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November 24, 2021

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Letter sent via email to Regan.Michael@epa.gov

Re: *Enforcement of Civil Rights and Environmental Justice*

Dear Administrator Regan,

Thank you for your commitment to leading the United States through this period of complex transitions and to strengthening enforcement of environmental and civil rights laws in communities overburdened by the cumulative effects of concentrated pollution and the climate crisis. On behalf of the undersigned organizations and individuals, we urge the United States Environmental Protection Agency (EPA) to follow through on the Biden-Harris 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 sub-recipients. 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 to advance civil rights and environmental justice.

This letter also serves as a response to the request for comments on the Draft FY 2022-2026 EPA Strategic Plan from National Environmental Justice Advisory Council (NEJAC), as well as our submission to the External Civil Rights Compliance Office’s open comment period. We would additionally request the opportunity to meet with you to discuss these matters.

We are heartened by the renewed focus on civil rights and environmental justice and by the commitments made by you and the Administration 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.”¹ EPA further outlines the following objectives within that goal:

- 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

The 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 the September 28, 2020 Office of Inspector General Report, *Improved EPA Oversight of Funding Recipients’ Title VI Programs Could Prevent Discrimination*.² In its response, EPA states that ECRCO intends to achieve the following, “all within dates certain”³:

- 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.⁴

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

² 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).

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

⁴ *Id.*

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 (DOJ), persistently and repeatedly over more than two decades.⁵

People of Color, Indigenous Peoples, and low-income communities have for too long felt the adverse health and other effects of racial segregation and inadequate environmental protection.⁶ Government-sanctioned discriminatory housing and land use practices have had devastating impacts on generations of residents, whose injuries include disproportionate levels of lead poisoning, asthma, diabetes, heart disease, respiratory illness, cancer, and now COVID-19.⁷ Severe and longstanding deficiencies in EPA’s external civil rights enforcement and oversight play a key role in enabling such environmental racism and injustice.⁸ Zealous enforcement of Title VI of the Civil Rights Act of 1964 (“Title VI”)⁹ and Executive Orders 12898, 13985, and 14008 is necessary to correct the longstanding trend of concentrating emitting facilities in environmental justice communities already disinvested and overburdened by pollution, and now contending with increasing risks due to climate change. EPA’s historical failure to challenge the unjust distribution of environmental, economic, public health, and climate burdens and benefits has constituted a massive failure of our nation’s civil rights enforcement 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

⁵ Comment letters regarding civil rights enforcement in the environmental justice context dating back to 2011 and detailing advocacy dating back at least to 2000 have been attached as an appendix to this letter. Related recommendations were shared, as well, with the Biden-Harris Transition Team. See Title VI EJ Alliance, *Achieving Meaningful Change in a Time of Both Crisis and Opportunity: Ensuring Equal Protection to Achieve Environmental Justice* (Dec. 11, 2020) https://legacy-assets.eenews.net/open_files/assets/2021/02/02/document_gw_03.pdf. See also 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).

⁶ See e.g. 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). See also Christopher W. Tessum, et al., *PM2.5 pollutants disproportionately and systemically affect people of color in the United States*, *Sci. Advances*, vol. 27, no. 18 (Apr. 28, 2021).

⁷ See, e.g., Jyotsna S. Jagai et al., *The Association Between Environmental Quality and Diabetes in the U.S.*, *Journal of Diabetes Investigation* (Oct. 2019) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7078099/>; Olga Khazan, *A Frightening New Reason to Worry About Air Pollution*, *The Atlantic* (July 5, 2018) <https://www.theatlantic.com/health/archive/2018/07/a-frightening-new-reason-to-worry-about-air-pollution/564428/>; Anthony Nardone et al., *Associations between historical residential redlining and current age-adjusted rates of emergency department visits due to asthma across eight cities in California: an ecological study*, *Lancet Planet Health* (Jan. 4, 2020); *New Research Links Air Pollution to Higher Coronavirus Death Rates*, *N.Y. Times* (Apr. 7, 2020) <https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html>; Claudia Persico & Kathryn Johnson, *The effects of increased pollution on COVID-19 cases and deaths*, *J. Envtl. Econ. Mgmt.* (Feb. 2021), <https://www.sciencedirect.com/science/article/pii/S0095069621000140>.

⁸ 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).

⁹ 42 U.S.C. § 2000d (1964) et seq.; Engelman-Lado, *supra* note 6.

communities most affected, in accordance with the Principles of Environmental Justice (Environmental Justice Principles).¹⁰

Concrete and immediate reforms to EPA’s civil rights compliance systems that center environmental justice and the communities most affected 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, ECRCO, and Office of Environmental Justice (OEJ), must 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.¹¹

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.”¹² . . . 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 remedy actions with unjustified disparate impacts. Until that happens, Title VI enforcement will continue to be illusory.¹³

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[,]”¹⁴ and cited the *Angelita C. v. California Department of Pesticide Regulations* case as EPA’s first and then-only preliminary finding of discrimination.¹⁵ That long-delayed finding and the informal resolution agreement that followed

¹⁰ 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>.

¹¹ 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.

¹² 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).

¹³ Appendix B, Letter to Lisa Jackson, Administrator, U.S.EPA at 2 (July 3, 2012).

¹⁴ *Id.* at 3.

¹⁵ 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).

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.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ Despite having the authority to undertake a cumulative risk assessment, and despite calls by the public and EPA Region 5 for such a study, EGLE has to date refused to do so.²⁰ This is not simply EGLE’s failing, but EPA’s as well.

Two decades since *Alexander v. Sandoval*²¹ 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. EPA’s failure to enforce Title VI has been well-documented, including, but not limited to, a 2015 Deloitte Consulting LLP evaluation

¹⁶ 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/>.

¹⁷ *Id.*

¹⁸ 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.

¹⁹ 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>

²⁰ 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>.

²¹ *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

commissioned by EPA itself;²² a 2015 exposé by Center for Public Integrity;²³ and a 2016 report issued by the United States Commission on Civil Rights.²⁴

The 2020 OIG report states the problem in short: “ECRCA has not fully implemented an oversight system to provide reasonable assurance that organizations receiving EPA funding are properly implementing Title VI.”²⁵ 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.²⁶ 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.²⁷ Even, as in Flint, when EPA finds discrimination is present, there has been little to no remedial or reparative effect for communities. And yet, EPA has yet to use its power to withhold or delay funding to ensure civil rights compliance.²⁸

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.

²² 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.”).

²³ 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.”).

²⁴ 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.

²⁵ 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).

²⁶ Engelman-Lado, *supra* note 6 at 295.

²⁷ 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.cbccfinc.org/wp-content/uploads/2017/01/EPATitleVIReport.pdf>.

²⁸ 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).

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.²⁹ 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.

Complete and finalized guidance from EPA is long overdue³⁰ and must be one of the agency’s immediate and top priorities 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 and distribution of environmental benefits 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 have concerns that EPA’s funding recipients have operated for too long without guidance, such that general compliance reviews without corresponding EPA guidance risk superficial results. Thus, we recommend that the issuance of clear and comprehensive guidance precede the deployment of an exhaustive, generalized compliance review effort. (This sequencing is appropriate for EPA given the agency’s current lack of civil rights infrastructure.) That said, we support the initiation of compliance reviews in the interim if undertaken in response to or in conjunction with a civil rights complaint or history of complaints (or if otherwise well-targeted to assess and achieve compliance on specific areas of concern). Of course, EPA must proceed apace with civil rights investigations and enforcement actions even as EPA develops guidance. Guidance should be developed without delay, so that robust civil rights compliance reviews can take hold as a new norm. 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

²⁹ OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

³⁰ See e.g. Appendix C, Letter to Robert Perciasepe, Acting Administrator & Deputy Administrator, U.S.EPA at 12 (March 22, 2013) (“A robust Title VI compliance program requires that EPA finalize guidelines to ensure clarity, transparency, standardization, and accountability. . . . [B]y addressing legal standards one at a time, and then memorializing them in multiple documents, EPA is creating unnecessary complexity for communities, recipients, and investigators.”).

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[,]”³¹ 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--and EPA’s framework and standards by which the Agency intends to evaluate compliance.³² 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

³¹ OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

³² See e.g. Appendix A, Letter to Diane E. Thompson, Chief of Staff, Office of the Administrator, U.S.EPA (June 29, 2011) (Inquiring “[f]or administrative complaints that are under active substantive investigation, how does EPA determine whether each of them presents a cognizable claim under Title VI?” and outlining a series of still-open questions required for development of a compliance framework and standards).

effects, as currently required under 39(c)(iii) of EPA’s General Terms and Conditions.³³ 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 “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 on 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. *Incorporating Analysis of Cumulative Impacts into Civil Rights Enforcement*

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.”³⁴

³³ 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

³⁴ 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>.

Scientific evidence continues to demonstrate the adverse health consequences of the cumulative impacts of social vulnerability, individual susceptibility, and exposure to environmental and climate hazards. Yet, as OIG recently noted, “[t]here is no precise threshold to determine when a community is overburdened[, which] means that it is often easier for a community that has seven facilities to get an eighth facility approved than for a community that has no existing facilities to get one approved.”³⁵ And yet, in the absence of guidance and training, the response by funding recipients is ad hoc,³⁶ even where community members, EPA, and its funding recipients alike acknowledge a need to address cumulative impacts.

As just one example, in response to Administrator Regan raising civil rights concerns and asking the City of Chicago to conduct an “environmental justice analysis” before making a permit decision on the proposed relocation of a controversial metals recycling operation, the Chicago Department of Public Health (CDPH) agreed to conduct a “health impact assessment” that the local agency represents will include a cumulative impacts framework. However, community advocates and their supporters have raised concerns with EPA’s evaluation of air monitoring data for use in this process, along with a number of concerns with CDPH’s process for, and the substance of, its review. Environmental justice advocates and their supporters in Chicago will be submitting detailed comments on CDPH’s health impact assessment to CDPH and EPA.

EPA must not only require recipients to assess cumulative impacts, but also issue detailed guidance on standards and best practices for doing so. 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.

As a general matter, 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) alternatives, 3) research and data from community-based research, 4) timely analysis of how reasonable foreseeable future actions will likely augment the impact of the project, and 5) 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. 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.³⁷
- 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

³⁵ OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2022 at 28 (Nov. 12, 2021) https://www.epa.gov/system/files/documents/2021-11/certified_epaog_20211112-22-n-0004.pdf.

³⁶ 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).

³⁷ See e.g. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020).

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 and citizen science³⁸ 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 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.
- Involvement of the public in providing input and information to identify potential adverse impacts.
- Analysis of how environmental and health impacts are distributed within the affected community, if the potential for any adverse impact is identified.
- 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.
- 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.
- 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.³⁹ 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

³⁸ See Caren B. Cooper et al., *Inclusion in citizen science: The conundrum of rebranding*, Science (July 16, 2021) https://discovery.ucl.ac.uk/id/eprint/10130354/1/Cooper_et_al_Science_2021.pdf (outlining the differences between community and citizen science and applying principles from the former to increase the inclusivity of the latter).

³⁹ 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>.

of climate change, including flooding, sea level rise, and wildfires.⁴⁰ GAO also concluded that EPA is not consistently integrating climate change considerations into its site-level cleanup decisions and plans.⁴¹ 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).⁴² 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 implementation of federal environmental statutes, as well as local and state law and policy.⁴³ ECRCO's guidance should clearly explain the relationship between 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".⁴⁴

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

⁴⁰ 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>.

⁴¹ *Id.* at 15.

⁴² 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>.

⁴³ 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.

⁴⁴ *Id.*

not a defense to a civil rights claim, consistent with the President’s commitment to “rescind EPA’s decision in *Select Steel*.”⁴⁵ As the Fourth Circuit 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.”⁴⁶ 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. As several of the undersigned emphasized in comments to EPA in 2013, the Agency

should make clear that adverse impacts may involve harms to health, damage to the environment, reduction in property values, and social harms, among others, and are not limited to measurable environmental or health effects. In addition, the investigation of adverse impacts should not be constrained by gaps in scientific knowledge about exposure, exposure pathways and health effects, or more broadly, the expertise of EPA or the recipients. Evidence of any adverse impact is relevant to a finding of discrimination.⁴⁷

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, OEJ, 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[,]”⁴⁸ as well as “clarify[] recipients’ obligation to collect and maintain data to evaluate and ensure compliance.”⁴⁹ 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

⁴⁵ *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, <https://joebiden.com/environmental-justice-plan/> (last visited Nov. 1, 2021).

⁴⁶ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 93 (4th Cir. 2020).

⁴⁷ Appendix C at 9.

⁴⁸ OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

⁴⁹ *Id.*

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 responsibilities.

While guidance is critical to ensure how data should factor into civil rights compliance, there are significant gaps in baseline data needed to identify disproportionate adverse and 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.”⁵⁰ 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 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.⁵¹ Meanwhile, environmental justice communities throughout the country have created robust systems for data collection, using community and citizen science methods, but such data may or may not be honored by EPA or recipient agencies.

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 community-based monitoring systems, consistent with recommendations advanced by the National Environmental Justice Advisory Council,⁵² White House Environmental Justice Advisory Council,⁵³ and Executive Order 14008.

⁵⁰ 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>.

⁵¹ 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>.

⁵² 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>.

⁵³ 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.

- Develop and issue policies and guidance to ensure that (1) the results of community and citizen science and community-based monitoring are incorporated into analyses conducted by EPA and its funding recipients regarding compliance with environmental and civil rights laws; and (2) the results of community and citizen science and community-based monitoring are deemed actionable as long as they meet scientific standards.
- Work with the WHEJAC, NEJAC, and frontline and fenceline communities to identify priority data gaps and develop a platform to aggregate and disseminate exposure data supplied by federal and state regulators, facilities-based monitoring and reporting, and community-based monitoring,
- 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 participate as equal partners at every level of decision-making”⁵⁴--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[.]”⁵⁵ 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:

- 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.⁵⁶

⁵⁴ 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>.

⁵⁵ OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, *OGC REVISED RESPONSES TO OIG RECOMMENDATIONS* (2021).

⁵⁶ 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).

- 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 the 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 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 perpetuated 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 initially sequence guidance before the agency embarks on an exhaustive compliance review effort, absent a specific complaint or other targeted circumstance that warrants an immediate 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 to “[r]emove the presumption that ECRCO will not object to approval of an award absent an unresolved finding of discrimination[.]”⁵⁷ 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.

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 recipient 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

⁵⁷ OFFICE OF GEN. COUNSEL, U.S. ENVTL. PROT. AGENCY, OGC REVISED RESPONSES TO OIG RECOMMENDATIONS (2021).

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, racial equity, and cumulative impact 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. OMB’s July 2021 report submitted to the President pursuant to Executive Order 13985 on identifying methods to assess equity provides a starting point for the development of parameters.⁵⁸

2. Transparent and Targeted Deployment of Affirmative Compliance Reviews

When EPA’s Strategic Plan for FY 2015-2020 emphasized developing a proactive compliance program, many of the undersigned raised concerns that the 2015-2020 Plan “fail[ed] to explain what criteria will be applied to determine when OCR will initiate compliance reviews.⁵⁹ It still 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, a single stakeholder session is insufficient and additional transparency and consultation regarding this process will likely lead to more nuanced input from stakeholders.

At a baseline, ECRCO should issue a public-facing compliance review plan every year, identifying the number of reviews to be conducted and criteria for selection. 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.

Sites for compliance reviews may be chosen on any well-reasoned basis, but not randomly. 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 such agreements 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

⁵⁸ 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.

⁵⁹ Appendix I, Letter to Gina McCarthy, Administrator, U.S.EPA at 4 (October 27, 2015).

significant racial disparities in COVID-19 morbidity and mortality that coincide with potential environmental exposure.⁶⁰

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.⁶¹ 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.⁶² 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. Further, 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 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, 2021.⁶³ Those comments highlight and support the 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.⁶⁴ 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, these recommendations and requests remain relevant and only more urgent.⁶⁵

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.

⁶⁰ 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>.

⁶¹ 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>.

⁶² Exec. Order No. 12250, 45 *Fed. Reg.* 72995 (Nov. 2, 1980).

⁶³ Appendix K, Comments of RISE St. James et al. to DOJ (attention Ms. Cynthia Ferguson) at 1-4, 18-20 (Oct. 15, 2021).

⁶⁴ *Id.* at 1-4.

⁶⁵ Appendix J, Comments of Environmental and Community Groups on EPA's Environmental Justice Strategic Plan: EJ2020 (July 28, 2016); Appendix G, Comments of Environmental and Community Groups on EPA's Environmental Justice Strategic Plan: EJ2020 (July 15, 2015).

As stated above, 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.”⁶⁶ Since 1994, Executive Order 12898 and subsequent EPA guidance have mandated public participation, meaningful involvement, and access to information relating to human health and the environment for People of Color, Indigenous Peoples, and low income communities, including “proactive steps” to provide opportunities for affected communities to participate in decisions affecting their health and livelihoods.⁶⁷ EPA itself has issued in depth guidance on public involvement for its funding recipients.⁶⁸ Executive Order 13985 now sets an even higher bar for engagement with communities and individuals who have been “historically underserved, marginalized, and adversely affected by persistent poverty and inequality.” Yet, *meaningful* engagement remains a problem, with recent public comments to the NEJAC and ECRCO affirming that EPA staff in both regional and national offices still often lack the depth of understanding necessary to be responsive to and, at worst, are experienced as indifferent to 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. Building trust with communities who have sought redress from EPA for the tangible and devastating impacts of discrimination without success will require repair. As a starting point, EPA’s Strategic Plan and civil rights enforcement programs 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. And 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 opposition, EPA should seek to collaborate with them whenever possible. Engagement is not meaningful unless the information gathered from the community is incorporated into policies, permits, and regulations. EPA’s own guidance counsels against one-way engagement processes that solicit feedback only to put it on a shelf. A seat at the table and an opportunity to be heard are the bare minima: affected communities must be empowered to help government officials make the decisions aimed to their own improve health, environment, and quality of life. Honoring the right of environmental justice communities to participate as

⁶⁶ 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>.

⁶⁷ U.S. EPA, Guidance on Considering Environmental Justice During the Development of Regulatory Actions (May 2015) <https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>; U.S. EPA, Technical Guidance for Assessing Environmental Justice in Regulatory Analysis (June 2016), https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

⁶⁸ U.S. EPA, *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance)*, 71 Fed. Reg. 14207, 14215 (March 21, 2006), https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf.

equal partners at every level of decision-making will, in time, result in stronger relationships and more equitable decisionmaking, and more just outcomes.

As a starting point, OCR and ECRCO 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.

ECRCO must also create mechanisms for accountability, engagement, and transparency for complainants. ECRCO’s Case Resolution Manual currently incorporates language responding to concerns raised by complainants across the country about being excluded from deliberations in the case resolution process, most notably in the *Angelita C.* case.⁶⁹ ECRCO’s Case Resolution Manual should be updated and 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.

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, significant 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 Freedom of Information Act (FOIA) process for both the public and EPA. This can be accomplished through the Enforcement and Compliance History Online website.⁷⁰
- Publish awards and award amounts for grant programs from 2006 to present and adopt policies ensuring the continuation of this practice on an annual basis to increase transparency regarding EPA jurisdiction and funding recipient obligations.

⁶⁹ 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.

⁷⁰ 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.

- Reinststate 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, 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’s and the Agency’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.

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.

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.”⁷¹ 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, a 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.

⁷¹ 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.

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 and any of the undersigned groups.

Sincerely,

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cc:

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Na'Taki Osborne Jelks, PhD, Vice-Chair NEJAC

Michael Tilchin, Vice-Chair NEJAC

Appendix A - Letter to Diane E. Thompson, Chief of Staff, Office of the Administrator, U.S.EPA - June 29, 2011
Appendix B - Letter to Lisa Jackson, Administrator, U.S.EPA - July 3, 2012
Appendix C - Letter to Robert Perciasepe, Acting Administrator & Deputy Administrator, U.S.EPA - March 22, 2013
Appendix D - Letter to Gina McCarthy, Administrator, U.S.EPA - November 5, 2013
Appendix E - Letter to Gina McCarthy, Administrator, U.S.EPA - March 7, 2014
Appendix F - Letter to Gina McCarthy, Administrator, U.S.EPA - November 24, 2014
Appendix G - Comments of Environmental and Community Groups on EPA's EJ2020 Strategic Plan - July 15, 2015
Appendix H - Letter to Vanita Gupta, Acting Assistant Attorney General, Civil Rights Division, U.S.D.O.J. - September 30, 2015
Appendix I - Letter to Gina McCarthy, Administrator, U.S.EPA - October 27, 2015
Appendix J - Comments of Environmental and Community Groups on EPA's EJ2020 Strategic Plan - July 28, 2016
Appendix K - Comments of RISE St. James et al. to DOJ (attention Ms. Cynthia Ferguson) - Oct. 15, 2021.

June 29, 2011

Diane E. Thompson
Chief of Staff
Office of the Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Room 3402, MC-1101A
Washington, D.C. 20460

Dear Ms. Thompson:

We appreciate your meeting with us on April 18 to discuss EPA's Title VI program. We are encouraged to learn that EPA plans to convene a workgroup to address Title VI enforcement issues and look forward to taking part in the discussion. In the meantime, we hope to host a conference devoted to Title VI and EPA's framework for reviewing Title VI complaints this fall at Howard University School of Law. To that end, it would be helpful if you could clarify a number of issues that were raised or hinted at during our meeting in Washington.

Please respond at your earliest convenience to the following questions so that we will be able to proceed with our own efforts on Title VI enforcement.

For administrative complaints that are under active substantive investigation, how does EPA determine whether each of them presents a cognizable claim under Title VI? Specifically, how does EPA address the following issues:

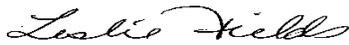
- (a) EPA regulations for Nondiscrimination in Programs Receiving Federal Assistance From the Environmental Protection Agency, 40 C.F.R. pt. 7.35(b)-(c) (2000), prohibit recipients of federal funds (hereinafter "recipients") from using "criteria or methods of administering [their] program[s] which have the effect of subjecting individuals to discrimination because of their race" and prohibit recipients from "choos[ing] a site or location of a facility that has the purpose or effect. . . of . . . subjecting [individuals] to discrimination under any program . . . on the grounds of race. . . ." What is EPA's operative definition of "effect"? What is EPA's operative definition of "adverse effect"?
- (b) Does EPA follow prior Title VI guidance documents and limit "effect" to health effects? How, if at all, does EPA consider economic, social, psychological, and cultural harms as part of its analysis of "adverse effects"? How, if at all, does EPA consider cumulative and/or synergistic effects as part of its analysis of adverse effects? How, if at all, does EPA account for background stressors, facility accidents, and/or chronic noncompliance with existing permit requirements when it quantifies the "effects" of a recipient's actions?

- (c) For Title VI complaints that are under review or that have been accepted, partially accepted, or referred, how will EPA decide whether there is sufficient proof of an adverse effect to establish a violation of the statute? Will EPA rely on a "differential exposure" standard such as the standard applied to the proposed Shintech facility in Convent, Louisiana in 1998, a "differential risk" standard, or some other approach? Can you point us to any document(s) that explains how EPA will decide whether the effects of a recipient's actions are sufficiently adverse to constitute a violation of Title VI and its implementing regulations?
- (d) For Title VI complaints that are under review or that have been accepted, partially accepted, or referred, how will EPA define the population affected by a recipient's actions? Will EPA rely on exposure pathway, proximity of a facility, or some other approach? How will EPA define the comparison population? Will EPA base the comparison population on the recipient's jurisdiction under the relevant environmental statute, or will it use some other approach? How will EPA define the degree of disparity between the "affected" and "comparison" populations necessary to establish a violation of the statute?
- (e) For Title VI complaints that are under review or that have been accepted, partially accepted, or referred, will EPA apply a presumption of "no adverse impact" when the facility in question is in compliance with all relevant environmental standards? If and when EPA applies a presumption of no adverse impact under such circumstances, what data will EPA collect and what analyses will EPA perform in order to test whether that presumption has in fact been rebutted? What role will the EJ Wizard, the EJ screening tool, or other approaches under development by EPA play in this and other efforts to respond to Title VI complaints?
- (f) Will EPA reject pending or future Title VI complaints that involve permit actions that will result in a decrease in total facility emissions or in emissions of pollutants of concern? If so, what level of decrease in overall emissions or in emissions of pollutants of concern would be necessary for EPA to close its investigation of a Title VI complaint?
- (g) How will a recipient's efforts to mitigate the effects of its actions influence EPA's investigation of whether there is a violation of Title VI? What level of mitigation will EPA consider sufficient to avoid a finding that a recipient violated the statute? How will EPA determine whether area-specific agreements between a recipient, residents, and other stakeholders that promise to reduce adverse impacts provide adequate mitigation of the effects of a recipient's actions?
- (h) What will a recipient be required to demonstrate in order to establish a legally-sufficient justification for an adverse impact?

Thank you for any additional information that you can provide about your Title VI investigative framework in response to these questions. The information will help us plan for a conference devoted to how that framework should be implemented. It will also be useful as we prepare to participate in any workgroup that you convene on Title VI in the coming months. To that end, we look forward to reading the results of the committee investigation of the Office of Civil Rights that you mentioned was convened by Administrator Jackson. We would very much

appreciate the opportunity to review the findings of the Administrator's committee, which you indicated will include a roadmap for the Office going forward. Our continued goal is to work with you to ensure that EPA's Office of Civil Rights implements a robust and fair process that can respond to complaints in a timely fashion. Thank you for your efforts thus far in refocusing the agency's attention to this long-neglected and critical program.

Sincerely yours,



Leslie Fields
National Environmental Justice and Community Partnerships Director
Sierra Club
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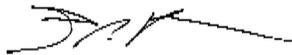
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Stephen G. Pressman

Advocates for Environmental Human Rights * CATA-The Farmworkers Support Committee
Center for Community Action and Environmental Justice * The Center on Race, Poverty & the
Environment * Central Valley Air Quality Coalition * The City Project * Earthjustice
Environmental Justice League of Rhode Island * Farmworker Justice
Global Community Monitor * Human Synergy Works * Los Jardines Institute (The Gardens
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New Mexico Environmental Law Center * Public Advocates Inc. * Sierra Club
Tri-Valley CAREs * West End Revitalization Association * Marc Brenman
Eileen Gauna * Ruth Wilson Gilmore * Gregg Macey * Vernice Miller-Travis

July 3, 2012

Lisa Jackson
Administrator
Attn: Plan EJ 2014
USEPA
Office of Environmental Justice
Mail Code 2201-A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Jackson,

The undersigned organizations and individuals submit these comments on the draft of “Plan EJ 2014 Supplement: Advancing Environmental Justice Through Title VI,” to emphasize the importance of Title VI enforcement in communities across the country and to call on EPA to dedicate to this effort the resources and expertise needed now and over a sustained period of time to address discrimination on the basis of race, color, and national origin, and to advance environmental justice in an effective and meaningful way. For too long communities have waited for EPA’s Office of Civil Rights (“OCR”) to prevent and address racial and ethnic disparities in the distribution of environmental contaminants and health hazards, as well as the denial of environmental benefits. We appreciate EPA’s recognition that Title VI and nondiscrimination statutes are “important tools in the Agency’s efforts to address discrimination and advance environmental justice,”¹ and we are pleased to see a timetable for concrete action to overcome deficiencies in EPA’s Title VI enforcement program. At the same time, the Title VI Supplement is skeletal, leaving many of the details to be worked out at a later date. In this letter, we identify some of the key issues that must be resolved in a final Title VI Supplement.

1. Effective Title VI Enforcement Rests on the EPA’s Willingness to Establish Zero Tolerance of Discrimination and to Impose Meaningful Remedies.

¹ EPA, *Plan EJ 2014 Supplement: Advancing Environmental Justice Through Title VI Draft 1* (2012) (“*Title VI Supplement*”).

The Title VI Supplement emphasizes improved communication with recipients of federal funds, promotion of dialogue with the states, and the creation of incentives through performance agreements and performance partnership grants.² While it is important that EPA establish measures to assist recipients in understanding their Title VI obligations within the context of their regulatory programs and legal authorities, a focus on the preventative aspect of Title VI compliance, alone, is not enough.³ 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."⁴ Indeed, in the years following the issuance of draft guidance documents,⁵ Title VI enforcement was at a standstill. Cases that were not dismissed under procedural or jurisdictional grounds remained unresolved. It is time for the EPA to put the teeth back into the civil rights tiger, and use its authorities under this important civil rights law to remedy actions with unjustified disparate impacts. Until that happens, Title VI enforcement will continue to be illusory.⁶

A recent Title VI case illustrates how OCR is effectively failing to deter federal fund recipients from discriminatory practices, and bears out the observation that federal funds have never been revoked from recipients of funding from EPA based on a violation of Title VI of the Civil Rights Act of 1964. In that case, *Angelita C. v. California Department of Pesticide Regulations*,⁷ the first and only time that EPA has formally made a preliminary finding of

² *Id.* at 1-3.

³ The Title VI Supplement seems to focus almost exclusively on public recipients of federal funds. This document, and EPA's enforcement program, should make clear that all programs and activities receiving EPA funding must comply with Title VI, whether they be public or private.

⁴ 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).

⁵ Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000) ("Draft Guidance Documents").

⁶ In a similar vein, we hope that EPA's commitment to Title VI enforcement will translate into an approach that is holistic rather than segmented. For example, the draft Title VI Supplement recognizes that OCR has pre-award and post-award compliance responsibility ("affirmative responsibility") as well as the authority to investigate and resolve complaints. See *Title VI Supplement*, *supra* note 1, at 4. OCR does not, however, address how the agency might use these authorities together—for example, if a complaint is filed with a jurisdictional defect that otherwise raises cognizable claims, OCR should use its affirmative authority to conduct a post-award compliance review. A commitment to Title VI enforcement should include a clear message that agency staff should exercise the full scope of their authority and responsibility to ensure that federal monies are not being used in a discriminatory manner.

⁷ *Angelita C. v. California Department of Pesticide Regulations*, Title VI Complaint No. 16R-99-R9 (Apr. 22, 2011), <http://www.epa.gov/ocr/TitleVICases/title6-settlement-agreement-signed.pdf>.

discrimination, it took OCR more than ten years, from 1999 to 2011, to find that there was a *prima facie* violation of Title VI.⁸ We applaud EPA for finally making a preliminary finding. Despite the finding, however, the California Department of Pesticide Regulations (“DPR”) was not in jeopardy of losing funds provided by EPA for the application of the toxic pesticide methyl bromide on Latino schoolchildren and DPR was not held accountable for its actions. Although we understand that fund termination is a remedy generally preceded by other less drastic forms of corrective action, in the absence of real, meaningful enforcement mechanisms, OCR operates as a toothless vehicle for enforcing Title VI. Ultimately, in this case, as in other pending matters, OCR failed to remedy or prevent racially disparate pesticide exposures.

Though we are eager for EPA to develop a strong enforcement program that will ensure compliance with the nondiscrimination requirements of Title VI, we raise concerns about *Angelita C.* in more detail because OCR’s handling of the case continues to demonstrate to recipients of federal financial assistance that EPA is still not prepared to demand that recipients change their ways to assure compliance.

Complainants in *Angelita C.* alleged that the DPR discriminated against Latino school children by allowing unhealthy levels of methyl bromide, a highly toxic fumigant, to be applied near schools attended primarily by Latino students. Schools with predominantly white student populations, by contrast, were not subject to unhealthy methyl bromide exposures in California. This pattern and practice of allowing methyl bromide to be applied near schools, the complaint alleged, caused an adverse and disparate impact on Latino school children and their parents, which violated Title VI of the Civil Rights Act.

EPA agreed, and on April 11, 2011, issued a preliminary finding that the Complaint established a *prima facie* violation of Title VI.⁹ Despite the Preliminary Finding and without notifying the complainants, EPA then negotiated a settlement agreement with DPR that required extended monitoring of methyl bromide and other pesticide products at several monitoring stations in San Joaquin, Kern, Ventura, Santa Barbara, and Monterrey counties through 2013 and further ordered DPR to conduct outreach and communications on pesticide drift. Under the settlement agreement, there is no required cessation of racially disparate pesticides exposure. EPA did not ensure that discriminatory methyl bromide or other pesticide exposures would cease, nor did the agency mandate use reduction should monitoring disclose excessive ambient concentrations of a pesticide.¹⁰ The agreement merely required additional monitoring when

⁸ See *id.*

⁹ See EPA Office of Civil Rights, *Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 37* (Aug. 25, 2011), available at www.epa.gov/ocr/TitleVI/cases/ir-082511.pdf.

¹⁰ EPA justified the settlement agreement recently in a letter from Raphael DeLeon to Brent Newell, dated May 23, 2012 (attached as Exhibit 1). EPA believed that the settlement was appropriate given the complaint’s focus on methyl bromide, regulations adopted by DPR to limit fumigant usage in certain California air basins, and the belief that the Montreal Protocol had reduced Methyl Bromide Usage. Letter from Raphael DeLeon, Dir., EPA, to Brent Newell (May 23, 2012) (on file with author). EPA failed to recognize that, as a matter of federal law under the Clean Air Act, the fumigant cap will only apply in Ventura County, that several other fumigant products are replacing methyl bromide, and that the most recent pesticide emissions inventory (2010) demonstrated increased

discrimination occurred rather than prohibiting the conduct. The significance goes beyond this individual case: the threat of EPA enforcement will not be taken seriously by funding recipients if EPA's compliance assurance efforts do not eliminate the adverse and disparate impact on the basis of race and ethnicity. If other Title VI complaints demonstrate merit, as *Angelita C.* did, and EPA does not demand compliance with Title VI, then recipients of federal funding will ignore Title VI to the detriment of affected communities nationwide.

2. EPA's Title VI Program Must Be Consistent with the U.S. Government's Legal Obligations under Executive Order 12250, Executive Order 12898, and the Convention on the Elimination of all Forms of Racial Discrimination, a Human Rights Law.

Other provisions of law reinforce EPA's duties under Title VI.¹¹ For example, pursuant to Executive Order 12250, "Leadership and Coordination of Nondiscrimination Laws,"¹² Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations" ("EJ Executive Order"),¹³ as well as obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), a human rights law, EPA is required to issue appropriate directives, implement Title VI and other applicable civil rights laws, and afford "effective protection and remedies" for actions with the "purpose or effect" of negatively impacting members of particular racial and ethnic groups.¹⁴

The United States ratified CERD in 1994, incorporating its provisions into the American system of law pursuant to Article 6 of the U.S. Constitution.¹⁵ As the U.S. Government explained in 2000, compliance with CERD is fully consistent with domestic civil rights laws, including Title VI of the Civil Rights Act of 1964, which is part of "the most important civil rights legislation in U.S. law..."¹⁶ Furthermore, the U.S. Government has noted that the EJ

emissions in California, and, for Ventura County and its fumigated strawberry fields, the highest emissions levels since 1990.

¹¹ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012).

¹² Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980).

¹³ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

¹⁴ See International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 212; see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁵ U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The United Nations adopted CERD in 1965. The United States joined as a signatory to CERD in 1966 and ratified CERD in 1994. See Reports Submitted by States Parties Under Article 9 of the Convention, CERD/D/351/Add.1, ¶ 3 (Oct. 2000) available at <http://www.state.gov/documents/organization/100306.pdf>.

¹⁶ *Id.* at ¶ 88.

Executive Order and the application of Title VI to achieve environmental justice are critical to fulfill the non-discrimination mandate of Article 5 of CERD, which prohibits racial discrimination and guarantees the enjoyment of the right to public health without distinction as to race, color, national or ethnic origin.¹⁷

We urge EPA to recognize that the development of an effective Title VI program is the legal foundation for the implementation of environmental justice policies and furthers the ability of the United States to protect human rights in compliance with CERD.

3. The Title VI Supplement Should Explicitly Address How EPA's Enforcement Program will Incorporate and Promote the Objectives of Environmental Justice.

EPA continues to express its commitment to environmental justice in the Title VI Supplement. However, the goals and strategies outlined in the Title VI Supplement raise serious questions about how EPA will resolve longstanding concerns about the implementation of its own Title VI regulations, let alone broader challenges that Plan EJ 2014 seeks to address. Despite the issuance of the EJ Executive Order that was signed by President Clinton nearly twenty years ago,¹⁸ environmental justice communities remain vulnerable due to the policies and decisions of a variety of parties, including the recipients of federal funds. Critics recognize that EPA does not adequately exercise its authority to shield environmental justice communities from disparate impacts.¹⁹ EPA's planning process, including Plan EJ 2014 and EPA's Strategic Plan for 2011 to 2015, will only succeed if it carefully examines the root causes of its inadequate response.

One such cause is the failure of EPA to incorporate principles of environmental justice into all of its programs, policies, and activities.²⁰ Recently, EPA established three broad goals to inform its efforts to reach a level of integration first envisioned in the EJ Executive Order: (1) protect health and environment in "overburdened communities;" (2) "[e]mpower communities to take action to improve their health and environment;" and (3) "[e]stablish partnerships with

¹⁷ *Id.* at ¶¶ 389-95. See also International Convention on the Elimination of Racial Discrimination, *supra* note 14, at art. 5(e)(iv), available at <http://www2.ohchr.org/english/law/cerd.htm>.

¹⁸ Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994).

¹⁹ See, e.g., Nat'l Acad. of Pub. Admin., *Environmental Justice in EPA Permitting: Reducing Pollution in High Risk Communities is Integral to the Agency's Mission* 2 (2001); U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 167 (2003); Bradford C. Mank, *Executive Order 12,898*, in *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks* 101, 103 (2d ed. 2008). Denis Binder et al., *A Survey of Federal Agency Responses to President Clinton's Executive Order 12,898 on Environmental Justice*, 31 *Envtl. L. Rep.* 11,133, 11,141 (2001); See also Bayview Hunters Point Cmty. Advocates, The Chinese Progressive Ass'n, People Org. to Demand Env'tl. & Econ. Rights & Our Children's Earth Found., *Letter to U.S. E.P.A.*, (July 15, 2005).

²⁰ See EPA, *Plan EJ 2014* 4 (2011), available at <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf> ("Plan EJ 2014").

local, state, tribal, and federal governments and organizations to achieve healthy and sustainable communities.”²¹ EPA further recognizes that environmental justice is not just an environmental and public health issue, but a civil rights imperative as well.²² While we agree with these goals, our concerns about the Title VI Supplement are in part due to the document’s failure to establish concrete mechanisms to promote these basic objectives.

EPA historically promoted a limited number of initiatives to ensure that communities are protected from disparate impacts, such as the Agency’s Small Grants Program and a Federal Interagency Working Group on Environmental Justice. Plan EJ 2014 tries to make broad improvements to these efforts. For example, the plan appears more focused on community “empowerment” than previous efforts, and it expands the concept of “fair treatment” to include not only the distribution of burdens but also “the distribution of the positive environmental and health consequences from [EPA] activities.”²³ The Title VI Supplement briefly mentions ways in which a focus on benefits and burdens might be addressed, such as re-evaluating Title VI regulations and reviewing programmatic standard operating procedures. Yet the Title VI Supplement fails to explain how a more inclusive view of disparate impact would guide EPA’s complaint processing or compliance assurance efforts. More broadly, it is troubling that EPA continues to stress that it has “considerable latitude” in determining disparate impact without providing needed specificity about basic methodology or defining the standard itself.²⁴ This is disappointing, particularly in light of the significant advances that have been made in empirical environmental justice research. Moreover, vague promises to reconsider Title VI implementing regulations without elaboration only perpetuates the concern that EPA will opt to enhance its flexibility at the expense of a prompt processing timeframe and clearer standards for how burdens and benefits should be distributed by recipients of federal funds.

With regard to Plan EJ 2014’s goal of community empowerment, the Title VI Supplement only mentions, in a general way, the value of community participation in the pursuit of environmental justice. Evidence of this focus on participation can be found in the recommendations of EPA’s Civil Rights Executive Committee in January 2012.²⁵ We agree on the importance of this principle, but methods of implementation remain fairly abstract within the document. Change in EPA’s policy and practice will require concrete steps, which should be prioritized in the Title VI Supplement. EPA’s current policy and practice leaves out impacted

²¹ *Id.* at i.

²² *See id.*

²³ *Id.* at 3.

²⁴ Civil Rights Exec. Comm., EPA, *Developing a Model Civil Rights Program for the Environmental Protection Agency: Final Report* 12 (Apr. 13, 2012), available at http://www.epa.gov/epahome/pdf/executive_committee_final_report.pdf. For additional comments on EPA’s Draft “Recommendations for Developing a Model Civil Rights Program,” see The City Project, Letter to Lisa Jackson (February 17, 2012), attached as Exhibit 2.

²⁵ *Id.* at 15 (“In some cases, better communication, community engagement, and technical assistance may mitigate or resolve community concerns.”).

communities from participation in Title VI complaint processing.²⁶ Complainants are the people most affected by discriminatory impacts, and their continual absence from participation in the investigation and resolution of Title VI complaints only ensures that important aspects of the investigation and remedial action will be minimized or missed altogether. If the EPA is to take seriously the goal of community empowerment, as well as the recommendation of EPA's Civil Rights Executive Committee, the Agency should place environmental justice communities on equal footing with other stakeholders in Title VI implementation. In contrast, the Title VI Supplement is heavily weighted in favor of assisting and involving recipients of federal funds, in order to "improve efficiencies in Title VI compliance."²⁷ Language in favor of pre- and post-award compliance assurance for fund recipients, technical assistance to recipients, and efficiencies in compliance is not matched by even a broad sketch of how communities might play a productive role, pursue meaningful data collections and effective remedies, or engage in other activities throughout the complaint process. The only exception to this in the Supplement is a brief discussion regarding limited English proficiency.

The Title VI Supplement furthers EPA's cross-agency focus, which may be a positive step. However, the document does not explain how communities, were they to be meaningfully included, would navigate an increasingly Byzantine multi-agency process. For example, EPA suggests that there should be efforts to mobilize resources "across EPA," partner with other federal agencies, and share responsibility among offices (including OCR) and EPA regions.²⁸ But little is said in the Supplement about how complainants will interact with the recently proposed Case Management Protocol, which would be set by internal agency order.²⁹ EPA is prioritizing work with other federal agencies "to strengthen the use of Title VI," but fails to identify activities or tasks to improve coordination of referrals and follow up.³⁰ In addition, the Title VI Supplement and work of EPA's Civil Rights Committee to limit the Office of Civil Rights' involvement in case processing threaten to further marginalize communities who seek meaningful involvement at each stage of an administrative complaint. Without concrete, practical ways to remove participatory barriers, EPA cannot achieve its overarching goal of establishing effective partnerships that prevent discrimination, not only between EPA and recipients of federal funds, but across a range of stakeholders.³¹

EPA's relative lack of attention to community concerns and the limited role of complainants, its insistence that it has substantial "latitude" in investigating and making determinations about disparate impact (without more elaboration), and its desire to promote an

²⁶ While the Draft Investigator Guidance notes that the EPA "may" involve complainants in complaint processing, 65 Fed. Reg. at 39,671, it is the experience of many of the signatories that the communities with which they work have not been afforded the opportunity to be involved.

²⁷ *Title VI Supplement*, *supra* note 1, at 1.

²⁸ *Id.* at 4; *Plan EJ 2014*, *supra* note 20, at 10-11, 14.

²⁹ *Plan EJ 2014*, *supra* note 20, at 13.

³⁰ *Id.* at 8, 20.

³¹ *Id.* at i.

informal, alternative dispute resolution-driven process that omits community participation fails to provide assurance that meaningful Title VI reform is underway.³² Unfortunately, EPA does not explain how it intends to use citizen-generated and recipient-generated data, how it will reconcile potential inconsistencies with its own data and other evidence of disparate impact, or how its decisions will result in the achievement of non-discrimination standards through appropriate enforcement mechanisms.

4. A Robust Title VI Compliance Program Requires that EPA Finalize Guidelines to Ensure Clarity, Transparency, and Standardization, and that Those Guidelines Comport with Civil Rights Law.

The Title VI Supplement sets the goal of establishing “a robust Title VI pre-award and post-award compliance program,”³³ but fails to commit to finalizing draft Title VI guidance documents.³⁴ More than a decade ago, EPA published the Draft Guidance Documents. Indeed, many of the signatories to this letter submitted extensive comments on the Draft Guidance Documents.³⁵ EPA has neither responded to those comments nor, after twelve years, finalized guidance documents. Continued reliance on the Draft Guidance Documents raises a host of substantive and procedural questions, not the least of which is a lack of clarity and transparency about the non-discrimination standards to be applied by OCR. As an element of the Title VI Supplement, EPA should commit to finalizing revised guidance documents, both to clarify and standardize EPA’s practices and, also, to bring EPA’s policies and practices into line with the standards utilized by the Department of Justice and other agencies and to resolve the flawed provisions in the Draft Guidance Documents. While an exhaustive analysis of the Draft Guidance Documents is outside the scope of these comments, this section contains a few illustrative examples of their deficiencies.

Historically, EPA has tended to interpret its Title VI responsibilities and authorities through the lens of traditional environmental regulation—relying on a presumption that protection for communities is adequate if recipients are in compliance with environmental statutes. Simply put, this approach is inconsistent with civil rights law and has failed to eliminate the adverse or disparate impacts to environmental justice communities that EPA’s Title VI regulations seek to forbid. We strongly urge EPA to move away from reliance on the traditional environmental regulatory approach to discrimination issues and to apply the congressionally mandated civil rights framework. A revision of the Draft Guidance Documents

³² *Id.* at 12.

³³ *Title VI Supplement*, *supra* note 1, at 3, 5.

³⁴ *See id.* at 5 (Activities 1.1 – 1.5).

³⁵ *See generally* Ctr. on Race, Poverty, & the Env’t, Cal. Rural Legal Assistance Found., *Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (August 26, 2000), available at http://www.epa.gov/ocr/docs/t6com2000/t6com2000_071.pdf; *see also* Eileen Gauna, *EPA at 30, Fairness in Environmental Protection*, 31 *Env’t. L. Rev.* 10528 (2001) (analyzing the Investigatory Guidance).

should make clear that technical compliance with environmental laws and regulations is not the measure of whether programs or activities have an “adverse impact” within the meaning of civil rights law. While the framework for assessing whether a recipient is in violation of the discriminatory effects standard in EPA’s Title VI implementing regulations includes a determination of whether the impact of a recipient’s programs or activities is both “adverse” and borne disproportionately by a group of persons based on race, color, or national origin, the regulations are silent as to how “adverse impact” is to be assessed. Compliance with environmental laws and standards should not be the ruler for civil rights compliance. Title VI is a civil rights statute, and it is independent of environmental laws and standards. Before the Supreme Court ruling in *Alexander v. Sandoval*,³⁶ when cases of disparate impact were adjudicated in court, the threshold for establishing impact was much lower than EPA’s current standards suggest. With rare exception, the crux of the inquiry focused on whether or not the impact was felt disproportionately on the basis of race or national origin, not the magnitude of the impact itself.³⁷ In one of the few cases to question whether plaintiffs had established the impact prong of the *prima facie* case, *U.S. v. Bexar County Hosp.*,³⁸ the court was concerned about whether traveling for what the court presumed would be superior health care constituted cognizable harm, not whether the level of impact met a technical standard imposed by the U.S. Department of Health & Human Services or another statute.

In particular, final Title VI guidance documents should remove any confusion caused by the *Select Steel* decision.³⁹ Compliance by recipients with standards adopted pursuant to the Clean Water Act, Clean Air Act, or other environmental laws does not mean that persons are not adversely affected by the recipients’ programs or activities. Environmental statutes, regulations, and standards are the outcome of political and administrative processes, which take into account an array of competing interests and criteria. As was the case with *Select Steel*, these standards may involve averaging emissions over large geographical areas that, if viewed in isolation, can hide disparities. They are, again, not the benchmark for a determination of “impact.” Among other things, environmental standards do not fully capture harms to public health and the environment. These standards change over time, for instance, precisely because they are found to be insufficiently protective.⁴⁰ We note, also, that the Draft Guidance Documents already

³⁶ *Alexander v. Sandoval*, 532 U.S. 275, 275 (2001) (holding that “[t]here is no private right of action to enforce disparate-impact regulations promulgated under Title VI”).

³⁷ See Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in *Civil Rights Litigation and Attorney Fees Annual Handbook* 186 (1994).

³⁸ *U.S. v. Bexar County Hosp.*, 484 F. Supp. 855, 859-60 (W.D. Tex. 1980).

³⁹ EPA, Office of Civil Rights, *Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5* (1998) (“*Select Steel*”).

⁴⁰ Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6,474, 6,480 (Feb. 9, 2010) (discussing new evidence regarding the relationship between NO₂ exposure and health effects). Along these lines, we note the decision of the Environmental Appeals Board (EAB) in which the EAB concluded that EPA erred when it relied solely on compliance with the then-existing annual National Ambient Air Quality Standard (“NAAQS”) for nitrogen dioxide (NO₂) as sufficient to find that the Alaska Native population would not experience “adverse human health or environmental effects from the permitted activity.” Though this decision arose in the context of the EJ Executive Order, and also turned on the fact that the NO₂ air quality standard was under revision, it is clear that

contain some language clarifying that “[c]ompliance with environmental laws does not constitute per se compliance with Title VI.”⁴¹ We agree. But although the provisions in the Draft Guidance Documents suggest that compliance with environmental laws may not be *per se* compliance with Title VI, nonetheless as a practical matter environmental regulatory standards largely determine Title VI compliance because of the presumption of compliance that EPA imposes if environmental standards are not exceeded.⁴² Other sections of the Draft Guidance Documents currently reinforce the erroneous notion that environmental standards will be used to determine whether a program or activity has an “impact.” This is in error. While noncompliance with an environmental or health standard may be relevant to a finding of adverse impact in some contexts, compliance with a federal, state, or local environmental standard does not negate otherwise valid evidence of harm or disparity under civil rights law.

Revisions of the Draft Guidance Document must also correct other errors. To consider just one of many, for example, the guidance should make clear that adverse impacts may involve harms to health, damage to the environment, reduction in property values, harm to cultural values (including, for example, harm to cultural or sacred sites), or social harms (including, for example, segregatory effects), among others, and are not limited to measurable health effects recognized by environmental regulations. Title VI prohibits recipients from excluding, denying the benefits of a program or activity, or subjecting people to discrimination on the basis of race, color, or ethnicity. This language contemplates the full range of potential impacts—for example, permitting that would have a segregatory effect is a cognizable form of injury.⁴³ In addition,

current compliance with an environmental standard is not determinative of whether an action or policy has an adverse impact. Though EAB rulings have not uniformly required the Agency to take into account newer data regarding the sufficiency of environmental standards to protect public health when issuing permits, *see, e.g., In Re Shell Offshore, Inc., OCS Permit No. R10OCS030000*, at 82-83 (March 30, 2012) (Order Denying Petitions for Review), available at [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/148252B4723F0450852579D100714934/\\$File/Shell%20Kulluk.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/148252B4723F0450852579D100714934/$File/Shell%20Kulluk.pdf), there is no doubt that standards in force to implement environmental laws at any given time do not and cannot capture all impact of a challenged activity.

⁴¹ 65 Fed. Reg. at 39,680.

⁴² *Id.* (“[W]here the area in question is attaining that [NAAQS] standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.”).

⁴³ The Draft Guidance Documents contain language that may be interpreted as limiting analysis of effects to a subset of impacts. *See, e.g.,* 65 Fed. Reg. at 39,660 (In a section entitled “Relevant Data,” the draft Guidance lays out an “order of preference” of relevant data to be used to conduct the analysis of adverse impact. The list starts with “[a]mbient monitoring data” and “[m]odeled ambient concentrations.” Notably, the list does not specifically identify outcome data—for example, high asthma or cancer rates. The list itself and the prioritization of items on the list reinforce an impression that a finding of adverse impact is contingent on environmental laws and standards and, also, that non-environmental harms will be ignored.); 65 Fed. Reg. at 39,661 (“Generally, the risk or measure of impact should first be evaluated and compared to *benchmarks* provided under relevant environmental statutes, regulations or policies.”) (emphasis added); 65 Fed. Reg. at 39,680 (examples of adverse impact benchmarks); 65 Fed. Reg. at 39,680 (“[W]here the area in question is attaining that [NAAQS] standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.”). These provisions and any similar language in the Draft Guidance Documents should be revised to make clear that while violations of environmental standards are evidence of harm, compliance does not negate other indicia or evidence of impact.

investigating adverse impacts should not be constrained by gaps in scientific knowledge about exposure, exposure pathways and health effects, or more broadly, the expertise of EPA or the recipients. As stated above, evidence of any adverse impact is relevant to a finding of discrimination.⁴⁴ Moreover, the standard for measuring impact is “adversity,” not “significant” adverse impact, as the Draft Guidance Documents would suggest. A narrow interpretation of the term “significant” can set the bar so high that it would effectively gut Title VI enforcement. Reliance on regulatory significance levels can also ignore the contributing effects of cumulative impact and synergistic risks, among other things. Instead, EPA should recognize that adverse impact above *de minimis* levels can constitute a violation.⁴⁵

In addition to modifying provisions regarding the process for engaging complainants to incorporate principles of environmental justice,⁴⁶ EPA should also clarify how the “cost and technical feasibility” of less discriminatory alternatives will be assessed.⁴⁷ As the Draft Guidance Document is currently written, consideration of cost and technical feasibility could obliterate the obligation not to discriminate.

5. Any Re-Evaluation of EPA’s Title VI Regulations Should Strengthen, Not Weaken EPA’s Title VI Enforcement Program.

The Title VI Supplement indicates that in consultation with the U.S. Department of Justice, EPA will re-evaluate its Title VI regulations and make any necessary changes.⁴⁸ To address environmental justice issues effectively in its Title VI enforcement program, EPA must re-shape its regulatory approach under Title VI in both form and substance. To that end, we support a thoughtful re-evaluation of EPA’s Title VI regulations, but believe the re-evaluation

⁴⁴ The Draft Guidance Documents err when limiting cognizable harms to those within EPA’s or a recipient’s expertise or “authority.” *See, e.g.*, 65 Fed. Reg. at 39,670 (“[I]n determining whether a recipient is in violation of Title VI or EPA’s implementing regulations, the Agency expects to account for the adverse disparate impacts . . . within the recipient’s authority.”).

⁴⁵ The guidance should not raise the ante by requiring that the adverse impact be “significantly adverse.” *See, e.g.*, 65 Fed. Reg. at 39,680 (“OCR intends to use all relevant information to determine whether the predicted impact is significantly adverse under Title VI.”); 65 Fed. Reg. at 39,680 (“Where the risks or other measure[sic] of potential impact meet or exceed a significance level, they generally would be recognized as adverse”); 65 Fed. Reg. at 39,660 (“Adverse disparate impact decision: Determine whether the disparity is significant.”); 65 Fed. Reg. at 39,661 (“Resources for Assessing Significance of Impact: Assessing the significance of a risk”); 65 Fed. Reg. at 39,661 (“[Y]ou may consider whether any scientific or technical information indicates that those impacts should be recognized as significantly adverse”); 65 Fed. Reg. at 39,665, 39,684 (definition of term “adverse impact:” “A negative impact that is determined by EPA to be significant based on comparisons with benchmarks of significance”).

⁴⁶ *See, e.g.*, 65 Fed. Reg. at 39,671 (suggesting that OCR “may” involve complainants in the informal resolution process, leaving this important step to OCR’s discretion).

⁴⁷ *See* 65 Fed. Reg. at 39,683 (“OCR will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives.”).

⁴⁸ *Title VI Supplement, supra* note 1, at 7 (Strategy 1, Activity 1.4).

should only be used as an opportunity to clarify and strengthen the regulations, rather than to weaken them.

Most significantly, revisions should not be used as an opportunity to modify timelines for agency action.⁴⁹ Only six percent of the 247 Title VI complaints have been addressed within the OCR's twenty-day time limit.⁵⁰ This backlog of cases, stretching back to 2001, represents decades of delay. As the Deloitte Report clearly showed, OCR's failure to comply with the timelines reflects poor performance on the part of the agency rather than a problem with the regulatory timeline.⁵¹

At the same time, reconsideration of the Title VI regulations provides an opportunity to include formal rights for complainants to participate meaningfully in the administrative process and informal resolution, with provisions to address issues of confidentiality. Such revisions are essential for bringing processes for complaint investigation into line with environmental justice principles. The OCR complaint investigation process has excluded complainants, the community stakeholders, from the decision-making process. As discussed above, this practice is in direct contradiction of the primary strategy underlying the Plan EJ 2014 to "[e]mpower communities to take action to improve their health and environment."⁵² To address these issues, communication and consultation should, for example, be required at the stage of informal resolution.⁵³ Revised regulations should also make clear that if the Administrator reviews a determination of the Administrative Law Judge, complainants should also be notified and given reasonable opportunity to file written statements and present their evidence and arguments to the Administrative Law Judge.⁵⁴

6. The Re-Evaluation of the Regulations and Interpretive Guidelines Should be Transparent and Engage Stakeholders.

⁴⁹ See 40 C.F.R. § 7.120 (2012) (OCR to notify complainant and recipient of receipt of the complaint within 5 days and complete the jurisdictional review within 20 days from the acknowledgement of the complaint); 40 C.F.R. § 7.115(c) (OCR to complete investigation and issue preliminary findings within 180 days of the start of a compliance review or complaint investigation).

⁵⁰ Deloitte Consulting LLP, *Evaluation of the EPA Office of Civil Rights 2* (2011). As of April 2012, eleven complaints were still in the "Jurisdictional Review" period, long past OCR's twenty-day time limit. EPA, Office of Civil Rights, *Title VI Complaints Listing*, http://www.epa.gov/ocr/docs/extcom/2012_04_title_vi_open-complaints.pdf (last updated Apr. 2012).

⁵¹ Deloitte Consulting LLP, *supra* note 50, at 2.

⁵² *Plan EJ 2014*, *supra* note 20, at i.

⁵³ See 40 C.F.R. 7.120(d)(2), and if OCR is making a finding, 42 C.F.R. 7.130(b)(1).

⁵⁴ See 40 C.F.R. 7.130(b)(3)(ii).

From a process standpoint, we urge EPA to be transparent and engage relevant stakeholders in the process of re-evaluating and revising the agency's Title VI regulations and interpretive guidelines.

We appreciate the effort with which EPA has responded to the Deloitte Consulting's Evaluation of the EPA Office of Civil Rights and how the Agency has proactively pushed forward EJ Plan 2014. Yet we remain concerned about the lack of transparency and involvement of the environmental justice community in the actual reform measures and potential regulatory amendments. We very much appreciate the willingness of the Administrator and senior EPA staff to meet with environmental justice leaders and advocates to hear our concerns and recommendations regarding EPA's enforcement of Title VI, but providing this opportunity to express our concerns has not yet led to involvement in the agency's actual reform efforts. The Title VI Supplement, as described above, only vaguely describes EPA's goals and activities regarding Title VI. As such, it is difficult to comment on the proposed activities when the Supplement describes them in such a vague, conclusory manner. For example, EPA only states that it will include stakeholder input in Activities 1.2 (post-award monitoring) and 1.4 (amending Title VI regulations) and proposes to include stakeholders' involvement "as necessary." Based on the Title VI Supplement, we remain concerned that there will be no further opportunity to participate in the majority of EPA's Title VI reform efforts, and that EPA will preclude the environmental justice community from the opportunity to participate in EPA's efforts to amend 40 C.F.R. part 7 until after EPA publishes proposed changes in the Federal Register. By that point, the Agency is likely to be committed to the course of action reflected in its proposal, and subsequent input from the environmental justice community is not likely to have much effect. Conversely, through proactive involvement of the environmental justice community, EPA will establish trust in, and earn respect for, EPA's efforts to ensure meaningful enforcement and implementation of the Civil Rights Act.

A robust Title VI enforcement program will require sustained attention and resources at what we understand to be a difficult time for EPA. Nonetheless, it is imperative that EPA demonstrate leadership by taking long overdue steps to make sure that federal dollars are not subsidizing discriminatory actions and that Title VI of the Civil Rights Act serves to prevent and address discrimination on the basis of race, color, and national origin. EPA must be clear with its recipients that they must comply with Title VI and other non-discrimination laws, and the enforcement program must reinforce this message with meaningful processes and remedies that prevent and remedy discriminatory actions. All of us, including EPA, must clearly state that we will no longer tolerate environmental "sacrifice zones," or areas where cumulative environmental insults have greatly degraded the quality of life in a defined area, disproportionately and adversely affecting people of color and low-income people. This is a bottom line, and all recipients—and OCR staff—must understand that actions with an unjustified discriminatory impact, such as adding yet another polluting source to an already overburdened community, are unacceptable and against the law.

Thank you for this opportunity to comment on the Title VI Supplement to Plan EJ 2014. Again, we appreciate your recognition of the importance of Title VI enforcement.

Sincerely,



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Lawyers' Committee for Civil Rights Under Law * Los Jardines Institute (The Gardens Institute)
* Maryland State Commission on Environmental Justice and Sustainable Communities * Natural
Resources Defense Council * OPAL Environmental Justice Oregon * Pesticide Action Network
North America * Poverty & Race Research Action Council * Public Interest Law Center of
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March 22, 2013

Via Electronic Mail

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Re: Comments on U.S. Environmental Protection Agency Draft Policy Papers, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards* (Released Jan 24, 2013); *Title VI of the Civil Rights Act of 1964: Draft Role of Complainants and Recipients in the Title VI Complaint and Resolution Process* (Released Jan. 25, 2013)

Dear Acting Administrator Perciasepe and the Office of Civil Rights,

The undersigned organizations and individuals submit these comments on two U.S. Environmental Protection Agency ("EPA") draft policy papers, EPA, Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards (Jan. 24, 2013) ("Adversity Paper"), and EPA, Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaint and Resolution Process (Jan. 25, 2013)

(“Complainant Guidance”). The signatories include community groups that have filed Title VI complaints with the Office of Civil Rights (“OCR”) and have substantial experience with EPA’s failure to create and enforce a meaningful Title VI enforcement program. We note that many of the concerns outlined today echo the expansive set of comments submitted in response to the publication of Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000) (hereinafter “Revised Guidance Documents”), and we refer OCR to the comments in the administrative record on the Revised Guidance Documents. Unfortunately, despite the passage of time and recent steps in the right direction, those comments remain relevant today.¹

Today’s comments are focused, particularly, on the Adversity Paper and the Complainant Guidance and address only a few of the issues that our organizations and partners have raised with EPA about strengthening the agency’s Title VI enforcement program and its compliance with Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Jan. 30, 1995) (the “Executive Order”). These include, for example, EPA’s failure to coordinate Title VI enforcement with other agencies, the need for EPA to incorporate the mandates of the Executive Order into its approach to Title VI enforcement, and concerns that complainants and other stakeholders face retaliation. A number of these issues are outlined in “Community Voice: Comments and Recommendations,” submitted to EPA on Wednesday, March 6, 2013 by Omega Wilson, West End Revitalization Association.

We strongly recommend that EPA develop and finalize a comprehensive guidance for implementing Title VI and its regulations, together with the Executive Order. While the piecemeal approach reflected in the two draft documents addresses a few isolated issues, a comprehensive guidance is needed to inform EPA staff, recipients of financial assistance, beneficiaries of such assistance, and the public as to their respective obligations and rights.²

¹ See, e.g., Ctr. on Race, Poverty, & the Env’t and Cal. Rural Legal Assistance Found., Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Aug. 26, 2000), available at http://www.epa.gov/civilrights/docs/t6com2000/t6com2000_071.pdf (“CRPE Comments”).

² See Fed. Transit Admin., U.S. Dep’t of Transp., FTA C 4702.1B: Title VI Requirements and Guidelines for Federal Transit Administration Recipients (Oct. 1, 2012), available at

We submit these comments with the hope that the agency has the will to take the additional necessary steps toward truly developing a “Model Civil Rights Program,” as the Final Report of the Civil Rights Executive Committee envisioned.³

I. The Adversity Paper

Title VI prohibits discrimination on the basis of “race, color, or national origin . . . under any program or activity receiving Federal financial assistance.”⁴ The text of the law explicitly directs each federal department and agency that extends federal financial assistance to effectuate the terms of the statute by issuing rules and regulations to carry out the objectives of the statute.⁵ As the Department of Justice (“DOJ”) has stated, “The purpose of Title VI is simple: to ensure that public funds are not spent in a way which encourages, subsidizes, or results in racial discrimination.”⁶ Toward that end, most federal agencies have adopted regulations that prohibit recipients of federal funds from using criteria or methods of administration that have the effect of subjecting individuals to discrimination based on race, color, or national origin.⁷

Consistent with other federal agencies, regulations promulgated by EPA in 1984 include the following prohibitions:

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, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

A recipient shall not choose a site or location of a facility that has the purpose or *effect* of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of

http://www.fta.dot.gov/legislation_law/12349_14792.html; Fed. Transit Admin., U.S. Dep’t of Transp., FTA C 4703.1: Environmental Justice Policy Guidance for Federal Transit Administration Recipients (Aug. 15, 2012), available at http://www.fta.dot.gov/legislation_law/12349_14740.html.

³ Civil Rights Exec. Comm., EPA, Developing a Model Civil Rights Program for the Environmental Protection Agency: Final Report (Apr. 13, 2012), available at http://www.epa.gov/epahome/pdf/executive_committee_final_report.pdf.

⁴ 42 U.S.C. § 2000d.

⁵ 42 U.S.C. § 2000d-1.

⁶ Civil Rights Div., DOJ, Title VI Legal Manual § VIII (2001), available at <http://www.justice.gov/crt/about/cor/coord/vimannual.php#I>.

⁷ *Id.*

race, color, or national origin or sex; or with the purpose or *effect* of defeating or substantially impairing the accomplishment of the objectives of this subpart.⁸

EPA regulations, like regulations at other federal agencies, thus already explicitly prohibit actions with a disparate impact. The challenge is to create a strong enforcement program: despite pervasive patterns of inequality in the distribution of contaminated sites, for example, and the disproportionately greater exposure of communities of color to environmental hazards, Title VI enforcement has been noticeably absent.⁹

EPA's Adversity Paper is a welcome and significant attempt to clarify guidance documents that have languished in draft form for more than a decade. We welcome the movement forward, and particularly, the move away from a rebuttable presumption that absent non-compliance with environmental or health standards, EPA will not make a finding of adverse impact.¹⁰ At the same time, the Adversity Paper suffers from a number of critical shortcomings: (A) most fundamentally, it continues to relate a finding of adversity under Title VI to the question whether a recipient has complied with other statutory or regulatory standards, a connection that is neither consistent with Title VI nor workable for complainants or the agency, (B) the Adversity Paper makes no commitment to memorialize EPA's evolved position on the subject of "adversity" in a final guidance or other document, (C) it ignores non-permitting fact patterns and the importance of other stages of the investigative process, which remain poorly developed in the Revised Guidance Documents, (D) by creating new jurisdictional requirements, it imposes new barriers to filing complaints, and, finally, (E) we are concerned that EPA's statement that "the cooperative federalism approach embodied in the federal environmental statutes ... do[es] not have ready analogues in the context of other federal agencies' Title VI programs"¹¹ reflects confusion about EPA's role as the agency charged with ensuring that recipients of federal funds administered by EPA are not discriminating. Again, we also want to emphasize the need for EPA to develop and finalize a more comprehensive guidance for

⁸ 40 C.F.R. § 7.35(b), (c) (emphasis added).

⁹ As Luke W. Cole and Sheila R. Foster wrote, "[N]ational studies conducted to date provide evidence that people of color bear a disproportionate burden of environmental hazards, particularly toxic waste sites. Numerous local studies, with some exceptions, have, on the basis of their assessment of particular cities, counties or regions, similarly concluded that racial disparities exist on the location of toxic waste facilities." Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 58 (2001).

¹⁰ See Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 ("*Select Steel*")

¹¹ Adversity Paper at 1.

implementing Title VI and its regulations. Clarification of the adversity standard would be only one part of a final Title VI guidance.

(A) EPA's Continued Reliance on Statutory and Regulatory Environmental and Regulatory Health Standards for Determining Adversity is Inconsistent with Civil Rights Law and Infeasible.

In the Adversity Paper, EPA describes the post-*Sandoval* administrative complaint investigative process as “complex and unique,” due to the “need to merge the objectives and requirements of Title VI with the objectives and requirements of [] environmental laws.”¹² At the outset, EPA has built its analysis on the faulty premise that its Title VI enforcement obligations must “merge” with duties and authorities, despite the fact that they are derived from distinct statutes, with different purposes. As the Adversity Paper suggests, environmental laws require “complex technical assessments” of “emissions, exposures, and cause-effect relationships” as well as “close coordination.”¹³ The agency should be clear: EPA has an independent set of duties and obligations pursuant to civil rights law, including its responsibility to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

The Adversity Paper nonetheless continues to tie the analysis of adversity to standards of environmental degradation and harm to health pursuant to other statutes, each itself the product of deliberation in light of independent statutory mandates and, therefore, makes only a minor commitment to change its approach to the adversity question. Regarding whether EPA should treat compliance with an environmental standard as triggering a rebuttable presumption of no adverse impact, EPA states that it “*may* need to consider whether a permit that complies with a health-based threshold can nevertheless cause an adverse impact.”¹⁴ Moreover, EPA backpedals from even this minor shift away from the rebuttable presumption in the very next sentence and elsewhere in the Adversity Paper. EPA states that its departure from the rebuttable presumption of no adverse impact¹⁵ may “involve analyses that are...simply infeasible,”¹⁶ is planned for “allegations about environmental *health-based* thresholds,”¹⁷ and will be used to focus on cases

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 3 (emphasis added).

¹⁵ See OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (1998).

¹⁶ Adversity Paper at 3.

¹⁷ *Id.* at 4 (emphasis added).

“representing the *highest environmental and public health risk.*”¹⁸ EPA also reiterates its longstanding justification for the presumption of no adversity when health-based standards are met – it argues that compliance with standards means that “remaining risks are low and at an acceptable level.”¹⁹ And EPA declares that it has limited ability to gather “credible, reliable” data in the context of a given Title VI complaint.²⁰

Historically, EPA has interpreted its Title VI responsibilities and authorities through the lens of traditional environmental regulation—if the environmental statutes are complied with, according to this line of thinking, then there is adequate protection for communities. Simply put, this approach has failed to eliminate the adverse or disparate impacts to environmental justice communities that EPA’s Title VI regulations seek to forbid. We strongly urge EPA to move away from the traditional environmental regulatory approach and address Title VI issues through a civil rights lens. A final guidance should make clear that technical compliance with environmental laws is not the measure of whether programs or activities have an “adverse impact.” While the framework for assessing whether a recipient is in violation of the discriminatory effects standard in EPA’s Title VI implementing regulations includes a determination of whether the impact of a recipient’s programs or activities is both “adverse” and borne disproportionately by a group of persons based on race, color, or national origin, compliance with environmental laws and standards is not the ruler for civil rights compliance.

Title VI is a civil rights statute, and it is independent of environmental laws and standards. Before *Alexander v. Sandoval*, 532 U.S. 275 (2001), when cases of disparate impact were adjudicated in court, the threshold for establishing adverse impact was low.²¹ With rare

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

²⁰ *Id.* at 5.

²¹ The DOJ Title VI Legal Manual states, “Under the disparate impact theory, a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. The elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law.” Civil Rights Div., DOJ, Title VI Legal Manual § VIII.B (2001) (citing *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995)). Given the origin of the analysis, the precise quantification of impact was more relevant to remedy than the prima facie case. *See, e.g., Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1420 (11th Cir. 1993) (“we believe that the zone-jumping of white students has increased the racial identifiability of the Training School . . . thus zone-jumping may be said to have produced a disparate impact on black students in Talladega County”); *Larry P. v. Riles*, 495 F. Supp. 926, 941-42 (N.D. Cal. 1979) *aff’d in part, rev’d in part sub nom. Larry P. By Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (improper placement in so-called educable mentally retarded classes has a definite adverse effect, in that such classes are dead-end classes that de-emphasize academic skills and stigmatize children improperly placed in them).

exception, the crux of the inquiry focused on whether or not the impact was felt disproportionately on the basis of race or national origin, not on the magnitude of the impact itself.²² In one of the few cases to question whether plaintiffs had established the impact prong of the *prima facie* case, *U.S. v. Bexar Cnty.*, 484 F. Supp. 855, 859-60 (W.D.Tex. 1980), the court was concerned about whether traveling for what the court presumed would be superior health care once a hospital facility moved from an urban center to the suburbs constituted cognizable harm, not whether the level of impact met a technical standard imposed by the U.S. Department of Health & Human Services or pursuant to another statute.²³

In particular, the final guidance should remove any confusion caused by *Select Steel*. Compliance by recipients with standards adopted pursuant to the Clean Water Act, Clean Air Act, or other environmental laws does not mean that persons are not adversely affected by the recipients' programs or activities. Environmental statutes, regulations, and standards are the outcome of political and administrative processes, which take account of an array of competing interests and criteria. As was the case with *Select Steel*, these standards may involve averaging emissions over large geographical areas that, if viewed in isolation, can hide disparities. They are, again, not the benchmark for a determination of "impact." Among other things, environmental standards do not fully capture harms to public health and the environment. These standards change over time, for instance.²⁴ Many health-based standards are not currently implemented (particularly in the area of toxic pollutants), and existing standards are rarely updated to account for the progress of science.²⁵

²² See Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in *Civil Rights Litigation and Attorney Fees Annual Handbook* 186 (B. Wolvovitz et al. eds. 1995).

²³ Indeed, as many of the signatories have previously emphasized, the standard for measuring impact is "adversity," not "significant" adverse impact, as the Revised Guidance Documents would suggest. Analysis of significance has traditionally been applied to the question of disproportionality. See, e.g., *Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 101-102 (N.Y. Sup. Ct. 2001) (New York court applying Title VI analysis in school equity case finding that "money is a crucial determinant of educational quality" and turning to statistical analysis of the disproportionality of the impact.).

²⁴ See *In re Shell Gulf of Mexico, Inc.*, 2010 WL 5478647 (EAB 2010). In *Shell*, the Environmental Appeals Board concluded that EPA erred when it relied solely on compliance with the then-existing annual NO₂ National Ambient Air Quality Standard ("NAAQS") as sufficient to find that the Alaska Native population would not experience "adverse human health or environmental effects from the permitted activity." *Id.* at *2. Though this decision arose in the context of Executive Order 12898 and turned on the fact that the NAAQS was under revision, it is clear that current compliance with an environmental standard is not determinative of whether an action or policy has a health impact.

²⁵ See, e.g., Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 Tex. L. Rev. 1701, 1721-1725 (2008) (standards such as new source performance standards

We note, also, that the Revised Guidance Documents already contain some language clarifying that “[c]ompliance with environmental laws does not constitute per se compliance with Title VI.” 65 Fed. Reg. at 39,680. Though the move away from the rebuttable presumption is a step in the right direction, the continued reliance on environmental laws is in error. Noncompliance with an environmental or health standard is relevant to a finding of adverse impact, but compliance with a federal, state, or local standard does not negate otherwise valid evidence of adversity.

EPA’s continued reliance on environmental standards also poses the following problems. First, the Revised Guidance Documents erred when limiting cognizable harms to those within EPA’s or a recipient’s expertise or “authority”²⁶ by not requiring “recipients to address social and economic issues that they are not authorized to address.”²⁷ The Adversity Paper fails to reverse these errors. As many of the undersigned emphasized in 2000, such an approach ignores the many aesthetic, cultural, economic, and social impacts experienced by communities.²⁸ For example, the approach leaves out odor, segregatory effects, and interference with enjoyment of property, as well as other economic impacts, such as the effect of polluting sources on property values. An analysis of whether a recipient’s action, policy, or practice has an adverse impact cannot ignore such a broad swath of impacts.²⁹ We are deeply concerned that the Adversity Paper continues a policy of willfully choosing to ignore real impacts affecting communities.

Notably, Title VI prohibits recipients from excluding, denying the benefits of a program or activity, or subjecting people to discrimination on the basis of race, color, or ethnicity.³⁰ The

under the Clean Air Act and effluent standards under the Clean Water Act are on average twenty years old, more than fifty percent have never been revised, and most others have been revised once).

²⁶ 65 Fed. Reg. at 39,670 (“[I]n determining whether a recipient is in violation of Title VI or EPA’s implementing regulations, the Agency expects to account for the adverse disparate impacts... within the recipient’s authority.”).

²⁷ *Id.* at 39,691. See Letter from Center on Race, Poverty and the Environment and Other Environmental Justice Organizations and Individuals to Carol Browner and Anne Goode, EPA (Aug. 26, 2000) (calling for EPA to consider social, cultural, and economic impacts of recipient actions) (hereinafter “Letter to Carol Browner”).

²⁸ CRPE Comments at 47-48.

²⁹ OCR adopted this narrow approach, for example, in *Padres*. See OCR, EPA, Investigative Report for Title VI Administrative Complaint, File No. 01R-95-R9 69-70 (Aug. 30, 2012) (finding that the recipient did not have authority to address a range of impacts and, thus, discounting any such impacts in the adversity analysis). An analysis of the *adverse impacts* of a recipient’s action is conceptually distinct from whether it would be outside of a recipient’s authority to mandate a particular remedy, which might be relevant to the content of a voluntary compliance agreement but should not limit the adversity analysis.

³⁰ 42 U.S.C. § 2000d.

statutory language contemplates the full range of potential impacts — including, for example, acknowledging that a segregatory effect is a cognizable form of injury. The Adversity Paper should make clear that adverse impacts may involve harms to health, damage to the environment, reduction in property values, and social harms, among others, and are not limited to measurable environmental or health effects. In addition, the investigation of adverse impacts should not be constrained by gaps in scientific knowledge about exposure, exposure pathways and health effects, or more broadly, the expertise of EPA or the recipients.³¹ Evidence of any adverse impact is relevant to a finding of discrimination.

Second, the Adversity Paper does not change the “hierarchy” of data on adverse impacts developed in the Revised Guidance Documents. In those guidance documents, EPA stated that “data may not be readily available for many types of impacts,” and created a hierarchy of existing data that OCR would use to determine adversity: (1) ambient monitoring data, (2) modeled exposure concentrations or surrogates, (3) known releases of pollutants or stressors, (4) quantities of chemicals and their potential for release, and (5) the existence of certain sources or activities.³² It remains unclear how this hierarchy of *existing* data will influence OCR’s attempt to use all “readily available and relevant data.”³³ There is no mention of OCR’s view on the relevance of citizen monitoring data, or local knowledge that may be less quantifiable than the data at the top of OCR’s hierarchy.³⁴

³¹ The Revised Guidance Documents contain additional language that may be interpreted as limiting analysis of effects to a subset of impacts and requires clarification. *See, e.g.*, 65 Fed. Reg. at 39,660 (in a section entitled “Relevant Data,” the Revised Guidance Documents lay out an “order of preference” of relevant data to be used to conduct the analysis of adverse impact. The list starts with “[a]mbient monitoring data” and “[m]odeled ambient concentrations.” Notably, the list does not specifically identify outcome data—for example, high asthma or cancer rates. The list itself and the prioritization of items on the list reinforce an impression that a finding of adverse impact is contingent on environmental laws and standards and, also, that non-environmental harms will be ignored.); 65 Fed. Reg. at 39,661 (“Generally, the risk or measure of impact should first be evaluated and compared to *benchmarks* provided under relevant environmental statutes, regulations or policies.”); 65 Fed. Reg. at 39,680 (The “[e]xample of adverse impact benchmarks,” relies on hazard indices that are developed for other purposes and should not be the markers for identifying adverse impacts under Title VI); 65 Fed. Reg. at 39,680 (“[W]here the area in question is attaining that [NAAQS] standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.”). The Adversity Paper should clarify that while violations of environmental standards are evidence of harm, lack of such data does not negate other indicia or evidence of impact.

³² *Id.* at 39,679.

³³ *Id.* at 39,660.

³⁴ *See* Jill Lindsey Harrison, *Pesticide Drift and the Pursuit of Environmental Justice* 115 (2011) (“defining an issue as belonging in the realm of science rather than politics ... is attempting to remove the issue from public debate”; to do so obscures data gaps, industry privilege, and other material factors that minimize official assessments of the problems such as pesticide drift, which disproportionately affects Latino farmworkers and their families). We note

Third, in light of EPA's concerns about its capacity and the availability of existing data, the approach to evaluating adverse impact suggested by the Adversity Paper is impracticable. EPA notes that in deciding whether a permit is in compliance with health-based standards, OCR may consider the "existence of hot spots, cumulative impacts, the presence of particularly sensitive populations...misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact."³⁵ But the Paper then indicates that compliance with ambient standards will under a variety of circumstances continue to operate as a presumption of no adverse impact, because "the Agency's existing technical capabilities and the availability of credible, reliable data" "may impact EPA's ability to consider other information concurrently with compliance with health-based thresholds."³⁶ In fact, if EPA continues to rely on such standards to measure adversity, it has a variety of platforms available that can provide, at reasonable cost, near-real-time, ground-level spatial data on emissions from permitted facilities. Its VIPER wireless system, for example, is in use throughout the country, and can be set up on short notice to gather new data on facility grounds or within residential communities through use of handheld sensors.³⁷ The agency could deploy these systems to gather baseline data at permitted facilities and ensure that increases over baseline do not pose a risk to public health. And it could partner with a variety of organizations, including other agencies such as the Centers for Disease Control and Prevention, to gather baseline biomonitoring data from residents who may be exposed to new emissions.³⁸ Such data are relevant for other existing programs administered by the agency, including EPA's Risk and Technology Review program that promulgates industry-specific residual risk standards based on maximally exposed individuals

that devaluing the experience of affected communities and anecdotal information has been a longstanding environmental justice concern. Moreover social issues like poverty, language barriers, and legal obstacles make environmental justice problems such as pesticide drift "more difficult to accurately quantify." *Id.* at 30.

³⁵ Adversity Paper at 4.

³⁶ *Id.* at 5.

³⁷ EPA, VIPER Wireless Monitoring, Presentation at VIPER Data Workshop (Dec. 21, 2011); *see also* Evaluate Air Sensors Developed During EPA's Air Sensor Evaluation and Collaboration Event, EPA, www.epa.gov/nerl/features/sensors.html (last updated Dec. 18, 2012).

³⁸ *See, e.g.*, Ctrs. for Disease Control and Prevention, Dep't of Health and Human Servs., Third National Report on Human Exposure to Environmental Chemicals (2005); Rachel Morello-Frosch et al., *Toxic Ignorance and Right-to-Know in Biomonitoring Results Communication: A Survey of Scientists and Study Participants*, 8 *Env'tl. Health* 1 (2009).

near permitted facilities.³⁹ Given these and other capabilities, OCR's claim that it "expects to gather pre-existing technical data rather than generating new data"⁴⁰ seems inapposite. Without new data, meaningful investigations are likely to be stymied. OCR should commit to make use of all resources available to EPA, especially those that are cost-effective (such as wireless sensors and bio-monitoring).

Moreover, as discussed below, to the extent that technical capabilities for establishing a baseline and/or evaluating the cumulative impacts, the presence of particularly sensitive populations, misapplication of environmental standards, or a site-specific demonstration of other adverse impact are, in fact, inadequate, such limitations should not preclude a finding of adversity. The agency proposes to create too high a burden, based on another set of laws and regulations, rather than determining whether there is an adverse impact on the basis of race, color or national origin. The lack of such data on contamination affecting overburdened communities is a reflection of long-standing societal priorities, which, if allowed to defeat a finding of adversity, perpetuates discriminatory patterns. Given constraints on resources, it is neither realistic nor reasonable to expect complainants to hire the experts and pull together the data that the government has failed to collect. And with thousands of grantees, and thousands of sub-grantees,⁴¹ EPA cannot feasibly build a Title VI enforcement program working on the premise that each investigation would have to meet this high a burden on the issue of adversity. Both the Revised Guidance Documents and the Adversity Paper raise the bar for a demonstration of adversity beyond the realm of feasibility, so that it will largely be out of reach for low-income communities of color that experience the disproportionate burden of contamination.

Fourth, to the extent that a finding of adversity remains tethered to environmental and health-based standards, the Adversity Paper fails to clarify whether OCR will rely on risk-based proxies for "adverse" impacts caused by a recipient of agency funds. How will EPA use thresholds (e.g., cancer risks of less than one in one million or non-cancer risks of less than one on the hazard index) to determine "adversity"? Will the agency consider impacts "not adverse"

³⁹ 42 U.S.C. § 7412(f)(2)(A).

⁴⁰ Adversity Paper at 5.

⁴¹ See Prime Award Spending Data: EPA, USA Spending, http://www.usaspending.gov/?tab=By+Agency&fromfiscal=yes&fiscal_year=2013&overridecook=yes&carryfilters=on&q=explore&maj_contracting_agency=6800&maj_contracting_agency_name=Environmental+Protection+Agency.

if they are lower than those thresholds?⁴² How will risks above those thresholds be determined to be “adverse”? Under what circumstances will EPA view differential exposure an “adverse” impact for purposes of making a *prima facie* finding of a Title VI violation? And how will it combine risk-based determinations with assessments of other health- and non-health-related stressors from a permitted facility’s operations as well as departures from normal operations?

(B) The Adversity Paper Makes No Commitment to Memorialize EPA’s Position in a Final Guidance and is Likely to Create Confusion for Recipients, Stakeholder Communities, and Investigators.

The Adversity Paper states, “Upon finalization of this paper, the policy described herein will supersede the corresponding discussions” in the Draft Revised Investigation Guidance.⁴³ A robust Title VI compliance program requires that EPA finalize guidelines to ensure clarity, transparency, standardization, and accountability. The footnote leaves vague the relationship between this new policy, for example, and the Draft Recipient Guidance. Moreover, by addressing legal standards one at a time, and then memorializing them in multiple documents, EPA is creating unnecessary complexity for communities, recipients, and investigators.

(C) The Adversity Paper Represents Part of a Piecemeal Approach to Addressing Longstanding Problems with EPA’s Legal Standards and Fails to Address Either Non-Permitting Fact Patterns or The Fact That Other Stages in the Investigative Process Remain Poorly Developed.

EPA limits the scope of the Adversity Paper to the question of “adversity,” a single step in its framework for analyzing Title VI claims for only one kind of decision by a recipient of federal funds: the decision to issue or renew an environmental permit. EPA’s failure to address the standard for assessing adversity in “most non-permitting fact patterns” can only lead to additional confusion and conflict about the appropriate standard to apply in these other contexts.⁴⁴

⁴² 65 Fed. Reg. at 39,680.

⁴³ Adversity Paper at 1 n.1.

⁴⁴ In 2000, many of the signatories to this letter raised concern about EPA’s failure to address the range of activities conducted by recipients of federal financial assistance that implicate Title VI, including, for example the clean-up of contaminated sites and the enforcement (or lack of enforcement) of environmental laws. See CRPE Comments at 10.

Moreover, EPA makes clear that it chose to focus its attention on only a narrow portion of the investigative process: “This paper focuses only on a particular issue...described in step 1.a. [‘Does the alleged discriminatory act have an adverse impact?’].”⁴⁵ Apart from clarifying a limited set of circumstances that may lead to a finding of adverse impact, EPA ignores the remainder of the investigative process for establishing a *prima facie* Title VI violation in the Adversity Paper, offering that “[o]ther[steps] may require elaboration in the future.”⁴⁶ This statement reveals a lack of institutional memory, which will limit EPA’s ability to competently reform its Title VI process.⁴⁷ Over more than ten years, comments filed before the agency, widely-cited journal articles in the wake of *Select Steel*, arguments in litigation against EPA, and findings of a federal advisory committee *convened* by EPA raised and repeated concerns with every stage of the investigative process.⁴⁸

For example, the Adversity Paper leaves in place a lack of clarity about what constitutes a sufficient “substantial legitimate justification” to rebut a *prima facie* case of discrimination and the standards for evaluating less discriminatory alternatives. The Revised Guidance Documents call for a recipient’s decision to be “reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient’s institutional mission.”⁴⁹ Yet there is confusion about which goals are “integral” to a recipient’s mission. In the Revised Guidance Documents, EPA states that OCR will administer this test by “likely consider[ing] broader interests, such as economic development.”⁵⁰ As Professor Eileen Gauna has suggested, the tension between the requirement that a goal must be “integral” to a recipient’s mission and this “broader” approach

⁴⁵ Adversity Paper at 3.

⁴⁶ *Id.*

⁴⁷ See Deloitte Consulting LLP, Evaluation of the EPA Office of Civil Rights (Mar. 21, 2011), available at http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf.

⁴⁸ See, e.g., Nat’l Advisory Council for Env’tl. Policy and Tech., Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs (1999); Luke W. Cole, *Wrong on the Facts, Wrong on the Law: Civil Rights Advocates Excoriate EPA’s Most Recent Title VI Misstep*, 29 Env’tl. L. Rep. 10,775 (1999); Bradford C. Mank, *The Draft Recipient Guidance and the Draft Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 Env’tl. L. Rep. 11,144 (2000); Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, 31 Env’tl. L. Rep. 10,528 (2001) (hereinafter “*EPA at 30*”); *Padres Hacia Una Vida Mejor v. Jackson*, No. 1:11-cv-1094, 2013 WL 459289 (E.D. Cal. Feb. 5, 2013).

⁴⁹ 65 Fed. Reg. at 39,654.

⁵⁰ *Id.*

creates an area of uncertainty.⁵¹ The Revised Guidance Documents also fail to provide clarity on the circumstances under which EPA will consider cost a substantial legitimate justification or a sufficient reason to reject a less discriminatory alternative, stating only “OCR will likely consider cost and technical feasibility in its assessment of the practicability of potential alternatives.”⁵² A recipient’s ability to justify disparate impacts by appealing to broader economic interests will sharply limit Title VI enforcement. The signatories to this letter urge EPA to close this loophole and adopt a more appropriate standard of justification.

(D) The Adversity Paper Indicates That Complaints Are Screened for Standing and Ripeness, Imposing New Barriers to Title VI Enforcement.

Footnote 8 of the Adversity Paper indicates that EPA’s jurisdictional review of complaints includes a screening for standing and ripeness, imposing new and unnecessary barriers to Title VI enforcement. The doctrine of standing, for example, serves to set apart cases and controversies that are justiciable and properly before the courts.⁵³ A plaintiff in federal court must meet a three-part test requiring demonstration of (1) injury in fact, (2) a causal connection between the injury and conduct that is the source of the complaint, and (3) redressability, i.e. that the injury can be redressed by the outcome of the court’s decision.⁵⁴ There is no standing requirement to file an administrative complaint under Title VI. Indeed, EPA’s regulations state that a person may file a complaint if he or she “believes that he or she *or a specific class of persons* has been discriminated against in violation of this part.”⁵⁵ There is no prerequisite that the complainant suffer direct or personal injury in fact, economic or otherwise, or be a member, representative, or organization representing a class of persons that suffers such harm. Pursuant to the Administrative Procedures Act, standing is *only* necessary when seeking judicial review, not when filing an administrative complaint or participating in the informal adjudication process.⁵⁶ Though the Adversity Paper asserts that the EPA, as well as other federal agencies,

⁵¹ EPA at 30, *supra* note 48, at 10,548.

⁵² 65 Fed. Reg. at 39,683.

⁵³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁵⁴ *Id.* at 560-61.

⁵⁵ 40 C.F.R. § 7.120(a).

⁵⁶ 5 U.S.C. § 551, *et. seq.*

has discretion in the enforcement of federal statutes, including how it elects to enforce Title VI,⁵⁷ any such discretion should not be exercised by the agency to add extra impediments to filing a viable complaint for an already overburdened, under-resourced, potential complainant. A new standing requirement further tips the scale in favor of the recipient by increasing the risk of discriminatory actions going unnoticed, and consequently unmitigated, at the expense of the health of many Americans.

Similarly, EPA's statement that its jurisdictional review includes a screening for "whether the complaint is ripe" also frustrates the goal of inclusive, comprehensive stakeholder involvement.⁵⁸ In *Angelita C*, EPA unambiguously stated that the showing of *potential* health effects (depending on their nature and severity) is an adequate basis not just for filing a complaint, but also for a finding of adverse impact.⁵⁹ The agency noted that a reasonable cause for concern, and correspondingly, a reasonable basis for filing a complaint based on that concern for public health or welfare can be evidenced in the establishment of an *imminent*, substantial harm or endangerment in a complaint:

...the decisional precedent demonstrates that an endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken, keeping in mind that protection of the public health, welfare and the environment is of primary importance.⁶⁰

Imminent harm can be shown before a regulation or action is enforced. If a complainant knows that a law or action is forthcoming, that should be a reasonable enough cause for concern to file a complaint before the law or regulation is enacted. Because a complaint is not a request for judicial review, but rather a request that something be done before judicial review is necessary, EPA should loosen instead of tighten the requirements for filing a complaint in order to encourage resolution without the expense and time of going to court. As mentioned earlier, Title VI complainants typically have far fewer resources to devote to judicial proceedings than recipients of federal funds.

⁵⁷ Adversity Paper at 2.

⁵⁸ See Adversity Paper at 2 n.8.

⁵⁹ OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 (2011).

⁶⁰ *Id.* at 27.

EPA applied a ripeness standard in its decision to dismiss without prejudice *Coalition for a Safe Environment v. California Air Resources Board*, EPA File No. 09R-12-R9.⁶¹ In *Safe Environment*, California community groups with members living in close proximity to facilities governed by California's greenhouse gas cap-and-trade program alleged that the California Air Resources Board violated Title VI by allowing carbon trading, which denied overburdened populations the benefit of co-pollutant reductions in their communities.⁶² *Safe Environment* alleged that the recent adoption of cap-and-trade inflicted imminent adverse impacts consistent with the *Angelita C.* preliminary finding and the Clean Water Act Enforcement Guidance.⁶³ EPA dismissed the complaint on ripeness grounds, stating:

OCR finds that this complaint is not ripe for review. The allegations in the complaint are speculative in nature and anticipate future events that may not occur. The actions to be taken in response to the new compliance obligations and the results of those actions are unknown and unpredictable. As a result, a meaningful review cannot be conducted at this time. Therefore, OCR rejects your complaint and its allegations.⁶⁴

The Complainants sought reconsideration given EPA's conclusory rejection.⁶⁵ Six months later and just *two days after* EPA proposed the Adversity Paper, including footnote 8, EPA responded to the *Safe Environment* petition.

Like the Complaint, your request lacks specific information that CARB either discriminated against "communities of color" in promulgating the Cap and Trade program, or that their actions in taking the preparatory steps to initiate the Cap and Trade program have resulted in harm to the complainants, either at the time the complaint was filed or now. Moreover, your request did not include any facts about the actual, real-world implementation of the program that would help to assess whether adverse, disparate impacts will occur.⁶⁶

⁶¹ See Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Env't. (July 12, 2012,) attached as Exhibit xxxx; Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Env't. (Jan. 25, 2013).

⁶² See *Coalition for a Safe Environment v. California Air Resources Board*, EPA File No. R09-12-R9, filed June 8, 2012.

⁶³ *Id.* at 9-16.

⁶⁴ See Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Env't. at 2 (July 12, 2012).

⁶⁵ See Letter from Brent Newell, Ctr. on Race, Poverty & the Env't., to Rafael DeLeon, Dir., OCR (Aug. 6, 2012).

⁶⁶ Letter from Rafael DeLeon, Dir., OCR, to Brent Newell and Sofia Parino, Ctr. on Race, Poverty & the Env't. at 2 (Jan. 25, 2013).

EPA's implementation of footnote 8 in *Safe Environment* demonstrates that EPA is radically altering the timing of when a complainant must file a complaint, shifting the burden of proof to the complainant, and imposing an "actual harm" threshold from the implementation of a discriminatory act. First, complainants have only 180 days to file a Title VI complaint, or EPA routinely dismisses such complaints without invoking its authority to investigate a complaint on its own prerogative.⁶⁷ Under *Safe Environment* and footnote 8, a complainant must not only track when the act of the recipient took place, but also wait until the ax falls. The decision hints that, in the case of a regulatory program, a complainant must obtain knowledge of the specific date or dates of a recipient's implementation of that program and evidence of resulting harm to the complainants. Many regulatory programs have multiple stages of implementation, as regulations frequently phase in compliance obligations. EPA has thus injected significant uncertainty into the key date from which a short statute of limitations begins to run.

Second, during that short statute of limitations period with an uncertain beginning, a complainant now seems to bear the burden of proof in demonstrating actual harm to EPA. This reflects, again, a radical departure from the last two decades of Title VI enforcement,⁶⁸ and allows EPA to dismiss complaints on procedural grounds without expending resources on costly investigations. In implementing this policy, EPA could determine that a complainant has not met its threshold burden to demonstrate harm, regardless of the allegations in the complaint.⁶⁹ As EPA recognized in the Revised Guidance Documents, it is EPA, not the complainants, who should investigate and determine whether or not a recipient of federal funding is discriminating.

EPA should abandon its proposed stance toward, and recent application of, standing and ripeness, because such EPA determinations do not further the enforcement of civil rights or environmental justice, obligations EPA has under the law and the Executive Order, but rather

⁶⁷ EPA's Title VI regulations make clear that the agency has affirmative authority to enforce Title VI, authority that is not limited to responding to complaints: "The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities." 40 C.F.R. § 7.115(a).

⁶⁸ See 65 Fed. Reg. at 39672 (June 27, 2000) ("... [T]he complainants do not have the burden of proving that their allegations are true, although their complaint should present a clearly articulated statement of the alleged violation. It is OCR's job to investigate allegations and determine compliance.")

⁶⁹ The complaint in *Safe Environment* included extensive allegations, supported by fact, of disparity and adversity. See *Coalition for a Safe Environment v. California Air Resources Board* at 9-28, EPA File No. R09-12-R9, filed June 8, 2012.

place complainants in untenable positions against powerful agencies and sometimes insurmountable burdens of proof merely to file a complaint.

Moreover, if potential complainants do in fact fall into the category of what EPA has called “tipsters,” discussed below at Part II.A, and are not aggrieved persons, directly affected by the recipient’s action, then requiring ripeness, much less standing, can have a chilling effect on the possibility that they will speak up against a harm that may have a devastating impact on others in their communities. Thus to require ripeness before a person can file a complaint is unduly burdensome and possibly unjust for far too many people who are potentially impacted, and goes against the EPA’s past practices and self-declared value of inclusivity of all stakeholders, making an already historically difficult and challenging process that much harder.

With this in mind, we hope the agency will remove references to jurisdictional review of standing and ripeness in any final version of the adversity guidance.

(E) Notwithstanding EPA’s Other Duties and Authorities, the Agency is Charged with Enforcing Title VI and Must Have the Political Will to Ensure Compliance, Even in the Context of Cooperative Federalism.

We support the dual importance of robust discrimination protections and effective governance, which should both constructively inform Title VI policies. In particular, administrative enforcement has the highest potential for success when agencies build on each other’s experience and on the resources already invested in developing best practices. For this reason, we were glad that EPA noted the importance of continuing “to review programs and best practices in place in other federal agencies to ensure consistency to the extent applicable and identify approaches that may be transferable to EPA’s Title VI program.”⁷⁰

However, we recommend that the final guidance take a more proactive and rigorous stance in seeking to match the best Title VI practices developed by other agencies,⁷¹ as well as striving for EPA to itself become a model. We hope that EPA will take concerted steps to identify elements of Title VI enforcement frameworks that have been maximally effective in ensuring that federal assistance does not reinforce or support discrimination—and will adapt those to be even more effective in the environmental regulatory context.

⁷⁰ Adversity Paper at 1 n.3.

⁷¹ In particular, we commend the Title VI guidance documents developed by the Federal Transit Administration as one example. *See, e.g.*, discussion *infra* note 83, at 22.

The Adversity Paper, in contrast, reflects an overly hesitant approach that undermines the value of cross-agency resources. In particular, the Adversity Paper guidance states:

The Agency has encountered a number of complex and unique issues of law and policy in the course of Title VI complaint investigations, especially allegations concerning the protectiveness of environmental permits issued by state and local agencies that receive EPA financial assistance. These challenges have been the consequence of the need to merge the objectives and requirements of Title VI with the objectives and requirements of the environmental laws that the Agency implements. The Agency's environmental regulatory mandates require complex technical assessments regarding pollution emissions, exposures, and cause-effect relationships. In addition, the cooperative federalism approach embodied in the federal environmental statutes requires that EPA accomplish its environmental protection objectives in close coordination with state and local environmental regulators. Such issues do not have ready analogues in the context of other federal agencies' Title VI programs.⁷²

We appreciate that each agency, including EPA, encounters unique challenges in Title VI program design. However, the tone of EPA exceptionalism set by this draft paragraph raises concerns that the guidance will foster a defeatist perspective toward efforts to mine other agencies' successes, as well as suggesting a relatively low standard for EPA's Title VI performance.

We address below the specific issues raised by this draft paragraph, but we would also emphasize that its premise runs contrary to fundamental Title VI objectives. While agencies must adapt Title VI procedures and enforcement to the fields they regulate (and the specific burdens and benefits encountered there), the legislation was clearly not intended to yield a tiered model in which some agencies incorporate its directives less fully than others due to inflexible program design or existing agency-recipient dynamics. Rather, Title VI was intended as a consistent and overarching mandate that the government divest itself of discrimination across all programs and activities: a way to "insure the uniformity and permanence to the nondiscrimination policy" and avoid a piecemeal approach.⁷³ Indeed, the challenges of federalism gave rise to civil rights laws, including Title VI, and are endemic to civil rights enforcement. Many of the pioneering Title VI cases, for example, brought to desegregate school systems throughout the country, carried this crucial federal prohibition against discrimination

⁷² *Id.* at 1.

⁷³ See 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey).

into traditional spheres of state and local control.⁷⁴ As the Fifth Circuit Court of Appeals stated in one such case, “Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation.”⁷⁵ Citing legislative history, the Court continued:

[T]itle VI is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.... It is not healthy nor right in this country to require the local residents of a community to carry the sole burden and face alone the hazards of commencing costly litigation to compel school desegregation. After all, it is the responsibility of the Federal Government to protect constitutional rights [such as those undergirding Title VI].⁷⁶

Given the inequitable distribution of environmental hazards on the basis of race, color, and national origin across the United States, and the devastating effects of contamination, including the impact of exposure to carcinogens, neurotoxins, endocrine disruptors, and other health hazards, the mandate of the federal government is no less crucial today.⁷⁷

This message was reinforced by Executive Order 12898, which heightened the procedural requirements for many agencies, including EPA, and called for increased cross-agency collaboration.⁷⁸ The hazards of discrimination are certainly no less important in the environmental sphere than elsewhere, and equal or greater safeguards are merited.

More specifically, this section of the Adversity Paper posits that the technical nature of environment regulation, and the priorities set by the cooperative federalist scheme, may prevent EPA from importing strong Title VI standards or setting its own. Yet other agencies face comparable challenges. EPA’s fellow agencies also grapple with an intricate range of statistical assessments, causality determinations, competing mandates, unclear valuations, and injury predictions. These agencies must evaluate potential health, economic, and other impacts that may require complex determinations.

⁷⁴ See, e.g., *United States v. Jefferson Cnty. Bd. Of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff’d on reh’g*, 380 F.2d 385 (5th Cir. 1967).

⁷⁵ *Id.* at 849.

⁷⁶ *Id.* at 849 n.17, citing House Judiciary Committee Report No. 914, to Accompany H.R. 7152, 2 U.S. Code Congressional and Administrative News, 88th Cong. 2nd Sess. 1964, at 2393.

⁷⁷ For an annotated bibliography of studies and articles documenting the disproportionate impact of environmental hazards on the basis of race and/or income, see Cole and Foster, *supra* note 9, at 167-83.

⁷⁸ See Exec. Order No. 12898, 59 Fed. Reg. 7629 (Jan. 30, 1995).

The challenges posed by cooperative federalism are not native only to environmental regulation. Federal programs such as Medicaid, for instance, are federal-state partnerships, and Medicaid is administered by state agencies.⁷⁹ Additionally, numerous other agencies must navigate relationships with recipients whom they both oversee and rely upon—both for the oversight of sub-recipients and for the implementation of other critical programs. For example, the U.S. Department of Housing and Urban Development (“HUD”) is charged with the compliance of state and local housing and community development agencies, which administer block grants as well as subsidies.⁸⁰

Federal-state partnerships of all kinds exist across federal agencies, and other federal agencies that enforce Title VI also wear multiple hats. For example, federally assisted transportation recipients must attend to the racially disparate effects of transit service plans, fare policies, and environmental and social benefits and burdens.⁸¹ The Federal Transit Administration has identified objectives for Title VI evaluations encompassing the need to:

- a. Ensure that the level and quality of transportation service is provided without regard to race, color, or national origin;
- b. Identify and address, as appropriate, disproportionately high and adverse human health and environmental effects, including social and economic effects of programs and activities on minority populations and low-income populations;
- c. Promote the full and fair participation of all affected populations in transportation decision making;
- d. Prevent the denial, reduction, or delay in benefits related to programs and activities that benefit minority populations or low-income populations;
- e. Ensure meaningful access to programs and activities by persons with limited English proficiency.⁸²

⁷⁹ See, e.g., *Frazier v. Bd. of Trustees of Nw. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278 (5th Cir. 1985), *modified on other grounds*, 777 F.2d 329 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986) (finding hospital contractor directly subject to Title VI because of receipt of Medicaid funds).

⁸⁰ See 24 C.F.R. § 1.4 (providing for nondiscrimination in housing programs); 28 C.F.R. § 42.408(c) (DOJ coordinating regulation providing that “[w]here a federal agency requires or permits recipient to process Title VI complaints, the agency shall ascertain whether the recipients’ procedures for processing complaints are adequate.”).

⁸¹ See Fed. Transit Admin., U.S. Dep’t of Transp., C 4702.1A: Title VI and Title VI-Dependent Guidelines for Federal Transit Administration Recipients (May 13, 2007), *available at* http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf.

⁸² *Id.* at II-1.

Along similar lines, the community development projects overseen by HUD can have multifaceted impacts that are greatly variable across locations.⁸³ For all agencies, the difficulties incumbent in assessing racially discriminatory harms should prompt efforts to render Title VI reviews and procedures *more* accessible, so that community impacts are better understood, while informing staff training and research investments.

While keeping in mind its obligations to the community at large, including vulnerable individuals and populations, any agency negotiating these relationships will need to consider the impact of enforcement on the recipient's beneficiaries and the continuing working relationship between federal and state entities—and Title VI and DOJ's Coordinating Regulations contemplate this concern across the board. *See* 42 USC §2000d-1; *Bd. of Pub. Instruction v. Finch*, 414 F.2d 1068, 1075 n.11 (5th Cir. 1969) (voluntary compliance should be sought and the termination of funds is a last resort, due to concerns for beneficiaries of federal assistance); *but see* 28 C.F.R. § 42.411(a), balancing this concern with the requirement that the agency ensure responsive action or then proceed to stronger enforcement measures.

EPA's role as a leading federal agency charged with protecting public health and the environment may be unique, but in our cooperative federalist system the challenges posed by the dual roles of agencies in policing recipients for compliance with Title VI and working cooperatively with them to implement federal laws and programs are shared by all federal agencies. The cooperative federalist model is no excuse for limiting EPA's Title VI enforcement program.

II. The Complainant Guidance

EPA's Complainant Guidance plainly responds to the criticism the environmental justice community has levied against EPA following EPA's exclusion of the complainants during the resolution of *Angelita C. v. California Department of Pesticide Regulation*, EPA File No. 16R-99-R9. Despite what appear to be good faith efforts by EPA, the Complainant Guidance neither provides anything beyond what the agency already does nor bestows any procedural

⁸³ *See, e.g., Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (finding that the procedures HUD followed in approving a change in an urban renewal plan that altered a plan for owner-occupied dwellings to a plan for rental dwellings with rent supplement assistance failed to make any inquiry into the effect of the change in type of housing on the racial concentration in the renewal area or in the city as a whole, and were not in adequate compliance with Title VI or the Fair Housing Act.)

rights on those filing complaints or suffering discrimination. Moreover, the Complainant Guidance fails to adhere to important principles set forth in EPA's 2003 Public Involvement Policy⁸⁴ and EPA's 2006 Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs.⁸⁵

EPA's Complainant Guidance suffers from several major deficiencies. First, EPA's labeling of those filing complaints or suffering discrimination as "Tipsters" is insulting to communities of color experiencing the impacts of environmental injustice. If EPA is serious about reforming its Title VI program, then EPA must institutionally change how it views and treats complainants and community stakeholders – people living and working in proximity to permitted facilities and toxic sites – more generally. Second, EPA must meaningfully involve those suffering discrimination in the investigation of their complaints, including proactively involving them in the investigation, providing full and free access to documents, and providing the resources to even the playing field during Alternative Dispute Resolution ("ADR"). Third, a complainant should receive immediate notice of a preliminary finding of discrimination, be included in any voluntary compliance negotiations on equal footing with the discriminating recipient, and be allowed to offer and receive settlement terms that actually remedy the discrimination suffered.

(A) Title VI Complainants Should Receive Dignified and Protective Treatment from EPA.

EPA's use of the term "tipster" in the Complainant Guidance denigrates those who suffer from unlawful discrimination. EPA justifies the use of that term because a "complainant is not like a plaintiff in court."⁸⁶ EPA asserts, "[r]ather, a complainant's role is more like that of a tipster, who reports what he or she believes is an act violating Title VI. . ."⁸⁷ EPA is correct that a complainant need not actually be a victim of discriminatory actions by a recipient to be eligible to file a Title VI complaint. *See* 24 C.F.R. § 7.120(a) ("A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a

⁸⁴ EPA, Public Involvement Policy (May 2003), *available at* <http://www.epa.gov/publicinvolvement/pdf/policy2003.pdf>

⁸⁵ 71 Fed. Reg. 14,207 (Mar. 21, 2006).

⁸⁶ Complainant Guidance at 1.

⁸⁷ *Id.*

complaint. The complaint may be filed by an authorized representative.”) However, more often than not, those who file Title VI complaints are directly harmed by the discriminatory actions of a recipient. For example, the children on whose behalf their parents filed a Title VI complaint in the *Angelita C.* case suffered discrimination from unhealthy short-term and long-term exposures to methyl bromide.⁸⁸ Those parents and others who are the victims of discriminatory conduct are not merely dropping a dime on a criminal or snitching. Instead, they seek to protect their right to be free from discrimination on the basis of race, color or national origin. EPA should delete all references to the term “tipster” in its final complainant guidance.

(B) EPA Must Provide Complainants a Meaningful Opportunity to Participate in the Title VI Complaint Process.

Rather than proposing new procedural protections, EPA instead offers to use its discretion to decide whether to include complainants in the investigation and resolution of their civil rights complaints. While EPA claims the Complainant Guidance “enhance the roles and opportunities for complainants . . . to participate in the complaint and resolution process,” the agency retains its discretion to exclude complainants when “appropriate” from complaint investigation and resolution, and appears to claim that such discretion is not subject to judicial review.⁸⁹ Because EPA proposes to use its discretion to decide whether to involve complainants, this Complainant Guidance does little, if anything, to enhance the role of complainants in the Title VI complaint process.

EPA’s failure to expand the role of complainants in the Title VI complaint process flies in the face of the agency’s 2003 Public Involvement Policy and 2006 Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs. In general, those documents dictate that both EPA and recipients provide opportunities for early and meaningful community involvement in agency decision-making, as

⁸⁸ See Letter from Rafael DeLeon, Dir., OCR, to Christopher Reardon, Acting Dir., Cal. Dep’t of Pesticide Regulation (Apr. 22, 2011).

⁸⁹ Complainants Guidance at 1. Ironically, while EPA considers complainants to be “tipsters,” the agency routinely dismisses complaints for a variety of procedural defects, such as the statute of limitations, without using EPA’s authority to investigate the alleged discrimination. Moreover, we are not aware of any instance in which EPA used its discretion to waive a statute of limitations defect and investigate a complaint notwithstanding that defect.

well as transparency in agency decision-making. Below are relevant excerpts from EPA's 2003 Public Involvement Policy, which expressly applies to all EPA programs and activities.⁹⁰

Agency officials should strive to provide for, encourage, and assist public involvement in the following ways:

- Involve the public early and often throughout the decision-making process
- Identify, communicate with and listen to affected sectors of the public (Agency officials should plan and conduct public involvement activities that provide equal opportunity for individuals and groups to be heard. Where appropriate, Agency officials should give extra encouragement and consider providing assistance to sectors, such as minority and low-income populations, small businesses, and local governments, to ensure they have full opportunity to be heard and, where possible, access to technical or financial resources to support their participation.)
- Involve members of the public in developing options and alternatives when possible and, before making decisions, seek the public's opinion on options or alternatives
- Use public input to develop options that facilitate resolution of differing points of view
- Make every effort to tailor public involvement programs to the complexity and potential for controversy of the issue, the segments of the public affected, the time frame for decision making and the desired outcome
- Develop and work in partnerships with state, local and tribal governments, community groups, associations, and other organizations to enhance and promote public involvement.⁹¹

The Policy also contains provisions regarding the principles of environmental justice, providing information to the public in a timely way, the availability of relevant documents, and the need to ensure that stakeholder groups participating in ADR are highly involved and informed.⁹²

⁹⁰ EPA's 2006 Title VI Public Involvement Guidance applies to recipients of federal financial assistance, as opposed to EPA. In promulgating that Guidance, EPA observed that "[t]he fundamental premise of EPA's 2003 Public Involvement Policy is that 'EPA should continue to provide for meaningful public involvement in all its programs, and consistently look for new ways to enhance public input.' . . . OCR suggests that EPA recipients consider using a similar approach when implementing their environmental permit programs." 71 Fed. Reg. at 14,210.

⁹¹ EPA, Public Involvement Policy 2-3 (May 2003).

⁹² The Policy also includes the following provisions:

Consistent with the provisions of EPA's 2003 Public Involvement Policy, below we set out recommendations for regulatory reform, which accords complainants their proper role in the investigation and resolution of Title VI complaints.

First, EPA's Title VI regulations should specifically mandate that complainants have a meaningful role in the complaint process. Such a role would include the opportunity to respond to a proposed EPA decision by submitting evidence and briefing in response to the proposed decision, a benefit recipients already enjoy. Often, a Title VI complainant lacks the resources to

This Policy complements and is consistent with EPA's environmental justice efforts. . . . This includes ensuring greater public participation in the Agency's development and implementation of its regulations and policies. (Memorandum from EPA Administrator Christine Todd Whitman, dated August 9, 2001, "EPA's Commitment to Environmental Justice.") (See also, Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," dated February 11, 1994.) Thus, ensuring meaningful public involvement advances the goals of environmental justice. . . .

Whenever possible, Agency officials should:

- Provide the public with adequate and timely information concerning a forthcoming action or decision
- Provide policy, program, and technical information to the affected public and interested parties at the earliest practicable times, to enable those potentially affected or interested persons to make informed and constructive contributions to decision making
- Provide information at places easily accessible to interested and affected persons and organizations
- To the extent practicable, provide the public with integrated, on-line, user-friendly access to health and environmental data and information and to the extent practicable, enable communities, including minority, low-income and underserved populations, to have access to relevant data and information. . . .

Repositories or Dockets:

The Agency should provide one or more central collections of documents, reports, studies, plans, etc. relating to controversial issues or significant decisions in a location or locations convenient to the public. Suitable locations will depend on the nature of the action. For national rules a single central docket is generally appropriate, but local repositories may be preferable when decisions relate to individual facilities or sites. . . . Agency officials are encouraged to determine the accessibility to the interested public and feasibility of electronic repositories that take advantage of the Internet to reach directly into homes, libraries and other facilities throughout a community and across the nation. . . . EPA's EDOCKET is an online public docket and comment system initially designed to expand public access to documents in EPA's major program dockets, eventually to include the other EPA dockets. EDOCKET allows the public to search available dockets online, submit or view public comments, access the index listing of the contents of the docket, and to access, download and print those documents in the docket that are available electronically. . . .

ADR is most effective when there are a few highly involved and informed stakeholder groups who agree to participate in a dialogue through which they raise their concerns and seek to resolve a particular issue by consensus. The Agency can use facilitation and ADR processes to encourage conflict prevention or resolution at any time during a decision-making process.

Id. at 5, 11, 13-14, 17.

produce the type of technical and scientific evidence EPA demands. EPA has recognized this, and should affirm that EPA does the factual investigation and it is not the complainants' burden to produce evidence to prove a Title VI violation.⁹³

Second, EPA should provide complainants with more information than only what is "in its case tracking system."⁹⁴ The current case tracking system that EPA provides on its web site contains nothing more than file numbers, recipient information, and status (updated quarterly).⁹⁵ EPA's regulations should provide complainants with full and no-cost access to the case file, so that complainants do not have to request those documents formally via the Freedom of Information Act, and pay any fees for such access.⁹⁶ Consistent with EPA's Public Involvement Policy's directive that the agency make information available to the public using electronic repositories or dockets,⁹⁷ such access could be accomplished by establishing an online document repository for every complaint that EPA accepts for investigation.⁹⁸

Third, EPA should guarantee the basic due process rights of complainants. Recipients of EPA funding enjoy administrative appeal rights should EPA ever go so far as to find a Title VI violation and rescind federal funding, which EPA has never done. Complainants enjoy no such basic due process rights. To provide complainants with procedural rights and due process, EPA's regulations should, at a bare minimum, provide complainants with the right to administratively appeal any adverse EPA decisions, and the right to seek judicial review of such decisions under the Administrative Procedures Act. Given the fact that *Sandoval* bars civil

⁹³ See 65 Fed. Reg. 39650, 39672 (June 27, 2000) ("... [T]he complainants do not have the burden of proving that their allegations are true, although their complaint should present a clearly articulated statement of the alleged violation. It is OCR's job to investigate allegations and determine compliance.")

⁹⁴ Complainant Guidance at 3.

⁹⁵ See <http://www.epa.gov/ocr/docs/extcom/title-vi-open-complaints.pdf>

⁹⁶ Access to documents in a complainant's file is unreasonably difficult under EPA's current policy and treatment of complainants as "tipsters." Counsel for the complainants in *Padres Hacia una Vida Mejor* and *Angelia C.* sought such records, had their fee waiver partially granted, and had to file a lawsuit to compel EPA to turn over the documents. It has been seventeen months since EPA received those FOIA requests, and EPA has partially turned over *Padres* records but has not provided any of the *Angelita C.* records.

⁹⁷ See discussion, *supra* note 94, at 27.

⁹⁸ EPA should also establish a separate repository for complaints that EPA chooses not to investigate, which would consist of two sets of documents: complaints received, with any supporting documentation, and letters from EPA informing complainants of the status of the case and the agency's decision not to accept the complaint for investigation.

actions except those alleging intentional discrimination, it is of paramount importance that those suffering discrimination not have their complaints dismissed without agency or judicial review.

Finally, we support the use of ADR to resolve complaints but urge EPA to amend its regulations to ensure that complainants have similar access to legal and technical resources during ADR as do recipients of federal funding. Many complainants are not represented by counsel, or else have little or no financial capacity to retain counsel and substantive experts to aid them in the ADR process. A credible ADR process requires a level playing field for negotiations between complainants and respondents. Even when ADR yields a positive result, as was the case recently with *Greenaction for Health and Environmental Justice v. San Joaquin Valley Air Pollution Control District*, EPA File No. 11R-09-R9, complainants are at a competitive disadvantage.⁹⁹ Greenaction lacked counsel while the Air District enjoyed its own in-house attorneys and ample staff resources. EPA has already recognized this unequal playing field in its Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs,¹⁰⁰ and should do so again by amending its Title VI regulations and the Complainant Guidance.

(C) EPA Must Simultaneously Notify Complainants, Respondents and the Public of any Preliminary Findings of Noncompliance.

EPA has only issued one Preliminary Finding of Noncompliance in its entire history, and did so without notifying the complainants until after the agency negotiated a resolution of the complaint with the respondent. On April 22, 2011, EPA issued a preliminary finding in *Angelita C.* finding that the complaint established a *prima facie* violation of Title VI.¹⁰¹ Despite the preliminary finding of noncompliance, and without notifying the complainants, EPA then negotiated a settlement agreement in secret with the respondent, and the agreement merely required additional monitoring rather than prohibiting the discriminatory conduct. The

⁹⁹ See *Greenaction Reaches Agreement with San Joaquin Valley Air District to Enhance Public Involvement in Permit Actions*, Greenaction, <http://greenaction.org/greenaction-reaches-agreement-with-san-joaquin-valley-air-district-to-enhance-public-involvement-in-permit-actions/>

¹⁰⁰ See 71 Fed. Reg. at 14214 (listing, as one example of an action that can contribute to a successful ADR process, “design[ing] a process that will allow all parties to provide necessary information in good faith and in some cases secure independent technical expertise to assist some of the parties prior to any negotiations”).

¹⁰¹ OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 (2011).

complainants learned of the preliminary finding three months later, when on August 25, 2011, EPA informed the public of its preliminary finding and settlement agreement.

EPA's refusal to include the complainants in resolution of the complaint demonstrates the serious need for regulatory reform. The Complainant Guidance state that EPA "intends to notify complainant of said finding" but "retains the discretion to contact the recipient first."¹⁰² EPA's proposal would still allow the agency to do exactly what occurred in *Angelita C.*: keep everything secret until EPA and the discriminating recipient negotiate without the knowledge, participation, or input of the complainant. Furthermore, the Complainant Guidance proposes that EPA, once again at its "discretion, when appropriate ... engage complainants who want to provide input on potential remedies" and that "EPA will determine based on its discretion when such engagement may occur during the process."¹⁰³ EPA further states that it will "consider complainant's input on potential remedies" and "potential terms of a settlement agreement."¹⁰⁴

EPA should amend its regulations to require simultaneous notification of a preliminary finding of noncompliance to the complainant, respondent, and the general public. The regulations should also mandate the complainant's participation, if the complainant so chooses, in voluntary compliance negotiations.¹⁰⁵ Both EPA's Public Involvement Policy and basic principles of transparency and environmental justice require these reforms. EPA should not have the sole and unfettered discretion to deem when it is or is not "appropriate" to involve the complainant or notify the public.

Furthermore, revisions of EPA's regulations should require that EPA only settle a complaint through a voluntary compliance agreement if that agreement fully remedies the discriminatory conduct and prevents the discriminatory conduct from continuing or recurring.¹⁰⁶ Recipients of EPA funding will not take the threat of EPA enforcement seriously if EPA's

¹⁰² Complainant Guidance at 3 & n.12.

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ As with ADR, EPA must ensure that complainants can participate in the settlement process on an even playing field with a well-armed recipient of federal funding. As Luke W. Cole and Sheila R. Foster have stated, the environmental justice struggle challenges, "first and foremost, the legitimacy of the decision-making process and the social structures that allow ... decisions to be made without the involvement of those most intimately concerned." Cole & Foster, *supra* note 9, at 14.

¹⁰⁶ In *Angelita C.*, for example, the voluntary compliance agreement did little, if anything, to remedy the discriminatory effects of permitting the application of toxic pesticides in close proximity to school grounds. OCR, EPA, Investigative Report for Title VI Administrative Complaint File No. 16R-99-R9 37-38 (2011).

compliance assurance and enforcement efforts amount to nothing more than a slap on the wrist. If other Title VI complaints demonstrate merit, as *Angelita C.* did, and EPA does not demand compliance with Title VI, then recipients of federal funding will ignore Title VI to the detriment of affected communities nationwide.

Thank you for this opportunity to comment on EPA's draft Title VI documents. Again, we appreciate EPA's recognition of the importance of Title VI enforcement, and the time and effort devoted to improving EPA's standards and practices.

Sincerely,



Marc Brenman, Social Justice Consultancy

Michael Churchill, Public Interest Law Center of Philadelphia

Allison Elgart, Equal Justice Society

Marianne Engelman Lado, Earthjustice

Steven Fischbach, Environmental Justice League of Rhode Island

Leslie Fields, Sierra Club

Robert Garcia, The City Project

Maya Golden-Krasner, Communities for a Better Environment

Megan Haberle, Poverty & Race Research Action Council

Al Huang, Natural Resources Defense Council

Anne Katten, California Rural Legal Assistance Foundation

Marylia Kelley, Tri-Valley CAREs

Aaron Kleinbaum, Eastern Environmental Law Center

Denny Larson, Global Community Monitor

Gregg P. Macey, Brooklyn Law School (for identification only)

Mike Meuter, California Rural Legal Assistance, Inc.

Vernice Miller-Travis, Maryland State Commission on Environmental Justice and Sustainable Communities

Richard Moore, Los Jardines Institute (The Gardens Institute)

Renee Nelson, Clean Water and Air Matter

Brent Newell, Center on Race, Poverty & the Environment

Jonathan Ostar, OPAL Environmental Justice Oregon

Joe Rich, Lawyers' Committee for Civil Rights Under Law

Virginia Ruiz, Farmworker Justice

Paul Towers, Pesticide Action Network North America

Omega Wilson, West End Revitalization Association

Center on Race, Poverty & the Environment * The City Project * Conservation Law
Foundation * Earthjustice * Environmental Justice League of Rhode Island *
Humansynergyworks.org * New Mexico Environmental Law Center * NRDC * Sierra
Club * West End Revitalization Association, Inc.
Marc Brenman * Patrice Lumumba Simms

Gina McCarthy
Administrator
Gwendolyn Keyes Fleming
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Washington, DC 20460

November 5, 2013

Dear Administrator McCarthy,

The undersigned environmental justice and environmental organizations and advocates write to request a meeting with you and your key staff to discuss Title VI enforcement and compliance issues. We are heartened by your commitment to environmental justice and hopeful that under your leadership, the agency will develop a civil rights compliance and enforcement program that has meaningful impact for communities that are all too often overburdened by toxic contamination.

As you may know, our loose alliance of organizations and advocates began meeting with EPA staff at the beginning of the Obama Administration. At that time, we raised initial concerns about the backlog of Title VI complaints, as well as the methodology used by the agency to undertake complaint investigations. We were concerned that the complaint investigation and resolution process had developed too slowly, was in violation of relevant regulations, and afforded minimal transparency. Indeed, given additional concerns about the capacity of the Office of Civil Rights to pursue investigations, the lack of adequate training for staff, recipients, and communities, and the failure of the agency to engage complainants and stakeholder communities in a meaningful way in the investigation process and, particularly, when developing remedial options, we were concerned that EPA's Title VI complaint and investigation processes were fundamentally broken.

Over time, we have been encouraged by frank conversation with Administrator Lisa Jackson, Deputy Administrator Robert Perciasepe, and other personnel. Significantly, the Administrator prioritized response to the *Evaluation of the EPA Office of Civil Rights*, the Final Report submitted by Deloitte Consulting LLP in March, 2011. Under Administrator Jackson's leadership, EPA also scaled up the agency's strategic planning

for environmental justice through its *Plan EJ 2014*, *Plan EJ 2014: Legal Tools*, and related documents.

Yet significant concerns remain. For example, efforts to resolve complaints in the backlog have raised questions about the agency's continued failure to engage complainants and community-based stakeholders in decision-making affecting the future of their communities. This includes, for example, questions about the agency's dismissal of complaints based on the 180 deadline for filing in situations when violations are ongoing but the agency chooses not to exercise its authority to address the continuing presence of pollution affecting human health. Moreover, there remains tremendous uncertainty about the legal standards applicable to recipients of federal funds and, in turn, that govern EPA investigations. In our meetings with Administrator Jackson, we focused initially on the definition and standard applied to the evaluation of "adversity" given the importance of the issue and, also, the fact that EPA's finding of no adversity in *Select Steel* (EPA File No. 5R-98-R5) created a significant credibility problem for the agency's civil rights program. Although EPA released a draft guidance on some aspects of the issue on January 24, 2013, "Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds," the draft has not been finalized and it is not clear what standards EPA is currently applying. Indeed, more comprehensive guidance is sorely needed. Many of the undersigned submitted comments on the draft Adversity document as well as "Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaint and Resolution Process" (January 25, 2013).

Many of the undersigned also filed expansive comments in response to the publication of the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39,650 (June 27, 2000) (Draft Revised Guidance documents). To this day, EPA has released no response to these comments. Even more significantly, the status of these guidance documents remains unclear, a situation all the more disconcerting because of our belief that some of the positions taken are inconsistent with a strong Title VI enforcement program. Moreover, though EPA leads an interagency workgroup on Title VI coordination and referrals, the agency has not released any information providing guidance on coordination among federal and state agencies responsible for Title VI compliance and enforcement activities.

We have appreciated the opportunity to meet with the Administrator, the Office of Civil Rights, and members of the Administrator's staff on these issues and hope that we can re-engage in a meaningful conversation in the coming weeks. Specifically, we hope that we can make progress on the following issues:

- **Process:** We recommend that EPA modify policies and practices governing communications with complainants and community-based stakeholders in the Title VI enforcement process, both to ensure a more active role for complainants

and community-based stakeholders in the Title VI enforcement process, and to bring Title VI enforcement into line with environmental justice principles and EPA efforts to encourage “meaningful engagement” of overburdened communities in permitting and other decision-making.

- **Transparency:** We recommend that EPA make up-to-date information about Title VI enforcement more readily available, including, for example, maintaining a docket with links to complaints, resolution agreements, and other official documents on EPA’s website.
- **Legal standards:** We recommend that EPA revise standards – including not only the standard for determining adversity but also issues such as what constitutes sufficient justification – that are set forth in the *Draft Revised Guidance* and related documents and, also, resolve uncertainty around the applicable standards by finalizing improved guidance documents.
- **The backlog:** We recommend that EPA establish a date by which the EPA will complete its investigations and resolve all pending Title VI civil rights complaints, with the involvement of complainants and their attorneys.
- **Capacity & Infrastructure:** EPA must ensure that the organizational dynamics and challenges outlined in the Deloitte report are fully addressed. EPA should also consider how it can preserve scarce agency resources during the preliminary investigation of a complaint.
- **Coordination:** EPA must take the lead on coordinating Title VI compliance and enforcement with delegated programs, EPA’s regional programs, and other federal agencies.
- **Remedies:** EPA must ensure that when it enters into a voluntary compliance agreement, remedial measures protect communities and secure Title VI compliance.

Note that our organizations view Title VI enforcement and compliance as deeply connected to the agency’s commitment to environmental justice. Moreover, as the federal government implements provisions of the Affordable Care Act that provide protection against discrimination in health programs and activities receiving federal financial assistance, we would welcome the opportunity to discuss EPA’s role and coordination with the U.S. Department of Health & Human Services to promote strong enforcement and healthy communities.

We deeply appreciate the time that EPA staff has taken in the past to meet with us to discuss priority concerns and the requests we have made to the agency. At the same time, as you have noted, progress will be judged by the difference that is made on the ground, in overburdened communities and, particularly, low-income communities of color. It is our sincere hope that EPA can be a leader in civil rights enforcement. Thank you for your time and consideration.

Most Sincerely,

Marianne Engelman Lado
Managing Attorney
Earthjustice

On behalf of:

Marc Brenman, Social Justice Consultant

Veronica Eady
VP, Director, Healthy Communities & Environmental Justice
Conservation Law Foundation

Leslie Fields
Program Director, Environmental Justice and Community Partnerships
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Steven Fischbach
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cc: Robert Perciasepe, Deputy Administrator
Vicki Simons, Acting Director, Office of Civil Rights
Helena Wooden-Aguilar (Acting Deputy Director
Lisa Garcia, Associate Assistant Administrator for Environmental Justice
Charles Lee, Deputy Associate Assistant Administrator for Environmental Justice



GREGG P. MACEY
ASSOCIATE PROFESSOR OF LAW

March 7, 2014

Gina McCarthy
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Washington, D.C. 20460

Dear Administrator McCarthy,

We appreciate the opportunity to meet with you on February 18 to discuss EPA's civil rights program. Enclosed are documents that provide a history of our meetings with EPA as well as important critiques of EPA's enforcement efforts under Title VI of the Civil Rights Act of 1964.

The documents include:

Correspondence:

Letter from Title VI Alliance to Diane E. Thompson, Chief of Staff, Office of the Administrator, U.S. Environmental Protection Agency (June 29, 2011).

Letter from Rafael DeLeon, Director, Office of Civil Rights, U.S. Environmental Protection Agency, to Gregg Macey, Brooklyn Law School, re: meeting in April (Aug. 2, 2011).

E-mail from Rafael DeLeon, Director, Office of Civil Rights, U.S. Environmental Protection Agency, to Title VI Alliance, re: Follow up to August 19th Meeting and proposed agenda (Sept. 30, 2011).

Letter from Title VI Alliance to Rafael DeLeon, Director, Office of Civil Rights, U.S. Environmental Protection Agency, re: follow-up on November 17th meeting (Dec. 13, 2011).

Letter from Title VI Alliance to Lisa Jackson, Administrator, U.S. Environmental Protection Agency, re: quarterly meetings (Mar. 29, 2012).

Title VI Alliance, Comments on Draft Plan EJ 2014 Supplement: Advancing Environmental Justice Through Title VI (July 3, 2012).

The City Project, Comments on Draft Plan EJ 2014 Supplement: Advancing Environmental Justice Through Title VI of the Civil Rights Act, Draft Title VI Implementation Plan (July 19, 2012).

Title VI Alliance, Comments on U.S. Environmental Protection Agency Draft Policy Papers, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards (Released Jan. 24, 2013)*; *Title VI of the Civil Rights Act of 1964: Draft Role of Complainants and Recipients in the Title VI Complaint and Resolution Process (Released Jan. 25, 2013)* (Mar. 22, 2013).

Letter from Title VI Alliance to Gina McCarthy, Administrator, U.S. Environmental Protection Agency, re: request for meeting (Nov. 5, 2013).

Overviews of Title VI Concerns:

Marc Brenman, EPA Title VI Issues.

Marc Brenman, Title VI Civil Rights and Environmental Justice Enforcement by Federal Agencies.

Marc Brenman and Steve Fischbach, Handling Title VI Complaint Backlogs in Federal Agencies (Nov. 16, 2011).

The City Project, Materials Relevant to Follow-up on Meeting with U.S. EPA Administrator Gina McCarthy (Feb. 21, 2014).

Critiques of EPA's Civil Rights Program and Title VI Guidance:

Center on Race, Poverty, and the Environment, Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Aug. 26, 2000).

The City Project, EPA Lists 231 Civil Rights Complaints, Failure of Timely Investigations 23 Page Spreadsheet, City Project Blog.

Available: <http://www.cityprojectca.org/blog/archives/4517>.

Mike Ewall, *Legal Tools for Environmental Equity vs. Environmental Justice*, 13 *Sust. Dev. L. & Pol'y* 4 (2012-2013).

Marianne Lado, Adversity and EPA/OCR Title VI Environmental Justice Concerns (Nov. 16, 2011).

Lawyers' Committee for Civil Rights Under Law, *Now is the Time: Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities* (June 2010).

Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*. 65 Admin. L. Rev. 757 (2013).

Memorandum from Thomas Perez, Assistant Attorney General, to Federal Funding Agency Civil Rights Directors, re: Title VI Coordination and Enforcement (Aug. 19, 2011).

U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* (Oct. 2003).

Correspondence Regarding *Angelita C.*:

Letter from Brent Newell to Rafael DeLeon, Director, Office of Civil Rights, re: *Angelita C. v. California Department of Pesticide Regulation*, Title VI Complaint 16R-99-R9 (June 29, 2012).

Letter from Brent Newell to Rafael DeLeon, Director, Office of Civil Rights, U.S. Environmental Protection Agency, re: *Angelita C. v. California Department of Pesticide Regulation*, Title VI Complaint 16R-99-R9 (Mar. 9, 2012).

Letter from Rafael DeLeon, Director, Office of Civil Rights, to Brent Newell, Center on Race, Poverty and the Environment, re: EPA decision not to reopen the *Angelita C.* case or agreement resolving the case (May 23, 2012).

Letter from Rafael DeLeon, Director, Office of Civil Rights, U.S. Environmental Protection Agency, to Brent Newell, Center on Race, Poverty and the Environment, re: reopening the *Angelita C.* settlement (Feb. 24, 2012).

Letter from Matthew Rodriguez, Secretary for Environmental Protection, California Environmental Protection Agency, to Rafael DeLeon, Director, Office of Civil Rights, U.S. Environmental Protection Agency, re: *Angelita C.* settlement (Mar. 9, 2012).

We look forward to working with you to ensure the development of a model civil rights program at EPA.

Warm regards,



Gregg P. Macey, Ph.D., JD
Associate Professor of Law

on behalf of the Title VI Alliance

Center on Race, Poverty & the Environment * The City Project * Earthjustice *
Environmental Justice League of Rhode Island * Human Synergy Works * New Mexico
Environmental Law Center * NRDC * Sierra Club * West End Revitalization
Association, Inc.
Marc Brenman * Vernice Miller-Travis

Gina McCarthy
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November 24, 2014

Dear Administrator McCarthy,

The undersigned environmental justice and environmental organizations and advocates write to express our deeply felt sense of urgency about the need to move forward in building a meaningful Title VI compliance and enforcement program at EPA and to request a follow up meeting with you and your key staff as soon as possible to discuss these issues. Though we are concerned about the pace and even direction of change in EPA's Title VI program, we remain hopeful that under your leadership, the agency will develop a civil rights program that has meaningful impact for communities that are all too often overburdened and adversely affected by toxic contamination and other environmental insults.

As you may recall, our loose alliance of organizations and advocates began meeting with EPA staff at the beginning of the Obama Administration. Many of our groups had been advocating for a stronger compliance and enforcement program for years, and had raised concerns about the backlog of Title VI complaints, the methodology used by the agency to undertake complaint investigations, the lack of adequate training for staff, recipients, and communities, and the failure of the agency to engage complainants and stakeholder communities in a meaningful way in the investigation process and, particularly, when developing remedial options. As we mentioned to you during our initial meeting on February 18th of this year, EPA's Title VI complaint and investigation processes are fundamentally broken.

In our meetings with Administrator Jackson, we focused initially on the definition and standard applied to the agency's evaluation of the "adversity" prong of Title VI's disparate impact standard. We communicated our concern that EPA's finding of no adversity in *Select Steel* (EPA File No. 5R-98-R5) created a significant credibility problem for the agency's Title VI program. In a subsequent meeting on July 26, 2012 with Deputy Administrator Robert Perciasepe and others in EPA's leadership, we were told that EPA anticipated moving away from the rebuttable presumption and reliance on health-based environmental standards in determining whether the "adversity" prong of the disparate impact standard is met. This message became a commitment, and EPA released a draft guidance on the issue on January 24, 2013 entitled "Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds." Though many of the undersigned submitted comments on the draft Adversity document as well as "Title VI of the Civil Rights Act of 1964: Role of Complainants and Recipients in the Title VI Complaint and Resolution Process" (January 25, 2013), and raised concerns, we at least believed that OCR had passed one goalpost, leaving behind the rebuttable presumption.

More recently, however, we learned that OCR has not incorporated the basic concepts in the draft guidance into trainings and investigations, representing a significant step backward. Of course, the continued life of the notorious "rebuttable presumption" is only one of many barriers in the way of building an effective Title VI program. Why is there no accountability for OCR's failure to meet milestones and deadlines in the Title VI Supplement to Plan EJ-2014 – effectively, to develop a functioning Title VI compliance and enforcement program? Why isn't OCR held to the standard set forth in Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," requiring each agency to ensure greater public participation? Why hasn't EPA provided additional support for Title VI compliance and enforcement if OCR is truly hamstrung in responding to Title VI complaints in an effective, thorough, and timely way by lack of staff and resources? On a most fundamental level, we have to ask why the most impacted communities such as Vincent Martin's, in Detroit, are not offered equal protection of the law and why polluting industries continue operating, exacerbating already overwhelming rates of illness, with no relief for the affected population.

We urgently seek a meeting to discuss how we can find a way forward and how our groups and the communities we serve can help EPA become a leader in meeting this Administration's commitment to developing a model civil rights program, a goal that we share.

Thank you for your time and consideration.

Most Sincerely,

A handwritten signature in black ink, appearing to read 'M Engelman Lado', written in a cursive style.

Marianne Engelman Lado
Managing Attorney
Earthjustice

On behalf of:

Marc Brenman, Social Justice Consultant

Leslie Fields
Program Director, Environmental Justice and Community Partnerships
Sierra Club

Steven Fischbach
Board Member Environmental Justice League of Rhode Island

Robert Garcia
Founding Director and Counsel
The City Project

Albert Huang
Senior Attorney,
Director of Environmental Justice
NRDC

Vincent Martin
Humansynergyworks.org

Doug Meiklejohn
Executive Director
New Mexico Environmental Law Center

Brent Newell
Legal Director
Center on Race, Poverty & the Environment

Omega Wilson
West End Revitalization Association, Inc.

cc: **Gwen Keyes Fleming, Chief of Staff**
Velveta Golightly-Howell, Director, Office of Civil Rights
Helena Wooden-Aguilar, Deputy Director, Office of Civil Rights
Matthew Tejada, Associate Assistant Administrator for Environmental Justice
Charles Lee, Deputy Associate Assistant Administrator for Environmental Justice

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**Draft EJ 2020 Action Agenda Framework
(June 15, 2015)**

*Submitted via e-mail - July 14, 2015
to ejstrategy@epa.gov*

COMMENTS OF ENVIRONMENTAL AND COMMUNITY GROUPS

AIR ALLIANCE HOUSTON; ALASKA'S BIG VILLAGE NETWORK; APOSTOLIC FAITH CENTER; CALIFORNIA COMMUNITIES AGAINST TOXICS; CALIFORNIA KIDS IAQ; CALIFORNIA SAFE SCHOOLS; CATA – THE FARMWORKERS SUPPORT COMMITTEE; CENTER FOR EFFECTIVE GOVERNMENT; CITIZENS AGAINST RUINING THE ENVIRONMENT; CITIZENS' ENVIRONMENTAL COALITION; CITIZENS FOR CLEAN AIR; CLEAN AIR COUNCIL; CLEAN AND HEALTHY NEW YORK; CLEAN WATER AND AIR MATTER; COALITION FOR A SAFE ENVIRONMENT; COMITE CIVICO DEL VALLE; COMITÉ DIÁLOGO AMBIENTAL, INC.; COMMUNITY DREAMS; COMMUNITY IN-POWER AND DEVELOPMENT ASSOCIATION; COMMUNITY SCIENCE CENTER; CONSERVATION LAW FOUNDATION MASSACHUSETTS; DEL AMO ACTION COMMITTEE; DESERT CITIZENS AGAINST POLLUTION; DIESEL HEALTH PROJECT; DOWNWINDERS AT RISK; EAST YARD COMMUNITIES FOR ENVIRONMENTAL JUSTICE; 48217 COMMUNITY AND ENVIRONMENTAL HEALTH ORGANIZATION; FARMWORKER ASSOCIATION OF FLORIDA; INSTITUTE OF NEUROTOXICOLOGY & NEUROLOGICAL DISORDERS; JESUS PEOPLE AGAINST POLLUTION; KENTUCKY ENVIRONMENTAL FOUNDATION; LABADIE ENVIRONMENTAL ORGANIZATION; MARTINEZ ENVIRONMENTAL GROUP; MIDWEST COALITION FOR RESPONSIBLE INVESTMENT; MOSSVILLE ENVIRONMENTAL ACTION NOW; NATURAL RESOURCES DEFENSE COUNCIL; NEIGHBORS FOR CLEAN AIR; NEW MEXICO ENVIRONMENTAL LAW CENTER; NORTH CAROLINA COASTAL FEDERATION; OHIO VALLEY ENVIRONMENTAL COALITION; PENDERWATCH & CONSERVANCY; PESTICIDE ACTION NETWORK NORTH AMERICA; SIERRA CLUB; SOUTHEASTERN NORTH CAROLINA ENVIRONMENTAL JUSTICE COALITION; SOUTHERN APPALACHIAN MOUNTAIN STEWARDS; STEPS COALITION; TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES; THE CITY PROJECT; THE ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT; TRI-VALLEY CARES; WEST END REVITALIZATION ASSOCIATION; AND EARTHJUSTICE

The U.S. Environmental Protection Agency is currently taking public comment on its proposed action agenda for a new strategic plan on environmental justice, to be called Plan EJ2020.¹ EPA has stated specific objectives it is considering including as areas of focus for this new plan. The undersigned commenters recommend that EPA put the bulk of its attention, authority, commitments, and resources into two of these areas: demonstrating progress on outcomes that matter to overburdened communities; and creating specific tools and initiatives that will assist with achieving this progress.

Many community members and organizations are submitting additional comments. This set of comments aims to supplement and emphasize cross-cutting actions that would advance environmental justice across the broad spectrum of the important issues that affect communities.

¹ This version, filed on July 23, 2015, adds five organizations who have since joined these comments.

These comments focus on the following components that EPA should commit to include as top priorities in Plan EJ2020, as described below.

I.	DEMONSTRATE PROGRESS ON OUTCOMES THAT MATTER TO OVERBURDENED COMMUNITIES: MAKE MEANINGFUL PROGRESS FOR COMMUNITIES WITH ENVIRONMENTAL JUSTICE CONCERNS.....	4
A.	Increase Agency Resources and Action Focused on Hot Spots: Vulnerable Communities with Disproportionate Need	4
B.	Achieve Health and Environmental Outcomes and Reduce Injustice	7
C.	Set Action Commitments and Evaluate Progress in Achieving Each of the EJ Metrics Outlined to the Agency in Prior Reports and Comments that Focus at the Regional and Local Level, As Well As the National Level.	10
II.	TO DEEPEN ENVIRONMENTAL JUSTICE PRACTICE, CREATE NEW CROSS-CUTTING INITIATIVES AND TOOLS THAT WOULD IMPROVE THE HEALTH AND ENVIRONMENT OF OVERBURDENED AND VULNERABLE COMMUNITIES WITH PARTICULAR ENVIRONMENTAL JUSTICE CONCERNS.....	17
A.	Enforcement Initiatives	17
1.	EPA should expand enforcement resources and direct its resources to the most vulnerable communities with greatest need and past and current compliance problems.	17
2.	Require EPA enforcement staff to ensure that the outcomes of cases, including any supplemental environmental projects, provide the best available benefits and pollution and health protections for affected local communities.	17
3.	EPA should track and regularly evaluate and publish detailed success metrics and results of enforcement cases in achieving objectives, environmental justice, and provide this information to the public and affected communities.	18
4.	EPA should create and publicize an anonymous community and worker hotline for concerns, tips, and complaints about potential violations of environmental laws and regulations.	19
5.	For each EPA Region, hold an annual enforcement symposium with communities and state and local enforcement agencies.	20
6.	Create a formal project for EPA-DOJ community-directed enforcement technical assistance, trainings, and amicus briefs.	20

7.	Create community trainings and information on pollution, compliance, permitting, and enforcement.....	20
8.	Provide input opportunities, information, and protections for communities living near contaminated and Superfund sites.....	21
B.	Regulatory Tools and Actions	22
1.	Update EPA’s approach to assess cumulative risks and impacts based on current science and the need to protect vulnerable communities.....	22
2.	EPA should perform a review of permits and strengthen the requirements applicable to all permits, including Title V permits, through state oversight and direction by providing best practices.....	26
3.	Revise the minimum public notice requirements for Clean Air Act and other permits, for both major and minor sources, to allow for adequate public review and participation.	26
4.	Create a National Clean Air Monitoring Rule to assure strong monitoring and reporting in Clean Air Act Title V permits.	26
5.	Strengthen Monitoring and Reporting Requirements in Rules.....	28
6.	Strengthen Air Monitoring Networks, Requirements, and Data.....	29
7.	Create a policy to use citizen-collected science and monitoring data within EPA programs, to the greatest extent possible.....	30
8.	Integrate enforcement staff and enforcement expertise into the rulemaking process.	31
9.	Assess and provide EJ outcomes in rulemakings and permitting, not just process.....	32
10.	OEJ should be given authority to set performance measures and evaluate EJ progress annually, as well as give advice and feedback to program staff.....	32
III.	INTERAGENCY WORK.....	33
IV.	EPA SHOULD BUILD TITLE VI COMPLIANCE AND ENFORCEMENT INTO ALL ASPECTS OF AGENCY OPERATIONS AND INCLUDE TITLE VI ACTION ITEMS IN PLAN EJ2020.....	35
V.	CONCLUSION.....	39

I. DEMONSTRATE PROGRESS ON OUTCOMES THAT MATTER TO OVERBURDENED COMMUNITIES: MAKE MEANINGFUL PROGRESS FOR COMMUNITIES WITH ENVIRONMENTAL JUSTICE CONCERNS.

To demonstrate that EPA is achieving progress, EPA must make commitments and take *substantive* action to reduce environmental health disparities, not merely create more commitments on *process* as its prior guidance documents have done.

EPA must look at, assess, and set goals to achieve improved outcomes for the health and protection of the environment for communities of color, low-income, and indigenous people. A long history of discrimination and neglect has produced socioeconomic inequality and has made people of color and low-income people more vulnerable to the harms of pollution, and with the least access to safe and healthy environments and natural areas.

The objective of Executive Order 12898 is not just to increase protection for all and leave disparities in place – it is to “make achieving environmental justice part of [each Federal agency’s] mission.”²

To achieve this objective, EPA needs to set metrics that assure:

- (1) The agency is targeting its resources to ensure that people of color and low-income people are experiencing the outcomes of its work as measurable, direct benefits and protections;
- (2) The agency is achieving the best possible, and greatest achievable results on the ground, in terms of such health and environmental outcomes; and
- (3) EPA is targeting and taking particular actions that aim to reduce the greater rate of environmental threats and impacts that are occurring for particular communities, correlated with and connected to their race and socioeconomic status, not just strengthen protections in some way and call its work done.

A. Increase Agency Resources and Action Focused on Hot Spots: Vulnerable Communities with Disproportionate Need

To achieve objective one, EPA must ensure that it expands resources and prioritizes its existing resources to reach the communities that are overburdened by pollution or other toxic exposures and have disproportionate representation of vulnerable communities of color and low-income people.

For example, for fiscal year 2015, EPA has created a “Making A Visible Difference In Communities” project, where it has selected 50 communities nationwide for particular attention and resources.³ To achieve its environmental justice objectives, in Plan EJ2020 EPA must do more than just choose these 50 communities to make a “visible difference.” And, EPA must do more than just consider issues related to “smart growth.”

² Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994).

³ EPA, *Making a Visible Difference in Communities*, <http://www2.epa.gov/smart-growth/making-visible-difference-communities> (last updated May 26, 2015).

First, EPA should commit to direct resources and apply its authorities to all overburdened communities meeting key criteria, not just select a limited number.

Second, EPA should use environmental justice factors to choose communities that will receive additional attention, action, and resources. For the 2015 project, it is unclear whether or how environmental justice factors were included in EPA's determination of which communities would be part of this project. It is unclear whether all of the communities EPA has chosen are the communities with the greatest need for environmental and health protection, that they are hot spots, or that they are communities with particular environmental justice concerns. EPA should provide transparency and an opportunity for further input, and should extend such opportunities to communities who may not have had a prior opportunity to provide input, and who seek to receive the additional protection and attention that this project will provide.

In particular, as part of Plan EJ2020, EPA should develop an expansive list of all known hot spot communities or areas that have environmental justice concerns, and that need further review, agency action, and attention, after taking public notice and comment. EPA should create this list using factors such as the following:

- (1) the factors contained in EJSCREEN;
- (2) additional health status and health disparity factors included in CalEnviroScreen,⁴ and any other valuable state tools;
- (3) additional indicators that are also linked with environmental justice, public health, and EPA's statutory authorities, such as:
 - whether an area is in nonattainment for a criteria pollutant;
 - whether an area has elevated cancer risks, as identified in EPA's Second Integrated Urban Air Toxics Report⁵;
 - whether an area has elevated levels of drinking water or soil contamination, including from legacy pollution or ghost industrial sites⁶;
 - whether a community has Superfund and/or brownfield sites;
 - whether a community includes facilities with a high number of violations of environmental laws;
 - whether a community includes major sources regulated under EPA's air toxics and other permitting programs;

⁴ Cal. EPA Ofc. Of Env'tl. Health Hazard Assessment ("OEHHA"), *CalEnviroScreen Version 2.0*, <http://oehha.ca.gov/ej/ces2.html> (last updated Nov. 10, 2014).

⁵ EPA, *The Second Integrated Urban Air Toxics Report to Congress* (Aug. 21, 2014), available at <http://www2.epa.gov/sites/production/files/2014-08/documents/082114-urban-air-toxics-report-congress.pdf>.

⁶ See, e.g., USA Today, *Ghost Factories*, <http://www.usatoday.com/topic/B68DCD3E-7E3F-424A-BDA4-41077D772EA1/ghostfactories/>.

- whether a history of segregation, racial zoning, redlining, and similar forms of discrimination played any role in the proximity between majority-minority neighborhoods and industrial sources, highways, and other pollution sources;
- whether a community includes a port or goods movement/transportation hub, and/or is located along or in close proximity to an international border or point of entry including both the U.S.-Mexico, and the U.S.-Canada borders;
- whether an area contains mining and/or oil and gas resources or extraction activities;
- whether a community is located in a geographical region or area that is particularly susceptible to extreme drought impacts, sea level rise, or other impacts from natural and climate-change related disasters;
- whether a community is located on tribal land, or may otherwise be linguistically or geographically isolated;
- whether a community is in proximity to one or more facilities that store or use hazardous chemicals⁷;
- whether a community relies on subsistence farming, fishing, or hunting;
- whether an area is largely agricultural, resulting in community members being exposed to pesticides;
- whether a community has been the site of repeated environmental health or safety emergencies;
- whether an area is identified by other state or federal agencies (including HUD, USDA or DOT) or initiatives such as Partnership for Sustainable Communities, Sustainable Communities/Strong Communities (“SC2”); and
- whether a community has equal and meaningful access to parks, green space, and the ability to enjoy natural areas.

Third, for all identified hot spot communities, EPA should commit to target its resources and authorities, and create an “all hands on deck” approach for environmental justice.

For EPA’s existing communities list in the “Making a Visible Difference” project, it is unclear whether community-specific plans have been or are being developed to protect these communities, or who is involved in this process other than the regional staff. For the full Plan EJ2020 list, EPA should direct all offices, departments, and relevant staff at the national and regional level to create a plan that assesses and uses specific authorities, resources, and actions to make progress to protect these hot spot communities, after taking public comment, and publish these plans. As part of these action plans for hot spot communities, EPA should commit to: (1) increase enforcement and compliance of all existing requirements applicable; (2) reduce air, water, and waste pollution and toxic exposure, including through use of EPA’s rulemaking, permitting, and chemical and product control authorities; (3) increase environment-related health protections and reduce environment-related health problems such as asthma, early mortality

⁷ See, e.g., Env’tl. Justice and Health Alliance for Chem. Policy Reform, *Who’s In Danger?* (May 2014), available at <http://comingcleaninc.org/assets/media/images/Reports/Who's%20in%20Danger%20Report%20FINAL.pdf>.

including infant mortality, cardiovascular problems, cancer, lost school and work days, high blood-lead levels, mercury and other toxin-burdens measured, and other health factors of importance; and (4) improve monitoring, pollution and health information, technical assistance, and other tools available to help communities protect their own health and environment.⁸

During the course of Plan EJ2020, EPA should regularly audit and include achievement of pollution reductions, health protections, and compliance progress in hot spot communities as part of all relevant EPA staff's performance reviews and staff reports. EPA should include community groups within the hot spot communities or areas of environmental justice concern as part of the progress audit process. EPA should publish regular reports on all actions taken to provide relief in hot spot communities, and a final report on progress achieved or in process as of 2020.

Notably, each regional office has a shortage of staff capacity to address the state-specific and local environmental justice issues facing some of their most vulnerable and overburdened communities, as well as to enforce regulations intended to protect vulnerable communities such as farmworkers. Indeed, some, if not many, regional offices have fully disbanded their environmental justice staffs, and are entirely dependent on the volunteer hours of committed program staff to address pressing environmental justice issues and impacts. When program staff who have full-time commitments to other areas of work are expected to devote extra, unpaid hours to address cumulative health and pollution issues facing environmental justice communities, there can be no realistic expectation that such issues are actually being adequately addressed. It is imperative that EPA back its commitments to achieving tangible environmental justice outcomes with full time staff and programmatic commitments beyond the agency's Washington, D.C. office, and throughout the reach of the regional offices. In order to make environmental justice outcomes a reality for many the nation's most impacted and overburdened communities, EPA must back its commitments with real human, financial, and programmatic resources in each of its regional offices, as well as action plans that staff must implement there.

As further examples of communities that greatly need attention, see the community impact reports previously submitted to EPA in connection with the agency's request for information on cumulative risk and impact assessment, and on the refineries rule.⁹

B. Achieve Health and Environmental Outcomes and Reduce Injustice

In response to EPA's request for comment on example metrics to use in assessing success on environmental justice concerns and in communities where people of color and low-income

⁸ Further information on these issues is discussed later in these comments. As one example, EPA needs to require that safety information on pesticide labels appear in Spanish as well as English so that farmworkers, who are overwhelmingly Latino, know how to protect themselves.

⁹ See, e.g., Comments of Environmental and Community Groups: Addendum A – Community Impact Report (Oct. 28, 2014), EPA-HQ-OAR-2010-0682-0568; Comments of Air Alliance Houston, *et al.*: Appendix E – Stories From Communities Overburdened by Pollution (June 28, 2013), EPA-HQ-ORD-2013-0292-0133.

people are disproportionately affected by pollution, toxic exposures, and EPA’s program actions, here is a list of some example metrics that EPA should be considering. The important points are: (1) focus on actual on-the-ground health impacts and not just EPA’s abstract environmental metrics (which may show progress but not anywhere near the progress communities need and want); and (2) assess whether EPA is actually addressing and working toward justice and equity, *i.e.*, not merely whether EPA has strengthened protection, but whether or not EPA has actually achieved any progress to reduce the disproportionate and unjust nature of the exposures and other impacts or made a meaningful difference to a particularly affected community. As EPA did not provide any real guidance on this question in the action framework document, we encourage EPA to publish a list of potential metrics for substantive objectives, including and in addition to the below, that it is actually considering and take further comment on this question, before determining the metrics it will use to assess success.

Progress Objective	Essential Metrics	Key Additional Metrics To Prevent Ongoing Injustice
Pollution	<p>Reduce air emissions, water contamination discharges, waste – for the most exposed and most vulnerable populations. Fine-scale studies may be needed where census tract- or even neighborhood-level may be too coarse.</p> <p>Using EJSCREEN and other relevant factors, track pollution burdens by race, income, and other socioeconomic factors, and report on whether they are both being reduced and becoming less disproportionately distributed in communities with environmental justice concerns.</p>	<p>Assess whether the amounts reduced are comparable to what has been achieved using the best available pollution controls and practices in other communities that have achieved the greatest reductions in similar pollution; and whether the amounts reduced reflect the maximum achievable levels of pollution reductions.</p> <p>In determining whether ambient pollution levels and toxic exposures have declined, EPA must base its assessment on reductions to the most exposed and most vulnerable populations.</p>
Health	<p>Increase health protection, particularly from environmentally-associated illnesses including pediatric and adult asthma, chronic obstructive pulmonary disease (“COPD”) and other respiratory problems,</p>	<p>Compare results to communities with least pollution and highest health scores; set disparity reduction goals and reduce disparities; assess whether the best available protection is achieved for children, in utero</p>

Progress Objective	Essential Metrics	Key Additional Metrics To Prevent Ongoing Injustice
	cardiovascular disease, cancer, birth defects and reproductive harm, diabetes – particularly for the most vulnerable community members, including children and the elderly.	and early life exposure, and for communities with socioeconomic stressors that increase vulnerability.
Enforcement and Compliance	Achieve compliance and create disincentives to violate environmental laws. Assess cases brought; success achieved; and environmental and health results achieved from these cases.	Show direct compliance results in targeted communities, compared with communities with the best compliance records, and include community input on the results of enforcement cases, to benefit immediate communities affected.
Clean Up Contaminated Sites including Superfund, and Expand Access to Healthy Green Space and Natural Areas	Identify more sites in priority areas and assure effective clean up progress, results, and success. Prioritize protecting and expanding free access to parks, healthy green space, and natural areas for communities of color and low-income communities.	Apply best practices and achieve best results in speed, amount and rate of clean up, public information and participation, access to clean and healthy natural areas, and community satisfaction in the results, as have occurred in communities without EJ concerns.
Products, Chemicals, and Pesticides	Reduce the number of chemicals that have not been assessed for toxicity, or have not been updated to reflect that they are particularly harmful early in life; that are persistent or bioaccumulative, or have only been assessed for one type of toxicity. Reduce unhealthy chemicals and product use in targeted	Assess results by comparison with best practices and outcomes achieved in some communities; focus on chemicals most known to be present in communities with environmental justice concerns, and on pesticides that are disproportionately associated with farmworker poisonings.

Progress Objective	Essential Metrics	Key Additional Metrics To Prevent Ongoing Injustice
	<p>communities, from pesticides to toys, home cleaning, and other consumer products.</p> <p>Cancel the most toxic agricultural pesticides handled by farmworkers and to which they and other community members are exposed.</p>	

C. Set Action Commitments and Evaluate Progress in Achieving Each of the EJ Metrics Outlined to the Agency in Prior Reports and Comments that Focus at the Regional and Local Level, As Well As the National Level.

EPA should (1) create the above-described cross-cutting projects and metrics to achieve progress across a number of issues; and (2) direct its staff to assess progress in resolving environmental justice concerns raised on many different issues nationally, regionally, and locally.

On the latter, we direct EPA's attention, for example, to the 2010 Lawyers' Committee for Civil Rights Under Law report.¹⁰ That report provides a list of important issues that EPA should seek a status report from its staff on to determine if any EJ progress is being made in program areas, and to commit to do so, where progress is not being made. Those policy recommendations cover the following areas, among others:

- Title VI of the Civil Rights Act of 1964, p. 68
- EPA Office of Civil Rights ("OCR"), p. 68
- Environmental Enforcement, p. 68
- Toxic Air Pollution, p. 71
- Coal Mining, p. 71
- Power Generation from Coal, p. 71
- Cessation of Mountaintop Removal Mining, p. 72
- Regulation of Coal Combustion Waste, p. 72
- Healthy Schools, p. 73
- Climate Change, p. 74
- Green Jobs, p. 75
- Transportation, p. 76

¹⁰ Lawyers' Committee for Civil Rights Under Law, *Now Is The Time: Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities* (June 2010), available at <http://www.lawyerscommittee.org/admin/site/documents/files/Final-Environmental-Justice-Report-6-9-10.pdf>.

- Housing and Urban Development, p. 76
- Public and Environmental Health, p. 77
- Homeland Security and Emergency Response, p. 78
- Federal Facilities, p. 78
- Gulf Coast Restoration and Hurricane Impacts, p. 79
- Semi-Urban and Rural Areas, p. 79
- Industrial Animal Production, p. 79
- Sewer and Water Infrastructure, p. 79
- Land Loss, p. 79
- Food Security and Federal Agriculture Policy, p. 79
- Indian Country, p. 80
- Canadian Border, p. 81
- Mexican Border, p. 81.¹¹

In addition, EPA should consider all comments received as part of prior rulemakings, and as part of this planning process, on other important issues with an environmental justice dimension, including but not limited to: issues involving goods movement (*see, e.g.*, Comments of Moving Forward Network (submitted on Plan EJ2020)¹²; chemical facility safety and security, including the need to protect public health and safety from refineries (*see, e.g.*, Petition of United Steelworkers *et al.* to EPA to Exercise Its Authority Under Section 112(r) of the Clean Air Act to Prevent Chemical Disasters (July 25, 2012); *Who's In Danger?*, *supra* n.7¹³; Comments of Environmental and Community Groups on EPA's Refineries Rule Proposal (Oct. 28, 2014)¹⁴; and the Letter from the National Environmental Justice Advisory Council to EPA on the Refineries Rule (May 21, 2015)); the need for stronger national ozone and other air and air toxics standards from power plants and other sources, as submitted to EPA previously in various rule dockets; toxic air and land use permitting programs and enforcement (Comments of the California Environmental Justice Alliance (submitted on Plan EJ2020)); the need for meaningful public participation in issues surrounding failing sewage systems, conversion of land to landfills, remediating groundwater contamination from historic hazardous waste dumping, and ameliorating harmful effects of massive industrial hog and poultry operations (*see, e.g.*, Comments of North Carolina Community Groups (submitted on Plan EJ2020)), the need for improved worker protection standards for farmworkers and the prevalence of unsafe and unhealthy products and practices like dangerous pesticide spraying in communities of color and

¹¹ *Id.* at 68-81.

¹² *See also* Nat'l Env'tl. Justice Advisory Council ("NEJAC"), *Reducing Air Emissions Associated With Goods Movement: Working Towards Environmental Justice* (Nov. 2009), available at <http://www.epa.gov/environmentaljustice/resources/publications/nejac/2009-goods-movement.pdf>.

¹³ *See also* Improving Chemical Facility Safety and Security, Exec. Order No. 13,650, 78 Fed. Reg. 48,029 (Aug. 1, 2013); Ctr. For Effective Gov't, *Kids in Danger Zones* (Sept. 2014), available at <http://www.foreffectivegov.org/files/kids-in-danger-zones-report.pdf> (One in three U.S. schoolchildren goes to school within the vulnerability zone of a hazardous chemical facility.).

¹⁴ EPA-HQ-OAR-2010-0682-0568 ("Refineries Comments"); *see also* Coalition to Prevent Chemical Disasters, *Home*, <http://preventchemicaldisasters.org>.

low-income communities (*see, e.g.,* Comments of Farmworker Justice and Earthjustice, *et al.* (Aug. 18, 2014)¹⁵).

We highlight in particular that noxious air pollution from large industrial and transportation-related sources has presented a serious health crisis in underserved communities across the country. That is partly why these Comments emphasize the need for cross-cutting tools and projects that would particularly help translate into stronger air monitoring, standards, and enforcement, if EPA prioritized these issues in Plan EJ2020. Recent reports on the harm caused by soot, and the link between asthma and weak national air standards for ozone and other pollutants, provide helpful information on this issue and the disparities of air pollution exposures and impacts.¹⁶

For example, a 2013 study by the Massachusetts Institute of Technology reported that Baltimore, Maryland – a city that is predominately black and home to many highly concentrated socio-economically distressed neighborhoods – had the highest emissions-related mortality rate of over 5,600 U.S. cities studied.¹⁷ Fueling this problem are the exceedingly high levels of fine particulate matter- and ozone-producing volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”) emissions from cars, trucks, and buses that occupy the Baltimore-area’s congested highways and narrow streets, as well as local coal-fired power plants. The deleterious impact of air pollution on public health in Baltimore is reflected by the fact that an alarming 20% of children in Baltimore City have asthma (more than double the national average), and the city’s pediatric asthma hospitalization rate is among the highest in the nation.¹⁸ In addition, across the state, black Marylanders are nearly 2.5 times more likely to die from asthma than white Marylanders. Air pollution and resulting harm to environmentally burdened communities in the City and surrounding areas are likely to increase significantly if the Port of Baltimore expands and brings in fleets of large diesel trucks and rail cars to move goods and other cargo in and out of the Baltimore.

¹⁵ EPA-HQ-OPP-2011-0184-2434.

¹⁶ *See, e.g.,* Am. Lung Ass’n, *State of the Air 2015* (2015), available at <http://www.stateoftheair.org>; Am. Lung Ass’n, *et al., Sick of Soot: How the EPA Can Save Lives by Cleaning Up Fine Particle Pollution* (Nov. 2011), available at <http://www.catf.us/resources/publications/files/SickOfSoot.pdf>; M. Ash, *et al., Justice in the Air: Tracking Toxic Pollution from America’s Industries and Companies to Our States, Cities, and Neighborhoods* (Apr. 2009); Black Leadership Forum, *et al., Air of Injustice: African Americans and Power Plant Pollution* (Oct. 2002); Am. Lung Ass’n, *Too Many Cases, Too Many Deaths: Lung Cancer in African Americans* (2010), available at <http://www.lung.org/associations/states/california/assets/pdfs/too-many-cases-too-many.pdf>; Am. Lung Ass’n, *State of Lung Disease in Diverse Communities: 2010* (2010), available at http://www.lung.org/assets/documents/publications/lung-disease-data/solddc_2010.pdf; NAACP *et al., Coal Blooded: Putting Profits Before People*, <http://www.naacp.org/pages/coal-blooded1>.

¹⁷ F. Caiazzo, *et al., Air pollution and early deaths in the United States*, 77 *Atmospheric Env’t* 198, 205 (2013), available at <http://lae.mit.edu/wordpress2/wp-content/uploads/2013/08/US-air-pollution-paper.pdf>.

¹⁸ Baltimore City Health Dep’t, *Asthma*, <http://health.baltimorecity.gov/node/454>.

Low-income communities and communities of color in and near many other major cities, from Houston to Los Angeles to Chicago to New York and Newark, are facing similar problems that require immediate attention from EPA at the national and local levels. EPA's own Second Integrated Urban Air Toxics Report and the American Lung Association's State of The Air provide strong illustrations of key work that EPA must do to recognize the strong link between national air standards, health, and the disproportionate impacts felt by environmental justice communities. In order to address these impacts, EPA must take active and immediate steps to protect communities from harmful air pollution.¹⁹ As discussed in comments and reconsideration petitions submitted by community groups into the dockets of these rules, EPA's air standards for power plants, refineries, and other sources causing disproportionate harm to communities of color and low-income communities provide an important opportunity and duty for EPA to take meaningful action to protect communities by setting health-protective standards, and standards that assure the maximum achievable degree of pollution protection, and by requiring the best available fence-line monitoring and enforceability measures.²⁰

There is a great need also for EPA and each regional office, specifically, to seek community input on important regional issues and hot spots, and national issues of particular regional concern. EPA should require all regions to create action plans, with input and help from states, local governments, and community members, and include concrete action and progress metrics in each plan that will help ensure every region sees on-the-ground benefits from Plan EJ2020 that are tailored to the communities' needs in that region. Commenters encourage EPA to require regions to seek input more broadly and increase transparency in how they are implementing EPA's environmental justice objectives, including through creating updated concrete action plans of their own with direct and significant input from local community groups.

Commenters note that Region 2 has provided an environmental justice action plan on its website that includes some significant objectives and concrete projects.²¹ But, formal planning is not translating into sufficient change on the ground. For example, although there are identified liaisons between Region 2 and affected Tribes, these liaisons are not conferred with sufficient authority and are not always included in relevant meetings. Ultimately, metrics of performance are critical to determine impact on the ground and with input from community stakeholders. EPA should evaluate changes that would ensure that action items produce outcomes that matter to overburdened communities.

¹⁹ See *supra* nn.5, 16 (*State of the Air 2015*).

²⁰ See, e.g., EPA, *Rules and Implementation*, <http://www.epa.gov/ttn/atw/eparules.html> (last updated May 22, 2015) (listing rules).

²¹ See EPA Region 2, *Environmental Justice Action Plan* (2014), available at http://www.epa.gov/region2/ej/region_2_environmental_justice_action_plan.pdf. We note, however, that although there are large farmworker communities in Region 2, the Action Plan does not mention the EJ community of farmworkers.

Many, if not most, other EPA Regions do not even have such plans in place, or have only permitting-specific plans.²² These are important efforts, but it is unclear to Commenters how those plans were created, whether community input was received in designing them, and what kinds of reports and updates will be provided to assure ongoing community input in assessing progress in achieving the objectives these reports include. EPA must provide educational opportunities, information, and training so that communities *can* participate in comment periods for draft permits and in public hearings. The permitting plan discusses working with other offices, but often, community groups do not feel that their voices are heard by the actual decision-makers. One suggestion would be a permit ombudsperson, with whom a community group could talk, to find out information and express its concerns in situations where the regional office and HQ rule-writer staff are not responsive to or actively engaging community members. EPA staff must be directed to listen to and weigh seriously the concerns raised by community members and this ombudsperson.

Furthermore, these documents state that EPA is planning to use EJSCREEN to identify affected communities. This is important as a starting point, but it is not enough not only because the tool is incomplete and needs to be strengthened as part of the input process EPA has created, but also because EPA needs to reach out to community groups actively. For example, EPA should create lists of past community group commenters and engage them early, actively, and directly on similar matters affecting their communities. EPA must develop a method that allows a community group to identify itself or register or utilize some way to make their presence known. Gathering demographic information is important, but this alone does not assure identification and involvement of the community groups and leaders who can help inform EPA action. The permitting plans also call for encouraging activities by the permit applicant – but this assumes that there is a positive relationship between the permittee and the community – and often that is not the case. Once again, this illustrates the importance of early community identification and engagement, which involves outreach activities, not just data analysis (which is important, but not enough).

Many of the regions also cover vast and dramatically diverse geographic areas – with Region 9 as one good example of this. The states encompassed in the region are home to a wide array of industries ranging from pervasive and often extreme oil, mineral, and other natural resource extraction and refining, to widespread commercial agricultural production, and from heavy ship, truck, and railroad traffic facilitating the movement of goods and labor from the region's ports and other points of entry along the U.S.-Mexico border, to some of the nation's most robust and concentrated technology and computer science development. As a result of these all-too-often highly polluting and toxic activities, communities of color, including many immigrant and linguistically isolated communities, low-income communities, and tribal communities experience a range of substantial environmental justice impacts. As such, the region is also home to a robust network of groups and organizations that engage in rigorous advocacy to address local, state-wide, and national environmental justice concerns. As an example, Commenters attach comments submitted by the People's Senate, including a one-year roadmap, urging reforms of California's Department of Toxic Substances Control to strengthen

²² EPA, *Considering Environmental Justice in Permitting: Regional Implementation Plans and Contacts*, <http://www.epa.gov/environmentaljustice/plan-ej/permitting.html#regions> (last updated Apr. 2, 2014).

community protections and address environmental justice problems.²³ Many, if not all, of these recommendations would also be valuable for EPA to use in strengthening other states' programs, as discussed elsewhere in these comments.

Due to the vast expanse of this region, and other similar regions, we strongly urge EPA to integrate each regional office in a state-by-state evaluation of how state-level agencies are engaged in incorporating environmental justice principles into their own permitting and enforcement practices. This will not only help EPA to adequately assess the environmental justice issues facing these large regions, but it will also enable EPA to better evaluate the region's progress towards achieving environmental justice objectives. State-level communication, cooperation, and oversight are also key to ensuring, rather than merely considering, environmentally just permitting and enforcement decisions. As a starting point, all regions could follow the lead of a region that has first assigned an environmental justice coordinator to be a liaison for one (or more) dedicated states, allowing them to aim to become an expert on environmental justice concerns in that state, and work closely with community group representatives from the assigned state.

As a part of this particular effort, we further recommend that EPA exercise its oversight authority to set specific, standardized permitting and enforcement criteria that must be followed by state agencies issuing and/or enforcing hazardous waste, air, and water permits to operate; permits to construct; closure or post-closure clean-up and remediation permits under the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act; as well as enforcing Worker Protection Standards for agricultural workers under the Federal Insecticide, Fungicide, and Rodenticide Act, among others. Such standards should plainly incorporate strong metrics to account for existing cumulative health and environmental burdens in the areas in which new polluting facilities are proposed, or have already been sited and are operating, and should ensure that adequate financial assurances are obtained and safeguarded prior to issuing permit modifications, new permits, or post-closure permits. These standards should also include metrics for ensuring that safeguards for workers and members of the community are rigorously enforced.

Beyond engaging with each state-level agency in the region, we further recommend that EPA reach out to and engage with local and municipal agencies and governments, as well as tribal governments, who have decision-making power over land use and permitting decisions that detrimentally and disproportionately impact communities of color and low-income communities in all of each region's states. Engaging with such agencies would directly assist EPA in ensuring meaningful inter-agency co-operation to achieve environmental justice goals, as contemplated in both its 2014 and 2020 EJ plans. For example, EPA's Enhanced Public Participation during permit review is a document EPA should promote with state and local governments to increase community engagement and input. At the same time, EPA needs to work with states to assist

²³ Letter to Barbara Lee, Dir., Cal. Dep't of Toxic Substances Control, from The People's Senate (Mar. 27, 2015); Ctr. on Race, Poverty & the Env't, *The People's Senate: Building a New Vision for DTSC* (Aug. 2014), available at http://www.crpe-ej.org/crpe/images/stories/pdf/FINAL_PeoplesSenateReport.pdf.

and require them to do more than just expand process steps or public participation, but also to set and achieve substantive environmental justice objectives, as discussed above for EPA itself.²⁴

We also strongly recommend that EPA exercise its authority to support the existing and future efforts of the regional offices to engage in program development aimed at addressing climate change impacts, adaptation, and mitigation on environmental justice communities. Across many regions, environmental justice groups are at the forefront of resiliency planning, conducting research, and identifying innovative strategies,²⁵ and must be involved as leaders in EPA's national and regional actions on global warming.

Many of the regional efforts should ensure that EPA also commit to outreach, education, and communication to better understand the needs of native and tribal communities which may face non-traditional EPA environmental justice issues. For example, Region 8 has unique issues EPA should consider in a regional environmental justice strategy alongside urban issues, such as mitigating acid mine drainage; abandoned mine cleanup; health impacts due to oil and gas development, agricultural runoff, nitrogen deposition in mountain areas; and energy-related permitting and siting issues. The region is also home to some of the most impoverished tribal communities in the country who have fundamental infrastructure needs and lack environmental enforcement assistance and resources. The Tribes also need EPA trainings to strengthen their governmental programs and EPA educational meetings to strengthen tribal community awareness. EPA should consider participating in tribal college environmental programs too. EPA received good advice on implementing its environmental justice goals in Indian Country through the National Environmental Justice Advisory Council recommendations.²⁶ As another example, for many or most federal projects in Alaska, only "foreign" languages, such as Hmong and Filipino, are included to translate and protect the interests and needs of limited English proficient ("LEP") persons. But, as shown in recent cases in Alaska, with both Yup'ik and Gwich'in LEP for voting under the Voting Rights Act, it is important for EPA to prioritize the inclusion of native and indigenous languages.²⁷ These recommendations should be implemented when EPA interacts with Tribes in various regions.

²⁴ As a survey of environmental justice policies showed, many states have procedural steps or requirements in place, but those are insufficient alone, without additional substantive limits, measures, targets, and requirements, to actually reduce the amount of pollution, toxic exposures, and environmental injustices that communities face. See J. Owley, *et al.*, *Symbolic Politics for Disempowered Communities: State Environmental Justice Policies*, Buffalo Legal Studies Research Paper Series, Paper No. 2014-036, Brigham Young Univ. J. of Pub. L. (2014), <http://ssrn.com/abstract=2425833>.

²⁵ See, e.g., New York Environmental Justice Alliance, *Waterfront Justice Project*, http://www.nyc-eja.org/?page_id=311.

²⁶ NEJAC, *Proposed Advice and Recommendations on Implementation of the EPA Policy on Environmental Justice for Tribes and Indigenous Peoples*, (Sept. 2014), available at <http://www.epa.gov/environmentaljustice/resources/publications/nejac/recommendations-tribal-policy-2014.pdf>.

²⁷ See, e.g., Legal Language Services, *Election Translation 2014* (Oct. 6, 2014), <https://www.legallanguage.com/legal-articles/election-translation-2014-yupik-and-gwichin>.

II. TO DEEPEN ENVIRONMENTAL JUSTICE PRACTICE, CREATE NEW CROSS-CUTTING INITIATIVES AND TOOLS THAT WOULD IMPROVE THE HEALTH AND ENVIRONMENT OF OVERBURDENED AND VULNERABLE COMMUNITIES WITH PARTICULAR ENVIRONMENTAL JUSTICE CONCERNS.

In addition to creating the metrics and actions described above, EPA should create the following national initiatives and tools to advance environmental justice.

A. Enforcement Initiatives

- 1. EPA should expand enforcement resources and direct its resources to the most vulnerable communities with greatest need and past and current compliance problems.**

As part of setting EPA's next national enforcement initiatives, EPA should increase enforcement resources and ensure broad community input and outreach, not just seek comment on its website or through the Federal Register. EPA should use EJSCREEN and other environmental justice metrics, as described in these and other comments EPA has received, to ensure targeting of initiatives and enforcement resources to achieve environmental justice objectives.

- 2. Require EPA enforcement staff to ensure that the outcomes of cases, including any supplemental environmental projects, provide the best available benefits and pollution and health protections for affected local communities.**

To strengthen the demonstrated outcomes of enforcement cases for communities, EPA should take at least the following three key steps:

- **Community Input During Enforcement.** EPA has previously made commitments to include community input in enforcement, but in many instances that input has not been sought or has not been utilized in a way that allows community members to affect the result of a consent decree or a supplemental environmental project ("SEP") chosen by EPA/DOJ. As part of Plan EJ2020, EPA should do an audit of prior cases; report on where there was community input and which groups were contacted; report on the results; and provide a report on best practices and specific actions that should be used across the board. Where possible, EPA should modify prior enforcement results to better protect communities. For new cases: EPA should require enforcement staff to identify community groups and contact them as early as possible during an action to seek input on the case objectives and results, including any supplemental environmental projects under consideration. EPA should ensure that there is a sufficient public comment period for consent decrees and settlements to allow for meaningful community input, and that this is publicized through direct communication and in other ways in the affected community, not just in the Federal Register and on-line.

- **Achieve Community Protections As Part of Case Results and Implementation.** EPA should require each proposed consent decree or settlement to include a clear method and role for community input as well as a community-focused benefit and protection objective. EPA should assess the results of enforcement cases based on community outcomes achieved, including metrics described earlier in these comments. EPA should provide information to community members on requirements, monitoring, and other components of successful enforcement cases so they can help track and receive the full benefit of these results over time as enforcement decrees, settlements, and court orders are implemented. EPA should create an ongoing Community Advisory Board or host regular meetings with the community and representatives during enforcement and throughout implementation to have continual meaningful engagement and input. EPA should require that copies of annual reports go to local community or civic groups to help keep the community informed.
 - **Publish and Disseminate Lists of Best Practices to Increase Community Protections.** EPA should perform an audit, with input from pollution control and monitoring companies, and create a list of best practices and technologies available for particular industries, pollutants, and pollution controls and monitoring methods. EPA should update this list and publish it annually so that it is available to community members evaluating permits, regulations, and bringing their own enforcement actions. Before proposing a component of a consent decree or settlement, EPA should assess whether it is the best available method already in use in another settlement, decree, or a state or local jurisdiction by the same or a similar industry or company at a different facility. EPA should set up a clear method of information-sharing to assist in this process, including through required communications within the agency and with state and local agencies.
3. **EPA should track and regularly evaluate and publish detailed success metrics and results of enforcement cases in achieving objectives, environmental justice, and provide this information to the public and affected communities.**

EPA often issues a press release when it achieves success in an enforcement case, listing the objectives that will be achieved. But, as the Office of the Inspector General (“OIG”) found after evaluating EPA’s refinery enforcement initiative, EPA needs to better assess the success of meeting requirements of consent decrees and settlements, and publish that information on a regular, at least annual, basis (or more often, depending on the consent decree and settlement).²⁸ EPA should also assure that this is provided to communities in an understandable way, so communities can help assess ongoing results and progress achieved.

²⁸ EPA, OIG Report, *EPA Needs to Demonstrate Whether It Has Achieved the Goals It Set Under the National Petroleum Refinery Initiative*, Report No. 14-P-0184, (Apr. 15, 2014), available at <http://www.epa.gov/oig/reports/2014/20140415-14-P-0184.pdf>.

4. EPA should create and publicize an anonymous community and worker hotline for concerns, tips, and complaints about potential violations of environmental laws and regulations.

Currently, EPA has a website that is not known to most community members and not useable without computer access.²⁹ This website directs people who wish to phone in a complaint to another site that says it is necessary to find the correct EPA Region. The website also states that it may be better to call a state or local agency, rather than EPA. This system is not workable or useful for many, if not most, community members with environmental and health concerns in vulnerable communities.

There should be a clear and easy to use, well-publicized method to phone in anonymous complaints. EPA should provide a public log of complaints received; the office or department, including contact information, to which the complaint was directed; and ultimate follow-up action (if any) or other outcome. EPA, on the regional websites, could also easily post contact information for regional state emergency or hotline numbers.

It is important that EPA publicize a complaint mechanism to ensure it particularly reaches workers and community members in overburdened communities with environmental justice concerns. EPA should use EJSCREEN and other metrics to ensure that community members whose primary language is not English have the necessary information and access to submit complaints, and receive follow-up information.

Anonymous reporting is especially important for workers who may have inside information about a problem that needs to be fixed, maintenance that could avoid a disaster, or other issue that is important to correct to prevent both additional pollution and immediate injury or loss of life.

In addition, EPA should update its tips and complaints website to keep up with the times, and allow for easy submission of photos, video, GPS data, air monitoring data collected remotely, *etc.*, to accompany a complaint. The public needs to be able to submit information that will be meaningful and useable for enforcement if they have this type of information. In addition, as discussed later, EPA needs to strengthen the availability of public information that community members can consult to assess compliance.

For example, EPA should review the best practices in use in some states or local areas, such as the Fresno Environmental Reporting Network (“FERN”) in Fresno County, CA,³⁰ and the Kern Environmental Enforcement Network (“KEEN”), in Kern County, CA.³¹ FERN provides information on how to submit complaints through multiple methods, and allows multilingual reporting. It even allows people to receive email alerts of problems reported in the area, so that other community members can receive the immediate benefit of knowing if there is

²⁹ See EPA, *Report Environmental Violations*, <http://www2.epa.gov/enforcement/report-environmental-violations> (last updated June 1, 2015).

³⁰ FERN, *Welcome*, <http://www.fresnoreport.org/>.

³¹ KEEN, *Home*, <http://www.kernreport.org/>.

an immediate potential health or safety concern they should be aware of. As stated on its website: “FERN is modeled after a successful project, the Imperial Visions Action Network. In the first two years IVAN generated violations leading to \$90,000 in penalties.”³² IVAN has since been expanded to other communities as well, as an “Environmental Monitoring System that connects the community with real people that can help solve local environmental problems.”³³

5. For each EPA Region, hold an annual enforcement symposium with communities and state and local enforcement agencies.

For each region, EPA should hold an annual meeting that brings together affected communities, EPA, state, and local environmental enforcement agencies to increase EPA’s enforcement impact and share information. There should be a community complaint and comment mechanism as part of this meeting. This meeting should also include a transparent discussion of identified compliance problems in the region; strategies to address those; and ways in which communities can have input, gain additional information, or in some instances assist in addressing such problems. This meeting should also include technical assistance and other information for community members. Some states – such as California – and regions previously have held these kinds of events, and EPA should contact staff there to seek information on best practices in how to organize and implement this kind of event.

6. Create a formal project for EPA-DOJ community-directed enforcement technical assistance, trainings, and amicus briefs.

EPA should create a work-group of EPA and DOJ enforcement staff who are available to provide technical assistance and enforcement trainings for community members who seek to evaluate potential problems arising from pollution or other toxic exposures, and decide whether to bring cases themselves that EPA/DOJ does not have the resources to bring directly. This group should be part of trainings and publicized widely to affected communities.

As part of this work-group, EPA and DOJ should track enforcement cases and actively consider submitting an amicus brief in federal courts, especially courts of appeals, where such a brief could make a difference to: strengthen applicable precedent on enforcement; ensure an incentive for facilities to comply rather than violate environmental laws; and assist in achieving a positive result for communities where EPA-DOJ did not have sufficient resources to bring a full enforcement case. EPA should actively seek out cases for potential amicus briefs.

7. Create community trainings and information on pollution, compliance, permitting, and enforcement.

EPA has made it a priority to create “Next Generation” monitoring and compliance tools in individual enforcement cases, even while it is going backward in rules and monitoring

³² See *supra* n.30.

³³ Identifying Violations Affecting Neighborhoods, *Home*, <http://www.ivanonline.org/>.

networks – which are important issues for Plan EJ2020 to address, as discussed later.³⁴ It is important that EPA provide training and information to communities so that they can understand how to interpret and use this information, and receive the full benefits that this project is intended to provide. EPA should hold regular community trainings and provide information on pollution, toxic exposures due to drift, monitoring data, compliance and enforcement to assist community members in understanding all of the ways in which they can help assure compliance and strengthen environmental enforcement. EPA provides some of these kinds of resources online, but they are difficult for community members to find, and not all are publicly available. EPA should create a single place where community members can find and access available information, publicize this widely for community members, and also hold additional trainings in the regions for more in-depth dissemination of information that communities need to engage actively in permitting and enforcement matters.

As a good example, EPA Region 4 has scheduled their 14th Community Involvement Training Conference on August 4-6, 2015 in Atlanta, Georgia. Events such as this are very important. EPA also must provide a mechanism by which poor and underserved communities can participate in this and other similar events. EPA has arranged for participation via telephone for those who cannot attend in person, but the phone is no substitute for the value of training or other informal and personal connections and discussions that can occur in person.

8. Provide input opportunities, information, and protections for communities living near contaminated and Superfund sites.

There is a strong need to reform and address environmental justice issues in all aspects of the Superfund program, including in terms of site prioritization, clean-up, and oversight. Experience at the General Motors Superfund Site in Massena, New York, a massive PCB dump directly adjacent to the St. Regis Mohawk Tribe, illustrates this. EPA has long recognized the need to take the cultural and historical concerns of Tribes into account when conducting Superfund remediations, and EPA recognized that because “the people of the St. Regis Mohawk Tribe ... have a cultural and spiritual link to the St. Lawrence Environment[,]” which they call Akwesasne, “[s]pecial consideration must be given to Native American concerns in evaluating and remediating the site.”³⁵ Yet EPA has persistently failed to incorporate the suggestions of the Tribe in its oversight of remedial actions, and the site is not expected to be cleaned up until 2017

³⁴ Mem. from Cynthia Giles, Asst. Administrator, EPA (Jan. 7, 2015), available at <http://www2.epa.gov/sites/production/files/2015-01/documents/memo-nextgen-useinenfsettlements.pdf> (“Giles Memo”); EPA, *Next Generation Compliance*, <http://www2.epa.gov/compliance/next-generation-compliance> (last updated June 15, 2015); see also EPA Ofc. of Enforcement & Compliance Assurance, *Next Generation Compliance: Delivering the Benefits of Environmental Laws*, EPA (Oct. 9, 2014), <http://www2.epa.gov/compliance/next-generation-compliance-delivering-benefits-environmental-laws>; EPA Office of Enforcement & Compliance Assurance, *Next Generation Compliance: Strategic Plan 2014-17* (Oct. 2014), available at <http://www2.epa.gov/sites/production/files/2014-09/documents/next-gen-compliance-strategic-plan-2014-2017.pdf>.

³⁵ EPA Superfund, Record of Decision: General Motors (Central Foundry Division), EPA/ROD/R02-92/170 at 29 (Mar. 1992), available at <http://www.epa.gov/superfund/sites/rods/fulltext/r0292170.pdf>.

– over thirty years after the site was first listed on the National Priorities List, even though there is significant PCB contamination.³⁶

As further examples of Superfund issues some supposedly “closed” Superfund sites are not closed at all – no fence, no posting, tanks labeled “permanently closed” but that are broken open, *etc.*, with nothing to warn or prevent children or adults from going onto the site. In addition to a hotline to report issues like this, as noted above, EPA should track and ensure protections to keep these sites closed and inform communities of the dangers of entering them. This information needs to be provided in languages used by all local community members.

In addition, a common concern expressed by community groups is the lack of meaningful, active EPA community engagement. Communities often feel that they are not considered to be important stakeholders in planned remediation activities in their communities. One example involves the Jacksonville Showcase community, where EPA has developed a strong relationship with the residential community group near a hazardous waste site. However, there is a former worker population that has not been included in EPA’s activities and, as such, this community has not received protections that should come from interaction with state, local, or federal environmental and health agencies. EPA must work actively to ensure the involvement of multiple community voices and groups in clean-up processes.

B. Regulatory Tools and Actions

1. Update EPA’s approach to assess cumulative risks and impacts based on current science and the need to protect vulnerable communities.

EPA must carry forward and follow through on its commitment from Plan EJ 2014 to address cumulative impacts, including cumulative risks.³⁷ EPA’s approach to assessing environmental health threats and impacts is woefully outdated and behind the science. This problem comes to a head in clean air, toxics, pesticides, civil rights enforcement, and other actions where EPA is required to assess health risks and impacts. But failing to follow the current science also harms the agency’s effort to account for and address vulnerabilities and environmental justice concerns across a broader range of its actions as well. EPA must take action to update its guidance. EJSCREEN is a screening tool that addresses only a few factors and is no substitute for the policies and protocols that EPA must use in actually deciding what action to take at the program level.

The dire reality is that environmental hazards affect some communities much more than others. Pollution and polluting sources are often concentrated together, overburdening and overwhelming communities and populations, and causing greater health effects and safety

³⁶ EPA, *G.M. Massena: St. Lawrence County, NY*, <http://www.epa.gov/r02earth/superfund/npl/gmassena/index.html> (last updated July 9, 2015).

³⁷ EPA, *Plan EJ 2014*, <http://www.epa.gov/compliance/ej/plan-ej/>.

threats.³⁸ Further, farmworker communities are often exposed to multiple pesticides in their workplaces, in their drinking water, and in their homes and communities as a result of drift and pesticides borne on clothes, shoes, and skin. Current risk assessment practices, which have failed to keep up with current science and do not account for real-world impacts, jeopardize the health of communities surrounded by sources of pollution – such as coal plants, refineries, cement kilns, chemical plants, metal smelters, incinerators, dry cleaners, highways, truck routes, landfills, Superfund, and other hazardous waste sites.

In order to fulfill the agency's renewed commitment to environmental justice and the recommendations from the National Academy of Sciences, National Research Council, EPA must update its approach to account for the cumulative impacts and risks faced from early-in-life exposure (including childhood) and from exposure to multiple sources, as well as the increased vulnerability from socioeconomic stressors and multiple pollutant and pathway exposures. To this end, we urge EPA to commit to do the following as part of Plan EJ2020:

a) EPA must incorporate the real-world experience and perspective of people who live in communities that are overburdened by pollution and other environmental hazards.

Too many communities of color and lower income communities are exposed to a disproportionate share of air pollution and all of the resulting health risks and impacts. Communities have previously submitted statements that summarize the situation and provide narratives from various example communities around the United States that describe the on-the-ground impact of EPA's scientific policy decisions and the urgency of reforms in risk assessment practices.³⁹

b) EPA must advance environmental justice and protect public health by establishing guidance that provides a means to reduce cumulative impacts in overburdened communities.

There is clear and mounting evidence that the concentration of environmental hazards in lower income communities and communities of color threatens public health and that current risk assessment practices contribute to environmental inequities and increase disparities. Experts have identified addressing cumulative impacts as a critical step to ensuring environmental justice and reducing disparities. At minimum, this must include:

³⁸ OEHHA, *Cumulative Impacts: Building a Scientific Foundation* at 5-16 (Dec. 2010), available at <http://oehha.ca.gov/ej/pdf/CIREport123110.pdf> (citing numerous research studies showing that exposure to pollution-emitting facilities, hazardous waste facilities and disposal, toxic releases, non-attainment air areas, high motor vehicle air pollution areas, and other types of pollution is more likely to be concentrated in communities with higher minority and lower income populations); R. Morello-Frosch, *et al.*, *Understanding The Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30(5) *Health Affairs* 879, (2011); R. Morello-Frosch, *et al.*, *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, *Envtl. Health Perspectives*, 114(3) *Envtl. Health Perspectives* 386 (2006)..

³⁹ See *supra* n.9.

- (1) Immediately updating existing guidelines for conducting risk-based assessments to incorporate mechanisms for accounting for the cumulative impacts of multiple exposures and underlying vulnerabilities; and
- (2) Moving beyond current risk frameworks and incorporating alternate methods to assess health threats from environmental exposures in a way that will better capture the impacts faced by overburdened communities and support policies to reduce them.

Regarding item (1) above, most urgently, where its authorities direct it to assess risk, EPA must use the best available current science to do so. EPA can and must vastly improve its approach by updating existing risk assessment guidelines to incorporate the science on cumulative risk and impacts, including by implementing the following:

- Account for individual-level vulnerability in risk assessments by better incorporating the vulnerability of children, early-life exposures, and the developing fetus into risk assessment methods:
 - Account for increased susceptibility by using age-dependent adjustment factors for all carcinogens, not just known mutagens.
 - Pre-natal susceptibility: Account for increased susceptibility by using a pre-natal adjustment factor for all carcinogens of *at least 10X*.
 - For chronic non-cancer risk, consult and apply child-specific reference values (such as those created by California EPA scientists), where available.
 - If child-specific reference values are unavailable, consult science on early exposure impacts, and use an additional default factor of *at least 10X*.
- Account for community level vulnerability by including factors to account for increased vulnerability based on demographic differences, as part of the risk assessment. EPA also must fully integrate the findings of its environmental justice analyses into its risk assessments and rulemakings, and set stronger pollution limits to provide environmental justice.
- Assess the cumulative burden of exposures to multiple pollutants and sources via multiple pathways:
 - Assess and aggregate exposure from multiple pathways – including by adding inhalation and non-inhalation-based cancer risks.
 - Include the interaction of multiple pollutants.
 - Account for exposure to multiple sources. Until EPA has a specific mechanism for estimating total exposures, a default or uncertainty factor of *at least 10X* should be used to provide overburdened communities with the protection they need now.

- Account for cumulative impacts of multiple exposures and vulnerabilities by shifting the level of risk which triggers policy action.
 - Reduce EPA’s benchmark of what it considers acceptable lifetime cancer risk, instead of relying on the outdated upper limit of 100-in-a-million. This benchmark is way too high, and is completely unacceptable to affected communities who are bombarded by high levels of pollution from many different sources, emitting many pollutants that can cause both additive and synergistic harm, and experience exposure through multiple pathways.
 - Use a Margin of Exposure (“MOE”) framework for non-cancer impacts and adjust the target MOE according to known vulnerability factors.
- In the face of increasing evidence calling into question the assumption of a safe or acceptable level of exposure, EPA should also consider reforming risk assessments to support reducing risks to the lowest possible level to protect public health, rather than suggest that there is a safe or acceptable level.

Prior comments submitted to EPA providing more detail on these issues are available in the dockets of the Office of Science Advisor and air office, among others.⁴⁰

Commenters also wish to highlight that EPA should be requiring and using a full Health Impact Assessment (“HIA”) wherever possible, in addition to looking at health risks where directed by law. An HIA is a more detailed and comprehensive tool to understand the impacts of pollution on a community that already includes significant health burdens and legacy pollution. The Port of Los Angeles HIA provides an example of the type of impact assessment that should be used more often.⁴¹

In addition, continued development of EJSCREEN and similar tools is also recommended to support communities in learning more about the environmental justice threats that surround them, so that communities know which pollutants to track and which monitoring tools will be most useful. EJSCREEN is a screening tool, and is no substitute for the long-overdue updates to EPA’s policy and protocol to assess cumulative risks and impacts, but these tools can work together to strengthen information available to communities, EPA, and state and local agencies, as well as other stakeholders.

⁴⁰ See, e.g., Comments of Air Alliance Houston, Earthjustice, *et al.* (June 28, 2013), EPA-HQ-ORD-2013-0292-0133; see also EPA, *Cumulative Risk Webinar Series: What We Learned*, EPA/600/R-14/212 (July 2014), available at <http://epa.gov/ncsr/cra/webinars/cra-webinar-summary.pdf>; NEJAC, *Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts* (Dec. 2004), available at <http://www.epa.gov/environmentaljustice/resources/publications/nejac/nejac-cum-risk-rpt-122104.pdf>.

⁴¹ EPA, *Los Angeles and Long Beach Maritime Port HIA Scope* (May 17, 2010), available at <http://www.epa.gov/Region9/nepa/PortsHIA/pdfs/DraftHIAScope4PortsOfLALB.pdf>. EPA should also ensure that this HIA is actually finalized so it can be fully used to strengthen local environmental and health protection.

2. EPA should perform a review of permits and strengthen the requirements applicable to all permits, including Title V permits, through state oversight and direction by providing best practices.

As some commenters, such as the Coalition For A Safe Environment, have previously proposed, EPA should create a permit taskforce – including one specific to Clean Air Act Title V, as well as for CWA permits – that updates EPA’s prior assessments with meaningful action steps. Each permit-focused taskforce should be charged with an independent review and evaluation of the quality of permits, including specific areas that need strengthening including: monitoring, reporting, public information, and other key components needed to assure compliance, including through public review and enforcement. EPA should provide a report and use this in oversight of states, and provide it for public commenters, along with a clear direction to lift all permits up to a higher level of essential enforcement requirements. The objective of this project would be to strengthen environmental justice protections for communities with a significant number of permitted facilities.

3. Revise the minimum public notice requirements for Clean Air Act and other permits, for both major and minor sources, to allow for adequate public review and participation.

To give more community members a chance to learn about permits that govern facilities in their area (including Clean Air Act Title V, PSD, NSR, Clean Water Act, and other types of permits), EPA should require facilities and/or state agencies to post permit applications and the proposed draft permit online on a publicly available website at the start of the public notice period. EPA should also ensure that notification occurs in relevant languages for the affected nearby communities.

It is a serious problem that some sources apply for and receive minor source permits without adequate review, often without submitting proper data showing that they are minor rather than major. A minor source often escapes the most protective requirements under the Clean Air Act, which can lead to communities facing even higher, unfair, and unlawful levels of pollution. EPA must revise its minor source permit rules to ensure public notice of all minor source permitting decisions.

In addition, EPA should require states to maintain a mailing list to notify interested persons of draft permits and final permits via email and telephone (for people without email access), for major and minor sources.

4. Create a National Clean Air Monitoring Rule to assure strong monitoring and reporting in Clean Air Act Title V permits.

In addition to the taskforce and to complement its work, as part of Plan EJ2020, EPA should create a national clean air monitoring rule that will include specific requirements for monitoring, reporting, and public disclosure of emissions data for all air permits.

Years ago, EPA acknowledged the need to implement the Act’s enhanced monitoring requirements by setting regulatory requirements, but it has not promulgated a national rule and

instead has proposed to do so rule-by-rule and permit-by-permit.⁴² EPA has often failed to follow through on these proposals. Many rules for specific source categories and many permits continue to lack monitoring requirements sufficient to ensure compliance with emission standards and to provide contemporaneous information on emissions to people exposed to those emissions in the community. In many cases, rules and permits require only a single stack test, once a year (or even less often) that does not reflect ongoing emission levels and does not assure continuous compliance. EPA has previously even taken action to prevent states from implementing supplementary, stronger monitoring requirements, which was struck down in court.⁴³ A national rule is needed to require all permits to include monitoring necessary to assure compliance.

The Clean Air Act requires EPA to set monitoring provisions to assure continuous compliance with emission standards.⁴⁴ The Act also requires emission standards to be continuous and apply at all times.⁴⁵ Many air sources, such as refineries, have a long history of violations, malfunctions, and other exceedances of the standards.⁴⁶ EPA is in the process of removing the unlawful SSM exemption that is included in some current standards, but in view of

⁴² Revisions To Clarify the Scope of Certain Monitoring Requirements for Federal and State Operating Permits Programs, 69 Fed. Reg. 3202 (Jan. 22, 2004) (vacated in *Envtl. Integrity Proj. v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005)); *see also* Enhanced Monitoring Program; Proposed Rule, 58 Fed. Reg. 54,648, 54,661 (Oct. 22, 1993) (“EPA intends to address the enhanced monitoring requirements pursuant to section 114(a)(3) in the requirements developed for such pollutants”; “EPA intends that the general provisions of part 63, MACT standards promulgated by rulemaking in individual subparts of part 63 ... will include, pursuant to the authority in section 114(a)(3) of the Act, appropriate enhanced monitoring provisions.”); *see also* Compliance Assurance Monitoring; Final Rule, 62 Fed. Reg. 54,900, 54,902 (Oct. 22, 1997) (“One method is to establish monitoring as a method for directly determining continuous compliance with applicable requirements. The Agency has adopted this approach in some rulemakings and, as discussed below, is committed to following this approach whenever appropriate in future rulemakings.”).

⁴³ *See, e.g., Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008) (vacating EPA’s prohibition on states from enhancing monitoring requirements, 71 Fed. Reg. 75,422 (Dec. 15, 2006)).

⁴⁴ *See, e.g.,* 42 U.S.C. § 7414(a)(3) (directing that EPA “shall in the case of ... a major stationary source ... require enhanced monitoring and submission of compliance certifications”). In addition, Title V requires permits to contain “conditions as are necessary to assure compliance with applicable requirements of [the Act];” and to include “monitoring ... requirements to assure compliance with the permit terms and conditions.” 42 U.S.C. § 7661c(a), (c). As the Senate Report accompanying the Act summarized: “EPA must require reasonable monitoring ... requirements that are adequate to assure compliance.” S. Rep. No. 101-228, at 350 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3733. Pursuant to its rulemaking authority and duty under Title V, 42 U.S.C. § 7661a(b)(2) and § 7661c(b), EPA has issued regulations in 40 C.F.R. Part 70 that affirm these requirements. 40 C.F.R. § 70.6(a)(3)(i)(B) requires “monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance.” Section 70.6(c)(1) requires all Part 70 permits to contain “testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.”

⁴⁵ 42 U.S.C. § 7602(k); *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008).

⁴⁶ *See, e.g.,* Refineries Comments at 26-27, *supra* n.14 (citing sources).

the record of the industry's reliance on that exemption, effective monitoring is required to assure compliance with the standards at all times. EPA needs to require truly "enhanced monitoring" in a national rule that will assure compliance with all air standards in permits, without further delay. The agency's compliance assurance monitoring rule is outdated and woefully inadequate for this purpose, and does not even purport to cover all sources covered by EPA rules and Title V permits.

EPA's own Enforcement Division is also implementing enhanced monitoring requirements to assure compliance in its refinery enforcement initiative, and EPA must require, at least, what its division is requiring as part of its "next generation compliance" policy.⁴⁷ EPA as a whole should follow this policy and implement the Act's enhanced monitoring requirements in this rulemaking.

In addition, significant advancements in monitoring have occurred in recent years. There are newly available technologies and monitoring techniques to assure compliance with air emission standards. In particular, more time-resolved, higher data-quality-producing fence-line monitoring protocols have been implemented at specific refineries through enforcement suits brought by EPA and negotiations with community groups. As examples, Commenters highlight the EPA consent decrees at Shell Deer Park and BP Whiting, and the community monitoring protocol set up at Chevron Richmond, and attach a summary of some of these monitoring protocols.⁴⁸

To date, EPA has not followed up to create a national monitoring rule addressing the monitoring needs outlined above, or to ensure that permits include such requirements. This is the kind of national program action that would help communities overburdened with air pollution, who are disproportionately communities of color and low-income communities. It is also extremely important for EPA to strengthen and require fence-line monitoring on a case-by-case basis in industry-specific rules and facility-specific enforcement actions. In addition, though, EPA must set national requirements to ensure stronger monitoring reaches more communities faster and in a more efficient way than a rule-by-rule approach allows.

5. Strengthen Monitoring and Reporting Requirements in Rules.

EPA needs to ensure that its rules provide for the best available monitoring, reporting, and public transparency requirements for the purposes of assessing and enforcing compliance. Its rules need to facilitate both government and affected community enforcement, such as through citizen actions, where necessary. Enforcement staff involved in review of permitting programs should be directed to ensure that states are issuing enforceable permits.

To achieve this objective, EPA should perform a systematic review of monitoring and reporting requirements in national standards and issue a publicly available report on the results. With input from the enforcement division and the public, EPA should assess the best available

⁴⁷ *See supra* n.34.

⁴⁸ Earthjustice, EIP *et al.* Letter to NEJAC summarizing fenceline monitoring in place (Apr. 2015); *see also* Refineries Comments, *supra* n.14.

monitoring requirements, such as: continuous emissions monitoring (“CEMS”) and digital camera and video monitoring; or continuous parametric monitoring and frequent stack testing for any pollutants/points where CEMS is not yet available; the best available reporting and transparency requirements: *e.g.*, where electronic reports of data collected go directly to state agencies and EPA, and are made publicly available in or near real time on-line, in a format that the public can review and understand. As part of this review, EPA should also consult the states to see the best practices in use for monitoring, testing, and reporting, as well as air pollution and monitoring control companies and trade associations, such as the Institute of Clean Air Companies (“ICAC”).

To achieve environmental justice objectives, EPA must recognize that community members have a basic right to know what is going into their environment so that they can use this information to better protect their own health and advocate for stronger protection, and so that they can know whether or not a source is in compliance or needs action to bring it into compliance.

To date, EPA has been moving in the opposite direction. For example, as detailed in comments filed in November 2014, EPA has proposed to weaken or forego public participation requirements for various monitoring programs that are particularly critical to people living in disadvantaged communities.⁴⁹ In addition, many rules include, at most, an initial, one-time stack emission test, or very delayed (*i.e.*, 5-year periodic one-time tests). Many rules include only on-site recordkeeping for agency inspection, without the ability for public review or transparency. And in some instances, EPA has eliminated the use of special purpose monitors to assess compliance with the National Ambient Air Quality Standards. EPA has also created biased defaults that assume “no pollution” whenever there is a concern about the quality of data, rather than using that data to trigger the need for areas/sources to prove that data was incorrect. This bias means that areas with poor resources are more likely to be assumed “clean” and there is actually an incentive not to invest in quality assurance/control. These are all serious problems that particularly affect communities with large numbers of sources, including many communities of color and low-income communities. Similar issues plague farmworker and other low-income worker communities, who have little reliable information about the number of acute pesticide and other types of chemical poisonings in the workplace; workers fear retaliation if they voluntarily report and there is no national pesticide incident reporting system or effective chemical safety risk reporting system that could be utilized by clinicians and others who work with farmworkers, chemical plant, refinery, or other workers.

6. Strengthen Air Monitoring Networks, Requirements, and Data.

EPA should invest in additional ambient air monitors. EPA should prioritize siting those monitors in communities identified as hot spots for environmental justice.

To create strong monitoring networks across the country, EPA should incorporate environmental justice principles when reviewing and approving air monitoring network plans. Consistent with the Clean Air Act’s requirements that states assure air quality for all people,

⁴⁹ Comments of Earthjustice & Am. Lung Ass’n at 1-4 (Nov. 10, 2014), EPA-HQ-OAR-2013-0619-0034.

EPA's review of these plans should assess whether a given air monitoring network is producing data that represents what people are breathing in overburdened communities.⁵⁰

In addition to the ambient air monitoring network, EPA should identify low-income communities and communities of color and target continuous, real-time fence-line monitoring at facilities in those communities, in line with Executive Order 12,898.⁵¹ Other "advanced monitoring" practices should be required in environmental justice communities as well, including lower-cost monitors that can be installed in many locations, monitors that produce data in real time, and monitors that present data in ways that a layperson can understand.⁵² Infrequent periodic stack tests are completely insufficient to assess and assure compliance. Further, all monitoring data must be reported to the public in or near real time, in a useable and understandable form, and not just collected for agencies to look at, if they so choose. EPA should also include indoor air quality monitoring under the umbrella of advanced monitoring, so that community members have a fuller understanding of the air quality they experience within their communities.

7. Create a policy to use citizen-collected science and monitoring data within EPA programs, to the greatest extent possible.

Community air monitoring must play an important role in creating strong air quality monitoring networks for low-income communities and communities of color. EPA should prioritize the acceptance of monitoring data that communities produce for themselves, and act as a partner and a resource for communities working to address air quality threats.

To this end, EPA has begun creating projects and grants to provide training and technology to encourage and assist community members to help assess air quality and other environmental problems. Yet, frequently when community members have brought data showing an air pollution problem or air standard exceedance to EPA, EPA has ignored and refused to use these data. As one recent example, community members in Galena Park in Houston, TX provided community monitoring data showing PM_{2.5} exceedances.⁵³ Yet, EPA neither recognized these data as showing a violation that required the area to be found to be in nonattainment for PM_{2.5}, nor performed any independent monitoring or verification to assess whether, with some additional work or data collection on EPA's part, the data could be used to

⁵⁰ See generally 42 U.S.C. § 7407(a).

⁵¹ See Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. at 7,629 ("... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations ...").

⁵² Giles Memo at 1-2, *supra* n.34.

⁵³ Comments of Sierra Club, *et al.* at 4 (Sept. 29, 2014), EPA-HQ-OAR-2012-0918-0295 (submitting data showing that "particulate matter levels are often well above the NAAQS standard in this area," including at a monitor near the Early Head Start building (a childhood development center serving children between 0-3 years of age), reporting recorded particulate matter daily average levels ranging from 7.8 to 44.7 micrograms per cubic meter, with an average value of 20.7).

address the clear problem they showed.⁵⁴ Thus, even though there is clearly a particulate matter problem in the air in this Houston neighborhood, and even though the community spent time and resources to gather air monitoring data to supplement the data EPA already had, the community was not designated as nonattainment and will not receive the health protections that would come from such a designation.

Rather than allow examples like this to continue to occur, EPA must set clear guidelines and a clear policy to recognize citizen science and monitoring, especially when citizen-provided data show environmental problems, toxic exposures, or violations, with input from regions and community groups. EPA should work with the states and local agencies to encourage them to do the same, following best practices. These guidelines should be predicated on an acceptance of the principles of community-based monitoring. As part of these:

- First, EPA should provide clear instruction to community members who will be collecting data on what quality assurance and quality control protocols or steps must be taken for the data to be considered as equally reliable as federally monitored data.
- Second, if citizens provide data that EPA believes do not meet these criteria for any reason, then EPA should presume such data are at least relevant, rather than just ignoring the data as though they were never collected and show nothing. In particular, EPA should direct its staff to ensure that when citizens submit data suggesting there is an environmental problem, then rather than reject or ignore these data, staff must take additional action to attempt to verify those data, show the verification process used, use independent monitoring to see if the data can be replicated using EPA methods, and/or to require a facility to show that the data do not demonstrate a violation or illustrate another environmental problem.

8. Integrate enforcement staff and enforcement expertise into the rulemaking process.

As part of each significant rulemaking in its air, water, waste, pesticides, and other programs, EPA should make it a requirement for rulewriters to request and receive an independent review and report on recommendations from its enforcement division to assess and strengthen monitoring, reporting, and other enforcement-related requirements in the rule. This report should be made available in the rulemaking docket as part of the public comment process. This review and report should both focus on what is needed to strengthen government enforcement and ensure that the rule is also enforceable by affected community members.

In addition, OECA staff should take a bigger role, and rulewriters themselves should be required to consider and address how to assure enforceability and compliance, as discussed above, by looking at: (1) the data that will be collected to assess compliance, if it includes enough detail and will be sufficiently understandable to assess compliance; (2) how it will be made available to the public as well as government agencies; (3) how timely will the data be

⁵⁴ Response to Comments at 56-57 (Dec. 17, 2014), EPA-HQ-OAR-2012-0918-0337.

available, so that corrective action can be taken and there are no concerns that the lag will prevent effective enforcement; and (4) if the rule will assure that a third party reviewing information can actually assess and determine compliance or a violation?

9. Assess and provide EJ outcomes in rulemakings and permitting, not just process.

In some recent public statements, EPA has referred to particular rules as examples of how EPA is implementing environmental justice objectives in rulemaking and other actions. For example, EPA pointed to the pending Refineries air toxics rule under Clean Air Act § 7412.⁵⁵ Commenters do not believe that holding public workshops or hearings, alone, illustrates success for environmental justice objectives. There must be both truly meaningful public participation and input throughout the process, and a commitment to achieving strong substantive outcomes to benefit affected communities.⁵⁶ Most importantly, EPA must consider and evaluate the results of the final rule, according to metrics of actual environmental health protections achieved, pollution reduced, monitoring and enforceability mechanisms strengthened, and must do so by comparison with the best available metrics, as discussed above, to determine whether or not it has actually achieved environmental justice objectives in a rulemaking. For the refineries rule, those are the metrics community members will be using, to assess whether indeed EPA has fulfilled its objective to provide environmental justice, not the number of public hearings or workshops held.

Regarding regulations and permitting, EPA should direct each regulatory and permitting program office or division to provide an audit and a report on the top ways in which the program office or division could strengthen the substantive outcomes for vulnerable communities in the work that it does, and publish those reports. Commenters highlight especially the concerns about how a history of problems with zoning or lack thereof have caused particularly disproportionate siting and pollution burdens for communities of color and low-income communities; the permitting process must reduce these disparities, not make them worse or ignore them.⁵⁷

10. OEJ should be given authority to set performance measures and evaluate EJ progress annually, as well as give advice and feedback to program staff.

On the metrics and objectives EPA chooses to establish for Plan EJ 2020, EPA should create a clear ongoing role for the Office of Environmental Justice to provide the particular expertise they have on EPA's program work and give input on ways that EPA's actions must be strengthened substantively to assure environmental justice. This role must include not only

⁵⁵ EPA, *Guidance on Considering Env'tl. Justice During the Development of Regulatory Actions* at E-2 (May 2015), available at <http://www.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-final.pdf>.

⁵⁶ See, e.g., Owley, *supra* n.24.

⁵⁷ NEJAC, *Recommendations Regarding EPA Activities to Promote Environmental Justice in the Permit Application Process* (May 2013), available at <http://www.epa.gov/environmentaljustice/resources/publications/nejac/2013-ej-in-permitting.pdf>.

helping to connect community stakeholders into EPA's work in terms of the process, but also evaluating and providing feedback to program staff on substance and concrete results in achieving environmental justice objectives. In addition, OEJ, in consultation with the National Environmental Justice Advisory Council, should have authority for reviewing, auditing, and providing a public progress report that is independent from EPA program staff's self-evaluations, and is included in EPA's regular reports. OEJ should directly seek affected community members' input on results achieved as part of evaluating progress on EPA's environmental justice responsibilities and objectives from community groups. Such audits and reports are no substitute for action, but action is unlikely to happen unless EPA commits to and also has an independent evaluation of whether it is indeed following through, and has accomplished real results for communities, that the communities themselves realize as progress on environmental health and environmental justice.

In addition, Commenters also urge EPA to implement NEJAC's recommendations on permitting and a long list of other issues – including recommendations submitted as part of Plan EJ2014 that have not been implemented.⁵⁸

11. Identify additional mobile source regulatory measures to protect disproportionately impacted communities.

Evidence suggests low-income and minority populations disproportionately reside near heavily trafficked roadways, and thus face greater exposure to traffic-related air pollution.⁵⁹ These concerns can be even more pronounced in communities adjacent to freight hubs (*e.g.*, railyards, distribution centers, ports). While some pollution issues can be addressed through better zoning, it is imperative to do more to protect communities currently facing the health threats from transportation-related pollution. Thus, we recommend that EPA explore additional regulations and guidance to ensure transportation-related pollution is cleaned up in communities, including measures to clean up freight equipment.

III. INTERAGENCY WORK

States: EPA must strengthen oversight of state and local agencies administering federal environmental laws and using delegated authority to issue permits, lead enforcement, and take other actions. Many permitting and enforcement decisions are made at the state and local levels. Without stronger EPA oversight, communities have not been afforded the full protection that national standards and federal regulations are supposed to provide. As part of Plan EJ2020, EPA should prioritize state and local oversight to lift up the best practices in some states and local areas in permitting, rulemaking, and enforcement, and to end the worst practices in areas where communities feel completely alone in handling serious environmental and health concerns. EPA

⁵⁸ See NEJAC, *Advice and Recommendations*, <http://www.epa.gov/environmentaljustice/nejac/recommendations.html> (last updated May 19, 2015); see also NEJAC, NEJAC Comments to EPA Plan EJ 2014 (Apr. 2011), available at <http://www.epa.gov/environmentaljustice/resources/publications/nejac/plan-ej-2014-comments-0511.pdf>.

⁵⁹ See D. Brugge, *et al.*, Developing Community-Level Policy and Practice to Reduce Traffic-Related Air Pollution Exposure, 8 *Env'tl. Justice* 95, 96-97 (June 15, 2015), available at <http://online.liebertpub.com/doi/full/10.1089/env.2015.0007>.

must use its full authority, including disapproving state programs or withdrawing delegation, whenever necessary to ensure that communities do not lose the basic protections federal environmental laws are supposed to provide. In addition, EPA should help make up the gap where state and local government agencies and laws, such as a lack of appropriate zoning or a history of discriminatory zoning, create particular concerns for communities of color and low-income communities.

Under the Clean Water Act, for years communities in Appalachia have faced state refusals to implement basic requirements to assure water quality, including the mandate to translate narrative water quality standards into permit effluent limitations. EPA has documented many of these problems and the fact that the impacts of these inadequate and unlawful permits fall disproportionately on low-income communities in multiple documents, including reports and guidance.⁶⁰ Yet, EPA still has not exercised the full oversight and authority needed to end this problem – while communities which are disproportionately low-income continue to suffer from the years of devastation to waters, wildlife, and public health associated with mountaintop removal mining.⁶¹

Longstanding problems with Texas’s air permitting programs provide well-known examples that EPA must address there and in other states, and on which EPA has received comments in recent years.⁶²

As another example, many parts of the country are currently facing potential increases in use of oil and gas transportation and infrastructure developments located in close proximity to communities with significant environmental justice concerns. For example, in Albany, New York, Global Companies offloads crude oil from rail cars into storage tanks and then transfers the oil to ships and barges on the Hudson River. Recent permitting actions by the New York

⁶⁰ See, e.g., EPA, *Review of Clean Water Act § 402 Permitting for Surface Coal Mines by Appalachian States: Findings & Recommendations* (July 13, 2010), available at http://water.epa.gov/polwaste/npdes/upload/Final_Appalachian_Mining_PQR_07-13-10.pdf; EPA, *Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order* at 4 (July 21, 2011) (“The environmental legacy of mining operations in the Appalachian region is far-reaching.”) (discussing deforestation and adverse impacts on aquatic ecosystems) (“July 2011 Guidance”); EPA Office of Research & Development Final Report: *The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields* (May 27, 2011), available at http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=501593; EPA, *Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia* at 94-97 (Jan. 13, 2011) (“Spruce Determination”), <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/spruce.cfm>.

⁶¹ See, e.g., Environmental Justice Petition for EPA Action Under Executive Order 12898 And All Other Legal Authorities, filed by Coal River Mountain Watch *et al.* (2009); Petition of 19 Local, Regional and National Organizations to EPA for Rulemaking to Set Water Quality Standards to Protect Appalachian Waters from Mining Waste and Harmful Levels of Conductivity (May 6, 2013), available at <http://earthjustice.org/documents/legal-document/pdf/community-petition-to-epa-for-rulemaking-on-mountaintop-removal-pollution-water-quality-standard-6>.

⁶² See, e.g., Comments of Air Alliance Houston, *et al.* (submitted on Plan EJ2020).

State Department of Environmental Conservation (“DEC”) have significantly increased rail and barge traffic and increased air emissions at the terminal, placing residents of the Ezra Prentice Homes at risk, yet DEC initially failed to conduct an appropriate environmental review of the project and failed to follow the required procedures for projects that could impact environmental justice communities. This is also a serious problem in other parts of the country, and we also highlight as an example the report from California on “blast zone” crude transport issues impacting communities of color.⁶³

Another example is North Carolina’s failure to address the impacts of industrial animal product in eastern North Carolina, where the density of hog and, more recently, poultry operations in low-income African American, Latino, and Native American communities has affected quality of life, waterways, and a range of health indicators. For years, community members in eastern North Carolina complained to EPA and the state Department of Environment and Natural Resources about the adverse effects of the industry on their health and environment and implored the agencies to provide greater protection to no avail. In 2014 community groups filed a civil rights complaint with EPA pursuant to Title VI of the Civil Rights Act of 1964, which might have been avoided had the state and EPA taken action to resolve the problem.

Federal: Under the Federal Interagency Working group, EPA should continue to work with other agencies and White House Offices to advance environmental justice, including through achieving results for the identified hot spot communities and areas with environmental justice concerns, as discussed earlier. Federal agencies, especially HHS, including the CDC, NIEHS, should work to assure better data is collected and available on health status and health concerns at the census tract level. These data are important for communities and EPA staff to have to direct and assess the success of resources applied to promote environmental justice. In addition, commenters are aware that some agencies (*e.g.*, U.S. Army Corps of Engineers) appear to have no environmental justice office or clear objectives of any kind. EPA should assist all agencies in implementing the Executive Order. For example, EPA should provide guidance to HUD and other agencies to consider when spending public funds, such as on low-income housing, which should be built in healthy and environmentally accessible areas – and not next to refineries, power plants, or other industrial sources of air and water pollution. As another example, EPA should ensure other federal agencies are vigilant in monitoring transportation projects, including freight expansion projects, which can exact a large toll on communities.

IV. EPA SHOULD BUILD TITLE VI COMPLIANCE AND ENFORCEMENT INTO ALL ASPECTS OF AGENCY OPERATIONS AND INCLUDE TITLE VI ACTION ITEMS IN PLAN EJ2020.

EPA has separated Title VI enforcement from its Plan EJ2020 process. Commenters urge EPA to set Title VI commitments as part of Plan EJ2020 for the following reasons.

⁶³ Communities for a Better Environment, *Crude Injustice on the Rails: Race and the Disparate Risk from Oil Trains in California* (June 2015), available at <http://www.foresthethics.org/sites/foresthethics.huang.radicaldesigns.org/files/Crude-Injustice-on-the-Rails.pdf>.

Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d – 2000d-7, prohibits recipients of federal financial assistance from discriminating on the basis of race, color or national origin in any of their programs or activities. EPA, like other federal agencies, enacted regulations pursuant to Title VI. 40 C.F.R. Part 7. Title VI and its regulations prohibit intentional forms of discrimination as well as actions, policies, and practices with unjustified discriminatory impacts, regardless of intent. In 2001, the Supreme Court ruled in *Alexander v. Sandoval* that aggrieved persons have no private right of action to enforce Title VI unless they can demonstrate intent.⁶⁴ As a result, people living in environmental justice communities that are environmentally overburdened with toxic releases rely on EPA to require compliance and enforce the law. Without an effective Title VI compliance and enforcement program at EPA, the law is an empty vessel. Unfortunately, EPA’s Title VI program has been notoriously inadequate.⁶⁵

The Plan EJ2020 Action Agenda Framework again relegates EPA’s external civil rights compliance and enforcement program to consideration on another day. Although we support the development of a long-term OCR Strategic Plan, Plan EJ2020 should recognize that Title VI of the Civil Rights of 1964 is one of the cornerstone legal tools for addressing issues of environmental justice⁶⁶ and build specific action items for Title VI compliance and enforcement into all aspects of EPA’s operations, especially as they relate to permits, delegation of authority, enforcement, and program approvals.⁶⁷

Relegating Title VI compliance and enforcement to later and separate treatment replicates the mistake made when Plan EJ 2014 failed to provide detail on actions to improve its civil rights program and ultimately released “Draft Supplement: Advancing Environmental Justice Through Title VI of the Civil Rights Act.” If, indeed, EPA is committed to improving its civil rights program and recognizing that enforcement of Title VI of the Civil Rights Act of 1964 is an important tool in EPA’s efforts to address discrimination and advance environmental justice, the Plan EJ2020 Action Agenda must include a strong and coordinated approach that identifies goals, actions, and metrics to assess performance and to send a clear message to EPA staff and stakeholders. Specifically, the Plan EJ2020 Action Agenda should address the following issues:

⁶⁴ 532 U.S. 275, 279-86 (2001).

⁶⁵ See, e.g., Deloitte Consulting LLP, *Final Report: Evaluation of the EPA Office of Civil Rights* at 2 (Mar. 21, 2011), available at http://epa.gov/epahome/ocr-statement/epa-ocr_20110321_finalreport.pdf (citing a “record of poor performance”).

⁶⁶ See Dept. of Justice, *Dept. of Justice Guidance Concerning Environmental Justice* at 2 (Dec. 3, 2014), available at http://www.justice.gov/sites/default/files/ej/pages/attachments/2014/12/19/doj_guidance_concerning_ej.pdf.

⁶⁷ Notably, the audit conducted by Deloitte to assess EPA’s Office of Civil Rights (“OCR”) specifically criticized EPA for operating OCR in “an insular fashion” that limited its effectiveness and for failing to provide clarity regarding internally or externally regarding expectations. Deloitte, *Evaluation of the EPA Office of Civil Rights* at 2, *supra* n.65. Failing again to address these issues in the Plan EJ2020 Action Agenda misses yet another opportunity to address these concerns.

- **Process:** EPA must review and modify policies and practices governing communications with complainants and community-based stakeholders in the Title VI enforcement process, both to ensure a more active role for complainants and community-based stakeholders in the enforcement process and to bring Title VI enforcement into line with environmental justice principles and EPA efforts to encourage “meaningful engagement” of overburdened communities in permitting and other decision-making. Although completion of the policy paper “Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process” is a step forward, the Plan EJ2020 Action Agenda should include specific goals, activities, and metrics to ensure changes in practice, including, for example, training for EPA staff and reform of policies that limit interactions of staff with stakeholders.
- **Transparency:** EPA still fails to make up-to-date information about Title VI enforcement readily available, including, for example, a docket with links to complaints, resolution agreements, and other official documents on EPA’s website. Although this project is underway, the EJ2020 Action Plan should include goals, activities and metrics to ensure that this project crosses the finish line and then is maintained, reviewed, and improved over time.
- **Strengthen Compliance:** EPA should strengthen its pre-award and post-award compliance review programs, including the collection and review of relevant information. EPA has recently modified Form 4700-4, Preaward Compliance Review Report For All Applicants and Recipients Requesting Federal Financial Assistance, to determine whether applicants for federal financial assistance are developing programs and activities on a non-discriminatory basis. Form 4700-4 is a start, but is insufficient to ensure compliance with Title VI. EPA should require recipients of federal financial assistance to submit a detailed analysis of how it complies with Title VI and EPA’s implementing regulations. State environmental agencies that receive funding from EPA, for example, should provide detailed information on how the agency’s permitting, enforcement, and rulemaking requirements comply. Such documents should be made publicly available for input, and should be reviewed by EPA as part of pre-award and post-award compliance reviews.
- **Legal Standards:** EPA’s second policy paper, “Adversity and Compliance with Environmental Health Based Thresholds,”⁶⁸ is languishing. Providing clarity on the standard for determining adversity in a disparate impact case is a necessary though insufficient step toward revision and finalization of guidance on legal standards. The EJ2020 Action Plan should provide a clear and measurable path forward to removing the “rebuttable presumption” that compliance with health standards is a sufficient defense against a civil rights claim and resolving other

⁶⁸ EPA, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health Based Thresholds*, (Jan. 24, 2013), available at http://www.epa.gov/civilrights/docs/pdf/t6.adversity_paper1.24.13.pdf.

uncertainties around the applicable standards by finalizing improved guidance documents.

- **The Backlog:** The EJ 2020 Action Plan should establish activities and a timeline by which EPA will resolve all pending Title VI civil rights complaints in a timely way – with the involvement of complainants and their attorneys and with creative and careful attention to the underlying issues. It is unconscionable that complaints have been languishing with the Office of Civil Rights, in some cases for more than a decade, reinforcing concerns about the integrity of the process. Given EPA’s breach of responsibility and the delay experienced by complainants seeking justice, the agency has a duty not just to complete the investigations, but to address claims raised in the complaints.
- **Capacity & Infrastructure:** The EJ 2020 Action Plan should ensure that the organizational dynamics and challenges outlined in the Deloitte report are fully addressed and contain clear goals, activities and metrics to ensure that scarce agency resources are preserved at all stages of civil rights compliance and enforcement work.
- **Coordination:** The EJ 2020 Action Plan must set forth goals, activities and metrics for EPA’s role in coordinating Title VI compliance and enforcement with delegated programs, EPA’s regional programs, and other federal agencies. Among other things, EPA must ensure that states submit Title VI plans on an annual basis and should require that funding recipients submit Title VI plans for review.
- **Resolution and Remedies:** The EJ 2020 Action Plan must include specific goals, activities and metrics for reform of its practice to ensure that (a) the alternative dispute resolution program provides sufficient technical assistance to level the playing field for complainants, and (b) when EPA enters a voluntary compliance agreement, remedial measures protect communities and secure Title VI compliance.

Finally, the EJ2020 Action Plan must ensure compliance and enforcement of the prohibition against national origin discrimination affecting LEP persons. Among other things, to comply with the Department of Justice’s Title VI requirements pursuant to Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” EPA must finalize its internal LEP plan, and ensure the inclusion of native and indigenous languages as discussed above.⁶⁹

⁶⁹ See LEP.gov, *Executive Order 13166*, <http://www.lep.gov/13166/eo13166.html> (“The Executive Order requires Federal agencies to examine the services they provide, identify any need for services to those with limited English proficiency (LEP), and develop and implement a system to provide those services so LEP persons can have meaningful access to them. It is expected that agency plans will provide for such meaningful access consistent with, and without unduly burdening, the fundamental mission of the agency.

V. CONCLUSION

Commenters appreciate EPA's time considering these comments and would be glad to provide further information if helpful.

Sincerely,

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The Executive Order also requires that the Federal agencies work to ensure that recipients of Federal financial assistance provide meaningful access to their LEP applicants and beneficiaries.”).

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September 30, 2015

VIA E-MAIL

The Honorable Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Ms. Gupta:

We are grateful for the chance to speak with you on September 11 about the Department's efforts to promote fair and effective implementation of non-discrimination policies throughout the federal government. In particular, we appreciate your interest in the Environmental Protection Agency's Office of Civil Rights and its troubled history of Title VI enforcement. EPA's inaction in response to Title VI complaints continues to startle and discourage communities across the country, for whom an administrative complaint is one of the few options available to remedy the discriminatory impacts of agency actions. While we applaud EPA's recent work to modernize OCR, add capacity, improve pre- and post-award compliance reviews, and broadly build a "model civil rights program," we recognize that these steps were taken in response to litigation and external pressure, most notably the Ninth Circuit's *Rosemere* decision; reports by organizations such as EPA's Office of the Inspector General, the Government Accountability Office, and Deloitte Consulting LLP; and litigation targeting EPA's consistent pattern of delay, unlawful withholding of agency action, and arbitrary and capricious settlement of disputes. We further note that none of these changes will improve the lived experience of environmental justice communities until EPA moves beyond staffing and programmatic steps, which represent the low-hanging fruit of agency reform.

To achieve excellence as a civil rights program, EPA OCR must treat Title VI complainants as full partners during a preliminary investigation, give communities the same due process considerations that are carefully communicated to potential violators, timely administer complaints, update its understanding of "adverse" and "disparate" impacts to reflect the current science of cumulative impacts, multiple stressors, and social and economic conditions, finalize and apply clear legal standards, value participatory and other community-driven research as potential inputs to the investigative process, adopt a stronger stance during voluntary compliance negotiations with federal fund recipients, and utilize its affirmative authority. To that end, we pledge to work with you, in the spirit of DOJ's oversight and coordination of federal Title VI programs, to ensure that these steps are taken

under the current Administration. Reiterating recommendations from our presentation at the September 11th meeting, we would like to see DOJ address the following:

- DOJ's clearance authority for Title VI rules, regulations, orders, guidance, and other documents: *DOJ should use its authority to identify EPA OCR documents, including the Draft Revised Guidance (2000), that are inadequate, unclear, or inconsistent; moreover, DOJ should ensure that EPA OCR is not rolling back regulatory timelines for responding to complaints;*
- DOJ's Title VI Legal Manual: *Updates to the Manual should stress elimination of EPA OCR's rebuttable presumption of no adverse impact when a recipient's action does not result in violation of an existing environmental standard;*
- DOJ's oversight and coordination of civil rights programs under Executive Order 12250: *DOJ should issue an EO 12250 Directive that focuses on the preliminary investigation of Title VI complaints by EPA OCR and other agencies, including the use of non-scientific factors to demonstrate adverse impact;*
- DOJ's coordination of civil rights programs: *DOJ should coordinate Title VI investigations and enforcement actions where there is a need for several agencies to be involved to provide an adequate remedial approach (e.g. Corpus Christi);*
- DOJ's Title VI coordination regulations: *DOJ should amend the regulations to clarify the kinds of data DOJ should collect from EPA to encourage better tracking of compliance by federal fund recipients, in annual agency implementation plans and by other means;*
- DOJ's affirmative litigation opportunities under Title VI: *DOJ should encourage EPA to (a) adopt a stronger position during voluntary compliance negotiations with recipients and (b) refer complaints of unique importance, precedential value, or complexity to DOJ for enforcement;*
- DOJ's ability to initiate its own civil litigation on behalf of agencies: *DOJ should explore the possibility of adopting a shared enforcement structure or encourage new models of joint investigation (e.g., EPA/DOT) of Title VI complaints;*
- DOJ's interest in resolving EPA OCR's Title VI complaint backlog: *DOJ should provide oversight and technical assistance to bring to bear any tools or resources that we could help DOJ develop to improve the efficiency and fairness of complaint processing at EPA OCR and/or resolution of open investigations that would address the underlying issues;*
- DOJ's interagency coordination work: *We are interested in assisting the Environmental Justice Interagency Working Group and involving new partners (e.g., the Community Relations Service) to strengthen the role of Title VI complainants during both the investigation and dispute resolution stages;*
- DOJ's interagency coordination work: *DOJ should work with EPA, the National Parks Service, and the Army Corps of Engineers to address disparities in access to parks and open space*

in environmental justice, health, and compliance analysis as applied to federal programs or activities under Executive Order 12898, and as applied to federally-funded programs and activities under Title VI; and

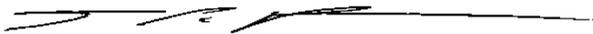
- Other steps: We hope to explore other steps that can be taken to *resolve the lack of clarity of EPA OCR's standards for determining discriminatory impacts; and to update EPA OCR's understanding of the current science of cumulative impacts, multiple stressors, socio-economic conditions, and other community impacts.*

In order to move forward with these recommendations, we would like to propose the following preliminary action items for DOJ to undertake:

- Setting up a meeting with the Title VI work group of the Environmental Justice Interagency Working Group where some of the above mentioned issues can be discussed;
- Connecting us to the Community Relations Service of DOJ to see whether CRS can play a role in addressing environmental justice matters before those matters become Title VI complaints;
- Setting up a joint meeting with DOJ, EPA, the National Parks Service, the Army Corps of Engineers, and community groups to address environmental justice and disparities in access to parks and open space;
- Convening a meeting with yourself and your staff along with EPA Administrator Gina McCarthy and appropriate members of her staff to discuss the concerns about EPA's Title VI program that we raised during our September 11th meeting; and
- Convening a follow-up meeting to discuss implementation of these recommendations among staff at Coordination and Compliance, EPA OCR, and members of the undersigned and our partners.

We thank you for your attention to these pressing concerns. We take heart in the fact that you are not satisfied with the pace of reform at agencies such as EPA. And we acknowledge that we share responsibility in that there are a number of roles we can play to help address these issues. To that end, we look forward to exploring the above issues with you and your team in greater detail in the near future.

Sincerely yours,



Gregg P. Macey, Ph.D., JD
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Submitted on behalf of:

Marc Brenman, IDARE LLC
Amy Laura Cahn, Public Interest Law Center of Philadelphia
Michael Churchill, Public Interest Law Center of Philadelphia
Ariel Collins, The City Project
Veronica Eady, Conservation Law Foundation
Steven Fischbach, Rhode Island Legal Services
Erin Gaines, Texas RioGrande Legal Aid
Robert García, The City Project
Megan Haberle, Poverty and Race Research Action Council
Kelly Haragan, University of Texas Environmental Law Clinic
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Sara E. Imperiale, Natural Resources Defense Council
Marianne Engelman Lado, Earthjustice
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Vernice Miller-Travis, Skeo Solutions/Maryland Commission on Environmental Justice
and Sustainable Communities
Brent Newell, Center on Race, Poverty & the Environment
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Environment and John S. Watson Institute for Public Policy at Thomas Edison State
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Omega Wilson, West End Revitalization Association

cc: Daria Neal, Department of Justice, Civil Rights Division
Cynthia Ferguson, Department of Justice, Environment and Natural Resources
Division

Ashurst Bar/Smith Community Organization * Black Belt Citizens Fighting for Peace and Justice * Center on Race, Poverty & the Environment * The City Project * Community Science Institute * Conservation Law Foundation * Crag Law Center * Earthjustice * Farmworker Justice * GASP * Human Synergy Works * Lawyers' Committee for Civil Rights Under Law * Maurice and Jane Sugar Law Center for Economic and Social Justice * Natural Resources Defense Council * New Mexico Environmental Law Center * Original United Citizens of SW Detroit * Public Interest Law Center * Sierra Club * UNC Center for Civil Rights * WE ACT * West End Revitalization Association
Marc Brenman * Gregg P. Macey * Vernice Miller-Travis

October 27, 2015

Gina McCarthy
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By First Class Mail and Email

Re: External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020

Dear Administrator McCarthy and Office of Civil Rights,

Below please find comments on the draft "External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020," (the "Strategic Plan"). These comments are identical in substance to the letter we submitted yesterday, but we write again to add the names of additional signatories.

The undersigned organizations and individuals submit these Comments to emphasize the critical importance of Title VI enforcement in communities across the

country and to express appreciation for the new energy that the Administration has brought to the Office of Civil Rights (“OCR”). At the same time, given the long history of poor performance by the agency in fulfilling its statutory responsibility to enforce anti-discrimination laws, we strongly oppose rulemaking that would weaken EPA’s accountability, including changes that would remove regulatory deadlines. The Strategic Plan also fails to address some critical elements necessary for a strong enforcement program and to bring the program into line with principles of environmental justice. These comments provide more detail and identify additional goals and benchmarks that should be incorporated in the final Strategic Plan.

A. An Effective Title VI Program Requires Major Reform.

OCR’s poor performance historically is well-known and well-documented,¹ and the impact of this poor performance on OCR’s credibility has been significant. The undersigned organizations and individuals live and work in, represent, and partner with environmental justice communities that have waited too long for OCR to prevent and address racial and ethnic disparities in the distribution of environmental contaminants and health hazards, as well as disparities in the availability of environmental benefits. The history of EPA’s failure to enforce Title VI – either through the complaint mechanism or with its affirmative authority – has created gaping holes in civil rights compliance, and OCR’s inaction across multiple Administrations telegraphed the message that recipients of EPA funding need not comply with Title VI nor use their legal authorities or expertise to eliminate, reduce or avoid racially disparate impacts. In the words of a recent report by the Center for Public Integrity:

Time and again..., communities of color living in the shadows of sewage plants, incinerators, steel mills, landfills and other industrial facilities across the country — from Baton Rouge to Syracuse, Phoenix to Chapel Hill — have found their claims denied by the EPA’s civil-rights office..... In its 22-year history of processing environmental discrimination complaints, the office has never once made a formal finding of a Title VI violation.²

EPA has been well aware of this dynamic, as highlighted by the candor of a high ranking state official, who noted in 2000 that EPA’s Draft Title VI guidance was a “tiger without teeth” and that “he was not going to pay particular attention to it.”³ With this history as background, we applaud real steps to make OCR, in the words of the Strategic Plan, “a

¹ See, e.g., Yue Qiu & Talia Buford, *Decades of Inaction*, Ctr. for Pub. Integrity (Aug. 3, 2015), <http://goo.gl/khzht0> (cataloguing disposition of complaints over 17 year period); Deloitte Consulting, *Evaluation of the EPA Office of Civil Rights 2* (March 21, 2011), available at <https://goo.gl/CmkrrZ> (describing OCR’s “record of poor performance”).

² Kristen Lombardi, Talia Buford & Ronnie Greene, *Environmental racism exists and the EPA is one reason why*, Ctr. for Pub. Integrity (Aug. 3, 2015), <http://goo.gl/cUV2Lg>

³ 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).

model civil rights program worthy of replication.”⁴ Ultimately, the success of reform efforts will be judged by their efficacy in preventing and addressing discriminatory policies. Until OCR exercises its authority, Title VI enforcement will continue to be illusory.

B. The Strategic Goals Envisioned by the Strategic Plan – Enhancing Docket Management, Developing a Proactive Compliance Program, and Strengthening OCR’s Workforce – Are Needed to Improve EPA’s Civil Rights Enforcement.

The Strategic Plan emphasizes concrete steps both to reform the complaint process and to develop a compliance program. Both are needed. A letter dated November 5, 2013 from many of the signatories to Administrator McCarthy outlined key issues that require attention from the agency, with recommended steps for addressing each issue.⁵

- “Process: We recommend that EPA modify policies and practices governing communications with complainants and community-based stakeholders in the Title VI enforcement process, both to ensure a more active role for complainants and community-based stakeholders in the Title VI enforcement process, and to bring Title VI enforcement into line with environmental justice principles and EPA efforts to encourage “meaningful engagement” of overburdened communities in permitting and other decision-making.
- “Transparency: We recommend that EPA make up-to-date information about Title VI enforcement more readily available, including, for example, maintaining a docket with links to complaints, resolution agreements, and other official documents on EPA’s website.
- “Legal standards: We recommend that EPA revise standards – including not only the standard for determining adversity but also issues such as what constitutes sufficient justification – that are set forth in the *Draft Revised Guidance* and related documents and, also, resolve uncertainty around the applicable standards by finalizing improved guidance documents.
- “The backlog: We recommend that EPA establish a date by which the EPA will complete its investigations and resolve all pending Title VI civil rights complaints, with the involvement of complainants and their attorneys.
- “Capacity & Infrastructure: EPA must ensure that the organizational dynamics and challenges outlined in the Deloitte report are fully addressed. EPA should also consider how it can preserve scarce agency resources during the preliminary investigation of a complaint.

⁴ Strategic Plan, at 3.

⁵ Letter from Ctr. for Race, Poverty & the Env’t. et al. to Adm’r McCarthy (November 5, 2013), at 2-3.

- “Coordination: EPA must take the lead on coordinating Title VI compliance and enforcement with delegated programs, EPA’s regional programs, and other federal agencies.
- “Remedies: EPA must ensure that when it enters into a voluntary compliance agreement, remedial measures protect communities and secure Title VI compliance.”

Although, as described below, the steps outlined in the Strategic Plan do not address all of these issues, EPA’s emphasis on initiating compliance reviews, enhancing data collection, developing and utilizing a case resolution manual consistent with federal best practices, increasing transparency, and improving training are each responsive to problems identified in the past.

To highlight a few examples, Goal 1 Benchmark 6 states “OCR will increase transparency and accountability by posting its Case Resolution Manual, settlement agreements, and final decisions on its public website,” which is responsive to the need for more transparency. The final Strategic Plan should, however, include a commitment to post all public documents associated with OCR’s investigations and not limit transparency to the Manual, settlement agreements and final decisions. Environmental justice communities seeking information about prior complaints or previous Title VI enforcement efforts should not each be required to request such basic information under the Freedom of Information Act, which is both burdensome for communities and inefficient for EPA. OCR should publish complaints, communications regarding final case decisions, and all other public documents in a timely way.⁶ The final Strategic Plan should include a timeline for achieving this and other goals, as well as timelines for updating information on the website.

Goal 1 Benchmark 4, which calls for “a comprehensive investigative, policy and legal training curriculum” for OCR staff, and Goal 3, which includes benchmarks to strengthen OCR’s workforce, are responsive to the need to build capacity and infrastructure. In addition, Goal 1, Benchmark 1, which commits OCR to developing and posting a Case Resolution Manual to include standard operating procedures, a strategic case assessment plan, and templates, is responsive to recommendations to improve capacity and infrastructure, improve transparency, and to process complaints in a timely way.

The Strategic Plan’s emphasis on developing a proactive compliance program is also consistent with EPA’s authority and responsibilities under Title VI. Goal 2 Benchmark 1, for example, calls for strengthening compliance reviews. The Strategic Plan fails to explain what criteria will be applied to determine when OCR will initiate compliance reviews. Moreover, the Plan should include a benchmark for integrating OCR’s complaint and investigation efforts with the affirmative proactive compliance

⁶ Notably, the Center for Public Integrity was able to post such materials, which they obtained through FOIA, within a relatively short time frame. See Lombardi, Buford & Greene, *supra* note 2. Stakeholders should not have to rely, however, on the Center rather than EPA for updated information.

program so that complaints that may provide a reasonable basis for belief that there may be discrimination will trigger compliance reviews even if the complaint itself might not meet jurisdictional requirements. OCR simply fails to serve justice when it dismisses a complaint on jurisdictional grounds and ignores discrimination. Instead, EPA should initiate a compliance review if it has reason to believe that discrimination may be occurring in a program or activity that receives EPA funding.⁷

C. Any Re-Evaluation of EPA's Title VI Regulations Should Strengthen, Not Weaken EPA's Title VI Enforcement Program; in Particular, EPA Should Not Remove Regulatory Deadlines for Action.

In light of EPA's poor record of case management, signatories strongly oppose the proposal to remove deadlines from EPA's Title VI regulations, which would weaken rather than strengthen EPA's enforcement program and is based on faulty premises.

The regulations currently require that OCR "promptly investigate all complaints ... unless the complainant and the party complained against agree to a delay pending settlement negotiations."⁸ In addition, the regulations provide a set of deadlines for the investigation: EPA must notify the complainant and recipient of the agency's receipt of the complaint within 5 calendar days,⁹ complete its jurisdictional review within 20 calendar days of the notice,¹⁰ and complete its preliminary investigation and notify the recipient in writing of preliminary findings, recommendations (if any) for achieving voluntary compliance, and information about the recipient's right to engage in voluntary compliance negotiations, within 180 days from the start of a compliance review or a complaint investigation.¹¹

The Strategic Plan states that EPA will engage in rulemaking "that will reaffirm EPA's discretion to determine how to ensure the prompt, effective, and efficient resolution of its cases and reaffirm EPA's enforcement discretion to tailor its approach to complaints to match their complexity, scope and nature." To be clear, EPA has in the past simply failed to be "prompt, effective or efficient" in resolution of its cases – and not because the timelines were a barrier. To our knowledge, never has a complainant sued EPA because the agency was one day, one week, one month, or even one year beyond its regulatory deadlines. Neither EPA's regulations, nor complainants, nor recipients have bound the agency in a rigid or inflexible way to its deadlines. A recent investigation by the Center for Public Integrity found the following:

[A Review of] 265 complaints filed from 1996 to 2013 shows that the EPA has failed to adhere to its own timelines: On average, the office took 350 days to decide whether to accept a complaint and allowed cases to

⁷ See 40 C.F.R. § 7.115(a) (2010) (OCR may conduct compliance reviews "when it has reason to believe that discrimination may be occurring....").

⁸ 40 C.F.R. § 7.120 (2010).

⁹ 40 C.F.R. § 7.120(c) (2010).

¹⁰ 40 C.F.R. § 7.120(d)(1)(i) (2010).

¹¹ 40 C.F.R. § 7.115(c) (2010).

stretch 624 days from start to finish. A consultant's report, which examined cases from 1993 to 2010, found that the agency accepted or rejected just 6 percent within the allotted time period. Half took a year or more to be adjudicated.¹²

And yet the regulatory deadlines have been the sole legal recourse for communities to hold what has been a negligent agency accountable. Removing the deadlines from the text of the applicable regulations will only weaken pressure on the agency to conduct investigations and manage cases in a "prompt, effective, and efficient" way.

The Strategic Plan glosses over its proposal to remove regulatory deadlines with two interconnected arguments – first, that the change would bring EPA into line with other agencies and, second, that current regulatory deadlines are somehow infeasible in light of the "inherent scientific complexity associated with determining how populations are impacted by environmental pollutants and the number of discrimination allegations and theories that may be asserted in any one complaint...."¹³

EPA's argument about alignment with other federal agencies loses sight of the context: after more than four decades of inaction, it is time for accountability. While current efforts are appreciated, strategic plans don't compel action over time and don't create mandatory duties. By comparison, regulatory deadlines can only be changed after notice and comment rulemaking. By removing regulatory deadlines now, EPA would weaken much needed accountability into the future, as administrations and priorities change over time. Moreover, the deadlines in EPA's regulations are already consistent with policies and practices in sister agencies.¹⁴

EPA's failure to conduct investigations in a timely way provides no ground for confidence that the agency would exercise the even greater discretion afforded by revising the regulations in a "prompt, effective or efficient" way. In 2005, for example, Rosemere Neighborhood Association filed suit against EPA seeking to compel OCR to make its initial jurisdictional determination – that is, to accept or reject its complaint – on a claim of retaliation that had been filed 18 months beforehand.¹⁵ OCR notified the complainants of its determination approximately six weeks after the litigation was filed and then moved to dismiss the case as moot.¹⁶ The court noted, however, that EPA's noncompliance with regulatory deadlines was pervasive:

¹² Talia Buford, *Thirteen years and counting: anatomy of an EPA civil rights investigation*, Ctr. for Pub. Integrity (Aug. 7, 2015), <http://goo.gl/qGpYBS>; see also Deloitte Consulting, *supra* note 1.

¹³ Strategic Plan, at 5, 10.

¹⁴ See, e.g., Federal Highway Administration, U.S. Department of Transportation, *Procedures Manual for Processing External Complaints of Discrimination*, Sections 2-2 (D) & (H) (May 18, 2012), available at <https://goo.gl/e4LnYj> (10-day time frame for jurisdictional review and 180-day timeframe for completing investigations).

¹⁵ *Rosemere Neighborhood Ass'n v. EPA*, 581 F. 3d 1169, 1171 (9th Cir. 2009).

¹⁶ Significantly, the Neighborhood Association was able to bring pressure to bear on the agency to act because of the specific timeframes in the regulations.

Rosemere's experience before the EPA appears, sadly and unfortunately, typical of those who appeal to OCR to remedy civil rights violations... discovery has shown that the EPA failed to process a *single* complaint from 2006 to 2007 in accordance with its regulatory deadlines.¹⁷

More recently, a district court judge in the Northern District of California found that delays in case handling had persisted despite the Administrator's recognition of the problem and assertion that steps were taken to address concerns, "including increasing staff and establishing a working group and task force to address the back lot [sic] of Title VI complaints."¹⁸ The court noted, further, that "[a] privately conducted report found that EPA complied with the 20-day period to accept, reject, or refer a complaint in only six percent of cases the report examined.... An EPA chart showed that EPA complied with the 20-day 'jurisdictional determination' in only two instances out of 136. A number of complaints have not been resolved years after they were accepted for investigation, including one dating back to 1994."¹⁹ Indeed, this year five complainants filed suit to challenge EPA's unreasonable delay in completing even preliminary investigations in their cases, which were filed between 1994 and 2003, all more than a decade ago.²⁰ EPA accepted these complaints for investigation between 1995 and 2005.²¹ Regulatory timelines can hardly be blamed for establishing "inflexible" deadlines; what they do provide is a mechanism for demanding relief from an agency that has failed to fulfill its duties.

The Strategic Plan also suggests that "scientific complexity" justifies its call for greater flexibility. At the outset, complexity has little relationship with deadlines for providing notice²² or even, in most cases, conducting jurisdictional reviews.²³ This argument is only even relevant to the challenges of conducting an investigation and reaching a preliminary decision within 180 days.

Even there, the challenge is one of the agency's making: EPA's approach to investigations is not sustainable and is not compatible with effective civil rights enforcement. Since its decision in *Select Steel*,²⁴ EPA has inappropriately conflated standards for environmental compliance with analysis of the "impact" prong of claims of disparate impact under Title VI of the Civil Rights Act of 1964. EPA acknowledges that "complex and unique issues" arose out of its perception of "the need to merge the objectives and requirements of Title VI with the objectives and requirements of the

¹⁷ *Rosemere v. EPA* at 1175 (emphasis in original).

¹⁸ *Garcia v. McCarthy*, No. 13-CV-03939-WHO, 2014 WL 187386, at *3 (N.D. Cal. Jan. 16, 2014).

¹⁹ *Id.* (citations omitted).

²⁰ Complaint for Declaratory and Injunctive Relief, *Californians for Renewable Energy v. EPA*, 4:15-CV-03292-SBA (N.D. Cal. July 15, 2015), at 2.

²¹ *Id.*

²² See 40 C.F.R. § 7.120(c) (2010) (deadline for notice).

²³ See 40 C.F.R. § 7.120(d)(1)(i) (2010) (deadline for jurisdictional review).

²⁴ OCR, *Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint)* (1998) ("Select Steel").

environmental laws that the Agency implements.”²⁵ This endeavor – the merger of objectives – was misguided from its inception. EPA has an independent statutory duty to enforce Title VI of the Civil Rights Act of 1964, and its effort to merge distinct requirements has undermined civil rights enforcement and exacerbated whatever “complexity” that civil rights enforcement effort might create.

By contrast, the Federal Highway Administration (FHA) received an administrative complaint filed on behalf of Leaders for Equality and Action in Dayton (LEAD) on August 10, 2011, and issued its finding less than two years later that “African Americans have faced discriminatory impact” as a result of the City of Beavercreek’s decision to deny the Regional Transit Authority’s application to install bus stops near a mall in the City.²⁶ FHA was able to complete its investigation in a timely way despite the fact that complainants raised multiple allegations, including disparate impact claims.²⁷ Most significantly, FHA reached its conclusion that the City’s action had an “impact” without overly burdensome analysis of the impacts – FHA neither evaluated, for example, how many people might be injured or killed as a result of walking down the highway to reach the mall in the absence of bus stops, nor the precise economic loss individuals might sustain if they were denied the additional access to the mall afforded by bus stops. The letter of findings issued by FHA reviews the racial composition of the impacted population and then concludes that, based on the statistics, “it is clear that African Americans disproportionately rely on RTA transit service compared with whites. As a result, African Americans are disproportionately affected....”²⁸

There is no rational basis for using rulemaking as an opportunity to modify timelines for agency action.²⁹ EPA’s backlog of cases, stretching back to 2001, represents decades of delay. As the Center for Public Integrity’s study and the earlier Deloitte Report clearly showed, OCR’s failure to comply with the timelines reflects poor performance on the part of the agency rather than a problem with the regulatory timeline.³⁰

We support a thoughtful re-evaluation of EPA’s Title VI regulations, but believe the re-evaluation should only be used as an opportunity to clarify and strengthen the regulations, rather than to weaken them. Reconsideration of the Title VI regulations provides an opportunity to include formal rights for complainants to participate meaningfully in the administrative process and informal resolution, with provisions to address issues of confidentiality. Such revisions are essential for bringing processes for

²⁵EPA, *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24739, 24740 (Apr. 26, 2013) (“Adversity White Paper”).

²⁶Letter from Warren S. Whitlock, Assoc. Adm’r for Civil Rights, FHA, to Michael Cornell, City Manager, City of Beavercreek, Ohio (June 26, 2013), at 15.

²⁷*Id.* at 4.

²⁸*Id.* at 11.

²⁹See 40 C.F.R. § 7.120 (2010) (OCR to notify complainant and recipient of receipt of the complaint within 5 days and complete the jurisdictional review within 20 days from the acknowledgement of the complaint); 40 C.F.R. § 7.115(c) (2010) (OCR to complete investigation and issue preliminary findings within 180 days of the start of a compliance review or complaint investigation).

³⁰See Lombardi, Buford & Greene, *supra* note 2, and Deloitte Consulting, *supra* note 1.

complaint investigation into line with environmental justice principles. The OCR complaint investigation process has excluded complainants, the community stakeholders, from the decision-making process, which is in direct contradiction to principles of environmental justice.³¹ To address these issues, communication and consultation should, for example, be required at the stage of informal resolution and/or before EPA issues preliminary findings.³² Revised regulations should also make clear that if the Administrator reviews a determination of the Administrative Law Judge, complainants should be notified and given reasonable opportunity to file written statements and present their evidence and arguments to the Administrative Law Judge.³³

D. The Strategic Plan Must Address Current Ambiguities in the Legal Standards and, Particularly, Reject the “Rebuttable Presumption” that Compliance with Environmental Standards Satisfies the Impact Prong of a Disparate Impact Claim.

A robust Title VI compliance program requires that EPA ensure clarity, transparency, and uniformity in application of its legal standards and make clear that those standards comport with civil rights law. Unless OCR clarifies current ambiguities in the legal standards it applies and, particularly, withdraws the rebuttable presumption that compliance with environmental standards satisfies the impact prong of a disparate impact claim, OCR will continue to lack credibility with both communities and recipients.

Goal 2 Benchmark 2 of the Strategic Plan calls for the development of strategic policy guidance, including a Civil Rights Compliance Toolkit, to “provide recipients guidance regarding their civil rights obligations and examples of promising practices for complying with the civil rights laws it enforces.”³⁴ Yet the Strategic Plan is strangely silent on the status of previous guidance documents, how the Toolkit or new guidance documents will address inconsistencies in or harmonize pre-existing guidance documents, or whether OCR will finalize its proposal to withdraw the rebuttable presumption.³⁵

More than a decade ago, EPA published draft guidance documents,³⁶ and many of the signatories to this letter submitted extensive comments at that time.³⁷ EPA has neither

³¹ See *Environmental Justice*, EPA (Oct. 20, 2015), <http://www3.epa.gov/environmentaljustice/>. (“Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”)

³² See 40 C.F.R. 7.120(d)(2) (2010), and if OCR is making a finding, 40 C.F.R. 7.130(b)(1) (2010).

³³ See 40 C.F.R. 7.130(b)(3)(ii) (2010).

³⁴ Strategic Plan, at 13.

³⁵ See Adversity White Paper, *supra* note 25, at 24739-24743.

³⁶ See EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, 65 Fed. Reg. 39650 (June 27, 2000) (“Draft Guidance Documents”).

responded to those comments nor, after more than a decade, finalized the substantive standards set forth in the guidance documents.³⁸ Continued reliance on the Draft Guidance Documents raises a host of substantive and procedural questions, not the least of which is a lack of clarity and transparency about the non-discrimination standards to be applied by OCR. The Strategic Plan should include goals and benchmarks for finalizing a clear and uniform set of standards to guide EPA's practices, bring EPA's policies and practices into line with the standards utilized by the Department of Justice and other agencies, and resolve the flawed provisions in the Draft Guidance Documents. While an exhaustive analysis of the Draft Guidance Documents is outside the scope of these comments, we want to underscore the importance of withdrawing the rebuttable presumption.³⁹

Historically, EPA has tended to interpret its Title VI responsibilities and authorities through the lens of traditional environmental regulation—relying on a presumption that protection for communities is adequate if recipients are in compliance with environmental statutes. This approach is inconsistent with civil rights law and has failed to eliminate the adverse or disparate impacts to environmental justice communities that EPA's Title VI regulations seek to forbid. We strongly urge EPA to move away from reliance on the traditional environmental regulatory approach to discrimination issues and to apply the congressionally mandated civil rights framework instead. As all of us have previously urged, OCR must make clear that technical compliance with environmental laws and regulations is not the measure of whether programs or activities have an "adverse impact" within the meaning of civil rights law. In particular, the Toolkit and/or any other final Title VI guidance documents should remove any confusion caused by the *Select Steel* decision.⁴⁰ Compliance by recipients with standards adopted pursuant to the Clean Water Act, Clean Air Act, or other environmental laws does not mean that persons are not adversely affected by the recipients' programs or activities. Environmental statutes, regulations, and standards are the outcome of political and administrative processes, which take into account an array of competing interests and criteria. As was the case with *Select Steel*, these standards may involve averaging emissions over large geographical areas that,

³⁷ See generally Ctr. on Race, Poverty & the Env't, Cal. Rural Legal Assistance Found., *Comments on Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Aug. 26, 2000), available at http://www.epa.gov/ocr/docs/t6com2000/t6com2000_071.pdf; see also Eileen Gauna, *EPA at 30, Fairness in Environmental Protection*, 31 *Env'tl. L. Rev.* 10528 (2001) (analyzing the Investigatory Guidance).

³⁸ On March 21, 2006, EPA issued *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, 71 *Fed. Reg.* 14207 (offering approaches to recipients of federal funds related to public involvement).

³⁹ Additional issues include, for example, that the Draft Guidance Documents unnecessarily heighten the burden for measuring impact by suggesting that OCR must find a "significant" adverse impact, importing a significance standard. A narrow interpretation of the term "significant" can set the bar so high that it would effectively gut Title VI enforcement. Reliance on regulatory significance levels can also ignore the contributing effects of cumulative impact and synergistic risks, among other things. Instead, EPA should recognize that adverse impact above *de minimis* levels can constitute a violation. EPA should also clarify how the "cost and technical feasibility" of less discriminatory alternatives will be assessed. As the Draft Guidance Document is currently written, consideration of cost and technical feasibility could obliterate the obligation not to discriminate.

⁴⁰ *Select Steel*, *supra* note 24.

if viewed in isolation, can hide disparities. They are, again, not the benchmark for a determination of “impact.” Among other things, environmental standards do not fully capture harms to public health, the environment, or a population’s way of life. Moreover, these standards change over time precisely because they are found to be insufficiently protective.⁴¹

We note, also, that the Draft Guidance Documents already contain some language clarifying that “[c]ompliance with environmental laws does not constitute *per se* compliance with Title VI.”⁴² We agree. Although the provisions in the Draft Guidance Documents state that compliance with environmental laws may not be *per se* compliance with Title VI, as a practical matter environmental regulatory standards largely determine Title VI compliance because of the presumption of compliance that EPA uses if environmental standards are not exceeded.⁴³ Other sections of the Draft Guidance Documents currently reinforce the notion that environmental standards will be used to determine whether a program or activity has an “impact.” This is in error. While noncompliance with an environmental or health standard may be relevant to a finding of adverse impact in some contexts, compliance with a federal, state, or local environmental standard does not negate otherwise valid evidence of harm or disparity under civil rights law.

On March 20, 2013, our groups and partners submitted comments on the Adversity White Paper, which are incorporated herein.⁴⁴ As we stated in 2013, EPA’s continued reliance on statutory and regulatory environmental and health standards for determining adversity is inconsistent with civil rights laws and is infeasible.⁴⁵ The ambiguous status of the Adversity White Paper compounds confusion on this key issue for communities, investigators and recipients alike. At this point, creating a compendium of guidance documents or adding new documents to the mix would only exacerbate the confusion

⁴¹ *Primary National Ambient Air Quality Standards for Nitrogen Dioxide*, 75 Fed. Reg. 6474, 6480 (Feb. 9, 2010) (to be codified at 40 C.F.R. pts. 50 & 58) (discussing new evidence regarding the relationship between NO₂ exposure and health effects). Along these lines, we note the decision of the Environmental Appeals Board (EAB) in which the EAB concluded that EPA erred when it relied solely on compliance with the then-existing annual National Ambient Air Quality Standard (“NAAQS”) for nitrogen dioxide (NO₂) as sufficient to find that the Alaska Native population would not experience “adverse human health or environmental effects from the permitted activity.” Though this decision arose in the context of the EJ Executive Order, and also turned on the fact that the NO₂ air quality standard was under revision, it is clear that current compliance with an environmental standard is not determinative of whether an action or policy has an adverse impact. Though EAB rulings have not uniformly required the Agency to take into account newer data regarding the sufficiency of environmental standards to protect public health when issuing permits, (see, e.g., *Shell Offshore, Inc., OCS Appeal Nos. 11-05, 11-06 & 11-07*, 82-83 (EAB Mar. 30, 2012), available at <http://goo.gl/TzLGqI>), there is no doubt that standards in force to implement environmental laws at any given time do not and cannot capture all impact of a challenged activity.

⁴² *Draft Title VI Guidance for EPA Assistance Recipients*, *supra* note 36, at 39680.

⁴³ *Id.* (“[W]here the area in question is attaining that [NAAQS] standard, the air quality in the surrounding community will generally be considered presumptively protective and emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.”).

⁴⁴ *Comments on U.S. Environmental Protection Agency Draft Policy Papers, Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards (Released Jan. 24, 2013); Title VI of the Civil Rights Act of 1964: Draft Role of Complainants and Recipients in the Title VI Complaint and Resolution Process (Released Jan. 25, 2013) (Mar. 20, 2013) (attached).*

⁴⁵ *Id.* at 5.

unless OCR harmonizes pre-existing guidance and clarifies the legal standards. Failure to require resolution of current ambiguities in the legal standards and to finalize the Adversity White Paper are gaping holes in the Strategic Plan and must be addressed.

E. The Strategic Plan Should Explicitly Address How EPA's Program will Incorporate and Promote the Objectives of Environmental Justice.

The Strategic Plan should aim to incorporate and promote the objectives of environmental justice and set benchmarks for establishing concrete mechanisms for reaching this goal. As a starting point, the Strategic Plan itself failed to indicate whether OCR has taken or will take any specific steps to involve environmental justice advocates or populations in the development of the Plan or in the reevaluation of EPA's Title VI regulations. The Strategic Plan appears to have been developed internally by OCR staff, and although it is now being distributed for comment, ideas are set forth with no clear evidence that input was solicited from the populations and communities that are impacted by environmental injustice and discrimination on the basis of race and ethnicity. Moreover, OCR's method of seeking input on the Strategic Plan seems to have been reliant on communication through the internet, which is not a sufficient means of reaching environmental justice populations, for the reasons outlined below. These are shortcomings with respect to the Strategic Plan as a whole and, also, with respect to specific aspects of the Plan, such as Goal 2 Benchmark 4, which calls for OCR to develop an outreach and communication plan. The Strategic Plan should state explicitly that OCR will consult with the affected populations and communities on the development of this plan.

The Strategic Plan's heavy reliance on the internet and electronic media for communications is misplaced. For example, Goal 1 Benchmark 6 focuses on posting of information on the OCR website, Goal 2 Benchmark 2, indicates that EPA will provide the toolkit, decisional documents, and settlement agreements on OCR's website, and the third and fourth bullets of Goal 2 Benchmark 4 emphasize the use of the OCR website to ensure transparency, and using training videos, webinars, and social media for training and outreach. Yes, relevant materials should be posted on the website. But environmental justice populations are much more likely than other segments of the population to lack access to the internet and other electronic media, and over-reliance on electronic media means that environmental justice populations will not be provided with notice of actions that affect them. The Strategic Plan nonetheless contains no provisions for the use of radio, television, community and church newsletters, and other media that are much more likely to reach environmental justice populations.

The absence of provisions for the use of alternative media is a particular problem for populations comprised of people whose primary form of communication is oral. The second bullet point of Goal 4 Benchmark 4 addresses translation of materials into the most prominent languages spoken by persons with limited-English proficiency, but it says nothing about what is to be done in communities where a significant proportion of the population may not read. There are, for example, few members of the Navajo Nation who

read Navajo, yet many members of that Nation speak Navajo only.⁴⁶ The same is true of other Native American languages, including those spoken by immigrants from indigenous communities in Mexico and Guatemala.

The Strategic Plan's scant attention to community input raises concern about OCR's commitment to transparency and stakeholder engagement. We remain concerned that there will be only limited opportunities for environmental justice communities to participate in EPA's efforts to amend 40 C.F.R. Part 7 until *after* EPA publishes proposed changes in the Federal Register. We appreciate OCR's recent efforts to reach out to the signatories to provide notice of its plans to engage in rulemaking and to issue a Case Resolution Manual, but also note that OCR staff indicated that the Notice of Proposed Rulemaking was likely to be published within the coming month. At this point, the Agency is likely to be committed to the course of action reflected in its proposal, and subsequent input from the environmental justice community is not likely to have much effect. Conversely, through proactive involvement of the environmental justice community, EPA can earn trust and respect for its efforts to ensure meaningful enforcement and implementation of the Civil Rights Act. The Strategic Plan should explicitly address and prioritize meaningful engagement by environmental justice communities and commit to benchmarks to align OCR activities with this goal.

F. Increasing Reliance on Voluntary Compliance and ADR Raises Significant Questions of Transparency, Stakeholder Participation, and Fairness, Which the Strategic Plan Should Address.

The Strategic Plan calls on OCR to “[f]ully utilize all resolution options available to OCR, including informal resolution and Alternative Dispute Resolution.”⁴⁷ Goal 1 Benchmark 1 establishes that OCR should emphasize early informal resolution and, again, “utilize all resolution options.”⁴⁸ This focus on both voluntary resolution and ADR raises significant issues. First, neither mechanism for resolving complaints is transparent. In the case of voluntary resolution, complainants have been entirely locked out of negotiations.⁴⁹ And confidentiality is often seen as necessary to the ADR process, as Guidance from the Federal Alternative Dispute Resolution Council at the Department of Justice emphasizes:

Guarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests in order to reach the best possible settlement of their claims. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process

⁴⁶ See generally Brian Bielenberg, *Indigenous Language Codification: Cultural Effects*, in *Revitalizing Indigenous Languages* 103 (Jon Reyhner et al., eds., 1999), available at http://jan.ucc.nau.edu/~jar/RIL_8.html (traditional Navajos view written Navajo as alien).

⁴⁷ Strategic Plan, at 5.

⁴⁸ *Id.* at 10.

⁴⁹ See, e.g., Plaintiffs-Appellants' Opening Brief, *Garcia v. McCarthy*, No. 14-15494 (9th Cir. May 1, 2015), at 12-13 (complainants' rendering of process for reaching voluntary compliance agreement in *Angelita C.* after OCR made preliminary finding of discrimination).

will be used against them later. Confidentiality can reduce posturing and destructive dialogue among parties during the settlement process.⁵⁰

In the ADR process, confidentiality can even extend to the very fact that the parties are participating in discussions, restricting communication by complainants and their accountability to the larger community of stakeholders.

Moreover, as currently undertaken by OCR, both voluntary resolution and ADR disempower community-based stakeholders – voluntary resolution by excluding complainants from negotiations and ADR by failing to level the playing field unless technical assistance and other steps are taken to support community involvement. If there is increased reliance on alternative mechanisms for reaching resolution, then the Strategic Plan should include goals and benchmarks to address the lack of transparency, stakeholder participation, and fairness in these negotiations.

G. OCR Should Use Its Regulatory Authority to Ensure Civil Rights Compliance in the Environmental Programs It Administers.

Finally, the Strategic Plan should call on EPA to use its regulatory authority pursuant to Title VI to ensure civil rights compliance in the environmental programs that it administers, such as the Clean Air Act and Clean Water Act permitting programs. These can be program-specific requirements, incorporated in program regulations but authorized by Section 602 of the Civil Rights Act of 1964,⁵¹ which will help bridge the disconnect between the fiefdoms within EPA and incorporate civil rights more broadly into the agency's actions.⁵²

Thank you for this opportunity to comment on the External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020. Again, we appreciate your recognition of the importance of Title VI enforcement and your consideration of these issues.

⁵⁰ *Confidentiality in Federal Alternative Dispute Resolution Programs*, 65 Fed. Reg. 83085 (Dec. 29, 2000).

⁵¹ 42 U.S.C. § 2000d-1 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity..., is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.”).

⁵² See, e.g., Ctr. on Race, Poverty & the Env't. et al., *Climate Justice Comments on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Docket No. EPA-HQ-OAR-2013-0602 at 2, 7-8 (Dec. 1, 2014) (calling for EPA to address its Title VI obligation by proposing additional regulatory language as part of the Clean Power rule that directs each state to include federally enforceable provisions in its state to ensure compliance with Title VI and requiring EPA to make a finding that state plans ensure such compliance when EPA reviews the plans).

Sincerely,



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EJ 2020 Action Agenda, Environmental Justice Strategic Plan 2016-2020 (draft May 2016)

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Submitted via e-mail - July 28, 2016
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COMMENTS OF ENVIRONMENTAL AND COMMUNITY GROUPS AIR ALLIANCE HOUSTON, ALASKA COMMUNITY ACTION ON TOXICS, ALTERNATIVES FOR COMMUNITY AND ENVIRONMENT, AMERICAN VETERANS (AMVETS), APOSTOLIC FAITH CENTER, BENICIANS FOR A SAFE AND HEALTHY COMMUNITY, BEYOND TOXICS, CALIFORNIA COMMUNITIES AGAINST TOXICS, CALIFORNIA KIDS IAQ, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CALIFORNIA SAFE SCHOOLS, CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR HEALTH, ENVIRONMENT AND JUSTICE, CITIZENS AGAINST RUINING THE ENVIRONMENT, CLEAN AIR COUNCIL, CLEAN AND HEALTHY NEW YORK, COALITION FOR A SAFE ENVIRONMENT, COMITE CIVICO DEL VALLE, COMITE PRO UNO, COMMUNITY DREAMS, COMMUNITY IN-POWER & DEVELOPMENT ASSOCIATION, DEL AMO ACTION COMMITTEE, EAST YARD COMMUNITIES FOR ENVIRONMENTAL JUSTICE, ECOLOGY CENTER, EMERGE, FARMWORKER ASSOCIATION OF FLORIDA, FARMWORKER JUSTICE, GASP, GOOD NEIGHBOR STEERING COMMITTEE (BENICIA), GREENLATINOS, GREENPEACE, HEALTH CARE WITHOUT HARM, HUMAN RIGHTS DEFENSE CENTER, LOUISIANA ENVIRONMENTAL ACTION NETWORK, NAACP SAN PEDRO-WILMINGTON BRANCH #1069, NEW MEXICO ENVIRONMENTAL LAW CENTER, PENDERWATCH & CONSERVANCY, PESTICIDE ACTION NETWORK NORTH AMERICA, POVERTY & RACE RESEARCH ACTION COUNCIL, SIERRA CLUB, SOCIETY FOR POSITIVE ACTION, TEXAS CAMPAIGN FOR THE ENVIRONMENT & TCE FUND, TEXAS ENVIRONMENTAL JUSTICE ADVOCACY SERVICES (T.E.J.A.S.), THE CITY PROJECT, UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, WE ACT FOR ENVIRONMENTAL JUSTICE, WILMINGTON IMPROVEMENT NETWORK, WOMEN’S VOICES FOR THE EARTH, AND EARTHJUSTICE

SUMMARY

The undersigned groups commend the Environmental Protection Agency on creating the Environmental Justice 2020 Action Agenda, as the agency’s draft Environmental Justice Strategic Plan for 2016-2020 (“2020 Plan”) and welcome this chance to offer comments on ways EPA should strengthen this plan.

First, thank you for your efforts to find concrete ways to commit to advance environmental justice in a cross-cutting agency plan. We appreciate the hard work of many EPA staff on the 2020 Plan. We support EPA’s important focus in this plan on actual, on-the-ground health and environmental justice impacts that can be measured in communities. We believe that the enforcement measures in this plan have particularly strong potential to provide meaningful and much-needed protection for communities overburdened by pollution and toxic exposure where industrial facilities and other entities are violating environmental requirements. We also applaud EPA’s acknowledgement that the agency must do a better job to protect communities and reduce unfair disparities in pollution, toxic exposure, and environmental health

harms—including in the four major areas of “national environmental justice challenges” that the 2020 Plan commits to address. Positive results in overburdened communities will be the essential metric to measure whether EPA succeeds in advancing environmental justice, using this plan as a tool.

At the same time, the 2020 Plan, coming at the end of this Administration, illustrates how much more work there is to be done. It is no longer enough to say the words “environmental justice.” It is time for EPA finally to commit in all of its actions to make these words mean something to communities of color, low-income, and indigenous communities who have long borne the brunt of environmental problems without EPA’s help or attention. EPA’s actions ultimately will be judged by whether the agency has prioritized justice, and whether it has taken the most environmentally just approach in all of its actions, or not. The 2020 Plan will represent an important part of Administrator McCarthy’s and this President’s environmental justice legacy. In view of this, we respectfully urge the agency to strengthen the plan, as described in these and other community group comments, before finalizing.

As EPA finalizes this plan, we ask the agency to commit to the following three major steps. Please take these actions to ensure that EPA’s plan is forward-looking, and actually achieves measurable results for justice for as many overburdened communities as possible.

1. **EPA should strengthen the commitments included in the 2020 Plan** by making the measures for on-the-ground impact stronger and directed to provide overburdened communities not just with better protection than they have now, but with the best available health and community protections.
2. **EPA should add commitments** on the cross-cutting issues highlighted and also by requiring each EPA program office and regional office to seek public input from community stakeholders, and create its own list of at least 5 additional environmental justice challenges and commitments to reduce disparities and strengthen protections. *Examples of key issues EPA should urge these offices to include are highlighted below and discussed in our 2015 comments, attached as an appendix.*¹
3. **For each objective included in the 2020 Plan, EPA should create a community work-group** of affected community members, community-based groups, and community-selected advocates to assist EPA in implementing and tracking progress, and strengthening the Plan.

We provide additional information on these issues in our detailed comments below and would welcome the opportunity at any time to talk with EPA staff about the 2020 Plan and the important matters described in these, and our 2015 comments.

¹ See Comments of Environmental and Community Groups on Draft EJ 2020 Plan Framework (July 14, 2015) (attached in Appendix), <http://www.foreffectivegov.org/sites/default/files/regs/epa-plan-ej2020-signon-comments.pdf>. Thanks to each group and individual who contributed valuable thoughts to these comments.

CONTENTS

SUMMARY	1
I. OVERVIEW OF THE CURRENT SCIENCE SHOWING EVIDENCE OF ENVIRONMENTAL INJUSTICE	5
II. EPA SHOULD STRENGTHEN THE OBJECTIVES IN THE PLAN.....	9
A. Lead.....	9
1. EPA Must Prioritize Updating All Outdated National Reference Levels, Standards, And Limits.....	11
2. EPA Must Protect Public Health From New Lead In The Air.	12
3. EPA Must Protect The Public From Exposures To Lead Resulting From Its Manufacture, Processing, Distribution, And Use.....	13
4. EPA Must Protect The Public From Lead In Soil.....	13
5. EPA Must Protect The Public From Lead in Drinking Water.	14
B. Small and Tribal Drinking Water Systems.	16
C. Air Quality.	17
1. Particulate Matter And Freight, Ports, and Goods Movement.....	17
2. Air Toxics.	22
D. Hazardous Waste.	25
E. Targeting Enforcement Action To Overburdened Communities.....	29
1. Ensure Enforcement Targeting Reaches Communities In Greatest Need of Enhanced Enforcement.	29
2. Remove All Unlawful Loopholes and Exemptions (SSM) and Fully Enforce Standards During Upsets and Malfunctions.	29
3. Strengthen Enforcement Policy To Address All Harmful Violations as High Priority Violations, Including Short-Term Upsets.....	31

4.	Involve Communities In Compliance and Enforcement to Ensure Remedies Provide Actual Relief to People Hurt by Environmental Violations and Prevent Future Violations.	32
5.	Strengthen EPA Oversight of States and Increase Objections to Inadequate and Unlawful State Permits.	32
6.	EPA Should Set Strong Enforcement Objectives to Reduce Violations that Release Toxic Air Pollution.	33
III.	EPA SHOULD ADD COMMITMENTS TO THE PLAN.....	33
A.	Cross-Cutting Issues.	34
1.	Strengthen Title VI & Civil Rights Enforcement.	34
2.	Improve Monitoring and Public Reporting.....	36
3.	Update Scientific Tools for Health Risk and Impacts Assessments To Follow Current Science and Address Cumulative and Aggregate Threats to Communities.	37
B.	Highlighting Additional Significant Omissions.....	38
1.	Farmworker Justice & Pesticides.....	38
2.	Chemical Facility Safety and Security.....	41
3.	Expanding Access to Parks and Green Space.....	41
4.	Other Key Comments, Including Prisoners’ Rights.	42
IV.	EPA SHOULD CREATE EJ COMMUNITY WORK GROUPS AND LISTSERVS TO HELP IMPLEMENT PLAN EJ 2020.....	43
V.	CONCLUSION.....	44

* * *

I. OVERVIEW OF THE CURRENT SCIENCE SHOWING EVIDENCE OF ENVIRONMENTAL INJUSTICE.

Patterns of exposure inequality based on race, ethnicity and income

EPA's Plan EJ 2020 is well-supported by the science showing unequal and unjust impacts of environmental contamination, pollution, and toxic exposure on communities of color, low-income, and indigenous communities. We urge EPA to further highlight these impacts and the scientific evidence of how environmental injustice affects public health in the final plan, and apply that science to strengthen this plan. EPA should apply the expertise of its scientists to raise awareness on, educate, and elevate this science for states, advocates, and others to use to inform their work and to assist communities in working to address this problem.

Since the 1987 landmark report *Toxic Wastes and Race in the United States*,² further study has confirmed again and again that communities of color and also economically disadvantaged populations are disproportionately located near toxic waste and other sources of pollution. These relationships can vary with factors including region and urbanity (racial and ethnic disparities more pronounced in certain areas of the U.S.) and with geographic units of analysis (usage of census tracts vs. zip codes), but the disproportionate burden of environmental exposure among these subpopulations cannot be disputed.^{3,4} Pollution and polluting sources are often concentrated together, overburdening and overwhelming communities and populations, and causing greater health effects.⁵ With this relationship established, the field of environmental equity research now seeks to find significant interactions and patterns within this overall trend—to determine how these disparities interact with each other and identify reasons they may be magnified. EPA has a significant responsibility and role in how these disparities have occurred and are perpetuated, and must take responsibility to strengthen equity, as well as reduce disparities.

In analyzing the relationship between socioeconomic inequality and disparities in environmental exposure, it has been found that 1) exposure inequality is considerably greater than income inequality and 2) that these inequalities are reinforcing.⁶ This is such that income

² Dr. Benjamin F. Chavis, Jr. & Charles Lee, Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States* (1987), <https://www.csu.edu/cerc/researchreports/documents/ToxicWasteandRace-TOXICWASTESANDRACE.pdf>.

³ Mohai, P., et al., *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial*

⁴ Zwickl, K., et al., *Regional Variation in Environmental Inequality: Industrial air toxics exposure in U.S. Cities* at 20, Political Economy Research Institute Working Paper Series No. 342 (Feb. 2014).

⁵ Cal. EPA, OEHHA, *Cumulative Impacts: Building a Scientific Foundation* at 5-17 (Dec. 2010), <http://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf> (citing numerous research studies showing that exposure to pollution-emitting facilities, hazardous waste facilities and disposal, toxic releases, non-attainment air areas, high motor vehicle air pollution areas, and other types of pollution is more likely to be concentrated in communities with higher minority and lower income populations).

⁶ Boyce, J.K., et al., *Measuring environmental inequality* at 14-16, Political Economy Research Institute Working Paper Series No. 409 (Dec. 2015).

inequality is likely exacerbated by significant disparities in toxic exposure.⁷ The implications of these reinforcing inequalities are especially concerning, as environmental exposure very likely contributes to the “poverty trap” for low-income communities. Low-income populations are likely to experience more adverse environmental exposure, which exacerbates socioeconomic difficulties and decreases their ability to move away from toxic and polluting sources or take other actions to protect themselves.

In analyzing relationships between racial/ethnic isolation and environmental exposure disparities, research has found that overall air pollution exposure is higher in areas where exposure is more strongly concentrated in communities of color.^{8,9,10} That is, total air pollution is higher in racially or ethnically isolated areas and, within these areas, people of color are disproportionately exposed.¹¹ It cannot be ignored, once again, that racial/ethnic disparities and exposure inequality are directly reinforcing. Not only do racially segregated areas correlate to more exposure for all populations in that area, but people of color suffer heavier burdens of exposure within an area of increased pollution.

Recent evidence also suggests that the components of this pollution differ based on demographics and income in addition to the total mass of exposure. In fact, even larger disparities in exposure exist for components of particulate matter as compared to exposure of total mass.¹² As some components of particulate matter are more toxic than others, certain demographics may be at an even greater risk than indicated by traditional particulate matter measures.

Impacts of differential exposure

With it abundantly clear that 1) socioeconomically-disadvantaged and people of color experience higher environmental exposures and 2) characteristics of these populations exacerbate exposure risk and vice versa, the impacts of environmental exposures on health take on an even greater meaning. With air pollution characterized as the “world’s largest single environmental health risk” by the World Health Organization (WHO), it is undisputed that environmental exposure adversely impacts human health.¹³ More and more evidence is coming to light

⁷ Bouvier, R., *Inequality in two dimensions: an analysis of the distribution of income and toxic emissions in Maine*, 102 *Ecological Economics* 39, 39 (2014).

⁸ Zwickl, *Regional variation in environmental inequality* at 9-10, *supra* n.4.

⁹ Ash, M., *et al.*, *Is environmental justice good for white folks? Industrial air toxics exposure in Urban America*, 94:3 *Soc. Sci. Q.* 616, 616 (2013).

¹⁰ Morello-Frosch, R., *et al.*, *Separate and unequal: residential segregation and estimated cancer risks associated with ambient air toxics in U.S. metropolitan areas*, 114:3 *Envtl. Health Perspectives* 386, 390-92 (2006).

¹¹ Bravo, M.A., *et al.*, *Racial isolation and exposure to airborne particulate matter and ozone in understudied US populations: Environmental justice applications of downscaled numerical output*, 92 *Env’t Int’l* 247, 250-53 (2016).

¹² Bell M.L., *et al.*, *Environmental inequality in exposures to airborne particulate matter components in the United States*, 120 *Envtl. Health Perspectives* 1699, 1702-03 (Dec. 2012).

¹³ World Health Organization, *7 million premature deaths annually linked to air pollution* (Mar. 25, 2014), <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>.

regarding how these exposures contribute to the well-known health disparities between people of different ethnicities, racial backgrounds, and income levels. For example, in a review of almost 100 studies, residential proximity to environmental hazards was found to be significantly linked to a number of health impacts including a variety of adverse pregnancy outcomes, childhood cancers, asthma and other chronic respiratory conditions, renal disease, diabetes, and stroke mortality.¹⁴

Furthermore, these populations are not only experiencing increased health risk due to environmental exposure, but also they are the most vulnerable to the health risks posed by such exposure. Several studies have demonstrated that lead, a highly toxic compound with known disparities in exposure, has more severe effects on both children and adults from low-income populations and people of color.¹⁵ For example, it has been found that lead impacts the testing scores of children from low socioeconomic positions more than their peers.¹⁶ Further, some studies show a stronger positive relationship between blood-lead levels and increased blood pressure for black adults as compared to white adults. This association holds even after accounting for several other risk factors such as smoking, age, and preexisting conditions.¹⁷

This increased likelihood of negative health outcomes due to environmental exposure clearly indicates that these populations are exceedingly vulnerable—they are both more likely to be exposed to pollution and more likely to be harmed by that exposure.¹⁸ It is likely that biological impacts of social stressors associated with lower socioeconomic status and racial/ethnic inequality, and the biological mechanisms of action of lead and air pollution act synergistically to result in severe health outcomes.^{19,20} Outside of biological mechanisms, low-income people and communities of color suffer from a lack of health-promoting services, such as adequate healthcare facilities, healthy food, and green spaces, thereby increasing the likelihood of adverse health outcomes.²¹ The cumulative impacts of social and economic disadvantage to

¹⁴ Brender, J.D., *et al.*, *Residential proximity to environmental hazards and adverse health outcomes*, 101 Am. J. Pub. Health, S37, S37-50 (2011).

¹⁵ Schwartz, J., *et al.*, *Exploring potential sources of differential vulnerability and susceptibility in risk from environmental hazards to expand the scope of risk assessment*, 101 Am. J. of Pub. Health S94, S96-97 (2011).

¹⁶ *Id.* at S96, *supra* n.15.

¹⁷ Hicken, M.T., *et al.*, *A novel look at racial health disparities: the interaction between social disadvantage and environmental health*, 102:12 Am. J. of Pub. Health 2344, 2346-47 (Dec. 2012); Vipputuri, S., *et al.*, *Blood lead level is associated with elevated blood pressure in blacks*, 41:3 Hypertension 463, 464-65 (Mar. 2003).

¹⁸ deFur, P.L., *et al.*, *Vulnerability as a Function of Individual and Group Resources in Cumulative Risk Assessment*, 115:5 Env'tl. Health Perspectives 817, 820-21 (2007); Morello-Frosch, *Separate and Unequal* at 390-92, *supra* n.10.

¹⁹ Vaziri, N.D., *Mechanisms of lead-induced hypertension and cardiovascular disease*, 295:2 Am. J. of Physiology: Heart & Circulatory Physiology H454, H454-63 (Aug. 2008).

²⁰ Clougherty, J.E., *et al.*, *The role of non-chemical stressors in mediating socioeconomic susceptibility to environmental chemicals*, 1 Current Env'tl. Health Report 302, 304-08 (2014).

²¹ Morello-Frosch, R., *et al.*, *Understanding the cumulative inequalities in environmental health: Implications for policy*, 30:5 Health Affairs 879, 880-81 (2011); Smedley, B.D., *et al.*, *Unequal Treatment: Confronting Racial Disparities in Health Care* at 5-6, Inst. of Medicine (2003).

human health cannot be understated or over-emphasized in creating risk assessments or public health interventions in terms of environmental exposure. And, as the National Academy of Sciences has recommended, “EPA should compile relevant data related to socioeconomic status (SES), which may serve as a proxy for numerous individual risk factors ... and may be a more direct measure of vulnerability than could reasonably be assembled by looking at all relevant individual risk factors.”²²

Leading scientific and medical experts, along with children’s health advocates, came together in 2015 under the auspices of Project TENDR: Targeting Environmental Neuro-Developmental Risks to issue a call to action to reduce widespread exposures to chemicals that interfere with fetal and children’s brain development. The TENDR consensus statement, released in 2016, emphasizes a clear need for EPA to do a better job of recognizing and addressing the impacts of toxic exposures in particular, that often fall disproportionately on children in communities of color and low-income communities and that threaten children with neurological and neurodevelopmental harm.²³ TENDR highlights air pollution in particular, as well as exposure to toxins like lead, mercury, PCBs, and pesticides as requiring strong federal action and attention.

TENDR’s statement follows up on another recent joint public statement by the American College of Obstetricians and Gynecologists and the American Society for Reproductive Medicine, finding as follows:

Reducing exposure to toxic environmental agents is a critical area of intervention for obstetricians, gynecologists, and other reproductive health care professionals. Patient exposure to toxic environmental chemicals and other stressors is ubiquitous, and preconception and prenatal exposure to toxic environmental agents can have a profound and lasting effect on reproductive health across the life course. Prenatal exposure to certain chemicals has been documented to increase the risk of cancer in childhood [We] join leading scientists and other clinical practitioners in calling for timely action to identify and reduce exposure to toxic environmental agents while addressing the consequences of such exposure.²⁴

²² National Academy of Sciences, *Science and Decisions: Advancing Risk Assessment* at 226, National Research Council (2009) (citing O’Neill, M.S., *et al.*, *Health, Wealth, and Air Pollution: Advancing Theory and Methods*, 111:16 *Envtl. Health Perspectives* 1861, 1865 (Dec. 2003)).

²³ See Project TENDR: Targeting Environmental Neuro-Developmental Risks, *The TENDR Consensus Statement*, 124 *Envtl. Health Perspectives* A118, A118 (July 2016), <http://ehp.niehs.nih.gov/wp-content/uploads/124/7/EHP358.alt.pdf>.

²⁴ Am. Coll. of Obstetricians and Gynecologists Comm. on Health Care for Underserved Women, Am. Soc. for Reproductive Med. Practice Comm., Committee Opinion No. 575, Exposure to Toxic Environmental Agents (Oct. 2013), <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Exposure-to-Toxic-Environmental-Agents>; see also Endocrine Society, Scientific Statements, <https://www.endocrine.org/endocrine-press/scientific-statements> (emphasizing potential in utero harm from even low doses of exposure); see also Ahearn, A., *Low-Dose Effects of Endocrine Disruptors, with Laura Vandenberg* at 2, *Envtl. Health Perspectives*, <http://ehp.niehs.nih.gov/wp-content/uploads/2012/10/ehp.trp060112.pdf> (“[for] every

The 2020 Plan should follow this science as well, by strengthening protections that would particularly help reduce early-life exposure and vulnerability, recognizing that there is no safe level of human exposure to many toxic agents for the developing fetus, and by calling out the dire need to protect children in overburdened communities from toxic exposure, as discussed in more detail below.

A brief overview of the scientific literature thus illustrates and confirms the importance of EPA's Plan EJ 2020 and highlights the great need for EPA to strengthen, add to, and fully implement this plan, by directing the program and regional offices, and assisting state and federal agencies, to do a much better job of promoting equity, and addressing and reducing environmental injustice and resulting harms across the board.

II. EPA SHOULD STRENGTHEN THE OBJECTIVES IN THE PLAN.

A. Lead.

We applaud EPA for naming the elimination of blood-lead level disparities among children as one of the significant national environmental justice challenges for which EPA has set the goal of demonstrating progress by 2020.²⁵ EPA should strengthen this commitment by aiming to prevent and reduce lead exposure (not just disparities), particularly for the most exposed and most vulnerable children. There is consensus that the amount of lead currently in Americans' bodies is too high.²⁶ Children in communities of color and low-income communities have higher blood-lead levels,²⁷ and suffer greater cognitive detriment as a result of lead exposure.²⁸ Clearly, this is an environmental injustice and new action is needed.

The tragedy in Flint, Michigan has raised the Nation's awareness of the catastrophic results of government failure to protect children from lead. But the children of Flint are not alone. There is a lead crisis affecting children in towns and cities across the country.²⁹ If we treat Flint as an anomaly and ignore the very high child blood-lead levels elsewhere, we will be condemning thousands of other children to the harms posed by lead exposures, just as the officials in Flint and Michigan turned a blind eye to the public health disaster in their midst.

chemical that we looked at that we could find a low-dose cutoff, if it had been studied at low doses it had an effect at low doses.”).

²⁵ 2020 Plan at iv.

²⁶ EPA, *Children's Environmental Health Facts, Lead Exposure*, <http://www2.epa.gov/children/childrens-environmental-health-facts> (last updated Feb. 23, 2016) (“In 2010, an estimated 535,000 children had a blood lead level of 5 µg/dL.”). Moreover, exposure to lead at levels far lower than 5 µg/dL put children at risk of diminished intellectual and academic abilities, higher rates of neurobehavioral disorders and lower birth weight. Council on Environmental Health, *Prevention of Childhood Lead Toxicity*, *Am. Acad. of Pediatrics*, 138:1 *Pediatrics* 1, 1 (July 2016).

²⁷ EPA, *Children's Environmental Health Facts*, *supra* n.26.

²⁸ See Chari, R., *et al.*, *Integrating Susceptibility into Environmental Policy: An Analysis of National Ambient Air Quality Standard for Lead*, 9:4 *Int'l J. of Env'tl. Research and Pub. Health* 1077, 1085 (Mar. 27, 2012).

²⁹ See, e.g., Kristof, N., *America is Flint*, *The N.Y. Times* (Feb. 6, 2016); Otterbein, H., *It's Not Just Flint – Philadelphia Has a Huge Lead Problem, Too*, *Philadelphia Magazine* (Feb. 21, 2016).

According to the 2020 Plan, EPA seeks to eliminate blood-lead level disparities by 1) developing partnerships to identify the most overburdened communities, and 2) reducing sources of lead contamination in those communities, including in drinking water, through education, awareness campaigns, ensuring adequate lead-based paint workforces, identifying best practices, improving use of data, increasing financial and technical assistance to optimize corrosion control, and removing lead service lines.³⁰ As a starting point for identifying communities where significant numbers of children have elevated blood-lead levels, EPA should review the recent Quest Diagnostics Health Trends report, which studies blood-lead levels in more than five million children in all fifty states and the District of Columbia.³¹

We strongly agree with EPA’s emphasis on reducing or eliminating exposure. As the American Academy of Pediatrics stated in a recent report: “Primary prevention, reducing or eliminating the myriad sources of lead in the environment of children before exposure occurs, is the most reliable and cost-effective measure to protect children from lead toxicity.”³²

However, the 2020 Plan overlooks critical measures that EPA *must take* to reduce, and ultimately eliminate, children’s lead exposure, including adoption of regulations that:

- Eliminate, or at least phase out, all non-essential uses of lead in consumer and commercial products (including imported products);
- Set more health-protective standards and action levels, and eliminate the continued introduction of lead into the air, water, and environment through industrial processes; and
- Remove gaping holes in federal regulation of lead—including in programs overseen by EPA.

The 2020 Plan must chart a path forward for EPA to start filling these regulatory holes that leave children in overburdened communities at serious risk of lead exposure.

The EPA must also take protective measures to reduce and ultimately eliminate blood-lead level disparities while reducing lead exposure for all people. Below are protective measures EPA should commit to take as part of the 2020 Plan.

1. EPA Must Prioritize Updating All Outdated National Reference Levels, Standards, And Limits.

Various industrial sources emit and for decades have previously emitted lead into local communities. EPA’s Toxics Release Inventory shows that in 2014 alone, reported industrial

³⁰ 2020 Plan at 38-40.

³¹ McClure, L.F., *Blood-lead Levels in Young Children: US, 2009-2015*, 175 J. of Pediatrics 173, 173-81 (Aug. 2016), [http://www.jpeds.com/article/S0022-3476\(16\)30206-2/pdf](http://www.jpeds.com/article/S0022-3476(16)30206-2/pdf).

³² Council on Environmental Health, American Academy of Pediatrics at 1, *supra* n.26.

releases of lead and lead compounds totaled over 739.7 million pounds (about 369,858 tons).³³ It is imperative that EPA update all standards and reference levels that determine when government will intervene to reduce human exposure to lead as a result of past and ongoing contamination. Many of the current standards are woefully outdated and not health-based. For example:

- EPA must adopt and use health-based action level standards for what constitutes a lead hazard in indoor dust. EPA agreed that it needs to update its standard for lead in dust in 2010, but has not moved forward. This delay is unacceptable.
- EPA must update its standard for lead in residential soil in children’s play areas. The federal standard of 400 parts per million (ppm), which has not changed since it was first adopted in the 1990s, is far in excess of California’s far more protective standard of 80 ppm. Children across the country deserve the same level of protection as those in California.
- EPA should strengthen the National Ambient Air Quality Standard (NAAQS) for lead to reduce ambient air levels to protect children’s health. The Children’s Health Protection Advisory Committee (CHPAC) compellingly wrote in its January 2015 letter to EPA how the current Lead NAAQs (established in 2008) “is insufficient to protect children’s health.”³⁴ EPA must lower the NAAQS for lead to the CHPAC recommended level of .02 µg/dL or below, use a more robust lead particulate monitoring network, and base its measurements on an averaging period of one month. The NAAQS in place now only seeks to avoid an air-related *population mean* IQ loss in excess of 2 *points*.³⁵ It is unacceptable for the federal government to set standards that tolerate significant IQ loss in our children, and all of the neurological and other health impacts that go along with that loss.

2. EPA Must Protect Public Health From New Lead In The Air.

Various industrial sources emit lead as an air pollutant. The Toxic Release Inventory for 2014 includes a total of 367,761 pounds of *new* emissions of lead compounds into the air from

³³ See EPA, TRI Explorer: Release Reports, https://iaspub.epa.gov/triexplorer/tri_release.chemical (Year of Data: 2014; Geographic Location: All of United States; Chemical: Lead & Lead Compounds; Industry: All Industries; Select “Total On–and Off–site Disposal or Other Releases”; Generate Report)) (last updated July 27, 2016).

³⁴ Letter from Sheela Sathyanarayana, Chair, CHPAC, to Gina McCarthy, Administrator, EPA (Jan. 8, 2015), https://www.epa.gov/sites/production/files/2015-01/documents/naaqs_for_lead_letter.pdf; National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964 (Nov. 12, 2008).

³⁵ 73 Fed. Reg. at 67,005-06 (stating that EPA set the NAAQS at 0.15 µg/m³ based on the finding that “the estimated mean IQ loss from air-related Pb in the subpopulation of children exposed at the level of the standard would generally be somewhat to well below 2 IQ points”).

reporting industries.³⁶ EPA has found that the typical average concentration of lead in air near lead-emitting stationary sources is as much as 8 times higher than the concentration at a site that is not near such a source.³⁷ Yet children's exposure to lead from air pollution has not received the attention it deserves. In the final 2020 Plan, in addition to strengthening the national ambient air quality standards as highlighted above, EPA also must take the following actions to reduce exposure to sources of lead emissions in the air:

- EPA must set stronger national emission standards for secondary lead smelters, or battery recyclers. These sources use secondary lead smelting or processing techniques that emit lead. More than 100,000 people experience elevated health threats from the 14 currently operating facilities, located in 11 states and Puerto Rico. Children are also disproportionately exposed to these facilities (30% of the affected population, compared to 27% of the national population). In the most-affected communities, 41% are people of color (compared to 25% of the national population); 52% are Latino or Hispanic (compared to 14% of the national population); and low-income people (living below the poverty level, or without a high school diploma) are also over-represented.³⁸
- EPA must immediately start to phase out leaded aviation fuel. Leaded aviation gasoline, or avgas, which is used in a large fraction of piston-engine aircraft in the United States, is the single largest source of lead to the air, contributing about 59 percent of the National Emission Inventory in 2011.³⁹ Studies have shown that children's blood-lead levels increase dose-responsively in proximity to the airports used by piston engine aircraft.⁴⁰ These emissions can add to the already disproportionately high exposure to lead in communities of color and low-income communities.⁴¹
- EPA should take an inventory of all industrial sources emitting new lead emissions into the air, perform a review of all available methods to reduce these lead emissions and exposures, and design a plan that commits to reduce lead exposure for children around at least 10 of the largest industrial sources of lead by 2020 using all available and appropriate Clean Air Act authorities, including section 112 (air toxics standards for

³⁶ See Right-to-Know Network, TRI Database, <http://www.rtknet.org/db/tri>.

³⁷ See EPA, EPA-454/R-12-001, *Our Nation's Air: Status and Trends through 2010* at 16 (Feb. 2012).

³⁸ Final Analysis of Socio-Economic Factors for Populations Living Near Secondary Lead Smelting Facilities at 10 tbl.2 (Dec. 2011), EPA-HQ-OAR-2011-0344-0161.

³⁹ EPA, Profile of the 2011 National Ambient Air Emissions Inventory at 20 fig.11 (Apr. 2014), https://www.epa.gov/sites/production/files/2015-08/documents/lite_finalversion_ver10.pdf.

⁴⁰ See Miranda, M.L., et al., *A Geospatial Analysis of the Effects of Aviation Gasoline on Childhood Blood-lead Levels*, 119:10 *Envtl. Health Perspectives* 1513, 1515-16 (Oct. 2011); Zahran, S., et al., *The Effect of Leaded Aviation Gasoline on Blood-lead in Children* at 20 (Aug. 2014), https://mpru.ub.uni-muenchen.de/62238/1/MPRA_paper_62238.pdf.

⁴¹ See EPA, *Children's Environmental Health Facts*, *supra* n.26.

source categories). For example, electric utilities together emit about 63,711 pounds of new lead emissions per year into local communities' air.⁴²

3. EPA Must Protect The Public From Exposures To Lead Resulting From Its Manufacture, Processing, Distribution, And Use.

With the reform of the Toxic Substances Control Act (TSCA), EPA has new authority and a new mandate to protect human health from toxic chemical substances, including lead. It should move forward promptly to use that authority to ban or significantly reduce the ongoing manufacturing, processing, distribution and use of lead in this country, including the importation of products containing lead and the domestic production of products containing lead intended for export. In particular, as part of the 2020 Plan, EPA should commit to naming lead one of the ten Work Plan chemicals that will undergo immediate risk evaluation and action under the amended TSCA. EPA should also commit to ensure that the risk evaluation and risk management of lead (and other toxic chemicals assessed under TSCA) will include a systematic review of health impacts, and that EPA will seek public comment on the scope of risk evaluations along with the public participation mandated by the new law. EPA should commit to use the most current science to evaluate the real-world risks and impacts from lead and other toxic chemicals under TSCA, including information on multiple types of exposure or aggregate exposure, and on early-life vulnerability and exposure, to protect children in overburdened communities.

4. EPA Must Protect The Public From Lead In Soil.

The lead-contaminated soil in the vicinity of hundreds of former lead smelter sites around the country has never been fully remediated. Indeed, many of these sites have never even been adequately assessed. In 2014, the EPA Office of Inspector General found that EPA had made progress in assessing and remediating these former smelter sites. However, it concluded that there are still dozens (if not more) former smelter sites with lead contaminated soil in residential areas around the country,⁴³ and there are serious problems with EPA's approach to assessment and cleanup.⁴⁴ EPA must move promptly and transparently to protect the communities in the vicinity of these sites from exposure to lead in the soil. The example of what local communities in Los Angeles, California are now facing from lead smelters there, after high levels of lead have been found in a large radius around people's homes and schools, illustrates how important this issue is for urgent action. Communities should not have to wait until a smelter is shut down, like the effort underway at Exide Technologies, to mount a clean-up effort when the soil was

⁴² Environmental Integrity Project, America's Top Power Plant Toxic Air Polluters at 14-16 tbl.5 (Dec. 2011), <http://www.environmentalintegrity.org/documents/Report-TopUSPowerPlantToxicAirPolluters.pdf>.

⁴³ See Young, A., *Audit faults EPA in delays probing lead factory dangers*, USA Today (June 18, 2014), <http://www.usatoday.com/story/news/nation/2014/06/18/epa-oig-lead-smelter-audit/10679089/>.

⁴⁴ See EPA, Office of Inspector General, *EPA Has Made Progress in Assessing Historical Lead Smelter Sites But Needs to Strengthen Procedures* (June 17, 2014), https://www.epa.gov/sites/production/files/2015-09/documents/20140617-14-p-0302_glance.pdf.

contaminated for years previously with no action and now the burden of trying to find funds for the necessary clean-up falls on local governments and community members.⁴⁵

5. EPA Must Protect The Public From Lead in Drinking Water.

We applaud EPA's commitment to "place special emphasis on addressing drinking water challenges in underserved communities," and to accomplish this by defining "a subset of the most overburdened communities where lead exposures are highest" in order to achieve this goal.⁴⁶ However, we disagree with EPA's proposal to designate overburdened communities based only on whether their drinking water is "supplied by utilities that exceed the Lead and Copper Rule action level for lead."⁴⁷ As the Plan acknowledges, the only health-based standard for lead in water is the Lead and Copper Rule's maximum contaminant level goal of zero.⁴⁸ In contrast, the Lead and Copper Rule's lead action level is not, and was never intended to be, a health-based level.⁴⁹ Moreover, many utilities across the country use sampling practices known to miss the highest levels of lead, skew action level calculations downward, and paint a false picture of lead levels in tap water.⁵⁰ Finally, the communities and households facing the greatest overall risk are not merely those where an action level exceedance has occurred, but those who lack access to the information and financial resources needed to undertake the measures necessary to remove their household sources of lead in water and protect themselves from further harm.

We therefore urge EPA to focus its efforts on the entire spectrum of communities with 1) low average income, 2) a disproportionate concentration of foreclosed, vacant properties where there is acute risk for lead contamination after prolonged periods of low or no water use which interferes with corrosion control treatment, and 3) older housing stock which is most likely to be served by a lead service line. EPA should prioritize these communities in developing its long-term revisions to the Lead and Copper Rule.

In addition, for EPA to create the robust protection needed from lead poisoning and bring down the high blood-lead levels in children in communities of color and low-income communities, Commenters call on EPA to commit to the following additional actions.

⁴⁵ See S. Coast Air Qual. Mgmt. Dist., Exide Technologies - Updates, <http://www.aqmd.gov/home/regulations/compliance/exide-updates>; Cal. Dep't of Toxic Subst. Control, Exide, <http://www.dtsc.ca.gov/HazardousWaste/Projects/UpdateExideSuspension.cfm>.

⁴⁶ 2020 Plan at 37, 39.

⁴⁷ *Id.* at 39.

⁴⁸ *Id.* at 40.

⁴⁹ See Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,478 (June 7, 1991).

⁵⁰ See NRDC, *What's In Your Water? Flint and Beyond* at 5, 16 (June 2016), <https://www.nrdc.org/sites/default/files/whats-in-your-water-flint-beyond-report.pdf>.

a. National Actions to Reduce Lead In Drinking Water.

While we endorse EPA's decision to prioritize the goal of reducing lead in drinking water, and appreciate the spirit and intention underlying this section of the 2020 Plan, the plans to reduce lead in drinking water are worryingly vague and noncommittal. EPA plans to:

- Work closely with states and public water systems to enhance oversight and provide guidance on tap water sampling;
- Improve guidance and implementation for corrosion control and lead mitigation⁵¹; and
- Identify best practices that can be applied to communities.⁵²

These goals are too general, do not lend themselves to accountability, and do not appear to add anything to EPA's basic obligations under the 25 year-old Lead and Copper Rule.

After years of delay, EPA has announced that it plans to publish proposed long-term revisions to the Lead and Copper Rule in early 2017 and, as the 2020 Plan notes, the Office of Groundwater and Drinking Water has already conducted extensive stakeholder input processes to prepare for this rulemaking.⁵³ Given that the rulemaking is relatively advanced, it is disappointing to read that "EPA's primary goals in considering Lead and Copper Rule long-term revisions" add nothing specific to the existing Lead and Copper Rule framework—namely to: "[i]mprove the effectiveness of the corrosion control treatment in reducing exposure to lead and copper, and [t]rigger additional actions that equitably reduce the public's exposures to lead and copper when corrosion control treatment alone is not effective."⁵⁴

The National Drinking Water Advisory Council has recommended that EPA adopt provisions in the Lead and Copper Rule requiring all public water systems to put into place proactive lead service line replacement programs, among other recommendations.⁵⁵ We strongly endorse this requirement, which would mark a move away from the passive sample-and-remediate approach that has proven ineffective at protecting public health. EPA should, at minimum, commit to require this critical action in the 2020 Plan.

In addition, in order to support the goal of full, publicly-funded lead service line replacement, EPA should adopt the following ongoing multi-faceted strategy:

- Publish robust information on health impacts associated with lead in water;

⁵¹ It is unclear what the Plan's reference to "lead mitigation" means in the context of drinking water. This should be clarified in the final Plan.

⁵² 2020 Plan at 40.

⁵³ EPA, Lead and Copper Rule Long-Term Revisions, <https://www.epa.gov/dwstandardsregulations/lead-and-copper-rule-long-term-revisions> (last updated May 12, 2016); 2020 Plan at 40.

⁵⁴ 2020 Plan at 40.

⁵⁵ Letter from EPA National Drinking Water Advisory Council, to Gina McCarthy, Administrator, EPA (Dec. 15, 2015), <https://www.epa.gov/sites/production/files/2016-01/documents/ndwacrecommtoadmin121515.pdf>.

- Publish studies on health benefits of eliminating lead service lines;
- Publish studies on societal costs of exposure to lead in water (medical costs, educational costs, lost productivity, quality of life, loss of life, *etc.*);
- Publish case studies from systems that have undertaken full lead service line replacement; and
- Publish studies on the positive impact of eliminating lead service lines in connection with simultaneous compliance requirements.⁵⁶

Notably, the Flint water crisis also demonstrates the need for EPA to integrate civil rights enforcement into its environmental justice program to address lead contamination and other longstanding environmental hazards that fall disproportionately on communities of color. As highlighted in a recent Earthjustice letter calling for a compliance review of state compliance with the Civil Rights Act, community representatives have previously filed multiple complaints with EPA alleging that Michigan's Department of Environmental Quality (MDEQ) failed to comply with civil rights law, but EPA's Office of Civil Rights repeatedly failed to identify and address clear red flags signaling a pattern of noncompliance at MDEQ over time.⁵⁷ Had EPA taken effective action to root out such practices at MDEQ, perhaps the agency would have acted to protect Flint residents from exposure.

B. Small and Tribal Drinking Water Systems.

Commenters encourage EPA to set up a community work group, as discussed elsewhere in these comments, to include tribal and indigenous community leaders and community-based advocates in implementing the actions EPA describes, and to seek input on the best ways to strengthen these and other actions in the 2020 Plan which affect indigenous and tribal communities.

In addition to the actions EPA describes to strengthen protections for small and tribal drinking water systems, EPA must also prioritize strengthening the information and warning system on drinking water hazards for communities. As two examples, EPA must strengthen and keep the ECHO database up to date. And, EPA must take measures to assure that there is better notification and clearer warning of the hazards associated with drinking water that is not meeting Safe Drinking Water standards.

On these examples, letters from the Environmental Integrity Project (EIP), and allied groups have presented these issues to EPA, seeking an appropriate response.

⁵⁶ Communities are also extremely concerned about lead in schools, and seek EPA's leadership in ensuring that there is transparency on the locations of school lead pipes for children's drinking water and priority commitments ensuring these are replaced.

⁵⁷ Letter from Earthjustice (on behalf of local Flint, state and federal groups) to Jocelyn Samuels, HHS; Lilian Dorka, EPA; and Daria Neal, DOJ (July 12, 2016), <http://earthjustice.org/sites/default/files/FlintLetterFinal.pdf>.

- In February 2016, Environmental Integrity Project advised OECA (by telephone, email, and an online “error” report) that the ECHO database indicated that Flint, Michigan was (and had been) in compliance with the Safe Drinking Water Act lead standard. OECA has yet to correct that flagrant error. The “Next Generation” compliance initiative relies on public access to accurate data about compliance with environmental requirements. It will never reach its potential if the agency cannot move quickly to fix the most glaring errors in its database.⁵⁸
- In April 2016, EIP wrote to the EPA Administrator asking that the agency exercise its authority to provide clearer warning of the hazards associated with continuing to consume water that failed to meet Safe Drinking Water arsenic standards. This letter forwarded EIP’s recent report⁵⁹ pointing out persistent arsenic contamination in low-income and Hispanic neighborhoods in Texas, where unsafe levels of arsenic have been reported for a decade or longer. EPA’s brief response through Region 6 ignored the issue raised, instead stating only that Texas was in compliance with current federal rules.

C. Air Quality.

Commenters strongly support EPA’s recognition that problems with air quality also indicate a fundamental environmental justice problem. The research well demonstrates this, as cited above, and as EPA has highlighted in the 2020 Plan. Consequently, it is essential that EPA include stronger actions to improve air quality and to protect communities’ health than the measures and actions described in the draft plan.

1. Particulate Matter And Freight, Ports, and Goods Movement.

Air pollution kills. It causes asthma attacks, heart attacks, cancer, and premature death; sends people to the hospital with breathing problems; forces children to stay inside instead of playing outside; harms children’s neurological development; and prevents children from attending school and adults from working.

Particulate matter is one lethal and dangerous type of air pollution that deserves priority attention from EPA. The 2020 Plan, however, looks only at particulate matter, aims to achieve only what already is legally required, and offers actions that are little more than what the Office of Air and Radiation is already doing or is supposed to be doing. It leaves out important goals and actions on air quality that are vital for truly realizing environmental justice. If the 2020 Plan is to accomplish its goals and advance EPA’s stated principles, including those in the 1994 Executive Order, it must start with the recognition that business as usual has not addressed environmental justice concerns, and in many cases has reinforced disparate impacts and unfair power dynamics. To provide justice on air pollution, instead of the minimal steps included in the draft, the final 2020 Plan should include commitments to:

⁵⁸ EPA, Flint MS4, <https://echo.epa.gov/detailed-facility-report?fid=110041957353> (last updated Sept. 2, 2014).

⁵⁹ Environmental Integrity Project, *Don’t Drink The Water* (Mar. 14, 2016), <http://environmentalintegrity.org/wp-content/uploads/Arsenic-Report.pdf>.

- Strengthen the PM_{2.5}, ozone, lead, and other NAAQS by ensuring that they provide the requisite protection for low-income persons and communities of color with disproportionately high rates of asthma and other diseases aggravated by air pollution;
- Improve ambient air quality monitoring networks to accurately monitor hot spots around impacted communities;
- Work with communities to help them accurately measure the pollution that affects them;
- Establish meaningful goals for each criteria pollutant, particularly ozone, and look at air pollution impacts synergistically;
- Redesignate areas as nonattainment for a pollutant when they violate the standard for that pollutant so that people in those areas receive the protections of the Clean Air Act;
- Improve the proposed measures for tracking progress toward the goal; and
- Use and increase available resources to adopt specific regulatory measures instead of spending resources on voluntary subsidies or incentives for for-profit polluting industries that undermine accountability to and protections for surrounding communities.

a. Achieving The National Standards For Fine Particulate Matter Is Important But Will Not Assure Protection Of Environmental Justice Communities.

EPA correctly recognizes that air pollution is an environmental justice problem that must be resolved. Regrettably, its goal for fine particulate matter is inadequate, both in terms of what it leaves out and what it sets for the goal. The goal looks only at one problematic air pollutant—fine particulate matter—though numerous other pollutants, like ozone and lead, present serious environmental justice issues.⁶⁰ To strengthen the Plan, EPA should take the following key steps:

EPA should expressly state that its goal for areas designated nonattainment for PM_{2.5} to follow the Clean Air Act and timely attain does not lessen EPA’s commitment for areas designated nonattainment for other pollutants to follow the Clean Air Act and timely attain.

Also, low-income communities and communities of color are disproportionately impacted by emissions of multiple chemicals—including toxics, such as known carcinogens like benzene—often coming from multiple major industrial sources, and exposing people through multiple routes. EPA should look at impacts on these communities synergistically and work to resolve them.

Moreover, the substance of the “new” goal—attainment “for all low-income populations as early as practicable, and no later than their statutory attainment date”—is identical to the

⁶⁰ See, e.g., Comments of American Lung Association, *et al.*, at 240-57 (Mar. 17, 2015), EPA-HQ-OAR-2008-0699-2720 (explaining how ground-level ozone pollution is an environmental justice issue) .

existing statutory requirement. That is, the goal is nothing more than what the law already requires. EPA should set goals not only to fulfill what the law requires, but to utilize the latest science and be precautionary in order to do better as a result of the long injustice that has already occurred in communities neglected and ignored, while being bombarded by fine particulate matter pollution and the harm it causes.

Further, the goal's focus on areas that are *designated* nonattainment⁶¹ ignores the fact that other areas that are not so designated actually have air quality that violates the PM_{2.5} NAAQS.⁶² Unless EPA redesignates these areas as nonattainment—which it should—the goal leaves affected communities out of the 2020 Plan unfairly and without any reasonable justification.

The problem with areas incorrectly lacking nonattainment designations goes deeper. The current monitoring network fails to include sites located in impacted communities, and EPA is actually rolling back prior commitments for near-highway monitoring in many of these communities.⁶³ Moreover, as noted in comments on the Draft Framework, EPA has even refused to use community monitoring data showing violations of the PM_{2.5} NAAQS to fill gaps in the network. By redesignating areas to nonattainment when they have air pollution problems, and by working with communities to assist their efforts to accurately measure the harmful pollution that affects them, EPA would advance the cause of environmental justice tremendously. EPA should correct problems with monitoring, as discussed elsewhere in these comments.

Finally, and most fundamentally, the goal is only as good as the standard it seeks to implement, and the current PM_{2.5} standards must be strengthened to satisfy the Clean Air Act and protect communities' health as required. As public health groups have explained, the most recent PM_{2.5} NAAQS—12 µg/m³ (annual standard) and 35 µg/m³ (24-hour standard)—are higher than what the science calls for to protect public health.⁶⁴ Scientifically justified standards of 11 µg/m³ (annual) and 25 µg/m³ (24-hour) would provide greater health protection for the communities that most need it and, given the most recent design values, would lead to significantly more communities taking steps to clean up their air. For example, Maricopa County, AZ; San Diego County, CA; Wayne County, MI; Bronx County, NY; Philadelphia County, PA; El Paso County, TX; Harris County, TX; and Milwaukee County, WI, all have at least one 2014 design value that exceeds the scientifically justified standard levels, yet none is designated nonattainment under any PM_{2.5} NAAQS.⁶⁵ Further, while EPA is proposing to make fine particulate matter a priority of its environmental justice strategy, it is also announcing that it

⁶¹ 2020 Plan at 42-43.

⁶² See PM₂₄ Design Values at tbls.2.b, 2c, https://www.epa.gov/sites/production/files/2016-05/pm25_designvalues_20122014_final_08_19_15.xlsx (listing 12 counties as having 2014 design values (currently the most recent EPA has released) that violate PM_{2.5} NAAQS even though those counties are not designated nonattainment).

⁶³ Revision to the Near-Road NO₂ Minimum Monitoring Requirements, 81 Fed. Reg. 30,224 (May 16, 2016)

⁶⁴ See Comments of American Lung Association, *et al.*, at 6, 15, 18-20, 38-84 (Aug. 31, 2012), EPA-HQ-OAR-2007-0492-9826; Comments of American Heart Association, *et al.*, at 12-13 (Aug. 31, 2012), EPA-HQ-OAR-2007-0492-9512.

⁶⁵ See PM₂₄ Design Values at tbl.4, *supra* n.62; EPA, *Current Nonattainment Counties for All Criteria Pollutants*, <https://www3.epa.gov/airquality/greenbook/ancl.html> (June 17, 2016).

will delay review and revision of the national standards until at least 2021, even though such review is required *by law* by 2017. Such actions are out of step with the principles and statements within the draft plan (as well as the Clean Air Act). Instead of delaying this much-needed action, EPA should expedite the ongoing review of the PM NAAQS and assure that it fully assesses, and provides requisite protection against, adverse health effects on low-income people and people of color with disproportionately high rates of asthma and other diseases aggravated by fine particle pollution.

b. The Proposed Measures Fail To Ensure Disproportionate Impacts On Environmental Justice Communities Will Be Addressed.

Two of the “measures” EPA proposes for tracking progress on particulate matter are ill-suited to the task. The first measure skews the results toward a misimpression that there is not much of a problem, since there are very few PM nonattainment areas currently and the standards are not as protective as the science requires. The second measure—the “average county-level design value for counties with monitors measuring PM_{2.5} concentrations not meeting the PM_{2.5} NAAQS”—is also of dubious utility.⁶⁶ People in Kern County, CA, do not breathe or otherwise have anything to do with the PM_{2.5} levels that are in Shoshone County, ID. Moreover, even within large western counties such as Kern, the location of the monitor matters. The proposed measure makes no effort to actually represent the exposures in environmental justice communities. There are disparities in exposure to environmental contaminants like PM_{2.5}, and even within the set of people disparately exposed to PM_{2.5}, there are disparate exposures. Averaging the design values across counties misleadingly elides those disparities without any apparent benefit. The third measure—the difference in attainment between low-income and other areas—is well-suited to the goal and should be retained but will require improvements in the monitoring network to provide any confidence that low-income areas are fairly represented.

c. The Proposed “Actions” Do Little or Nothing to Achieve Environmental Justice.

The action list for achieving the fine particulate matter goal does not assure that the Office of Air and Radiation changes business as usual on the critical issue of air quality and environmental justice. The proposal commits to oversee SIP development, but this is already required by law; to adopt unspecified rules by unspecified dates; and otherwise to pursue various voluntary programs that funnel limited resources to the industries responsible for polluting these communities.

The latter focus on voluntary subsidy programs such as DERA grants and the voluntary ports initiative is particularly troubling. First, it communicates that the government would rather use its limited financial resources to give money to polluters to reduce emissions than to mandate those reductions and save those resources for meeting statutory obligations and building out the monitoring and other infrastructure necessary to protect impacted communities. This is a political choice that undermines the Agency’s words about wanting to address environmental

⁶⁶ One positive of it is that it is not limited to counties that are designated nonattainment.

injustice. Second, the focus on unenforceable voluntary programs rather than enforceable mandates undermines the ability of communities to hold polluters accountable. Voluntary incentive programs rely on contractual agreements between the agencies and the polluters that cannot be enforced or even scrutinized by anyone else. Such focus reinforces the unfair power dynamic that excludes communities from being able to protect themselves—the dynamic that the 2020 Plan should be trying to fix.

Instead of the list of actions included in the 2020 Plan which will make little or no difference for affected communities, EPA should outline a course of action that will actually address and reduce the problem. Commenters have highlighted key actions on the national PM_{2.5} standards, above, that EPA should include in the 2020 Plan. In addition, and importantly, EPA's action strategy for addressing the disproportionate impacts of fine particulate matter pollution should target freight as discussed below.

d. Commit to Reduce Unjust Air Pollution from Freight and Goods Movement

Over 4 million people in the U.S. are exposed to port-related diesel particulate matter concentrations that exceed a 100-per-million lifetime cancer risk, and the communities around these ports and rail yards with elevated diesel particulate matter levels are disproportionately low-income communities of color.⁶⁷ Community and environmental groups have already submitted detailed recommendations on actions that EPA should take to address emissions from freight-related activities.⁶⁸ These include:

- 1) new national standards on heavy-duty trucks, locomotives and marine vessels;
- 2) a national indirect source review program;
- 3) improved requirements to inventory emissions from freight facilities;
- 4) guidance on available state measures on freight-related sources; and
- 5) greater oversight in federal environmental review of freight-related infrastructure projects.⁶⁹

These are the kinds of actions that would make a meaningful difference to reduce environmental injustice from air pollution resulting from freight. The Administrator recently

⁶⁷ ICF International, *Estimation of Diesel Particulate Matter Population Exposure Near Selected Harbor Areas and Rail Yards (revised)* (Sept. 28, 2007), EPA-HQ-OAR-2003-0190-0744; see EPA, *2014 DERA Ports RFP List of Areas of Poor Air Quality* (Sept. 16, 2014), <http://www3.epa.gov/otaq/ports/documents/fy14-ports-county-area-list.pdf>.

⁶⁸ See Letter from Angelo Logan, Moving Forward Network, to Gina McCarthy, Administrator, EPA at 6-12 (Dec. 7, 2015), <https://www.scribd.com/doc/295160200/Letter-and-recommendations-to-EPA-Administrator-Gina-McCarthy>; see also NEJAC, *Reducing Air Emissions Associated With Goods Movement: Working Towards Environmental Justice* (Nov. 2009).

⁶⁹ EPA should commit to reviewing and implementing at the national level lessons and key information from state leaders—including emerging ship and locomotive engine exhaust capture and treatment technologies such as the recently California Air Resources Board certified Advanced Maritime Emissions Control System (AMECS); and the recently released California Governor Executive Order for California to transition to zero-emission freight technologies.

committed to create an agency wide goods movement working group. At a minimum, that commitment should be included in the actions listed in the 2020 Plan. But the final version should go further and task the working group with exploring the specific outlined regulatory and other actions and reporting back on progress at specific intervals. Such actions would signal that EPA will commit resources to exploring solutions to the disproportionate impacts of air pollution and is taking this environmental justice effort seriously enough to offer more than the proposed business as usual.

2. Air Toxics.

It is a major omission from the 2020 Plan not to include toxic air pollution as part of the air quality objectives. There is strong evidence showing disproportionate exposure and resulting health threats from toxic air pollution for communities of color and low-income communities. These threats include neurological harm, respiratory harm, birth defects, and cancer, among others. And these impacts fall disproportionately on children, in communities of color and low-income communities, where there are also higher cancer rates and incidences. Evidence also shows that air pollution has the greatest carcinogenic impact early in life due to children's greater vulnerability and exposure, including in utero. For example, in the U.S., during the past decade while cancer incidence rates for men decreased and for women remained steady, cancer rates for children increased 0.8% per year. Cancer is the second leading cause of death among children younger than 14. And, in the U.S., black men have the highest overall cancer incidence rate (587.7 per 100,000) of any racial or ethnic group. Blacks are also more likely to suffer and die from lung cancer than any other group; lung cancer incidence is 32% higher for black men than white men, even though black men's exposure to cigarette smoke is lower.

In example after example of EPA's own recent rulemakings for major industrial air toxics sources ranging from petroleum refineries to battery recyclers to chromium electroplaters, the agency has repeatedly found air toxics sources disproportionately expose and threaten the health of people of color, people living below the poverty level, people without a high school diploma, and/or people linguistically isolated.⁷⁰ Exposure to air pollution is highly involuntary and a critical justice issue requiring strong governmental action. People exposed to cancer-causing air—especially those who cannot move away or cannot or do not want to have to avoid going outside in their own neighborhoods—have little or no ability to protect themselves, and depend on EPA fulfilling its legal responsibilities to protect them.

In view of these impacts, Commenters urge EPA to add at least the following specific substantive commitments on air toxics to Plan EJ 2020:

⁷⁰ See, e.g., Air Alliance Houston, *et al.*, Petition for Reconsideration at 37-40 (Feb. 1, 2016), EPA-HQ-OAR-2010-0682-0860; Final Analysis of Socio-Economic Factors for Populations Living Near Secondary Lead Smelting Facilities at 9-10, *supra* n.38; Analysis of Socio-Economic Factors for Populations Living Near Hard Chromium Electroplating Facilities at 7-8, EPA-HQ-OAR-2010-0600-0601 (Dec. 1, 2011).

a. End the backlog of overdue air toxics rulemakings and strengthen national air toxics standards for major and area sources.

EPA has failed to act for many years to complete the health risk and technology review and update rulemakings for dozens of industrial air toxics sources.⁷¹ EPA should commit to complete all overdue rules as part of this plan, including by designating additional staff time and resources, if helpful, to ensure these rules are done right.

b. Close all loopholes by regulating and reducing uncontrolled emission points and toxic air pollutants.

In recent decades, EPA has repeatedly failed to fulfill the Clean Air Act's requirements to set emission standards for all air toxics, and all sources of air toxics.⁷² EPA is also overdue in updating the list of air toxics, which has never been expanded, and the list of industrial source categories of toxic air pollutants.⁷³ EPA should commit to fulfill these obligations without delay and to assure that communities receive strong protection—the maximum achievable emission reductions in all toxic air pollution, including pollution that is currently completely uncontrolled. In addition, as discussed above, for all air toxics and other air rules, EPA must remove all loopholes resulting from EPA's unlawful policies regarding startup, shutdown, and malfunction exemptions from emission standards, including the affirmative defense and new variations of such exemptions like the one placed into the 2015 refineries rule.⁷⁴

c. Require existing sources to keep up with the air pollution reductions achieved by the best-performing sources.

EPA must not sunset or freeze the air toxics provisions in time, and cut off their ongoing effect as EPA revises emission standards based on pollution control advancements. EPA must not turn the Act's promise of continuing protection from air toxics into just a single snapshot of forgotten protection that assures only the use of outdated technology from decades ago.

⁷¹ EPA, *Risk and Technology Review*, <https://www3.epa.gov/airtoxics/rrisk/rtrpg.html> (last updated Apr. 12, 2016).

⁷² See Petition of NRDC and Sierra Club to EPA, filed by Earthjustice (Jan. 14, 2009) (seeking a comprehensive assessment of regulations under 40 C.F.R. parts 61 and 63 to ensure standards comply with the Clean Air Act and governing judicial rulings), http://earthjustice.org/sites/default/files/library/legal_docs/mact-petition-for-rulemaking.pdf.

⁷³ 42 U.S.C. § 7412(b)(2), (c)(1).

⁷⁴ See EPA, *Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards; Final Rule*, 80 Fed. Reg. 75,178 (Dec. 1, 2015); see also EPA, *EPA Updates Emissions Standards for Petroleum Refineries*, (Sept. 29, 2015), <https://yosemite.epa.gov/opa/advpress.nsf/bd4379a92ceceae8525735900400c27/d12edc1c383adf0385257ecf005b96b6!opendocument>; Petition of Air Alliance Houston *et al.* at 3-35 (Feb. 1, 2016), <http://earthjustice.org/sites/default/files/files/2.1.16%20Refineries%20EPA%20Petition%20for%20Admin%20Recon.pdf>.

When pollution control advancements occur, EPA is supposed to update the basic stringency level of the emission limits as a result of its 8-year review. In particular, it is supposed to follow at least the average of what the cleanest sources have achieved, and assure the maximum achievable level of emission reduction.⁷⁵ The Clean Air Act is clear. Air toxics “emissions standards promulgated under [subsection (d) of section 7412]” must follow these requirements.

These requirements, 42 U.S.C. § 7412(d)(2)-(3), are the heart of the air toxics law. But EPA has chosen to ignore them in recent rules. If EPA follows these requirements when it promulgates revised air toxics standards, Americans will receive the continued health protection that Congress meant the Clean Air Act to provide. If not, Americans will lose this vital protection.

Unless EPA follows the Clean Air Act, emission standards will become more and more obsolete even while pollution control methods improve. Correcting course on this policy would strengthen protection for communities affected by toxic air pollution from all major industrial sources—many of which are more than a decade old—such as chemical plants, oil refineries, smelters, dry cleaners, coal-fired power plants, chromium platers, and every other current or future listed category.⁷⁶

Unless EPA follows the Clean Air Act, the air toxics law will lose its potency as the cancer-prevention and health-protection law Congress intended it to be. And the “equity concern” that informed the 1990 air toxics amendments⁷⁷ will only increase as the gap widens between those local communities where sources implement up-to-date pollution control methods and those that do not, cementing disparities in air toxics exposure and health impacts. Companies that would otherwise reduce their pollution voluntarily and state and local regulators who wish to encourage innovation to advance health protection can face a competitive disadvantage if they do more to control pollution than weak national standards require. EPA should not allow cost preferences to limit public health protections. It would be particularly unjust to do so on the issue of air toxics where exposures and other health burdens fall disproportionately on communities of color and low-income communities.

d. Revise and reduce EPA’s policy benchmark on unacceptable cancer risk.

Since 1989, EPA’s policy under the Clean Air Act has been that a 100-in-1 million lifetime cancer risk from the inhalation exposure to air pollution from a single type of stationary source is acceptable. This issue determines how much protection EPA will require from all major sources of toxic air pollution under Clean Air Act section 112(f)(2). Both the science and social values have evolved dramatically in recent decades—*e.g.*, in terms of what we know about children’s health and vulnerability, socioeconomic disparities, pollution controls, and the level of

⁷⁵ 42 U.S.C. § 7412(d)(2)-(3).

⁷⁶ See EPA, Technology Transfer Network – Air Toxics Web Site, <https://www3.epa.gov/ttn/atw/> (last updated Feb. 23, 2016).

⁷⁷ Legislative History of the Clean Air Act Amendments of 1990 (104 Stat. 2468, P.L. 101-549).

involuntary environmental health risk people believe is acceptable. EPA must update its policy and reduce that benchmark.⁷⁸ In view of evidence showing many chemicals, including lead, have no safe level of exposure, EPA must also reform its risk assessment policy to ensure all such health risks are reduced to the lowest possible level to protect public health, rather than suggesting there is any safe or acceptable level.

e. Fulfill the urban air toxics requirements of the Act.

EPA is far behind in fulfilling its responsibility to reduce toxic air pollution under the urban air toxics program, as shown by recent NATA data, and the Clean Air Act Advisory Committee's (CAAAC) report and recommendations.⁷⁹ Commenters urge EPA to set stronger standards for all air toxics sources and to fulfill other recommendations of the CAAAC, such as those on mobile sources, diesel, cumulative risks and impacts assessment, and supplemental environmental projects that would actually achieve stronger health protections without delay. Many of these issues are discussed in other sections of these comments in more detail. We urge EPA to prioritize, among those recommendations, the actions that would definitively reduce exposure and health threats rather than employing voluntary measures or financial incentives that are an unacceptable substitute for binding enforceable action for long-ignored and low-resourced communities facing environmental injustice.

D. Hazardous Waste.

EPA is correct to finally prioritize agency attention at hazardous waste sites and the environmental justice communities that surround them who constantly face the threats of toxic contamination or are already seriously impacted.⁸⁰ But EPA's 5-year plan falls far short of the effective agency action that is much needed and long overdue.

As a general matter, EPA must clarify that its 2020 Plan focusing on "hazardous waste" sites includes sites that use any of the many EPA-made regulatory exclusions and exemptions from RCRA's definition of solid waste. As EPA is well aware, communities near sites that are excused by EPA's regulations from RCRA's cradle-to-grave hazardous waste management requirements are at great risk of serious harm caused by explosions, fires, spills, and leaks that release harmful chemicals—that would otherwise be controlled—into the air, soil, surface and drinking water. Indeed, EPA has recently identified over 250 cases of significant environment damage and adverse human health impacts, including death, at sites that evade RCRA using EPA's regulatory loopholes.⁸¹ Many of these sites have become so heavily contaminated with

⁷⁸ See Comments of Air Alliance Houston, *et al.*, (June 28, 2013), EPA-HQ-ORD-2013-0292-0133.

⁷⁹ See EPA, Final Recommendations of the Air Toxics Work Group (Jan. 2016), <https://www.epa.gov/sites/production/files/2016-01/documents/urban-air-toxics-wkgrp-report-2016.pdf>.

⁸⁰ See, e.g., Env'tl. Justice and Health Alliance for Chem. Policy Reform, *Who's In Danger?* (May 2014), <http://comingcleaninc.org/assets/media/images/Reports/Who's%20in%20Danger%20Report%20FINAL.pdf>.

⁸¹ See EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* at 5-9 (Dec. 10, 2014), EPA-HQ-RCRA-2010-0742-0370.

toxic pollution that they have been designated as CERCLA Superfund sites requiring extensive and expensive government-funded clean-up actions.⁸²

For similar reasons, the 2020 Plan must also include toxic coal ash sites, which EPA has also found disproportionately impact people of color and low-income communities.⁸³ Although coal ash has been statutorily exempted from listing as a “hazardous waste,” coal ash, like the other exempted wastes mentioned above, contains hazardous substances and poses threats equivalent to listed hazardous wastes. It is irrational and unjustified for EPA to ignore the impact of these excluded and exempted wastes on environmental justice communities and to fail to assess the effectiveness of remedial efforts. EPA’s plan must also address all sites where coal ash is disposed, including municipal solid waste landfills, which are not currently regulated under EPA’s 2014 coal combustion residuals rule.⁸⁴

There are several other problems with the 2020 Plan as presented. EPA’s stated goal for all hazardous waste sites is merely to “reduce human exposure to contamination at hazardous waste sites, with emphasis on *understanding* the impact in minority, low-income and vulnerable communities.”⁸⁵ Although symbolically important, it is an astoundingly unimpressive goal, which will do little, if anything, to ameliorate the disproportionate burden of hazardous waste exposure in environmental justice communities.

First, it is well past time for the agency to focus simply on “understanding” the impact of hazardous waste sites on the health and well-being of environmental justice communities. Aiming to understand what the agency and the public have long known is hardly an acceptable goal. Indeed, as EPA’s plan acknowledges, the disproportionate impact of hazardous waste sites has been well documented for decades:

The plight of overburdened communities surrounded by hazardous waste sites has been an important issue in the history of environmental justice. Minority and low-income populations are more likely to be located in neighborhoods with hazardous waste facilities and are more vulnerable to the negative impacts from such facilities. A key finding of the report *Toxic Waste and Race at Twenty 1987-2007* found that minority populations make up the majority of those living in host neighborhoods within 3 kilometers (1.8 miles) of the nation’s hazardous waste facilities.⁸⁶

⁸² *Id.*

⁸³ See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,467 (Apr. 17, 2015).

⁸⁴ See 40 C.F.R. Part 257, Subpart D. See also Petition Seeking Amendment Of 40 C.F.R. Part 258 To Strengthen Safeguards For The Disposal Of Coal Combustion Residuals In Municipal Solid Waste Landfills (submitted June 8, 2016).

⁸⁵ 2020 Plan at 44 (emphasis added).

⁸⁶ *Id.* (internal citation omitted); see Bullard, R.D., *et al.*, United Church of Christ Justice & Witness Ministries, *Toxic Wastes and Race at Twenty 1987- 2007* (Mar. 2007), <https://www.nrdc.org/sites/default/files/toxic-wastes-and-race-at-twenty-1987-2007.pdf>.

EPA recently confirmed this in the Environmental Justice Analysis it completed for its 2015 Definition of Solid Waste rulemaking.⁸⁷ Yet, the entire thrust of the agency’s plan for addressing hazardous waste sites in communities of color and low-income and vulnerable communities is simply to “understand” these established facts and catalogue the progress of business as usual, already mandatory cleanups on a biennial basis.

The plan, in its entirety, is to assess every two years the nearly 800 RCRA corrective action and CERCLA sites where human exposure to hazardous waste is not under control and determine whether the sites are in environmental justice communities and whether the site has been remediated sufficiently to re-classify the site as “human exposure under control.” While such an assessment of the leaking hazardous waste sites must indeed be completed—with the findings published for public review immediately—this should be just the beginning of EPA’s actions to both *prevent and address* disproportionate harm, not the end result.

EPA’s “strategy” will be virtually useless in achieving results if it does not include real measures and concrete actions directed to prevent contamination at hazardous waste sites in the first instance, and speed the pace of cleanup, prioritize contaminated sites, and substantially assess the effectiveness of remediation in environmental justice communities.

To truly assist dangerously burdened communities in a meaningful way in the next five years, EPA should accomplish the following:

- EPA must prioritize prevention of hazardous waste contamination in environmental justice communities across the country. As an immediate first step, EPA must impose on all facilities using regulatory exclusions, exemptions, and alternative standards the notification requirement EPA has identified as a “minimum requirement necessary” to define when hazardous wastes are unlawfully circumventing RCRA’s cradle-to-grave protections.⁸⁸ As EPA knows, the lack of notification requirements is a massive barrier to oversight and enforcement needed to ensure that hazardous wastes are safely managed in accordance with the law; it also denies communities of their right to know what toxic constituents are being handled near their homes and places of work and recreation without the full protection of RCRA, and what risks such activities may pose to their health and safety.
- EPA must prioritize cleanups in environmental justice communities, where human exposure to hazardous waste is most severe and where there are multiple sources of chemical exposure. EPA’s strategy fails to address cumulative impacts and threats from chemical releases in communities of color and low-income communities and to prioritize those sites where dangerous impacts are occurring. EPA must assess disease, death, and hospitalization rates; population density; child and senior populations; and diminished access to health care, direct pathways of exposure (*e.g.*, subsistence fishing), and other

⁸⁷ See Potential Adverse Impacts Under the Definition of Solid Waste Exclusions (Including Potential Disproportionate Adverse Impacts to Minority and Low-Income Populations) at 10-13 (Dec. 2014), EPA-HQ-RCRA-2010-0742-0371.

⁸⁸ See Definition of Solid Waste, 76 Fed. Reg. 44,094, 44,138-39 (July 12, 2011).

factors that increase the severity of adverse impacts in environmental justice communities. EPA must take these factors into account in the prioritization and design of remedial actions, starting in the first year of the plan's implementation.

- After identification of sites in environmental justice communities, EPA must ensure that funds have been dedicated for public education tailored to informing local communities and site workers of the risks posed to their health and safety. At each site, EPA must ensure transparency and meaningful community participation in all aspects of the cleanup processes, including opportunities to provide input on and make decisions regarding the selection of the cleanup/corrective action plan and applicable or relevant and appropriate requirements (ARARs), access information about the status of the cleanup, and engage in citizen monitoring to track compliance, progress and exposures.
- Before cleanup/corrective action plans are selected, EPA must ensure that human health and environmental risks associated with the cleanup activity have been fully assessed, and that such information is shared with local communities. Once a plan has been selected (with the involvement of the communities), EPA must protect against any associated risks by ensuring compliance with ARARs and requiring additional necessary safeguards at the site. EPA must also engage in extensive and appropriately tailored public outreach necessary to ensure that the affected local communities are fully informed about all risks and ways to reduce their exposures.
- In its overall assessment, EPA must determine, on a national level, whether the pace of cleanup of waste sites and the types of remedies chosen differ based on the income level or racial or ethnicity makeup of the host community and prepare a report detailing these findings along with remedies, if disparities are found.
- Because of the disproportionate impact of waste sites on Tribes, EPA must launch a special inquiry concerning the effectiveness of remedial actions on tribal lands. Of a total of 1,322 Superfund sites as of June 5, 2014, nearly 25 percent were in Indian country.⁸⁹ EPA must identify the waste sites on or adjacent to tribal lands where human exposure is not under control, separately assess the progress of cleanup and levels of exposure to Tribes from such sites, and develop a separate plan to prioritize cleanup and engage affected Tribes in remedial design. In addition, EPA must assess the effectiveness of consultations with Tribes impacted by waste sites and propose changes to the National Oil and Hazardous Substances Pollution Contingency Plan⁹⁰ to establish rules that guarantee public participation and require compliance with ARARs established by Tribes.
- EPA should also recognize that properly addressing and cleaning up hazardous waste can help advance more sustainable economic development and opportunity for communities that need this. Failing to address hazardous waste can hold back sustainable development

⁸⁹ Terri Hasen, *There Are 532 Superfund Sites in Indian Country!*, (June 17, 2014),

<http://indiancountrytodaymedianetwork.com/2014/06/17/532-superfund-sites-indian-country-155316>.

⁹⁰ See 40 C.F.R. Part 300.

and delay economic justice and job creation for communities. We strongly recommend that EPA work with communities to find ways to make safe hazardous waste clean-up and sustainable and healthy economic opportunity go hand in hand.

E. Targeting Enforcement Action To Overburdened Communities.

EPA's goal to deepen EJ Practice to improve the health and environment of overburdened communities through enforcement and compliance is commendable, but falls short both in its substance as well as solutions for specific enforcement problems. Moreover, it is unclear why EPA is not including targeted Title VI enforcement as part of this important objective. In addition to strengthening EPA's Title VI enforcement program and including Title VI in this priority, as further discussed later in these comments, EPA should also do the following:

1. Ensure Enforcement Targeting Reaches Communities In Greatest Need of Enhanced Enforcement.

EPA's commitment to target enhanced enforcement actions and resources to strengthen protection for at least 100 overburdened communities is important and will make a difference in these communities. To choose these communities, Commenters previously provided example criteria EPA should consider using, and incorporate those comments here.⁹¹ It is essential that EPA take public comment and receive community input as part of the process of choosing these communities. As discussed later (in Part IV, below), once each community is chosen, EPA also should create a Community Enforcement Workgroup for each chosen community to receive information and have an opportunity to provide input and assist EPA in advancing environmental justice as part of its enforcement initiative within that community.

Commenters also wish to note that EPA should acknowledge the fundamental unfairness of current policies regarding the status and deportation of undocumented immigrants, and the adverse public health consequences of those policies. Among other concerns, current policies make immigrants more exposed and vulnerable, especially without adequate environmental enforcement and assistance. A well-founded fear of immigration-enforcement authorities also can prevent some immigrants from taking advantage of government-provided services—such as those provided in Flint, Michigan—for fear that contact with such services may lead to deportation. EPA should consider this point as it targets enforcement resources and aims to ensure that it protects the most vulnerable communities from harm.

2. Remove All Unlawful Loopholes and Exemptions (SSM) and Fully Enforce Standards During Upsets and Malfunctions.

EPA has a long and problematic history of creating exemptions from Clean Air Act emission standards during periods of startup, shutdown, and malfunction.⁹² EPA's exemptions have been repeatedly found to be unlawful, including in decisions issued in 2008 and 2014 by

⁹¹ See 2015 Comments at 3-7, *supra* n.1.

⁹² Air Alliance Houston, Petition for Reconsideration at 4-5, *supra* n.70.

the D.C. Circuit. EPA must remove the SSM exemptions, affirmative defense to civil penalties during malfunctions, and all variations on these exemptions from all Clean Air Act standards that contain them—including section 111, 112, and state implementation plans, and not give into polluter pressure to craft new similar exemptions.⁹³ EPA must also follow through expeditiously on its pending rulemaking to remove these exemptions from the Title V regulations, and thus from all Title V permits.⁹⁴ Work to ensure that such exemptions are speedily removed from Title V permits must follow, and a worthy goal for EPA would be to focus its and states' attention on sources in overburdened communities.

Unfortunately, EPA has recently finalized a new variation of this exemption in the 2015 refineries air toxics rule.⁹⁵ In that rule, EPA has allowed facilities to get away with one or two free passes (every three years) from requirements to reduce air toxics from flares and pressure relief devices. These malfunction exemptions are just as unlawful and harmful to public health and the environment as all of the prior similar exemptions found unlawful in court.⁹⁶ The people most exposed to air pollution and to health and safety threats from refineries, living in the most vulnerable and exposed zones around these facilities, are disproportionately communities of color and lower-income communities.⁹⁷ EPA must remove from the refinery standards, and all other standards, all types of exemptions and stop allowing facilities to emit freely without consequence.

SSM exemptions contradict environmental justice efforts by disproportionately exposing overburdened communities to more air pollution and preventing corrective action from being taken to end harmful malfunctions that threaten public health. EPA must issue new final rules removing all of these exemptions, and thus satisfy the Clean Air Act, reduce communities' exposure to air pollutants, and strengthen health protections for overburdened communities. As long as major releases are being excluded because of arbitrary exemptions and loopholes such as the SSM and other types of malfunction exemptions, EPA is not fulfilling its obligations under the Clean Air Act or advancing environmental justice.

⁹³ See, e.g., 80 Fed. Reg. 33,840 (June 12, 2015) (SSM SIP Call); 80 Fed. Reg. 2871. (Jan. 21, 2015) (proposing to remove affirmative defense from area source boilers rule). We are encouraged by EPA's removal of the affirmative defense from, for example, the MATS rule, but more remains to be done. Other standards that illegally contain affirmative defenses include the NSPS for electric utility steam generating units, 40 C.F.R. § 60.48(a); and the NESHAP for chemical manufacturing area sources, *id.* § 63.11501(e). Sierra Club provided a full list of such sources in its June 17, 2014, *Oljato* petition/petition for rulemaking (attached, along with EPA's grant of the petition). As explained there, EPA can and should remove all the affirmative defenses in one rulemaking for all source categories, rather than doing so piecemeal, category by category.

⁹⁴ 81 Fed. Reg. 38,645 (June 14, 2016).

⁹⁵ 80 Fed. Reg. at 75,245, 75,264-65.

⁹⁶ Air Alliance Houston, Petition for Reconsideration at 4-5, *supra* n.70.

⁹⁷ See Env'tl. Justice and Healthy Alliance for Chem. Policy Reform, *Who's In Danger*, *supra* n.80; Analysis of Socio-Economic Factors for Populations Living Near Petroleum Refineries at 8, tbl.2 (Jan. 6, 2014), EPA-HQ-OAR-2010-0682-0226.

3. Strengthen Enforcement Policy To Address All Harmful Violations as High Priority Violations, Including Short-Term Upsets.

On August 25, 2014, EPA revised its enforcement policy defining the “High Priority Violations” of the Clean Air Act that are “most likely to be significant for human health and the environment.”⁹⁸ Under the revised version, illegal emissions of hazardous chemicals and other pollutants will no longer be considered a “high priority” unless the violations persist for at least seven days.

This policy should be amended to include short-term violations that, due to the amount or toxicity of the specific pollutants released, deserve equal attention from federal and state enforcement programs because of their disproportionate impact on overburdened communities. The new EPA policy is clearly intended to create a presumption that violations that do not persist for more than seven days are less serious because they are unlikely to pose a significant risk to public health or the environment. However, the data show this assumption is false.⁹⁹ The short term emission events can overwhelm communities with high volumes of pollution, include significant amounts of carcinogens and other toxins that are dangerous in small concentrations, and may contribute more to annual emissions than so-called “normal operations.”

The communities most affected by these episodes are working-class neighborhoods, where a majority of the residents are black or Latino. These overburdened communities are downwind from refineries, chemical plants, and oil and gas drilling and processing sites. They also include large numbers of children and elderly residents, who are more sensitive to the respiratory ailments triggered by air pollution. In the 2020 Plan, EPA promises to “continue to develop approaches to target compliance and enforcement resources to make a bigger difference in the most overburdened communities.” The EPA cannot keep this promise if emissions from catastrophic or chronic upsets at plants near these vulnerable communities are classified as a “lower priority” for EPA or state enforcement. To further environmental justice, EPA must amend the policy to reclassify and recognize as a high priority certain short-term violations caused by emission events that can be extremely dangerous to public health.

⁹⁸ Mem. from Phillip Brooks, Director, Air Enforcement Division at 1-2 (Aug. 25, 2014), <https://www.epa.gov/sites/production/files/2015-01/documents/hpvpolicy2014.pdf>.

⁹⁹ See Letter from Environmental Integrity Project to Cynthia Giles, EPA OECA, Re: EPA Definition of “High Priority Violations” of the Clean Air Act (Oct. 6, 2015), http://environmenttexas.org/sites/environment/files/resources/EPA_HighPriorityViolationsLetter_10%206%2015%20%28002%29.pdf (Shell Oil Deer Park released more than 300,000 pounds of 1,3-butadiene from a relief valve in just 55 minutes, and a Texas Petrochemicals manufacturing site released nearly 12,000 pounds and 35 tons of smog-forming organic chemicals from a unlit flare in a six hour period, just to name a few).

4. Involve Communities In Compliance and Enforcement to Ensure Remedies Provide Actual Relief to People Hurt by Environmental Violations and Prevent Future Violations.

The goal lacks specificity in how EPA plans to involve communities in enforcement and compliance proceedings and does not consider the realities of overburdened communities. For example, EPA promises to “increase ... enforcement actions for serious violations affecting overburdened communities, and ... will identify ... strategies in at least 100 of the most overburdened communities over the next five years.”¹⁰⁰ However, it is unclear how or if EPA will use selection criteria that factor in long-term cumulative exposures, risks and other impacts, nor does it show how EPA will actually engage communities in the process.

Next, EPA promises to “build upon existing tools (e.g., EJSCREEN) to help regional offices and co-regulators ... identify the most overburdened communities,” but does not explain how the information will be used to target non-compliant facilities in overburdened communities—only that the new approach will bring together “other data” with on-the-ground knowledge to help direct focus—with no information on this data.¹⁰¹ Moreover, it is not enough to simply “identify” communities, EPA must consult with the communities to understand their concerns and provide relevant and catered advice to the offices working on the enforcement actions.

EPA also promises “to *increase the number* of SEPs and mitigation projects affecting overburdened communities” by “promot[ing] early consideration of [the options],” and “*increase the number* of EPA enforcement settlements ... that incorporate environmental monitors and/or transparency tools.”¹⁰² However, these are incomplete and insufficient metrics because a community’s rights are often unfairly compromised in settlement negotiations unless they have sufficient information, an opportunity to have a voice and seat at the table, and the ability to inform remedies.¹⁰³ Similarly, the “number” of settlements does not consider the type of settlements, *i.e.*, whether the settlement is even relevant or remedial given the community’s needs. That is why in enforcement actions it is not enough for EPA to simply “share ... examples of outreach to communities regarding enforcement actions.”¹⁰⁴ Actual community involvement in the process and in designing and assuring appropriate remedies must be required from the beginning and through the entirety of the proceedings.

5. Strengthen EPA Oversight of States and Increase Objections to Inadequate and Unlawful State Permits.

As the 2015 coalition comments emphasized in more detail, the agency needs to defer less to states with a harmful record of inadequate and unlawful permits and policies that undermine the Clean Air Act, Clean Water Act, hazardous waste, and other environmental and

¹⁰⁰ 2020 Plan at 15.

¹⁰¹ *Id.* at 14.

¹⁰² *Id.* at 15-16 (emphasis added).

¹⁰³ See generally, Rechtschaffen, C., *et al.*, Environmental Justice: Law, Policy & Regulation (2009).

¹⁰⁴ 2020 Plan at 15.

health statutes on issues ranging from clean air to the devastation of mountaintop removal mining, which the agency should not allow.¹⁰⁵ EPA should commit to strengthen its oversight program, including by objecting more to unlawful permits.¹⁰⁶ EPA should also commit to provide concrete methods to ensure states do not violate Title VI of the Civil Rights Act in permitting, as discussed later, and that states consider and address environmental justice concerns and disparities in permitting.

6. EPA Should Set Strong Enforcement Objectives to Reduce Violations that Release Toxic Air Pollution.

EPA's specific enforcement objectives for environmental justice should include toxic air pollution, and especially frequent upsets that vent or flare large volumes of carcinogens or other pollutants across the fenceline and into neighborhoods downwind. The communities most affected disproportionately include low-income people and people of color and should be "ground zero" for EJ initiatives.

For additional information on the above and other enforcement issues, please see the detailed comments of the Environmental Integrity Project and University of Maryland Environmental Law Clinic.

III. EPA SHOULD ADD COMMITMENTS TO THE PLAN.

Commenters urge EPA to address major omissions and add objectives currently excluded from the plan into the 2020 Plan before it is finalized. We point EPA to our prior 2015 comments, attached and incorporated by reference, which also cited and incorporated the 2010 Lawyers' Committee for Civil Rights Under Law's major environmental justice report on actions needed.¹⁰⁷ Many or most of the 2010 recommendations have never been fulfilled.

In addition to evaluating these issues, and urging regional offices to add to the priorities, as discussed above, we also ask EPA to add to the 2020 Plan key cross-cutting actions that would advance environmental justice on many issues across many offices, regions, and states.

¹⁰⁵ See Environmental Justice Petition for EPA Action under Executive Order 12898 and All Other Legal Authorities (filed 2009 by Coal River Mountain Watch, Kentuckians For The Commonwealth, Ohio Valley Environmental Coalition, Southern Appalachian Mountain Stewards, Statewide Organizing for Community eMpowerment, Sierra Club's Environmental Justice and Community Partnerships Program, and the Appalachian Center for the Economy & the Environment).

¹⁰⁶ See 2015 Comments at 26-28, *supra* n.1.

¹⁰⁷ Lawyers' Committee for Civil Rights Under Law, *Now Is The Time: Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities* (June 2010), <http://www.lawyerscommittee.org/admin/site/documents/files/Final-Environmental-Justice-Report-6-9-10.pdf>; see also Environmental Justice Petition for Action, *supra* n.105.

A. Cross-Cutting Issues.

1. Strengthen Title VI & Civil Rights Enforcement.

We appreciate that the 2020 Plan acknowledges the relationship of environmental justice to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. Nonetheless, the section of the draft devoted to this relationship lacks any specificity: it contains neither goals nor action items, neither deliverables nor measures of performance. We strongly urge EPA to set clear and measurable strategies and action items in this section to strengthen EPA's Title VI compliance and enforcement program and, critically, to guide EPA's effort to integrate environmental justice and Title VI compliance and enforcement efforts.¹⁰⁸

Enforcement of Title VI is not just “an important complement to the EJ program,” as the 2020 Plan suggests. Title VI, along with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (NEPA), served as the authority upon which Executive Order 12898 was based and, indeed, the Executive Order was intended to strengthen federal enforcement of Title VI.¹⁰⁹ In a Memorandum for the Heads of All Departments and Agencies issued in tandem with the Executive Order, President Clinton stated that the Order was specifically “intended to promote nondiscrimination in Federal programs substantially affecting human health and the environment” and reiterated the mandate to enforce Title VI:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.¹¹⁰

This statement, as well as similar language in the Executive Order itself, mirrors the text of Title VI, 42 U.S.C. § 2000d, and EPA's implementing regulations, 40 C.F.R. § 7.35(a), (b). Moreover, in turn, Title VI compliance and enforcement is critical to achieving the goals of environmental justice.

Although the 2020 Plan recognizes that EPA can strengthen both its environmental justice and civil rights program “through a sharing of knowledge and past experiences in identifying and responding to community concerns,”¹¹¹ it utterly fails to provide any specifics

¹⁰⁸ Many of the Commenters also submitted earlier comments on the Draft Framework, which are incorporated here by reference. These comments called for “a strong and coordinated approach that identifies goals, actions, and metrics to assess performance” related to EPA's Title VI compliance and enforcement program. See EJ 2020 Framework Public Comments at 103-06, <https://www.epa.gov/sites/production/files/2016-05/documents/ej2020frameworkpubliccomments.pdf>. In addition, Commenters seek goals, actions, and metrics specifically to improve coordination between the Office of Civil Rights and the Office of Environmental Justice.

¹⁰⁹ See Exec. Order No. 12,898 § 1-101, 59 Fed Reg. 7629, 7629 (Feb. 11, 1994).

¹¹⁰ See Title VI, 42 U.S.C. § 2000d.

¹¹¹ 2020 Plan at 6.

that would afford accountability. Commenters call on EPA to incorporate the following recommendations:

- First, EPA should develop protocols detailing how the Office of Civil Rights (OCR) and the Office of Environmental Justice (OEJ) will work together. The protocol should set forth clear triggers for the two offices to confer and ensure that job descriptions and other work plans are adjusted accordingly.
- Second, the 2020 Plan should include clear steps to ensure that OCR will confer with OEJ on issues relating to community engagement. OCR's recent experience organizing hearings around its Notice of Proposed Rulemaking strongly suggest that OCR can benefit from OEJ's knowledge and experience involving community stakeholders. Plans for the hearings failed to meet standards for ensuring "meaningful involvement" in rulemaking.¹¹² As EPA's 2015 Guidance states:

Promoting meaningful involvement often requires special efforts to connect with populations that have been historically underrepresented in decision-making and that have a wide range of educational levels, literacy, or proficiency in English. It will likely be necessary to tailor outreach materials to be concise, understandable and readily accessible to the populations that rule-writers are trying to reach.¹¹³

EPA's Guidance recognizes that involving overburdened communities in a meaningful way "presents challenges and opportunities that are different than those presented by [the] general public" and offers a number of specific ways in which agency rule-makers should overcome barriers, such as disseminating information using local radio stations and newspapers, conveying issues in ways that are tailored to each population (*e.g.*, through timing and location), and various means of developing trust, among others.¹¹⁴ In order to avoid continued problems with community engagement or wasting resources reinventing the wheel, the 2020 Plan should include steps to improve integration of OEJ resources and expertise into the work of OCR.

To be clear, the protocol should recognize that OEJ involvement should be triggered not only when OCR is engaged in rulemaking or soliciting input on policy decisions, but also in the civil rights external compliance and enforcement process. OCR's failure to engage complainants and stakeholders effectively in the complaint investigation and resolution process has created significant issues of trust between the OCR's External Compliance

¹¹² See EPA, Guidance on Considering of Environmental Justice During the Development of Regulatory Actions at 32, (May 2015), <https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>.

¹¹³ *Id.* at 33.

¹¹⁴ *Id.* at 33-34.

Program and overburdened environmental justice communities.¹¹⁵ The 2020 Plan should require clear steps to ensure that OCR confers with OEJ, as well as EPA staff at the regional level who may have relationships with complainants and other community-based stakeholders, at key points in the investigation process such as during intake, the development of the investigative plan, and when OCR considers remedial options. In some cases, OEJ might also help to facilitate creative resolutions to civil rights complaints.

- Third, the 2020 Plan should require that EPA develop clear protocols authorizing and delineating when OEJ should make referrals to OCR, which has the authority to conduct compliance reviews and to conduct on-site reviews when OCR has reason to believe a recipient is in non-compliance with the civil rights laws.¹¹⁶ OEJ engages with overburdened communities across the country and should both provide information to community stakeholders about the complaint and investigation process and, in turn, make referrals to OCR when there is reason to believe that a recipient is in non-compliance.
- Fourth, the poor performance of OCR's civil rights compliance and enforcement activities, stretching back over many administrations, raises questions about whether structural changes might be helpful to elevate civil rights and environmental justice as priorities within EPA, and, particularly, might improve the integration and coordination of OCR and OEJ activities. The 2020 Plan should include a wholesale review of the relationship between OCR and OEJ, including consideration of the possibility of reorganization within EPA.

2. Improve Monitoring and Public Reporting.

In all regulatory actions, particularly rules on air quality for which EPA has recognized that there are environmental justice concerns, it would make a meaningful difference for EPA to strengthen monitoring and public reporting requirements. Commenters previously provided information on important actions EPA should take on each of the following issues. The 2020 Plan does not make commitments to ensure these steps are taken and EPA's response to public comments is similarly vague and not informative. Therefore, Commenters incorporate their 2015 comments, and emphasize that it is essential for EPA to include specific concrete commitments for action, including regulations, that will achieve the following objectives:

- Require fence-line monitoring at more industrial sources of air pollution;

¹¹⁵ See, e.g., Center on Race, Poverty & the Environment, *A Right Without A Remedy: How the EPA Failed to Protect the Civil Rights of Latino Schoolchildren* (2016), http://earthjustice.org/sites/default/files/Right%20without%20a%20Remedy%20FINAL_optimized.pdf (discussing how OCR's failure to consult with complainants compounded the harm of EPA's long-delayed investigation).

¹¹⁶ 40 C.F.R. §§ 7.85, .115.

- Strengthen the monitoring requirements in permits, including by issuing a national air rule that ensures strong continuous emission and other monitoring is included in all clean air permits to assure compliance;
- Strengthen EPA reporting and public reporting requirements in all rules, instead of just allowing facilities to keep records on site;
- Increase ambient air monitors to assess compliance with national air standards, including near roadways; and
- Support community air monitoring projects at the neighborhood level, such as http://www.cehtp.org/page/imperial_county, and stop rejecting citizen science and provide clear guidance that assists and expands the use of citizen air monitoring information.¹¹⁷

3. Update Scientific Tools for Health Risk and Impacts Assessments To Follow Current Science and Address Cumulative and Aggregate Threats to Communities.

EPA continues to fail to implement major scientific recommendations from the National Academy of Sciences on risk assessment, and is far behind the work done by states like California who have begun to apply current health risk and impacts tools. In Plan EJ2014, EPA committed to create these tools. It has not yet done so. EPA's risk assessment teams often seem to be tying themselves up in knots, rather than simply implement key recommendations from external scientists. The result of EPA's failure to follow the current science on real-world risks and impacts that communities face from air pollution and other exposures is that communities miss out on protections now. The people most hurt are children and overburdened communities of color and low-income communities. EPA must make it a priority to update key guidance documents and protocols used by various program offices to implement the Clean Air Act, the amended TSCA, and other statutes that include risk assessments. Fully implementing the key recommendations Commenters and other groups have made repeatedly to EPA over the last 8 years on each of the following issues is imperative and must be included in the 2020 Plan to advance environmental justice:

- assessment of aggregate exposures;
- accounting for cumulative exposures and effects, including from multiple contaminants, sources, and pathways of exposure;
- consideration of vulnerable groups and populations of concern, particularly early-life vulnerability and exposure of children and pregnant women, and including accounting for in utero exposure to the developing fetus, and increased vulnerability related to socioeconomic status and stressors;

¹¹⁷ See 2015 Comments at 26-31, *supra* n.1. EPA should also confer with NEJAC, which has a workgroup on monitoring, and with NACEPT's workup

- the use of systematic scientific literature reviews in all risk assessments;
- complete long-overdue chemical risk assessments—the Integrated Risk Information System (IRIS) review process has been bogged down for many pollutants for much too long; EPA must not allow that delay to undermine action it takes based on assessments of risk,^{118, 119} and instead must use the best available scientific information to inform its action, including by following NAS recommendations on the use of default values¹²⁰; and
- other key issues highlighted in the comments attached from recent 2013-2016 comment periods EPA has opened, but where the agency still has not taken action.¹²¹

B. Highlighting Additional Significant Omissions.

1. Farmworker Justice & Pesticides.

We are troubled that the 2020 Plan still does not include the environmental injustices faced by the 2.5 million farmworkers in this country and their families. Farmworkers are overwhelmingly Latino, migrant, poor, socially isolated, and overburdened by the adverse health effects of environmental hazards such as: pesticide exposure (which occurs in the workplace, in communities via drift, and in the home via drift and pesticides brought home on shoes and

¹¹⁸ U.S. Gov't Accountability Office, GAO-12-42, Chemical Assessments: Challenges Remain with EPA's Integrated Risk Information System Program at 17-18 (2011).

¹¹⁹ See Steinzor, R., *et al.*, *Setting Priorities for IRIS: 47 Chemicals that Should Move to the Head of the Risk-Assessment Line*, Ctr. For Progressive Reform (Dec. 2010), http://www.progressivereform.org/articles/IRIS_Priorities_1010.pdf. CPR's analysis of IRIS offers a critical exposé of these problems. Ctr. For Progressive Reform *EPA's IRIS: A Database With Blind Spots*, <http://www.progressivereform.org/iris.cfm> (last visited July 26, 2016). See also Gov't Accountability Office, GAO-11-278, High Risk Series: An Update (Feb. 2011), <http://www.gao.gov/new.items/d11278.pdf>; Gov't Accountability Office, GAO-09-774T, EPA Chemical Assessments: Process Reforms Offer the Potential to Address Key Problems (June 11, 2009), <http://www.gao.gov/new.items/d09774t.pdf>; Gov't Accountability Office, GAO-08-743T, Toxic Chemicals: EPA's New Assessment Process Will Increase Challenges EPA Faces in Evaluating and Regulating Chemicals (Apr. 29, 2008), <http://www.gao.gov/new.items/d08743t.pdf>; Gov't Accountability Office, GAO-08-440, Chemical Assessments: Low Productivity and New Interagency Review Process Limit the Usefulness and Credibility of EPA's Integrated Risk Information System at 29 (2008), <http://www.gao.gov/new.items/d08440.pdf>.

¹²⁰ With its new TSCA authority, EPA also needs to move forward expeditiously to conduct robust risk evaluations of chemicals of concern without getting bogged down in the delays that have hampered the IRIS program.

¹²¹ See Earthjustice Comments (Mar. 22, 2016), EPA-HQ-ORD-2015-0684-0024 (citing sources including National Academies of Science, *Science and Decisions*, *supra* n.22; Scientists' Comments to EPA on Human Risk Assessment Guidelines (Mar. 2016) (citing sources); Janssen, S., *et al.*, NRDC Issue Paper: Strengthening Toxic Chemical Risk Assessments to Protect Human Health (Feb. 2012), <http://www.nrdc.org/health/files/strengthening-toxic-chemical-risk-assessments-report.pdf>); Comments of Air Alliance Houston, *et al.*, EPA-HQ-ORD-2013-0292-0133, *supra* n.78.

clothing); contaminated drinking water; and air pollution.¹²² A comprehensive description of the environmental justice challenges faced by farmworker communities, and suggestions for how EPA can address them, was laid out in the July 13, 2015 Comments of The Farmworker Association of Florida and CATA Farmworkers Support Committee on the Draft Framework, as well as the July 14, 2015 Comments of Environmental and Community Groups.¹²³ We refer EPA to those comments rather than repeating the concerns and suggestions here.

Farmworkers and their communities should be included in the 2020 Plan whether or not their environmental burdens are reflected in the EJ SCREEN tool.¹²⁴ We strongly urge EPA to consult with organizations working with farmworker communities, including California Rural Legal Assistance Foundation, Columbia Legal Services, Farm Labor Organizing Committee, Farmworker Justice, Farmworker Association of Florida, Toxic Free North Carolina, United Farm Workers, and Worker Justice Center of New York. At a minimum, the 2020 Plan should be modified to include farmworkers in these respects:

- In Goal 1, in addition to considering environmental justice in EPA-issued permits, the 2020 Plan should call for considering environmental justice in pesticide registrations and registration reviews, since the greatest burdens of pesticide use fall on farmworkers, pesticide handlers, and their families and communities. EPA's Office of Pesticide Programs is currently reviewing the registrations of eight organophosphate pesticides that cause poisonings of workers and bystanders every year and are associated with alarming neurodevelopmental impairments to children exposed during early life stages. The 2020 Plan should call for including environmental justice principles in these, and all, registration reviews.
- Also in Goal 1, in connection with strengthening the role of environmental justice in EPA's compliance and enforcement work and enhancing its work with regulatory partners in overburdened communities, EPA should specifically call out the need to include environmental justice in the enforcement of the Worker Protection Standards.
- In Goal 2, the 2020 Plan should specifically call out farmworker communities and organizations serving EPA as partners.

¹²² We are deeply appreciative of the efforts EPA is making in connection with the adoption and implementation of the Worker Protection Standard for farmworkers and pesticide handlers. However, this set of rules does not address the full range of environmental harms that disproportionately fall on farmworker communities.

¹²³ See 2015 Comments at 13, *supra* n.1.

¹²⁴ We are confused by EPA's Response to the Public Comments, which contends that the Agency has not included farmworker communities in the 2020 Plan because it is hampered by "data limitations ... regarding the amount of real-time information available on transient, temporarily relocated, and displaced populations." EPA, Response to Public Comments at 20, https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final.pdf. The location of heavily agricultural areas that rely on farmworkers is not a secret. Data from California and Washington shed light on which pesticides are involved in pesticide poisoning incidents and which communities are most prone to experiencing pesticide drift. Moreover, EPA has national data on contaminated drinking water and air pollution in areas where many farmworkers live.

- In Goal 3, the 2020 Plan should specify that EPA’s work to “ensure that all people served by community water systems have drinking water that meets applicable health based standards” includes farmworker communities. Likewise, the 2020 Plan should specify that EPA’s work to “achieve air quality that meets the fine particle pollution national ambient air quality standards for all low-income populations as soon as practicable and no later than the statutory attainment date” includes farmworker communities.¹²⁵
- The 2020 Plan should set a timeframe for EPA to require that safety-related information on pesticide labels appear in Spanish as well as English, as requested in the 2009 petition submitted by Migrant Clinicians Network, Farmworker Justice and others.¹²⁶ Pesticide labels communicate information critical to the prevention of adverse effects to human health and the environment. This includes warnings and precautionary statements, first aid information, personal protective equipment, and directions for safe use. The agricultural workforce is overwhelmingly foreign born, and the majority speaks Spanish. According to the National Agricultural Worker Survey (NAWS), 81% of farmworkers reported Spanish as their native language, and 53% of the farmworkers said they cannot speak, read, or write English.¹²⁷ In a recent study of pesticide handlers in Washington State, only 29% reported being able to read in English, but nearly all of the participants were able to read in Spanish to at least some degree.¹²⁸ These workers therefore do not understand the pesticide use directions, the personal protective equipment (PPE) required, emergency decontamination instructions, or the instructions to avoid environmental contamination. Pesticide handlers who do not read English are therefore more likely to be exposed than handlers who read English. Indeed, researchers found that pesticide handlers who were not able to read English had greater exposure rates than handlers who could read English at least to some degree.¹²⁹ Moreover, growers and pesticide applicators in Puerto Rico, where Spanish is the official language, are now using pesticide products that have labels entirely in English. This situation presents a classic environmental injustice that we strongly urge the EPA to set a timeframe for ending.

¹²⁵ 2020 Plan at iv.

¹²⁶ See, e.g., Letter from Farmworker Justice to Office of Pesticide Programs, EPA (June 28, 2011), <https://www.farmworkerjustice.org/sites/default/files/Farmworker%20Justice%20Comments%20to%20EPA%20re%20Bilingual%20Pesticide%20Labeling%2006-28-2011.pdf>.

¹²⁷ See U.S. Department of Labor, Findings from the National Agricultural Workers Survey 2001-2002 at 17 (Mar. 2005), https://www.doleta.gov/agworker/report9/naws_rpt9.pdf.

¹²⁸ Hofmann, J., et al., *Development of a computer-based survey instrument for organophosphate and N-methyl-carbamate exposure assessment among agricultural pesticide handlers*, 54:6 *Annals of Occupational Hygiene* 640, 644 (2010).

¹²⁹ In a study of 154 pesticide handlers who participated in the Washington State cholinesterase monitoring program in 2006 or 2007, researchers examined cholinesterase (BuChE) inhibition, a marker of pesticide exposure, by English literacy status. Researchers found that pesticide handlers who were not able to read English had significantly greater BuChE inhibition than handlers who could read English at least to some degree after adjustment for other factors that might influence BuChE activity (on average 5.2% greater BuChE inhibition among subjects who could not read English; P=0.01). Personal communication with Jonathan Hofmann, PhD. (Apr. 5, 2011).

2. Chemical Facility Safety and Security.

The President has made chemical facility safety and security a priority after the recent Chevron Richmond, CA refinery disaster and the West, TX fertilizer explosion. The President has directed federal agencies to use all available authority to protect communities from chemical disasters. Communities have long called on EPA to recognize the need for stronger protection as a serious environmental justice concern, as the National Environmental Justice Advisory Council (NEJAC) highlighted to EPA in a 2012 letter.¹³⁰ People of color and low-income people are disproportionately at risk of severe harm and from chemical disasters, as documented in recent reports.¹³¹

EPA has a particular responsibility to prevent these disasters from facilities with or using hazardous substances, and covered by Clean Air Act section 112(r). EPA's pending rule under this provision would require certain industries that affect communities of color and low-income communities, such as refineries and chemical plants, to perform a safer technological alternatives assessment, and those requirements should be strengthened and finalized. The proposed rule would only apply these requirements to 12% of the covered hazardous facilities and many more facilities have no prevention requirements under the rule. Thus, EPA also must strengthen its rule to expand its requirements to more facilities, and ensure full and expeditious implementation and public transparency, so that communities and workers on the front lines have the best available, inherently safer technologies and other prevention measures in place. EPA should take all necessary steps under this provision of the Clean Air Act to ensure that no more people will die or face catastrophic health impacts from chemical disasters that need not happen in the first place, and that have a particularly unjust impact on people of color and low-income people when they do occur.¹³²

3. Expanding Access to Parks and Green Space.

Other community comments (including from The City Project, as well as our 2015 coalition comments) have elevated the importance of expanding green space and access to healthy natural areas, parks, and green space for communities of color and low-income communities. This is a significant environmental justice, health, and civil rights issue. Strengthening the ability for these communities to be able to enjoy healthy, non-toxic green space and natural areas is important in its own right as a valuable resource that all communities should have, and also can be a powerful tool to protect public health and help counteract the effects of other kinds of environmental and socioeconomic stressors that threaten community well-being.

¹³⁰ Letter from Elizabeth C. Yeampierre, Chair, NEJAC, to Gina McCarthy, Administrator, EPA (Mar. 14, 2012), <https://www.documentcloud.org/documents/332041-nejac-letter.html>.

¹³¹ EPA, Draft Guidelines for Human Exposure Assessment (Jan. 7, 2016), EPA-HQ-ORD-2015-0684-0002.

¹³² Comments of the Coalition to Prevent Chemical Disasters (May 13, 2016), EPA-HQ-OEM-2015-0725-0575 (signed by over 100 organizations).

Therefore, we reiterate the importance of this, as noted in those comments, and in support of additional comments to be submitted to EPA. We commend EPA for adding information on park data into EJ SCREEN, and encourage EPA to ensure parks and green space access is an objective EPA considers and aims to expand generally as part of its environmental justice work. It is especially important for EPA to recognize the need to address and prioritize positive and health green space and natural area access as important independently and separately from cleaning up contaminated sites, which is also a vital goal (as discussed earlier).

4. Other Key Comments, Including Prisoners' Rights.

EPA received significant and important comments in 2015, and will receive such comments again, from various additional community members and groups around the country with expertise in environmental health and environmental justice. Commenters seek to elevate those for the agency's further consideration. As one example, we would like to highlight the issue of prisoners' rights, and the rights of people detained in jails or government detention centers, as an important civil rights and environmental health issue. EPA's attention could and should make a real difference for people who, while imprisoned, have literally no ability to protect themselves, such as by avoiding environmental contamination and exposure without government action.

An open and honest dialogue on the environmental injustice implications of actions that affect prisoners is long overdue. We challenge the EPA to address the environmental burdens that over 2.3 million prisoners face. Prisons are typically built on former waste sites, flood plains, or near hazardous facilities, and there is overwhelming evidence that prisoners are disproportionately people of color and almost entirely low-income, regardless of race.¹³³ Instead of repeating the details of the environmental injustice faced by prisoners on a daily basis, and the specific examples of the environmental nightmares prisoners face in disaster situations like Hurricane Katrina, we refer the EPA to the detailed public comments submitted in 2015 by the Human Rights Defense Center and its 93 signatories.¹³⁴

At a minimum, the Action Agenda should be modified to include prisoners' rights in these respects:

- Expand the definition of environmental justice communities to include people living in prisons, as requested by the signatories in the EJ 2020 Public Comments.¹³⁵ In its response to the public comments on prisoners' rights, EPA claims that "data limitations still exist regarding the amount of real-time information available on transient, temporarily relocated, and displaced populations," and provided a boilerplate response that challenges will continue to be worked on, without explaining how.¹³⁶ In short, EPA's reason for not addressing the concerns of some of the most vulnerable and overburdened citizens in this country, in the *only* environmental plan with power to do so,

¹³³ See, e.g., EJ 2020 Framework Public Comments at 166.

¹³⁴ *Id.* at 161-75.

¹³⁵ *Id.* at 125.

¹³⁶ See EPA, Response to Public Comments at 20, *supra* n.124

is because they “move around too much.” This is unacceptable, and fails to mention that environmental justice guidelines have not been applied to prisons because EPA uses census data that does not include prisoners. If EPA wanted, the data exists or could be gathered to allow it to effectively and accurately determine environmental impacts on incarcerated populations.

- Although some prisoners’ rights issues fall outside EPA’s immediate authority, EPA is a leader in the Interagency Working Group on Environmental Justice, and is in a position to assist and advise other agencies to address the unique circumstances of prisoner populations. For example, the EPA should hold the Federal Bureau of Prisons (BOP) accountable for consideration of environmental justice in its environmental impact statements (EIS) under NEPA. To date, BOP has never taken its prisoner population into consideration under NEPA’s EJ guidance, even amongst reports of rampant pollution and environmental health problems in prisons nationwide, including a 2010 report from the Justice Department’s Office of the Inspector General pinpointing “numerous violations of health, safety and environmental laws, regulations and (Bureau of Prisons) policies” at certain prison industry programs.¹³⁷
- Lastly, EPA should include prisons, jails, and detention centers where people are held by the government for any significant period of time in EJ SCREEN and in all of its NEPA reviews as a high congregation area similar to churches, schools, and hospitals.

Please review the previous comments on prisoner’s rights, new comments by the Human Rights Defense Center. EPA should include language in the 2020 Plan which can ensure that prisoners in this country receive the protections directed under Executive Order 12898 and Title VI of the Civil Rights Act.

IV. EPA SHOULD CREATE EJ COMMUNITY WORK GROUPS AND LISTSERVS TO HELP IMPLEMENT PLAN EJ 2020.

EPA has recognized the need to seek community input by taking public comment on Plan EJ 2020. Many groups and communities that are affected or work with affected communities have little or no idea about this process. EPA has sought input primarily over the Internet and via word of mouth, without even using the Federal Register as an additional tool. Many community groups have little or no resources or paid staff time to be able to review and engage in the Plan EJ 2020 process or processes like it. The 2020 Plan must do more to expand public transparency and information, and actually reach and include affected people and communities. Ensuring that people most affected by EPA’s actions have a meaningful ability to engage and have a seat at the table to be able to affect those actions is a fundamental environmental justice concern.

EPA’s follow-up implementation and future strengthening of its EJ Plan would benefit greatly from stronger community involvement, and from employing the experience and expertise

¹³⁷ Doyle, M., *Whistleblower exposed violations at Atwater, other federal prisons, report says*, McClatchy Newspapers (Nov. 9, 2010), <http://www.mcclatchydc.com/news/crime/article24599803.html>.

that community groups can offer on key issues they work on locally and that matter to them, their members, and their constituents. Expanding community group involvement in EPA's process of implementing and strengthening the plan would require and illustrate a true commitment to transparency, enhance accountability, and make the process more efficient by gathering information and input earlier in EPA's action process. Commenters believe that EPA has a responsibility to more actively engage community groups in the process of action under Plan EJ 2020, as part of trying to fulfill basic environmental justice principles of engagement, strategy, and leadership from communities and community group leaders themselves on actions, policies, and decisions EPA makes.

Therefore, Commenters urge EPA to take active steps and incorporate into the plan specific commitments and methods to engage and assist communities in knowing about and having a chance to participate in follow up on the 2020 Plan. We urge EPA to consider as many possible ways to do this, and, at minimum, include the following two actions in Plan EJ 2020:

1. Create Community Work Groups to help implement, track, and provide information and input on each of EPA's defined objectives, including, at minimum, the enforcement component and each of the four national environmental justice challenges, along with all other components that would benefit from such a work group. To set up these work groups, EPA should publish notice and seek input from community groups that have members or constituents who are particularly affected by, and who have experience and expertise in these areas, and a demonstrated record of working on these or similar issues in a particular community or communities.

2. Create a Community Input Listserv for each of the objectives open to any interested persons. Require staff to send at least monthly updates to this list, providing information on EPA's progress in moving forward on the objective, any new actions EPA has initiated or finalized, requests for specific types of community and local information that might help EPA achieve its objectives, and a heads up of at least 30 days on any upcoming opportunities for public input or action.

We believe that implementing these steps for each objective would strengthen and assist EPA in achieving its stated goals and also advance the environmental justice principles of participation of affected community members, and recognition and consideration of community experience, knowledge, and a right to involvement in governmental actions affecting community life and health.

V. CONCLUSION.

Commenters appreciate EPA's time considering these comments and would be glad to provide further information if helpful. Please feel free to contact any of us directly, or contact Emma Cheuse at Earthjustice, echeuse@earthjustice.org, or (202) 745-5220 for assistance in following up on these comments. Thank you for your time and consideration of these comments.

Sincerely,

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October 15, 2021

To: U.S. Department of Justice, Environment and Natural Resources Division and Civil Rights Division

Attn: Ms. Cynthia Ferguson, U.S. Department of Justice (sent by email)

From: RISE St. James, Texas Environmental Justice Advocacy Services (t.e.j.a.s.), Ashurst Bar-Smith Community Organization, Air Alliance Houston, Appalachian Mountain Advocates, Blue Ridge Environmental Defense League, California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Coming Clean, Community Action Works, Community Dreams, California Kids IAQ, Citizens for Alternatives to Radioactive Dumping, Concerned Citizens for Nuclear Safety, EMeRGE, Environmental Justice Health Alliance for Chemical Policy Reform, Environmental Integrity Project, Hoosier Environmental Council, Louisiana Bucket Brigade, Louisiana Environmental Action Network, NAACP San Pedro-Wilmington Branch, New Mexico Environmental Law Center, Ohio Valley Environmental Coalition, West Virginia Environmental Council, Sierra Club, Vermont Law School Environmental Justice Clinic, and Earthjustice

Re: **Comments on Environmental Justice and Enforcement**

Thank you for your time and attention to this important issue, and for seeking stakeholders' input. To fulfill President Biden's commitments on environmental justice, the U.S. Department of Justice (DOJ) must boost its enforcement resources, increase the number of enforcement attorneys, and take concrete actions to change how it does its work with communities, and to ensure that it achieves measurable, environmental justice results. These comments provide examples of ways DOJ can and should fulfill the President's commitment.

We appreciate your consideration of these comments and encourage DOJ to broaden this request for input and continue to engage with stakeholders, including in the context of specific enforcement matters, as discussed below.¹

INTRODUCTION AND SUMMARY

DOJ should take swift and decisive action to restore and expand vigorous enforcement of environmental laws. Enforcement is essential to protect frontline communities, especially communities of color, linguistically isolated, indigenous, and low-income communities who have shouldered a disproportionate burden of pollution and environmental and human health harm for decades. DOJ – working with agencies like the U.S. Environmental Protection Agency

¹ While we value this comment opportunity, it was not widely publicized and DOJ provided fewer than 30 days to comment. We requested an extension to allow more time for notice and meaningful input but have not received a response and are therefore submitting these comments by the date DOJ requested. Due to the short timeframe, some issues and citations are in shorthand. We are glad to provide more information in writing or in a meeting if helpful.

(EPA) – has the opportunity and responsibility to reverse this trend of injustice and effectively enforce our environmental laws.

Environmental enforcement – including by DOJ and EPA – has declined dangerously over the last 15 years and is not effectively addressing environmental violations. Since 2006, enforcement cases with high-monetary value have dropped over 50 percent.² Inspections and other important metrics of enforcement fell by large percentages. Environmental enforcement will plunge off a cliff during the next four years if DOJ and federal agencies like EPA do not make enforcement a top priority.

There is no shortage of cases to bring and environmental violations to remedy and the federal government cannot rely on state enforcement agencies to fill the gap. For example, in 2020, the Texas Commission on Environmental Quality (TCEQ) issued notices of violation for only 5% of the unauthorized air pollution releases industry reported.³ Research by expert Cynthia Giles who led EPA’s Office of Enforcement and Compliance Assurance under the Obama-Biden Administration has reported that compliance with environmental laws “is worse than you think,” documenting significant violations in about 25 percent of all facilities for which data is available, and finding that for some industries with the worst impact on health, noncompliance is as high as 50-70 percent.⁴

While DOJ and its agency clients, as well as state enforcement officials, have failed to bring case after case, communities have been living for years with unacceptably harmful pollution. Over 130 million Americans live in neighborhoods that do not meet the national air quality standards.⁵ Communities have been witnessing massive releases of toxic chemicals, such as in the wake of Hurricane Harvey, with no accountability and no remedial prevention measures.⁶ Some industries have operated with impunity, relying on enforcement discretion that

² EPA Inspector General, Report: EPA's Compliance Monitoring Activities, Enforcement Actions, and Enforcement Results Generally Declined from Fiscal Years 2006-18, Report #20-P-0131, (Mar. 2020), www.epa.gov/office-inspector-general/report-epas-compliance-monitoring-activities-enforcement-actions-and; EPA Ofc. of Inspector Gen., *Resource Constraints, Leadership Decisions, and Workforce Culture Led to a Decline in Federal Enforcement*, No. 21-P-0132, 11-19 (May 13, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/epa_oig_20210513-21-p-0132_0.pdf; see also EIP, <https://environmentalintegrity.org/news/new-report-epa-enforcement-at-record-low-in-2018/>; EIP, <https://environmentalintegrity.org/news/epa-enforcement-data-downward-trend-during-trump-administration/>.

³ TCEQ, *Annual Enforcement Report Fiscal Year 2020*, 5-1, 5-6, https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf_reports/AER/FY20/enfrptfy20.pdf; see also Houston Br. II at 12-13.

⁴ C. Giles, *Next Generation Compliance: Environmental Regulation for the Modern Era Part 2* (Apr. 14, 2020), <https://eelp.law.harvard.edu/2020/01/next-generation-compliance-environmental-regulation-for-the-modern-era/>.

⁵ EPA, Air Quality - National Summary, <https://www.epa.gov/air-trends/air-quality-national-summary>.

⁶ EIP, Preparing for the Next Storm (2018), environmentalintegrity.org/reports/preparing-for-the-next-storm/; A Disaster In the Making, <https://earthjustice.org/features/toxic-catastrophes-texas-national-chemical-disaster-rule#>; see also UCS, CPR & Earthjustice, Preventing “Double Disasters” (July 2021), <http://progressivereform.org/our-work/energy-environment/preventing-double-disasters/>.

EPA or a state provided without concern for public health and well-being. For drinking water, about 9 out of 10 violations do not lead to formal enforcement actions and violators virtually never are fined; even the most serious health standard violations rarely face formal enforcement.⁷

In 2020, the situation got worse under EPA’s COVID-19 “temporary” enforcement policy.⁸ When the COVID-19 crisis hit, the Trump Administration announced a policy to “temporarily” suspend enforcement and routine compliance monitoring and reporting for a variety of regulated industries. The Trump Administration gave a pass to the worst industries at the most critical time for communities in harm’s way, and created an even larger chasm between DOJ, federal agencies, and communities affected by environmental injustice.

Meanwhile, people in areas with unhealthy air quality died more quickly and faced worse COVID-19 outcomes – as COVID-19 put in stark relief the cascading harm from disproportionate air pollution exposure and environmental injustice. Researchers from the Harvard T.H. Chan School of Public Health found a direct link between places with high levels of air pollution in the United States and the probability of more severe COVID-19 cases in those locations.⁹ One air pollutant, fine particulate matter (“PM2.5”), is generated by combustion from car engines, refineries, and coal or gas power plants.¹⁰ The Harvard study modeled the relationship between air pollution and coronavirus death by using years of PM2.5 data from more than 3,000 counties, as well as COVID-19 death counts from the first couple of months of the pandemic. The results showed that long-term exposure to PM2.5 is linked to a greater chance of dying from COVID-19; at the county level, just a small increase in long-term exposure to PM2.5 pollution leads to a large increase in COVID-19 death rate. The increase in COVID-19 mortality associated with PM2.5 was 20 times higher than all other causes.¹¹ Researchers have also found a link between exposure to hazardous air pollution and more severe COVID-19 cases and increased mortality.¹²

The lack of effective enforcement by DOJ and client agencies has disproportionately harmed low-income communities and communities of color. For example, one recent study

⁷ See, Kristi Pullen Fedinick, NRDC, “What’s in Your Water? An Updated Analysis,” 2018, at <https://www.nrdc.org/experts/kristi-pullen-fedinick/whats-your-water-updated-analysis>; and NRDC, “What’s in Your Water?” 2016, at <https://www.nrdc.org/resources/whats-your-water-flint-and-beyond>.

⁸ Memo from Susan Bodine, Assistant Adm’r, OECA, EPA Re: COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program (Mar. 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>; <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications#covid-19>.

⁹ Wu, X. *et al.*, 2020. Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis. *Science advances*, 6(45) (hereinafter “Harvard Study”), <https://advances.sciencemag.org/content/6/45/eabd4049>.

¹⁰ PM2.5 can cause serious health problems because when the very small particles are inhaled, they can get deep into the lungs and enter the bloodstream. See EPA, Particulate Matter Basics, <https://www.epa.gov/pmpollution/particulate-matter-pm-basics>.

¹¹ Wu *et al.*, *supra* note 9.

¹² M. Petroni *et al.*, Hazardous air pollutant exposure as a contributing factor to COVID-19 mortality in the United States, *Env’t Rsrch. Letters* 15 (2020), <https://iopscience.iop.org/article/10.1088/1748-9326/abaf86/pdf>.

found that drinking water systems that serve the communities that are most marginalized, particularly Black and other communities of color, are more likely to be in violation and to stay in violation for longer periods.¹³

Rebuilding enforcement is critically important as the nation continues to grapple with a pandemic that disproportionately harms the most vulnerable populations, including people with underlying conditions linked with pollution, and communities of color already facing a high cumulative burden of toxic exposure. The good news is that high-impact enforcement matters are ripe for DOJ action. Effective enforcement will make a tremendous difference in community well-being, while also signaling to other facilities that it is time to start complying or face real consequences.

DOJ should pick up and go well beyond where the Obama-Biden Administration left off, reinvigorating enforcement solutions that benefit communities most burdened by pollution, providing full staffing and funding, and prioritizing enforcement to protect public health. DOJ should focus on environmental justice by developing community-centered plans with significant input from the most affected communities and expanding on prior commitments that the prior Administration refused to fulfill.

The below comments discuss five over-arching areas where DOJ should make significant progress and include recommendations of specific, concrete action that DOJ should take to demonstrate measurable results for environmental justice:

1. Boost and target enforcement action holistically to overburdened, frontline communities facing environmental injustice, including cumulative impacts of air and water pollution, toxic chemical and hazardous materials exposure.
2. Promote better engagement and responsiveness to community concerns, capacity-building, information sharing, training, and involvement both before and after enforcement actions begin.
3. Strengthen DOJ's enforcement policies to protect public health and advance environmental justice and civil rights.
4. Create a Compliance Assurance Technical Policy Team to increase the enforceability of rules and requirements and improve compliance through innovation and guidance.
5. Support greater tribal government involvement and enforcement in Indian country.

¹³ NRDC, Coming Clean, and Environmental Justice Health Alliance, Watered Down Justice, 2019, <https://www.nrdc.org/sites/default/files/watered-down-justice-report.pdf>

I. BACKGROUND

A. Science on environmental injustice

Since the 1987 landmark report *Toxic Wastes and Race in the United States*,¹⁴ further study has confirmed again and again that communities of color and economically disadvantaged populations are disproportionately located near toxic waste and other sources of pollution.¹⁵ These relationships can vary with factors including region and urbanity (racial and ethnic disparities more pronounced in certain areas of the U.S.) and with geographic units of analysis (usage of census tracts vs. zip codes), but the disproportionate burden of environmental exposure among these subpopulations cannot be disputed.^{16,17} Pollution and polluting sources are often concentrated together, overburdening and overwhelming communities and populations, and causing greater health effects.¹⁸ With this relationship well-established, the field of environmental equity research seeks to further explain significant interactions and patterns within this overall trend—to better determine how these disparities interact with each other and shed further light on how reasons they are magnified. DOJ and other federal agencies have a significant responsibility and role in how these disparities have occurred and are perpetuated, and must take responsibility to strengthen equity, as well as reduce disparities.

Analysis of the relationship between socioeconomic inequality and disparities in environmental exposure shows that: 1) exposure inequality is considerably greater than income

¹⁴ Dr. Benjamin F. Chavis, Jr. & Charles Lee, Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States* (1987), <https://www.csu.edu/cerc/researchreports/documents/ToxicWasteandRace-TOXICWASTESANDRACE.pdf>.

¹⁵ See, e.g., 2016 U.S. Commission on Civil Rights Report, https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf; Lawyers' Committee for Civil Rights Under Law, *Now Is The Time: Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities* (2011), <https://www.reimaginepe.org/node/5571>; Shriver Center on Poverty Law, *Poisonous Homes: The Fight for Environmental Justice in Federally Assisted Housing* (2020), <https://www.povertylaw.org/report/poisonoushomes> (70% of all Superfund sites are located within one mile of federally assisted housing which is home to predominantly people of color); Union of Concerned Scientists & t.e.j.a.s, *Double Jeopardy in Houston: Acute and Chronic Chemical Exposures Pose Disproportionate Risks for Marginalized Communities* (Aug. 2016), <https://www.ucsusa.org/resources/double-jeopardy-houston>.

¹⁶ Mohai, P., et al., *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial Facilities: Evidence From the Americans' Changing Lives Study*, 99 Am. J. of Pub. Health S649, S652-54 (Sept. 2009).

¹⁷ Zwickl, K., et al., *Regional Variation in Environmental Inequality: Industrial air toxics exposure in U.S. Cities* at 20, Political Economy Research Institute Working Paper Series No. 342 (Feb. 2014).

¹⁸ Cal. EPA, OEHHHA, *Cumulative Impacts: Building a Scientific Foundation* at 5-17 (Dec. 2010), <http://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf> (citing numerous research studies showing that exposure to pollution-emitting facilities, hazardous waste facilities and disposal, toxic releases, non-attainment air areas, high motor vehicle air pollution areas, and other types of pollution is more likely to be concentrated in communities with higher minority and lower income populations).

inequality, and 2) that these inequalities are reinforcing.¹⁹ Income inequality is likely exacerbated by significant disparities in toxic chemical and hazardous materials exposure.²⁰ The implications of these reinforcing inequalities are especially concerning, as environmental exposure very likely contributes to the “poverty trap” for low-income communities. Low-income populations are likely to experience more adverse environmental exposure, which exacerbates socioeconomic difficulties and decreases their ability to move away from toxic and polluting sources or take other actions to protect themselves – a responsibility that should fall on the government, not on communities’ shoulders.

In analyzing relationships between racial/ethnic isolation and environmental exposure disparities, research has found that overall air pollution exposure is higher in areas where exposure is more strongly concentrated in communities of color.^{21,22,23} That is, total air pollution is higher in racially or ethnically isolated areas and, within these areas, people of color are disproportionately exposed.²⁴ Once again, racial/ethnic disparities and exposure inequality are directly reinforcing. Not only do racially segregated areas correlate to more exposure for all populations in that area, but people of color suffer heavier burdens of exposure within an area of increased pollution.

Evidence also suggests that the components of this pollution differ based on demographics and income in addition to the total mass of exposure. In fact, even larger disparities in exposure exist for components of particulate matter as compared to exposure of total mass.²⁵ As some components of particulate matter are more toxic than others, certain demographic groups may be at an even greater risk than indicated by traditional particulate matter measures.

B. Impacts of differential exposure

The evidence shows that 1) socioeconomically-disadvantaged and people of color experience higher environmental exposures, and 2) demographic characteristics of these populations are linked with greater exposure risk and vice versa, such that the impacts of environmental exposures on health take on an even greater meaning. With air pollution

¹⁹ Boyce, J.K., *et al.*, *Measuring environmental inequality* at 14-16, Political Economy Research Institute Working Paper Series No. 409 (Dec. 2015).

²⁰ Bouvier, R., *Inequality in two dimensions: an analysis of the distribution of income and toxic emissions in Maine*, 102 *Ecological Economics* 39, 39 (2014).

²¹ Zwickl, *Regional variation in environmental inequality* at 9-10, *supra* n.17.

²² Ash, M., *et al.*, *Is environmental justice good for white folks? Industrial air toxics exposure in Urban America*, 94:3 *Soc. Sci. Q.* 616, 616 (2013).

²³ Morello-Frosch, R., *et al.*, *Separate and unequal: residential segregation and estimated cancer risks associated with ambient air toxics in U.S. metropolitan areas*, 114:3 *Envtl. Health Perspectives* 386, 390-92 (2006).

²⁴ Bravo, M.A., *et al.*, *Racial isolation and exposure to airborne particulate matter and ozone in understudied US populations: Environmental justice applications of downscaled numerical output*, 92 *Env't Int'l* 247, 250-53 (2016).

²⁵ Bell M.L., *et al.*, *Environmental inequality in exposures to airborne particulate matter components in the United States*, 120 *Envtl. Health Perspectives* 1699, 1702-03 (Dec. 2012).

characterized as the “world’s largest single environmental health risk” by the World Health Organization (WHO), it is undisputed that environmental exposure harms human health.²⁶ More and more evidence is coming to light regarding how these exposures contribute to the well-known health disparities between people of different ethnicities, racial backgrounds, and income levels. For example, in a review of almost 100 studies, residential proximity to environmental hazards was found to be significantly linked to a number of health impacts including a variety of adverse pregnancy outcomes, childhood cancers, asthma and other chronic respiratory conditions, renal disease, diabetes, and stroke mortality.²⁷

Furthermore, communities of color and low-income populations are not only experiencing increased health risk due to environmental exposure, but they are also the most vulnerable to the health risks posed by such exposure. Several studies have demonstrated that lead, a highly toxic compound with known disparities in exposure, has more severe effects on both children and adults from low-income populations and people of color.²⁸ Childhood lead poisoning is 100% preventable. Exposure to lead can seriously and permanently harm a child’s health, including damage to the brain and nervous system, slowed growth and development, learning and behavior problems, and hearing and speech problems. No safe blood lead level in children has been identified. And research shows that lead affects the educational learning and testing scores of children from low socioeconomic positions more than their peers.²⁹ Further, some studies show a stronger positive relationship between blood-lead levels and increased blood pressure for black adults as compared to white adults. This association holds even after accounting for several other risk factors such as smoking, age, and preexisting conditions.³⁰

The increased likelihood of negative health outcomes due to environmental exposure clearly indicates that these populations are exceedingly vulnerable, at higher risk—they are both more likely to be exposed to pollution and more likely to be harmed by that exposure.³¹ It is likely that biological impacts of social stressors associated with lower socioeconomic status and racial/ethnic inequality, and the biological mechanisms of action of lead, air pollution and other

²⁶ World Health Organization, *7 million premature deaths annually linked to air pollution* (Mar. 25, 2014), <http://www.who.int/mediacentre/news/releases/2014/air-pollution/en/>.

²⁷ Brender, J.D., et al., Residential proximity to environmental hazards and adverse health outcomes, 101 Am. J. Pub. Health, S37, S37-50 (2011).

²⁸ Schwartz, J., et al., Exploring potential sources of differential vulnerability and susceptibility in risk from environmental hazards to expand the scope of risk assessment, 101 Am. J. of Pub. Health S94, S96-97 (2011).

²⁹ *Id.* at S96.

³⁰ Hicken, M.T., et al., A novel look at racial health disparities: the interaction between social disadvantage and environmental health, 102:12 Am. J. of Pub. Health 2344, 2346-47 (Dec. 2012); Vippituri, S., et al., Blood lead level is associated with elevated blood pressure in blacks, 41:3 Hypertension 463, 464-65 (Mar. 2003).

³¹ deFur, P.L., et al., *Vulnerability as a Function of Individual and Group Resources in Cumulative Risk Assessment*, 115:5 *Envtl. Health Perspectives* 817, 820-21 (2007); Morello-Frosch, *Separate and Unequal* at 390-92, *supra*.

environmental stressors act synergistically to result in severe health outcomes.^{32,33} Outside of biological mechanisms, low-income people and communities of color suffer from a lack of health-promoting services, such as adequate healthcare facilities, healthy food, and green spaces, thereby increasing the likelihood of adverse health outcomes.³⁴

The cumulative impacts of social and economic disadvantage to human health cannot be understated or over-emphasized in creating enforcement plans, risk assessments or other public health interventions in terms of environmental exposure. And, as the National Academy of Sciences has recommended, federal agencies like EPA and DOJ “should compile relevant data related to socioeconomic status (SES), which may serve as a proxy for numerous individual risk factors ... and may be a more direct measure of vulnerability than could reasonably be assembled by looking at all relevant individual risk factors.”³⁵

Leading scientific and medical experts, along with children’s health advocates, came together in 2015 under the auspices of Project TENDR: Targeting Environmental Neuro-Developmental Risks to issue a call to action to reduce widespread exposures to chemicals that interfere with fetal and children’s brain development. The TENDR consensus statement, released in 2016, emphasizes a clear need for federal agencies, including DOJ, to do a better job of recognizing and addressing the impacts of toxic exposures in particular, that often fall disproportionately on children in communities of color and low-income communities and that threaten children with neurological and neurodevelopmental harm.³⁶ TENDR highlights air pollution in particular, as well as exposure to toxins like lead, mercury, PCBs, and pesticides as requiring strong federal action and attention.

Project TENDR’s statement follows up on another recent joint public statement by the American College of Obstetricians and Gynecologists and the American Society for Reproductive Medicine, finding that protecting children and the developing fetus is essential:

Reducing exposure to toxic environmental agents is a critical area of intervention for obstetricians, gynecologists, and other reproductive health care professionals. Patient exposure to toxic environmental chemicals and other stressors is ubiquitous, and preconception and prenatal exposure to toxic environmental agents can have a profound and lasting effect on reproductive health across the life course. Prenatal exposure to

³² Vaziri, N.D., *Mechanisms of lead-induced hypertension and cardiovascular disease*, 295:2 Am. J. of Physiology: Heart & Circulatory Physiology H454, H454-63 (Aug. 2008).

³³ Clougherty, J.E., et al., The role of non-chemical stressors in mediating socioeconomic susceptibility to environmental chemicals, 1 Current Env'tl. Health Report 302, 304-08 (2014).

³⁴ Morello-Frosch, R., et al., Understanding the cumulative inequalities in environmental health: Implications for policy, 30:5 Health Affairs 879, 880-81 (2011); Smedley, B.D., et al., Unequal Treatment: Confronting Racial Disparities in Health Care at 5-6, Inst. of Medicine (2003).

³⁵ National Academy of Sciences, *Science and Decisions: Advancing Risk Assessment* at 226, National Research Council (2009) (citing O’Neill, M.S., et al., *Health, Wealth, and Air Pollution: Advancing Theory and Methods*, 111:16 Env'tl. Health Perspectives 1861, 1865 (Dec. 2003)).

³⁶ See Project TENDR: Targeting Environmental Neuro-Developmental Risks, *The TENDR Consensus Statement*, 124 Env'tl. Health Perspectives A118, A118 (July 2016), <http://ehp.niehs.nih.gov/wp-content/uploads/124/7/EHP358.alt.pdf>.

certain chemicals has been documented to increase the risk of cancer in childhood [We] join leading scientists and other clinical practitioners in calling for timely action to identify and reduce exposure to toxic environmental agents while addressing the consequences of such exposure.³⁷

DOJ's environmental justice plan and efforts should follow this science, by carefully and strategically choosing cases and then ensuring remedies that will strengthen protection for the most-exposed, and most affected community members, recognizing that racial injustice and socioeconomic inequality are making the pollution problems worse and more concentrated. Your efforts should also aim to protect children who live in disadvantaged communities, who also face multiple pollution threats – to help reduce early-life exposure and vulnerability, recognizing that there is no safe level of human exposure to many toxic agents for the developing fetus, and by calling out the dire need to protect children in overburdened communities from toxic exposure, as discussed in more detail below.

Based on the science, DOJ must act clearly and expeditiously to advance environmental justice by directing its enforcement attorneys, inspection and investigation teams nationally and in the regional offices, to do a much better job of promoting equity, and centering environmental injustice and resulting harms across the board. DOJ should also provide training and information to its attorneys and other enforcement staff on environmental injustice, environmental racism, and the science of environmental health disparities to advance meaningful progress in this area.

All in all, as discussed next in these comments, DOJ should follow the evidence to direct resources where they will make the greatest difference for communities who have never seen the full benefit of the protections promised by environmental and civil rights laws.

II. BOOST AND TARGET HOLISTIC ENFORCEMENT ACTION TO OVERBURDENED, FENCELINE COMMUNITIES FACING ENVIRONMENTAL INJUSTICE, INCLUDING CUMULATIVE IMPACTS.

To rebuild public trust, DOJ should prioritize visible, high-impact enforcement that ends environmental law violations and properly remedies the harm to affected communities. DOJ should restore enforcement to record levels, target the most harmful industries and violators, reduce longstanding environmental injustice, and boost community-led enforcement.

³⁷ Am. Coll. of Obstetricians and Gynecologists Comm. on Health Care for Underserved Women, Am. Soc. for Reproductive Med. Practice Comm., Committee Opinion No. 575, Exposure to Toxic Environmental Agents (Oct. 2013), <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Exposure-to-Toxic-Environmental-Agents>; see also Endocrine Society, Scientific Statements, <https://www.endocrine.org/endocrine-press/scientific-statements> (emphasizing potential in utero harm from even low doses of exposure); see also Ahearn, A., *Low-Dose Effects of Endocrine Disruptors, with Laura Vandenberg* at 2, *Envtl. Health Perspectives*, <http://ehp.niehs.nih.gov/wp-content/uploads/2012/10/ehp.trp060112.pdf> (“[for] every chemical that we looked at that we could find a low-dose cutoff, if it had been studied at low doses it had an effect at low doses.”).

First and foremost, it is essential that DOJ reverse the decline in enforcement, especially as seen in the past four years, and prioritize enforcement that makes the biggest difference for fence-line communities. Second, as part of any strategy or initiative, environmental justice and cumulative impacts should direct new enforcement actions and projects. There are more than enough enforcement actions that DOJ could bring. What is key is DOJ using its understandably limited resources to bring the right cases, the ones that will have the most impact on improving the health of overburdened communities, especially those facing multiple or systemic threats, and also ensure the proper enforcement tool is used in order to produce the strongest deterrent effect.

As to choosing cases, DOJ should expand and target resources to communities that most need enforcement – including communities with environmental justice concerns, communities in toxic hot spots from ethylene oxide, chloroprene, lead, and more, communities facing the most severe environmental and public health harms, and communities where state enforcement has been weak. DOJ should seek input from fence-line communities, and ensure action begins immediately to move forward on multiple fronts to assist communities facing a spectrum of environmental assaults simultaneously. Years ago, in a 2016 strategic plan for environmental justice known as “EJ2020,” EPA committed to target enhanced enforcement actions and resources to strengthen protection for at least 100 overburdened communities with environmental justice concerns.³⁸ EPA never followed through, and instead went backward on enforcement and on environmental justice during the last four years.

DOJ should pick up where EPA left off and work with EPA and other agencies to implement a similar plan to ensure an infusion of resources and information, holistically across facilities, in communities that need enforcement the most. DOJ should learn from, and implement and expand the enforcement commitments that EPA made in EJ 2020 (but never fulfilled) as a starting point.³⁹

To choose these communities, Commenters previously provided example criteria EPA should consider using, and incorporate those comments here⁴⁰ – including:

- (1) The factors contained in EJSCREEN;
- (2) Additional health status and health disparity factors included in CalEnviroScreen and the similar Washington state mapping tool;
- (3) Additional indicators linked with environmental justice, public health, and relevant federal statutory authorities, such as:

³⁸ EPA EJ 2020 Action Agenda at 19-23 (2016), https://www.epa.gov/sites/default/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf; EPA, EJ 2020 Website, <https://www.epa.gov/environmentaljustice/about-ej-2020>

³⁹ Comments of Environmental and Community Groups on EPA’s Environmental Justice Strategic Plan: EJ2020 (2016) (filed by Earthjustice, and attached here for reference); Comments of Air Alliance Houston *et al.* on EPA’s Environmental Justice Strategic Plan: EJ2020 (2015) (filed by Earthjustice, and attached for reference).

⁴⁰ See 2015 Comments at 3-7, *supra*.

- Whether a community lives near multiple sources of highly toxic pollution, hazardous chemicals and other environmental health threats, and experiences cumulative impacts from these exposures;
- whether a community is located in an area in nonattainment for a criteria pollutant;
- whether an area has elevated cancer risks, as identified in EPA's Second Integrated Urban Air Toxics Report, National Air Toxics Assessment, Risk Screening Indicators or more current similar tool;⁴¹
- whether an area has elevated levels of drinking water or soil contamination, including from legacy pollution or ghost industrial sites⁴²;
- whether a community has Superfund and/or brownfield sites;
- whether a community includes facilities with a high number of violations of environmental laws;
- whether a community includes major sources regulated under EPA's air toxics and other permitting programs;
- whether a history of segregation, racial zoning, redlining, and similar forms of discrimination played any role in the proximity between majority-minority neighborhoods and industrial sources, highways, and other pollution sources⁴³;
- whether a community includes a port or goods movement/transportation hub, and/or is located along or in close proximity to an international border or point of entry including both the U.S.-Mexico, and the U.S.-Canada borders;
- whether an area contains mining and/or oil and gas resources or extraction activities;
- whether a community is located in a geographical region or area that is particularly susceptible to extreme drought impacts, sea level rise, or other impacts from natural and climate-change related disasters;
- whether a community is located on tribal land, or may otherwise be linguistically or geographically isolated;

⁴¹ EPA, *The Second Integrated Urban Air Toxics Report to Congress* (Aug. 21, 2014), available at <http://www2.epa.gov/sites/production/files/2014-08/documents/082114-urban-air-toxics-report-congress.pdf>; EPA NATA, <https://www.epa.gov/national-air-toxics-assessment/nata-overview>; EPA RSEI, <https://www.epa.gov/rsei>; see also S. Lerner, A Tale of Two Cities: The EPA's Bungled Response to an Air Pollution Crisis Exposes a Toxic Racial Divide, *The Intercept* (Feb. 24, 2019), <https://theintercept.com/2019/02/24/epa-response-air-pollution-crisis-toxic-racial-divide/>.

⁴² See, e.g., USA Today, Ghost Factories, <http://www.usatoday.com/topic/B68DCD3E-7E3F-424A-BDA4-41077D772EA1/ghostfactories/>.

⁴³ See, e.g., Univ. of Richmond's Digital Scholarship Lab, Mapping Inequality: Redlining in New Deal America, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58>; A. Hsu et al., *Disproportionate exposure to urban heat island intensity across major U.S. cities*, *Nature Communications* (2021), <https://www.nature.com/articles/s41467-021-22799-5#Sec2>.

- whether a community is in proximity to one or more facilities that store or use hazardous chemicals,⁴⁴ and in areas prone to worsening chemical disasters related to climate change and extreme weather⁴⁵;
- whether a community relies on subsistence farming, fishing, or hunting;
- whether an area is largely agricultural, resulting in community members being exposed to pesticides;
- whether a community has been the site of repeated environmental health or safety emergencies;
- whether an area is identified by other state or federal agencies (including HUD, USDA or DOT) or initiatives such as Partnership for Sustainable Communities, Sustainable Communities/Strong Communities; and
- whether a community has equal and meaningful access to parks, green space, and the ability to enjoy natural areas.⁴⁶

DOJ should seek public input as part of the process of choosing these communities. As discussed later, with each community selected, DOJ also should create a Community Enforcement Workgroup to provide for engagement, information-sharing, and community input to assist the agency in advancing environmental justice as part of its enforcement initiative within that community.

As to what enforcement tool to use, in its targeting and enforcement resource planning, it is critical for DOJ to ensure that enforcement cases are not just one-offs, but are strategic, intentional and focus holistically on protecting communities from environmental injustice and do so in a manner that will dissuade others from committing similar violations. Criminal enforcement, for example, can address widespread, repeat, or, significant violations of environmental laws and can accomplish both specific and general deterrence – changing the behaviors of not just the entity violating the law but an entire industry. Civil enforcement can provide proper penalties and needed injunctive relief. Administrative enforcement can address more minor violations of environmental laws that may still have significant impacts.

For communities that live in or near the Houston Ship Channel, Port Arthur, TX to Cancer Alley, La., to Charleston, WV, New Castle, Del., Northwest Indiana, Wilmington and Los Angeles, Cal., and so many other communities who face multiple threats and multiple violators, strategically using the extensive toolbox that DOJ, EPA, and other federal agencies have to ensure compliance with the law can go a long way to address community concerns and increase compliance. Fenceline communities need and deserve a strategic, hands-on

⁴⁴ See, e.g., Env'tl. Justice and Health Alliance for Chem. Policy Reform, *Who's In Danger?* (May 2014), available at

<http://comingcleaninc.org/assets/media/images/Reports/Who's%20in%20Danger%20Report%20FINAL.pdf>; Coming Clean, *Life at the Fenceline*, <https://comingcleaninc.org/fencelines>.

⁴⁵ See, e.g., Union of Concerned Scientists, CPR & Earthjustice, *Preventing 'Double Disasters'* (2021), <http://progressivereform.org/our-work/energy-environment/preventing-double-disasters/>.

⁴⁶ These are examples are provided from our earlier comments – there are likely more, up-to-date factors that may be most relevant and we urge DOJ to seek additional input from communities going forward, with adequate public notice and time.

enforcement approach to the widespread noncompliance and resulting unlawful toxic exposures they face and have faced for years and sometimes generations. They need more than just one enforcement action. DOJ should apply a more expansive, community-centric approach that assures compliance across multiple sources and exposures that are causing serious cumulative harm in the community.

Importantly, it is not enough to simply “identify” communities of concern, DOJ and client agencies must consult with and learn from the communities both to choose where to target and to understand their concerns and provide relevant and tailored advice to the offices working on the enforcement actions. This work needs to occur both on the front end before an enforcement action is considered or brought as well as on the back end when remedies are sought to ensure the remedies will provide the on-the-ground changes the communities want and need.

In addition, as discussed later, DOJ also should support or create National Enforcement Initiatives, taskforces or attorney team efforts, such as on hazardous air pollution, chemical disasters under the Clean Air Act Risk Management Program, lead and drinking water, and other serious environmental problems with well-known serious, disproportionate impacts on communities of color and low-income communities.

III. PROMOTE COMMUNITY ENGAGEMENT, PROVIDE CAPACITY-BUILDING, INFORMATION SHARING, AND OPPORTUNITIES FOR INVOLVEMENT.

Community engagement must be a core component of DOJ’s plan to advance environmental justice in enforcement. Here are four concrete examples of actions DOJ should take that would make a significant difference to advance fenceline community engagement and responsiveness to meeting environmental justice goals through proper process and respect for communities affected by DOJ cases.

A. Community Accountability and Involvement Plan for All Environmental Justice-related Matters

First, DOJ should create and follow a Community Accountability and Involvement plan for enforcement – that includes seeking input and providing training, information, and resources to boost community citizen suit engagement and enforcement advocacy. DOJ attorneys and staff need to consult and talk with fenceline communities – and focus on making life better for them. The best and most important time to do that is in the context of specific enforcement matters where DOJ is considering whether to take action on environmental violations, and what kind of remedies to seek. DOJ should assure that in every case or potential case with environmental justice concerns, there is a clear process that line attorneys follow to both gather and share information, where possible, and, always seeking community input initially, throughout the process, and when it is time to resolve remedies. DOJ should also make clear when community members affected by pollution have a legal right to participate in an enforcement proceeding, whether it is at the plea or sentencing stage of a criminal case or intervening in a DOJ civil enforcement suit to ensure their voices are heard and rights secured.

As part of this dialogue, DOJ should share options on the kinds of remedies, including the use of mitigation measures and supplemental environmental projects (SEPs) as part of any

resolution, examples DOJ has implemented before and new ideas it is considering, and should consult and seek input on ideas that would most help the community who has faced the environmental problem at issue. On this note, it is critical that DOJ bring back the use of SEPs and meaningful mitigation to better address the harm and restore health, environmental resources, and community well-being affected by environmental violations. This should include ensuring the Trump rule prohibiting the use of SEPs is properly rescinded.

The bottom line is that remedies DOJ chooses to negotiate and seek with polluting facilities and other entities must help mitigate and address the harm violations have caused to the local community itself, in addition to the complementary goal of ending and deterring future violations. That should mean that on-the-ground assistance, support, benefits, and training go directly to the people affected, including through SEPs and mitigation, not just to the Treasury through criminal or civil penalties. It could mean that in some instances DOJ works with communities most affected to get state-of-the-art pollution control and curtailment, a health clinic or funds for health care assistance, fence-line air monitoring, mobile asthma vans, school and residential air filters, home cleanup and repairs associated with sewage backups, electric vehicles, community support funds, equitable home buyouts or moving assistance (for people who want to be able to leave), training and protection for workers and their representatives to improve health and safety inside hazardous facilities and protection for workers who may be bringing toxic exposure home, or even assistance moving a school that is in harm's way from toxic air pollution. DOJ should create environmental trust funds that could be administered through Congressionally-approved foundations.⁴⁷

It is important to note that these are examples of what some communities would like, but they are not appropriate or desired by every community – and some important examples that some communities may want are likely missing from this list. Different communities need tailored solutions that match their experience and address the particular impacts they are facing – and there is no one-size-fits-all approach to meaningful mitigation. This is partly why consultation with the community is so essential to enforcement that centers and strives to advance environmental justice. In addition, substantial penalties and SEPs, where used, are important to remedy and deter violations in ways the community can count on – and not simply provide a slap on the wrist, or fund local government services that should be happening anyway.

In sum, DOJ should require enforcement staff to ensure that the outcomes of cases provide the best available benefits and pollution and health protections for affected local communities. This requirement should apply to all cases, including any supplemental environmental projects and mitigation. EPA should do so through:

- Direct community involvement and meaningful input both in deciding where to target enforcement resources as well as before bringing an enforcement action if possible. It is also key to seek community input before finalizing any remedies – mitigation and SEPs in particular.

⁴⁷ Appendix 1 of Environmental Crimes Section SEP policy setting out foundations that can accept SEP funds. January 16, 2009 memo from AAG Ronald Tenpas, “Guidance on Restitution, Community Service, and Other Sentencing Measures Imposed in Environmental Crimes Cases.”

- Responsiveness to comments and questions, and meeting with affected community members if requested.
- Robust transparency and accountability including for compliance reports and during long-term implementation of remedies.
- Stronger financial penalties to incentivize future compliance and deter violations by the same and similarly situated entities.
- Meaningful mitigation measures and other remedies that actually help the community members who have faced the worst impacts.
- DOJ and client agencies also should work with communities to develop a mitigation and “SEP bank” of projects that serve community needs so that those projects are ready when enforcement cases settle.⁴⁸

B. Strengthen the Direct Line of Communication with Communities

As part of advancing community involvement, DOJ should encourage and support various agencies in receiving more *direct* complaints about environmental injustice right from the public, including workers and whistleblowers. For example, for years communities have called for EPA to create an anonymous worker and community hotline, as other agencies have implemented in limited contexts.⁴⁹ Creating or assisting with similar, anonymous hotlines, with multiple language access, would ensure that DOJ and client agencies hear more directly from communities about the environmental problems they are experiencing and may also help gather helpful evidence.

C. Amicus briefs and community enforcement

Third, DOJ should track and file more amicus briefs supporting citizen enforcement suits, including at the appellate level. This seems to be rare, when it should be an almost regular occurrence to show support for community enforcement that supplements and complements agency enforcement. DOJ should also work with client agencies to find other ways to boost community enforcement, including by providing information, training, technical information,

⁴⁸ See, e.g., Patrice Simms, Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities,

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/elrna47&div=67&id=&page=>

⁴⁹ See, e.g., FAA Aviation Reporting System,

<https://www.faa.gov/documentLibrary/media/Order/1070.1A.pdf>; National Firefighters, www.firefighternearmiss.com; CIRAS (Confidential Incident Reporting and Analysis System), the confidential reporting system for the British railway industry; CHIRP (Confidential Human Factors Incident Reporting Programme / Confidential Hazardous Incident Reporting Programme), British aviation and maritime industries; CROSS (Confidential Reporting on Structural Safety), structural and civil engineering industry; BSEE, Director’s Corner (Feb. 18, 2014), <http://www.bsee.gov/Safety/Directors-Corner/>; BSEE, Press Release, BSEE and BTS to Host Public Meetings to Discuss Near-Miss Reporting System (Mar. 31, 2014), <http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2014/BSEE-and-BTS-to-Host-Public-Meetings-to-Discuss-Near-Miss-Reporting-System>.

and capacity-building to communities who may not realize they can bring lawsuits, such as through an annual community enforcement symposium.⁵⁰

D. Public Information and Transparency

Fourth, DOJ should improve public transparency by providing regular compliance and enforcement reports that are accessible and helpful to the public. DOJ should share on public websites⁵¹ and repositories to the greatest extent possible the information used in enforcement cases – such as compliance reports, inspection reports, permits and permit file materials – and the remedies (consent decrees, settlements) it reaches. In many cases, these materials can be hard for the public, and fenceline community members to access. It is also nearly impossible to tell how long-term implementation or administration of court orders and consent decrees is going, and the ultimate measure of the impact of DOJ's cases. Improving both the monitoring of impact and public information on this would be valuable to help communities know what is or is not happening, and to assist them in tracking the long-term changes at a facility or entity near them to prevent back-sliding, long after a court case has ended.

DOJ should work with client agencies to improve transparency on enforcement and compliance assurance. For example, EPA's ECHO system should contain a specific tracking number for each enforcement action. ECHO should also contain up-to-date, publicly accessible information about compliance or noncompliance. DOJ should work with EPA and other client agencies to ensure that the permit authority and the public have access to reports on current compliance for the facility during the federal and state permitting processes for existing and new facilities (with parent companies) (e.g., Clean Air Act Title V operating permits for major sources, Clean Water Act discharge permits). DOJ and its client agencies should also provide public notice online of quarterly updates to the consent decrees or settlements and provide a way for community members to receive updates on each case and resulting compliance and remedial actions – after a consent decree, settlement or court order is issued.⁵²

As part of its public transparency and tracking of success, DOJ needs to work with and encourage client agencies to track demographics, race and socioeconomic status, health burdens, along with other relevant information on communities, so DOJ can assess and report on disparities in non-compliance and agency enforcement actions in terms of environmental justice. These numbers are not currently available to the public. DOJ should provide information publicly that includes metrics showing DOJ's and federal agencies' record on environmental justice and enforcement, including long-term after a settlement or consent decree is implemented – as well as the numbers of cases, penalty amounts, court orders, and consent decrees.

⁵⁰ For example, the Attorney General of California filed an amicus brief in support of a community CEQA lawsuit against the Port of Los Angeles in the *Fast Lane Transportation Inc. v. City of Los Angeles, City Council of Los Angeles, Los Angeles Board of Directors* opposing the BNSF SCIG Project.

⁵¹ See e.g., <https://www.epa.gov/il/communities-east-st-louis-area-and-sanitary-sewer-overflows>.

⁵² See, e.g., GAO, *Additional Action Needed to Improve EPA Data on Informal Enforcement and Compliance Assistance Activities*, GAO-20-95 (published Jan. 31, 2020; released Mar. 2, 2020), <https://www.gao.gov/products/GAO-20-95>.

DOJ should also track and include the time from discovering an environmental problem to remedy implementation. Many of DOJ's cases take too long – it should not take years to get meaningful relief for communities suffering from health emergencies like toxic air pollution. Tracking this would provide information DOJ, client agencies, and affected communities can use to try to shorten the time and get relief more quickly. Recognizing that complex cases can take years, DOJ should create a policy to ensure that some interim action occurs to stop the harm, restore environmental health and quality as expeditiously as possible, and assess appropriate penalties and remedies over an appropriate timeframe.

E. Multi-Lingual Accessibility and Equity

Importantly, in all community engagement and information sharing as discussed in these comments, DOJ must ensure its engagement represents a model of accessibility for the public. This must include multilingual language access including interpreters, public notices and publicity in multiple relevant languages, and other information as needed to ensure equal opportunities to participate and to fulfill the Executive Order on Limited English Proficiency.⁵³ Failing to ensure accessible community engagement would mean DOJ would never hear from some of the people most affected, whom it must be able to consult in order to make a meaningful difference in its enforcement cases.

Finally, Commenters also wish to acknowledge the fundamental unfairness of current policies regarding the status and deportation of undocumented immigrants, incarcerated persons in prisons, and the adverse public health consequences of those policies. Among other concerns, current policies make immigrants, incarcerated people, and other community members more exposed and vulnerable, especially without adequate environmental enforcement and assistance. A well-founded fear of immigration-enforcement authorities also can prevent some immigrants from taking advantage of government-provided services for fear that contact with such services may lead to deportation. DOJ should consider this point as it targets enforcement resources and aims to ensure that it protects the most vulnerable communities from harm, including refugees and immigrants.

And, complementing this and other sections of these comments, last section discusses unique and important concerns for tribal governments and indigenous communities.

IV. STRENGTHEN ENFORCEMENT POLICY TO PROTECT PUBLIC HEALTH AND ADVANCE ENVIRONMENTAL JUSTICE, AND CIVIL RIGHTS

A. Revoke Harmful DOJ Policies

In addition to creating strong new affirmative policies that advance environmental justice, DOJ must remove harmful legacy policies from recent years that undermine this goal. DOJ must rescind all policies weakening DOJ's information and ability to engage in high-impact enforcement that benefits fenceline communities. For example:

⁵³ E.O. 13166: Improving Access to Services for Persons with Limited English Proficiency (2000), <https://www.justice.gov/crt/executive-order-13166>; see also LEP.gov, <https://www.lep.gov/>.

- 1) Reaffirm and expand use of Supplemental Environmental Projects and rescind the anti-SEP memos and any policies or rules stemming from them to undermine governmental or community (citizen suit) enforcement: Jeffrey Bossert Clark, Re: Using Supplemental Environmental Projects (SEPs) in Settlements with State and Local Governments (Aug. 21, 2019); Jeffrey Bossert Clark, DOJ AAG, Supplemental Environmental Projects (SEPs) in Civil Settlements with Private Defendants (Mar. 12, 2020).
- 2) Reaffirm federal enforcement to lead and not just supplement state enforcement, and rescind “Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings” (July 27, 2020).

B. Enforcement Action and Guidance to Implement Title VI of the Civil Rights Act

DOJ should work with client agencies and communities to ensure long overdue enforcement of Title VI of the Civil Rights Act in the environmental justice context. This provision, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. It is critical for DOJ and client agencies to fully follow and enforce this provision to protect the civil rights of the public interacting with federal agencies, and with states or other federal grantees. DOJ should work with its client agencies, including EPA and the Department of Housing and Urban Development (“HUD”), to undertake a comprehensive Title VI reform program, aligned with civil rights standards and based on best practices, e.g.:

- Encourage client agencies, including EPA to follow the lead of other agencies, such as the Department of Education, and hire attorneys with the independent ability to bring civil rights enforcement cases. In addition, the External Civil Rights Compliance Office should receive sufficient staff and training to ensure its ability to meet regulatory requirements.
- Develop and adopt a comprehensive programmatic guidance document, with public input, on how Title VI should work across the agencies, including EPA. This document should clarify that compliance with environmental laws is not a defense to a civil rights claim.
- Increase transparency about complaints and how EPA responds, including making public reporting of complaints, their resolution, and the amount of time elapsed in between.
- DOJ and its client agencies should consult with the community before resolving a complaint. DOJ should also encourage its client agencies to require recipients of federal funds to report to them on their compliance with Title VI.
- Consider withholding funding where needed from states found to have violated Title VI, strategically, while avoiding harm to people affected by the discrimination at issue.⁵⁴

Overall, at this point, all federal agencies should be well along in their fulfillment of the Biden Executive Order on equity analysis, and those results should be made public, subject to

⁵⁴ See comments on HUD’s proposal regarding disparate impact (accompanying these comments).

comment, and incorporated where appropriate in the agencies' Title VI plans.

DOJ should be exercising its Executive Order 12250 authority to ensure that all federal agencies are fulfilling their Title VI responsibilities. DOJ is supposed to provide training to them on how to investigate complaints (it used to do this, pre-Trump).⁵⁵ DOJ should reinvigorate its leadership role in the Title VI Work Group if the IWG to share best practices and ensure greater interagency coordination. DOJ is supposed to coordinate agency efforts, and is supposed to report on those efforts. These are important responsibilities for DOJ to prioritize and fulfill.

DOJ should not only coordinate Title VI efforts, but should organize and carry out joint investigations with other agencies. For example, all federal agencies must ensure that their recipients have signed and provided the assurance forms that accompany federal grants. The statements in these assurances make possible the use of contract law in regard to possible discrimination in recipients' programs.

All federal agencies with any EJ and Title VI responsibilities should also have annual compliance review plans, where a significant number of self-initiated class and pattern and practice investigations are undertaken on issues chosen in advance in regard to selected recipients of federal financial assistance. Under federal court jurisprudence, any issues and recipients under the jurisdiction of the agency can be chosen, but the choices cannot be random.

Such agencies also should create, use and follow environmental justice burden and screening tools like the Cal. Enviro Screen and EJScreen (EPA) that allow them both to assess disproportionate impact, cumulative impacts, and consider less discriminatory alternatives, with public input.⁵⁶ Carrying out such an analysis should be required as agencies act, in order to fulfill Title VI. With the science clear on disproportionate impacts of pollution and exposure, states and federal agencies must not be allowed to ignore this fact as they take action, using federal funds. State agencies, who are recipients of federal financial assistance, should not be granting permits to entities where disparate impacts exist or are caused by the activities allowed by such permits without addressing or remediating these impacts.

DOJ should research the possibility of designing a more vigorous way of enforcing Title VI without threatening to take away all federal money from a recipient. Currently, most federal agencies are reluctant to take recipients to an administrative enforcement hearing under Title VI because of the severe nature of the potential remedy. There should be intermediate remedies, for example deferring or taking away federal funds proportionate to the magnitude of the violation of Title VI. This would require at a minimum revisions to many Title VI regulations, and perhaps

⁵⁵ Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws (Nov. 2, 1980) (vesting responsibility in DOJ to “coordinate the implementation and enforcement by Executive agencies” of Title VI and other laws prohibiting discrimination).

⁵⁶ See, e.g., CalEnviroScreen 4.0, <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40>; Univ. of Wash. Dep’t of Env’tl & Occ. Health Sciences, Wash. State Dep’t of Health, Wash. State Dep’t of Ecology & Puget Sound Clean Air Agency, Washington Environmental Health Disparities Map (2019), https://deohs.washington.edu/sites/default/files/images/Washington_Environmental_Health_Disparities_Map.pdf; EPA, EJSCREEN: Environmental Justice Screening and Mapping Tool, <https://www.epa.gov/ejscreen>.

a change in the statute.

DOJ should issue guidance in regard to various Covid stimulus and infrastructure laws, making clear that federal civil rights laws continue to apply to recipients of these funds. Such guidance was issued by DOJ to good effect during the Great Recession of 2008-2012.

DOJ must coordinate with other agencies to expand language access and strengthen guidance documents on language accessibility and Title VI compliance, more generally, as discussed elsewhere in these comments. Specific requirements should include: clear criteria and standards, such as translation of important public notices, documents, and legal requirements, interpreters at public meetings and hearings, and the ability to offer complaints about environmental and civil rights violations in multiple languages and to receive appropriate multilingual responses from the agencies. As an example, see the 2019 t.e.j.a.s. and Sierra Club Title VI complaint to EPA on the Texas Commission on Environmental Quality's permitting rules – consequently, the state has now issued a new rule expanding language access in permitting.⁵⁷

DOJ should address and creatively explore how to protect low-income people, consistent with civil rights law and principles of environmental justice.

And, DOJ must republish various Title VI guidance documents removed from the DOJ website during the last four years – it is positive to see the Legal Manual is back online.⁵⁸

C. National Enforcement Initiatives to Advance Environmental Justice

EPA initially created National Enforcement Initiatives to tackle major environmental enforcement needs by seeking community input and targeting enforcement. The National Enforcement Initiatives (NEI), set out “to focu[s] resources on national environmental problems where there is significant noncompliance with laws, and where federal enforcement efforts can make a difference,”⁵⁹ but the Trump Administration redirected and gutted their effectiveness. Restoring and expanding the NEI at the DOJ-level, across multiple agencies where appropriate, would revitalize vigorous federal environmental justice enforcement.

DOJ should support and create similar initiatives to target enforcement resources on a community-wide basis and to target meaningful, long-term positive impact on particular types of environmental problems. DOJ should incorporate both public input and internal expert input into NEI design. Measuring impact and reporting on progress under these initiatives creates a meaningful way that DOJ can assure accountability. Restoring and fully implementing new

⁵⁷ Title VI Petition to EPA on TCEQ and Language Access (2019), https://earthjustice.org/sites/default/files/title_vi_complaint_epa_11-12-2019.pdf; Earthjustice *et al.* press release: Texas Expanding Language Access for Decisions Involving Pollution Permits (Aug. 25, 2021), <https://earthjustice.org/news/press/2021/texas-expanding-language-access-for-decisions-involving-pollution-permits>.

⁵⁸ <https://www.justice.gov/crt/fcs/T6manual>.

⁵⁹ 80 Fed. Reg. 55352 (Sept. 15, 2015).

National Enforcement Initiatives should be an important focus of the first year of DOJ's new environmental justice plan.

Problem-Focused National Enforcement Initiatives are greatly needed in these areas to advance environmental justice:

Air:

- (1) Cutting Hazardous Air Pollutants;
- (2) Creating Cleaner Air for Communities;
- (3) Reducing Air Pollution from the Largest Sources;
- (4) Stopping Aftermarket Defeat Devices for Vehicles and Engines

Hazardous Chemicals:

- (1) Reducing Hazardous Releases from Hazardous Waste Facilities;
- (2) Reducing Risks and Preventing Accidental Releases at Industrial and Chemical Facilities

Water:

- (1) Reducing Significant Noncompliance with National Pollutant Discharge Elimination System (NPDES) Permits;
- (2) Reducing Noncompliance with Drinking Water Standards at Community Water Systems;
- (3) Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters and Preventing Sewage from Backing Up in Homes and on Lawns

And, overall: Ensuring Energy Extraction Activities Comply with All Environmental Laws.

New initiatives should address, for example:

1. Oil and gas industry, including upstream and midstream segments, and transmission and storage. In recent years, there have been many state-led actions to address the environmental harms from the oil and gas industry, such as the recent denial of the Williams Northeast Supply Enhancement project. At the same time, dangerous leakage of methane, air toxics, and other pollutants has occurred throughout the production chain – and has killed workers. Increased federal focus on this industry would provide needed backup for strong state actions. It can also ensure that community members receive the same strong environmental protections regardless of where they are located. In addition to reducing air toxics and criteria pollutants, focusing federal resources on preventing leakage could significantly reduce emissions of methane, a potent greenhouse gas.

2. Coal ash (including a focus on Tribal lands). Coal ash impoundments throughout the country are old, leaky, and dangerous. The waste is laden with heavy metals and other contaminants, which have leaked into waterways for decades. New rules promulgated by the Obama EPA had just gone into effect at the end of 2016. There has effectively never been federal

enforcement of these rules, making them ripe for consideration in the NEI. DOJ should work with EPA to review the deadlines set for old storage pits to close. Additional enforcement would send an important message, in addition to providing substantive protections.

3. New Source Review (NSR)/ Prevention of Significant Deterioration (PSD) enforcement for coal, petrochemical plants, and other sources. DOJ should work with EPA to undertake a systematic review with an eye towards making recommendations about whether NSR rules are adequately enforceable. This is an area where it is particularly important to review past cases as well as build new ones. Old (Bush era) regulatory loopholes have frustrated meaningful enforcement. DOJ should work with EPA to examine the demand growth exclusion, which makes the NSR requirements difficult to enforce and not protective.

4. Animal waste. Animal waste was included in the NEI until 2019 and it ought to be restored. Animal waste is a multi-media problem making it better suited for enforcement as an NEI than in a single medium component. There is also a history of weak enforcement and regulatory capture at the state level in this area. Where possible, DOJ should focus its efforts on: (1) corporate actors that control conditions at operations, (2) the cumulative impacts of multiple industrial food animal production facilities on communities, (3) facilities that disproportionately impact communities of color, and (4) regions where the impacts of climate change (e.g. extreme heat, flooding) are exacerbating the effects of this industry.

5. Drinking Water. Drinking water enforcement is weak at EPA and in the states and Tribal governments, and there is poor compliance with federal rules especially for lead. Even state reporting of violations to EPA is dangerously deficient. For example, an EPA audit several years ago found that 92 percent of lead health standard treatment violations known to states were not reported to EPA.⁶⁰ DOJ should work with EPA to:

- Substantially expand the number of public water systems considered "high-priority" significant violators prioritized for formal enforcement action under EPA's enforcement targeting tool ("ETT"), and require that formal enforcement action be taken within 30 days of appearance on the list.
- Commit to enforcement consistent with the federal action plan to reduce childhood lead exposure, including automatic issuance of notices of violations when reported to EPA, and follow-up enforcement action.⁶¹
- Require electronic reporting directly from certified labs of drinking water test results, and of all violations (America's Water Infrastructure Act added SDWA §1414(j) requiring EPA to consider requiring electronic reporting and to establish a strategic plan).
- Institute routine audits of state drinking water files, including enforcement activities, and evaluate revoking state primacy if necessary. Previously, audits found that 92

⁶⁰ EPA, "2006 Drinking Water Data Reliability Analysis and Action Plan," 2007, at <https://bit.ly/2YAJv1U>

⁶¹ See also 2016, Earthjustice, Plan of Action to Prevent Childhood Lead Exposure, <https://earthjustice.org/sites/default/files/files/President%27s%20Task%20Force%20Letter%20FINAL.pdf>.

- percent of state Lead and Copper Rule treatment violations, and 70 percent of all monitoring and reporting violations known by states, were not reported to EPA.⁶²
- Make a renewed commitment to support EPA in following its guidance, which requires a timely and appropriate enforcement action for a violation of SDWA, including against large water systems. (EPA has taken virtually no formal enforcement actions against large water systems over the past decade; EPA engaged in Flint only after an enormous public outcry.).⁶³

6. Sewage overflows. Sewage overflows were included in the EPA NEI until 2019 and ought to be restored. Sewage overflows still affect hundreds of cities across the country. Especially with increasing precipitation this problem still requires attention from DOJ and EPA. There should be less willingness to extend compliance deadlines under consent decrees for such overflows.

7. Evaluate referrals, community complaints, and cases in which DOJ or a client agency previously declined to take action, particularly in these NEI areas. With the prior Administration's relaxing of environmental enforcement, there may be cases or community complaints that badly need overdue enhanced enforcement attention. DOJ and its client agencies should undertake a timely, systematic review of referred cases and any cases that are still viable and reconsider enforcement actions. Examples include the serious complaints due to releases during and after Hurricane Harvey that still have not been addressed.

D. Legislative Policy Recommendations

DOJ should work with client agencies to advance and promote stronger statutory protections for environmental justice and enforcement, including the following:

- (1) Support the Representative Grijalva and Senator Booker bills: In the 116th Congress, there were two environmental justice bills that received wide support from environmental justice organizations and community leaders, as well as green groups. The Environmental Justice for All Act (H.R. 5986), introduced by Chair Raul Grijalva and Rep. McEachin, as well as the Environmental Justice Act of 2019 (S. 2236, House Companion H.R. 3923 introduced by Rep. Ruiz) contain many similar policy provisions driven by an open process in which many environmental justice groups participated. Both bills were reintroduced in 2021. DOJ should explore opportunities to support these efforts and provide input on language that would maximize enforceability by client agencies and affected communities.
- (2) Support legislative efforts to address *Guardians* and *Sandoval* rulings: The Supreme Court's combined rulings in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582

⁶² EPA, "2006 Drinking Water Data Reliability Analysis and Action Plan," 2007, at <https://bit.ly/2YAJv1U>

⁶³ EPA, OIG, "Management Weaknesses Delayed Response to Flint Water Crisis," Report No. 18-P-0221, July 19, 2018, https://www.epa.gov/sites/production/files/2018-07/documents/_epaog_20180719-18-p-0221.pdf.

- (1983) and in *Alexander v. Sandoval* 532 U.S. 275 (2001) have barred aggrieved persons from bringing private actions to enforce Title VI of the Civil Rights Act unless they can demonstrate an intent to discriminate. This has prevented people living in communities of color from going to court to enforce the law to address disparate impacts from pollution, which differs from rights afforded to communities under many other bedrock environmental laws. To fully realize the promise of Title VI, community members should be able to bring disproportionate impact-based enforcement actions in court. There are various legislative proposals that would provide for this right.⁶⁴ Progress on this issue would advance civil rights and racial justice goals more broadly than environmental justice alone and is an area of potential collaboration with other civil rights and social justice organizations outside of the traditional environmental space.
- (3) Support funding and action on fenceline monitoring and other enforcement tools, like those in the Public Health Air Quality Act introduced by Rep. Blunt Rochester and Senator Duckworth in 2020, and similar bill language in appropriations.⁶⁵ These would support more funding and requirements for EPA and other agencies to implement emission measurement, including fenceline monitoring, and strengthen national ambient monitoring networks, and public transparency of monitoring data are critical to advance environmental justice. These requirements will protect the right of communities to know what's in their air and provide tools to DOJ and client agencies to use in enforcement to ratchet down hazardous and other harmful air pollution.
 - (4) Legislatively Overturn *Sierra Club v. Ottetail Power*, 615 F.3d 1008 (8th Cir. 2010) and Affirm Remedies for Citizen Enforcement Suits Complementing DOJ and Agency Enforcement. This case held that the concurrent remedy doctrine means that if penalty relief is barred by a statute of limitations then equitable relief is also barred, for citizen enforcement suits. DOJ should support congressional efforts to legislatively overturn this case and affirm remedies for citizen enforcement suits.
 - (5) Fix Safe Drinking Water Act (SDWA) Enforcement Provisions to Support Community-Based Enforcement. Amendment is needed to authorize penalties in citizen suits, allowing community members to sue for imminent and substantial endangerment under SDWA §1431 (as allowed under RCRA § 7002), and by mandating automatic public and simultaneous electronic reporting of lab results to states, EPA, and water utilities. DOJ should work with EPA to support congressional efforts to amend SDWA to authorize penalties in citizen suits.
 - (6) DOJ should support congressional efforts to amend or supplement the Clean Air Act (CAA), 42 U.S.C. 7413, to ensure courts may apply penalties consistent with the severity of emission releases and resulting harm. It is crucial that DOJ and affected community members can sue for penalties based on the volume of pollution released.

⁶⁴ See, e.g., A. Huang, *Environmental Justice and Title VI of the Civil Rights Act: A critical crossroads*, ABA (Mar. 1, 2012), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/.

⁶⁵ See, e.g., <https://www.duckworth.senate.gov/news/press-releases/blunt-rochester-duckworth-introduce-bill-to-improve-air-quality-monitoring-and-protect-front-line-communities>.

This allows accounting for short term upsets that release a huge pollution spike in hours or minutes. (Similarly, under the Clean Water Act hazardous penalties are assessed by the barrel or pound). Under current law, CAA penalties are subject to a daily cap that ignores amount of pollution. While supporting congressional action, DOJ should also work with EPA to consider administrative policy actions that could supplement the current penalties within the constraints of the existing law.

V. COMPLIANCE ASSURANCE TECHNICAL POLICY TEAM AND AGENCY GUIDANCE ON INNOVATIONS AND ESSENTIALS TO WRITE ENFORCEABLE RULES AND REQUIREMENTS

DOJ should create a Compliance Assurance Technical Policy team to provide key guidance on how to write more enforceable rules, and aim to better assure compliance, long before environmental violations occur. As former EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance Cynthia Giles explained in recent research: “Environmental non-compliance is worse than you think” – and that is because environmental rules rarely plan for or assure compliance.⁶⁶ DOJ can only bring so many cases directly. Providing guidance to increase compliance would make the greatest difference to advance environmental justice and prevent problems.

DOJ’s new policy team should recommend that compliance be a strong focus in all regulatory, enforcement, and permitting programs across its client agencies to address environmental justice. The team should partner across the agencies, including EPA, to spur innovation in fence-line and other pollution monitoring techniques, reporting, and compliance tools.

Specific guidance from DOJ to client agencies on essential terms and methods of compliance assurance to include in rules and policies should include core components that experts like former Assistant Administrator Giles have found are effective in assuring compliance and preventing problems.⁶⁷ As some examples, DOJ should include recommendations for:

(1) fence-line air monitoring and similar up-to-date emission testing, and online and accessible reporting of results,

(2) frequent and publicly available compliance reports,

(3) automatic liability admissions in compliance reports;

(4) automatic corrective action and penalty requirements that facilities or entities are required to fulfill without any government action needed other than to review and revise as needed.

⁶⁶ C. Giles, *Next Generation Compliance: Environmental Regulation for the Modern Era Part 2* (Apr. 14, 2020), <http://eelp.law.harvard.edu/wp-content/uploads/Cynthia-Giles-Part-2-FINAL.pdf>.

⁶⁷ *Id.*

(5) ongoing assessments and trend analysis to ensure improving environmental conditions and advance justice.

(6) publicly accessible online access to monitoring and testing data, and compliance reports.

All of these things would help fix problems early, and would prevent the need for application of significant government enforcement resources after violations occur. They also would help identify problems, correct them quickly, and make it easier to prove and win cases when violations occur.

As part of guidance, DOJ should advise client agencies to stop baking illegal exemptions and loopholes into their rules. This undermines the environmental and public health requirements and can turn them into swiss cheese, full of holes. They also make DOJ enforcers' and citizen enforcers' work much harder.

As a key example: please urge EPA to remove and end all of the harmful and illegal versions of the startup, shutdown, malfunction or “force majeure event” exemptions (SSM) that currently exist throughout its clean air rules, including its air toxics rules, so that clean air requirements will finally apply at all times.⁶⁸ The D.C. Circuit has repeatedly found EPA’s exemptions and loopholes are unlawful, including in decisions issued in 2008 and 2014.⁶⁹ DOJ represented EPA in those cases, and yet EPA still has failed to follow those court decisions by taking action to remove illegal loopholes from its rules. DOJ should work with EPA to ensure it promptly removes the SSM exemptions, affirmative defense to civil penalties during malfunctions, and all variations on these exemptions from all Clean Air Act standards that contain them—including section 111, 112, and state implementation plans, and not give into polluter pressure to craft new similar exemptions, especially for the chemical and petrochemical sectors.⁷⁰ DOJ should also advise EPA to follow through expeditiously on its pending rulemaking to remove these exemptions from the Title V regulations, and thus from all Title V permits.⁷¹ Work to ensure that such exemptions are speedily removed from Title V permits must

⁶⁸ See, e.g., Letter to EPA on Startup, Shutdown, Malfunction Exemptions and Loopholes (May 2021), [https://www.sierraclub.org/sites/www.sierraclub.org/files/SSM%20Community%20Letter%20-%20Final%205-18-2021%20\(1\).pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/SSM%20Community%20Letter%20-%20Final%205-18-2021%20(1).pdf).

⁶⁹ *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008); *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014).

⁷⁰ EPA recently took one positive action as relevant to criteria pollutants – showing a path forward. See <https://www.epa.gov/air-quality-implementation-plans/emissions-during-periods-startup-shutdown-malfunction-ssm>. But so far EPA has still not removed this exemption from air toxics rules like those for synthetic organic chemical manufacturing, neoprene production and more -- in some instances over 10 years after the D.C. Circuit found them to be illegal. And EPA has created new versions of the exemptions that are under review pursuant to President Biden’s 2021 Executive Order, in the air toxics rules for petroleum refineries, miscellaneous organic chemical manufacturing, ethylene production, and other chemical and petrochemical sources. For more information, see [https://www.sierraclub.org/sites/www.sierraclub.org/files/SSM%20Community%20Letter%20-%20Final%205-18-2021%20\(1\).pdf](https://www.sierraclub.org/sites/www.sierraclub.org/files/SSM%20Community%20Letter%20-%20Final%205-18-2021%20(1).pdf).

⁷¹ EPA, Proposed Rule, Removal of Title V Emergency Affirmative Defense Provisions, 81 Fed. Reg. 38,645 (June 14, 2016), <https://www.regulations.gov/search?filter=EPA-HQ-OAR-2016-0186>.

follow, and a worthy goal would be to focus federal and state attention on sources in overburdened communities.

Unfortunately, EPA recently finalized new versions of the exemption in air toxics rules for refineries, chemical and petrochemical sources. In these rules, EPA has allowed facilities to get away with one or two free passes (every three years) from requirements to reduce air toxics from flares and pressure relief devices – and any time there is a malfunction due to a so-called “force majeure event,” which can happen frequently in hurricane-prone areas like the Gulf where many chemical and petrochemical facilities are concentrated. These malfunction exemptions are just as unlawful and harmful to public health and the environment as all of the prior similar exemptions found unlawful in court – and rules should focus on preventing, not allowing, emission exceedances, as the Clean Air Act requires standards to be “continuous” and apply at all times.⁷² The people most exposed to air pollution and to health and safety threats from refineries, living in the most vulnerable and exposed zones around these facilities, are disproportionately communities of color and lower-income communities.⁷³ EPA must remove from the refinery, chemical, and petrochemical emission standards, and all other standards, all types of exemptions and stop allowing facilities to emit freely without consequence.

SSM exemptions and loopholes contradict environmental justice efforts by disproportionately exposing overburdened communities to more air pollution and preventing corrective action from being taken to end harmful malfunctions that threaten public health. DOJ should advise EPA to follow the court decisions and issue new final rules removing all of these exemptions, and thus satisfy the Clean Air Act, reduce communities’ exposure to air pollutants, and strengthen health protections for overburdened communities. As long as major releases are being excluded because of arbitrary exemptions and loopholes such as the SSM and other types of malfunction exemptions, EPA is not fulfilling its obligations under the Clean Air Act or advancing environmental justice.

Finally, DOJ and agency enforcement teams often use the most innovative compliance tools, like fenceline monitoring, long before they come to the attention of rulewriters and permitting agencies. DOJ should ensure that the innovation in technologies and tools used in the enforcement context transfers early and often to rulewriters. Sharing information between enforcement, rulewriters, and permit authorities will lead to more enforceable rules and requirements, and will improve the quality and efficiency of actions across agency teams. Therefore, DOJ should encourage and should work with and train client agencies to ensure information-sharing and to encourage use of the most current methods of monitoring and compliance tools in regulations and permits, just as enforcement staff aim to do in enforcement decrees and settlements.

⁷² 42 U.S.C. § 7602(k); see cases cited *supra* note 69; see also, e.g., RISE St. James *et al.*, Petition to EPA for Reconsideration of Misc. Organic Chemical Manufacturing Rule (Oct. 13, 2020), https://earthjustice.org/sites/default/files/files/_enviro_pet_for_reconsideration_of_mon_rule_10-13-2020.pdf.

⁷³ See Env'tl. Justice and Healthy Alliance for Chem. Policy Reform, *Who's In Danger*, *supra*; Analysis of Socio-Economic Factors for Populations Living Near Petroleum Refineries at 8, tbl.2 (Jan. 6, 2014), EPA-HQ-OAR-2010-0682-0226.

VI. SUPPORT GREATER TRIBAL GOVERNMENT INVOLVEMENT AND ENFORCEMENT IN INDIAN COUNTRY

Environmental enforcement in Indian country is fraught with problems for many reasons, including limited tribal environmental regulations, limited federal enforcement, and lack of clarity surrounding jurisdiction over and responsibility for environmental issues based on land status. Reservation lands were for generations targeted for extractive industry operations such as mining, oil and gas development and logging. Tribal environmental departments are often understaffed and under-resourced. Federal officials at DOJ and EPA with enforcement responsibility in Indian country are often located many hundreds of miles away from tribal lands and slow to respond. Off-reservation actors causing on-reservation environmental impacts are often not subject to tribal or federal jurisdiction. Superfund sites on or adjacent to reservations languish for years, unaddressed, while the environmental impacts worsen.

This mosaic of longstanding problems results in a broad lack of environmental enforcement in Indian country. This limited environmental regulation and enforcement, coupled with chronically underfunded health systems, lack of reliable data, and glaring unmet drinking water, sanitation and other infrastructure needs results in poor health outcomes for Native people and worsening environmental degradation. In addition, the existing federal environmental laws and regulations frequently do not provide adequate consideration or redress for impacts to culturally significant plants, animals, water sources and landscapes.

Due to the differing needs and capacities of each community, environmental regulation should best be undertaken at the tribal level. Tribal enforcement of federal laws (and tribal laws and regulations that meet or exceed federal requirements) should be encouraged, supported and funded, including year-over-year funding that would allow tribal environmental departments to fund and train environmental law enforcement personnel. Tribal environmental sampling and monitoring should be encouraged, supported and funded, and the results of that tribally collected data should not be unnecessarily rejected by EPA or other federal or state regulators, which frequently occurs. Memoranda of Understanding (MOUs) between tribal governments and federal, state and local agencies should be encouraged where feasible to reduce jurisdictional and regulatory uncertainties, increase communication and collaboration, strengthen and enforce tribal authority over on-reservation actors, and share knowledge and resources.

When DOJ enters into consent decrees with polluters whose actions impact tribal citizens and natural resources, often the information provided to impacted tribal government officials during the settlement negotiation process is very limited. Then, when the terms of a consent decree are finalized, an impacted tribe has very little or no opportunity to provide meaningful input, as the terms have already been negotiated. Finally, an impacted tribe not a party to a consent decree has no ability to later enforce the consent decree against a polluting company or actor. Impacted tribal governments, including those holding off-reservation treaty rights, should have the opportunity to be parties to consent decrees so that they may have meaningful input into the process and the ability to enforce the terms of a consent decree when violated.

Conclusion and Contact Information

In sum, we urge you to use DOJ's full authority and substantial expertise to advance environmental justice in a visible and meaningful way, that includes and implements fence-line community consultation and input. 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 Emma Cheuse, Earthjustice at (202) 745-5220 or echeuse@earthjustice.org, and any of the undersigned groups.

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