emphasized that “Tennessee does not have an [executive order] or specific language within rule or statute that requires and/or provides TDEC the explicit authority to consider environmental justice within its environmental regulatory program actions.”<sup>67</sup> But issuance of an executive order or specific language in state regulations has no bearing on TDEC’s obligations to comply with the Civil Rights Act as a recipient of federal funding. Claiming that it “striv[es] for the equal treatment of all communities,” TDEC cited only the public notice and public hearing on the draft permit as sufficient to resolve any environmental justice concerns.<sup>68</sup> This is not sufficient. As EPA guidance provides, “[u]nderstanding the existing environmental and health impacts as well as the demographics, in the areas under consideration for the siting of new facilities, may help [permitting agencies] ensure they do not issue permits in a discriminatory manner.”<sup>69</sup> Non-health-related harms, such as harms to property values or quality of life, are also factors in disparate impact analysis.<sup>70</sup> Justification of these environmental and other harms requires TDEC to “offer evidence that its policy or decision in question is demonstrably related to a significant, legitimate goal related to its mission,” but TDEC has provided no such evidence.<sup>71</sup>

TDEC’s non-response to comments raising concerns about the economic benefits (or lack thereof) to affected communities, and the negative impacts on Black homeownership and property values, is inadequate. In the November 9, 2020 Notice of Determination for the Byhalia Pipeline Permit, TDEC noted that many public comments questioned the validity of the supposed economic and social justification and raised issues about whether the project would actually economically and socially harm, rather than benefit, the affected communities, but TDEC then

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<sup>66</sup> Aubrey Ford, Phoebe Weinman and Walker Weinman, *Boxtown: The Land of Broken Promises*, Storyboard Memphis (Sept. 16, 2019), <https://storyboardmemphis.org/neighborhood-board/boxtown/>.

<sup>67</sup> Notice of Determination, 9.

<sup>68</sup> *Id.*

<sup>69</sup> EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance), 71 Fed. Reg. 14207, 14215 (March. 21, 2006).

<sup>70</sup> Civil Rights Compliance Toolkit, Chapter 1 FAQs, 4.

<sup>71</sup> *Id.* at 15.

entirely omitted *any* consideration of the economic and social effects of the project.<sup>72</sup> TDEC completely avoided responding to the numerous public comments raising these concerns, and simply stated that the environmental degradation from the project was mitigated to such a degree that no consideration of social or economic effects was necessary, and that TDEC had no authority to consider things like effects on property values.<sup>73</sup> What TDEC did *not* say was that it had previously requested just such an analysis from Byhalia Pipeline LLC, and had included that analysis in a draft permit posted on TDEC’s permit data viewer website just 6 days earlier, on November 3, 2020.<sup>74</sup> That November 3 draft permit also noted that the environmental degradation was sufficiently mitigated, and nothing had changed in the interim 6 days; TDEC’s decision to just drop that analysis in the final permit and Notice of Determination is completely unexplained.<sup>75</sup>

When considering the economic impacts of a permitting decision, and whether they would justify a disparate impact on a particular community, EPA guidance instructs TDEC to consider whether any purported economic benefits would be “delivered directly to the affected population,” keeping in mind “the views of the affected community” about whether the benefits justify the disparate impacts.<sup>76</sup> The community made its voice very clear, as the comments given above indicate: it did not think the pipeline benefited them, and thought it would actually harm them—socially, economically, and environmentally. As a comment from the President of the Whitehaven Community Development Corporation put it:

[W]ho, other than the oil companies who use these pipelines, will benefit from this project? Certainly not the already struggling families who will be mostly affected... Even the hired PR firm stated that the jobs created would not be the type of jobs the local economy could support or fill. So, how is this proposed partnership creating and perpetuating a sustainable economic and preferred development for the local economy?<sup>77</sup>

With no explanation for why it dropped the social and economic analysis specifically requested from Byhalia Pipeline LLC, TDEC’s ultimate refusal to engage in this question because it may not be necessary under the permitting regulations appears pretextual. TDEC is fully able to ensure that its ARAP program fulfills its primary water quality protection purpose while also ensuring the program does not have discriminatory effects, and regularly considers social and economic impacts in many situations.<sup>78</sup> Its decision to forgo such analysis here, when comments and evidence suggest that the decision to issue the permit will cause disproportionate adverse impacts to primarily low-income, Black communities, violates Title VI’s requirement to administer programs in a non-discriminatory manner.

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<sup>72</sup> Notice of Determination, 7-10.

<sup>73</sup> *Id.*

<sup>74</sup> November 3 Draft Permit, 21.

<sup>75</sup> *Id.* at 23.

<sup>76</sup> Civil Rights Compliance Toolkit, 15.

<sup>77</sup> Comment from Whitehaven Community Development Corporation (Sept. 11, 2020) (Attachment R).

<sup>78</sup> *See, e.g.,* Tenn. Comp. R. & Regs. 0400-40-03-.06.

TDEC's refusal to consider the potential contamination of drinking water and groundwater is also unjustified, particularly where, as here, that contamination contributes to disparate adverse impacts to communities protected by Title VI. Although TDEC's permitting decision focused on impacts to surface waters, the Tennessee Water Quality Control Act allows TDEC to consider groundwater, too, particularly when that groundwater is a drinking water source. TDEC's own regulations require it to consider "any other factors relevant under the Act" when evaluating a permit application.<sup>79</sup> The Tennessee Water Quality Control Act prohibits the unpermitted "alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state."<sup>80</sup> The waters of the state include groundwater,<sup>81</sup> and the "government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve" the public's right to clean water.<sup>82</sup> Because the Act seeks to protect *all* waters of the state, a substantial risk of groundwater pollution—especially near drinking water intakes—is highly relevant to TDEC's decision to issue an ARAP for the development of a high-pressure crude oil pipeline.

TDEC also has an additional statutory basis for considering drinking water in its permitting decisions. The people of Tennessee, including Memphians, have a "right to unpolluted waters,"<sup>83</sup> including groundwater. The Department is charged with "prevent[ing] the future pollution of the waters . . . so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters."<sup>84</sup> Given its duty to protect drinking water, TDEC's attempt to avoid analyzing the potential impacts to drinking water resulting from issuing the Byhalia Pipeline Permit because of some perceived lack of statutory authority falls flat.

Finally, though Tennessee may not have a statute expressly requiring TDEC to consider environmental justice, such analysis is essential here for TDEC to ensure that its policies and practices do not disparately impact Black residents, as required for compliance with Title VI. TDEC has not shown its policy to forgo environmental justice analysis, particularly when, as here, public comments clearly frame it as an issue, is somehow "necessary to meeting a goal that [i]s legitimate, important, and integral to the [recipient's] institutional mission."<sup>85</sup> TDEC's only justification for not considering environmental justice is that the agency could not identify any explicit provisions in a Tennessee statute that "required and/or provided" it authority to perform such analysis. A purported lack of explicit authority to consider disparate impacts under *state* law cannot alone be sufficient reason to uphold a policy that creates disparate impacts on groups protected by Title VI, a federal civil rights law with which TDEC is required to comply. And absence of a state statute explicitly *requiring* that analysis is no excuse for failure to comply with the Civil Rights Act.

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<sup>79</sup> Tenn. Comp. R. & Regs. 0400-40-07.04(6)(c).

<sup>80</sup> Tenn. Code Ann. § 69-3-108(b)(1).

<sup>81</sup> *Id.* 69-3-103(45).

<sup>82</sup> *Id.* § 69-3-102(a).

<sup>83</sup> Tenn. Code Ann. § 69-3-102(a).

<sup>84</sup> *Id.*

<sup>85</sup> Civil Rights Compliance Toolkit, 9.

#### **IV. Undisclosed Information**

Since TDEC issued the Byhalia Pipeline Permit on November 17, 2020, additional investigation has revealed information which make the disproportionate adverse impacts of the Byhalia Pipeline even more clear: the proposed pipeline would not only run over the Memphis Sand Aquifer in an area where the aquifer is known to be vulnerable to contamination<sup>86</sup>—it would also plow right between two wells in a municipal wellfield that provides drinking water to Black communities in southwest Memphis.<sup>87</sup> Any pipeline spill or leak could therefore contaminate not just the drinking water aquifer, but actual drinking water supplies, even more quickly than previously suspected. This information should have been available to TDEC in its permitting process but Byhalia Pipeline LLC did not disclose it. Accordingly, it has only come to light since TDEC issued the permit.

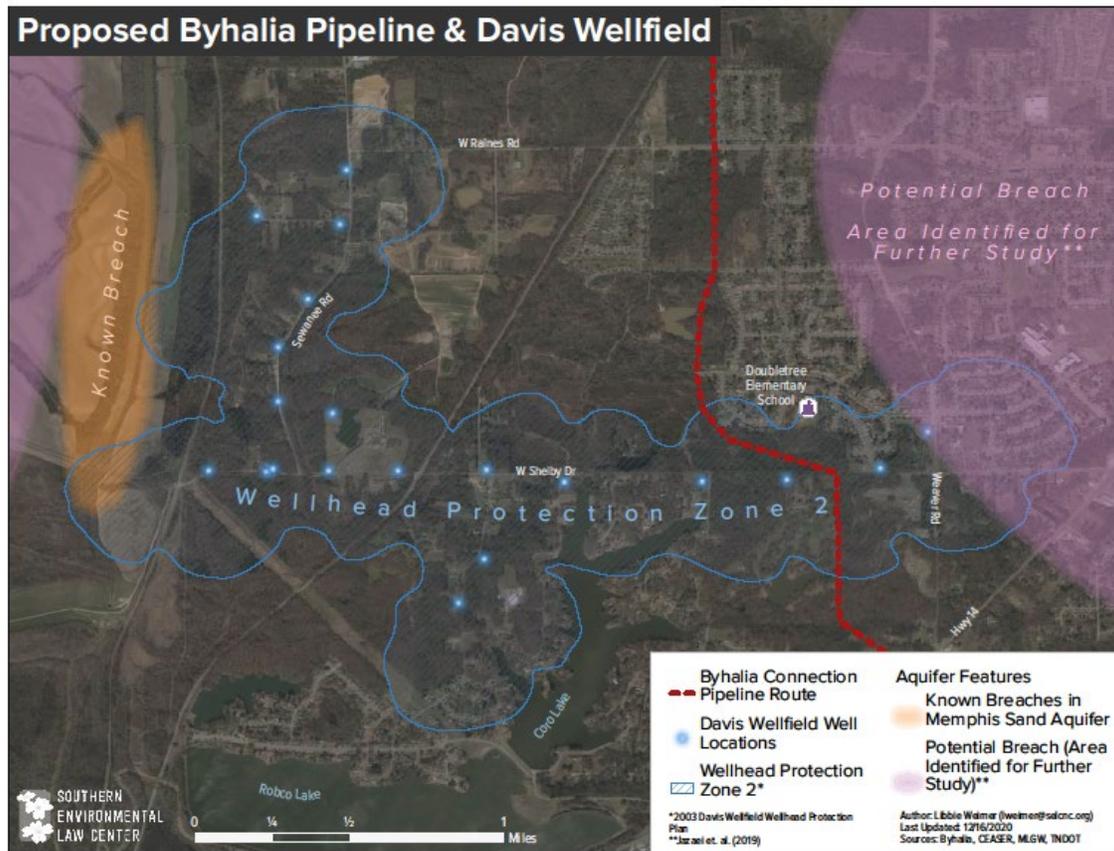
The following map shows where the pipeline route crosses the municipal wellfield, and the sensitive area around the wells designated by Memphis Light, Gas and Water (“MLGW”) as Wellhead Protection Zone 2, near areas of known or suspected breaches in the clay layer separating the shallow alluvial aquifer from the Memphis Sand Aquifer.<sup>88</sup>

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<sup>86</sup> MCAP et al. Demand to Revoke ARAP and 401 for Byhalia Pipeline (Apr. 29, 2021), 7 (“MCAP Demand Letter”) (Attachment S).

<sup>87</sup> *Id.*

<sup>88</sup> Although the attached map is based on MLGW’s 2003 Wellhead Protection Plan maps, advocates with the local groundwater protection organization Protect Our Aquifer recently inspected the current version of MLGW’s Wellhead Protection Plan and confirmed that Zone 2 is the same or very similar in scope.



Because Byhalia Pipeline LLC did not disclose this fact during the permitting process, MCAP, the Southern Environmental Law Center, and other local groups retained an independent expert who prepared a report evaluating risks to the wellfield and drinking water *after* they were able to piece together the relationship of the pipeline route to the wellfield. Dr. Douglas J. Cosler, Ph.D., P.E., Principal Chemical Hydrogeologist with Adaptive Groundwater Solutions LLC in Matthews, North Carolina, found that a leak from the crude oil pipeline could pollute the Memphis Sand Aquifer in the vicinity of the Davis Wellfield.<sup>89</sup> The 24-inch diameter, high-pressure crude oil pipeline would go through MLGW's Davis Wellfield, which provides area residents with drinking water, as well as through MLGW's Wellhead Management Zone. Further, the area around the Davis Wellfield is known to be vulnerable to contamination due to known and suspected breaches in the clay layer above the aquifer.<sup>90</sup> Dr. Cosler's report concludes that any spill could spread crude oil contaminants into the Memphis Sand Aquifer near drinking water intakes.<sup>91</sup>

Dr. Cosler's report confirms what many Memphians already know: a pipeline leak could be catastrophic. Because of groundwater flows and the proposed pipeline's route, oil

<sup>89</sup> Cosler Report, 3.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 3–12.

contamination could reach the Memphis Sand Aquifer and MLGW's drinking water intakes relatively quickly—years rather than the decades often associated with groundwater travel times.<sup>92</sup> Operating at 1500 psi—more than twice the pressure of fire hoses that spray water 30 stories into the air—the pipeline offers no margin of error, as “hundreds of gallons of crude oil can spew out of a small opening” in a pipeline operating at such high pressure.<sup>93</sup> Crude oil contains known and probable carcinogens, including benzene.<sup>94</sup> Cleaning up crude oil once it reaches the groundwater is an expensive and difficult task.<sup>95</sup> After consideration of these and other factors, Memphis Mayor Jim Strickland recently announced that after consultation with environmental scientists, he considers the Byhalia Connection Pipeline an “unacceptable risk” to the city's drinking water.<sup>96</sup> In addition, earlier this month geologists from the University of Memphis Center for Applied Earth Science and Engineering Research presented additional compelling evidence of a breach in the clay layer in the immediate vicinity of the proposed pipeline's route through the Davis Wellfield.<sup>97</sup>

Byhalia Pipeline LLC did not disclose the fact that its proposed pipeline would run through the municipal drinking water wellfield that serves Black communities in southwest Memphis during the permitting process. Nor did TDEC request Byhalia perform the groundwater analysis that would have brought that information forward.

Similarly, Byhalia Pipeline LLC failed to disclose the fact that a pipeline connecting the Diamond and Capline crude oil pipelines *already exists*.<sup>98</sup> Use of the existing Collierville Connection Pipeline could avoid all of the construction- and many of the operational-related impacts of the proposed Byhalia Pipeline on southwest Memphis. Yet the pipeline company did not disclose the existence of the Collierville Pipeline, and TDEC did not consider use of that existing pipeline in its alternatives analysis.<sup>99</sup>

Because Byhalia failed to disclose fully all relevant information during the permitting process, the Southern Environmental Law Center on behalf of MCAP and other groups sent a letter to TDEC on April 29, 2021 demanding that TDEC immediately revoke or suspend the

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<sup>92</sup> *Id.* at 7–12.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> *Id.* at 6.

<sup>95</sup> *Id.* at 4–7.

<sup>96</sup> Sarah Macaraeg, ‘An unacceptable risk’: Memphis Mayor Jim Strickland opposes Byhalia pipeline, Memphis Commercial Appeal (April 20, 2021), <https://www.commercialappeal.com/story/news/2021/04/20/memphis-mayor-jim-strickland-opposes-byhalia-pipeline-tennessee-mississippi/7301469002/>.

<sup>97</sup> Michaela Watts and Samuel Hardiman, *New possible threat to Memphis' drinking water discovered along Byhalia pipeline route*, Memphis Commercial Appeal (May 12, 2021), <https://www.commercialappeal.com/story/news/environment/2021/05/13/aquifer-breach-byhalia-oil-pipeline-threaten-memphis-drinking-water/5022458001/>.

<sup>98</sup> MCAP Demand Letter, 3.

<sup>99</sup> Alternatives Analysis, Byhalia Connection Pipeline, TDEC ARAP NRS20.089 (June 19, 2020) (Attachment F); Notice of Determination.

Byhalia Pipeline Permit, and demanding that any future re-evaluation of the permit application evaluate drinking water and environmental justice impacts.<sup>100</sup> To date, TDEC has not responded.

## V. Relief Requested

- A. *TDEC must revoke the current Byhalia Pipeline Permit and consider environmental justice impacts in determining whether to re-issue that permit.*

In order to comply with Title VI, and prevent unjustified disparate impacts, TDEC must revoke the current Byhalia Pipeline Permit. If Byhalia Pipeline LLC applies for another ARAP and Section 401 water quality certification, TDEC must consider all factors in its permitting decision relevant to whether the permit would have discriminatory effects, which includes disparate levels of risk to drinking water resources.

Attempted compliance with environmental laws does not ensure compliance with Title VI. To comply with the latter, TDEC must take affirmative steps to consider and prevent disparate impacts. Beyond rejecting the permit outright, TDEC may be able to ensure compliance with Title VI by modifying permit conditions or requiring a different route; these would potentially be less discriminatory alternatives that satisfy TDEC's other obligations.<sup>101</sup>

- B. *TDEC must create and enforce a permit review policy that considers and evaluates the potential for disproportionate adverse impacts on groups protected by Title VI.*

In addition to rectifying TDEC's violation of Title VI in issuing the Byhalia Pipeline Permit, TDEC must also change its current policy of refusing to engage in analysis to determine whether its decisions have discriminatory effects. This is a policy or practice that leads to disparate adverse impacts, and EPA should counsel TDEC on how to develop a permit decision-making policy that is fair, equitable, and Title VI-compliant going forward, as well as on how to administer that policy in a non-discriminatory manner.

## VI. Conclusion

The Byhalia Pipeline's proposed route, approved by TDEC, will endanger the drinking water, depress the property values, threaten surface waters, and inhibit future development in the poor, majority Black communities in southwest Memphis. By refusing to consider the concerns of the affected communities on these issues and issuing the permit without any consideration of the potential for disparate impacts, TDEC has violated Title VI. EPA should ensure that TDEC revokes the discriminatory Byhalia Pipeline Permit, and develops a Title VI-compliant policy for evaluating future permits. Should TDEC fail to come into compliance with Title VI voluntarily,

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<sup>100</sup> MCAP Demand Letter. TDEC has cause to modify, suspend, or revoke a permit when the permit applicant obtained "a permit by misrepresentation or failure to disclose fully all relevant facts." Tenn. Comp. R. & Regs. 0400-40-07-.04(6)(b).

<sup>101</sup> Civil Rights Compliance Toolkit, 15.

we request that EPA initiate proceedings to suspend or terminate EPA funding to TDEC in accordance with Title VI and 40 C.F.R. §§ 7.115, 7.130.

Sincerely,



Chelsea Bowling

Amanda Garcia

Chandra Taylor

Attorneys for Memphis Community Against  
Pollution, Inc.

Attachments available via ShareFile at:

<https://southernenvironment.sharefile.com/d-s3693be33e6b043b79a6eb130a41e929d>

Cc (via email):

Greg Young, Deputy Commissioner for the Environment, TDEC

Jenny Howard, General Counsel, TDEC

Patrick Parker, Attorney, Office of General Counsel, TDEC

Jennifer Dodd, Director, Division of Water Resources, TDEC

Kendra Abkowitz, Director for the Office of Policy and Sustainable Practices, TDEC