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Community Organization \* Alternatives for Community & Environment \* CALifornians for  
Renewable Energy, Inc. \* Clean Air Council \* Conservation Law Foundation \* Earthjustice \*  
GASP \* Jean-Michel Cousteau's Ocean Futures Society \* Los Jardines Institute \* Lawyers for  
Civil Rights \* New York Lawyers for the Public Interest \* Poverty & Race Research Action  
Council \* St. Francis Prayer Center \* Sierra Club \* Southern Environmental Law Center \*  
Texas Environmental Justice Advocacy Services \* Texas Rio Grande Legal Aid, Inc. \* Unitarian  
Universalist Mass Action \* Urban Habitat \* West End Revitalization Association \*  
Environmental Justice Clinic at Vermont Law School  
Rebecca Bratspies \* Marc Brenman \* Richard Grow \* Steven Fischbach \* Ryke Longest  
Sacoby Wilson, PhD, MS \* Katherine Wolf \* Tseming Yang

Submitted via email and regulations.gov

Re: Comments on U.S. Environmental Protection Agency (EPA) Strategic Plan, Docket Number  
EPA-HQ-OA-2021-0403

November 12, 2021

Holly Green  
Director, Planning Division,  
Office of Planning, Analysis, and Accountability  
Office of the Chief Financial Officer  
U.S. Environmental Protection Agency  
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Dear Director Green:

Thank you for the opportunity to submit these comments on the FY 2022 - FY 2026 U.S. Environmental Protection Agency ("EPA") Strategic Plan. On behalf of the undersigned organizations and individuals, we urge EPA to follow through on this Administration's stated commitment to advance racial equity throughout the federal government. This will require systemic changes, sustained action, and a shift in culture at all levels and across all components within EPA and amongst its funding recipients and subrecipients. We draw upon our collective experience as advocates and practitioners to make recommendations for institutional change within EPA, and for ways that EPA should strengthen its oversight and enforcement role in order to advance environmental justice.

We are heartened by the renewed focus on civil rights and environmental justice and by the commitments made by the Biden-Harris Administration and EPA Administrator Regan to a whole-of-government approach to racial equity and environmental justice. As such, Goal 2 of the EPA Strategic Plan states that EPA will "Take Decisive Action to Advance Environmental Justice and Civil Rights."<sup>1</sup> EPA further outlines the following objectives within that goal:

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<sup>1</sup> FY 2022-2026 EPA Strategic Plan Draft, 86 Fed. Reg. 54,448 (Oct. 1, 2021).

- Promote Environmental Justice and Civil Rights at the Federal, Tribal, State, and Local Levels
- Embed Environmental Justice and Civil Rights into EPA’s Programs, Policies, and Activities
- Strengthen Civil Rights Enforcement in Communities with Environmental Justice Concerns

EPA’s External Civil Rights Compliance Office (“ECRCO”) and Office of General Counsel (“OGC”) have made more specific commitments in the September 20, 2021 EPA Response to a September 28, 2020 Office of Inspector General Report, *Improved EPA Oversight of Funding Recipients’ Title VI Programs Could Prevent Discrimination*.<sup>2</sup> In its response, EPA states that ECRCO intends to achieve the following, “all within dates certain”<sup>3</sup>:

- Clarify interpretations of requirements and expectations through issuance of guidance documents;
- This includes civil rights guidance in the permitting context and, particularly, how cumulative impacts are considered when evaluating disparate impacts under civil rights law;
- Systematize review of compliance with foundational procedural requirements for applicants of federal financial assistance and recipients of federal financial assistance;
- Ensure that civil rights compliance goes beyond a checklist of procedural requirements and, toward that end, develop ECRCO capacity to evaluate whether specific actions, policies, and practices by recipients – including permitting – comply with civil rights law;
- Launch post-award compliance reviews and a process for prioritizing compliance reviews on an annual basis;
- Provide greater transparency to the public about ECRCO’s work; and
- Meaningfully engage stakeholders.<sup>4</sup>

While we applaud EPA for agreeing to undertake these measures, we must also call attention to the fact that our recommendations—and the critical concerns underlying them—have been raised with EPA, as well as the Department of Justice, persistently and repeatedly over more than two decades.<sup>5</sup> People of Color, Indigenous Peoples, and low-income communities have for too long felt the adverse health and other effects of inadequate environmental protection.<sup>6</sup> Severe and longstanding deficiencies in EPA’s external civil rights enforcement and oversight play a key

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<sup>2</sup> OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, Report No. 20-E-0333, *IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS’ TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION* (2020).

<sup>3</sup> OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, *OGC REVISED RESPONSES TO OIG RECOMMENDATIONS* (2021) at 2.

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

<sup>5</sup> See Sarah Lazare, *After EPA Ignored Environmental Racism for Decades, Communities Fight Back*, Facing South (July 16, 2015), <https://www.facingsouth.org/2015/07/after-epa-ignored-environmental-racism-for-decades.html> (referring to a 2015 suit filed by Earthjustice where Earthjustice argued that the EPA failed to take adequate action to states granting permits to hazardous polluters in working-class, black and Latinx neighborhoods).

<sup>6</sup> See Dorceta E. Taylor, *Toxic Exposure: Landmark Cases in the South and the Rise of Environmental Justice Activism*, in *TOXIC COMMUNITIES: ENVIRONMENTAL-RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY* 6 (New York University Press 2014) (highlighting major environmental racism cases in the South).

role in enabling such environmental racism and injustice.<sup>7</sup> Zealous enforcement of Title VI of the Civil Rights Act of 1964 (“Title VI”) and Executive Orders 12898, 13985, and 14008 is necessary to correct the longstanding trend of concentrating heavily polluting facilities in environmental justice communities already overburdened by pollution and now contending with increasing risks due to climate change.<sup>8</sup> EPA’s historical failure to challenge the unjust distribution of environmental, economic, public health, and climate burdens has constituted a massive failure of our nation’s civil rights infrastructure. For federally funded programs to achieve equitable outcomes and fulfil the long overdue promise of environmental justice, this failure must be addressed systematically and in partnership with the communities most affected, in accordance with the Principles of Environmental Justice (Environmental Justice Principles).<sup>9</sup>

Concrete and immediate reforms to EPA’s civil rights compliance systems that center environmental justice must therefore be a core priority for this Administration, set forth in EPA’s Strategic Plan, and fully resourced in the months and years to come. Leadership and other staff across EPA, including but not limited to EPA’s OGC and ECRCO, should take action to create lasting, systemic change in the agency’s operation, and should enact the measures described below without undue delay.

**A. Effective Title VI Enforcement Rests on EPA’s Willingness to Establish a Zero Tolerance of Discrimination and Impose Meaningful Remedies.<sup>10</sup>**

The above heading opened a comment letter to then-EPA Administrator Lisa Jackson submitted by some of the undersigned on July 3, 2012. The letter continued as follows:

*The history of EPA’s failure to enforce Title VI has dramatically demonstrated that recipients will not fulfill their obligations under Title VI and use their legal authorities or expertise aggressively to eliminate, reduce or avoid racially disparate impacts. The economic and political pressures toward regulatory leniency are simply too great. EPA has been well aware of this dynamic, particularly in light of the candor of a high ranking state official, who noted in 2000, after EPA’s last significant effort to implement Title VI, that EPA’s Draft Title VI guidance was a “tiger without teeth” and that “he was not going to pay particular attention to it.”<sup>11</sup> . . . It is time for EPA to put the teeth back into the civil rights tiger, and use its authorities under this important civil rights law to*

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<sup>7</sup> Marianne Engelman-Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22.4 Univ. of Pennsylvania J. of L. and Soc. Change 281, 290–93 (2019).

<sup>8</sup> 42 U.S.C. § 2000d (1964) et seq.; Engelman-Lado, *supra* note 6.

<sup>9</sup> First National People of Color Environmental Leadership Summit, *The Principles of Environmental Justice* (EJ) (Oct. 24-27, 1991), <https://www.ejnet.org/ej/principles.pdf>.

<sup>10</sup> Perspectives on language around “zero tolerance” have changed in the education and criminal justice contexts, particularly given the disparate impacts of such policies on People of Color, people with disabilities, and others. However, the critical need for immediate and decisive action on civil rights remains, almost a decade since the submission of the 2012 comment letter as too little has changed to move the ball on environmental justice.

<sup>11</sup> See *Environmental Justice: Draft Revised Civil Rights Guidance Clarifies Definitions, Addresses State Issues*, 31 Env’t Rep. 1331 (June 23, 2000) (quoting Russell Hardin, then Director of Michigan’s Department of Environmental Quality from 1995–2002, during which time he approved the Clean Air Act permit for the Select Steel facility in Flint, Michigan).

*remedy actions with unjustified disparate impacts. Until that happens, Title VI enforcement will continue to be illusory.*<sup>12</sup>

The 2012 letter went on to observe that “federal funds have never been revoked from recipients of funding from EPA based on a violation of Title VI[,]” and cited the *Angelita C. v California Department of Pesticide Regulations* case as EPA’s first and then-only preliminary finding of discrimination.<sup>13</sup> That long-delayed finding and the informal resolution agreement that followed encapsulated structural problems with EPA’s civil rights enforcement program: significant delays, exclusion of the people most affected from the investigation of the complaint and its resolution, a persistent lack of accountability by the funding recipient, and an ongoing failure by EPA to use Title VI to combat environmental racism while allowing civil rights to be subsumed by environmental standards.

Since 2012 and, in fact, throughout its entire history, EPA has still only made one formal finding of discrimination. In 2017, EPA found that the Michigan Department of Environmental Quality discriminated against Black residents of Flint, Michigan, during the public participation process for the permitting of the Genesee Power Station—responding decades later to a 1992 complaint filed by the St. Francis Prayer Center.<sup>14</sup> With this finding, EPA ordered MDEQ to (1) improve its public participation program to reduce risk of future disparate treatment, (2) improve its foundational non-discrimination program, and (3) establish an appropriate process to address environmental complaints.<sup>15</sup> Two additional Title VI complaints regarding public participation for permitting in Genesee County resulted in EPA entering into resolution agreements with both MDEQ—now the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”)—and the county to ensure non-discriminatory public participation.<sup>16</sup>

What changed as a result? As evidenced in the context of a 2021 draft air permit for a hot mixed asphalt plant in Flint, Michigan, EGLE’s permitting processes still lack adequate public participation processes and remain deficient in the analysis of the permitting decision’s adverse impact on classes protected by Title VI.<sup>17</sup> Despite having the authority to undertake a cumulative

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<sup>12</sup> Letter from Marianne Engleman Lado et al. to Lisa Jackson, Administrator, Env’tl Prot. Agency (July 3, 2012) (attached).

<sup>13</sup> U.S. Env’tl. Prot. Agency, Preliminary Finding on Title VI Complaint 16R-99-R9 (Apr. 22, 2011), <https://www.epa.gov/sites/default/files/2016-04/documents/title6-c42211-preliminary-finding.pdf>; Complaint, *Angelita C., et al. v. Cal. Dep’t of Pesticide Regulation* (EPA Office of Civil Rights File No. 16R-99-R9).

<sup>14</sup> Talia Buford, *Rare Discrimination Finding by EPA Civil Rights Office*, THE CENTER FOR PUBLIC INTEGRITY (Jan. 25, 2017), <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/>.

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

<sup>16</sup> EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE., U.S. ENVTL. PROT. AGENCY, IN REPLY TO: COMPLAINT NO. 17RD-16-R5 (2019), [https://www.epa.gov/sites/default/files/2019-12/documents/resolution\\_letter\\_and\\_agreement\\_for\\_complaint\\_17rd-16-r5.pdf](https://www.epa.gov/sites/default/files/2019-12/documents/resolution_letter_and_agreement_for_complaint_17rd-16-r5.pdf).

<sup>17</sup> Mich. Dep’t of Env’t, Great Lakes, and Energy, *Proposed Project Summary: AJAX Materials Corporation - Flint, Genesee County, Michigan*, 1 (July 2021). <http://www.deq.state.mi.us/aps/downloads/permits/PubNotice/APP-2021-0019/APP-2021-0019PPS.pdf>

risk assessment, and despite calls by the public and EPA Region 5 for such a study, EGLE has to date refused to do so.<sup>18</sup> This is not simply EGLE's failing, but EPA's as well.

Two decades since *Alexander v. Sandoval* barred non-federal parties from bringing disparate impact lawsuits and placed enforcement against disparate impact discrimination solely in the hands of federal agencies, recipients of funding from EPA continue to make decisions without regard to compliance with civil rights laws.<sup>19</sup> EPA's failure to enforce Title VI has been well-documented, including, but not limited to, a 2015 Deloitte Consulting LLP evaluation commissioned by EPA itself;<sup>20</sup> a 2015 exposé by Center for Public Integrity;<sup>21</sup> and a 2016 report issued by the United States Commission on Civil Rights.<sup>22</sup>

The 2020 OIG report states the problem in short: "ECRCO has not fully implemented an oversight system to provide reasonable assurance that organizations receiving EPA funding are properly implementing Title VI."<sup>23</sup> EPA, its funding recipients, and the communities they are both mandated to protect still lack comprehensive and formal guidance on civil rights compliance and enforcement. As a result, EPA still lacks a formal process to include the people most affected by environmental racism in the investigation and resolution of complaints. Where EPA has intervened to request state or local action--even in the context of an informal resolution agreement--the lack of guidance, oversight, and enforcement has resulted in deficient engagement of community members; inadequate analyses relying on poor or incomplete data; insufficient prioritization of community protection, and/or no action at all.<sup>24</sup> EPA's few preliminary and formal findings of discrimination have focused solely on procedural violations, ignoring voluminous evidence from environmental justice communities around the country documenting disproportionate adverse health impacts based on race and national origin.<sup>25</sup> Even, as in Flint, when EPA finds discrimination is present, there has been little to no remediative or

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<sup>18</sup> U.S. ENVTL. PROT. AGENCY, DETAILED PERMIT COMMENTS AJAX MATERIALS CORPORATION PTI APP-2021-0019 (2021); Ron Fonger, EPA Recommends Further Study Before Genesee Township Asphalt Plant Gets Permit, Michigan Live (Sept. 16, 2021), <https://www.mlive.com/news/flint/2021/09/epa-recommends-further-study-before-genesee-township-asphalt-plant-gets-permit.html>.

<sup>19</sup> *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

<sup>20</sup> See, e.g., Deloitte Consulting LLP, Final Report: Evaluation of the EPA Office of Civil Rights (Order # EP10H002058) 1–2 (noting EPA's failure to "adequately adjudicate[] Title VI complaints . . . has exposed EPA's Civil Rights programs to significant consequences which have damaged its reputation internally and externally.").

<sup>21</sup> Kristen Lombardi et al., *Environmental Justice Denied: Environmental Racism Persists, and the EPA is One Reason Why*, Center for Public Integrity (2015) (noting EPA "the civil-rights office rarely closes investigations with formal sanctions or remedies," so EPA's Office of Civil Rights "appeared more ceremonial than meaningful, with communities left in the lurch.").

<sup>22</sup> U.S. Commission on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*, 1, 2 (2016) ("The [United States Commission on Civil Rights], academics, environmental justice organizations, and news outlets have extensively criticized EPA's management and handling of its Title VI external compliance program."); see also Engelman-Lado, *supra* note 6 at 295–300.

<sup>23</sup> OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, Report No. 20-E-0333, IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION (2020).

<sup>24</sup> Engelman-Lado, *supra* note 6 at 295.

<sup>25</sup> Dayna Bowen Matthew, *How the New Administration Could Bring a New Day to the EPA's Title VI Enforcement*, CONGRESSIONAL BLACK CAUCUS FOUNDATION, 1, 2 (2017), <https://www.cbfcinc.org/wp-content/uploads/2017/01/EPATitleVIReport.pdf>.

reparative effect for communities. And yet, EPA has yet to use its power to withhold or delay funding to ensure civil rights compliance.<sup>26</sup>

Environmental justice communities throughout the country still await the civil rights tiger with teeth.

**B. A Robust Title VI Compliance Program Requires Strong Civil Rights Guidelines that Promote the Objectives of Racial Equity and Environmental Justice Consistent with Executive Orders 12898, 13985, and 14008.**

EPA, via its ECRCO, has committed to “developing and issuing guidance to clarify the agency’s interpretations of legal requirements and expectations to stakeholders,” including guidance on legal standards pursuant to Title VI, with respect to permitting and consideration of cumulative impacts in disparate impact and disparate treatment analyses.<sup>27</sup> In its anticipated Dear Colleague Letter and future communications to recipients of EPA funding, as well as communications to the Environmental Council of the States (“ECOS”), EPA should set forth strong and detailed civil rights standards that are consistent with Environmental Justice Principles, communicating clearly that Title VI prohibits recipients from taking actions that result in discrimination on the basis of race and national origin, whether intentionally or unintentionally.

Such guidance is long overdue and must be one of EPA’s top priorities. This effort should be prioritized for expeditious action within the FY 2022 – 2026 time frame covered by the Draft Strategic Plan. Activities covered by this guidance should include, at minimum, recipient agency permitting, regulatory activities, planning, enforcement, land use and transportation planning and zoning, and the design and enforcement of mitigation measures, as well as affirmative funding mechanisms such as the allocation of resources for air monitors, green stormwater infrastructure, open spaces, and space for local food production.

Effective sequencing of the Agency’s Title VI efforts will greatly enhance the Agency’s civil rights work by enabling subsequent compliance reviews to address substantive as well as procedural requirements. We recommend that issuing clear and comprehensive guidance take precedence over the deployment of a compliance review effort, unless a review is undertaken in response to or in conjunction with a civil rights complaint or history of complaints. Further, compliance activity should be targeted to yield strong examples of substantive and concrete civil rights improvements, rather than simply checking procedural boxes.

EPA guidance must be communicated in ways that are accessible to diverse and multilingual audiences, including funding recipients, potential complainants seeking relief, and other community stakeholders. Issuance of the guidance must be accompanied by rigorous education and training for recipients and affected communities whose protection and well being is at stake. Guidance needs to communicate clear expectations and protocols to recipients—who must

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<sup>26</sup> OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, Report No. 20-E-0333, IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS’ TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION (2020).

<sup>27</sup> OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

comply—and it must also be understandable to the public—to inform them of their rights and how to obtain recourse—in a manner that is effective in reaching a range of underserved populations. EPA should engage stakeholders when formulating guidance, to ensure that the agency is communicating clearly and effectively.

The following recommendations should be incorporated to ensure that recipients of EPA funding and their programs comply with Title VI, setting forth the obligations and grant conditions for recipients of federal funds.

### *1. Legal Requirements and Expectations of Recipient Actions, Policies, and Practices*

ECRCO has “committed to developing and issuing guidance to clarify the agency’s interpretations of legal requirements and expectations to stakeholders[,]”<sup>28</sup> including permitting. ECRCO’s guidance should clearly delineate to which activities the guidance applies. EPA guidance should specifically set out requirements that recipients’ programs or activities cannot employ criteria, administration methods, or siting practices that cause or contribute to discriminatory impacts or effects. This is consistent with civil rights law, as well as with President Biden’s goal in Executive Order 13985 to advance equity through “a systematic approach to embedding fairness in decision-making processes.”

ECRCO’s guidance should further:

- Clearly prohibit a recipient of EPA funding from granting new permits, licenses, exemptions, or variances, as well as expansions or renewals of the same, to any entity found to be engaging in discrimination/discriminatory practices by any judicial or administrative body, including EPA or the recipient agency itself. This extends to any type of discrimination, including employment discrimination.
- Include examples of prohibited discriminatory effects, including but not limited to the segregation or exclusion of protected groups, or siting a polluting facility in a manner that would increase cumulative harms on protected groups.
- Communicate that decisions on applications for new permits, licenses, exemptions, or variances, as well as expansions or renewals of the same, must consider whether the facilities will have a disproportionate impact on the basis of race or national origin and, if so, whether there is a less discriminatory alternative.
- Communicate that funding recipients can lawfully deny permission or impose conditions based on environmental justice and civil rights grounds.

ECRCO’s guidance should also set forth affirmative measures for applicants to ensure that their actions do not involve discriminatory treatment and do not result in unintended discriminatory effects, as currently required under 39(c)(iii) of EPA’s General Terms and Conditions.<sup>29</sup> Such measures are consistent with President Biden’s policy set out in Executive Order 13985 to “affirmatively advance equity, civil rights, racial justice, and equal opportunity” as part of a

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<sup>28</sup> OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

<sup>29</sup>U.S. ENVTL. PROT. AGENCY, EPA GENERAL TERMS AND CONDITIONS EFFECTIVE OCTOBER 1, 2021 (last visited Nov. 12, 2021), [https://www.epa.gov/system/files/documents/2021-09/fy\\_2022\\_epa\\_general\\_terms\\_and\\_conditions\\_effective\\_october\\_1\\_2021.pdf](https://www.epa.gov/system/files/documents/2021-09/fy_2022_epa_general_terms_and_conditions_effective_october_1_2021.pdf)

“comprehensive approach” across the whole of government. At minimum, the guidance should also include:

- Affirmative requirements to include the use of environmental justice, racial equity, and cumulative impact analyses and procedural requirements to determine whether programs or activities cause disproportionately high and adverse impacts to a given population group relative to other population group(s), analyze the disparate impact(s), demonstrate whether the disparate impact is nondiscriminatory in nature, and show that less discriminatory alternatives were not available.
- Guidance should also address the collection and submission of racial data (on a revised form 4700-4), and standards and procedures for the analysis of whether recipients’ decisions comply with Title VI and other laws (including whether those decisions have a disparate impact on the basis of race or national origin).
- Require recipients to affirmatively document the results of environmental justice, racial equity, and cumulative impact analyses in the funding application process and make this non-discrimination and civil rights compliance action publicly available on the recipients’ website so the public knows what they are doing to comply.
- Require recipients to fill in, sign, date, and submit required Assurance Forms. EPA should keep these on file and use them as necessary to enforce Title VI through an action for breach of contract.

## 2. *Guidance on Cumulative Impacts*

As the National Environmental Justice Advisory Council (NEJAC) wrote in its December 2004 report, *Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts*:

*“The sense of anguish expressed . . . and uniformly experienced by disadvantaged, underserved, and environmentally overburdened communities reflects a complex web of combined exposures. In recent years, this combination has come to be described as ‘cumulative risks and impacts.’ Manifested . . . is the concept of vulnerability, a matrix of physical, chemical, biological, social and cultural factors which result in certain communities and sub-populations being more susceptible to environmental toxins, being more exposed to toxins, or having compromised ability to cope with and/or recover from such exposure.”<sup>30</sup>*

Over time, scientific evidence has further demonstrated the adverse health consequences of the cumulative impacts of social vulnerability, individual susceptibility, and exposure to environmental hazards.<sup>31</sup> No issue could be more central to residents of already environmentally overburdened communities than the proper consideration of cumulative impacts in environmental decision making. And yet, in the absence of guidance and training, the response

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<sup>30</sup> NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, ENSURING RISK REDUCTION IN COMMUNITIES WITH MULTIPLE STRESSORS: ENVIRONMENTAL JUSTICE AND CUMULATIVE RISKS/IMPACTS (2004), <https://www.epa.gov/sites/production/files/2015-04/documents/ensuringriskreductionnejac.pdf>.

<sup>31</sup> *Id.*

will be ad hoc,<sup>32</sup> even where funding recipients acknowledge a need to address cumulative impacts. EPA must not only require recipients to assess cumulative impacts, but also issue detailed guidance on standards and best practices for doing so.

A cumulative impacts analysis must incorporate 1) all significant effects on the environment from the project or policy in question, including effects that would be irreversible, 2) mitigation measures, 3) alternatives, 4) research and data from community-based research, 5) timely analysis of how reasonable foreseeable future actions will likely augment the impact of the project, and 6) the cumulative effects on a local population or community over time and space, of other projects, including those funded by other federal, state, and local agencies and entities. Based on the outcome of that analysis, a grantee should deny new or continued funding to projects that will exacerbate existing harmful conditions on that population or community.

EPA should provide detailed guidance to funding recipients on necessary considerations required for a cumulative impact analysis, including, not limited to, the following:

- The nature and severity of the impact, including whether the health, economic, or environmental effects impact People of Color, Indigenous Peoples, low-income, and other underserved communities in a disproportionately high and adverse way, taking into account localized risks and physical sensitivities of the affected community.<sup>33</sup>
- Consideration of the continuing impact of historic harms caused by racial segregation and colonization that have created and perpetuated sacrifice zones, including historical patterns of exposure to environmental hazards and economic and health burdens associated with disinvestment. For example, such guidance should recognize that even where pollution levels are trending downwards in an environmental justice community, the past history of higher exposures warrants harm reduction in the present.
- Discussion of the proper scope of comparison communities to the potentially most-impacted community for the disparity analysis.
- When statistical evidence is needed and what sources and types of data can and should be used as indicators of an adverse or disparate impact.
- Importance and role of community-based and citizen science efforts that have filled gaps in data on disparities in environmental and public health.
- Direct and indirect effects of the project on a given resource, ecosystem, and affected community and whether potentially impacted resources translate to use values (e.g., other economic or social purposes, religious or spiritual practices) or non-use values (e.g., scenic views) by members of the affected community.
- Whether environmental standards adequately address the possible levels, risks, and routes of exposure to the potentially affected communities. Guidance should also address the fact that while exposure standards do not exist for all chemical products or pollutants, many chemicals lacking such standards do produce cognizable harms which should be eliminated, avoided, reduced, and mitigated.
- Systematic consideration of all reasonable alternatives for reducing or eliminating potentially disproportionate impacts. This should include consideration of alternatives proposed from

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<sup>32</sup> OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, Report No. 20-E-0333, IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION (2020).

<sup>33</sup>See e.g. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020).

within the affected communities, documenting the rationale for rejection of alternatives considered, and incorporating consistent consideration of a “no action” alternative as a real option.

- Basis for any conclusion that an impact may or may not be disproportionately high and adverse and the rationale behind that conclusion. This information should be made transparent to and reviewed with the affected communities.
- Analysis of how environmental and health impacts are distributed within the affected community, if the potential for any adverse impact is identified.
- Funding recipients’ obligations to inform the public by providing sufficient and comprehensive information on any disproportionately high and adverse impacts and the rationale for an agency’s conclusions about the impacts.
- Involvement of the public in providing input and information to identify potential adverse impacts.
- Impact of current and future climate risks and burdens and how those factor into environmental remediation activities. To ensure consistent and robust consideration of climate impacts, EPA must develop clear and binding standards for how to incorporate climate change considerations into site-level plans and periodic reviews.

As an example of the final point above, the Draft Strategic Plan highlights that Superfund sites are disproportionately located near low-income communities and communities of color.<sup>34</sup> Climate change compounds this disproportionate risk: in 2019, the Government Accountability Office (“GAO”) found that a significant number of Superfund sites are vulnerable to the impacts of climate change, including flooding, sea level rise, and wildfires.<sup>35</sup> GAO also concluded that EPA is not consistently integrating climate change considerations into its site-level cleanup decisions and plans.<sup>36</sup> For example, during and after Hurricane Harvey in 2017, Houston residents, many of whom were low-income residents and/or residents of color, were forced to swim through floodwater that contained chemicals from at least 12 Superfund sites (as well as 10 oil and gas refineries and 500 chemical plants).<sup>37</sup> Projects such as Superfund and brownfields cleanups should be designed and implemented so that they can withstand the foreseeable impacts of climate change and protect surrounding communities and the environment. The consequences of not considering the risks and burdens of the climate crisis layered on top of existing environmental harms are severe.

EPA’s guidance on cumulative impacts as it relates to civil rights enforcement should be coordinated with the development of policy, guidance, and methodology on cumulative impacts elsewhere, including but not limited to incorporation of cumulative impacts assessments into

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<sup>34</sup> U.S. ENVTL. PROT. AGENCY, POPULATION SURROUNDING 1,857 SUPERFUND REMEDIAL SITES (2020) <https://www.epa.gov/sites/default/files/2015-09/documents/webpopulationrsuperfundsites9.28.15.pdf>.

<sup>35</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 20-73, SUPERFUND: EPA SHOULD TAKE ADDITIONAL ACTIONS TO MANAGE RISKS FROM CLIMATE CHANGE (2019), <https://www.gao.gov/products/gao-20-73>.

<sup>36</sup> *Id.* at 15.

<sup>37</sup> Frank Bajak, *Hurricane Harvey’s toxic impact deeper than public told*, Associated Press, Mar. 23, 2018, <https://apnews.com/article/environment-hurricanes-storms-tx-state-wire-north-america-e0ceae76d5894734b0041210a902218d>.

implementation of federal environmental statutes, as well as local and state law and policy.<sup>38</sup> ECRCO’s guidance should clearly explain the relationship of a Title VI analysis and the cumulative impact analysis required under CEQ’s proposed revision of its NEPA regulations and possibly equivalent state statutes. Cumulative impacts analysis for purposes of Title VI compliance should be at least as stringent as that required under the proposed CEQ NEPA rule. Furthermore, the guidance should emphasize that while compliance with NEPA may help fulfill entities’ cumulative impact analysis requirements under Title VI, Title VI (unlike NEPA) requires entities to select the least discriminatory alternative. EPA should also be clear that proving Title VI violations requires only a preponderance of the evidence, and that this is substantially less than the scientific standard of proof. CEQ and EPA should institute a notification and/or information sharing process to ensure that both agencies and the public are made aware of NEPA analyses that may have implications for Title VI enforcement.

Finally, EPA must emphasize the requirement and urgency of acting on the implications and conclusions of cumulative impact analyses. As articulated in the 2004 NEJAC report excerpted above, EPA and its funding recipients must institutionalize a “bias for action”.<sup>39</sup>

### 3. *Rescission of the Rebuttable Presumption*

As part of ECRCO’s commitment to address potential noncompliance with Title VI before funds are awarded, ECRCO must establish clear guidance that compliance with environmental laws is not a defense to a civil rights claim, consistent with the President’s commitment to “rescind EPA’s decision in *Select Steel*.”<sup>40</sup> As the Fourth Circuit now famously stated in *Friends of Buckingham v. State Air Pollution Control Bd.*, “relying on ambient air standards is not a sufficiently searching analysis of air quality standards for an [environmental justice] community.”<sup>41</sup> To that end, EPA must clarify that recipients have obligations to comply with Title VI that are distinct from their obligations under environmental laws, including NEPA.

Although EPA released Chapter 1 of its External Civil Rights Compliance Office Compliance Toolkit and FAQ on January 18, 2017, in part to withdraw what has been called the “rebuttable presumption” that compliance with environmental laws is a defense to the adversity prong of a disparate impact analysis, time and again in its decisions, EPA and its funding recipients continue to either conflate environmental and civil rights standards or get the standards wrong. As part of ECRCO’s commitment to update, clarify, and strengthen Chapter 1 of the Toolkit, the office should clearly and affirmatively rescind the portion of the *Select Steel* decision that assumed or established a rebuttable presumption. Furthermore, the office should emphasize this commitment in its Dear Colleague Letter, and incorporate the guidance in future training materials to be distributed to Deputy Civil Rights Officials, Regional Counsels, Environmental

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<sup>38</sup> The State of New Jersey and the Commonwealth of Massachusetts are both currently engaging in and/or embarking on rulemaking efforts to implement new laws that require consideration of cumulative impacts in permitting decisions. See An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts Ch. 8, §§ 58, 102C.; New Jersey Environmental Justice Law, N.J.S.A. 13:1D-157, et seq.

<sup>39</sup> *Id.*

<sup>40</sup> *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, <https://joebiden.com/environmental-justice-plan/> (last visited Nov. 1, 2021).

<sup>41</sup> *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 93 (4th Cir. 2020).

Justice, and other EPA regional and program staff, as outlined in OGC’s response letter to the OIG.

#### 4. *Clarifying and Bolstering the Role of Data*

ECRCO has committed to “[d]evelop or update and implement policy, guidance, and standard operating procedure for collecting, reviewing, and using data to aid the External Civil Rights Compliance Office, EPA regions and programs, and recipients in assuring Title VI compliance[,]”<sup>42</sup> as well as “clarify[] recipients’ obligation to collect and maintain data to evaluate and ensure compliance.”<sup>43</sup> ECRCO’s anticipated guidance should include clear parameters stating when statistical and historical evidence is needed and what sources and types of data should be used as reliable indicators of a disparate impact (e.g., how to determine which comparative groups to use to determine a disparity). In addition to clarifying that recipients must collect and maintain data to evaluate and ensure compliance with Title VI (as promised in OGC’s response letter), EPA should emphasize that Title VI also requires the recipient of federal funds to evaluate racial and ethnicity data and conduct environmental justice analyses when issuing new permits, licenses, exemptions, variances, expansions, or renewals, as well as policies and regulations, among other activities. EPA should emphasize that collecting and analyzing socioeconomic data, as well as granular data on localized environmental, climate, and public health burdens, will assist recipients in fulfilling their responsibility.

While guidance is critical to ensure how data should factor into civil rights compliance, there are significant gaps in baseline data needed to identify adverse, cumulative impacts. In 2020, the Government Accountability Office reported on the national ambient air quality monitoring system, finding that it suffers from aging infrastructure and underfunding, leading to gaps in data needed to “understand and address the health risks from air pollution.”<sup>44</sup> This is not the only structural deficiency undermining understanding of cumulative environmental, climate, and health burdens. For example, for decades regulated industries have pushed back successfully against requirements for pre-construction monitoring to ensure actual onsite baseline air quality data, as was intended under the Clean Air Act, while many communities can point to ill-placed monitors that fail to account for and track environmental and public health burdens caused by emitting facilities.

EPA’s 2020 enforcement discretion policy also demonstrates the perils of relying on industry to self-report, particularly when monitoring and reporting requirements can so easily be deregulated, leaving communities without any information at all about adverse impacts on water and air quality.<sup>45</sup> Meanwhile, environmental justice communities throughout the country have created robust systems for data collection, using citizen science and community-based research methods, but such data may or may not be honored by EPA or recipient agencies.

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<sup>42</sup> OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

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

<sup>44</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-21-38, AIR POLLUTION: OPPORTUNITIES TO BETTER SUSTAIN AND MODERNIZE THE NATIONAL AIR QUALITY MONITORING SYSTEM (2020), <https://www.gao.gov/products/gao-21-38>.

<sup>45</sup> *See, e.g.,* VERMONT LAW SCH. ENVTL. JUSTICE CLINIC ET AL., ENVIRONMENTAL RACISM UNDER COVID-19 (2021), <https://www.vermontlaw.edu/sites/default/files/2021-08/Federal-Dereliction-of-Duty-Full-Report.pdf>.

ECRCO should work with offices across EPA to facilitate data collection, reporting, and awareness of pollutants of concern to residents of environmental justice communities, providing communities access to the most protective monitoring tools to assess baseline cumulative environmental risks and harms. An EPA-wide comprehensive environmental monitoring program should at minimum:

- Develop and adopt procedures that allow for the swift collection, analysis, verification, and reporting of monitoring data, including through investment in resources for ongoing citizen science and community-based monitoring systems, consistent with recommendations advanced by the National Environmental Justice Advisory Council,<sup>46</sup> White House Environmental Justice Advisory Council,<sup>47</sup> and Executive Order 14008.
- Ensure that the results of community-engaged and citizen science and community-based monitoring are honored and incorporated into analyses conducted by EPA and funding recipients and are deemed actionable as long as they meet scientific standards.
- Consistent with the OIG’s recommendation to develop tools to aid ECRCO and other offices in assuring Title VI compliance, EPA should consider developing and launching a platform to aggregate and disseminate exposure data supplied by federal and state regulators, facilities-based monitoring and reporting, and community-based monitoring, working with the WHEJAC, NEJAC, and frontline and fence-line communities to identify priority data gaps.
- Conduct immediate and targeted assessments of stationary and mobile source violations of any criteria air pollutants environmental justice communities.
- Communicate real-time environmental and public health risks, ensure timely communication of exposure data, provide real-time data to communities as often as practicable, ensure that technical information is supplied in formats and language accessible to lay audiences and people with limited English proficiency.

All this said, data collection should neither be a burden on environmental justice communities nor a procedural step with no substantive outcomes, but should lead directly to enforcement and ultimately tangible improvements to air and water quality and health outcomes.

#### *4. Language Access and Accessibility*

Efforts to strengthen requirements for meaningful language access and accessibility should start from the Environmental Justice Principle that the communities most affected have the “right to

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<sup>46</sup> NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, RECOMMENDATIONS AND GUIDANCE FOR EPA TO DEVELOP MONITORING PROGRAMS IN COMMUNITIES (2017), <https://www.epa.gov/sites/default/files/2018-01/documents/monitoring-final-10-6-17.pdf>.

<sup>47</sup> WHITE HOUSE ENVTL. JUSTICE ADVISORY COUNCIL, INTERIM FINAL RECOMMENDATIONS (2021), [https://www.epa.gov/sites/default/files/2021-05/documents/whejac\\_interim\\_final\\_recommendations\\_0.pdf](https://www.epa.gov/sites/default/files/2021-05/documents/whejac_interim_final_recommendations_0.pdf).

participate as equal partners at every level of decision-making”<sup>48</sup>--and strive to dismantle the barriers to making that a reality. ECRCO and OGC have committed to “enhance communication and engagement with environmentally overburdened and disadvantaged communities[.]”<sup>49</sup> Consistent with that commitment and President Biden’s mandate pursuant to Executive Order 13985 that agencies identify potential barriers underserved communities face in accessing agency resources, EPA must work with diverse stakeholders to develop and distribute supplemental internal and external Title VI Limited English Proficiency Guidance, as well as guidance on accessibility for people with disabilities, including, but not limited to, the following:  
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- Cite, enunciate, and comply with Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency*. Compliance should also be consistent with DOJ guidance on Title VI enforcement of limited English proficiency rights.<sup>51</sup>
- Clarify and expand the definition of “vital documents” to ensure translation of materials, including but not limited to notices and agendas of public meetings and hearings, notices of violations or enforcement or disciplinary action, permit summaries, proposed and final rules, and documents relevant to natural disasters or other emergencies.
- Develop and distribute guidance and methodology for identifying populations with limited English proficiency, anticipating language needs relative to any given funding recipient program or activity, and for providing interpretation or translation services whenever requested. Guidance should require state agencies to issue translated notices of the availability of interpretation services at public meetings and hearings, as well as clear instructions for how to request language access services if they will not automatically be provided, with provision of language access services being the default.
- Establish a set of core competencies and quality control protocols to ensure that funding recipients engage interpreters and translators equipped with the relevant training, skills, and subject matter expertise necessary to ensure access to any given funding recipient program or activity.
- Update and distribute guidance on best practices for fulfilling public notice requirements to proactively expand access for public participation, e.g. taking into account the shifting roles of traditional print media; ensuring notices are published in ethnic, community, and

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<sup>48</sup> First National People of Color Environmental Leadership Summit, *The Principles of Environmental Justice* (EJ) (Oct. 24-27, 1991), <https://www.ejnet.org/ej/principles.pdf>.

<sup>49</sup> OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, *OGC REVISED RESPONSES TO OIG RECOMMENDATIONS* (2021).

<sup>50</sup> See Dep’t of Just., *Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs* (May 2011), [https://www.lep.gov/sites/lep/files/resources/2011\\_Language\\_Access\\_Assessment\\_and\\_Planning\\_Tool.pdf](https://www.lep.gov/sites/lep/files/resources/2011_Language_Access_Assessment_and_Planning_Tool.pdf); Dep’t of Just., *Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs* (Aug. 2011), [https://www.lep.gov/sites/lep/files/resources/081511\\_Language\\_Access\\_CAQ\\_TA\\_Guidance.pdf](https://www.lep.gov/sites/lep/files/resources/081511_Language_Access_CAQ_TA_Guidance.pdf).

<sup>51</sup> Enforcement of Title VI of the Civil Rights Act of 1964–National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123 (Aug. 16, 2000).

foreign-language newspapers and shared on social media and hyperlocal media, as well as online; employing email and phone lists in partnership with community-based organizations and institutions; and taking into account and addressing overall barriers to digital access in environmental justice communities.

- Develop and distribute guidance for public engagement and participation that maximizes access for people with disabilities and people with limited English proficiency within the meaning of Executive Order 13166 and EPA Order 1000.32, including, but not limited to, addressing time limits for public comment, assuring virtual and telephone access wherever possible (in addition to in-person access), providing for after-traditional work hours participation opportunities, allowing people to give comments in their own language and responding to their comments in the same language, and developing standards for interpretation and translation services to ensure participants can both speak and understand proceedings in real time.

The COVID-19 pandemic has, by necessity, required EPA and its funding recipients, as well as organizations and institutions worldwide, to develop strategies to reach stakeholders through reliance on digital technology. Moving forward, EPA and its funding recipients must build on the lessons learned and relationships built out of this moment *and* resist the urge to let this moment establish a new status quo, asking, instead, who can show up, where, and for how long. EPA and its funding recipients should use this opportunity to expand access, in consultation with the disability community, through well-facilitated and interpreted virtual options. However, online meetings cannot replace the value of in-person public participation, given the continued disparities created by the digital divide, particularly within environmental justice communities. EPA and its funding recipients must embrace a range of options for engagement that prioritize directly connecting the people most affected by a decision to the people holding the power to make that decision.

### **C. EPA’s Approach to Affirmative Compliance and Enforcement Must Go Beyond the Procedural Checklist.**

ECRCO has committed to proactively addressing potential noncompliance with Title VI prior to the awarding of federal funds, and to develop a “systematic approach” to ensure ongoing compliance through compliance reviews and post award audits. As stated above, ECRCO must sequence guidance before compliance reviews, absent a specific complaint or history of complaints that warrants a compliance review. With guidance as a framework, ECRCO should establish mechanisms to facilitate and monitor affirmative compliance, while communicating and delivering consequences for noncompliance. Thus, we support the commitment “[r]emove the presumption that ECRCO will not object to approval of an award absent an unresolved finding of discrimination[.]”<sup>52</sup> in conjunction with EPA’s review of Form 4700-4. Consistent with that recommendation and in addition to the actions outlined in OGC’s response to the OIG’s Recommendation 2, ECRCO should take the following actions to ensure federal funds are not used to support actions that discriminate or have discriminatory effects on protected groups.

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<sup>52</sup> OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

## *1. Robust Screening and Accountability Measures*

As a start, ECRCO must screen funding applicants for civil rights compliance in conjunction with (1) new applications for funds, (2) applications for approval of specific projects, and (3) significant changes in applications for continuation or renewal of funding. The policies should affirmatively state that EPA shall not award financial assistance until the civil rights assessment is complete and the funding applicant signs a document certifying to civil rights compliance. In OGC's response to the OIG's Recommendation 4, ECRCO states that it plans to recommend approval of financial assistance identified as noncompliant with Title VI and EPA's nondiscrimination regulation through review of Form 4700-4, "provided that [an] applicant has agreed in writing . . . to have all requirements in place within six months." Unless and until EPA establishes a new culture of compliance and enforcement within the agency and amongst funding recipients, conditional approval seems insufficient.

ECRCO must also include clear, forceful language in Performance Partnership Agreements (PPAs) that delineates what compliance with Title VI requires, and clarify that noncompliance will result in the de-awarding of federal funds until recipients can demonstrate compliance. Failure to comply must result in the de-awarding of grants until grant recipients can demonstrate compliance. A periodic review of recipients should be undertaken to demonstrate the seriousness of agency intentions.

However, to meet EPA's own commitment to "ensure that civil rights compliance goes beyond a checklist of procedural requirements." ECRCO also needs to create additional evaluation mechanisms to determine whether funding recipients are, in fact, complying with Title VI. As discussed above regarding guidance on legal requirements and expectations of recipient Actions, policies, and practices, ECRCO must require all funding applicants to conduct and submit to EPA environmental justice and equity analyses of their programs and activities as a condition of federal funding. EPA should develop and disseminate evaluation methodology and guidance to facilitate compliance, relying on early and frequent consultation with community stakeholders as well as public comment opportunities on the proposed approach. In recommending the parameters to be used in conducting these analyses, EPA can also rely on OMB's July 2021 report submitted to the President pursuant to Executive Order 13985 on identifying methods to assess equity.<sup>53</sup>

## *2. Transparent and Targeted Deployment of Affirmative Compliance Reviews*

It remains unclear how ECRCO intends to deploy its limited resources in selecting priority areas for compliance reviews and audit. ECRCO has appropriately sought out input through its October 27, 2021 stakeholder engagement session on selecting priorities for its planned compliance reviews and audit processes. However, additional transparency and consultation regarding this process would likely lead to more nuanced input from stakeholders.

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<sup>53</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STUDY TO IDENTIFY METHODS TO ASSESS EQUITY: REPORT TO THE PRESIDENT (2021), [https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation\\_508-Compliant-Secure-v1.1.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf).

ECRCO should issue a public-facing compliance review plan every year, identifying which issues will be covered, and how many reviews will be conducted. As a starting point, ECRCO should focus on communities where funding recipients have been subject to repeated complaints, as well as recipients subject to Informal Resolution Agreements as many have, to date, gone unenforced or under-enforced. ECRCO should additionally work in coordination with the Office of Air and Radiation (OAR), Office of Enforcement and Compliance Assurance (OECA), Office of Environmental Justice (OEJ), Office of Research and Development (ORD), and other relevant offices at EPA to identify funding recipients in geographic areas experiencing significant racial disparities in health outcomes and/or environmentally-related morbidity/mortality, including geographic areas currently experiencing significant racial disparities in COVID-19 morbidity and mortality that coincide with potential environmental exposure.<sup>54</sup>

Sites for compliance reviews may be chosen on any well-reasoned basis, but not randomly. Issues should be those that professional civil rights staff, advocates, and members of the public and communities believe need addressing, but which have not previously been addressed sufficiently. Model investigative plans should be written for these issues. Properly conducted compliance reviews should be designed to achieve systemic, pattern and practice beneficial improvements in civil rights compliance that hopefully shift the burden away from individual complainants. EPA's emphasis should be on achieving such systemic, pattern and practice improvements.

### *3. Commitment to Coordination with and Referral to the Department of Justice*

The Department of Justice (DOJ) has recently launched its first environmental justice investigation of one of its own funding recipients, committing to an “independent, thorough and fair” investigation into wastewater disposal and infectious disease and outbreaks programs of the Alabama Department of Public Health and the Lowndes County Health Department.<sup>55</sup> EPA must work in tandem with DOJ to develop a strong culture of civil rights enforcement in the environmental justice context, consistent with the authority vested to DOJ to “coordinate the implementation and enforcement” of Title VI and other laws prohibiting discrimination.<sup>56</sup> EPA should set forth clear parameters for referral to DOJ to pursue enforcement against noncompliance. EPA should rely on DOJ's coordination function when a recipient that is subject to a complaint receives funding from multiple agencies. Finally, EPA should institute a policy of referral to DOJ rather than simply denying jurisdiction when EPA receives a complaint about an entity to whom EPA does not provide funding so that DOJ can properly direct the complaint to the relevant federal agency.

We also would like to call your attention to comments submitted to DOJ by 28 environmental justice and environmental groups and individual civil rights advocates regarding Environmental Justice and Enforcement, on October 15, 2021. Those comments highlight and support the

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<sup>54</sup> Michael Petroni et al., *Hazardous air pollutant exposure as a contributing factor to COVID-19 mortality in the United States*, 15 *Env'tl. Res. Letters* 0940a9 (2020), <https://iopscience.iop.org/article/10.1088/1748-9326/abaf86/pdf>.

<sup>55</sup> U.S. Dep't of Just., *Justice Department Announces Environmental Justice Investigation Into Alabama Department of Public Health and Lowndes County Health Department* (Nov. 9, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-environmental-justice-investigation-alabama-department-public>.

<sup>56</sup> Exec. Order No. 12250, 45 *Fed. Reg.* 72995 (Nov. 2, 1980).

comments discussed here, and seek leadership and action from DOJ to assist EPA in the work discussed in these comments under Title VI and to advance civil rights and environmental justice in the enforcement of environmental laws.<sup>57</sup> In addition, in 2015 and 2016, a large coalition of environmental justice and environmental groups submitted comments to EPA regarding its then-in-development Environmental Justice Strategic Plan known as EJ 2020 addressing these issues and we also bring those to your attention--years later, the recommendations and requests remain relevant and only more urgent.<sup>58</sup>

#### **D. EPA Must Establish Clear and Meaningful Mechanisms for Stakeholder Engagement and Transparency in the Development *and* Implementation of its External Civil Rights Compliance and Enforcement Program.**

The Environmental Justice Principles require “the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement, and evaluation.”<sup>59</sup> ECRCO’s Case Resolution Manual incorporated language developed in a white paper issued in 2013,<sup>60</sup> as a result of concerns raised by complainants across the country about being excluded from deliberations in the case resolution process, most notably in the *Angelita C.* case. ECRCO’s Case Resolution Manual should be amended to ensure that ECRCO regularly consults with complainants and/or stakeholder communities during investigations and before reaching a settlement, resolution agreement, or final determination in a case, in conformity with the Environmental Justice Principles. Such consultation should include making complainants aware of the need for, and allow complainants time to submit, specific categories of additional information if EPA believes it needs such information or evidence that is not in the record. ECRCO should further clarify that consultation with complainants is required, not discretionary.

The OGC should additionally recommend that Administrator Regan rescind or significantly revise former Administrator Pruitt’s October 16, 2017 [\*Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements\*](#). The directive requires EPA to first consult states and regulated industries affected by a complaint and to have those entities concur with a consent decree or settlement agreement before it is finalized, but includes no parallel requirement for affected communities. The directive also requires EPA to “seek to exclude the payment of attorney’s fees and costs to any plaintiff or petitioner in the litigation.” Taken together, these changes explicitly tilt the scales in favor of regulated industry while excluding complainants and the communities they represent. The Directive is thus inconsistent with President Biden and Administrator Regan’s public commitments to enhance meaningful engagement with overburdened communities, and increase access to federal resources, and should be rescinded or revised to reflect the administration’s priorities set forth in Executive Order 13985.

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<sup>57</sup> See Comments of RISE St. James et al. to DOJ (attention Ms. Cynthia Ferguson) at 1-4, 18-20 (Oct. 15, 2021).

<sup>58</sup> Comments of Environmental and Community Groups on EPA’s Environmental Justice Strategic Plan: EJ2020 (2016); Comments of Air Alliance Houston *et al.* on EPA’s Environmental Justice Strategic Plan: EJ2020 (2015);

<sup>59</sup> First National People of Color Environmental Leadership Summit, The Principles of Environmental Justice (EJ) (Oct. 24-27, 1991), <https://www.ejnet.org/ej/principles.pdf>.

<sup>60</sup> EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE, U.S. ENVTL. PROT. AGENCY, CASE RESOLUTION MANUAL (2021), [https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual\\_.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

ECRCO must further commit to transparency in EPA’s civil rights enforcement program and take a more inclusive approach to its relationship with complainants. While the recent publishing by ECRCO of a list of complaints received in FY 2021 through FY 2017 is a welcome step forward, additional transparency is necessary. This entails the following steps.

- Institute a searchable database of all ongoing and resolved civil rights cases with links to public documents for stakeholders to download to ensure transparency—particularly around frequent offenders—and to eliminate the burden of a FOIA process for both the public and EPA. This can be accomplished through the Enforcement and Compliance History Online website.<sup>61</sup>
- Publish awards and award amounts for grant programs from 2006–present and adopt policies ensuring the continuation of this practice on an annual basis.
- Reinstate a Title VI and Civil Rights Subcommittee within the NEJAC and/or establish a Title VI and Civil Rights Federal Advisory Committee within ECRCO to allow ECRCO to receive consistent advice on Title VI and Civil Rights from affected stakeholders.

Finally, EPA must establish an ongoing process for meaningful engagement to ensure that any guidance released by ECRCO is informed by the lived experience of environmental justice communities facing the cumulative impacts of environmental and climate burdens and systemic racism. The final guidance should be drafted to be broadly accessible to both recipients of federal funding as well as communities. Recipients should be able to easily understand and apply EPA’s guidance in order to facilitate quick and effective compliance. Communities should also be able to easily understand to whom the guidance applies, what measures are required, how to determine when a prohibited discriminatory action has been taken, and what mechanisms are available to challenge those actions or seek redress. These actions should be taken in consultation with and through regular reporting to the NEJAC and WHEJAC.

#### **E. EPA’s Title VI Program Requires a Culture Shift to Center Environmental Justice Communities in Decision-making and Promote the Objectives of Racial Equity and Environmental Justice Consistent with Executive Orders 12989, 13985, and 14008.**

As the Office of Management and Budget found in its July 2021 Assessing Equity Report to President Biden, issued pursuant to Executive Order 13985, “for change to take root, organizational cultures must also shift, and the people in those cultures must consolidate new skills.”<sup>62</sup>

Meaningful engagement of residents in EJ communities requires more than inviting community members to NEJAC meetings that include public comment periods or the EPA Administrator

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<sup>61</sup> Available documents should include correspondence with complainants such as acceptance or nonacceptance letters, Agency determinations such as jurisdictional reviews, and the complaints themselves, with consent of complainants and/or appropriate redactions.

<sup>62</sup> OFFICE OF MGMT. & BUDGET, OMB 35-36, STUDY TO IDENTIFY METHODS TO ASSESS EQUITY: REPORT TO THE PRESIDENT (July 2021), [https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation\\_508-Compliant-Secure-v1.1.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf).

making a stop in a frontline community on a regional tour. Despite having good intentions, EPA staff are currently at best ill equipped and at worst disinterested by the lived experiences and needs of people on the frontlines and fencelines of pollution and climate change. Building trust with communities that have been consistently and systematically oppressed for generations will not happen overnight; as a starting point, EPA's Strategic Plan and civil rights enforcement program should direct both time and resources to train staff on culturally appropriate and trauma-informed approaches to engage with environmental justice communities, people with limited English proficiency, people with disabilities, and other populations that have been left out of the rooms and processes where decisions are made. As a starting point, regional staff should be encouraged to foster relationships with people and organizations working to address the impacts of the climate crisis and environmental racism in their areas. One concrete way that EPA could start to shift this dynamic and foster trust with impacted communities is to create regional equivalents of NEJAC. Rather than seeing organizers and community-based organizations across the country as disgruntled opposition, ECRCO and EPA should seek to collaborate with them whenever possible.

It is unacceptable to solicit feedback only to put it on a shelf. Engagement is not meaningful unless the information gathered from the community is incorporated into policies, permits, and regulations. A seat at the table and an opportunity to be heard are the bare minimum: affected communities must be empowered to help government officials make the decisions that are aimed to improve their health, environment and quality of life.

## **F. Conclusion**

For EPA to “advance justice and equity” and “take decisive action to advance environmental justice and civil rights” (as stated in the EPA Draft Strategic Plan) will require systemic and structural changes, significant investment of staff and resources; actual ongoing, regular engagement and information sharing with the people most affected, including communities living at the fencelines and frontlines of environmental and climate risks and burdens; and investment into a culture shift within the agency and amongst funding recipients.

Addressing racial disparities in environmental exposure and ensuring environmental justice requires a new commitment to civil rights enforcement by federal agencies and to oversight of civil rights compliance among federal funding recipients. We urge that affirmative implementation of Environmental Justice Principles in decision-making will further civil rights compliance. These are not separate endeavors. Ultimately, the goal must be tangible reductions in emissions and pollution, environmental restoration, and improved health outcomes in environmental justice communities to address longstanding and current disparities on the basis of race and national origin.

In sum, the structural nature of past, present, and future environmental and climate harms requires EPA to rethink and remake how the federal government makes decisions, distributes resources, holds federal funding recipients accountable, and ensures that those communities historically and currently underserved and overburdened are at the center of the policymaking process. Thank you for your time and consideration of these comments.

We would be glad to discuss further and assist however possible as you move forward. For more information, please contact Amy Laura Cahn, Director, Environmental Justice Clinic at Vermont Law School at (917)-771-3385 or [alcahn@vermontlaw.edu](mailto:alcahn@vermontlaw.edu) and any of the undersigned groups.

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