

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Draft EJ 2020 Action Agenda Framework)
(June 15, 2015))
Submitted via e-mail - July 14, 2015
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COMMENTS OF ENVIRONMENTAL AND COMMUNITY GROUPS

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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. 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.

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

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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.”¹

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.² 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.”

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

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

² EPA, *Making a Visible Difference in Communities*, <http://www2.epa.gov/smart-growth/making-visible-difference-communities> (last updated May 26, 2015).

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,³ 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 Report⁴;
 - whether an area has elevated levels of drinking water or soil contamination, including from legacy pollution or ghost industrial sites⁵;
 - 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 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;

³ Cal. EPA Ofc. Of Envntl. Health Hazard Assessment ("OEHHA"), *CalEnviroScreen Version 2.0*, <http://oehha.ca.gov/ej/ces2.html> (last updated Nov. 10, 2014).

⁴ 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>.

⁵ See, e.g., USA Today, *Ghost Factories*, <http://www.usatoday.com/topic/B68DCD3E-7E3F-424A-BDA4-41077D772EA1/ghostfactories/>.

- 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 chemicals⁶;
- 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 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.⁷

⁶ 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>.

⁷ 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.

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.⁸

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 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

⁸ 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.

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, cardiovascular disease, cancer, birth defects and reproductive harm, diabetes – particularly for the most vulnerable community members, including children and the elderly.</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 and early life exposure, and for communities with socioeconomic stressors that increase vulnerability.</p>

Progress Objective	Essential Metrics	Key Additional Metrics To Prevent Ongoing Injustice
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	<p>Identify more sites in priority areas and assure effective clean up progress, results, and success.</p> <p>Prioritize protecting and expanding free access to parks, healthy green space, and natural areas for communities of color and low-income communities.</p>	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	<p>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.</p> <p>Reduce unhealthy chemicals and product use in targeted 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>	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.

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.⁹ 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
- 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. 81.¹⁰

⁹ 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>.

¹⁰ *Id.* at 68-81.

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)¹¹; 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.6¹²; Comments of Environmental and Community Groups on EPA's Refineries Rule Proposal (Oct. 28, 2014)¹³; 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 low-income communities (*see, e.g.*, Comments of Farmworker Justice and Earthjustice, *et al.* (Aug. 18, 2014)¹⁴).

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.¹⁵

¹¹ *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>.

¹² *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.).

¹³ EPA-HQ-OAR-2010-0682-0568 ("Refineries Comments"); *see also* Coalition to Prevent Chemical Disasters, *Home*, <http://preventchemicaldisasters.org>.

¹⁴ EPA-HQ-OPP-2011-0184-2434.

¹⁵ *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.*,

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.¹⁶ 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.¹⁷ 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.

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.¹⁸ 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,

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>.

¹⁶ F. Caiazoo, *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>.

¹⁷ Baltimore City Health Dep’t, *Asthma*, <http://health.baltimorecity.gov/node/454>.

¹⁸ See *supra* nn.4, 15 (*State of the Air 2015*).

and standards that assure the maximum achievable degree of pollution protection, and by requiring the best available fence-line monitoring and enforceability measures.¹⁹

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.²⁰ 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.

Many, if not most, other EPA Regions do not even have such plans in place, or have only permitting-specific plans.²¹ 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.

¹⁹ See, e.g., EPA, *Rules and Implementation*, <http://www.epa.gov/ttn/atw/eparules.html> (last updated May 22, 2015) (listing rules).

²⁰ 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.

²¹ 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).

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 community protections and address environmental justice problems.²² 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

²² 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.

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 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.²³

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,²⁴ and must be involved as leaders in EPA's national and regional actions on global warming.

²³ 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>.

²⁴ See, e.g., New York Environmental Justice Alliance, *Waterfront Justice Project*, http://www.nyc-eja.org/?page_id=311.

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.²⁵ 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.²⁶ These recommendations should be implemented when EPA interacts with Tribes in various regions.

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

²⁵ 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>.

²⁶ See, e.g., Legal Language Services, *Election Translation 2014* (Oct. 6, 2014), <https://www.legallanguage.com/legal-articles/election-translation-2014-yupik-and-gwichin>.

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).²⁷ EPA should also assure that this is provided to communities in an understandable way, so communities can help assess ongoing results and progress achieved.

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.²⁸ 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

²⁷ 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>.

²⁸ See EPA, *Report Environmental Violations*, <http://www2.epa.gov/enforcement/report-environmental-violations> (last updated June 1, 2015).

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,²⁹ and the Kern Environmental Enforcement Network (“KEEN”), in Kern County, CA.³⁰ 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 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.”³¹ 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.”³²

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

²⁹ FERN, *Welcome*, <http://www.fresnoreport.org/>.

³⁰ KEEN, *Home*, <http://www.kernreport.org/>.

³¹ *See supra* n.29.

³² Identifying Violations Affecting Neighborhoods, *Home*, <http://www.ivanonline.org/>.

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 networks – which are important issues for Plan EJ2020 to address, as discussed later.³³ 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

³³ 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>.

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.”³⁴ 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 – over thirty years after the site was first listed on the National Priorities List, even though there is significant PCB contamination.³⁵

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,

³⁴ 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>.

³⁵ EPA, *G.M. Massena: St. Lawrence County, NY*, <http://www.epa.gov/r02earth/superfund/npl/gmmassena/index.html> (last updated July 9, 2015).

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.³⁶ 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 threats.³⁷ 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:

³⁶ EPA, *Plan EJ 2014*, <http://www.epa.gov/compliance/ej/plan-ej/>.

³⁷ 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)..

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.³⁸

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:

- (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*.

³⁸ See *supra* n.8.

- 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.³⁹

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.⁴⁰

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.

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.

³⁹ 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/ncer/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>.

⁴⁰ 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.

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.⁴¹ 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

⁴¹ 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 *Env'tl. 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.").

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.⁴² 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.⁴³ The Act also requires emission standards to be continuous and apply at all times.⁴⁴ Many air sources, such as refineries, have a long history of violations, malfunctions, and other exceedances of the standards.⁴⁵ EPA is in the process of removing the unlawful SSM exemption that is included in some current standards, but in view of 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.⁴⁶ 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

⁴² 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)).

⁴³ 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."

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

⁴⁵ See, e.g., Refineries Comments at 26-27, *supra* n.13 (citing sources).

⁴⁶ See *supra* n.33.

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.⁴⁷

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 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.

⁴⁷ Earthjustice, EIP *et al.* Letter to NEJAC summarizing fenceline monitoring in place (Apr. 2015); *see also* Refineries Comments, *supra* n.13.

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.⁴⁸ 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, 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.⁴⁹

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 12,898.⁵⁰ 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.⁵¹ Infrequent

⁴⁸ Comments of Earthjustice & Am. Lung Ass’n at 1-4 (Nov. 10, 2014), EPA-HQ-OAR-2013-0619-0034.

⁴⁹ See generally 42 U.S.C. § 7407(a).

⁵⁰ 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 ...”).

⁵¹ Giles Memo at 1-2, *supra* n.33.

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.⁵² 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 address the clear problem they showed.⁵³ 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

⁵² 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).

⁵³ Response to Comments at 56-57 (Dec. 17, 2014), EPA-HQ-OAR-2012-0918-0337.

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 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 § 7412.⁵⁴ 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

⁵⁴ 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>.

benefit affected communities.⁵⁵ 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.⁵⁶

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 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.

⁵⁵ See, e.g., Owley, *supra* n.23.

⁵⁶ 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>.

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.⁵⁷

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.⁵⁸ 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 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

⁵⁷ 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>.

⁵⁸ See D. Brugge, *et al.*, Developing Community-Level Policy and Practice to Reduce Traffic-Related Air Pollution Exposure, 8 *Envtl. Justice* 95, 96-97 (June 15, 2015), available at <http://online.liebertpub.com/doi/full/10.1089/env.2015.0007>.

guidance.⁵⁹ 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.⁶⁰

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.⁶¹

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 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.⁶²

⁵⁹ 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>.

⁶⁰ 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>.

⁶¹ See, e.g., Comments of Air Alliance Houston, *et al.* (submitted on Plan EJ2020).

⁶² 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>.

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.

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.⁶³ 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

⁶³ 532 U.S. 275, 279-86 (2001).

law is an empty vessel. Unfortunately, EPA’s Title VI program has been notoriously inadequate.⁶⁴

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 justice⁶⁵ 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.⁶⁶

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:

- **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.

⁶⁴ 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”).

⁶⁵ 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.

⁶⁶ 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.64. Failing again to address these issues in the Plan EJ2020 Action Agenda misses yet another opportunity to address these concerns.

- **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,”⁶⁷ 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 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.

⁶⁷ 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.

- **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.⁶⁸

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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⁶⁸ 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. 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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